<table>
<thead>
<tr>
<th><strong>EDUCATIONAL SESSIONS</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ALTERNATIVE DISPUTE RESOLUTION</strong></td>
<td>International Commercial Dispute Resolution: How it’s different and how understanding the differences can help your practice</td>
</tr>
<tr>
<td><strong>CIVIL RIGHTS AND PUBLIC ENTITY LIABILITY</strong></td>
<td>The Police and the Mentally Ill: A Complex Combination</td>
</tr>
<tr>
<td><strong>DRUG, DEVICE &amp; BIOTECHNOLOGY/TRANSPORTATION/CLASS ACTION</strong></td>
<td>From Farm to Table or Felon to Table – How to Know the Difference: FSMA – What it means for foreign suppliers and U.S. importers. An update on Implementation, Compliance, Litigation and Enforcement</td>
</tr>
<tr>
<td><strong>INSURANCE COVERAGE</strong></td>
<td>What Lies Between Big Lies And Little Lies</td>
</tr>
<tr>
<td><strong>TRIAL TACTICS, PRACTICE AND PROCEDURES</strong></td>
<td>Pushing Back Against Excessive/Unreasonable Medical Bills; Opening Juror’s Eyes</td>
</tr>
<tr>
<td><strong>PLENARY PROGRAM</strong></td>
<td>The Swiss Way—Banks, Guns and Happiness</td>
</tr>
<tr>
<td><strong>PLENARY PROGRAM</strong></td>
<td>Commercial Uses and Liability Exposures Associated with Drones</td>
</tr>
<tr>
<td><strong>PLENARY PROGRAM</strong></td>
<td>“Winning” in Mediation with Brain Science</td>
</tr>
<tr>
<td><strong>PLENARY PROGRAM</strong></td>
<td>Todd’s Talks – “Inspirational Leadership” by Lewis Collins</td>
</tr>
<tr>
<td><strong>APPELLATE LAW/COMMERCIAL LITIGATION/INTERNATIONAL</strong></td>
<td>A Comparison of Commercial Litigation in Europe and North America</td>
</tr>
<tr>
<td><strong>CONSTRUCTION</strong></td>
<td>Contractual Risk Transfer – The Changing World of Indemnification and Insurance in Construction Contracts and Litigation</td>
</tr>
<tr>
<td><strong>EMPLOYMENT PRACTICES AND WORKPLACE LIABILITY</strong></td>
<td>Guns In The Parking Lots And Employees Smoking Weed: What Employers Need To Know In The New Frontier Of Workplace Safety</td>
</tr>
<tr>
<td><strong>EXTRA-CONTRACTUAL LIABILITY/REINSURANCE, EXCESS AND SURPLUS LINES/PROPERTY INSURANCE</strong></td>
<td>Can we Talk? The Importance of Communication when Dealing with Excess and Reinsurers</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>PLENARY PROGRAM</td>
<td></td>
</tr>
<tr>
<td>The Law Firm of the Future: Real Estate, Technology and Millennials</td>
<td>509</td>
</tr>
<tr>
<td>PLENARY PROGRAM</td>
<td></td>
</tr>
<tr>
<td>Trial Masters – Buffalo Airline Crash Part Deux</td>
<td>520</td>
</tr>
<tr>
<td>PLENARY PROGRAM</td>
<td></td>
</tr>
<tr>
<td>Keynote Speaker and Power Panel: The Emotional Power of Belonging &amp; Maximizing the Return on Diversity and Inclusion Initiatives</td>
<td>543</td>
</tr>
<tr>
<td>ENERGY UTILITIES LAW/TOXIC TORT AND ENVIRONMENTAL LAW</td>
<td></td>
</tr>
<tr>
<td>Walking the Tightrope: Balancing the Defense in a War on Multiple Fronts</td>
<td>551</td>
</tr>
<tr>
<td>HEALTHCARE PRACTICE/PROFESSIONAL LIABILITY/LIFE, HEALTH AND DISABILITY</td>
<td></td>
</tr>
<tr>
<td>The New Long Term Care Regulations: What does the first major overall of OBRA regulations in 25 years mean for the industry and litigation in this arena?</td>
<td>569</td>
</tr>
<tr>
<td>LAW PRACTICE MANAGEMENT</td>
<td></td>
</tr>
<tr>
<td>In Advance of the Crisis: An Ounce of Prevention and Preparation</td>
<td>579</td>
</tr>
<tr>
<td>PRODUCTS LIABILITY/PREMISES LIABILITY/INTELLECTUAL PROPERTY</td>
<td></td>
</tr>
<tr>
<td>Emerging issues in Third-Party Litigation Funding</td>
<td>593</td>
</tr>
<tr>
<td>PLENARY PROGRAM</td>
<td></td>
</tr>
<tr>
<td>Trial Masters – Trial Technology in Action</td>
<td>623</td>
</tr>
<tr>
<td>PLENARY PROGRAM</td>
<td></td>
</tr>
<tr>
<td>Keynote Speaker – Nontombi Tutu</td>
<td>624</td>
</tr>
<tr>
<td>SPEAKER BIOGRAPHIES</td>
<td>625</td>
</tr>
</tbody>
</table>
WEDNESDAY, JULY 26, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

ALTERNATIVE DISPUTE RESOLUTION
International Commercial Dispute Resolution:
How it’s different and how understanding the differences
can help your practice
Rochers de Naye

Moderator:
Jim Clancy

Speakers:
Sonia Bjorkquist
Mary A. Lopatto
David Roney
ETHICAL ISSUES AND PRACTICAL STRATEGIES: Lessons Learned from International Arbitration

FDCC Annual Meeting
Fairmont Le Montreux Palace
Montreux, Switzerland
July 25-29, 2017

Presented by:

Sonia Bjorkquist
Osler, Hoskin & Harcourt LLP
(Toronto, Ontario Canada)

Eric Morgan
Osler, Hoskin & Harcourt LLP
(Toronto, Ontario Canada)

This Paper has been prepared for general information and is not intended to be relied upon as legal advice.
Introduction

Dispute resolution becomes more multi-jurisdictional each day in an increasingly global economy. Even if you have a largely domestic practice, from time to time you will encounter clients, witnesses, opposing parties or attorneys from other jurisdictions. It is important to appreciate that participants from other jurisdictions may approach the fundamentals of dispute resolution very differently depending on the legal system and ethical codes in their home jurisdiction. This includes different approaches to core practices like witness preparation, examination-in-chief and cross-examination.

Savvy practitioners can take advantage of lessons learned from international arbitration. Avoiding missteps in the ethical minefield of international dispute resolution is just part of the benefit. The additional reward comes from adapting alternative dispute resolution techniques to help your clients resolve their disputes more creatively and efficiently.

The Unique Challenges of International Arbitration

While the answers to ethical questions for counsel in domestic litigation may not always be simple, at least the rules of professional conduct are clear. Counsel appearing before a court are bound by the rules of their local jurisdiction’s bar or law society. A New York-licensed lawyer appearing before a New York court is bound by the New York Rules of Professional Conduct of the New York State Bar Association.

However, when it comes to ethical questions in international arbitration, the multi-jurisdictional nature of the dispute can exponentially complicate what rules govern counsel’s conduct. Take a situation where one set of counsel are from New York, opposing counsel are from Germany, the seat of the arbitration is London, and the International Chamber of Commerce’s procedural rules are being used. Which rules of professional conduct apply? To whom? What other ethical obligations exist? Who will enforce these obligations? What are the consequences of non-compliance? The answers may not be straightforward or universally-accepted, but counsel in an international arbitration must nonetheless be aware of these layers of complexity to avoid unwittingly succumbing to ethical pitfalls.

No Single Code, No Simple Answer

For counsel acting in international arbitrations, unfortunately, there is no single international code of conduct. Further, as Professor Catherine Rogers at Pennsylvania State University has observed, there is no supra-national authority to oversee counsel conduct in international arbitrations.¹ Instead, a variety of sources of rules govern counsel conduct, and enforcement may vary.

In an international arbitration, at least three jurisdictions or sources of obligations are at play:

1. **The jurisdiction where counsel are licensed**

Lawyers are generally subject to their own domestic ‘home’ law society rules of professional conduct, even when practicing in an arbitration, including an international arbitration. The New York Rules of Professional Conduct are explicitly extraterritorial for the New York State Bar Association’s members. Rule 8.5 provides: “A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer’s conduct occurs.”

However, it is increasingly common for clients to engage lawyers licensed in different jurisdictions to represent them in disputes that have multi-jurisdictional implications, such that different rules of professional conduct may apply to different lawyers even on the same client team. Moreover, when opposing counsel in an arbitration are licensed elsewhere, other rules likely apply to their conduct.

2. **The jurisdiction of the seat of the arbitration**

When parties to an arbitration agreement choose the “seat” of an arbitration, they determine the laws that apply to the arbitration and which courts have oversight of the arbitration agreement and enforcement of arbitral awards. The rules of professional conduct in the seat of the arbitration thus may also factor into the ethical obligations of counsel, although this is less settled than the first principle, above. A jurisdiction’s rules of professional conduct generally have mandatory application to lawyers licensed to practice law in that jurisdiction, rather than based on participation in an arbitration “seated” in that jurisdiction.

However, the seat’s rules of professional conduct should not be ignored. The International Bar Association (IBA) International Principles on Conduct for the Legal Profession calls on lawyers to abide by the rules of conduct of both their home and host jurisdiction. Further, some domestic rules and codes of professional conduct (for example, the American Bar Association’s Model Code and the German rules of professional conduct) also require their members to comply with the rules of professional conduct of the seat of arbitration.

3. **The procedural rules governing the arbitration**

Many arbitral institutions have their own procedural rules which govern the conduct of the arbitration. These differ from one institution to the next, and parties in ad hoc arbitrations are free to agree on their own procedures. This means the procedural rules governing an arbitration are almost infinitely variable among disputes. When this is layered onto differing cultural norms and rules of professional conduct, lawyers must

---


adapt and be mindful of how these many sources of obligations intersect in the context of each dispute.

The arbitration tribunal has an interest in monitoring counsel conduct to protect the integrity of the award (i.e., the decision or order of the arbitrators) since the award can typically be set aside for procedural irregularity. The tribunal will look primarily to the rules governing the arbitration to do so. In some international arbitrations, tribunals have tested the waters on finding that they have “inherent jurisdiction” to take certain actions regarding counsel’s conduct – whether or not flowing explicitly from the arbitral rules governing them – to protect the integrity of their process.6

Practically speaking, the tribunal is the most immediate potential enforcer of rules of conduct in an international arbitration, with the most immediate effects, which can include excluding evidence, cost consequences and, at perhaps the most extreme, removing counsel. Notably, though, even the arbitrators themselves will come to a dispute with varying ethical rules backgrounds.

In international arbitrations, these three jurisdictions (the home jurisdiction, the seat and the procedural rules) can all be different. This raises the possibility that counsel will be simultaneously subject to more than one set of rules – a servant with two or three masters. This situation only becomes a problem where the rules are inconsistent or incompatible. Counsel should at a minimum be aware of these additional considerations when acting in an international arbitration, including that opposing counsel may come to the dispute with different ground rules of conduct too.

Like ethical questions in domestic litigation, a distinction may also be made between obligatory rules and “soft law” best practices. Local, regional and international legal organizations have created guidelines that establish norms of ethical behaviour that supplement or interpret the formal rules of professional conduct and often set out best practices. For example, the IBA Guidelines on Party Representation in International Arbitration, adopted in 2013 by the IBA (an organization with voluntary membership), seek to reduce uncertainty as to which rules govern in international arbitration. Parties can make these Guidelines enforceable by agreement.

**Different Legal Traditions, Different Approaches**

Differences in counsel’s legal traditions may cause friction and require greater cultural sensitivity. For example, lawyers trained in civil law jurisdictions such as Europe, Louisiana, Quebec or Latin America may have different expectations and understandings than lawyers trained in common law jurisdictions, sometimes affecting counsel conduct in fundamental ways:

- Some civil law jurisdictions generally place fewer requirements on counsel to verify that their client’s documentary disclosure is complete. Common law jurisdictions often

---

require counsel to certify that disclosure is complete (or at least that counsel has explained the obligation for full disclosure to the client).\(^7\)

- In some civil law jurisdictions, counsel generally owe no duty to the court to disclose adverse legal authority; in common law jurisdictions, such a duty generally applies.
- In common law jurisdictions, *ex parte* communications are generally not allowed. In some civil law jurisdictions, there is less concern about *ex parte* communication as counsel’s role is that of a “guide” to the court.\(^8\)

Even within civil law systems the rules can differ from one jurisdiction to the next. Similarly, counsel should be aware of jurisdiction-specific differences within the common law tradition:

- Expert witnesses in the US may be expected to be more partisan for the party that instructs them, whereas expert witnesses in court proceedings must remain impartial in Canada.
- Barristers and solicitors in the UK can prepare witnesses to a limited extent, but they cannot coach them, rehearse questions or conduct mock cross-examinations. In the US and Canada, lawyers are expected to meet with witnesses to prepare them for a hearing, and mock cross-examinations are considered a best practice.\(^9\) Some (but not all) European jurisdictions consider it an ethical breach to meet with a witness in advance of a hearing.\(^10\)
- Cross-examination techniques that are acceptable if not expected in certain jurisdictions (including so-called “aggressive” cross-examination) are frowned upon or even offensive in other jurisdictions. Arbitrators and counsel from other jurisdictions alike have been known to criticize “zealous” techniques\(^11\) as unnecessarily hostile or uncivil, often leaving unsuspecting witnesses unduly shaken.

Other areas of friction include:\(^12\)

- Different concepts of privilege and its scope;
- Different concepts of the role of in-house counsel;
- Whether a party can appear as a fact witness; and

\(^7\) Catherine A. Rogers, *Ethics in International Arbitration*, Oxford University Press, p. 120.

\(^8\) Catherine A. Rogers, *Ethics in International Arbitration*, Oxford University Press, pp. 126-127


• Whether counsel can make statements of fact not supported by the record.\textsuperscript{13}

Working with counsel, parties and arbitrators from different legal cultures therefore requires a greater sensitivity and awareness than where all counsel come from the same legal tradition.

\textit{Best Practices in Multi-Jurisdictional Dispute Resolution}

There is a concern in international arbitration that compliance with the rules of counsel’s home jurisdiction only might give an advantage to one counsel who is subject to less strict standards than another counsel. For example, mock cross-examination may be permitted (even expected) in one jurisdiction, say New York; but it may be considered unlawful for English barristers, who view it as impermissible witness coaching.\textsuperscript{14} Witnesses for a party represented by New York lawyers will have robust preparation; a witness for the English counsel’s party will not.

A best practice is therefore to keep in mind the various ethical obligations of the home and host jurisdictions, as well as the procedural rules of the arbitration. Institutional rules can be very useful in moving toward a more level playing field, proactively dealing with the ground rules of counsel conduct before issues arise and, for the avoidance of doubt, seeking guidance from the tribunal. Being familiar with these rules and norms protects counsel and protects the clients, with the ultimate purpose of ethical rules being the preservation of the legal profession’s integrity.

\textit{Embrace the Alternatives}

Anyone who has practiced international arbitration knows that the rules of court in most jurisdictions entrench procedures that trade efficiency for procedural safeguards and predictability. The thought of short-tracking pre-trial stages of a dispute and foregoing copious discovery or depositions makes most US and Canadian-trained lawyers anxious. However, most international arbitration practitioners (and lawyers trained in some other jurisdictions) emphasize the virtues of targeted disclosure to get to a hearing more quickly and cost-effectively. Similarly, using witness statements instead of examination-in-chief can shorten hearings considerably, achieving greater cost savings and quick dispute resolution – generally with little or no offsetting downside.

All of this to say, the most sophisticated practitioners in an increasingly cost-conscious global economy will give due consideration to proven practices and approaches from other jurisdictions. You can distinguish yourself in the profession – and with your clients – by being flexible, and even embracing other traditions where they can bring greater efficiencies to dispute resolution without sacrificing your core duties and objectives.

SB/EM

\textsuperscript{13} “In some states (such as Mexico and Saudi Arabia) a lawyer may make statements to the tribunal about the facts, even if this statement is not supported by any known evidence.” International Code of Ethics for Lawyers Practicing before International Arbitral Tribunals, in \textit{Arbitration Advocacy in Changing Times}, ICCA Congress Series No. 15 408, 417 (Albert Jan Van Den Berg ed., 2011), as quoted in Margaret Moses, \textit{Ethics in International Arbitration: Traps for the Unwary}, 10 Loy. U. Chi. Int'l L. Rev. 73 (2012-2013), p. 75.

WEDNESDAY, JULY 26 2017
7:45 A.M. – 8:45 A.M.

SUBSTANTIVE SECTION MEETINGS

CIVIL RIGHTS AND PUBLIC ENTITY LIABILITY
The Police and the Mentally Ill: A Complex Combination

Salon de Musique

Speakers:
Kay Hodge
Jeffrey Lowe
Robert Lockwood
THE POLICE AND THE MENTALLY ILL: A COMPLEX COMBINATION

Kay H. Hodge, Esquire  
Stoneman, Chandler & Miller, LLP  
Boston, MA

Robert C. Lockwood, Esquire  
Wilmer & Lee, P.A.  
Huntsville, AL

R. Jeffrey Lowe, Esquire  
Kightlinger & Gray, LLP  
New Albany, IN

Increasingly, police officers throughout the United States are interacting with mentally ill individuals in the course of their duties.\textsuperscript{1} Sometimes, those interactions go wrong, both for law enforcement and the mentally ill person. This outline highlights many special challenges faced by jurisdictions and their attorneys defending against civil claims that can arise when a mentally ill individual is injured or killed by a police officer.

In Part A of these materials, Kay Hodge provides a general background on the scope of this problem, and explains how law enforcement agencies are working to minimize the risk of such interactions resulting in serious harm to mentally ill individuals, to the police officers responding to calls involving such a person, or to any bystanders to these interactions.

In Part B of these materials, Robert Lockwood details the types of federal civil claims that can arise when these interactions result in a police officer using force, including deadly force, on a mentally ill individuals.

Finally, in Part C of these materials Jeffrey Lowe provides practical strategies for defending police officers in personal injury or wrongful death claims arising out of police officer interactions with mentally ill individuals.

This outline is not a comprehensive review and is not intended to be a substitute for the advice of experienced legal counsel in specific situations, as well as with respect to state law.

\textsuperscript{1} For the sake of brevity, and as the issues mentally ill individuals and mentally disabled individuals raise in their interactions with the police can be very similar, in these materials the term mental illness includes mental disabilities.
Part A – by Kay H. Hodge, Esquire, Stoneman, Chandler & Miller, LLP, Boston, MA

A. The Scope of the Problem and How Law Enforcement Agencies are Working to Minimize the Risk of Bodily Harm Arising from Interactions Between Police Officers and Mentally Ill or Mentally Disabled Individuals

1. The Problem

As Jim Ruiz and Chad Miller concluded in their 2004 article in Police Quarterly on police officers’ perceptions of dangerousness and their ability to manage people with mental illness:

U.S. police agencies have been given the obligation of responding to calls for service involving persons with mental illness. However, they have not been given the education and training necessary to manage this responsibility. Moreover, departments lack written policies and procedures for management of persons with mental illness. The lack of education, training, policies, and procedures has a tendency to cause line officers to respond improperly. Instead of approaching the call as a person with an illness, oftentimes the police officers will approach as though the patient is a dangerous felon. Such perceptions have a tendency to lead to a self-fulfilling prophecy when injury or death may occur to the patient, police officers, or both.  

Police officers all across the United States frequently respond to calls involving people who have a serious mental illness. Indeed, one study found that medium and large police departments estimate that 10% of their contacts with the public involve people with a mental illness. ³ Often the responding police officer does not realize that the person has a mental illness until after arriving on the scene and beginning to interact with the individual. While most of these calls ultimately are resolved without the use of substantial force or harm, some of these calls quickly and unexpectedly escalate in hostility to the point that substantial force is used on the individual in order to disarm, to protect against the individual harming themselves or someone else, or to place the individual under arrest. This use of force by a police officer against a mentally ill person can result in harm or even death to the individual or to a nearby bystander, and thereafter can result in the filing of civil litigation claims against the police officer and the officer’s department.

In addition, violent interactions between police officers and mentally ill individuals can seriously damage already fragile relations between a police department and the local residents. The relatively recent phenomenon of bystanders videotaping police interactions on their cell phones and then posting these tapes on line, where they can go “viral” in a matter of minutes, means that just one negative incident can tarnish a

² http://journals.sagepub.com/doi/abs/10.1177/109861103258957
³ https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2655327/
police department’s reputation, and diminish its effectiveness in the community for many years.

Moreover, the arrest and detention of a person with a mental illness often results in far greater emotional harm to that person, and expense to the jurisdiction, than if the person had been referred immediately for appropriate mental health treatment instead of being booked on criminal charges.

At its core, the problem is that historically police officers have been trained to use escalating threats and force quickly to control and end illegal or threatening conduct. But people with mental illness frequently do not respond well to such traditional police tactics, and the use of such tactics by police officers on the mentally ill may result in rapid escalation of the situation and in the use of force by one or both sides to the interaction which can very quickly and uncontrollably spiral out of control. The unpredictable nature of a person with a psychiatric condition can easily be misinterpreted by the police office as a threat, which can quickly escalate the situation to violence. In addition, police officers are trained to establish a command presence when faced with a potentially disruptive situation, but this training runs counter to how best to de-escalate a potentially volatile situation with a mentally ill person.

One example of such an interaction occurred in 2014 in Phoenix, Arizona, and involved Michelle Cusseaux, a 50-year-old woman with bi-polar disorder and schizophrenia. When the police went to her residence for a court-ordered transport to a psychiatric facility, she met them at the door with a claw hammer. The situation quickly escalated, prompting a Phoenix police officer to shoot and kill her with his service weapon.4/

The problem is not an isolated one. A 2015 study by the Virginia-based Treatment Advocacy Center found that people with a mental illness are 16 times more likely than other people to be killed by a police officer.5/ A 2015 study by the Los Angeles Police Department found that more than one-third of all people shot by their police officers had exhibited signs of mental illness.6/

Similarly, a 2015 Washington Post story reported that of the 462 police shooting deaths in the United States in the first half of 2015, 25% of these deaths involved people “in the throes of emotional or mental crisis.” This story went on to note that


The vast majority were armed, but in most cases, the police officers who shot them were not responding to reports of a crime. Most often, the police officers were called by relatives, neighbors or other bystanders worried that a mentally fragile person was behaving erratically, reports show. More than 50 people were explicitly suicidal. 7/

Thus, police officers are being called by relatives or bystanders to help protect a mentally ill person who is acting erratically, but the outcome of police involvement is too often a shooting and perhaps the death of the individual for whom help was sought.

According to the National Alliance on Mental Illness (NAMI), 1 in 4 persons killed in police officer involved shootings has a serious mental illness, and roughly 15% of men and 30% of women in local jails have a serious mental illness. 8/ To that end, a 2016 investigation by the Star Tribune of Minneapolis found that in their city at least 45% of the people killed by police since 2000 had a history of mental illness or were in a mental health crisis at the time of their death. Indeed, that same report found that the problem was getting worse, not better, as 9 of the 13 people killed in 2015 had a history of mental health issues. 9/

It is also important to note that police officers on the street are the gatekeepers of both the criminal justice and mental health systems, with the power to send a mental ill person committing minor crimes into either of these systems. The ability of a police officer to manage his or her interactions with a mentally ill person on the street can significantly influence whether the person in a mental health crisis receives mental health treatment or faces incarceration in a criminal justice system that is ill prepared to meet their needs.

Accordingly, police departments, advocates for the mentally ill, the public at large, and criminologists have come to realize that it is imperative for police departments to find and deploy methods of deescalating potentially violent interactions between police officers and people with a mental illness so that as little force as possible is used by the police and so that the mental ill people involved are immediately referred to appropriate treatment or hospitalization (rather than arrested) whenever possible.

It is also worth noting that the same programs that police departments have introduced to allow their police officers to better manage and de-escalate their interactions on the street with the mentally ill, also can help these police officers avoid using unnecessary force when dealing with other people in crisis, such as people in the

7/ http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/?utm_term=.c4914e07a9d7


9/ http://www.startribune.com/minnesota-could-mandate-officer-training-for-mental-illness-calls/417872373/
midst of a family crisis or people who are under the influence of drugs. These programs also are helpful in training police how best to respond to other potentially difficult encounters, such as those involving juveniles, the homeless, non-English speakers, or veterans suffering from PTSD.

2. Addressing the Problem

A. Memphis

In response to local community outrage following the 1988 police shooting of a man with a serious mental illness who was armed with a knife, the Memphis Police Department adopted what has proven to be one of the most successful crisis intervention programs in the country. This program has reduced arrests, increased safety for both police officers and mentally ill individuals who interact with the police, and increased diversions from the criminal justice system to the mental health system. This program has also reduced the Memphis Police Department’s use of high-intensity police units, such as SWAT teams.

In Memphis police officers are offered training in crisis intervention and in how to verbally de-escalate their interactions with the mentally ill and to divert many of these mentally ill people for treatment rather than for arrest and incarceration. Memphis elected only to train police officers who volunteered for such training, with the rationale that not all police officers have the disposition or the interest to be effective in dealing with mentally ill persons. Memphis’ goal was to have 20-25% of their police force trained to ensure 24/7 availability.10

A crucial component of the Memphis program is a centralized psychiatric emergency drop-off program at the local hospital with a no refusal policy that gives police transported individuals priority, as this allows police officers to quickly drop off mentally ill individuals and return to patrol within 15-30 minutes.11

B. Crisis Intervention Training for Police Officers

Inspired by the success of such programs in Memphis and elsewhere, more than 3,000 of the nation’s roughly 18,000 police departments provide some or all of their officers with Crisis Intervention Training (CIT).12 This training, which typically lasts 40

10/ Other police departments have elected to train all of their police officers in crisis intervention with the mentally ill, on the grounds that every police officer can, and almost certainly will, encounter the mentally ill while on the street. To date, there has been no definitive study demonstrating which of these models is more successful in reducing the use of force by police officers against the mentally ill.

11/ https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/

hours, includes teaching officers verbal de-escalation skills, scenario-based training, and having officers spend time with individuals who have gone through a mental health crisis. For example, CIT officers are trained to keep a safe distance from the person in crisis, avoid using or threatening the use of force against that person unless absolutely necessary, let the person in crisis “vent” and explain how they are feeling, and then work with that person for as long as it takes to find a safe way to end the situation in a manner that helps that person. The goal of CIT is to educate a police officer about people with mental illnesses to reduce the use of escalating force and enhance the referral of such individuals for mental health treatment rather than arrest.

A goal of diverting mentally ill people from the criminal justice system to the mental health system can be beneficial to all stakeholders, and should also greatly reduce the risk of violent and sometimes lethal encounters between police officers and the mentally ill. The available mental health treatment options can vary from jurisdiction to jurisdiction. But in general, police officers should have options besides dropping off the mentally ill person at the local hospital’s emergency department. Such options include community-based alternatives to jail when transport from the scene of the encounter with the police is called for, providing mental health treatment centers and programs that can rapidly see and treat the person, and providing respite options for these individuals with differing lengths of time and varying degrees of services.

As Amy Watson, a professor in social work at the University of Illinois at Chicago, has observed

CIT-trained officers seem to have an idea of wanting to take time and wait it out to see if they can get the person to calm down. Non-CIT-trained officers seem to have that point where ‘It’s on.’

CIT takes a step back and gets the person to calm down. CIT officers are better prepared to work through that and come to some kind of solution.  

In many communities, when a call is identified by dispatch as involving a person with a mental illness, a CIT officer is dispatched and may even be given the authority of the officer in charge, regardless of rank. This CIT officer assesses the situation and, if appropriate, attempts to resolve it through negotiation and other de-escalation techniques. Finally, the CIT officer decides once the situation is resolved whether transport to emergency psychiatric services, provision of mental health referrals, or arrest is the best option.

A CIT program is much more effective if it is more than just police officer training, although involving mental health system stakeholders requires both resources

13/ http://www.cnn.com/2015/07/06/health/police-mental-health-training/

14/ https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2655327/
and a spirit of cooperation that may be lacking in some jurisdictions. Specifically, the most effective CIT programs involve local mental health treatment centers and hospitals, and even mental health courts and other government entities, in addition to police officer training, all working together to help keep the mentally ill out of the criminal justice system for minor offenses or disturbances, while also providing these individuals with timely and appropriate mental health care.

Even well-trained CIT police officers become discouraged when a mental ill person that has been referred by them for urgent care at a local treatment center or hospital in lieu of arrest ends up back on the street an hour later with little or no treatment and still in the midst of a mental health crisis. Examples of effective coordination is giving police officers a centralized drop off location for mentally ill persons in lieu of arrest, so that these persons can be quickly triaged and given prompt and appropriate mental health care (including psychiatric hospitalization if necessary) or having a mobile crisis team to transport people with mental illness to the appropriate treatment location.

Ideally, other public entities that may confront mentally ill people in crisis, such as firefighters and child protective services employees, should be educated on how to act when faced with a person with a mental illness and when to call for police CIT support. Many jurisdictions have trained dispatch center employees how to best identify calls that involve mental illness, so that appropriate CIT resources can quickly be deployed for such calls. Thus, as CIT experts are quick to note, “CIT is more than training, it is a community program.”

In many ways, the development and deployment of CIT is part of the evolution of law enforcement in the United States over the last few decades towards one based more on protection of and service to the community, rather than on the strict maintenance of law and order. To that end, the essential goal of a CIT program, besides reducing violence and arrests, is to reverse the endless cycle of arrests, mental health hospitalizations and premature releases that plague most jurisdictions.

However, CIT has its limitations, as it does not work if the police do not recognize at the time that the situation involves mental illness or if the situation unfolds quickly in a totally unpredictable way.

C. The US Department of Justice and the Chicago Police Department

The US Department of Justice (DOJ) has also become involved in the issue of appropriate policing and mental health by requiring through consent decrees that law enforcement entities train their officers in CIT and implement other programs to minimize the risk of escalation in the interactions between police officers and the mentally ill.\textsuperscript{15} To that end, on January 13, 2017, in the last week of the Obama administration, the DOJ issued its very lengthy report on its investigation of the Chicago

\textsuperscript{15} As discussed below, one such DOJ consent decree, with Seattle in 2012, has proven very successful to date.
Police Department following the 2015 shooting deaths of Quintonio LeGrier and Bettie Jones by Chicago police officers responding to a call for help with a domestic disturbance.\textsuperscript{16}

On January 13, 2017, the DOJ and Chicago entered into a written agreement to work together “over the coming months” to negotiate a mutually acceptable consent decree to file with the local US District Court in lieu of the DOJ filing suit against Chicago for civil rights violations by its police department.\textsuperscript{17}

The DOJ investigation concluded that the Chicago police had a pattern or practice of using unreasonable and excessive force against mentally ill persons who did not present a threat and who were suspected only of low-level crimes (or no crimes at all). The DOJ concluded that this illegal practice was at least in part a reflection of the fact that Chicago had trained relatively few of its police officers in CIT, with the result that there was not a CIT officer deployed to most police interactions with the mentally ill and that CIT’s principles had not been adopted by many of its police officers. Thus, the DOJ found that regularly “officers used force against people in crisis who needed help” such as when “officers used a Taser against an unarmed, naked, 65-year-old woman who had bi-polar disorder and schizophrenia.”\textsuperscript{18}

As the Trump administration has indicated very little interest in supporting civil rights consent decrees, it is unknown if any consent decree for Chicago will ever be negotiated. It is also unknown whether the DOJ will continue to investigate aggressively police departments that are accused of a pattern of civil rights violations. Nevertheless, as a result of the DOJ investigation, Chicago committed to providing and supporting additional CIT training to its police officers and emergency dispatchers to aid them in working to de-escalate interactions between the police department and the mentally ill. Chicago also committed to providing all of its police officers with force-mitigation training designed to better equip these officers to de-escalate conflicts safely, recognize the signs of mental illness, trauma and crisis, and respond more appropriately when force is necessary. Of course, how much additional training actually occurs, and the extent to which it is effective in materially reducing the problems faced by Chicago, remains to be seen.

Finally, the DOJ’s report into its investigation of the Chicago police department could have a major impact in any future civil rights claims against that department by mentally ill people subjected to police officer force, and could also be viewed as a standard by which all urban police departments should conduct their CIT programs (for example, in having more detailed police reporting of interactions with the mentally ill, in

\textsuperscript{16} The DOJ’s Investigation of the Chicago Police Department (2017) is available at https://www.justice.gov/opa/file/925846/download

\textsuperscript{17} https://www.justice.gov/crt/case-document/file/925921/download

\textsuperscript{18} https://www.justice.gov/opa/file/925846/download
deploying CIT officers to all scenes involving the mentally ill, and in increasing the training staff and resources of their CIT program).

D. Co-Responder Programs

i. The Jail Diversion Program (JDP) in Massachusetts

The JDP in certain communities in Massachusetts is a co-responder program and has proven to be highly successful. The program was established in 2003 when the police department of Framingham partnered with a non-profit social services agency, Advocates Inc., to work together to divert mentally ill people from the criminal justice system and into treatment. The funding for the JDP initially relied on foundation money, but after the program proved quite successful in 2006 it began to be funded by the state’s Department of Mental Health. Since then the JDP has expanded into six other nearby Massachusetts towns (Marlborough, Watertown, Ashland, Sherborn, Holliston and Hopkinton).

At the heart of the JDP is building a close working relationship between police officers and mental health workers who are employed by the JDP, ride along with the police officers, and act as emergency clinical responders. These emergency clinical responders act as immediately accessible resources to aid the police officers to de-escalate their interactions with mentally ill individuals in crisis and then to arrange for mental health assessment, referral and placement for these individuals in lieu of arrest. The JDP thus provides an alternative disposition for the police to utilize for mentally ill people committing low-level offenses. The police officer knows that the arrest diversion will result in the individual receiving appropriate and needed treatment. This frees the officer to avoid the time otherwise spent arresting, booking and guarding the individual.

The JDP only involves police officers that volunteer to participate, as the program is dependent on total cooperation between the police officer and the clinician. The voluntary nature of the JDP on police officers also addresses the potential concerns of police unions.

In the first 12 years of the JDP in Framingham, over 1,500 people were diverted from the criminal justice system and into treatment. For Framingham, this has resulted in considerable cost savings, especially since most of the people who were diverted were not sent through the expense of a hospital emergency room admission. For example, in 2014, 105 unnecessary arrests were diverted as a result of the JDP in Framingham alone, for a total cost savings in arrest diversions and avoidance of emergency room admissions of approximately $476,000.19/

ii. Other Co-Responder Programs

Many other jurisdictions have introduced their own co-responder programs to address the need to minimize the risk that interactions between the police and the mentally ill will end badly. For example, Minneapolis recently introduced a pilot program that paired mental health professionals with police officers responding to emergencies, and San Antonio and Los Angeles also have similar “co-responder” programs.  

In fact, the San Antonio program is seen by many people as being the best in the nation, and is based on an especially close collaboration between the police and mental health providers. One interesting point is that this program is successful even though Texas ranks 49th in the United States in mental health services spending.  

An example of a successful co-responder program in a smaller community involves the Overland Park Police Department in Kansas police department. In 2014, that police department, which has roughly 250 officers, hired a mental health “co-responder” after seeing a surge in mental health related calls. During her first year on the job, that co-responder helped to divert individuals on 129 occasions to receive mental health treatment. That police department estimated that during that same year these diversions avoided their need to make 40 arrests.  

E. Policy Adjustments

Earlier this year, the Los Angeles Police Commission voted to require their police officers - “whenever it is safe and reasonable to do so” - to try to defuse tense situations without firing their service weapon by taking more time to let it unfold, moving away from the person and trying to talk to him or her, and calling in other resources. This new requirement formally incorporated the concept of de-escalation into the Los Angeles Police Department’s policy outlining how and when police officers can use deadly force.  

20/ http://www.startribune.com/minnesota-could-mandate-officer-training-for-mental-illness-calls/417872373/


This new Los Angeles policy is based on one established in Seattle requiring its police officers to attempt to de-escalate their potentially volatile interactions with mentally ill people, such as by trying to calm them down verbally or by calling a mental health unit to the scene. Seattle issued its policy as a result of signing a 2012 consent decree with the US Department of Justice. At the same time, Seattle required all of its police officers to undergo CIT training. Seattle’s new policies have been seen as highly successful. For example, in 2015 out of 9,300 crisis incidents, just 149 involved any use of force and just 36 resulted in tackling someone to the ground or equivalent force. Fewer than 8 percent of the suspects in these incidents were arrested. For example, earlier this year a 22 year old mentally ill man holding a knife begged Seattle police to shoot him as he stood in a major avenue during rush hour. Prior to 2012, this incident could have ended badly. Instead, after two hours of his interaction with CIT trained police officers and without anyone being hurt, the man surrendered to police and was taken to the hospital for a psychiatric evaluation.24/

F. Re-routing of 911 Calls

One innovative program in an Eastern Maryland community partnered their police department’s 911 emergency dispatch system with a local mental health center’s crisis hot line. All 911 calls were triaged to see if they presented only a mental health issue. This program resulted in 30-40% of all calls being rerouted to the mental health center’s crisis hot line, avoiding any police response at all, and thereby resulted in reduced arrest and incarceration rates.25/

G. Education of Behavioral Health Professionals and the Community

Although CIT programs teach police officers how to deal with mental health professionals and programs, there are few innovative programs that do the opposite – teach mental health professionals how to deal with the police. The Linden, New Jersey, police department offers one such program called “Why We Do What We Do” to behavioral health professionals and community members. This program focuses on teaching about police protocols, procedures and operations.26/

Part B - Robert C. Lockwood, Esquire, Wilmer & Lee, P.A., Huntsville, AL

B. The Types of Federal Civil Claims that can Arise when Police Officers use Force on Mentally Ill or Mentally Disabled Individuals.

I. Law Enforcement Interactions with the Mentally Ill are Increasingly in the News

In preparation for this presentation, a quick Google search revealed a substantial number of news stories dealing with the use of force by law enforcement against the mentally ill:


For one presenter on this panel, the issue came closer to home: *Woman Shot, Killed by Deputy after Crashing into Ripon Home*, The Modesto Bee, February 26, 2017. In that case, a woman with bipolar disorder stopped taking her medicine prior to leading law enforcement officers on a car chase.

One of the most-publicized cases involving interaction between mental illness and law enforcement is the Alan Pean case from Houston, Texas. It was the subject of a New York Times Article (*When the Hospital Fires the Bullet*, New York Times, February 12, 2106) and an episode of the This American Life Podcast (*My Damn Mind*, This American Life, February 12, 2016). In short, two off-duty Houston police officers worked as security guards at a hospital. In the course of attempting to subdue Mr. Pean, who suffers from bipolar disorder, they shocked him with a tazer, shot him once and handcuffed him. Mr. Pean filed suit in June 2016, and we hope to have access to pleadings in that case in time for our session in Montreux.

II. Predictably, Law Suits Arise From These Interactions.

When mentally ill individuals are subjected to force at the hands of government actors, they (or their surviving family members) frequently take legal action. A non-scientific review of case law demonstrates that the overwhelming majority of these cases wind up in federal court. Certainly, plaintiffs frequently assert state law claims such as negligence, wantonness, assault, and intentional infliction of emotional distress. But, plaintiffs invariably assert a claim for constitutional violations under 42 U.S.C. § 1983, disability discrimination under the Americans with Disabilities Act, or both statutes. Presumably, those claims are asserted so frequently because of the ability to obtain
attorneys’ fees, which are unavailable in many state law tort claims. This portion of the paper will focus on those federal claims.

III. 42 U.S.C. § 1983

A. Fourth Amendment Excessive Force

The Fourth Amendment to the United States Constitution provides citizens with the right to be free from unreasonable searches and seizures, which includes “the right to be free from the use of excessive force in the course of arrest.” Saunders v. Duke, 766 F.3d 1262, 1266-67 (11th Cir. 2014). As a result, most cases arising from the interaction of law enforcement and the mentally ill focus upon Fourth Amendment excessive force allegations.1

The use of force is evaluated under an objective reasonableness standard based upon the perspective of a reasonable officer on the scene. Graham v. Conner, 490 U.S. 386, 396-97 (1989). “Excessive force claims are necessarily fact-intensive; whether the force used is ‘excessive’ or ‘unreasonable’ depends on ‘the facts and circumstances of each particular case.’” Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009)(quoting Graham, 490 U.S. at 396). In Graham, the Supreme Court set out three factors to consider in determining the reasonableness of force: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and, (3) whether he is actively resisting arrest or attempting to evade arrest by flight. Graham, 490 U.S. at 396.

B. Does a Plaintiff’s Mental Illness Change the Analysis?

Should a plaintiff with mental illness be treated differently from a “legitimate” criminal? In short, does the use-of-force analysis change when the plaintiff suffers from diminished capacity? At the same time, should we require police officers to be sidewalk-psychiatrists responsible for analyzing a perpetrator’s mental state?

Arguments can certainly be made both ways. Nevertheless, there is a line of cases in which a plaintiff’s mental illness impacted the use-of-force analysis. The Ninth Circuit Court of Appeals wants to have its cake and eat it too:

This Court has “refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.” ... The Court has, however, “found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the

1There are certainly possible other claims. In Holloway v. Purvis, No. 16-60406, 2017 WL 715895 (5th Cir. Feb. 22, 2017), the plaintiff argued that the attempt to seize him pursuant to a “mental writ statute” was Fourth Amendment unreasonable seizure. He argued that it amounted to a “warrantless arrest without probable cause,” but the Fifth Circuit rejected that argument.
governmental interest in using such force is diminished by the fact that the
officers are confronted ... with a mentally ill individual.”

Hughes v. Kisela, 841 F.3d 1081, 1086 (9th Cir. 2016). The Seventh Circuit is more
straightforward:

There is a commonsense need to mitigate force when apprehending a non-
resisting suspect, particularly when the suspect is known to have
diminished capacity. An arrestee may be physically unable to comply with
police commands. See Smith, 295 F.3d at 770; see also Cyrus, 624 F.3d at
863 (noting that officer was “aware of [arrestee’s] mental illness”);
McAllister, 615 F.3d at 883 (finding knowledge of arrestee's diabetic
condition relevant to excessive force analysis); Champion v. Outlook
Nashville, Inc., 380 F.3d 893, 904 (6th Cir.2004), (“The diminished
capacity of an unarmed detainee must be taken into account when
assessing the amount of force exerted.”).

Phillips v. Community Ins. Corp., 678 F.3d 513, 526 (7th Cir. 2012). Even the Fifth
Circuit (no bastion of liberalism) has quoted the Ninth Circuit approvingly: “Although we
have not had the occasion to consider qualified immunity in the context of the police
killing a mentally ill individual, we note that the Ninth Circuit has held ‘the governmental
interest in using [deadly] force is diminished by the fact that the officers are confronted,
not with a person who has committed a serious crime against others, but with a mentally
ill individual.” Meadours v. Ermel, 483 F.3d 417, 423 n.5 (5th Cir. 2007).

Of the foregoing cases, the Ninth Circuit’s Hughes opinion comes the closest to
requiring sidewalk psychoanalysis. In that case, police responded to a “check welfare”
call regarding a woman reportedly hacking a tree with a large knife. Hughes, 841 F.3d at
1084. Upon arrival, they found the woman acting erratically, and ordered her to drop the
knife. The woman ignored those commands and walked towards another, nearby,
unarmed woman. A police officer shot her four times. In the course of finding the use of
force excessive, the Court found that “there were sufficient indications of mental illness
to diminish the governmental interest in using deadly force.” Id. at 1086.

While mental illness can be taken into account, it cannot be used as an excuse for
potentially deadly behavior. For example, in Hassan v. City of Minneapolis, 489 F.3d
914 (8th Cir. 2007), police officers approached a man walking down the middle of the
street with a machete and a tire iron. As the man walked towards pedestrians, the officers
used a taser twice, which was ineffective. The man began to chase the officers with the
machete and they tasered him again to no effect. Ignoring multiple demands to drop the
machete, the man advanced on the officers and hit a police car with the machete. As he
continued to advance waving the machete, the officers shot and killed him. The
representative for the estate argued that the use of force was unreasonable because the
officers should have known that he was mentally ill, but that argument was rejected by
the Eighth Circuit:
Hassan argues the officers should have known Jeilani's behavior indicated he was mentally ill, and thus, their conduct was unreasonable. However, even if Jeilani were mentally ill, Jeilani's mental state does not change the fact he posed a deadly threat to the officers and the public. "Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual." Sanders, 474 F.3d at 527 (citing Bates ex rel. Johns v. Chesterfield County, Va., 216 F.3d 367, 372 (4th Cir.2000)).

_Hassan_, 489 F.3d at 919.

Courts generally recognize the difficulties faced by officers dealing with the mentally ill:

Police officers face tough judgment calls about what to do with the mentally ill. Arrestees do not normally arrive at jail toting their medical records. Psychiatric problems do not always manifest themselves with clarity. And not even clear psychiatric problems always reveal their potential for serious harm—as here a heart attack. Perhaps those truths counsel in favor of more policies and training designed to minimize tragic injuries and deaths like Omar's. And perhaps police would be wise to err on the side of calling a doctor in cases like this one. But the United States Constitution and Ohio law do not elevate any deviation from wise policy into a cognizable lawsuit for money damages against the City or the relevant law enforcement officers.


C. **Qualified Immunity**

The United States Supreme Court's most-recent decision on qualified immunity demonstrates the hesitancy of the federal courts to second-guess split-second decisions of law enforcement officers. _See White v. Pauly_, 137 S.Ct. 548 (2017). _White_ did not involve a mentally-ill plaintiff. Nevertheless, it discussed the qualified immunity "of an officer who - having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by the officers - shoots and kills an armed occupant of the house without first giving a warning." _White_, 137 S.Ct. at 549. The facts indicated that earlier-arriving officers failed to properly identify themselves and warn the victim. Nevertheless, those alleged errors could not deprive the later-arriving officer of qualified immunity: "No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here." _Id._ at 552.
In the vast majority of cases reviewed in preparation for this paper, individual law enforcement officers prevailed in their assertions of qualified immunity. Probably, this is because qualified immunity poses a substantial challenge to most plaintiffs. Indeed, qualified immunity “protects all but the plainly incompetent and those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1986). The familiar analysis for qualified immunity requires a plaintiff to prove: (1) a violation of constitutional rights; and, (2) that the right violated was “clearly established.” Given the substantial obstacles for overcoming qualified immunity, instead of focusing on “wins” for law enforcement, this presentation will focus on circumstances in which courts have denied summary judgment.

It appears that the most-frequent basis for denial of qualified immunity is the existence of conflicting facts. For example, the Fifth Circuit affirmed a denial of summary judgment fairly summarily in Meadours v. Ermel, 483 F.3d 417 (5th Cir. 2007). In that case, Bob Meadours’ sister called 911 and “made it clear she was seeking mental health assistance for her brother and not reporting a crime.” Meadours, 483 F3d at 419. Officers shot Mr. Meadours at least twice with beanbag rounds before he climbed on top of a doghouse, and then advanced on the officers with a screwdriver. The officers then shot and killed Mr. Meadours. The Court found that fact issues prevented a legal determination on the question of reasonableness of force: “for example, whether Meadours was first shot while charging at Officer Kominek, or while he was still atop the doghouse, posing no imminent threat.” Id. at 432. “The question of when and where Meadours was shot is integral to determining whether the officers’ actions were reasonable, and, consequently we conclude that the dispute is material.” Id.

In Wate v. Kubler, 839 F.3d 1012 (11th Cir. 2016), James Barnes attended a baptism in the ocean, and while in the water, began flailing, flopping, thrusting his arms and body and yelling loudly about a demon. The facts thereafter are extremely detailed. Barnes initially engaged in a struggle with an Officer Tactuk in the water. Tactuk ultimately handcuffed Barnes in an unorthodox manner with one arm pulled over his head. He called for assistance and stated that he had a violent, mentally-ill person in custody. Barnes continued to resist and Tactuk shot pepper spray in his eyes and struck him in the face multiple times. Office Kenneth Kubler responded and helped to subdue Barnes. In the course of doing so, Kubler used his taser five times. Barnes died from complications of asphyxia with contributory conditions of blunt trauma and restraint. The Eleventh Circuit affirmed the denial of qualified immunity for Officer Kubler on the grounds that “gratuitous use of force when a criminal suspect is not resisting constitutes excessive force.” Wate, 839 F.3d at 1021. Here are the facts relied upon by the Court to support that conclusion:

Construing the evidence in favor of Plaintiff, the unambiguous facts are that Barnes was no longer resisting at least after the first two tasings, and that Kubler’s further use of the Taser was wholly unnecessary, and grossly disproportionate to the circumstances. Kubler had arrived on the scene six and a half minutes earlier, found Barnes bleeding from the face and observed Tactuk striking Barnes multiple times. The two officers immobilized Barnes face down on the sand. Barnes had no weapon and
was awkwardly handcuffed, which, drawing inferences from the facts in a light favorable to Plaintiff, had a greater than normal effect of further neutralizing Barnes. The record establishes that while the first or maybe even the second Taser deployment may have been warranted, there is competent unambiguous evidence that by the third tasing, Barnes was handcuffed, immobile and still, such that a reasonable officer in Kubler’s position would conclude that Barnes did not present a risk of flight, or a threat of danger to the officers or to the public. Under these circumstances, further shocks were unnecessary and grossly disproportionate, and a jury could find that Kubler’s use of a Taser on Barnes five times was unreasonable force.

Id. The Court further found that Barnes’s right was clearly established because “[a] reasonable officer in Kubler’s position and under these circumstances would have had fair warning that repeatedly deploying a Taser on Barnes, after he was handcuffed and had ceased resisting, was unconstitutionally excessive.” Id.

Another interesting case dealing with excessive force is Weiland v. Palm Beach County Sheriff’s Office, 792 F.3d 1313 (11th Cir. 2015). In that case, Christopher Weiland’s father made a “Baker Act” call to police, and informed the deputies that his son was bipolar, “acting up,” “on drugs,” and “probably had a gun.” The complaint alleged:

Fleming and Johnson, guns drawn, approached the bedroom without calling out or identifying themselves. The deputies “came upon [Weiland] sitting on the edge of a bed looking down at a shotgun that lay loosely in his lap.” Suddenly and without warning, Johnson fired two rounds at Weiland, knocking him off the bed. As Weiland lay on the floor bleeding and critically injured, Fleming tasered him. Then both Johnson and Fleming “physically beat and assault[ed] [Weiland] before finally handcuffing one of his hands to a dresser.” At no point did Weiland raise the shotgun from his lap or point it at the deputies.

Weiland, 792 F.3d at 1317. Weiland is not a qualified immunity case. Instead, the trial court dismissed based upon a failure to state a claim upon which relied can be granted. A large part of the Weiland opinion chastises the plaintiff for shotgun pleading, and it appears that poor pleading was probably the underlying reason for dismissal. Nevertheless, the Eleventh Circuit reversed dismissal, finding that the complaint asserted sufficient facts to state a claim for excessive force.

In Hobart v. Estrada, 582 Fed. App’x 348 (5th Cir. 2014), the Fifth Circuit reversed a summary judgment based on qualified immunity where a mentally ill teenager was killed after his parents sought assistance in transporting him to the hospital. In Hobart, Officer Jesus Estrada arrived at the scene before the Houston Crisis Intervention Team – which is trained on mental illness and tactics to verbally de-escalate situations involving persons with serious mental illness. Rather than waiting for the CIT, Officer Estrada entered the house and spoke with the mother. The trial court denied summary judgment on the basis of qualified immunity and the Fifth Circuit affirmed, based upon the mother’s version of the facts:
Accordingly, if a jury were to credit Mrs. Hobart's testimony, it could reasonably conclude that Officer Estrada faced only minor physical contact from Aaron, and that such contact ended and the two men were separated for multiple seconds prior to Officer Estrada pulling out his gun and shooting Aaron approximately six times. Under that factual scenario, Officer Estrada would lack probable cause to believe that Aaron posed a significant threat of death or serious physical injury to Officer Estrada or to others, and shooting Aaron in the manner that he did would be clearly excessive and unreasonable.

*Hobart*, 582 Fed. Ap’x at 355. The Court further rejected an argument regarding Estrada’s subjective mental state: “As the district court noted, regardless of whether an officer’s mental state caused him to panic such that he unreasonably determined that a threat was present, that would not render his determination reasonable.” *Id.*

The Sixth Circuit focused on the fact-intensive nature of the excessive force analysis in affirming denial of qualified immunity in *Hanson v. City of Fairview Park*, 349 Fed. Ap’x 70 (6th Cir. 2009). In that case, Scott Hanson had a history of mental illness and stopped taking his medications. Police officers responded to a complaint that Hanson was “out of control” and “trash[ing] his house.” Officer John Brewer found a car driven through the garage door and observed Hanson in his garage “walking back and forth like he’s agitated,” and with two golf clubs “beating something like a workbench.” Brewer claimed that he called out to Hanson, who “charged” toward him, walking “briskly” with two golf clubs in his hands. Brewer claimed that Hanson raised the golf clubs above his head and said: “I’m coming for you.” Brewer claimed that he was unable to retreat because of the crashed car. So, he fired his weapon and killed Hanson. But, witnesses disputed whether Hanson raised the golf clubs. The trial court denied summary judgment, finding fact issues of “whether Mr. Hanson had anything in his hands, whether Mr. Hanson was advancing when he was shot, and whether Officer Brewer was penned in by the PT Cruiser ....” *Hanson*, 349 Fed. Ap’x at 73. The Sixth Circuit agreed with that analysis:

While we agree that Officer Brewer’s conduct was reasonable if the deceased was threatening Officer Brewer with raised golf clubs, if the deceased was threatening him but had lowered the clubs, the justification given by the officer may be no longer available. The reasonableness of defendant’s conduct would then be a different question, and we do not have defendant’s testimony to support the assertion that, given that factual scenario, shooting the decedent would be a reasonable response. If the deceased had no weapon in his hand, the immediate threat would be less and some lesser use of force might have been reasonable.

*Id.* at 76.

In *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), the court focused on fact issues regarding an officer’s conduct immediately prior to the use of force. Lieutenant Donald Smith responded to a call that Terry Allen was sitting in his car threatening suicide. When he arrived, Mr. Allen was sitting in the driver’s seat with one foot out of the vehicle and a gun in his right hand on the console between seats. Lt. Smith repeatedly told Allen to drop the gun. He then tried to reach into the car and grab the gun
while an Officer Bentley held Allen’s left arm and an Officer Farmer attempted to enter the car on the passenger side. Mr. Allen reacted by pointing the gun at the officers. Shots were exchanged and Allen was killed. In considering the reasonableness of force, the Tenth Circuit will consider the “officer’s conduct prior to the suspect’s threat of force if the conduct is ‘immediately connected’ to the suspect’s threat of force.” *Allen*, 119 F.3d at 840. Without explicitly saying so, the Tenth Circuit essentially found that an officer’s use of force might not be reasonable if the officer provoked the victim’s threat of force. In the *Allen* case, there as evidence that Lt. Smith “ran ‘screaming up to Mr. Allen’s car and immediately began shouting at Mr. Allen to get out of his car....” *Id.* at 841. Because of those facts, the Tenth Circuit reversed summary judgment on qualified immunity: “Clearly, the officers’ preceding actions were so ‘immediately connected’ to Mr. Allen’s threat of force that they should be included in the reasonableness inquiry. The differences in eyewitness testimony regarding the officers’ approach are therefore material factual disputes.” *Id.*

Our newest Supreme Court Justice participated in a decision from the Tenth Circuit Court of Appeals last year. *Perea v. Baca*, 817 F.3d 1198 (10th Cir. 2016). In that case, Officers David Baca and Andrew Jarmillo were called to perform a “welfare check” on Jerry Perea, because his mother stated that he was on “very bad drugs” and she was afraid of what he might do. The officers located Perea on his bicycle, and Officer Jaramillo pushed Perea off the bicycle. They did not tell Perea why they were following him or why he was being seized, and they never asked Perea to halt or stop. Perea struggled and Jaramillo ultimately tasered him ten times in less than two minutes. While waiting for an ambulance, Perea stopped breathing and died. The Court found that the *Graham* factors weighed against a finding of objective reasonableness. Because they were merely performing a welfare check and not looking for Perea as a criminal suspect, the first factor (severity of the crime) weighed “heavily against the use of anything more than minimal force.” *Perea*, 817 F.3d at 1202. “Repeated use of the taser exceeded the minimal force that would be proportional to Perea’s crime.” *Id.* at 1203. The second factor (immediacy of the threat to officers or others) weighed against the officer because Perea was not “a danger to anyone other than himself before they attempted to affect the arrest.” *Id.* The final factor, whether Perea resisted arrest, weighed in favor of some use of force, but the “relevant inquiry” was “whether the taser use was reasonable and proportionate given Perea’s resistance.” *Id.*

Even if Perea initially posed a threat to the officer that justified tasering him, the justification disappeared when Perea was under the officers’ control. It is not reasonable for an officer to repeatedly use a taser against a subdued arrestee they know to be mentally ill, whose crime is minor, and who poses no threat to the officers or others.

*Id.* at 1204. After finding the use of force excessive, the Court quickly dispensed with the “clearly established” analysis:

It is — and was at the time of Perea’s death — clearly established law in the Tenth Circuit that the use of disproportionate force to arrest an individual who is not suspected of committing a serious crime and who poses no threat to others constitutes excessive force. .... More specifically, it is
likewise clearly established that officers may not continue to use force against a suspect who is effectively subdued.

Id.

D. Municipal Liability for Failure to Train

Individual law enforcement officers are not the only parties at risk arising from a use of force against the mentally ill. Plaintiffs also seek to hold municipalities liable for failure to adequately train officers on how to deal with the mentally ill. Yet again, federal law makes it very difficult for failure to train claims to succeed. The Supreme Court has recognized that a city’s culpability “is at its most tenuous where a claim turns on failure to train.” Connick v. Thompson, 131 S.Ct. 1350, 1359 (2011). The first hurdle to municipal liability is the underlying claim itself. If the plaintiff cannot demonstrate a constitutional violation by law enforcement, he/she has no claim for failure to train. “[T]he inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” City of Canton v. Harris, 489 U.S. 378, 388 (1989)

“Deliberate indifference can be established in two ways: by showing a widespread pattern of similar constitutional violations by untrained employees or by showing that the need for training was so obvious that a municipality’s failure to train its employees would result in a constitutional violation.” Mingo v. City of Mobile, 502 Fed. Appx. 793, 799-800 (11th Cir. 2014).

Plaintiffs can rarely provide sufficient evidence to meet the “deliberate indifference” standard. So, again, rather than focusing on municipal “wins,” which are voluminous, this paper will review cases which were allowed to proceed against municipalities for failure to train. In Allen v. Muskogee (discussed above), the Tenth Circuit not only denied qualified immunity, but also found sufficient evidence to require a trial on failure to train. In that case, the Muskogee Police Department training coordinator testified that “officers acted in accordance with their training in approaching the car and trying to take away the gun.” Allen, 119 F.3d at 843. The plaintiff countered with expert testimony establishing that such training was “wrong and out of sync with the rest of the country in the police profession.” Id. The court concluded “[w]hen viewed in the light most favorable to the plaintiff, the record contains evidence that the officers were trained to act recklessly in a manner that created a high risk of death. The evidence is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the

\[\text{Footnote: For example, in Valle v. City of Houston, 613 F.3d 536, 548 (5th Cir. 2010), the Court found that the plaintiff must show more than a potential for constitutional violations. Instead, the plaintiff must “link this potential for constitutional violations with a pattern of actual violations sufficient to show deliberate indifference.” “Prior instances must point to the specific violation in question; ‘notice of a pattern of similar violations is required.’ ... Although it is possible to infer that prior shootings may have involved excessive force, that inference is too tenuous to survive summary judgment.” Id.}\]
policymakers of the City could reasonably be said to have been deliberately indifferent to
the need.” *Id.* at 844.

The case before us is within the “narrow range of circumstances”
recognized by *Canton* and left intact by *Brown*, under which a single
violation of federal rights may be a highly predictable consequence of
failure to train officers to handle recurring situations with an obvious
potential for such a violation. The likelihood that officers will frequently
have to deal with armed emotionally upset persons, and the predictability
that officers trained to leave cover, approach, and attempt to disarm such
persons will provoke a violent response, could justify a finding that the
City's failure to properly train its officers reflected deliberate indifference
to the obvious consequence of the City's choice. The likelihood of a
violent response to this type of police action also may support an inference
of causation—that the City's indifference led directly to the very
consequence that was so predictable.

*Id.* at 845.

In *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1310 (10th Cir. 2002), Carl Kipp
Olsen was arrested and transported to the Davis County Jail. He told prebooking officers
that he suffered from Obsessive Compulsive Disorder (“OCD”) and required medication
to prevent panic attacks. The officers took his medication from him and insisted that he
remove his shoes and socks. Mr. Olsen “recoiled” at the request and suffered a panic
attack after acceding to the demand. The Davis County Jail did not provide any training
for handling individuals with OCD. The Tenth Circuit found that Olsen provided
sufficient facts to support deliberate indifference – primarily because of the prevalence of
that condition: “It hardly bears repeating, but OCD does not rival Halley’s comet in its
infrequency of appearance. OCD occurs in more than two percent of the population....
Although a jury shall decide exactly to what extent it has burst into the mainstream, one
could hardly deem it an obscure disorder.” *Olsen*, 312 F.3d at 1319.

Given the frequency of the disorder, Davis County's scant procedures on
dealing with mental illness and the prebooking officers' apparent
ignorance to his requests for medication, a violation of federal rights is
quite possibly a “‘plainly obvious' consequence” of Davis County's
failure to train its prebooking officers to address the symptoms.
*Barney*, 143 F.3d at 1307 (internal citations omitted). And this is for a jury
to decide. That OCD is relatively common and that the county had
procedures in place for dealing with inmates with psychiatric disorders
suggest that the municipality may have had constructive notice of the
illness' prevalence and consequences. Accordingly, Appellant has raised a
genuine issue of material fact as to whether the county had notice of and
was deliberately indifferent in its failure to train prebooking officers on
OCD.

*Olsen*, 312 F.3d at 1320.

A final interesting case is *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir.
2001). In that case, officers received a complaint that a man was running around naked.
They found him on an exterior landing of an apartment building, jumping up and down, yelling and kicking his legs in the air. The officers persuaded him to come down the steps, but when he tried to walk past them, a struggle ensued. In restraining Cruz, the officers used a “hog tie” restraint. Cruz later died, arguably as a result of his position on the ground while restrained. The Tenth Circuit found that use of a “hog tie” restraint was unconstitutional when used against individuals with diminished capacity:

We do not reach the question whether all hog-tie restraints constitute a constitutional violation per se, but hold that officers may not apply this technique when an individual's diminished capacity is apparent. This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an individual's condition mandates the use of less restrictive means for physical restraint.

Cruz, 239 F.3d at 1188. The Court found that the individual officers were entitled to qualified immunity, because the right was not “clearly established.” Nevertheless, the Court affirmed denial of summary judgment for the City of Laramie on a failure to train claim:

The court cited evidence that the City failed to train its officers on the use of hobble restraints and that the City put such restraints in its police cars. The court also noted that high ranking officials were aware of positional asphyxia attributable to hobble restraints and of a doctor's report stating that “deaths in police custody with hog-tie restraint[s] have been reported in medical literature a number of times.” The district court found that genuine issues of material fact were in dispute. The denial of summary judgment to the City therefore was appropriate.

Id. at 1191.

IV. Americans with Disabilities Act

Because Section 1983 contains so many barriers to recovery, plaintiffs have sought relief through other avenues of redress. Most mental illnesses will probably rise to the level of a “disability” under the Americans with Disabilities Act. Because the ADA is designed to eliminate discrimination against individuals with disability, many people who encounter force at the hands of law enforcement claim that they suffered impermissible discrimination.

A. General Principles of the ADA

Title II of the Americans with Disabilities Act provides: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The United States Department of Justice has issued regulations implementing Title II’s
prohibition against discrimination. Those regulations provide that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7). Mentally ill individuals frequently claim that law enforcement officers should have made “reasonable modifications” to normal policies before implementing the use of force. “Under the ADA[,] ... a discrimination claim based on an arrest situation usually arises in two different situations: (1) when police wrongfully arrest someone by mistaking his disability for criminal conduct, and (2) when police properly investigate and arrest someone with a disability for a crime unrelated to the disability and then fail to reasonably accommodate the disability in the course of the investigation or arrest.” Joseph v. Bailum, No.16-cv-81176-BLOOM/Valle, 2017 WL 733393 at *6 (S.D. Fla. Feb. 24, 2017).

B. Does the ADA Apply to Encounters Between Law Enforcement and the Mentally Ill?

As an initial matter, it must be noted that the Fifth Circuit Court of Appeals takes the position that the ADA “does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.” Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000). It appears that the Fifth Circuit is the only appellate court to adopt this bright-line rule. Instead, other courts seem to balance the totality of circumstances in determining if there has been a violation. See Waller ex rel. Estate of Hunt v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009) (“Just as the constraints of time figure in what is required of police under the Fourth Amendment, they bear on what is reasonable under the ADA.”); Bircoll v. Miami–Dade County, 480 F.3d 1072, 1085 (11th Cir. 2007)(“The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.”); Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) (rejecting “a broad rule categorically excluding arrests from the scope of Title II ....”).

C. Failure To Train Law Enforcement on Interacting with the Mentally Ill.

Just as they do under Section 1983, some plaintiffs attempt to use the ADA to impose liability on municipalities for failure to train law enforcement officers on interactions with the mentally ill. At least one court has found that there is no “viable claim” for insufficient training under Title II of the ADA. Buchanan v. Maine, 469 F.3d 158, 177 (1st Cir. 2006) (but “bypassing” the issue of whether Title II requires law enforcement to “draft policies and train officers on the needs of the mentally ill public.”) To the extent that a failure to train claim may be viable, “[f]ailure to train claims under the ADA are generally analyzed under the same framework as failure to train claims brought against municipalities under 42 U.S.C. § 1983.” Estate of Saylor v. Regal

The ADA and the Rehabilitation Act prevent public entities and the recipients of federal funding from discriminating against disabled individuals. See Barnes v. Gorman, 536 U.S. 181, 184–85, 122 S.Ct. 2097, 2100, 153 L.Ed.2d 230 (2002). To state a claim for compensatory damages under either statute, a private plaintiff must show that the defendant acted “with discriminatory intent.” McCullum v. Orlando Reg. Healthcare Sys., Inc., 768 F.3d 1135, 1146–47 (11th Cir. 2014); see Delano–Pyle v. Victoria Cty., Tex., 302 F.3d 567, 574 (5th Cir. 2002) (“A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination.”). That requires proof the defendant either intentionally discriminated against the plaintiff or was “deliberately indifferent to his statutory rights.” McCullum, 768 F.3d at 1147 (quotation marks omitted). “To establish deliberate indifference, a plaintiff must show that the defendant knew that harm to a federally protected right was substantially likely and failed to act on that likelihood.” Id. (quotation marks and alteration omitted).

Boynton v. City of Tallahassee, 650 Fed. Appx. 654, 658 (11th Cir. 2016)

D. Immunity

The majority of circuits hold that there is no individual liability under Title II of the ADA. See, e.g., Bowens v. Wetzel, No. 16-3036, 2017 WL 35712 at *2 (3d Cir. Jan. 4, 2017); Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir. 2001). Nevertheless, there appears to be an interesting line of divergent cases in the Eighth Circuit. In Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999), the court noted that the defendants could “not be sued in their individual capacities directly under the provisions of Title II.” Nevertheless, that court has more recently conducted an extensive analysis of qualified immunity as a defense in an ADA claim brought against police officers who used force against an individual suffering from a psychotic episode. Roberts v. City of Omaha, 723 F.3d 966, 972 (8th Cir. 2013). The Roberts court made no mention of whether individual liability was available under Title II and appeared to simply assume that it was – in the course of granting qualified immunity to the officers.

Finally, it should be noted that Eleventh Amendment immunity is not available to state actors under Title II. Most employment lawyers are probably familiar with the Supreme Court’s decision in Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), holding that Congress did not validly abrogate Eleventh Amendment immunity with regard to Title I of the ADA. In contrast, the Court found that Congress did validly abrogate Eleventh Amendment immunity with regard to Title II in U.S. v. Georgia, 546 U.S. 151 (2006).
C. Some Practical Strategies for Defending Police Officers in Personal Injury or Wrongful Death Claims Arising out of Police Officer Interactions with Mentally Ill or Disabled Individuals

Generally speaking there are two different types of settings in which we will be forced to deal with these types of claims. The first is prior to the lawsuit being filed when you get a call from the local news media who want a comment on an event of which they have bystander video or a Plaintiff’s lawyer has released video of an incident. The second is after the lawsuit is filed and you are tasked with defending an officer who has had an interaction with a person with a disability. This presentation will discuss a few things to think about in each setting. The presentation is not meant to be an exhaustive list of things you should do or a checklist. It is presented as an opener to a discussion amongst your clients and colleagues about some of the issues that arise in these claims and how to address them.

POST-INCIDENT, PRIOR TO LAWSUIT

We have all experienced the scenario where we receive a call from the local news media asking for comment on a video you have not seen or received a public records request for information pertaining to a police-citizen interaction. Generally speaking, these are fairly good indicators of later litigation, but how we respond to these inquiries and request for comment will lay the groundwork for how you defend the later-filed litigation. Ultimately, the lawsuit will be judged by the standards created for evaluating use of force claims under the Fourth Amendment or Title II of the ADA/Rehabilitation Act. Knowing those standards, we know exactly what the claimant will have to prove should a lawsuit be filed and what we will have to prove to defend the claim. We know in the Fourth Amendment claim we will have to establish the officer’s use of force was objectively reasonable. In order to do that, we will have to show that with all the facts known by the officer at that time, the suspect posed a threat that justified the officer’s use of force. In order to properly consider that and investigate the incident you want to obtain as much information about the incident as possible. The following items are things you should think about in responding to the request and preparing for litigation.

1. Obtain all information from your client – it is vitally important that as soon as you receive notice of this potential claim you contact your client and advise them to preserve as much information as possible. The potential sources include
   a. Body camera recordings
   b. Audio recordings
   c. In-car camera recordings
   d. Incident reports
   e. Use of Force reports
   f. CAD or dispatch recordings
   g. 911 calls
h. CAD digital information
i. Ambulance/EMT treatment post-incident
j. Witness statements/interviews
k. Department Policies/Procedures
l. Officer Employment/Personnel Files

2. Obtain all information from other sources – it can be invaluable to being able to tell a complete story to exhaust the search for information about the event. Therefore, you should consider what other sources of information may exist that you can obtain to show the whole story
   a. Recordings of the event from other sources –
      i. Social media – Facebook, Instagram, Snapchat, etc., – search the social media world for bystander video.
      ii. News Media – Request raw data, recordings, interviews from media who may have different statements, recordings, etc., from what they aired or printed.
      iii. Surrounding locations security video – Did the event take place where an adjoining business or landowner might have security video footage of the event. If so, send a request for the video and a litigation hold letter. You might also want to consider whether the municipality where the incident occurred has traffic cameras or other cameras placed that might contain a view of the event.
   b. Obtain statements from all witnesses – Obviously you are going to get a statement from your officer. However, if there are witnesses, you also want their statements because it will give you the ability to know what they are going to say pre-litigation and be able to build that big picture, complete picture of the event.
   c. Obtain statement from the claimant – In some circumstances, they may not be represented, or if represented, their attorney will permit a pre-suit interview. In that interview, you want to discuss more than just the event. You want to develop all information you can regarding the claimant’s disability and the outward signs and symptoms of their disability and how it manifests itself.
   d. Obtain medical records of the claimant – To the extent possible, and pursuant to state or federal law, it is helpful to have a working knowledge of the claimant’s condition as early as possible. Not only will it help you evaluate the claimant’s damages, it will help you understand and explain the Plaintiff’s interaction.

3. Once you have enough information to make the determination, you need to decide whether you want to get out in front of the message and present your own message. Too often, the standard response is a “no comment.” However, in certain circumstances you may want to tell your side of the story to the public.
Why?

a. It may assist in showing the claimant's attorney the weakness of their position/the strength of your position – which may preclude lawsuit/claim.

b. It may assist in starting to explain to your juror pool why the video/audio is limited in what it shows with regard to this instance. It gives you the opportunity to present your client as fair and balanced because this is what other sources of information provide.

c. It also may assist in messaging the limitations of recordings in general. In a case where you have bad video footage, but it does not tell the whole story or show the whole story, you may be able to show your juror pool the limitations of body cameras/audio recordings.

But it may be that “no comment” is the appropriate response given what you have learned in your investigation. While the case can be lost in the court of public opinion, you may also know the case can be won in the court of law and comment is not necessary or beneficial. However, there also may be circumstances where a pre-litigation comment may serve to lessen the prejudicial impact of a media file. Having all of the information in hand, however, permits you to make an informed decision about whether to comment or not, and also sets the table for a successful defense of the litigation.

PRACTICAL STRATEGIES IN LITIGATION

Based on all the information you were able to gather in the pre-litigation phase, you should be in a good position to successfully defend the case, assuming it can be successfully defended.

1. **Motion to Dismiss** – You will want to consider, whether, based on the Plaintiff’s Complaint, they have put enough information in the Complaint to allege sufficient facts to state a Fourth Amendment or ADA claim under *Iqbal* and *Twombly*. There may be some practical advantage to attempting a motion to dismiss based on the manner in which the Plaintiff has described the allegations. Based on the Plaintiff’s allegations, there may be a basis to argue the allegations establish the Plaintiff was a threat and Defendant’s response was reasonable. Additionally, given the United States Supreme Court’s holding in *Sheehan* regarding the ADA and its applicability to this type of situation, there may be a basis to argue the ADA does not apply. The Supreme Court did not find the ADA did not apply to this type of circumstance, but specifically reserved finding Title II applies to police interaction with a person with a disability. Depending on your Circuit (some circuits have applied Title II to arrests of qualified individuals with a disability), it may be beneficial to test whether your District Court will permit the claim to go forward.
2. **Discovery** – In the discovery phase, you will want to focus on getting the information you need to evaluate the Plaintiff’s damages and getting the information you were not able to get pre-suit, such as medical records that you could not obtain by authorization. You will also want to use discovery to obtain in an admissible form the information you need to support your motion for summary judgment.

Also, with the Plaintiff’s deposition, you will want to confirm Plaintiff’s version of the event, fact by fact, specific by specific. The reason for that is twofold. One, you want to know what they are going to say in trial. Two, you are creating material with which you can ultimately impeach the Plaintiff because you will have your recreation or reconstruction that shows that specific or fact as testified to by the Plaintiff cannot possibly be true.

3. **Motion for Summary Judgment** – The Motion for Summary Judgment will focus on the qualified immunity analysis. Qualified immunity will apply to the Fourth Amendment claim and the ADA claim. The analysis requires both the evaluation of whether there was a constitutional/statutory violation and whether the public official’s action violated clearly established law.

   A. *Sheehan’s effect on Motion Practice in these Types of Cases*

As we know, *Sheehan* addressed those two issues that will be summary judgment issues in ADA and Fourth Amendment cases. The effect of *Sheehan* could be very wide-ranging.

   i. **Sheehan’s Interpretation of ADA Claims** - The first question it addressed was the ADA issue and likely will be an issue that will need to be addressed by the Supreme Court again because the Supreme Court punted the issue and did not rule.

   The Court in *Sheehan*, however, left open crucial issues regarding the application of Title II of the ADA to police interaction with qualified individuals with disability that will ultimately need to be decided by the Supreme Court. San Francisco’s argument was the ADA governs the manner in which a qualified individual with a disability is arrested relying on the language of the Act that states a public entity may not exclude a qualified individual with a disability from participating in and may not deny that individual the benefits of, the services, programs or activities of a public entity. The Court held San Francisco’s argument was based on the assumption made by the parties that an arrest is an “activity” in which the arrestee participates or from which the arrestee may benefit. The Court was not willing to find an arrest was an “activity” in which an arrestee participates or from which the arrestee may benefit because it was not properly before the Court.
and needed additional briefing and argument. Therefore, that is an issue that may support a motion for summary judgment. However, there are circuits that have already pronounced a Title II ADA claim applies to arrests. Therefore, the Motion for Summary Judgment on this issue may have to get the Circuit to change its previous ruling on this issue or may have to go to the Supreme Court to get them to make a ruling on the issue.

Another ADA issue raised by the Court in Sheehan was whether a public entity, the only entity subject to liability under Title II of the ADA, could be vicariously liable for money damages for the purposeful or deliberately indifferent actions of its employees. The parties failed to address the issue in their briefing assuming only that it was true. The Supreme Court said it had never decided the issue and was not going to do so in this case because the issue had not been properly presented to the Court. Therefore, the issue exists as to whether Title II liability can be imposed on the employer for the employee’s purposeful or deliberately indifferent action. Again, check your circuit to determine whether it has addressed this issue and taken a position. Even if so, it may be worthwhile to give this argument a try given the Supreme Court’s language in Sheehan.

ii. Sheehan’s Interpretation of Fourth Amendment Claim - The second issue addressed by the Court in Sheehan was whether the officers were entitled to qualified immunity. The Court found they were. The takeaways from Sheehan in the Fourth Amendment context when dealing with mentally ill individuals are:

a. The Court’s recognition of the emergency aid exception to the warrant requirement. That may provide defense arguments to address entry and seizure claims filed by individuals with a disability.

b. Also, the Court against stressed lower courts are not to analyze force cases using hindsight and must give police officers some leeway when they make split second decisions, even if the officers make a mistake.

c. In the Court’s eyes, the issue came down to whether the officers were objectively reasonable when they used force instead of trying to accommodate Sheehan’s disability. However, again, the Court felt the issue was not properly before it and did not decide that issue.

d. What the Court ultimately determined was the officer’s failure to accommodate Sheehan’s disability was not a clearly established violation of Sheehan’s Fourth Amendment rights.

e. The qualified immunity analysis requires delving specifically into the right alleged to have been violated. In this case, it was
not just whether using excessive force is a violation of the Fourth Amendment. It requires the analyzing court to analyze the specifics facts of the situation before it to determine whether a reasonable officer would know that specific conduct violated the suspect’s rights.

f. The Court held Sheehan could not establish a Fourth Amendment violation based merely on bad tactics that resulted in a deadly confrontation that could have been avoided because hindsight cannot be used in evaluating the officers’ conduct.

g. The Court also rejected Sheehan’s argument that the officers’ alleged violation of department policy for dealing with the mentally ill established they were not entitled to qualified immunity. The Court held as long as a reasonable officer could have believed his conduct was justified, a plaintiff cannot avoid summary judgment by just presenting an expert’s report that an officer’s conduct violated department policy.

h. There existed no “robust consensus of cases of persuasive authority” supporting the plaintiff’s argument that it was clearly established law that the officers had to accommodate her mental illness in arresting her and the failure to do so constituted a violation of her Fourth Amendment rights. In fact, the Court found the consensus of persuasive authority supported the opposite proposition, relying on cases from the Fourth, Eighth and Eleventh Circuits.

i. Ultimately, to properly support a qualified immunity summary judgment motion, the lower court must decide the issue of whether the officer had “fair and clear warning of what the Constitution requires.”

B. Post-Sheehan cases evaluating similar claims - A couple of Post-Sheehan cases have addressed these claims in light of the Supreme Court’s opinion in Sheehan.

1. Kinerson v. Jones, 20165 U.S. Dist. LEXIS 86007 (E.D. Wa. June 30, 2015) – Plaintiff reported to be suicidal, going to harm others and in possession of handgun. Physical disability was he had RSD in his right arm. Despite the officers’ concession that issues of fact existed regarding whether the force they used was excessive, the Court still found the officers were entitled to qualified immunity on the claim because the law was not clearly established that a reasonable officer would understand that Tasering plaintiff, attempting to handcuff him, including starting to kick the Plaintiff, with no resulting injury, constituted a clearly established violation of the plaintiff’s constitutional rights.
There is some good language on qualified immunity standards in that case:

“In order to be clearly established, existing precedent must place the statutory or constitutional question beyond debate.”

“This exacting standard gives government officials breathing room to make reasonable, but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.”

“The most important Graham factor is whether the suspect posed an immediate threat to the safety of the officers or others.”

“One factor for consideration is Plaintiff’s medical condition/disability. (citation omitted) (Just like any other relevant personal characteristic – height, strength, aggressiveness – a detainee’s known disability is part of the Fourth Amendment circumstantial calculus.) Accepting for purposes of this Motion that the officers were informed, or recognized, a disability affecting one arm, that does not mean Kinerson was not a threat.”

“Officers are not required to use the most minimal force.”

On the alleged official capacity claim, the district court found:

“As there is no clearly established right to have police officers accommodate the disability of an armed and potentially violent individual in the course of bringing the suspect into custody, municipal liability cannot be based on the alleged failure to have a policy requiring such accommodation.”

2. Vos v. City of Newport Beach, 2016 U.S. Dist. LEXIS 152248 (D.C Cen. Cal. Nov. 2, 2016) – Vos ran around the local 7-11 waving scissors and stabbed a patron in the hand. Police were called and set up defensive position around the store. Vos ran toward officers, was shot and died.

On the excessive force claim, the court reiterated it was not a sufficient defense to a properly supported summary judgment motion on an excessive force claim to assert the officer should retreat, attempt to defuse and then, and only then, shoot. The court said the only appropriate inquiry is whether a reasonable officer could have believe his conduct was justified.

The court also considered important the amount of time the incident took. The quicker the event, the less likely the officer has to deliberate and consider options and the more likely the reaction was reasonable.
The court also rejected the plaintiffs’ arguments that the officers did not need to use deadly force because they outnumbered the Plaintiff and were well-armed. The court found a “police tactical advantage does not require them to risk their lives.” The court also rejected the plaintiffs’ provocation argument – an argument that is accepted in California, but rejected in other states – that essentially argues the use of force was reasonable, but only became necessary because the officer’s intentional or reckless conduct provoked the suspect’s reaction.

And, it found officers do not have to give suspects the widest possible berth or use the least intrusive means available: “an officer’s immunity does not become less if his assailant is motivated to commit suicide by cop.”

Finally, the court rejected the plaintiffs’ argument that Vos’ mental illness required the officers to use non-deadly force. The court rejected that argument finding Vos presented a real and present threat and was charging the officers with a weapon. The court distinguished the plaintiffs’ case from the cases on which the plaintiffs relied because those cases were situations where officer’s used force on essentially compliant individuals.

The court also addressed Vos’ ADA claim under Title II. The court found the Supreme Court’s dismissal of certiorari on Sheehan as improvidently granted reinstated the Ninth Circuit’s holding in Sheehan. The Ninth Circuit held Title II applies to arrests and a jury issue existed on whether the officers’ provoked Sheehan when the re-entered Plaintiff’s room when they could have remained outside and used other less intrusive means to subdue Sheehan. The court found there was no evidence of provocation as to Vos and therefore summary judgment was appropriate.

3. Rucinski v. County of Oakland, 655 Fed. Appx. 338 (6th Cir. 2016) – Rucinski was shot and killed by county officers who came to home because girlfriend alleged to 911 operator that Rucinski was schizophrenic, having a breakdown, had a switchblade and needed to go the hospital because she was worried about it. When the officers arrived, they came at the garage from inside the house and outside the house. When they opened the garage door, Rucinski started toward the officers, saying “bring it on or here we go.” The officers told him to stop and he failed to comply. One of the defendants fired her Taser and the other officer fired her service weapon a split second later killing Rucinski.
The district court agreed the officers’ actions were reasonable and granted the defendants’ Motion for Summary Judgment. The Sixth Circuit affirmed. The court rejected plaintiff’s argument that the officers’ reliance of previous Sixth Circuit case law was misplaced. Plaintiff attempted to distinguish the cases on which the Defendants relied because they all dealt with officers arresting persons alleged to have committed a crime and plaintiff argued the defendants were just conducting a welfare check on Rucinski. The court rejected that argument finding the plaintiff presented no case law restricting an officer’s right or ability to use deadly force when she has probable cause to believe that a mentally ill person poses an imminent threat of serious physical harm to her person and in fact the case law was to the contrary. Quoting an Eighth Circuit case, it held “[k]nowledge of a person’s disability simply cannot foreclose officers from protecting themselves . . . when faced with threatening conduct by the disabled individual.”

The district court also rejected the plaintiff’s attempts to have the Sixth Circuit reject its standard, segmented approach of evaluating excessive force claims because the plaintiff argued that approach improperly protects officers that proactively create a need for force that otherwise would not have existed. The plaintiff also relied on those other circuits that had adopted approaches considering whether the officer’s provocation or other action led to the officer’s use of force. The Sixth Circuit rejected plaintiff’s request finding it would require the Sixth Circuit to disregard stare decisis and Sheehan specifically found courts could not find a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided. Therefore, an argument certainly exists that Sheehan stands for the proposition that provocation is no longer an issue for consideration in these types of cases.


The court found defendants were entitled to summary judgment on the excessive force claim because “existing precedent did not establish beyond debate that a police officer must employ de-escalation techniques before attempting to effect the arrest of a person suffering with excited delirium whom the officer otherwise has probable cause to arrest.”

Also important from the case is the statement that there are no cases that establish, however, that a police officer will be liable for excessive force during a struggle to arrest the decedent when the decedent dies of natural causes.
Additionally, it was not clearly established that law enforcement officers cannot use any force to arrest, subdue or control a suspect suffering from excited delirium particularly where, as in this case, the force actually applied by the deputies has not been shown to have actually caused the suspect’s death.

4. Experts – You will want to consider several potential experts for this type of case.
   a. Potentially, you may want to retain an expert to address the disability and how it affects the claimant and how the disability manifests itself.
   b. You may also want a police practice’s expert to discuss the officer’s reaction to the situation and that it was reasonable. The police practice’s expert may also want to opine on the official capacity claim that the department was properly trained and had proper procedures and practices in place to address suspects with disabilities.
   c. Finally, you may want to consider the use of an expert to show how and why the video/audio is limited and with all the evidence considered it shows a different story that is more consistent with your officer’s version. You can retain the services of an expert who will be able to recreate or reconstruct the event that takes all the evidence into account, instead of one view that shows only what your officer’s shoulder, chest or belly button would see. This is why you want to get as much information as possible in the pre-suit phase to be able to create the whole picture instead of the limited picture shown by the dash camera or body camera.

5. Voir dire – As we all know, to the extent possible and permitted by the trial judge, we begin to tell our story in voir dire. The same is true in this context. To the extent permitted and possible, you want to inquire into potential juror’s disabilities, histories with people with disabilities, interactions with police officers (good and bad). I would also suggest you start the messaging with limitations of the video recordings/audio recordings if that is relevant.

CONCLUSION

Based on the foregoing, it is clear that in telling your story you want to be able to tell all sides of the story and not just what it is shown in a short, limited video. Additionally, the more facts you can provide the court, the more information it will have to determine that your officer acted reasonably in using force on an individual with a disability. Finally, even if an issue of fact remains about whether the level of force your officer used was reasonable, the qualified immunity analysis requires the law be clearly established that the manner in which your officers used force was unconstitutional. Given the case law cited above, there is very little case law that establishes an officer’s interaction with a person with a disability who is a threat is a violation of the individual’s constitutional rights. Therefore, developing the case in the manner outlined above will
hopefully help you establish to the Plaintiff and Court that there is no basis for the Plaintiff’s claim and lead to a successful defense of these claims.
WEDNESDAY, JULY 26, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

DRUG, DEVICE & BIOTECHNOLOGY/TRANSPORTATION/CLASS ACTION
From Farm to Table or Felon to Table – How to Know the Difference: FSMA
– What it means for foreign suppliers and U.S. importers. An update on
Implementation, Compliance, Litigation and Enforcement

Salle des Fêtes

Speakers:
Dr. Art Miller
Phil Reeves
Michael Walsh
THE FOOD MODERNIZATION ACT OF 2011
AND
THE GLOBAL FOOD SUPPLY

Michael A. Walsh
Partner, Food Drug and Device Law
Strasburger & Price, L.L.P.
Dallas, Texas
O: 214-651-4459
C: 214-912-4574
Fx: 214-659-4085
michael.walsh@strasburger.com
Website: www.strasburger.com
LinkedIn

Produced for the 2017 FDCC Annual Meeting
Drug Device & Biotechnology/Transportation/Class Action and MDL
Section Meeting

July 26, 2017
Montreux, Switzerland
## TABLE OF CONTENTS

I. The Global Supply Chain – Food and Drugs in the 21st Century ..........................1
   Introduction 1
   1. White House Global Strategy ...........................................................2
      i. National Strategy for Global Supply Chain Security ..............2
      ii. “Harmonizing” the global regulatory market ......................3
      iii. Critical Infrastructure Partnership Advisory Council ........5
   2. FDA and Global Engagement ..........................................................5
      i. Commissioner statement .......................................................5
      ii. Global Engagement Report ...................................................6
      iii. Pathway to Global Product Supply .......................................7

II. The Food Supply Chain- Massive Restructuring and Influx of Regulations ..........12
   Introduction: 12
   1. The Food Safety Modernization Act (FSMA) .................................14
   2. FDA’s Operational Strategy for Implementing FSMA .....................19
      Advancing the Public Health ..........................................................20
   3. FSMA Registration Guidance .........................................................21
   4. Sanitary Transportation ................................................................22

III. Sanitary Transportation of Food: Contracts and the New Rules .........................22
   New terms and shifting responsibilities require attention by all supply chain members ...................................................22
   Key Definitions ..................................................................................22
   5. Coverage ........................................................................................23
   6. Exclusions ......................................................................................24
   7. Responsibilities under the SFT Rule ..............................................24
      i. Vehicles and Transportation Equipment .............................24
      ii. Transportation Operations ...................................................24
      iii. Training ...............................................................................26
      “When the carrier agrees in writing to be responsible for sanitary conditions during transport, the carrier must provide training . . . on food safety and basic sanitary food transportation practices.” ..........26
      i. Records ...............................................................................26
   Allocation of Responsibilities; Role of Written Contracts ..............................27
   Waivers 27
   Conclusion 27
   8. Prior Notice of Imported Food ........................................................29
   9. Foreign Supplier Verification Programs (FSVPs) ...........................32
   10. Protecting Against Intentional Contamination ................................37
   11. Third-Party Auditors ..................................................................43
   12. Traceback Procedures ..................................................................45
   13. “Track and Trace” Pilot Project ....................................................45

IV. Conclusion .................................................................................................47
I. The Global Supply Chain – Food and Drugs in the 21st Century

Introduction

On September 11, 2001 the world changed. Congress and government regulators recognized that the laws and rules were well designed to respond to widespread unintended adverse outcomes from medical products and outbreaks of food borne illness but were inadequate to prevent intentional and criminally negligent outcomes and outbreaks. Congress has acted by enacting aggressive new legislation that revolutionizes the supply and distribution of food and drugs in the United States. In response to the new legislation, FDA is implementing a massive restructuring of how it oversees the transport of regulated products throughout the United States. The sea-change in the oversight of the transportation of regulated products has created new opportunities, challenges and risks for suppliers, manufacturers, distributors, marketers and sellers of FDA regulated products.

The first step towards the regulation of the food and drug industry was the formation of the U.S. Pharmacopeia, the first compendium of standard drugs for the United States. Eleven physicians meet in Washington D.C. in 1820 to establish this list.\(^1\) The FDA was initially named the Division of Chemistry in the late 19th century, later changed to the Bureau of Chemistry, then the Food, Drug and Insecticide Administration, and is today known as the Food and Drug Administration.

In 1862, President Lincoln appointed a chemist named Charles M. Wetherill who set up a laboratory and began analyzing samples of food, soils, fertilizers, and other agricultural substances. Dr. Harvey W. Wiley became the Bureau of Chemistry’s chief chemist in 1883 and started the campaign for federal legislation governing food adulteration, a grass roots movement that created political support for legislation governing food and drugs was known as the Pure Food Movement.

The Food and Drug Act was signed into law by President Roosevelt on June 30, 1906. At its inception the Food and Drug Act was commonly known as the Wiley Act because Wiley was a driving force behind the legislation.\(^2\) With the passage of the Federal Food and Drugs Act in 1906 the modern era of the FDA began but it was a far cry from what we know today and the compounds available to the consuming public without prescription or physician make today’s regulation look paternalistic. Another reported driving force behind the Food and Drug Act was the novel, The Jungle, by Upton Sinclair which described of the condition of the meat-packing industry. The book chronicled the plight of the worker from a socialist’s perspective but the author’s principle political point was obscured and outrage ran to the handling of food. The focus of the Food and Drug Act was on the product labeling rather than the pre-market approval of products placed on store shelves. The notion of letting the consumer know what was in a product was more important than requiring proof of safety before marketing and Americans were decades from any requirement of evidence of efficacy for regulated products. The sentiment may best be demonstrated by a contemporaneous quote in the Journal of the America Medical Association:

“Life is a dangerous thing at best and very few of us get out of it alive,” while those of us who spend all our energies

---


trying to elude its incidental risks might almost as well never have lived at all. Health is largely a matter of a proper balance of opposing forces; and that balance can be preserved, in part, by cultivating a due measure of indifference to inevitable dangers.\textsuperscript{3}

Despite great strides over the past 100 years, the early days were much like today as laws and regulations are largely reactive to product outcomes. Adverse outcomes, whether real or perceived have historically motivated consumers and law makers to require more from manufacturers and less from consumers. Elixir sulfanilamide was a drug therapeutic claims touted the compound as a “wonder drug.” The drug had been in a pill form which was large and difficult to ingest in sufficient quantities for much therapeutic benefit until mixed with diethylene glycol, antifreeze like substance, for oral administration. Tragically use of the drug resulted in many deaths including many children.\textsuperscript{4} In response in 1938, the Food and Drug Act was replaced with the Food, Drug and Cosmetic Act with a new emphasis on safety. This Act mandated pre-market approval of all new drugs and required that drugs be labeled with directions for safe use. Several amendments to this Act were later passed in response to drug experience and world events such as the sedative Thalidomide, which produced thousands of grossly deformed newborns in many countries creating the impetus for the Kefauver-Harris Amendment.

It wasn’t until 1962 that the law required proof of efficacy; that is to say, that the product does what the manufacturer says it does. The changes in food and drug laws over the past century suggest that the focus of these regulations shifted from protecting consumers by educating and informing consumers and implementing pre-market controls.\textsuperscript{5}

1. **White House Global Strategy**

   1. **National Strategy for Global Supply Chain Security**

On January 23, 2012 the White House issued its *National Strategy for Global Supply Chain Security*\textsuperscript{6}. The White House strategy includes two goals:

The first goal of the White House strategy is to “Promote the Efficient and Secure Movement of Goods.” The first goal concerns protecting and securing the timely, efficient flow of legitimate commerce by:

a. Resolving threats early by integrating security processes into supply chain operations;

b. Increasing verification and detection by identifying goods that are not what they are represented to be, are contaminated, are not declared, or are otherwise adulterated or misbranded;

c. Enhancing security

---

\textsuperscript{3} *Germophobia*, 54(2) JAMA. 135,135-136 (1910).


d. Modernizing supply chain infrastructure and processes; create new for low risk cargo; simplifying trade compliance processes; and create incentives for stakeholder collaboration

The second goal is to “Foster a Resilient Supply Chain.” The second goal contemplates shifting focus from responding to threats and hazards after they arise to anticipating them and creating an approach to withstand and recover rapidly from disruptions by establishing:

a. Risk management principles to identify and protect key assets, infrastructure, and support systems; and implement sustainable operational processes and redundancy; and

b. Trade resumption policies and practices establishing “national and global guidelines, standards, policies, and programs.”

The administration’s approach considers enhanced collaboration at the federal and state level as well as with stakeholders under a proposed “all-of-nation approach to leverage the critical roles played by state, local, tribal and territorial governments, and private sector partners.” On a global scale the Administration’s plan recognizes that the “global supply chain transcends national borders and Federal jurisdiction” and seeks to “implement global standards, strengthen detection, interdiction, and information sharing capabilities, and promote end-to-end supply chain security efforts with the international community.”

To implement the strategy, the White House set a number of focus areas:

a. Align Federal activities across the entire Government;
b. Refine and reassess the threats and risks associated with the global supply chain;
c. More use of advanced technology to oversee cargo in air, land, and sea environments;
d. Identify infrastructure projects to serve as models for the development of critical infrastructure resiliency best practice;
e. Incorporate global supply chain “resiliency” goals and objectives into the Federal infrastructure investment programs and project assessment process;
f. Promote legislation that supports implementation of the strategy by Federal departments and agencies;
g. Work with industry and foreign governments to speed the flow of low-risk commerce in specific supply chains that meet designated criteria; and
h. Align trusted trader program requirements across Federal agencies. Standardize application procedures, enhance information-sharing agreements, and security audits conducted by joint or cross-designated Federal teams.

ii. “Harmonizing” the global regulatory market

Globalization has come to mean that FDA now exerts far more oversight overseas, as opposed to at the border, than in the past: we had to change our operating

---

7 Id. at 2.
8 Id.
As Globalization marches forward the emergence of the concept of “harmonization” has come to the forefront. Harmonization is a catch phrase for negotiating with international bodies to create a seamless scheme of regulation and enforcement of the laws of different nations. As this concept evolves, we may see not so much harmonization as counterpoint as the harmonies clash between nations and the liberties granted their citizens do not meld. For the student of global harmonization, the following organizations are focusing on developing the standards and procedures in this evolving marketplace:

- International Conference on Harmonisation (ICH),
- Pharmaceutical Inspection Cooperation Scheme (PIC/S),
- International Pharmaceutical Regulators Forum (IPRF), and
- Asia Pacific Economic Cooperation’s (APEC) Pharmaceutical Product Supply Chain,

While the regulators focus on establishing a system of oversight, not all products or facilities can be inspected and tested and “companies must feel responsible and accountable, always. Quality must be built into products from start to finish and must be a focus of all activities.”

At the bottom of the massive increase in regulation and oversight are very real concerns for example:

another concern that I want to mention. This is the growing opportunities for intentionally adulterated, counterfeited or otherwise falsified medical products to infiltrate the legitimate medical products supply, which signal an alarming trend. Recent incidents of this kind have caused serious threats to health, with tragic consequences around the world. I’m sure that you are aware of some of these episodes— from contaminated heparin (the blood-thinning drug), to counterfeit Avastin (a cancer treatment), to children’s cough syrup containing ethylene glycol, a well-known poison. Such adulterated medical products may contain too much, too little, or the wrong active ingredient, and could contain toxic ingredients. They prevent patients from getting the real medical products that they need and for antibiotics, they can also increase the likelihood of drug resistance, which is a serious and growing concern for us all.

---

10 Id.
11 Id. at 5.
12 Id.
III. Critical Infrastructure Partnership Advisory Council

The Department of Homeland Security has established the (CIPAC)\textsuperscript{13} which is a Federal Advisory Committee Act-exempt body established by the Secretary of Homeland Security, as authorized in Section 871(a) of the Homeland Security Act [6 U.S.C §451(a)], to implement the National Infrastructure Plan (NIPP) Framework.\textsuperscript{14} The NIPP Framework is a partnership between government and critical infrastructure and key resources owners and operators, and provides a forum in which they can engage in a broad spectrum of activities to support and coordinate critical infrastructure protections.

2. FDA and Global Engagement
   i. Commissioner statement

   In discussing the greatest impact on public health FDA Commissioner stated:

   The rise of global markets and supply. Many regulators around the globe face additional concerns, as their systems are skeletal at best. Change has been rapid and profound. Emerging markets and developing economies are gaining new prominence, and the increased flows of people, capital, information and goods across borders have realigned many roles, relationships and risks.

   At every step in global supply chain networks -- from raw materials and other ingredients, to manufacture, storage, sale, and distribution -- there are opportunities for a product to be improperly formulated or packaged, contaminated, diverted, counterfeited, or adulterated. For so many countries, including my own, import volumes have increased exponentially and inspecting products at ports of entry is no longer adequate to ensure that our consumers have safe products. Rather, prevention of problems before they reach our borders requires strengthening quality and safety oversight in countries from which we import products, with benefits for consumers everywhere. It also means strengthening the integrity of supply chains as products move through the system.\textsuperscript{15}

   Highlighting the burden on the US manufacturer the Commissioner observed:

   “[m]any regulators around the globe face additional concerns, as their systems are skeletal at best. Nearly 40 percent of finished drugs Americans consume today are made elsewhere, as are about 50 percent of all medical devices. Approximately 80 percent of the manufacturers of active pharmaceutical ingredients used in the United States are located outside our borders.

\textsuperscript{14} Id.
China already has the largest number of foreign, FDA-registered, drug manufacturing establishments, followed by India. And China has the fourth highest volume of exports to the U.S. of medical equipment and is the leading supplier of sutures, sterile, surgical, and dental goods. In addition to the growth in sheer volume of imports and foreign facilities, today’s complicated supply chain involves a web of sources and shippers, as well as repackers and redistributors. Innovations in transportation, refrigeration, and communication have made it increasingly easy to ship drugs, medical devices, and biologics over long distances.16

As significant advances in global product sourcing creates greater opportunities, “[t]oday’s global supply chain poses greater risks to consumers because there are so many additional steps, potential vulnerabilities and questions to be asked including: Who has handled the product? How was it manufactured, packed, distributed, and stored? And who supplied the ingredients?”17

II. Global Engagement Report

FDA views its success in protecting the U.S. public as depending increasingly on its ability to reach beyond U.S. borders and engage with regulatory counterparts in other nations, as well as industry and regional and international organizations.

Through effective global engagement, FDA is working with its many international partners to weave a global safety net that benefits public health in the United States and around the world.

FDA’s Office of International Programs issued its November 21, 2013 report entitled “Global Engagement”18 identifying the FDA’s efforts concerning all FDA regulated products. FDA identifies its efforts as a “paradigm shift” recognizing that it will move from being an observer of the global market to an active participant. FDA recognizes that inspection at the U.S. borders or ports-of-entry is no longer sufficient to ensure the safety of the ever increasing tide of imports to the United States.19

Since 2002, for example, imports of pharmaceutical products and biologics have more than doubled, and medical device imports have quadrupled. Foreign sourced pharmaceuticals now account for some percent of the drugs consumed in the United States, and an astonishing 80 percent of the active ingredients in U.S.-consumed drugs are sourced from abroad.13 With respect to medical devices, imports now represent more than 35 percent of the U.S. medical equipment market.20

16 Id.
17 Id
19 Id. at 3
20 Id. at 6
III. Pathway to Global Product Supply

As described in more detail in FDA’s 2011 Special Report, Pathway to Global Product Safety and Quality,21 “the Agency is working to transform itself over the next ten years from a domestic agency operating in a globalized economy to a truly global agency fully prepared for the regulatory pressures of globalization.”22

How will it be done and when?

By “including a global data information system they can use to proactively share real-time information and resources across markets. To achieve a true and lasting paradigm shift, FDA will be engaging stakeholders in a process that will unfold over the next several years.”23

As of 2011 the FDA had offices in the following foreign countries:

- China with posts in Beijing, Shanghai, and Guangzhou.
- India with posts in New Delhi and Mumbai.
- Latin America with posts in San Jose, Costa Rica; Santiago, Chile; and Mexico City, Mexico.
- Europe with posts in Brussels, Belgium; London, United Kingdom; and Parma, Italy.
- Asia-Pacific, located at FDA headquarters.
- Sub-Saharan, located in Pretoria, South Africa.
- Middle East and North Africa, located in Amman, Jordan.24

The FDA is a founding member of the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH),25 which seeks to harmonize regulatory standards, processes, and procedures for the pharmaceutical industry. Established in 1990, ICH brings together drug regulatory authorities and pharmaceutical industry experts of the United States, European Union, and Japan. Additional participants, as observers, include WHO, Canada, and Australia.

Global pathway FDA’s July, 7, 2011 revised report, Pathway to Global Products and Safety,26 lays out FDA’s ten year “vision” for transforming the global supply chain for FDA regulated products. As FDA puts it “Ten Years From Now, the World Will Be

---

22 Id. at 9.
23 Id. at 9.
24 Id. at 10.
26 Pathway to Global Product Safety and Quality, supra note 21.
Very Different Than it is Today.” Historically, FDA’s primary tool for product safety and quality was inspections at production facilities and ports of entry.\textsuperscript{27} In the decade ahead “the world economy will be shaped by several distinct forces: the rise of emerging markets, the scarcity of natural resources, and the increased flow of capital, information, and goods across borders. The cumulative effect of these trends means not only phenomenal growth in the import sector but increasing complexity for regulators, as the distinction between foreign and domestic products continues to blur.”\textsuperscript{28}

Because of these forces, a shift in global product flows will make it difficult to identify the “source” of a product and to ensure that all players along the supply chain meet their safety and quality responsibilities.\textsuperscript{29} To address this changed world, FDA’s Global Pathway builds on four (4) core concepts:

- Global coalitions of regulators;
- Develop a real time global data information network.
- Expand intelligence gathering and modernized analytics and
- Risk based resource allocation.

The 10 Year Plan:

- **The great rebalancing.** FDA sees globalization in trade as “likely leave traditional Western economies with a lower share of GDP in 2050 than they had in 1700.” Western economies with aging population and emerging populations increasing with urban expansion.

- **The productivity imperative.** FDA sees “Rich nations” experiencing “the natural progress of opulence.”

- **The global grid.** Cross-border capital flows have expanded at three times the rate of GDP growth. These days, a typical manufacturing company relies on more than 35 different contract manufacturers around the world. Id at 7

- **Government and the marketplace.** FDA foresees an enhanced role for regulators. Citing three reasons (i) negative impact of globalization on local economy; (ii) government stimulus; and (iii) more dispersed economic power and regulation requiring manufacturers to adapt.

    Greater governmental involvement in the medical and healthcare marketplace.

Estimates predict that by the end of 2010, more than 40% of the final assembly in the consumer goods and life sciences industries will be performed by foreign producers, due largely to the lower cost of production.\textsuperscript{30}

While imports in and of themselves are not problematic, what does present a problem for regulators is reflected in the World Health Organization estimate that

\begin{itemize}
    \item \textsuperscript{27} Id. at 2.
    \item \textsuperscript{28} Id.
    \item \textsuperscript{29} Id.
    \item \textsuperscript{30} Id. at 10 (citing Global Supply Chain Trends 2008 – 2010: Driving Global Supply Chain Flexibility through Innovation, PRTM Management Consultants).  
\end{itemize}
between 5% and 8% of all of pharmaceuticals worldwide were counterfeit in 2003.\(^{31}\) Moreover, increasing cases of adulterated, misbranded and improperly transported and unapproved products and products distributed by unregistered manufacturers through both traditional and online distribution sources has increased the burden for the FDA products.

With this backdrop, there is a call for a transformation of the FDAs operating model for supply and distribution. In furtherance of the shifting manufacturing market and increased risk for adulterated and misbranded products a number of initiatives have been instituted. For example, FDA moved to PREDICT (Predictive Risk-based Evaluation for Dynamic Import Compliance Targeting)\(^{32}\) Focusing on cargo that presents the highest risk: focusing on product codes, manufacturer's history, country of origin, recall security risks. PREDICT is the FDA's electronic screening tool for import operations that replaces the legacy screening tool in OASIS (Operational and Administrative System for Import Support). It works behind the scenes to screen all lines of imported product electronically submitted to the FDA via the US Customs and Border Protection interface. MARCS (Mission Accomplishment and Regulatory Compliance Services) Imports Entry Review is FDA’s new application used to make initial admissibility decisions, assign field work, and display the results of the PREDICT risk-based screening and database lookups. National rollout of PREDICT began in September of 2009 to all 16 import Districts and was completed in December 2011. PREDICT is designed to calculate a customized risk score for every line in an entry.

In 2008 the General Accounting Office\(^{33}\) recommended that FDA increase inspections of foreign drug establishments and improve information it receives to manage overseas inspections.\(^{34}\) But at current rates, it would take an estimated nine years for FDA to inspect every high priority pharmaceutical facility just once.\(^{35}\)

FDA’s successes in engaging foreign partners have not helped the agency substantially increase the coverage of its safety and quality assurance activities.\(^{36}\)

3. **Good Importer Practices - Guidance for Industry**\(^{37}\)

In January 2009 FDA issued its draft Guidance on “Good Importer Practices” setting forth four Guiding principles. In general, FDA recommends importers know the foreign firms and any other firms with which they do business and through which such products pass (e.g., consolidators, trading companies, distributors). In addition, FDA recommends understanding the products that they import and the vulnerabilities associated with these products and the hazards that may arise during the product life cycle, including all stages of production, ensuring proper control and monitoring of these hazards.

**Guiding Principle I Establishing a Product Safety Management Program**

\(^{31}\) Id. at 16 (citing WHO estimate; IMS: global drug market size, ex-manufacturer prices).
\(^{33}\) U.S. GOV'T ACCOUNTABILITY OFFICE, GAO – 10-961, DRUG SAFETY – FDA HAS CONDUCTED MORE FOREIGN INSPECTIONS AND BEGUN TO IMPROVE ITS INFORMATION ON FOREIGN ESTABLISHMENTS, BUT MORE PROGRESS IS NEEDED (2010).
\(^{34}\) Id.
\(^{35}\) Id. at 19.
\(^{36}\) Id. at 19.
FDA suggests importers establish a product safety management program that includes the following:

- Establish a management structure for product safety.
- Assign responsibility for compliance to specific individuals.
- Ensure assigned individuals have training, knowledge, experience, skills, and competence to perform compliance.
- Maintain documented policies, specifications, and procedures.
- Establish a process to analyze and evaluate risks in the product life cycle.
- Develop and maintain a system for communication.
- Establish a formal quality-assurance program.

Guiding Principle II Knowing the Product and Applicable U.S. Requirements

To ensure imported products are in compliance with all applicable U.S. statutes and regulations, importers should have a good understanding of the products they are importing, the applicable regulatory requirements, and the compliance history of the products and the firms involved in the products' design, production and handling. The importer should have sufficient knowledge of the product, its intended use, its inherent vulnerabilities and risks, and the methods by which it is grown, harvested, manufactured, processed, packed, received, transported, stored, imported, and distributed. The importer should know the regulatory framework that governs the products in the country of production; the compliance status of the products it imports; the foreign firms that manufacture those products; and other firms with which it conducts business involved in the product's life cycle.

Guiding Principle III Verifying Product and Firm Compliance with U.S. Requirements throughout the Supply Chain and Product Life Cycle

Have knowledge of the firms/persons in the foreign supply chain (e.g., name, address, type of business, etc.), to the extent feasible, from the production or growing of raw materials to manufacturing/processing, packaging, storage, and transportation of products destined for import into the United States:

- Know what preventive controls, if any, firms must institute at each critical point in the product's life cycle, and the steps firms need to take to ensure that those controls are being appropriately applied.
- Prior to doing business with a supplier, perform an assessment of the supplier to determine whether it has implemented an effective product safety program to help ensure you receive a product that meets applicable U.S. requirements.
- Resolve any potentially significant or questionable information gaps about the firms involved.
- Obtain a written guarantee of product compliance from company representatives, Insist on compliance with U.S. requirements in the purchasing contract.
- Deal directly with the supplier, or its authorized agent, to avoid fraudulent schemes.
• Require all those in the supply chain to have evidence of compliance with applicable U.S. requirements.
• Require foreign firms to train their employees on U.S. requirements.
• Establish mechanisms to verify compliance with U.S. requirements.
• Inspect the foreign firm either through periodic visits or by placing personnel in critical, foreign production facilities. Alternatively, the importer could hire qualified third parties to perform inspections.
• Consider purchasing from certified firms.
• Determine if the source country has laws that regulate the product, if the foreign regulatory scheme applies to exports and covers U.S. requirements, if there is a competent regulatory authority that regularly inspects the facility for compliance with the source country's requirements, and whether the source country's oversight includes any sampling and analysis.
• Conduct paper audits.
• Periodically reassess monitoring mechanisms.
• Be alert to evidence that casts suspicion on the product.
• Obtain guarantees or certifications subject to substantiation, if appropriate, that products vulnerable to moisture, contaminants, temperature, or other environmental conditions have been maintained under acceptable conditions during transit.

During Entry: Control, Monitor, and Verify Product Compliance

The guidance recommends conducting a risk-based monitoring program of incoming products including:
• Examination of shipping records - certifications, certificates of analysis, letters of guarantee, etc.;
• Physical examination of packaging and labeling;
• Risk-based product sampling and testing to ensure the product is authentic, and meets company specifications and U.S. requirements.
• Consider using a licensed customhouse broker. Know the correct harmonized tariff schedule number, as well as the correct commodity and product codes, and provide them to the broker/filer.
• Avoid any broker/filer that repeatedly provides incorrect information to the U.S. Government.

In Distribution. - Control, Monitor, and Verify Product Compliance. Stablish procedures to:
• review and handling of safety complaints from consumers and customers
• identify non-compliant products, and for communicating information within the organization and to third parties, including Federal, State, and local authorities.
• identify the source and destination of a potentially violative product
• isolate and hold the product until all applicable agencies have issued the relevant releases.
• recall products from distribution channels in the United States.
• notify distributors, retailers, consumers and other end users.

II. The Food Supply Chain- Massive Restructuring and Influx of Regulations

Introduction:
The United States’ food supply is a modern day miracle. If you calculate the number of meals, the number of producers, the number of ingredients that each consumer encounters in the course of a year, it is truly a miracle that the marketplace has performed so well for so long without the current influx of new laws and regulations. Relying on references to a CDC statement that itself relies on data that arguably does not support the conclusion, FDA states that “one of every six Americans will get ill each year.” The CDC data relied on by FDA includes all level of illness and does not exclude consumer handling as the contributing cause.

Because of consumer concerns over food handling practices, Congress established the FDA more than 100 years ago. Over time and in reaction to a serious health impacts from adulterated and misbranded products, the scope of how the FDA goes about fulfilling its mission has expanded. In setting FDA’s mission, 38 Congress provided that the (Food and Drug) Administration shall—

(1) promote the public health by promptly and efficiently reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner;

(2) with respect to such products, protect the public health by ensuring that—
   (a) foods are safe, wholesome, sanitary, and properly labeled;
   (b) human and veterinary drugs are safe and effective;
   (c) there is reasonable assurance of the safety and effectiveness of devices intended for human use;
   (d) cosmetics are safe and properly labeled; and
   (e) public health and safety are protected from electronic product radiation;

(3) participate through appropriate processes with representatives of other countries to reduce the burden of regulation, harmonize regulatory requirements, and achieve appropriate reciprocal arrangements; and

(4) as determined to be appropriate by the [FDA], carry out paragraphs (1) through (3) in consultation with experts in science, medicine, and public health, and in cooperation with consumers, users, manufacturers, importers, packers, distributors, and retailers of regulated products.

Over most of the past 100 years the FDA’s role was to respond to incidents and outbreaks, remove offending products and punish offenders. With the passage of new laws, most notably the Food Drug Administration Safety Innovation Act (FDASIA) and Food Safety Modernization Act (FSMA), the emphasis is now on prevention. That is, to establish rules and guidelines that give the FDA significantly greater oversight through facility registration, inspections, record production requirements and greatly enhanced enforcement powers. The scope of the oversight for FDA does not stop at the border either, and the law grants oversight and inspection power of facilities abroad. The new

38 21 USC § 393
“normal” for the food industry is robust compliance programs and employees who enforce them. Simply relying on supplier indemnification is no longer enough.

Beginning in 1906, when faced with information concerning widespread unsanitary food handling, Congress established the Food and Drug Administration and set its mission to promote the public health and to ensure that “foods are safe, wholesome, sanitary and properly labeled.” Since that time, outbreaks of foodborne illness have resulted in Congress increasing the grant of federal oversight of the food industry providing the FDA more and greater powers to regulate and punish food manufacturers for violations of the Food Drug and Cosmetic Act (FDCA) and FDA’s Regulations. Most recently and perhaps most profoundly, the Food Safety Modernization Act of 2010 (FSMA) signed into law on January 4, 2011 gave the FDA significant new muscle and, since its enactment, FDA has flexed its substantial new regulatory might through fines, product detention, suspension of registration and criminal prosecution of executives and employees.

The Company: Peanut Corporation of America (PCA). The Crime: not complying with good manufacturing practices resulting in a potentially deadly outbreak of food borne illness. The Punishment: PCA is out of business, and on February 20, 2013 the Department of Justice unsealed a 76 count criminal indictment of former executives and employees.

The indictment relates to a national outbreak of salmonella in 2008 and 2009 that was traced to PCA “as a likely source for that outbreak.”

As charged in the indictment, PCA produced peanuts … under insanitary conditions, which included PCA’s failure to follow appropriate practices to ensure its plants were sanitary, its failure to prevent cross-contamination between raw and cooked product, and its failure to take adequate steps to keep rodents and insects out of the plant.

The indictment charges that the employees committed fraud and conspiracy by falsifying data concerning the “quality and purity of the peanut products and specifically misled PCA customers about the existence of foodborne pathogens.” The indictment charges that test results were ignored and the company falsified documents that attested to quality “stating that shipments of peanut products were free of pathogens when, in fact, there had been no tests on the products at all or when the laboratory results showed that a sample tested positive for salmonella.”

Compounding the criminal problems, once the investigation began “[defendants] gave untrue or misleading answers to questions” concerning “the plant, its operations, and its history.” The charges range from conspiracy to introduce adulterated food into interstate commerce and misbranding with the intent to defraud, to wire fraud and obstruction of justice. One of the defendants has already pled guilty.

Announcing the indictment, the Deputy Assistant Attorney stated that:

Under the FDCA, it is illegal to introduce into our markets a food or drug that is adulterated – which, for foods, generally

can mean either that the product is tainted or that it was produced or handled in insanitary conditions. As a result, the FDCA is a powerful tool for protecting the health and safety of all Americans. Using the FDCA, the Department has worked to prevent adulterated products from reaching consumers by securing injunctions that ban companies from distributing food or drugs until they have cleaned up their facilities. And, when adulterated products do reach the market and pose a significant danger to the public, we will not hesitate to bring criminal cases that seek to hold wrongdoers accountable and deter other would-be violators.42

As the FDCA becomes more expansive and compliance more complex, a number of industry groups are producing free practice guides to help navigate the new rules and regulations. For example, the Grocery Manufacturers Association (GMA) has created a Supply Chain Handbook 43 which provides and outline of how to conduct an assessment to ensure programs exist to ensure safety and compliance. The GMA Handbook recommends (i) having knowledge of your supplier’s safety programs, (ii) conduct supplier inspection surveys, facility audits, product testing and evaluation, and (iii) review product specification compliance.

1. The Food Safety Modernization Act (FSMA)

FSMA is an impressive restructuring and enhancement in governmental oversight of the food industry which imposes an enormous workload on the FDA including 50 new rules, guidance documents, reports within 3 years and tight deadlines. Under the Obama Administration, the FDA was charged with building a new system which is a long-range process and will require significant new resources.

Under FSMA, the term “facility” includes any factory, warehouse, or establishment (including a factory, warehouse, or establishment of an importer) that manufactures, processes, packs, or holds food. The term facility does not include farms; restaurants; other retail food establishments; nonprofit food establishments in which food is prepared for or served directly to the consumer; or fishing vessels.44

Retail Food Establishments are redefined and the FDA was directed to amend the definition of the term to clarify that, in determining the primary function of an establishment, the sale of food products directly to consumers by such establishment, including roadside stands or farmers’ market where such stand or market, a “community supported agriculture program” and “any other such direct sales platform as determined by the Secretary.”45

FDA’s new power to obtain records “applies to all records relating to the manufacture, processing, packing, distribution, receipt, holding, or importation of such article maintained by or on behalf of such person in any format (including paper and electronic formats) and at any location.” 46

44 21 U.S.C. § 350d(c) excludes such vessels engaged in processing as defined in 21 CFR 123.3(k).
45 21 C.F.R. § 1.227(b)(11).
Title I of FSMA provides the framework for “Improving Capacity to Prevent Food safety problems” in a number of significant ways, including expanding FDA’s ability to obtain records. Under prior law, FDA could obtain only limited records and for the product under suspicion. The new law expands on that power allowing the agency to declare products "adulterated" where “Secretary has a reasonable belief” the product will cause serious adverse health consequences as follows:

USE OF OR EXPOSURE TO FOOD OF CONCERN.—If the Secretary believes that there is a reasonable probability that the use of or exposure to an article of food, and any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, will cause serious adverse health consequences or death to humans or animals, each person (excluding farms and restaurants) who manufactures, processes, packs, distributes, receives, holds, or imports such article shall, at the request of an officer or employee duly designated by the Secretary, permit such officer or employee, upon presentation of appropriate credentials and a written notice to such person, at reasonable times and within reasonable limits and in a reasonable manner, to have access to and copy all records relating to such article and to any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, that are needed to assist the Secretary in determining whether there is a reasonable probability that the use of or exposure to the food will cause serious adverse health consequences or death to humans or animals.

Accordingly, having a person in charge and trained on the requirements and limitations when the investigator or inspector arrives is a critical first step. What you say in response to an investigators inquiry can result in problems far more serious than whatever the underlying cause for the investigation of inspection and knowledge, preparation and awareness of the obligations and limits must be a first priority.

With this expanded power to obtain records, it is incumbent on both the manufacturer and the FDA to ensure that proprietary and commercially sensitive information not becomes publically available. Section 350c(c) provides for the protection of such information and requires the FDA “shall take appropriate measures to ensure that there are in effect effective procedures to prevent the unauthorized disclosure of any trade secret or confidential information that is obtained by the Secretary pursuant to this section.”

The Hazard Analysis and Risk-Based Preventive Controls charges the “owner, operator, or agent in charge” of a facility to evaluate the hazards that could affect food manufactured, processed, packed, or held by such facility, identify and implement preventive controls to significantly minimize or prevent the occurrence of such hazards and provide assurances that such food is not adulterated or misbranded, monitor the

---

47 Id. § 101 ((21 U.S.C. § 350c(a))
48 Id. § 350c(a)(2).
49 Id. § 103 (21 U.S.C. § 350g)
50 Id. § 402 (21 USC § 342).
51 Id. § 403(w).
performance of those controls, and maintain records of this monitoring as a matter of routine practice.

There are a number of steps to take to ensure compliance:

1. Hazard analysis
2. Preventive controls
3. Monitoring of effectiveness
4. Corrective actions
5. Verification of Effectiveness
6. Recordkeeping
7. Written plan documentation
8. Reanalyze requirement

“Preventive controls” are defined as “risk-based, reasonably appropriate procedures, practices, and processes that a person knowledgeable about the safe manufacturing, processing, packing, or holding of food would employ to significantly minimize or prevent the hazards identified under the hazard analysis” that are consistent with the current scientific understanding of safe food manufacturing, processing, packing, or holding at the time of the analysis. Those procedures, practices, and processes may include sanitation procedures, hygiene training, environmental monitoring program to verify the effectiveness of pathogen controls, allergen control, a recall plan, Current Good Manufacturing Practices (cGMPs) and supplier verification.

The Act further addresses establishing protections against intentional adulteration and authorizes FDA to issue regulations to establish measures to protect against intentional adulteration and to employ science-based mitigation strategies or measures to prepare and protect the food supply chain at specific vulnerable points. The focus of the Act is food for which there is “a high risk of intentional contamination” that could cause serious adverse health consequences or death.

In addressing the issue of building domestic capacity, Congress required FDA to prepare an initial report “that identifies programs and practices that are intended to Promote the safety and supply chain security of food and to prevent outbreaks of foodborne illness and other food-related hazards that can be addressed through preventive activities.”

Among the tools available under FSMA is authority for requiring unique identification numbers. FSMA seeks to improve the reportable food registry and FDA is given authority to require UPC, SKU, or lot or batch numbers sufficient for the consumer to identify the article of food, and manufacturer contact information for reportable foods. According to the FDA “[T]he core authority for these proposed regulations is to be found in the SFTA. You are not going to find any provisions in the FSMA proper specifically addressing transportation, except one key provision in Section 111(a) which directs FDA to complete the implementation of the 2005 SFTA, essentially

---

52 Id. § 106 21 USC 350i. See also infra III of Protecting Against Intentional Contamination
53 See infra III. 7
54 § 110. 21 U.S.C. § 2204
55 § 211. (21 U.S.C. § 350f)
on the same schedule that the FSMA laid out for the preventive controls rule." The FDA’s authority under FSMA for the provisions in the Sanitary Transportation Rule is set forth in the Sanitary Transportation Practices provision of the FDCA.

Sanitary transportation practices, overseen by FDA DOT DOA EPA, provide for the issuance of regulations for the sanitary transport of food requiring “shippers, carriers by motor vehicle or rail vehicle, receivers, and other persons engaged in the transportation of food to use sanitary transportation practices prescribed by the Secretary to ensure that food is not transported under conditions that may render the food adulterated.” According to the FDA under these proposed regulations, food shippers, receivers, and carriers by motor vehicle and rail would, for the first time -- and I emphasize this is a first -- be required to use sanitary transportation practices as specified in “FDA looks to the key provisions of the 2005 SFTA which requires FDA to promulgate regulations establishing sanitary transportation practices. Once these regulations become effective, food that is transported under conditions not in compliance with the regulations is deemed adulterated. And as we have said, transportation, as defined in the law proper, only encompasses the movement of food in the U.S. by motor vehicle or rail.”

FSMA defines “Responsible Persons” broadly and the term “transportation” means any movement in commerce by motor vehicle or rail vehicle and “bulk vehicle” includes a tank truck, hopper truck, rail tank car, hopper car, cargo tank, portable tank, freight container, or hopper bin, and any other vehicle in which food is shipped in bulk, with the food coming into direct contact with the vehicle.

While the scope of the law is limited, FDA considered whether it should be expanded stating “the law does provide authority to apply its requirements to other persons engaged in the transportation of food, but we have not proposed to do so. We have requested comment on whether persons other than shippers, receivers, and carriers by motor vehicle and rail should be subject to these proposed regulations.”

Subsection (c) authorized FDA to issue regulations concerning sanitation, packing, limitations on vehicles, information that must be disclosed to a “carrier” a manufacturer that arranges for transport or furnishes the vehicle and recordkeeping.

In practice, vendor and services agreements need to address the rollout of the compliance requirements and responsibility to provide accurate records.

The FSMA provides for the preemption of state laws or regulations that make compliance with the federal law impossible or when the state action creates an obstacle to enforcing federal regulations.

---

57 21 USC §350e
58 21 U.S. Code § 350e.
59 See infra at III. 4.
60 Sec. 111. (21 U.S.C. § 350e).
61 M. KASHTOCK, supra, note 117, at 16
62 Id. at 19.
63 § 350
64 M. KASHTOCK, supra note 117, at 19.
Title II of FSMA addresses improving Capacity to Detect and Respond to Food Safety Problems and targets inspection resources for domestic facilities, foreign facilities, and ports of entry. \textsuperscript{65} FSMA sets the “Inspection Frequency” and a heightened frequency for “high risk facilities” which will be inspected once every 3 years. High Risk is based on:

(a) known safety risks of the food manufactured, processed, packed, or held at the facility.

(b) compliance history, including recalls, outbreaks, and violations of food safety standards.

(c) The “rigor and effectiveness” of the facility’s hazard analysis and risk-based preventive controls.

(d) Whether the food manufactured, processed, packed, or held at the facility meets the criteria for priority under section 801(h)(1).

(e) Whether the food or the facility that manufactured, processed, packed, or held such food has received a certification as described in section 801(q) or 806, as appropriate.

(f) Any other criteria deemed necessary and appropriate by the Secretary for purposes of allocating inspection resources.

Non High Risk facilities will be inspected within 7 years of enactment and then every 5 years thereafter.

Foreign Facilities: FDA will inspect 600 foreign facilities and “may rely on inspections conducted by other Federal, State, or local agencies under interagency agreement, contract, memoranda of understanding, or other obligation.

Identification and Inspection at Ports of Entry: The FDA will allocate resources to inspect any article of food imported into the United States based known safety risks of the article of food, based on the following factors:

(1) The known safety risks of the food imported.

(2) The known safety risks of the countries or regions of origin and countries through which such article of food is transported.

(3) The compliance history of the importer, including recalls, outbreaks of foodborne illness, and violations of food safety standards.

(4) The rigor and effectiveness of the activities conducted by the importer of such article of food to satisfy the requirements of the foreign supplier verification program.

(5) Whether the food importer participates in the voluntary qualified importer program.

(6) Whether the food meets the criteria for priority under section 801(h)(1).

(7) Whether the food or the facility that manufactured, processed, packed, or held such food received a certification as described in section 801(q) or 806.

(8) Any other criteria deemed necessary and appropriate by the Secretary for purposes of allocating inspection resources.

\textsuperscript{65} § 201 (21 U.S.C. 350j).
Enhanced Track and Trace.\footnote{Id. § 204} Enhancing tracking and tracing of food and recordkeeping to explore and evaluate methods to rapidly and effectively identify recipients of food to prevent or mitigate a foodborne illness outbreak and to address credible threats of serious adverse health consequences or death to humans or animals as a result of such food being adulterated FDA will establish a product tracing system to receive information that improves the capacity of the FDA to effectively and rapidly track and trace food that is in the United States or offered for import into the United States. Prior to the establishment of such product tracing system, the Secretary shall examine the results of applicable pilot projects and shall ensure that the activities of such system are adequately supported by the results of such pilot projects.

Additional Requirements for High-Risk Facilities: FDA is required to identify high risk foods and specify the heightened recordkeeping requirements.

Enforcement. “Prohibited Acts”\footnote{Id. § 301(e) (21 U.S.C. § 331(e)).} are amended to include “the violation of any recordkeeping requirement of the FDA Food Safety Modernization Act.”\footnote{Id. § 204} Failure to comply with “the recordkeeping requirements under section 204 of the FDA Food Safety Modernization Act (other than the requirements under subsection (f)) [will result in the food being] refused admission.”\footnote{Amending Section 801(a) (21 U.S.C. § 381(a)).}

The standard for “Administrative Detention” of food is changed from “‘credible evidence or information indicating’ to reason to believe” and modifies “‘presents a threat of serious adverse health consequences or death to humans or animals’ to ‘is adulterated or misbranded’”.\footnote{Id. § 207 (21 USC § 334(h)).}

2. FDA’s Operational Strategy for Implementing FSMA


FDA identifies the central “driver” in its change as “the dramatic expansion in the global scale and complexity of the food system.”

Hundreds of thousands of growers and processors worldwide are producing food for the U.S. market, using increasingly diverse and complicated processes, managing complex and extended supply chains, and making millions of decisions every day that affect food safety. The burgeoning scale and complexity of the food system make it impossible for FDA on its own, employing our historic approaches, to provide the elevated assurances of food safety envisioned

\footnote{This is a misnomer since FDA does not have legal authority to enforce food handling regulations once a citizen acquires title and possession of an article of food for personal use.}
by FSMA and needed to maintain a high level of consumer confidence in the safety of the food supply.

FDA views food safety as depending on a top-level management commitment working in a continuous improvement mode, to: (1) implement science- and risk-based preventive measures at all appropriate points across the farm-to-table spectrum, and (2) manage their operations and supply chains in a manner that provides documented assurances that appropriate preventive measures are being implemented as a matter of routine practice every day.

FDA’s operational strategy for implementation of FSMA includes:

**Advancing the Public Health**
- Primary focus on improved public health outcomes, reducing the risk of foodborne illness through preventive practices;
- FDA serving as the central public health leadership catalyst for innovation and repository of the science and expertise needed to understand and prevent food safety problems.
- Oversight of systems that protect food safety, within their operations and through their supply chains. Oversight will include judicial enforcement, “but FDA will focus primarily on assessing whether systems are working effectively to prevent problems and on taking immediate action to protect public health through voluntary corrective action or a range of administrative remedies.”

Working to create an integrated global food safety network that includes federal, state, local, tribal, territorial, and foreign agencies, international organizations, the food industry, growers, academic experts, and consumers.

FDA’s Risk-Based Oversight will include commodity and sector-specific guidance, education and outreach, technical assistance, incentives for compliance, such as less frequent or intense inspection for good performers, reliable third-party audits to verify compliance, public education, transparency, and publicity to promote compliance and prevention; and modernized approaches to inspection and enforcement based on the prevention framework and the enhanced inspection and enforcement tools provided by FSMA.

FDA will significantly expand its inspection and surveillance tools to include a wider range of inspection, sampling, testing, and other data collection activities conducted through its own field force and through collaboration with partner agencies and the food industry.

Enforcement includes judicial actions when necessary to complement non-judicial compliance actions and address matters for which there is no adequate administrative remedy, such as:
- Seizure actions that are needed to back up administrative detentions or for other reasons
- Injunction actions when other measures are inadequate to prevent future non-compliance
- Criminal prosecution in appropriate cases
Guiding Principles for Implementation of FSMA’s Import System: Rather than relying primarily on FDA detecting and stopping food safety problems at the border, under FSMA importers provide assurances that their foreign suppliers have taken proper steps to prevent problems. To complement FDA’s oversight of importers, FSMA directs FDA to strengthen private audit systems, increase its overseas presence, and work in partnership with foreign governments to strengthen and capitalize on their capacity to help ensure the safety of food destined for the United States, all in keeping with the collaboration and leveraging elements of our operational strategy for FSMA implementation. Key features of FDA’s import implementation effort will include:

- Audit foreign supplier verification programs and hold importers accountable for effectively managing their supply chains in accordance with FSMA
- Reconfiguring current import screening and field exam activities to complement oversight of FSMA’s foreign supplier verification requirement
- Implementing the voluntary qualified importer program to expedite entries for good performers and allow more resources to be directed toward high-risk imports
- Audit accrediting bodies and accredited third-party certifiers
- Assessments of foreign government regulatory systems
- Data integration and analysis systems

3. FSMA Registration Guidance:

FDA’s oversight begins with registration requirements which provides for the registration of food facilities. FSMA requires FDA to issue regulations requiring registration for any “facility engaged in manufacturing, processing, packing, or holding food for consumption in the United States.” Both domestic and foreign facilities must be registered by “the owner, operator, or agent in charge” of the food facility. Foreign facilities are also required to include with the registration the name of the United States agent for the facility. FSMA provides for email contact for the “contact person” or US agent for foreign facilities and for “even year” renewal registration. The registration provides an “assurance” to permit inspection of the facility. In December 2012 FDA issued is Registration Guidance (5th Edition).

Suspension of Registration: FSMA grants FDA with significant power to suspend the registration of a facility. If the registration of a facility is suspended under this subsection, no person shall import or export food into the United States from such facility, offer to import or export food into the United States from such facility, or otherwise introduce food from such facility into interstate or intrastate commerce in the United States. A facility registration can be suspended where, in its judgment, there is a “reasonable probability of causing serious adverse health consequences or death” where the facility “(A) created, caused, or was otherwise responsible for such reasonable probability; or “(B)(i) that knew of, or had reason to know of, such

74 Operational Strategy for Implementing FSMA, supra Appendix.
reasonable probability; and “(ii) packed, received, or held such food. In the event the FDA issues an order suspending a registration there are options to vacate the order. FSMA provides for an “opportunity” for an informal hearing in 2 days and places the burden of proof on the facility to show “adequate grounds do not exist to continue the suspension of the registration.” Vacating a suspension order will require a “Corrective Action Plan.”

4. **Sanitary Transportation:**

Before enactment, the Transportation Sanitary Rule\textsuperscript{77} began tepidly stating “[w]e lack sufficient data to quantify the potential benefits of the proposed rule.” Notwithstanding this disclaimer, Congress charged FDA to implement the new law.

III. **Sanitary Transportation of Food: Contracts and the New Rules**

**New terms and shifting responsibilities require attention by all supply chain members**

Pursuant to the Sanitary Food Transportation Act of 2005 and the Food Safety Modernization Act (FSMA), the U.S. Food and Drug Administration (FDA) published the final rule entitled “Sanitary Transportation of Human and Animal Food” (SFT Rule) on April 6, 2016. The SFT Rule is effective June 6, 2016, with compliance beginning April 6, 2017, for small businesses, which have until April 6, 2018, to comply. The SFT Rule establishes the requirements for sanitary transportation practices applying to shippers, loaders, carriers and receivers engaged in the transportation of food to ensure the safety of the food they transport. This article will provide an overview of the scope and coverage of the SFT Rule.

**Key Definitions**

*Shippers* are persons who arrange for the transportation of food in the United States by a carrier or multiple carriers sequentially. Importantly, this definition includes a freight broker. The definition also includes imported food. For example, where a freight broker has arranged the U.S. land-based transportation leg of the foreign shipment, the broker is deemed the “shipper.”

*Carriers* are persons who physically move food by rail or motor vehicle in commerce within the United States, regardless of ownership of the vehicles. The term does not include any person who transports food while operating as a parcel delivery service.

*Loaders* are a new category defined by the SFT Rule and are defined as persons who load food onto a motor or rail vehicle during transportation operations.

*Receivers* are defined as persons who receive food at a point in the United States after transportation, regardless of whether that person is at the food’s ultimate destination. The term does not include consumers.

*Transportation* is defined as any movement of food by motor vehicle or rail vehicle in commerce within the United States.

*Transportation equipment* is the equipment used in food transportation operations, for example, bulk and nonbulk containers, bins, totes, pallets, pumps, fittings, hoses, gaskets, loading systems and unloading systems. Transportation

\textsuperscript{77} [http://www.fda.gov/food/guidanceregulation/fsma/ucm383763.htm](http://www.fda.gov/food/guidanceregulation/fsma/ucm383763.htm)
equipment also includes a railcar not attached to a locomotive or a trailer not attached to a tractor.

“Transportation equipment is the equipment used in food transportation operations...”

Transportation operations are all activities associated with food transportation, including food requiring temperature control, which may affect the sanitary condition of food including cleaning, inspection, maintenance, loading and unloading, and operation of vehicles and transportation equipment. The SFT Rule excludes food in enclosed containers.

Vehicles are motorized land conveyances (i.e., motor vehicles) or those that move on rails (i.e., railcars), which are used in transportation operations.

5. Coverage

With some exceptions, the SFT Rule applies to shippers, loaders, receivers and carriers involved in transportation operations for the transportation of human and animal food by rail or motor vehicle in commerce within the United States, whether or not the food is being offered for or enters interstate commerce. Applicability of the SFT Rule depends on the type of food being transported, the means of transportation, the intended destination of the food and the person(s) involved in the transportation operations. The definition of a “shipper” now includes one that “arranges for the transportation,” which now includes a transportation broker. Further, the SFT Rule applies even where the different transportation operations are conducted under the ownership or operational control of a single corporate/legal entity, that is, food shipments involving shippers, loaders, carriers and/or receivers that are corporate subsidiaries or affiliates of a common corporate parent company/legal entity.

Failure to comply with the SFT Rule requirements that causes the food to be “actually unsafe” renders the food adulterated and is a prohibited act under the Federal Food, Drug, and Cosmetic Act of 1938. An “inconsequential failure” by a carrier to meet the shipper’s temperature-control specifications, or from a broken seal or other evidence of tampering, will not create a “per se presumption of adulteration.” But if a covered person “becomes aware” or there is evidence of possibly “material” deviation from the specifications, a “qualified individual” must determine that the food is not unsafe. Failure to take such action may render the food adulterated.

The SFT Rule does not solve or purport to solve any clearly identified problem but is part of FSMA’s overall “paradigm shift” from response to outbreaks to preventing them in the first place. Prevention is accomplished through a set of seven new rules and accompanying agency guidances that implement FSMA. Currently, it is common for manufacturing and distribution agreements to address regulatory requirements the old-fashioned way by simply stating: “XYZ Corp. will comply with all laws and regulations.” This simple provision served industry well for generations when the focus was on response, but today prevention places the obligation on all participants in the supply chain to ensure upstream and downstream compliance.
6. **Exclusions**

   The SFT Rule contains several exclusions for certain types of food and businesses. Additionally, the SFT Rule does not apply to issues not pertaining to the establishment of sanitary transportation practices, such as cargo security and food quality or appearance. Cargo security will be addressed in the upcoming Intentional Contamination Rule.

7. **Responsibilities under the SFT Rule**

   The SFT Rule sets out equipment, operational, training and records requirements for those who serve as shippers, receivers, loaders and carriers engaged in transportation operations. The same person may act and be responsible in more than one of the above four capacities on a given shipment, and it is now necessary to ensure that the roles are specified in writing and that all participants in the supply chain have written procedures in place to ensure compliance. The responsibilities should be assigned among the parties in a written contract maintained in accordance with record-keeping requirements set forth in the SFT Rule. It is important for those involved in the transportation of food to specify in their contracts precisely who is responsible for ensuring compliance.

   This section will discuss the new equipment, operations, training and records requirements for shippers, carriers, loaders and receivers engaged in transportation operations under the SFT Rule. Special attention is required to the new obligations the SFT Rule imposes on loaders and carriers.

   I. **Vehicles and Transportation Equipment**

      The SFT Rule imposes requirements for the design, maintenance and storage of vehicles and transportation equipment (V&TE) used in transportation operations. Specifically, V&TE must be designed and of such material and workmanship as to be suitable and adequately cleanable for their intended use to prevent the food they transport from becoming unsafe, that is, for it to be unadulterated, during transportation operations. Thus, the “intended use” of the vehicle will determine the material and workmanship necessary for it to be “suitable.” V&TE must then be maintained and stored to prevent them from becoming unsafe. While the SFT Rule does not specify which party is responsible for the V&TE requirements and, by default, responsibility would fall to the shipper, each participant in the supply chain is responsible and must have procedures in place to ensure compliance and must know who is responsible for the V&TE and if those duties are assigned by contract.

   II. **Transportation Operations**

      Operational responsibilities under the SFT Rule include responsibilities for the measures taken during transportation to ensure food safety, such as adequate temperature controls, preventing contamination of ready-to-eat food from touching raw food, protection of food from contamination by nonfood items in the same load or previous load and protection of food from cross-contact, that is, the unintentional incorporation of a food allergen. While the operational responsibilities apply to all shippers, carriers, loaders and receivers engaged in transportation operations, shippers have primary responsibility for determining appropriate V&TE for transportation operations absent a contractual agreement to assign some of these responsibilities to other parties. While the default
responsibility falls to the shipper unless otherwise agreed by contract, but all parties should make sure their procedures and contracts clearly delineate who has responsibility. All parties should also ensure that their procedures address documentation and records necessary to support their compliance and a mechanism for ensuring others in the supply chain are compliant.

a. Shippers

Shippers are required to develop and implement written procedures to ensure that vehicles and equipment used in their transportation operations are in appropriate sanitary condition, that is, the V&TE will prevent the food from becoming adulterated, and, where applicable, to ensure that adequate temperature control is provided during the transportation of food that requires temperature control for safety under the required conditions of shipment. Measures to implement these procedures may be accomplished through a carrier or other party covered by the SFT Rule under a written agreement in compliance with the SFT Rule, but the shipper must furnish also have a procedure to request information from a carrier regarding prior cargo and most recent cleaning in the event that a bulk vehicle is used for food transportation.

“...the SFT Rule applies to shippers, loaders, receivers and carriers involved in transportation operations for the transportation of human and animal food...”

b. Carriers

Where the carrier and shipper have a written agreement that the carrier is responsible, in whole or in part, for sanitary conditions during the transportation operations, the contract must include the following six requirements: written specifications for the other party detailing the required sanitary specifications, including design and cleaning and, where applicable, operating temperature. The shipper should

(1) The V&TE must be appropriate and meet the shipper’s specifications.
(2) Must assign duty of providing the temperature information (if required) and demonstrating temperature compliance to the receiver. Recorded temperatures can be appropriate means to demonstrate compliance. Thus, carriers will need to have written procedures for documenting temperature before during and at delivery.
(3) Precooling must be addressed.
(4) Bulk carriers should have documentation regarding prior cargo.
(5) Procedures must be in place to document most recent cleaning.
(6) Must have written procedures for cleaning, sanitizing and inspecting V&TE.

c. Loaders

Loaders have responsibility for vehicle inspection. Before loading food not completely enclosed by a container, a loader must determine whether the V&TE are in appropriate sanitary condition and, where applicable, verify that each mechanically refrigerated cold storage compartment or container is adequately prepared for the transportation of such food. The loader may make its determination of whether the V&TE are in appropriate sanitary condition using
industry standards. Perhaps recognizing that the SFT Rule is a solution in search of problem, the FDA made a significant concession to industry in allowing industry standards to apply to assess appropriate sanitary conditions for V&TE.

The loader also must have written procedures in place to determine specifications and to determine if the V&TE are in appropriate sanitary condition. The SFT Rule requires a written policy and creation of documentation verifying the specifications and determining the V&TE are adequately prepared.

d. Receivers

Upon receipt of temperature-controlled food, “the receiver must take steps to adequately assess that the food was not subjected to significant temperature abuse, such as determining the food’s temperature, the ambient temperature of the vehicle and its temperature setting, and conducting a sensory inspection, for example, for off-odors.” This will require the receiver to know what it is receiving and to have procedures in place to assess and document the lack of problems. Thus, the receiver needs a policy to request operating temperature specifications provided by the shipper and to ensure that compliance with those specifications has been accomplished.

III. Training

When the carrier agrees in writing to be responsible for sanitary conditions during transport, the carrier must provide training to its personnel on food safety and basic sanitary food transportation practices. Training is to be done at hiring and as needed thereafter. Further, the carrier must establish and maintain records documenting the training, including the date of the training, the type of training and the person(s) trained.

“When the carrier agrees in writing to be responsible for sanitary conditions during transport, the carrier must provide training . . . on food safety and basic sanitary food transportation practices.”

i. Records

The SFT Rule requires shippers, carriers, loaders and receivers engaged in transportation operations to maintain records of all written procedures, agreements and training (required of carriers) necessitated by the SFT Rule. The required retention time for these records depends upon the type of record and when the covered activity occurred but does not exceed 12 months. Specifically, shippers must maintain records demonstrating they provide specifications and operating temperatures to carriers as a regular part of their transportation operations for 12 months after termination of an agreement with a carrier. Shippers must also retain records of written agreements and procedures required by the SFT Rule for “12 months beyond when the agreement and procedures are in use.” For carriers, records of written procedures required by the SFT Rule must be kept for 12 months beyond when the agreements are in use in their transportation operations, and training records must be kept for 12 months after the person stops performing the duties. Any agreement assigning responsibilities under the SFT Rule must be kept for 1 year beyond its termination.

Records required to be maintained under the SFT Rule must be kept as originals, including true copies and electronic copies, and must be available
“promptly” or within 24 hours if kept off-site. However, records of procedures that are in effect at a particular facility must be kept on-site.

**Allocation of Responsibilities; Role of Written Contracts**

Duties assigned by the SFT Rule to a shipper, loader, carrier or receiver may be reassigned by written contract and maintained in accordance with record-keeping requirements of the SFT Rule. Absent any contract reassigning responsibilities created by the SFT Rule, duty assignments appear to apply by default. Responsibility for ensuring that transportation operations are carried out in compliance with the SFT Rule must be assigned to “competent supervisory personnel.” The SFT Rule does not specifically address the issue of personal liability for responsible individuals, but it should be expected that FDA will apply its ordinary rules in this regard that impose liability on individuals in position of responsibility for compliance.

While the SFT Rule excludes certain small entities, FDA commented clearly that those entities, noncovered shippers, loaders and receivers, will remain subject to the current Good Manufacturing Practices provisions in Section 117.93 of the Preventive Controls Rule that goes into effect in September 2016, as well as the rules prohibiting introducing adulterated food into commerce.

FDA intends to further promote the application of sanitary transportation practices through guidance for transportation activities performed by noncovered businesses.

**Waivers**

Shippers, receivers, loaders and carriers subject to the SFT Rule may petition for a waiver of any requirement with respect to any class of persons, vehicles, food or nonfood products. FDA may grant the petition on its own initiative. The petition must describe with particularity the waiver requested, including the persons, vehicles, food or nonfood product(s) to which the waiver would apply and the SFT Rule requirement(s) to which the waiver would apply. The petition must also present information demonstrating that the waiver will not result in the transportation of food under conditions that would be unsafe for human or animal health and will not be contrary to the public interest. Failure to include the required information in a petition is grounds for denial of that petition. The petition may also be denied if it is determined that either the waiver could result in the transportation of food under conditions that would be unsafe for human or animal health or that it could be contrary to the public interest. When a waiver is granted, a notice will be published in the Federal Register setting forth the waiver and the reasons for such waiver. This notice should assist in understanding the SFT Rule’s application after the effective date.

**Conclusion**

Under the SFT Rule, when any covered person or company at any point in the transportation supply chain becomes aware of a possible failure of temperature control or any other condition that may render a food unsanitary or adulterated, that food must not be sold or distributed until a determination of safety is made.

When the shipper has determined that temperature control is necessary, FDA requires the shipper and the carrier to agree upon how that is going to be
done, how it is going to be monitored and how that is going to be recorded. FDA wants this agreement in writing because it will want to review the processes being used.

FDA has revised the final rule to place primary responsibility for determinations about appropriate transportation operations on the shipper. Each participant in the supply chain needs to have procedures in place to ensure it knows who is responsible for the V&TE. The default responsibility falls to the shipper unless otherwise agreed by contract, but all parties should make sure their procedures and contracts clearly delineate who has responsibility and who is to maintain documentation to support compliance.

The time-tested provision that the parties “will comply with all laws and regulations” has served industry well for generations and so too have general indemnification provisions. For those in the food industry today, however, the stakes are higher and the regulatory responsibility is increasing and can be assigned by contract. The stakes are higher for a number of reasons: First, FSMA’s paradigm shift from response to prevention requires a fresh look at policies and procedures and contracts to ensure compliance. Second, the U.S. Centers for Disease Control and Prevention, FDA and state health authorities are becoming more sophisticated in identifying the source of contamination and prosecuting those who fail to comply. Third, terrorists and other bad actors are increasingly looking for ways to exploit our open food supply chain and disrupt commerce to frighten, injure or kill the public. The issue of intentional contamination will be the focus of the final rule to be issued under FSMA. Finally, governmental enforcement, including recent U. S. Department of Justice pronouncements, is increasing the focus on senior management and executives in civil and criminal enforcement actions.

**Exporters and Foreign Transportation:** The rule sets forth sanitary transportation practices for shippers, carriers, and receivers who transport food that will be consumed or distributed in the United States and brings the provisions of the FDA’s cGMP and the Food Code to bear on the transportation industry.

The rule’s compliance and recordkeeping requirements extend to a “person outside of the United States, such as an exporter, who ships food to the United States in an international freight container by oceangoing vessel or in an air freight container, and arranges for the transfer of the intact container in the United States… if that food will be consumed or distributed in the United States.” When the FDA determines that shipper failed to comply with the requirements of this rule, food may be considered adulterated under the FDA and refused admission into the United States.

**Additional Requirements for High-Risk Foods:** FSMA further requires that the FDA designate a class of foods as high-risk for which additional record keeping requirements will be appropriate, including retaining records for a longer time period. On February 4, 2014, the FDA published notice seeking comments and scientific data concerning the Designation of High-Risk Foods for Tracing.
8. **Prior Notice of Imported Food:**

FDA published its final rule 78 adopting its May 5, 2011 interim final rule entitled “Information Required in Prior Notice of Imported Food.” 79 The final rule adopts the requirement of additional information required in a prior notice of imported food, specifically that a person submitting prior notice of imported food, including food for animals, must report the name of any country to which the article has been refused entry.

Often cited but never definitively proven CDC conclusion that “[e]ach year about 48 million people (1 in 6 Americans) get sick; 128,000 are hospitalized; and 3,000 die from food borne diseases, according to 2011 data from the Centers for Disease Control and Prevention. 80 This is a significant public health burden that is largely preventable.” This CDC supports virtually all recent food law and regulatory efforts. Despite to practically incomprehensible complexity of the US food supply it nothing short of a miracle that even the often cited CDC data is so low. Nonetheless, the FDA Food Safety Modernization Act (FSMA) was signed into law by President Obama on January 4, 2011, granting FDA expansive new power “to focus more on preventing food safety problems rather than relying primarily on reacting to problems after they occur.” The real muscle in the new law is that it grants FDA with enforcement power for compliance and enforcement of “risk-based food safety standards.”

Prior Notice Requirement 81 requires additional information to be provided in a notice of imported food submitted to FDA. This change requires information identifying “any country to which the [food] article has been refused entry.” As this final rule imposes no new regulatory requirements, a delayed effective date is unnecessary.

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) 82 was signed into law on June 12, 2002, and among other things, it created the requirement that FDA receive certain information about imported foods before arrival in the United States. 83 It also provided that an article of food imported or offered for import is subject to refusal of admission into the United States if adequate prior notice has not been provided to FDA. The FDA was directed to issue implementing regulations requiring prior notice of imported food.

In calendar year 2011, 10,537,372 prior notices were submitted, 9,054,230 of which were submitted through the CBP system with the remaining 1,483,142 being submitted through the FDA system.

FSMA defines “importer” as (A) the US owner or consignee of the article of food at the time of entry of such article into the US; or (B) if there is no US owner or consignee, the US agent or representative of the foreign owner or consignee of the article of food. 84 The foreign supplier verification program provides that each importer shall perform risk-based foreign supplier verification activities for the purpose of

---

79 76 FR 25542; May 5, 2011
81 § 304 of (21 U.S.C. § 381(m)).
83 Adding Section 801(m).
84 Title III, Sec. 301. 21 USC § 384a.
verifying that the food imported by the importer or agent of an importer is— (A) produced in compliance with the requirements of section 301 or section 303, as appropriate; and (B) is not adulterated under section 40285 or misbranded under section 403(w).86

New regulations are required to ensure foreign suppliers comply with processes and procedures, including reasonably appropriate risk-based preventive controls, to ensure the same level of public health protection consistent with those under section 41887 or section 41988 and such other requirements as necessary to verify that food imported into the United States is as safe as food produced and sold within the United States.

The foreign supplier verification program may include monitoring records for shipments, lot-by-lot certification of compliance, annual on-site inspections, checking the hazard analysis and risk-based preventive control plan of the foreign supplier, and periodically testing and sampling shipments.89

“Prohibited Act” include importation or offering for importation of a food if the importer90 does not have in place a foreign supplier verification program in compliance with such section 805."91

FDA also has authority to require certifications regarding imported high risk foods, or foods from what is termed “high risk countries. “Certification or assurances may be provided in the form of shipment-specific certificates, a listing of certified facilities that manufacture, process, pack, or hold such food, or in such other form as the Secretary may specify.92

FDA is granted extensive oversight power and does not limit the authority of the FDA to conduct inspections of imported food or to take such other steps as the FDA deems appropriate to determine the admissibility of imported food. FSMA contemplates audits of foreign suppliers and defines both accredited third-party auditors and consultative audits. The Act does permit auditors to serve both roles but does not allow them to be owned or controlled by an eligible entity.93

Final Rule: Prior Notice of Imported Food Shipments: In its Final Rule Published for Food Imports: FDA focuses on Food Safety for its “Prior Notice” Rule and takes a common sense approach for Imported Foods requiring notice of another country’s refusal to allow entry to be reported if the refusal relates to food safety concerns. In calendar year 2011 more than 10.5 million prior notices were submitted, 9 million were submitted through the Customs and Border Patrol system with the remaining 1.5 million submitted through the FDA system. Even though FDA estimates that it’s final rule entitled “Information Required in Prior Notice of Imported Food”94 only adds about 1 minute to each import entry it reviews, FDA was unable to quantify or otherwise demonstrate benefits from the rule. FDA did conclude that “potential benefits can result

85 21 USC § 342
86 21 USC § 343(w)
87 21 USC § 350g
88 21 USC § 350h
89 Under 21 USC § 384a(c)(4).
90 As defined in Section 805.
from FDA’s ability to use the additional information to better identify imported food shipments that may pose a safety or security risk to U.S. consumers.” The final rule was published on May 30, 2013.

Citing CDC data, FDA concludes there is a “largely preventable” public health burden stating “[e]ach year about 48 million people (1 in 6 Americans) get sick; 128,000 are hospitalized; and 3,000 die from food borne diseases.” Despite these generalized estimates concerning all aspects of the food supply, including consumer handling, no data is provided concerning imports.

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 requires that FDA obtain information about imported foods before arrival in the United States. It also provided that an article of food imported or offered for import is subject to refusal of admission into the United States unless adequate prior notice has been provided to FDA. Section 304 of the Food Safety Modernization Act (FSMA), signed into law by President Obama on January 4, 2011, further amended the FDCA requiring prior notice identifying “any country to which the [food] article has been refused entry.”

In its Notice FDA clarified that the phrase “refused entry” only includes refusals related to “food safety.” FDA stated that it “considers ‘refused entry’ to mean a refusal of entry or admission of human or animal food based on food safety reasons, such as intentional or unintentional contamination of an article of food.” While the Act and the Final Rule do not specify refusals based on food safety concerns, FDA “agreed” that only refusals for food safety reasons should be reported.

FDA further clarified that the phrase “article of food” refers only to the specific food item for which the Prior Notice is being submitted. FDA stated that is will not consider the phrase an “‘article of food’ to refer to food from the same batch or lot that is not being imported or offered for import into the United States and for which Prior Notice will not be submitted, or to refer to food of a similar type that was previously refused entry by a country.” FDA provides an illustration where “Country A refuses entry, this fact is not submitted as part of prior notice for the portion that had been shipped to the United States.”

In determining whether there has been a violation of the prior notice regulations, FDA will look at the “totality of the circumstances” and will follow its compliance policy guide entitled “Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.” Among the considerations in enforcing a violation, FDA will “take into account the severity of the violations, whether they are flagrant, and whether the person has had previous violations, particularly if they were similar types of violations.”

The prior notice regulations describe the information that must be submitted in a prior notice. The 2011 Interim Rule required that the prior notice include the identity of

---

96 FDCA, § 801(m).
any country to which an article of food has been refused entry and the final rule adopts those changes. FDA received 15 comments in response to the Interim Rule and did not make any changes to the regulatory language.

One comment requested that FDA clarify the scope of the term “refused entry” to include only refusals related to “food safety.” In addressing this concern FDA stated that it “considers ‘refused entry’ to mean a refusal of entry or admission of human or animal food based on food safety reasons, such as intentional or unintentional contamination of an article of food. FDA agrees that only refusals for food safety reasons should be reported.”

FDA further clarified that “the term ‘article of food’ to refer only to the specific food item for which prior notice is being submitted. As such, FDA does not consider ‘article of food’ to refer to food from the same batch or lot that is not being imported or offered for import into the United States and for which prior notice will not be submitted, or to refer to food of a similar type that was previously refused entry by a country.” FDA provides an illustration that where “Country A refuses entry, this fact is not submitted as part of prior notice for the portion that had been shipped to the United States.”

In determining whether there has been a violation of the prior notice regulations, FDA will look at the “totality of the circumstances” and will follow its compliance policy guide entitled “Sec. 110.310 Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.” Among the considerations in enforcing a violations FDA will “take into account the severity of the violations, whether they are flagrant, and whether the person has had previous violations, particularly if they were similar types of violations.”

According to the FDA, the new rule adds “58 seconds (on average) per entry” unless of course you have a violation. The 2011 analysis did not quantify potential benefits from the new rule but FDA believes “potential benefits can result from FDA’s ability to use the additional information to better identify imported food shipments that may pose a safety or security risk to U.S. consumers.”

9. Foreign Supplier Verification Programs (FSVPs)

On November 27, 2015 FDA published its final rule on Foreign Supplier Verification Programs (FSVPs) for Importers of Food for Humans and Animals, FDA’s rule. In fiscal year 2011, nearly 10.5 million product lines of food (representing unique food products) were imported into the United States and approximately 15 percent of all food consumed in the US is imported, including approximately 50 percent of fresh fruit and 20 percent of fresh vegetables. There are more foreign firms registered with FDA than domestic firms (even though fewer kinds of foreign firms are required to register). In addition, FDA is able to physically examine only a small fraction of the food that is offered for import into this country. At the time FSMA was enacted there were more than 250,000 foreign food facilities registered to export food to the United States (in contrast to approximately 167,000 domestic food facilities) even completing 19,200 foreign

---

inspections in 2016 would translate to a statutory inspection rate of less than once every 10 years.  

FSMA takes the concept of “harmonization” into account in section 404 providing “that the provisions of the act and any amendments to the FDCA may not be construed in a way that is inconsistent with the agreement establishing the World Trade Organization (WTO) or any other treaty or international agreement to which the United States is a party.” The FSVP regulations recognize Codex Alimentarius in establishing international food safety standards, guidelines, and recommendations. Codex was formed in 1963 by the Food and Agriculture Organization and the World Health Organization to develop food standards, guidelines, and related texts such as codes of practice, and is recognized as the international standards organization for food safety. In describing the general characteristics of food import control systems, the Guidelines for Food Import Control Systems developed by the Codex Committee on Food Import and Export Inspection and Certification Systems recognize a number of related concepts, including countries can set their own appropriate levels of protection based on risk that are applied equally to imported and domestic food. The Guidelines recognize that there is a potential need for different approaches to compliance monitoring of domestic and imported food to ensure consistent levels of protection and that there is utility in conducting audits, in addition to assessing importer controls to ensure that imported foods are safe, including importers’ use of supplier verification systems.

Under FSMA, FDA is required to establish rules requiring importers to ensure that food imported into the US is produced in compliance with processes and procedures, including reasonably appropriate risk-based preventive controls, that provide the same level of public health protection as those required under the hazard analysis and risk-based preventive controls and standards for produce safety sections of the FDCA. The Foreign Supplier Verification Program rule requires importers to create and follow programs to help ensure the safety of imported food. The regulations vary based on the type of food product (such as processed foods, produce, and dietary supplements) and category of importer.

The hazard assessment under the rule assumes well accepted and understood standards throughout the international food safety community (i.e. hazard analysis and critical control point (HACCP) and preventive controls programs) and proposes a flexible, risk-based approach to foreign supplier verification. The regulations focus on foreseeable food safety risks identified through a hazard assessment process, but there are exemptions.

---

102 See id. at 26.
103 Notice of FSMA was provided to the WTO on February 14, 2011 (G/SPS/N/USA/2156).
104 Id. at 27.
105 FDA is in a leadership position with the Codex Commission and its objective is to develop science-based international food safety, labeling, and other standards to provide consumer protection, labeling information, and prevention of economic fraud and deception that is consistent with corresponding U.S. regulations and laws.
107 FSMA Section 301, Sec. 805 of the FDCA (21 U.S.C. 384a).
108 The rule provides exemptions for certain foods that are already subject to verification under FDA’s HACCP regulations. Exemptions also exist for food for personal consumption, alcoholic beverages, food that is transshipped, food that is imported for re-export, and food for research or evaluation.
The rule further recognizes that FSMA further requires persons who import food into the United States to perform risk-based foreign supplier verification activities for the purpose of verifying the food is produced in compliance with hazard analysis and risk-based preventive controls or standards for the safe production and harvesting of certain fruits and vegetables. FSMA further requires verifying that the food is not adulterated or misbranded. Section 805(c) of the FDCA directs FDA to issue regulations on the content of FSVPs.

The FSVP regulations require importers to:

- Review the compliance status of the food and the foreign supplier, including issuance of FDA warning letters, import alerts, or certification requirements.
- Conduct their own analysis or review and evaluate the hazard analysis conducted by the food’s foreign supplier.
- Establish written verification procedures. Verify that reasonably likely hazards are adequately controlled and to document such control or conduct an on-site audit.
- Review complaints, investigate adulteration or misbranding (with respect to allergen labeling), and take corrective actions in the case of supplier noncompliance.
- Reassess the effectiveness of its FSVP when it becomes aware of a new hazard or every 3 years.
- Ensure that the importer’s name and Dun and Bradstreet Data Universal Numbering System (DUNS) number is provided for each line of entry of food.
- Maintain records of their FSVP activities.

Modified Provisions for Certain Types of Importers

Dietary supplement compliance supplier verification activities would focus on verifying that the supplier is in compliance with the dietary supplement CGMP regulations.

Very small food importers and importers of food from very small foreign suppliers (i.e., entities with annual food sales of no more than $500,000) the importer would not be required to conduct hazard analyses and would be able to verify their foreign suppliers by obtaining written assurance that describes the processes and procedures the suppliers use to ensure the safety of the food.

For imports from countries that are comparable or equivalent to the US, currently including New Zealand, Australia and Canada. For suppliers in these countries, the rule is relaxed, provided the supplier is in compliance in that country. FDA does emphasize that “importers have always had the responsibility to offer for entry into the United States products that are not adulterated.”

In adopting the regulations, the FDA recognized that it did not propose specific regulations on supplier verification in the Preventive Controls Proposed Rule, but requested comment on when and how approval and verification of suppliers of raw materials and ingredients are an appropriate part of preventive controls.

---

109 21 U.S.C. §§ 350g and 350h.
112 Section 301 of FSMA adding Section 805 to the FDCA (21 U.S.C. 384a)
113 60 F.R. 65096 at 65153.
114 78 F.R. 3646 at 3665 to 3667.
Definitions: The Rule defines a number of terms, including:

Audit: Onsite auditing is required of foreign suppliers in certain circumstances as a mechanism for supplier verification. Section § 1.500 define audit as the systematic, independent, and documented examination (through observation, investigation, discussions with employees of the audited entity, records review, and, as appropriate, sampling and laboratory analysis) to assess an audited entity’s food safety processes and procedures.115

Food: has the meaning given in the FDCA.116 FDA concluded that pesticides were not intended to be considered “food” for purposes of section 805 of the FDCA and the FSVP regulations and had requested comment on this exclusion.

Foreign Supplier: is an establishment that manufactures/processes the food, raises the animal, or harvests the food that is exported to the United States without further manufacturing/processing by another establishment, except for further manufacturing/processing that consists solely of the addition of labeling or any similar activity of a de minimis nature. The definition of foreign supplier does not include firms that only pack or hold food even if they are required to register with FDA. FDA concluded that “Congress intended the importer to verify a single foreign supplier for a particular shipment of a food and, when several entities are required to register as foreign facilities with respect to that food, excluding a subsequent (and registered) packer or holder would be consistent with this intent.”

Hazard and Hazard Reasonably Likely to Occur: A hazard is any biological, chemical, physical, or radiological agent that is reasonably likely to cause illness or injury in the absence of its control.

Importer: is (A) the US owner or consignee of the article of food at the time of entry of such article into the US; or (B) the US agent or representative of a foreign owner or consignee. Under the definition, the importer of an article of food might be the importer of record of the article (i.e., the individual or firm responsible for making entry and payment of import duties). Where food has not been sold or consigned to a person in the US at the time of entry, the foreign owner or consignee would need to have a U.S. agent or representative who would be responsible for meeting the FSVP requirements.

Qualified Individual: Is a person with the “necessary education, training, and experience” to perform the activities needed to meet the requirements of this the law. The person may be, but is not required to be, an employee of the importer. Among the activities the Qualified Individual must be able to perform are a food hazard analysis and verification of foreign supplier processes and procedures to ensure that hazards are adequately controlled. A qualified individual must have successfully completed training in the development and application of risk-based preventive controls at least equivalent to that received under a standardized curriculum recognized as adequate by FDA or be otherwise qualified through job experience to develop and implement a food safety system. The qualified individual includes a third-party or an employee of a foreign government.

Raw Agricultural Commodity (RAC): Includes fruits or vegetables as defined in section 201(r) of the FDCA.117

---

115 21 CFR §1.500.
116 Section 201(f) (21 U.S.C. 321(f)
Exemptions (§ 1.501)

1. Exemption for Food from Juice and Seafood HACCP Facilities Section 805(e) states that the foreign supplier verification requirements “shall not apply to a facility if the owner, operator, or agent in charge of such facility is required to comply with, and is in compliance with,” the HACCP regulations for seafood or juice. FDA concluded that it was Congress’s intent that section 805(e) apply to food being imported from foreign suppliers that are facilities subject to and in compliance with FDA requirements for juice or seafood HACCP. The importer would still be required to verify a foreign supplier’s compliance with the juice or seafood HACCP provisions, but would do so under the regulations that are specific to those foods.

2. Food Imported for Research or Evaluation or for Personal Consumption: FDA excludes small quantities for research and evaluation purposes or for personal consumption, provided that such foods are not intended for retail sale and are not sold or distributed to the public. Food imported for research must be labeled as such.

3. Alcoholic Beverages.

Scope of FSVP (§ 1.502): Importers would be required to develop procedures for the operation of their FSVPs, such as procedures for the following:

- Review of the compliance status of foods and foreign suppliers
- Analysis of hazards reasonably likely to occur with foods
- Determination and performance of appropriate foreign supplier verification activities for foods
- Review of complaints, investigation of adulteration or misbranding, and taking of corrective actions
- Reassessment of the FSVP
- Ensuring that required information is submitted at entry
- Maintenance of records

To help ensure that importers are obtaining food only from appropriate foreign suppliers, § 1.506(a) requires each importer to follow written procedures to ensure that they import foods only from foreign suppliers that are approved based on the required evaluation conducted under §1.505.119

Severe Adverse Consequences or Death to Humans or Animals (SAHCODHA): In certain situations, conducting onsite auditing alone may not be sufficient to ensure that the hazard is adequately controlled. When onsite auditing alone cannot provide adequate assurances that such a hazard is adequately controlled, the importer must conduct one or more additional verification activities to provide such assurances.120 Foreign supplier verification activities that importers may choose to conduct, if they are appropriate for the hazard, are as follows:

- Periodic onsite auditing.
- Periodic or lot-by-lot sampling and testing of the food.
- Periodic review of the foreign supplier’s food safety records.

---

118 21 CFR §1.510
119 21 CFR §1.506(a)
120 Id. at 78
• Any other procedure established to be appropriate.

In lieu of an audit FDA provides that importers are
required to use the risk evaluation they conduct to determine which verification
activity or activities are appropriate and the frequency with which those activities
must be conducted. However, with respect to foods with a SAHCODHA hazard
that would be controlled by the foreign supplier, the importer would be required to
conduct or obtain documentation of an onsite audit of the foreign supplier before
initially importing the food and at least annually thereafter, unless the importer
documented a determination, based on the risk evaluation, that instead of initial
and annual onsite supplier auditing, some other supplier verification activities
and/or less frequent onsite auditing would be appropriate to provide adequate
assurances of safety. 121

Records: § 1.510(b) requires importers to maintain records required under the
FSVP regulations in English and make these records available promptly to an
authorized FDA representative, upon request, for inspection and copying. Section
805(d) of the FDCA states that records related to a foreign supplier verification program
“shall be made available promptly to a duly authorized representative [of FDA] upon
request.” The rule states that an importer must maintain records at its place of business
or at a reasonably accessible location; records would be considered to be at a
reasonably accessible location if they could be immediately retrieved from another
location by computer or other electronic means. 122 If records are requested in writing by
FDA, an importer must send records to the Agency electronically rather than making the
records available for Agency review at the importer’s place of business 123 and importers
are required to maintain records for a period of at least 2 years. 124

10. Protecting Against Intentional Contamination

On May 27, 2016 FDA issued its final rule entitled “Mitigation Strategies to
Protect Food against Intentional Adulteration.” 125 The rule requires facilities that are
required to register (both domestic and foreign) “to identify and implement focused
mitigation strategies to significantly minimize or prevent significant vulnerabilities
identified at actionable process steps in a food operation.” FDA will begin enforcing the
rule in July 2018. 126

The rule is designed for acts of intentional contamination and provides
exemptions for qualified facilities. FSMA directed FDA to issue regulations facilities that
manufacture, process, pack or hold food and requires facilities to consider hazards that
may be intentionally introduced, including by acts of terrorism 127, food for which there is
a high risk of intentional contamination and for which such intentional contamination
could cause serious adverse health consequences or death to humans or animals, 128
and setting forth science-based minimum standards for the safe production and

121 See final rule comment 177.
122 § 1.510(b)
123 1.510(b)
124 § 1.510(d)
125 See FDA Docket No. FDA-2013-N-1425
126 § 419 of the FDCA (21 U.S.C. § 350d,g,h).
127 § 103.
128 § 106.
harvesting of produce, and requires that the rulemaking consider hazards that may be intentionally introduced, including by acts of terrorism.\textsuperscript{129}

Intelligence gathered since the attacks on the United States on September 11, 2001, indicated that terrorist organizations have discussed contamination of the food supply as a means to harm U.S. citizens and disrupt the global economy and much of the defensive apparatus in the federal government has mobilized to anticipate the threat. FDA, USDA, DHS, State and local governments and the food industry collaborated to conduct vulnerability assessments of a variety of products and processes within the food and agriculture sector.\textsuperscript{130}

For the student or even the casual observer of the acronym riddled FDA might believe FDA’s acronym is itself an acronym for Finding Descriptive Acronyms. In the food area, federal acronym creation professional are working overtime. In additional to a number of guidance documents to assist the food industry, FDA made the following resources available:

- The “ALERT” program,
- The “Employees FIRST” training tool,
- The “CARVER+Shock Vulnerability Assessment” software tool,
- The “Mitigations Strategies Database,”
- The “Food Defense Plan Builder” software tool,
- The Food Related Emergency Exercise Bundle, and
- The “Food Defense 101” training courses.

FDA and USDA’s Food Safety and Inspection Service (FSIS) adapted a military targeting tool known as CARVER to assess vulnerabilities of the food and agriculture sector. CARVER is an acronym for the following six attributes used to evaluate the attractiveness of a target for attack:

- Criticality-- public health and economic impact of an attack;
- Accessibility--ability to physically access and egress from target;
- Recuperability--ability to recover from an attack;
- Vulnerability--ease of accomplishing an attack;
- Effect--amount of direct loss from an attack as measured by loss in production; and
- Recognizability--ease of identifying a target.

A seventh attribute, “Shock”, was added to the original six attributes to assess the combined health, economic, and psychological impacts of an attack on the food industry.\textsuperscript{131}

The ALERT program was instituted in 2006 and is an acronym for five elements for use by the food industry:

- A--ASSURE that the supplies and ingredients you use are from safe and secure sources?
- L--LOOK after the security of the products and ingredients in your facility?

\textsuperscript{129} § 105.
\textsuperscript{130} Id. at 18.
\textsuperscript{131} Id. at 19.
• E--EMPLOYEES and people coming in and out of your facility?
• R--REPORTS about the security of your products while under your control?
• T--THREAT or issue at your facility, including suspicious behavior

The FIRST tool was instituted in 2008 is a food defense awareness training program for front-line food industry workers about the risk of intentional adulteration. This tool identifies the following five key elements:

• F--Follow a food defense plan and procedures;
• I--Inspect your work area and surrounding areas;
• R--Recognize anything out of the ordinary;
• S--Secure all ingredients, supplies, and finished product; and
• T--Tell management if you notice anything unusual or suspicious.

In 2008, WHO issued its “Terrorist Threats to Food--Guidelines for Establishing and Strengthening Prevention and Response Systems”132 to provide policy guidance to its Member States for integrating consideration of deliberate acts of sabotage of food into existing prevention and response programs.

FSMA requires that the owner, operator, or agent in charge of a facility shall identify and evaluate hazards that may be intentionally introduced, including by acts of terrorism.133 In addition, the owner, operator, or agent in charge of a facility must identify and implement preventive controls to provide assurances that any hazards that relate to intentional adulteration will be significantly minimized or prevented and addressed.134 FDA states that the provisions in the rule are applicable to activities that are intrastate in character, not merely activities interstate and facilities are required to register with the FDA even where the food remains intrastate and does not enter interstate commerce.135

Scope of Intentional Adulteration Covered by this Rule

Acts of intentional adulteration may take several forms, including acts of terrorism, acts of disgruntled employees, consumers, or competitors, or economically motivated adulteration. Vulnerability assessments performed by FDA, USDA, DHS, FBI and state and local law enforcement view an intentional attack as a low probability with a potentially exceedingly high consequence. FDA identifies four (4) Key Activity Types: bulk liquid receiving and loading; liquid storage and handling; secondary ingredient handling; and mixing and similar activities.136 FDA is looking to industry to establish mitigation strategies that may include sealing or locking outbound conveyances of bulk liquid, or requiring that inbound conveyances be sealed or locked as a condition of receipt of the bulk liquid.137

Definitions:

Actionable Process Step is a “point, step, or procedure in a food process at which food defense measures can be applied and are essential to prevent or eliminate a significant vulnerability or reduce.”138

---

133 § 418(b)(2).
134 § 418(c)(2).
135 § 1.225(b)
136 Id. at 31.
137 Id. at 39.
138 Id. at 54.
Contaminant is defined as “any biological, chemical, physical or radiological agent that may be intentionally added to food and that may cause illness, injury or death.”\textsuperscript{139}

Facility is defined to mean a domestic facility or a foreign facility that is required to register under the FDCA.\textsuperscript{140}

Focused Mitigation Strategies is analogous to the term “preventive controls” in a HACCP-type framework for food safety.\textsuperscript{141}

Food Defense refers to the sum of actions and activities (including identification of actionable process steps; implementation of focused mitigation strategies; monitoring, corrective actions, verification, and training activities) taken to protect food from intentional acts of adulteration related to terrorism.\textsuperscript{142}

Manufacturing/Processing means “making food from one or more ingredients, or synthesizing, preparing, treating, modifying or manipulating food, including food crops or ingredients.”\textsuperscript{143}

Mixed-Type Facility is “an establishment that engages in both activities that are exempt from registration under section 415 of the FDCA and activities that require the establishment to be registered.”\textsuperscript{144}

Monitor means to “conduct a planned sequence of observations or measurements to assess whether focused mitigation strategies are consistently applied and to produce an accurate record for use in verification.”\textsuperscript{145}

Qualified End-User with respect to a food is the consumer of the food (where the term consumer does not include a business); or a restaurant or retail food establishment\textsuperscript{146} that is located in the same State and within 275 miles, and is purchasing the food for sale directly to consumers at such restaurant or retail food establishment.\textsuperscript{147}

Qualified Facility is a facility that is either a “very small business” or a facility to which both of the following apply: (i) during the 3-year period preceding the applicable calendar year, the average annual monetary value of the food sold directly to qualified end-users exceeded the average annual monetary value to all other purchasers; and (ii) the average annual monetary value of all food sold during the 3-year period preceding the applicable calendar year was less than $500,000.\textsuperscript{148}

Significant Vulnerability is analogous to the term “hazard that is reasonably likely to occur” in a HACCP-type framework for food safety. A “significant vulnerability” is defined as

a vulnerability that, if exploited, could reasonably be expected to cause wide scale public health harm. A significant vulnerability is identified by a vulnerability assessment conducted by a qualified individual, that includes

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 55.
\textsuperscript{141} Id. at 56.
\textsuperscript{142} Id. at 57.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 58.
\textsuperscript{145} Id.
\textsuperscript{146} As defined at 21 CFR § 1.227.
\textsuperscript{147} Id. at 59.
\textsuperscript{148} Id.
consideration of the following: (1) Potential public health impact (e.g., severity and scale) if a contaminant were added, (2) degree of physical access to the product, and (3) ability of an attacker to successfully contaminate the product. The assessment must consider the possibility of an inside attacker.149

Significantly Minimize means to reduce to an acceptable level, including to eliminate and is used in FSMA consistent with the outcome of a “control measure” as described in the HACCP regulations.150

Small Business means a business employing fewer than 500 persons.151

Very Small Business means a business that has less than $10,000,000 in total annual sales of food per year, during the 3-year period preceding the applicable calendar year in sales of human food plus the market value of human food manufactured, processed, packed, or held without sale.152

Vulnerability is used in the term “vulnerability assessment”153 and is defined as the susceptibility of a point, step, or procedure in a facility’s food process to intentional adulteration and may best be described in the food defense context as analogous to the term “hazard” in a HACCP-type framework for food safety.154

Among the exemptions from the requirements is the holding of food, except the holding of food in liquid storage tanks.155 Also exempt will be the packing, re-packing, labeling, or re-labeling of food where the container that directly contacts the food remains intact156, produce farms and alcohol.

Food Defense Plan:157 Section § 121.126(a)--Requirement for a Food Defense Plan requires that the owner, operator, or agent in charge of a facility prepare, or have prepared, and implement a written food defense plan. The contents of a Food Defense Plan requires written identification of actionable process steps158, focused mitigation strategies159, procedures for monitoring160, other procedures in § 121.145(a)(1),and verification procedures.161

Identification of Actionable Process Steps

a. Vulnerability assessments and FDA-identified key activity types.
b. Written identification of actionable process162

---

149 21 CFR §121.3
150 Id. 
151 Id. 
152 Id. 
153 In section 420 of the FDCA. 
154 Id. 
155 21 CFR §121.5(b). 
156 21 CFR §121.5(c). 
158 § 121.130. 
159 § 121.135(b). 
160 § 121.140(a). 
161 § 121.150(e). 
162 21 CFR §121.130.
c. Identification of four (4) actionable process steps using FDA identified key activity types\textsuperscript{163} i.e. bulk liquid receiving and loading, liquid storage and handling, secondary ingredient handling, and mixing and similar activities.

d. Conducting a vulnerability assessment.\textsuperscript{164} Elements of a Facility-Specific Vulnerability Assessment:

- Planning --collect and evaluate appropriate background information on biological, chemical, physical, and radiological agents of concern, such as those found in the CDC’s Select Agents and Toxins List\textsuperscript{165};
- Assemble a vulnerability assessment team-- security, food safety/quality assurance or control, human resources, operations, maintenance, and other individuals deemed necessary to facilitate the formation of a vulnerability assessment;
- Develop a process flow diagram
- Identify significant vulnerabilities—prioritize vulnerabilities and identify significant vulnerabilities. Consider (1) The potential public health impact if a contaminant were added; (2) whether downstream processing steps would eliminate or remove agents of concern; (3) the degree of physical access to product; (4) the ability of an aggressor to successfully contaminate the product; and (5) the volume of product impacted. This evaluation should also include the rationale or justification for which process steps were and were not identified as significant vulnerabilities; and
- Identify actionable process steps for identified significant vulnerabilities

Focused Mitigation Strategies Sections 418 and 420 of the FDCA require the owner, operator, or agent in charge of a facility to identify and implement preventive controls to provide assurances that hazards identified in the hazard analysis conducted under section 418(b)(2) of the FDCA will be significantly minimized or prevented and addressed. There are two types of mitigation strategies, broad mitigation strategies are general facility-level measures whereas “focused mitigation strategies” are specific to an actionable process step in a food operation where a significant vulnerability is identified. FDA gives a number of specific examples of focused mitigation strategies in the rule.\textsuperscript{166}

§ 121.135(a) requires that the owner, operator, or agent in charge of a facility identify and implement focused mitigation strategies at each actionable process step to provide assurances that the significant vulnerability at each step will be significantly minimized or prevented. The rule requires the focused mitigation strategies be written.\textsuperscript{167}

Training: Personnel and supervisors assigned to actionable process steps must receive “appropriate training” in food defense awareness and their respective responsibilities in implementing focused mitigation strategies.\textsuperscript{168}

Records: § 121.305(a) requires that the records be kept as original records, true copies (such as photocopies, pictures, scanned copies, microfilm, microfiche, or other

\textsuperscript{163} 21 CFR § 121.130(a).
\textsuperscript{164} 21 CFR § 121.130(b).
\textsuperscript{165} \url{http://www.selectagents.gov/resources/List_of_Select_Agents_and_Toxins_2013-09-10.pdf}
\textsuperscript{166} See pages 103-117.
\textsuperscript{167} 21 CFR § 121.135(b).
\textsuperscript{168} § 121.160.
accurate reproductions of the original records), or electronic records. Section 121.305(b) require that records contain the actual values and observations obtained during monitoring. Records must be accurate, indelible, legible\textsuperscript{169}, created concurrently with performance of the activity documented\textsuperscript{170} and as detailed as necessary to provide a history of work performed.\textsuperscript{171}

The failure to comply with the foregoing requirements will constitute a prohibited act under 21 USC 331.

11. Third-Party Auditors

Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications\textsuperscript{172}

On November 27, 2015 FDA issued its final rule on Third-Party Auditors. Congress directed FDA\textsuperscript{173} to establish a new program for accreditation of third-party auditors conducting food safety audits and issuing food and facility certifications to eligible foreign entities (including registered foreign food facilities) that meet FDA requirements.

This rule ensures competent and independent third-party auditors/certification bodies conduct foreign food safety audits. These certifications will include food certifications required by FDA as a condition of granting admission to a food determined to pose a safety risk. The Rule adds a number of new terms:

Accreditation means a determination by a recognized accreditation body that a third-party auditor/certification body meets the applicable requirements including the model accreditation standards.

Accreditation body means an authority that performs accreditation of third-party auditors/certification bodies.

Accredited auditor/certification body means a third-party auditor/certification body that a recognized accreditation body has determined meets the applicable requirements to issue food or facility certifications to eligible entities.

Audit means: (1) by FDA to assess the accreditation body’s authority, qualifications, and resources; its procedures for quality assurance, conflicts of interest, and records; its performance in accreditation activities; and its capability to meet the applicable requirements; (2) by a recognized accreditation body to assess the third-party auditor’s/certification body’s authority, qualifications, and resources; its procedures for quality assurance, conflicts of interest, and records; its performance in auditing and certification activities; and its capability to meet the applicable requirements; and (3) by an accredited auditor/certification body to assess the entity, its facility, system(s), and food using audit criteria for consultative or regulatory audits, including compliance with any applicable requirements for preventative controls, sanitation, monitoring, verification, corrective actions, and recalls, and, for consultative audits, also includes an assessment of compliance with applicable industry standards and practices.

\textsuperscript{169} 21 CFR § 121.305(c), (d) and (e).
\textsuperscript{170} 21 CFR § 121.305(d)).
\textsuperscript{171} § 121.305(e).
\textsuperscript{172} PROPOSED RULE ON THE ACCREDITATION OF THIRD-PARTY AUDITORS/CERTIFICATION BODIES TO CONDUCT FOOD SAFETY AUDITS AND TO ISSUE CERTIFICATIONS (posted Nov. 20, 2013) http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0146-0039.
\textsuperscript{173} FSMA added section 808 to the FDCA (21 U.S.C. 384d).
Audit agent means an individual who is an employee or other agent of an accredited auditor/certification body who, although not individually accredited, is qualified to conduct food safety audits on behalf of an accredited auditor/certification body.

Certification body means a foreign government, agency of a foreign government, foreign cooperative, or any other third party that is eligible to be considered for accreditation to conduct food safety audits and to certify that eligible entities meet applicable requirements of the FDCA.

Consultative audit means an audit of an eligible entity: (1) To determine whether such entity is in compliance with applicable requirements of the FDCA and industry standards and practices; and (2) which are for internal purposes only and cannot be used to determine eligibility for a food or facility certification issued under this subpart or in meeting the requirements for an onsite audit of a foreign supplier.

Direct accreditation means accreditation of a third-party auditor/certification body by FDA.

Eligible entity means a foreign entity that chooses to be subject to a food safety audit by an accredited auditor/certification body.

Facility means any structure, or structures of an eligible entity under one ownership at one general physical location, or, in the case of a mobile facility, traveling to multiple locations, that manufactures/processes, packs, or holds food for consumption in the United States. Transport vehicles are not facilities if they hold food only in the usual course of business as carriers.

Facility Certification means an attestation to establish that a facility meets the applicable requirements of the FDCA.

Food Certification means an attestation that a food meets the applicable requirements of the FDCA.

Food Safety Audit means a regulatory audit or a consultative audit.

Foreign cooperative means an entity that aggregates food from growers or processors that is intended for export to the United States.

Recognized Accreditation Body means an accreditation body is authorized to accredit third-party auditors/certification bodies.

Regulatory audit means an audit of an eligible entity to determine whether such entity is in compliance with the FDCA and the results are used to determine eligibility for food certification. The Regulatory Audit may be used by an importer in meeting the requirements for an onsite audit of a foreign supplier.

Relinquishment means: (1) With respect to an accreditation body, a decision to cede voluntarily its authority to accredit third-party auditors/certification bodies as a recognized accreditation body; and (2) With respect to a third-party auditor/certification body, a decision to cede voluntarily its authority to conduct food safety audits and to issue food and facility certifications to eligible entities.

Self-assessment means a systematic assessment conducted by an accreditation body or by a third-party auditor/certification body to determine whether it meets the applicable requirements.

Third-party auditor means a foreign government, agency of a foreign government, foreign cooperative, or any other third party that is eligible to be considered
for accreditation to conduct food safety audits and to certify that eligible entities meet the applicable requirements of the FDCA.

12. **Traceback Procedures:**

On August 13, 2014 the U.S. Department of Agriculture’s (USDA) Food Safety and Inspection Service (FSIS) posted notice\(^{174}\) that it will implement new “traceback” procedures on October 14, 2014. The “FSIS estimates that dozens more recalls may occur once these new protections are in place.” The new traceback procedures trace contaminated ground beef back to its source more quickly, remove it from the market, and determine the “root cause.” Under the new traceback procedures, FSIS conducts immediate investigations at businesses where tests return “presumptively positive” for E. coli O157:H7 during initial testing and at suppliers that provided the tested materials.

Under the traceback procedure investigators will gather relevant information about the production of the product, including use of antimicrobials and prevention of cross-contamination, sanitary conditions, and relevant purchase specifications. Investigators will review test results to determine whether an establishment has experienced a high event period (HEP). The new procedures impose no new requirements related to HEPs but are “intended to improve and expedite FSIS traceback procedures.”

FSIS will request that supplier establishments recall product if:

1. additional positive results are found;
2. introduction or cross contamination was unlikely to have occurred;
3. the establishment did not combine material from multiple source lots to create the lot of product that tested positive;
4. after traceback identifies the supplier of the source material, FSIS determines that the supplier or downstream users split the implicated lot before sending it to the establishment where the positive sample was taken; and
5. the split lot was sent into commerce for further processing into product that does not receive a full lethality treatment to eliminate E. coli.

If all of the foregoing occurs, FSIS will request the establishment to initiate a recall.

FSIS further recommends that establishments identify HEP criteria so they can determine whether they need to withhold product from commerce when a HEP has occurred.

13. **“Track and Trace” Pilot Project**

Food Track and Trace: Pilot Projects for Improving Product Tracing along the Food Supply System Final Report

On March 4, 2013 FDA released a report on two product tracing pilot projects conducted by the Institute of Food Technologists (IFT).\(^{175}\) The pilots were required under section 204 of the FDA Food Safety Modernization Act, which required FDA to establish recordkeeping requirements for high-risk foods to help in tracing products. The pilot projects looked at methods for quick and effective tracking and tracing of food,

---


including types of data that are useful for tracing, ways to connect the various points in the supply chain and how quickly data can be made available to FDA.

FDA is required to designate high-risk foods for which additional recordkeeping requirements are appropriate and necessary\textsuperscript{176} in order to rapidly and effectively track and trace such foods during a foodborne illness outbreak or other event. This is the first step towards meeting that requirement.\textsuperscript{177}

The product tracing system involves documenting the production and distribution chain of products so that in the case of an outbreak or evidence of contaminated food, a product can be traced back to a common source or forward through distribution channels. Product tracing systems enable government agencies and those who produce and sell food to take action more quickly when an outbreak of foodborne illness occurs or contaminated product is identified, thus preventing illnesses. Actions include removing a product from the marketplace and alerting the public if a product has already been distributed.

**IFT’s 10 Recommendations:**

1. From an overarching perspective, IFT recommends that FDA establish a uniform set of recordkeeping requirements for all FDA-regulated foods and not permit exemptions to recordkeeping requirements based on risk classification.

2. FDA should require firms that manufacture, process, pack, transport, distribute, receive, hold, or import food to identify and maintain records of Critical Tracking Events (CTEs) and Key Data Elements (KDEs) as determined by FDA.

3. Each member of the food supply chain should be required to develop, document, and exercise a product tracing plan.

4. FDA should encourage current industry-led initiatives and issue an Advance Notice of Proposed Rulemaking or use other similar mechanisms to seek stakeholder input.

5. FDA should clearly and more consistently articulate and communicate to industry the information it needs to conduct product tracing investigations.

6. FDA should develop standardized electronic mechanisms for the reporting and acquiring of CTEs and KDEs during product tracing investigations.

7. FDA should accept summarized CTEs and KDEs data that are submitted through standardized reporting mechanisms and initiate investigations based on such data.

8. If available, FDA should request more than one level of tracing data.

9. FDA should consider adopting a technology platform that would allow efficient aggregation and analysis of data submitted in response to a request from regulatory officials. The technology platform should be accessible to other regulatory entities.

\textsuperscript{176} § 204(d)(2) of FSMA.
FDA should coordinate traceback investigations and develop response protocols between state and local health and regulatory agencies, using existing commissioning and credentialing processes. In addition, FDA should formalize the use of industry subject matter experts in product tracing investigations.

For more details on IFT’s recommendations and their report, please go to Pilot Projects for Improving Product Tracing along the Food Supply System – Final Report (PDF: 5.6MB).

IV. Conclusion

Congress reacted to the events of September 11, 2001 and to the rapid change in the global sourcing and delivery of regulated products. The interests of industry and regulators align on many issues but government plays a unique role is creating a uniform system where problems are responded to, anticipated and prevented altogether. As the implementation of the regulations evolves, we are facing a forward looking system for the supply and distribution of food that dove-tails with systems of sister nations, what is envisioned to emerge is a robust global marketplace that can both prevent and respond to and emerging threats.

To their credit, Congress and government regulators recognized that laws and rules designed to respond to widespread adverse outcomes, whether intended and unintended, from medical products and outbreaks of food borne illness but were inadequate to prevent intentional and criminally negligent conduct. Congress has acted by enacting aggressive new legislation that revolutionizes the supply and distribution of food and drugs in the United States while allowing for the US system to “harmonize” with those of sister nations. How and whether a robust global system will succeed is secondary to the urgency of taking bold steps today to thwart, capture and prevent the catastrophic health outcomes of tomorrow.

As FDA restructures of how it oversees the transport of regulated products throughout the United States and from foreign suppliers, the sea-change in the oversight of the supply and distribution of FDA regulated products is creating new opportunities, challenges and risks for suppliers, manufacturers, distributors, marketers and sellers of FDA regulated products. Some of the changes that are underway were anticipated by industry and many industry participants view the new rules as merely codifying what they have been doing all along. Others, particularly those who have grown from smaller operations over the past decade maybe either scrambling to keep up with the changes or not aware of them at all. How industry responds to ensure robust competition and compliance will be a legacy for generations to come.

Make no mistake, every participant in the supply chain has the responsibility to ensure that its supplier is in compliance. No longer can we simply rely on the language in our indemnification agreements. Now, each is its supplier’s insurer.
WEDNESDAY, JULY 26, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

INSURANCE COVERAGE
What Lies Between Big Lies And Little Lies
Salon Rotary

Speakers:
Stephen Carter
Natalie Vloemans
C. Michael Johnson
Insurance fraud has for some time been an increasing concern of insurers. In 2013, the Association of British Insurers (“ABI”) issued a press release revealing that in the prior year insurers had uncovered 124,000 fraudulent claims worth £1.1bn, almost double the value of fraudulent claims between 2007 and 2012. In January 2015, the UK government set up the “Insurance Fraud Taskforce” to investigate and report on the causes of fraudulent behaviour and to make recommendations to reduce the level of insurance fraud. The Taskforce included members representing the ABI, the British Insurance Brokers Association (“BIBA”), the Insurance Fraud Bureau (“IFB”), the Financial Services Consumer Panel (“FSCP”), “Citizens Advice” and the Financial Ombudsman Service (“FOS”). Its report, published in January 2016, covered a wide range of fraudulent behaviour and its findings were equally wide-ranging (www.gov.uk/government/publications/insurance-fraud-taskforce-final-report). It made a number of recommendations aimed at, for example, tackling the common assumption that insurance fraud is “fair game”.

“Judge rules it’s OK to LIE on your claims ….” (The Sun)

How could it be that just 6 months later The Sun newspaper (the leading national newspaper at least in terms of circulation) ran the headline “Insurance premiums set to rocket after judge rules it OK to LIE on your claims” (The Sun, 21 July 2016). It reported:

“After an epic legal battle judge ruled a ‘collateral lie’ was no reason not to pay out.

TOP judges have deemed it OK to lie when making insurance claims – in a ruling poised to send premiums soaring.

The shock judgment was made at the Supreme Court in a row over a ship but it will affect policies covering cars, homes and even phones.”
The Director of Insurance Policy at the ABI commented that the decision “flies in the face” of work of the industry and government to crack down on fraudsters.

It is important to distinguish between fraud in relation to the placement of the insurance policy and fraudulent claims. The former involves a deliberate non-disclosure/misrepresentation to insurers in the presentation of the risk when the policy is placed. Until the Insurance Act 2015, the remedy for any such non-disclosure was that the insurers had the right to avoid the policy from inception, provided the non-disclosure was such as to induce the insurer to enter into the contract on the terms that it did (see *Pan Atlantic Insurance Company v Pine Top Insurance Company Limited* [1995] 1AC501).

That changed with the Insurance Act 2015, which adopted a similar (though not identical) regime to that of the Continental European civil jurisdictions. Under the 2015 Act, if the non-disclosure or misrepresentation was not fraudulent and if it induced the insurers to enter into the contract at a lower premium or on different terms, then the claim is to be paid pro rata (i.e in such proportion as the premium that would have been charged bears to the premium that was charged) or on the basis of the different terms that would have been applied. However, the right to avoid from inception remains in place when either the risk would not have been accepted at all had there been a fair presentation of the risk, or where the non-disclosure/misrepresentation was deliberate (meaning intentional failure on the part of the insured, with the knowledge that this is wrong – see *Mutual Energy v Star Underwriting Agencies and Travelers Syndicate Management Limited* [2016] EWHC 590 [TCC] – a decision of the English Court of Appeal).

We are not here concerned with the presentation of risk at placement or such disclosures or representations made at that point. The law with which we are here concerned is that relating to fraud in the claims process itself. However, that law has evolved against the background of (but is not connected to) the strict approach to non-disclosure/misrepresentation of English common law and legislation before the 2015 Act. Likewise, the change of approach in relation to collateral lies, to which the above headline refers, occurred against the background of (but is not connected with) the more causal approach to the effects of non-disclosure/misrepresentation adopted in the 2015 Act.
The Fraudulent Claims Rule in English Law

The common law has for a long time prohibited recovery from an insurer when the insured’s claim has been fabricated or dishonestly exaggerated. This is known as the “Fraudulent Claims Rule”. Both English law and US law on this subject have their roots in 19th Century English common law. The leading case on this was Britton v Royal Insurance Company (1866) 4F&F 905, fire insurance claim, in which Willes J said in his summing up to the jury (for at that time juries sat on English civil cases):

“… As it is a contract of indemnity only, that is, a contract to recoup the insured the value of the property destroyed by fire, if the claim is fraudulent, it is defeated altogether. That is, suppose the insured made a claim for twice the amount insured and lost, thus seeking to put the office off its guard, and in the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of wilful arson. It gives the go-bye to the origin of the fire, and it amounts to this – that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with sound policy. The law is that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy”.

In England, the Courts consistently applied this test to repudiate the entirety of an exaggerated claim. Now, some 200 years later, the considerations remain the same. For example, in Galloway v Guardian Royal Exchange (UK) Limited [1990] Lloyd’s Rep IR 209, Millet LJ commented (at page 204):

“The making of dishonest insurance claims has become all too common. There seems to be a widespread belief that insurance companies are fair game, and that defrauding them is not morally reprehensible. The rule which we are asked to enforce today may appear to some to be harsh, but it is in my opinion a necessary and salutary rule which deserves to be better known by the public. I for my part would be most unwilling to dilute it in any way.”
As a result, false claims and dishonestly exaggerated claims fall within the Fraudulent Claims Rule. Under this Rule, insurers’ remedy is to repudiate the entire claim and, at their option, to terminate the policy prospectively from the date of the fraud. An often repeated justification for this position was given by Lord Hobhouse in “The Star Sea” (Manifest Shipping Company Limited v Uni-Polaris Insurance Company Limited (“The Star Sea”) [2001] UKHL 1; [2003] 1AC 469):

“The logic is simple. The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.”

This formulation of the reasoning gives rise to the commonly used shorthand that the fraudulent insured must not be allowed a “one-way bet”.

Fraudulent devices and collateral lies

Under the common law as it stood until 2002, there had been no distinction between the use of a fraudulent device to support a claim and the making of a false or exaggerated claim. However, in 2002, the question of whether the use of a fraudulent device was covered by the Fraudulent Claims Rule was considered by the English Court of Appeal in “The Aegeon” [2002] EWCA 247. In this case, a passenger ferry, The Aegeon, had been destroyed by fire. The insured had warranted to insurers that hot works would not be carried out on the ship until a certificate had been obtained from the London Salvage Association (“LSA”). The insured said that hot works did not commence on the vessel until 12 February 1996, a date that was important because 8 February 1996 was the earliest date on which it would have been possible to obtain the LSA certificate. Thus, if the works had taken place before then, the insured would have been in breach of warranty. There was evidence that hot works had been carried out as early as 1 February 1996 which, if correct, would mean that insurers had a potentially complete defence for breach of warranty. However, insurers also wanted to argue that the insured’s claim should be dismissed on the basis that the insured had been guilty of knowingly, falsely and fraudulently misrepresenting its case.

As it turned out, the case did not turn on this issue, but the Court of Appeal nevertheless went on to consider obiter the issue of the use of a fraudulent device to support an insurance claim. Mance LJ gave the leading judgment, in which he enunciated the following “tentative solution” to the fraudulent devices question:
“a) To recognise that the fraudulent claim rule applies as much to the fraudulent maintenance of an initially honest claim as to a claim which the insured knows from the outset to be exaggerated;

b) To treat the use of a fraudulent device as a subspecies of making a fraudulent claim – at least as regards forfeiture of the claim itself in relation to which the fraudulent device or means is used. (The fraudulent claim rule may have a prospective aspect in respect of future, and perhaps current, claims, but it is unnecessary to consider that aspect or its application to cases of use of fraudulent devices);

c) To treat as relevant for this purpose any lie, directly related to the claim to which the fraudulent device relates, which is intended to improve the insured’s prospects of obtaining a settlement or winning the case, and which would, if believed, tend, objectively, prior to any final determination at trial of the parties’ rights, to yield a not insignificant improvement in the insured’s prospects – whether they be prospects of obtaining settlement, or a better settlement, or of winning at trial; and

d) To treat the common law rules governing the making of a fraudulent claim (including the use of fraudulent device) as falling outside the scope of s.17 [the 1906 Marine Insurance Act]. On this basis no question of avoidance ab initio would arise”.

Although strictly obiter dicta, this decision was followed by the Privy Council in Stephenson v AMP General Insurance (NZ) Limited [2006] Lloyd’s Rep IR 152, and in other cases.

Accordingly, following “The Aegeon”, in order to repudiate a claim, insurers merely had to establish the use of a fraudulent device in the claims presentation – not its ultimate effect on the claim itself. It was this aspect of the Fraudulent Claims Rule that came to be considered in Versloot Dredging BV & Anor v HDI Gerling Industrie Versicherungs AG & Ors [2016] UKSC 45 (“Versloot”), the decision led to The Sun newspaper’s somewhat dramatic headline quoted above. In Versloot, the Supreme Court coined the phrase “collateral lie”. Lord Sumption usefully defined a collateral lie as the dishonest embellishment to a claim that may be made “… because the insured was unaware of the strength of his case or else with a view to obtaining payment faster and with less hassle … a lie which turns out, when the facts are found, to have no relevance to the insurer’s right to recover … the claim would have been equally recoverable whether it was true or false.”
Versloot – The Facts

A cargo ship’s engine was damaged by ingress of water. The ship owners made a claim for the cost of repairs, approximately €3.2m. The Judge found that part of the vessel’s manager’s explanation of events was speculative and that he had recklessly supported it with an untrue statement that members of the crew claimed to have heard the alarm going off, but did not investigate because it was attributed to the rolling of the vessel.

The Commercial Court and Court of Appeal

Both the Commercial Court and the Court of Appeal, following “The Aegeon”, held that this amounted to use of a fraudulent device and insurers could therefore repudiate the claim and terminate the contract, even though had the manager not made the untrue statements, the claim would have succeeded in full.

Popplewell J, at first instance, so held only reluctantly:

“I have reached this conclusion with great regret. In a scale of culpability which may attach to fraudulent conduct relating to the making of claims, this was at the low end. It was a reckless untruth, not a carefully planned deceit …… To be deprived of a valid claim of some €3.2m as a result of such reckless untruth is, in my view, a disproportionately harsh sanction”.

Clarke L J, giving the leading judgment in the Court of Appeal, had no such qualms:

“… the drastic effect of the forfeiture rule is what gives it its deterrent effect and its justification rests on that basis”.

The Supreme Court decision

The Supreme Court eschewed the term “fraudulent device” in favour of “collateral lie”, thereby foreshadowing its downgrading. It found that to apply “the fraudulent claims rule to lies which are found to be irrelevant to the recoverability of the claim is a step too far. It is disproportionately harsh to the insured and goes further than any legitimate commercial interest of the insurer can justify”.
Lord Sumption observed that the insured had not obtained anything from the collateral lie that he
would not have been entitled to had he not told it. For an insurer to be able to forfeit the claim on
the basis of the insured’s collateral lie, the lie must be material to the merits of the claim “on the
ture facts”. That is, on the facts as they are ultimately established, not as they are thought to be at
the time the lie was told.

Comment

Lies that go to recoverability still fall within the fraudulent claims rule. Nevertheless, the need to
establish the true implications of a lie before deciding whether it does fall within the rule, or is
merely collateral, may increase the time and cost of investigating claims and give rise to potential
disputes (including, following the Enterprise Act 2016 (which introduced into English law damages
for failure to pay an insurance claim within a reasonable time), as to what is a reasonable time for
investigation). In addition, some claims that would not have been payable, henceforth will be. These
factors gave rise to concerns that premiums will increase, although it is unclear whether that has
transpired, at least as a result of Versloot.

Although there is now no legal remedy for the embellished presentation of an insurance claim if it is
shown that the embellishment was not necessary because the claim would have been recoverable in
any event, the court pointed to other possible sanctions:

(1) the insured will forfeit credibility of his evidence;
(2) the policy is likely to be terminated by insurers, at least prospectively; and
(3) the history will be disclosable in the claimant’s future insurance proposals, as a result of which
he is likely to be refused insurance or to be quoted increased premiums.

The efficacy of these factors may in practice be limited, so it is important that the courts are seen to
penalise collateral lies by imposing expensive inter partes costs orders on insured’s using them, as
the Supreme Court also predicted. (It must be remembered that although in English Courts the
“loser pays” rule generally applies to both parties’ legal fees, their award is actually at the discretion
of the Court, which may take other relevant factors into account).
Finally, it should be noted that this decision will not be affected by the Insurance Act 2015. Section 12 of the Act retains the common law fraudulent claims rule. However, the Act does not define “fraudulent claims”. The effect of Versloot Dredging will therefore be that fraudulent claims under the Act will not include collateral lies that, on the facts as they ultimately turn out to be, would have made no difference to the recoverability of the claim made.

However, the facts as they ultimately turn out to be are not always found before a settlement is entered into. Insurers and insured will commonly enter into settlements on the basis of insurers’ suspicion, not amounting to an absolute confidence of success at trial, of fraud in the claims process; of collateral lies.

*Hayward v Zurich Insurance Company [2016] UKSC 48*

This is exactly what happened in *Hayward v Zurich*. Mr Hayward suffered an injury at work on 9 June 1998. His employer’s employment liability insurers were Zurich Insurance Company. A settlement, including a full discharge from further liability, was entered into with Zurich whereby Zurich paid Mr Hayward £134,973.

However, in 2005, Zurich were informed by Mr Hayward’s neighbours that Mr Hayward had recovered completely from his back injury at least a year prior to the settlement and that, accordingly, the extent of the injury had been fraudulently represented. They signed Statements.

In 2009, Zurich commenced proceedings against Mr Hayward claiming damages for deceit, alleging that the information contained in Mr Hayward’s Particulars of Claim and the Schedule of Loss delivered in the original proceedings as to the extent of his injuries, constituted fraudulent misrepresentations. Zurich claimed damages equal to the difference between the amount of the settlement and the damages that would have been awarded had Mr Hayward told the truth. Zurich then amended the claim to include an alternative case of rescission of the settlement agreement and repayment of the settlement monies.

Mr Hayward relied on the Court Orders, asserting estoppel, and alternatively that Zurich’s action was an abuse of the process of Court as the issue of fraud had been compromised by the settlement. It transpired that some years prior to the settlement being effected, Zurich had disclosed surveillance
evidence of Mr Hayward and in the original proceedings had alleged in the pleadings that Mr Hayward was exaggerating the consequence of his alleged injuries for financial gain.

At first instance, Zurich succeeded. Mr Hayward had deliberately and dishonestly exaggerated the extent of his injuries in the earlier Court process in circumstances where, although Zurich was aware at the time of the settlement of the real possibility of fraud, Mr Hayward’s continued misrepresentations as to the extent of his injuries influenced Zurich into agreeing to a much larger settlement than it otherwise would have done. The settlement was therefore set aside and Mr Hayward had to repay 90% of the settlement proceeds plus interest, on the basis that he should only have received 10% of the settlement figure by way of damages but for his fraudulent actions. However, the Court of Appeal reversed this, upholding the settlement agreement on the basis that the risk of his exaggerating the claim was taken account of in the settlement.

Zurich appealed to the Supreme Court, which upheld the first instance decision setting the settlement aside. The Supreme Court found that for the compromise to be set aside, it was not necessary for Zurich to show that it was induced into the settlement because it believed the misrepresentations were true. Instead, it is sufficient for the defrauded party to show that the fact of the misrepresentations was a material cause of that party’s decision to enter into the settlement. The misrepresentation must be an inducing cause, but it need not be the sole cause.

Accordingly, although Zurich had made it clear in earlier proceedings that it had doubts as to the veracity of the plaintiff’s allegations, the question was not what view the employer or its insurer might take, but what view the Court may arrive at. Therefore, it is a valid consideration for the employer and its insurer to take into account the possibility the insured person will be believed by the Trial Judge when it comes to arriving at a decision to settle the claim.

The Supreme Court observed that it was difficult to envisage any circumstance in which a mere suspicion that a claim was fraudulent would prevent unravelling a settlement claim when fraud is subsequently established. Interestingly, the Supreme Court accepted Zurich’s submission that the defrauded party was not under a duty to be careful, suspicious or diligent in its research, but noted that in this case Zurich had done as much as it reasonably could to investigate the accuracy of Mr Hayward’s representations before reaching the settlement.
Were a settlement to be entered into under a first party policy between insurers and insured, whereafter the use of a fraudulent device which would have had a direct impact on the claim is discovered, it is entirely feasible that this same argument might be invoked by insurers in order to recover part or all of the claims payments from the insured.
“What lies between big lies and little lies?”

Evidence of insurance fraud in European Civil Law systems
How to 'play the game' in the Netherlands

Natalie Vloemans
Partner
Ploum Lodder Princen

An insurance agreement is an agreement *uberrimae fidei*: an agreement based on utmost good faith. Good faith requires that the insured discloses the true facts, both when entering into the insurance agreement and when claiming under the insurance agreement. The insurer depends to a high degree on the information provided by the insured. In the event that this trust is deliberately betrayed, it removes the basis of the insurance agreement. Generally, Dutch law therefore provides that in the case of insurance fraud, the insured’s right to payment lapses.

But there are 'big frauds' and 'little frauds'. It is possible that a (partial) fraud does not justify the loss of the right to payment in its entirety. Dutch courts tend to follow the hard line with regard to sanctioning partial fraud, taking as a starting point that the intention to mislead in connection with the settlement of claims justifies in principle the loss of any right to payment.

The other side of the far-stretching consequences of insurance fraud for the insured is that courts are strict when considering the evidence furnished by the insurer that invokes such consequences. However, the Dutch law system does not provide for pre-trial discovery or disclosure, like in the US or UK. How is the insurer to prove that the insured had an intention to mislead the insurer when making the claim?

**General: obligation to notify and inform the insurer when making the claim**

Dutch law provides for two basic rules regarding the making of a claim under an insurance agreement (article 7:941.1 and article 7:941.2 of the Dutch Civil Code): as soon as the policyholder or the beneficiary has become aware or ought to have become aware of the occurrence of an insured risk, he is obliged to notify this occurrence to the insurer as soon as reasonably
possible. Furthermore, both the policyholder and the beneficiary have an obligation to provide the insurer with all information and documents that are of importance for the insurer to assess its obligation to pay out insurance proceeds under the insurance contract.

The Dutch Civil Code provides that if the beneficiary has not complied with one of these obligations, he is in breach. Such breach allows the insurer to reduce the insurance proceeds with the damage it has suffered as a result of the breach. In practice, most insurers stipulate the full loss of the right to insurance proceeds in the event of breach. This is allowed under the Dutch Civil Code, provided that the insurer can establish that its reasonable interests were prejudiced by the breach.

On the basis of article 7:941.5 of the Dutch Civil Code, the right to insurance proceeds lapses in full if the policyholder or beneficiary has not complied with their notification or information obligation with the wilful intent to mislead the insurer, except as far as this deceit does not justify the loss of the right to payment.

The consequences of fraud for invoking the loss of rights clause

By adding the words “except to the extent that this misleading does not justify the loss of the right to payment” the arrangement in article 7:941.5 of the Dutch Civil Code provides for a sanction arrangement in the event of partial fraud. A court can consider whether partial fraud justifies the loss of the right to payment in its entirety.

The formerly existing Supervisory Council for the Insurance Industry initially took a fairly soft approach regarding partial fraud. It referred to article 6:237.h of the Dutch Civil Code which provides that in general conditions (not specifically relating to insurance contracts) in an agreement between a company and a consumer, a lapse of claims clause is considered to be unreasonably burdensome. In this view, the Council reasoned that an insurance company cannot simply stipulate a lapse of claims clause. In a steady line of judgments, the Council considered that if an insurance company establishes a wilful non-disclosure regarding a specific part of the insurance claim, the insurer is in principle only allowed to demand very strict proof of the other items that form part of the insurance claim. In other words, an insurance company was not allowed to invoke the lapse of claims clause with respect to the whole claim if the insured was able to furnish clear evidence regarding the other items of the claim.
However, a shift has occurred on this point in recent years. Several appeal courts followed the hard line with regard to sanctioning partial fraud. The courts took as their starting point that the intention to mislead in connection with the settlement of claims justifies in principle the loss of any right to payment. These rulings can be regarded as a return to the principle of trust as leading principle in insurance contract law and the qualification of an insurance agreement as an agreement *uberrimae fidei*. Understandably, there is a reluctance to give the insured an option to gamble when it comes to filing its insurance claim: a chance to be successful in fraud without a sanction when the fraud is discovered. The dependency of the insurer on the information provided by the insured justifies that a lapse of claim clause can be invoked with respect to the whole claim.

Following the lead of the public courts, the Supervisory Council made a turn. In its ruling of 8 April 2002, the Council also took the entire loss of the right to payment as a starting point, provided the insurer included the loss of rights clause in its policy conditions. The Supreme Court established this line in a ruling on 3 December 2014. This ruling specifically deals with article 7:941.5 of the Dutch Civil Code in which, whilst referring to the ruling of the Supervisory Council of 2002 mentioned above, the hard line remained intact and became even stronger.

The 3 December 2014 ruling concerned a case dealing with the policy conditions of a so-called ‘one-stop-shop policy’, which also covered theft, and also included a provision that “any right to compensation will lapse if the insured intentionally provides inaccurate details”. When the policyholder reported a theft from her home, she claimed a total of over NLG 10,000 from her non-life insurer, which claim included the theft of a Lorus watch and a brooch. During the investigation, the surveyor established that the policyholder had provided inaccurate details of the value of these two objects: the watch was not worth NLG 659 but NLG 59, whereas the brooch was not worth NLG 726 but NLG 626. The remainder of the claim appeared to be accurate. The Court of Appeal had dismissed the claim in full.

The Supreme Court firstly considered the wording of article 7:941.5 of the Dutch Civil Code, which had not yet entered into force, the explanatory memorandum to this article and the fact that the Supervisory Council adhered to this. Secondly, it took into account that – for the content of the legal view currently applicable on this issue in the Netherlands – there are reasons to give importance to the position of the Supervisory Council, that the provisions in article 7:941.5 of the Dutch Civil Code should also be assumed for the law currently in force. In the opinion of the Supreme Court, the Court
of Appeal did not display an inaccurate legal view by putting an entire loss of rights to compensation first and foremost in connection with insurance fraud.

Therefore, stated briefly, the minor extent of the fraud appears not to be sufficient to avoid any loss of right to payment – using the last sentence of paragraph 5. So which circumstances should then come to mind? The parliamentary proceedings include the example that a more proportionate sanction (than that of entire loss of rights) could be applied if the fraudulent act only relates to one of the various claims which the insured submitted under various categories of the policy.

A ruling which might be able to give further direction to the elaboration of ‘circumstances’ as meant above is the one of the appeal court of The Hague of 22 August 2000. In this case, after theft by means of burglary, the insured submitted a claim of NLG 120,000, which amount included an amount of NLG 20,000 for non-stolen goods. The appeal court concluded in this case that there was intention to mislead due to the circumstances of the case. As motivation for its ruling that the entire loss of right to payment was acceptable, the Court of Appeal mentioned several other circumstances. It refers to the period of time in which the fraud occurred, the question of how the misleading was discovered (by the insurer itself or by the insured’s own statement), the consciously untruthful information provided on various occasions, the absence of any indication of an intention by the insured himself to retrace his steps, the gross violation of contractual obligations and the decency to be observed.

The burden of proof and evidence in Dutch law

Article 150 of the Dutch Code of Civil Procedure plays a central role in the distribution of the burden of proof: the party which invokes legal consequences must prove them. This is extremely important in Dutch civil proceedings: carrying the burden of proof also implies carrying the risk that the proof cannot be given. This risk is not imaginary: a general obligation to furnish information to an opposing litigant comparable to that in the United States does not exist in the Netherlands. In principle, a party in proceedings is only held to furnish information in his possession which is known, or at least strongly suspected, to exist. In the Netherlands, a request for a document for which one is not sure whether it exists is already referred to as a "fishing expedition", which is not allowed.
Obtaining evidence and disclosure of documents

There are ways to obtain documents or information. Article 833 Code of Civil Procedure provides that a third party can be compelled to issue a copy of an excerpt from a formal legal document. In addition, a party who has lost a piece of documentary evidence can demand a copy or extract of the document from the person (including a third party to the litigation) who possesses the document. Beyond these limited situations, Dutch law gives a few more general possibilities to obtain documentary information from the opposing party.

In a normal civil lawsuit, the judge has the power to call the parties to appear before him and order them to provide him with information orally or to produce "certain documents relating to the case". Such documents are to be produced by the date ordered with a copy produced to the opposing party. A court can, however, not request documents the existence of which, having read the case file, he does not know or suspect.

Another possibility is based on article 843a Code of Civil Procedure, which provides that a party which has a legitimate interest can, at his own expense, demand a copy or excerpt of a signed legal document concerning a legal relationship in which he or his legal predecessor is a party from the person who has the document in his possession or control. This demand may be directed at third party custodians and may include documents originating from other than the custodian as long as they are under the custodian's control. The request for submission of documents can be made separately or during pending proceedings. To obtain an order under the "exhibition obligation", one must satisfy three requirements. The first is relevance. The requesting party must show a connection between the document and the legal relationship in question. The second is necessity. It must be established that one has a "legitimate interest" in the information sought. Thirdly, the document must qualify as a signed legal document.

A final possibility for obtaining documentary information in the possession of the other party is by means of an attachment of evidence. Such an attachment can be ordered in the Netherlands if a party convinces the court that there is a serious risk of critical evidence being destroyed if it is not attached.

Apart from these (limited) possibilities to obtain documents, evidence can be obtained in other ways. In trial and in pre-trial proceedings, the court can be requested to hear witnesses. Such
preliminary witness hearings may be necessary in order to establish whether the claimant has a claim to submit to the court. Therefore the petition the claimant files with the court should indicate the facts he wishes to prove, as well as the particulars of the witnesses and the (possible) defendant(s).

Furthermore, a claimant can file a petition with the court, explaining the facts of the case and the technical issue to be investigated, and request for the appointment of a (pre-trial) expert. If the court allows the expert to be appointed, the investigation will take place and result in an expert report which is filed with the court.

The rules of evidence in the Code of Civil Procedure apply (as a basic rule) to all civil proceedings (either proceedings that start with a writ of summons – as most normal claims – or request (petition) proceedings). To some specific civil law proceedings, the nature of the matter prevents the applicability of the rules of evidence. This is, for instance, in preliminary relief proceedings (in which proceedings the President of the court will only give a provisional judgment, that is not binding on the merits), and the second phase of the enquiry proceedings before the Enterprise Chamber of the Court of Appeal in Amsterdam. The rules of evidence do not apply in arbitration proceedings. In particular, arbitration proceedings may be attractive to parties used to the common law systems, as the parties can agree upon the procedural rules and, for instance, agree upon a form of discovery or disclosure proceedings.

As a basic rule, all evidence can be used as such. There are no restrictions: tape recordings, deautidu witness hearings, or forensic reports can all be used as evidence. Even evidence that was stolen, or that was otherwise acquired unlawfully, is in most cases allowed as evidence (notwithstanding the fact that the way the evidence was obtained, may result in a criminal offense).

The burden of proof and the risk of evidence

In Dutch civil proceedings, the court can only ground its judgment on facts that were clearly stated as such by either party, and that have not been disputed by the other parties, or on facts that have been evidenced (proven) in conformity with the rules of evidence during the proceedings. The court is passive: the court is not allowed to base the judgment on facts that have not been brought forward by any of the parties. The court is free in the assessment of all evidence provided; however, some evidence is conclusive, such as deed signed before a Dutch civil law notary (notarial deed).
If assertions have been clearly stated and have not been disputed, the court will accept the assertions as 'facts'. If the other party disputes the assertions, the party making the assertions will need to furnish evidence in order to make the assertions 'sufficiently acceptable' for the court to allow them as 'proven'. The party in the proceedings relying on the legal consequences of facts or rights asserted by it, will bear the burden of proof, unless the law specifically provides otherwise, or unless such burden of proof would be contrary to the principles of reasonableness and fairness. Therefore, in most cases, the claimant carries the burden of proof. The risk of not providing (sufficient) evidence, also is on the party that has burden of proof; this is called the “evidence risk”. The other party is allowed to provide counter-evidence, which is evidence that (sufficiently) contradicts the evidence put forward by other party. This is generally easier than providing full evidence. If assertions are sufficiently contradicted, the party carrying the burden of proof will fail in providing sufficient evidence and the court will not accept the assertions as facts.

In some circumstances, a court is allowed to shift the burden of proof (and the evidence risk) to the other party. For instance, this is possible if a court seeks to rectify the disadvantage of a party who has insufficient access to essential information (which his opponent presumably possesses) necessary to prove his case. For instance, a court can (while not necessarily reversing the burden of proof) require the other party to bring forth further factual information so that the asserting party has a reference point to make his case. In this manner, a party can be induced to produce evidence adverse to his own case. Refusal to cooperate may result in the judge drawing the inference that the withheld information would have proven the other party's point.

Given the evidence risk, it is extremely important in Dutch law to establish what exact assertions must be made to allow a claim. Each assertion can entail a burden of proof, which means that it is important to try and make clear what assertions must be made - and proven - by the other party. Substantive law in principle plays the guiding role here. It may provide deviations where a special rule or demands of reasonableness and fairness shift the burden of proof from one party to the other.

**Insurance claims: evidence of fraud**

The arrangement of the loss of rights to payment in the event of (partial) fraud has several evidentiary aspects. This is firstly the evidence of the intention, as well as – in the sanction phase –
the application of the exception mentioned earlier (“except to the extent that this misleading does not justify the loss of the right to payment”).

Evidence of the intention

When an insurer invokes the loss of the right to payment in the event of fraud, it is assumed that the insurer states and proves this fraud: after all, it is the insurer who invokes the release of its obligation to pay compensation under the policy and therefore it is up to the insurer to put forward that the policyholder or the insured gave inaccurate information with regard to a claim that occurred with the intention of obtaining higher compensation or obtaining payment to which he would not be entitled should the actual state of affairs have been known. Whether this intention to violate the policy conditions took place can in cases in which the policyholder or the insured does not admit this himself – only be demonstrated by assumptions arising from the circumstances of the case.

In the event of fraud a strong sanction is assumed by the insurer, namely that of the loss of any right to payment. The particular seriousness of this sanction, advocates that fraud should not be assumed too easily. It is appropriate that restraint in the assessment is translated by an insurer into meticulous investigation of the facts, circumstances and background of a certain claim statement (as made by the insured). Considering the interest that the policyholder has in cover under the policy, he can demand that the insurer thoroughly examines whether there was in actual fact fraud or whether there might only be (or have been) clumsiness on the part of the insured, an excusable error with regard to completing the claims form, or whether there is a misunderstanding in terminology or expressions. The insurer is expected to fulfil its obligation to furnish facts to a high degree, to deal with the position of the insured and provide insight into the investigation it carried out and produce the documents of it, if there are any. In line with this, there is also the obligation resting on the insurer to produce a surveyor’s report.

It remains up to the insured to respond to this with sufficient reasons and provide counter-evidence. Subsequently, in principle the ordinary rules of furnishing facts apply: if an insurer states with sound reasons that an insured intentionally provided inaccurate details in the claims settlement procedure and the insured insufficiently disputes this, this establishes the intention. “Intention is a matter of mental state and therefore difficult to prove. If an insurer states that an insured intentionally provided inaccurate details in settling the claim and the insured contradicts this insufficiently, this
makes the intention an established fact. After all, it is already difficult enough for the insurer to provide evidence.

When the intention to mislead the insurer is established, the insurer is not required to prove that its legitimate interests were prejudiced. However, in legal literature it is defended that in the event of fraud by the insured the insurer can in principle invoke the loss of rights clause, but can no longer do so when the insured demonstrates that because of this a reasonable interest of the insurer has not been prejudiced. Thus, if despite the intention to mislead there is no question of prejudiced interest, the insurer can (still) not invoke the (entire) loss of rights clause. This approach may be in line with the nuanced approach to the ('unintentional') prejudiced interest by late notification: 'no entire loss of rights if there is no prejudice or only partial prejudice.' The arrangement in article 7:941.5 of the Dutch Civil Code also has scope for this solution. In this event, the burden of proof will be on the insured.

Evidence of the exception

A next question that arises if the intention to mislead the insurer can be assumed is that of the sanction. The starting point in the sanction phase is that it can only be assumed in special cases that the (entire) loss of right to payment is not justified. The last sentence stipulated in the law ("except to the extent that this misleading does not justify the loss of the right to payment") intends to give the court, when applying the sanction, the possibility to take into account the details of each case so that - considering the seriousness of the fraud - it can impose a suitable, more proportionate sanction.

It should be noted that the risk of furnishing evidence with regard to the argument that entire loss of rights is not justified rests on the insured: after all, the exception has been incorporated for his benefit and it is therefore up to him to put forward facts and circumstances justifying the opinion that the misleading does not justify the loss of the right to compensation.

Final remarks

Given the restricted possibilities in Dutch law to force the other party to disclose documents in proceedings, an insurer that wants to establish fraud by the insured will need to play the game the
Dutch way. That means, first and foremost, that it should try to investigate the circumstances in pre-trial ways as meticulously as possible and in that respect hire a sufficiently experienced fraud expert.

If the insured refuses cooperation or obstructs attempts to obtain documents, an insurer can seek relief through the limited possibilities provided for in Dutch civil proceedings: for instance by pre-trial hearing of witnesses or the appointment of a court expert. If an insured refuses to cooperate with the court expert, this may well convince the court that the insured attempts to hide certain facts and the court may draw its conclusions from such non-cooperation. Another method would be the pre-trial attachment of documents (bewijsbeslag) which, although not common practice in the Netherlands, can be a very useful instrument.

'Playing the game' also implies that it should be thoroughly examined which assertions exactly need to be proven by a party, and which should be shifted to the other party. It is important to bear in mind that the discussion about fraud necessarily comes after the establishment that an insured risk has occurred. It is for the policyholder or the insured to assert - and if disputed, prove - that the insured risk has occurred. The definition of an insured risk in the policy conditions may provide the insurer with tools to force the insured to detailed information about the circumstances under which the risk occurred, for instance, if the insured risk is connected to the occurrence of an 'external calamity'. Such detailed information can be the starting point for further investigation. Furthermore, in court proceedings, if an insurer has furnished evidence regarding an alleged fraudulent claim, based on an expert report, an insurer can insist that the insured who disputes the allegations - and who is in possession of all relevant documentation - should have an aggravated duty to substantiate its defences.

When it comes to furnishing evidence of fraud in the Netherlands, the devil is in the details!

---

1 The Supervisory Council (Raad van Toezicht op het Verzekeringsbedrijf) has in 2007 become part of the Financial Disputes Committee.
2 For instance, RvT II 93/7.
3 RvT 2002/I.
5 The new Dutch Civil Code on insurance contracts entered into force on 1 January 2006.
6 Prg 2000, 5565.
In the United States the legal ramifications of falsely presenting a claim vary state-by-state depending on the decisions of each state’s legislature and judiciary. Thus, a choice of law analysis is critically needed every time a carrier seeks to challenge the veracity of the insured in its presentation of a claim.

We do not attempt to address the states varying choice of law rules or provide a comprehensive review of the law of the 50 states governing fraud or material misrepresentation in presentment of a claim. Rather, we focus on four states in different regions of the country so we can discuss these varying approaches to the problem in contrast to the British and European positions presented.

What is clear from the law around the country is that all the courts struggle with expressing rules intended to define the line between when concealment and lies are intentional and warrant loss of coverage and when concealment and lies are unintentional or merely the expression of “opinions honestly held” not warranting loss of coverage. These rules, commonly relied upon when charging a jury, explain in varying ways the level of proof needed for the insurer to prove that the insured has stepped over the line in presentment of its claim justifying voidance of the policy. Attempting to convince a jury about the mental “intent” of an insured is a difficult endeavor. The insured’s counsel has ample defenses. For example, New York decisions state an insured committing “unintentional fraud” – to most lawyers an impossible concept but perhaps understandable by juries – will not void the policy.

**CALIFORNIA LAW**


The *Ferguson* case, although unpublished, reflects the hard line with regard to fraudulent claims. 2015 Cal. App. Unpub. LEXIS 2313 (Cal App. 4th March 30, 2015) In that case the insured’s horse ranch burned to the ground in an electrical fire. It was vacant at the time of the loss. The
claim was for the structure, personal property and loss of rents and for those claims the insurer paid approximately $532,000 to the insured. The tenant that had occupied the property two months prior to the loss tipped the insurer off that the insured had inflated her insurance claim (specifically, misrepresenting the property that was in the house at the time of the fire). An investigation and suit followed. The insurer alleged that the insured had violated California’s Insurance Fraud Prevention Act and sought to have her criminally charged. The IFPA entitles an insurer who proves a violation based on a fraudulent claim to receive a civil penalty plus an assessment of no more than three times the amount of each claim. The insured plead guilty to the charge of insurance fraud; as such, the insurer’s initial burden under the IFPA was met. The insured’s efforts to defend were insufficient and the court granted the insurer the return of the monies it had already paid as well as a penalty of twice the amount of the claim.

In *Cummings* the insured submitted a claim for vandalism to her home and its contents. While in the course of investigating the claim, the insurer received a tip from a neighbor that the insured’s son was living in the home and present on the day of the vandalism and the neighbor heard the sounds of a commotion and things being broken. The insurer initiated an investigation which involved, among other things, a recorded statement from the insured in which she gave “a false version of the events.” Thereafter, the insured was examined under oath, and again repeated that same version of events only to change the story mid-testimony with a true accounting of what had happened when presented with evidence contradicting her story. She testified she had lied because of fear of her son who was dangerous. The insurer nevertheless declined to cover the loss based on the insured’s original misrepresentations. She was also criminally charged for her violation of California Insurance Code § 556. The insured filed suit on the grounds that there were issues of fact with regard to the materiality of the alleged misrepresentations. She also pursued breach of contract, bad faith and various other claims against the insurer. Summary judgment in favor of the insurer resulted in the trial court which lead to an appeal. The California appellate court explained that a misrepresentation is material if it concerns a subject reasonably relevant to the insured’s investigation and a reasonable insurer would attach importance to the fact misrepresented. The issue of materiality of a misrepresentation can be decided as a matter of law. The falsehood was the insured first claiming vandals damaged her property when it was her son living in the house that destroyed her personal property. The fact she ultimately told the truth when presented with evidence contradicting her story and that she lied out of fear of her son were not valid defenses for her original intentional lies to deceive the insurer. Her intent to defraud the insurance company was deemed legally implied when she knowingly misrepresented the facts resulting in voiding coverage.

**GEORGIA LAW**

In Georgia law "it is only fraudulent false swearing, in furnishing the preliminary proof or in the examinations which the insurers have a right to require, that avoids the policies." *American Alliance Insurance Co. v. Pyle*, 62 Ga. App. 156, 165, 8 S.E.2d 154, 160 (1940) (citing *Claflin v. Commonwealth Insurance Co.*, 110 U.S. 81, 3 S. Ct. 507, 28 L. Ed. 76 (1884); *Woods v. Independent Fire Ins. Co.*, 749 F.2d 1493 (11th Cir. 1985). Intentional concealment of material facts in proofs of loss or other statements also can void the policy if the policy terms so provide.

As to intent, whether a "claim was fraudulently or innocently made [is] a question of fact peculiarly within the province of the jury." Camden Fire Ins. Ass'n v. Penick, 2 F.2d 964, 965 (5th Cir. 1924). However, as a matter of law, where there is "no evidence that the misstatements in the proof of loss were fraudulent," the insurer cannot rely on the misstatements in the proof of loss to void coverage under the policy. See Casey Enters., Inc. v. Am. Hardware Mut. Ins. Co., 655 F.2d 598, 601 (5th Cir. 1981). Furthermore, the misrepresentation must be in the insured’s interest. Compare Woods v. Independent Fire Ins. Co., 749 F.2d 1493 (1985) and Pooser v. Norwich Union Fire Insurance Soc'y, 51 Ga. App. 962, 182 S.E. 44 (1935).

An inflated property valuation in a proof of loss, if proven, is deemed material as a matter of law because it would affect the amount the insurer is obligated to pay. See Ussery, supra; OSA Healthcare, Inc. v. Mount Vernon Fire Ins. Co., 975 F. Supp. 2d 1316, 1323 (N.D. Ga. 2013). In Ussery, the insureds’ dwelling was destroyed by fire. The insurer denied the claim based on its discovery that the insureds had provided a significantly lower valuation for their personal property in a previously filed bankruptcy petition than they had submitted as part of their insurance claim. After discovery of the bankruptcy provision, the insurer took examinations under oath of the insureds. When confronted with the values set forth in the bankruptcy petition, the insureds responded that the petition did not accurately reflect the true value of their personal property and that they had followed the advice of their bankruptcy counsel in providing those values. The insureds subsequently amended their bankruptcy petition to include the same inventory and values as stated in their insurance claim, and the bankruptcy court approved the amendment. Because of the amended bankruptcy petition, the court held the insurer could no longer say that the valuations were inconsistent, and the insureds gained “no unfair advantage in the bankruptcy court,” as any recovery would inure to the benefit of the bankruptcy estate.

NEW YORK LAW


Yet, under New York law, the hurdle is very high for an insurer to void a policy based on fraudulent presentation of the loss. A false statement as to a “matter of opinion honestly held” by an insured, even if mistaken, will not prevent recovery. Azzato, supra. This concept is more broadly stated as “unintentional fraud or false swearing or the statement of an opinion mistakenly held are not grounds for vitiating a policy.” Walker v. Tighe, 142 A.D. 3d 549, 551 (App. Div. 2nd. Dept. 2016) (quoting a judicial pronouncement originally found in Domagalski, supra). Hence, in New York under the jury charges that can be derived from this legal precedent it is likely very difficult to prove fraud in the presentment of the claim. Yet, if the insured is ultimately determined to have intentionally made material false statements, recovery is precluded. Azzato, supra.

Even the issue of what is a material misrepresentation is difficult in New York as the insurance representatives’ testimony of what is material to their claims decisions is not determinative. “Moreover, the issue of materiality is generally a question of fact for the jury, and “[c]onclusory statements by insurance company employees . . . are insufficient to establish materiality as a matter of law.”” Walker v. Tighe, supra.

Yet, in the context of values provided in a sworn proof of loss, one way to determine fraudulent intent is if the value is grossly disproportionate to the actual value of loss. Id. (citing Saks & Co., supra). Also, the insured’s explanation for the value provided can show intent if it is “so unreasonable or fantastic that it is inescapable that fraud has occurred."
Importantly the violation of a concealment and fraud provision does not automatically preclude coverage for other insureds. See Azzato, supra. “Accordingly, this clause only serves to vitiate the coverage of a named insured who has actually engaged in misrepresentation (see Krupp v Aetna Life & Cas. Co., 103 A.D.2d 252, 261 (1984); cf. Lane v Security Mut. Ins. Co., 96 NY2d 1, 5 (2001).” Id. To bar coverage for the second insured, the insurer must show that the second insurer participated in or had knowledge of the other insured’s fraudulent actions. Id.

In Azzato, a husband and wife secured insurance coverage for a residence purchased by a husband and a third party. A fire occurred at the residence. The insurer denied the claim because the husband submitted false evidence to support valuations of appliances that were purportedly located in the residence at the time of the fire. The court found that the insurer had established a prima facia case that the husband had made fraudulent statements and submitted values for the loss items that were significantly inflated from the actual prices he paid for the items. Yet, the court found that the husband’s actions did not automatically vitiate the wife’s rights of recovery. The concealment and fraud provision only bared recovery for a “named insured ‘who has concealed or misrepresented any material fact or circumstances.” The insurer had not provided evidence that the wife had knowledge about her husband’s fraudulent actions or that she otherwise made any material misrepresentations. [The court did find, however, that the wife could not recover for any damage to the residence itself because she did not possess an insurable interest.]

WASHINGrON LAW


Kim also held that where the policy contains terms that render the policy void for such fraud, the entire policy is voided and innocent co-insureds are also barred coverage. That reasoning was rejected regarding mandatory automobile liability coverage in Angarita v. Allstate Indem. Co., 2014 Wash. App. LEXIS 1636, which held the public policy related to mandatory automobile liability coverage supported a finding that one insured’s fraud in presentment of the claim did not void coverage for innocent co-insureds.

In Cox, the insured inflated his unscheduled personal property damage claim after a fire destroyed his house. 757 P.2d 499, 502 (Wash. 1988) Evidence showed he included several substantial items on his inventory list that were not in the house at the time of the fire. The insurer, with suspicion of the fraud still made interim payments under the policy for the building loss. A suit followed in which the insurer sought to void coverage under the policies “Misrepresentation, Concealment or Fraud” language and the insured countered with a bad faith claim. The insured also claimed that recovery under the policy could be severed such that the
fraud only invalidated coverage for the personal property. The court found that the language of the Misrepresentation clause did not provide for severability as it expressly said “the entire policy is void…” The Court also refused the insured’s claim of estoppel based on the insurers’ knowledge of the fraud at the time it made the partial payments. This case also suggests that a better course would have been for the trial court to bifurcate the fraud part of the case from the bad faith, taking up the fraud portion first. That would have eliminated the need for the jury to decide bad faith as even in the face of evidence of bad faith, the Court would not allow an insured who attempted to defraud the insurer to obtain a windfall based on a finding of bad faith.

The Cox case has been more recently cited for the proposition that the misrepresentation clause in the policy that provides that the “entire policy is void…” does not allow for severability. See e.g., Johnson v. Allstate, 108 P.3d 1273 (Wash. App. 2005) (policy coverage voided after insured found to have made misrepresentations with regard to contents of home after fire) However, to the extent that a Washington issued policy does not expressly void the entire policy based on fraud or misrepresentation, these decisions leave open the possibility that the Court would entertain severing the policy coverages and simply voiding coverage under that part to which the fraud or misrepresentation pertains.

The misrepresentations need to be material. Huston involved misrepresentations by the insureds concerning certain facts reported in the investigation of a suspicious fire loss. 94 P.3d 358 (Wash. App. 2004) In that case, the fire was being investigated as arson and the insureds made certain misrepresentations concerning their marital status, the status of the smoke alarm in the bedroom, where the fire started and their locations at the time of the actual fire (conflicting stories as to whether they were inside or outside of the house). A declaratory judgment action was filed by Allstate claiming that material misrepresentations were made in the investigation and that the insureds had intentionally set the fire. The policy at issue stated that “coverage will not be provided for any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstance.” The Court found that this language plainly encompasses post-loss misrepresentations. A finding of materiality was thereafter required. Under Washington law, “a misrepresentation is material ‘when it concerns a subject relevant and germane to the insurer’s investigation as it was then proceeding’ at the time the inquiry was made.” In other words, could the misrepresentation have affected the investigation. Materiality is different than prejudice and a showing of prejudice is not required. For the former, the only question is “could it have”, for the later, the question is “did it”. The Court of Appeals found the misrepresentation issue to be a fact question appropriate for the jury to decide.

The jury ultimately found no arson but did find that the insureds made misrepresentations material to the investigation. The finding of no arson did not affect the issue of whether the misrepresentations were material. Based on the jury’s findings, the trial court had entered judgment in favor of Allstate finding no coverage and that judgment was affirmed on appeal. As an aside, the finding that Allstate was not entitled as a prevailing party to recover its fees and costs (Washington law grants fees and costs to prevailing parties) was also upheld because the crux of the case was the arson issue and Allstate did not prevail on that issue.

Materiality is a mixed question of law and fact which is most often determined by a jury. “A misrepresentation is material if a reasonable insurance company, in determining its course of
action, would attach importance to the fact misrepresented.” However, it must also be knowingly made with the intent to deceive the insurer. If the insured knowingly makes a misrepresentation it will be presumed to have been made with the intent to deceive. See Kay v. Occidental Life Ins. Co., 183 P.2d 181 (Wash. 1947). In Johnson v. Safeco Ins. Co. of Am., 316 P.3d 1054 (Wash. App. 2013), the court granted judgment in favor of the insurer after the insured admitted to submitting a fraudulent lease to support the value of his additional living expenses claim. In that case, the court reiterated that an insured’s material misrepresentation will negate any claim of bad faith against an insurer.

It is significant to note that the timing of the misrepresentation is as important as the materiality of it. The misrepresentation must occur in the claims process. Oregon Mut. Ins. Co. v. Barton, 36 P.3d 1065 (Wash. App. 2001), The Court in Barton found that the insured’s misrepresentations in an examination under oath that took place six weeks after a settlement of the insured’s claim had been reached, did not operate to void the coverage under the Policy. This case involved an arson claim on a truck tractor. The insured and the insurer (who suspected the insured was involved in arson but couldn’t prove it) reached a settlement of the claim with no reservations and checks were tendered to and negotiated by the insured. Subsequently, the insurer reopened its investigation, claiming that the insured started the fire, and for the first time took an EUO of the insured. The insurer thereafter initiated suit to obtain repayment. The court was charged with deciding whether misrepresentations by the insured in the EUO after settlement concerning work opportunities for the tractor trailer voided the policy. Because there had been no reservation on the settlement and the misrepresentations did not induce the settlement, the Court found that the misrepresentations did not void the policy. There had to be a relationship between the fraud and the settlement tender. Distinguishing this case from the finding in Cox that fraud at any point in the claims process voids the entire contract regardless of whether the statements were relied upon by the insurer, the court found that the claims process was no longer on going and absent a finding of arson against the insured, the settlement should stand.

SAMPLE OF FRAUD AND MISREPRESENTATION WARNINGS REQUIRED IN POLICIES

Even in the fraud and misrepresentation warnings required by different states, there is lack of agreement on how to word the warning to an insured about when they can be guilty of insurance fraud (italics below added to highlight differences in wording):

**State of California**
For your protection, California law requires the following to appear on this form: Any person who *knowingly* presents a *false or fraudulent* claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison.

**State of Florida**
Any person who *knowingly and with intent to injure, defraud, or deceive* any insurer, files a statement of claim or an application containing *false, incomplete or misleading information* is guilty of a felony of the third degree.
State of New Jersey
Any person who knowingly files a statement of claim containing any false or misleading information is subject to criminal and civil penalties.

State of New York
Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime, and shall also be subject to a civil penalty not to exceed five thousand dollars and the stated value of the claim for each such violation.

State of Ohio
Any person who, with intent to defraud or knowing that he is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.

State of Oregon
Any person who, with an intent to knowingly defraud any insurance company or other person, files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, may be subject to prosecution for insurance fraud.

State of Pennsylvania
Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information or conceals for the purpose of misleading, information concerning any fact material thereto commits a fraudulent insurance act, which is a crime and subjects such person to criminal and civil penalties.
WEDNESDAY, JULY 26, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

TRIAL TACTICS, PRACTICE AND PROCEDURES
Pushing Back Against Excessive/Unreasonable Medical Bills;
Opening Juror’s Eyes
Salle des Congrès

Moderator:
Marc Young

Speakers:
Kurt Paxson
Oscar J. Cabanas
The *Good* Fight
Against
Bad Medical Expenses

Kurt G. Paxson, Esq.
Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C.

Oscar J. Cabanas, Esq.
Wicker Smith O’Hara McCoy & Ford, P.A.
A practical review of the arguments and strategies from discovery to trial on the ways to attack inflated medical bills and bills generated through letters of protection and similar vehicles.
The Problem

- Plaintiff incurs large medical expenses and uses them to build a personal injury case.
  - Plaintiff does not turn bills into insurance/Medicare
  - Plaintiff goes to treatment as private pay
  - The bills are protected by liens and/or letter of protection
  - The large specials inflate general damages (A rising tide raises all boats)
Scenario A

- Medicare eligible claimant goes to the emergency room, then immediately retains a lawyer
- Bills are **not** submitted to Medicare by agreement with the health care provider (HCP)
- HCPs seek higher level of reimbursement by agreement to letter of protection with claimant’s attorney or third party financing company
- HCPs all testify that their bills are reasonable and necessary
Scenario B

- Medicare eligible claimant has minor accident, soft tissue injury only, goes by ambulance to E.R., run by large national hospital chain
- Hospital does not bill Medicare. Asserts lien (Statutory in many states)
- Plaintiff’s counsel is unable to get reductions from hospital
- Case cannot be settled due to size of bill/lien
Dear Dr. Marano:

The purpose of this letter is to verify that we, Dash Law Firm, have taken on one of your recent clients' injury claim cases. Wanda Gandry came to us after she was in a car accident and wanted compensation for the other driver's negligence. **We have decided to take on her case, and are confident we will get a cash settlement very soon.**

You can be assured that when we do receive the cash settlement, any outstanding debts Wanda has with you, specifically file #734232, will be paid in full. We thank you for your cooperation!

Sincerely,

John Garldan
Dash Law Firm
Sample Letter of Protection

FEE GUARANTEE AGREEMENT FOR
MEDICAL PROVIDER NAME HERE

PATIENT:_____________________________________________________

DATE OF BIRTH:_______________________________________________

TREATMENT DATES:____________________________________________

ACCIDENT DATE:_______________________________________________

I, the above noted Patient, do hereby authorize and direct my present and any future attorney to honor this fee guarantee agreement. This agreement is made in favor of the above named Medical Provider and shall be termed a “Letter of Protection.” The Letter of Protection shall serve to place a continuing lien on any proceeds I recover in any legal action related to the above noted accident date.

Consideration. In consideration of the medical treatment provided and time provided to pay for said medical treatment, I hereby grant a direct lien on any and all funds I may recover in any legal action related to the above accident date.

Protection of Outstanding Charges. The above named Patient hereby agrees that if s/he recovers any money from any person or entity in connection with any legal action related to the above noted accident date, the Patient shall withhold from those funds, sufficient money pay the full outstanding balance of any bill(s) owed to the above named Medical Provider for treatment or any work completed in relation to the above noted accident date. Those funds shall be deducted prior to any other party removing funds for any reason, including but not limited to attorney’s fees, costs, other court fees, or any other bill or lien whatsoever. Patient hereby directs their present and/or future attorney to pay said outstanding medical bill in connection with the above noted treatment. This agreement shall obligate each attorney who represents the above named patient in any way and recovers any funds related to the above noted accident date and creates a constructive trust with said attorney. Further, this agreement shall extend pay any outstanding balance for any copies, costs or reports the above named Medical Provider endures in relation to any legal issue for the above accident date. The Patient hereby agrees to waive any rights they have, under contract, law or equity, to have the Medical Provider bill a third party entity, including but not limited to any contracted payer, health insurer or government payer and further desires to pay for the medical treatments through the legal action’s proceeds.
Sample of Unreasonable Surgeon Bill

<table>
<thead>
<tr>
<th>Date</th>
<th>Code</th>
<th>Description</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/06/2016</td>
<td>22856</td>
<td>S- CERV DISC REPLACEMENT</td>
<td>SELF</td>
<td>1.00</td>
</tr>
<tr>
<td>01/06/2016</td>
<td>22551</td>
<td>S-CERV FUSION PEEK</td>
<td>SELF</td>
<td>1.00</td>
</tr>
<tr>
<td>01/06/2016</td>
<td>76000</td>
<td>FLUORO MD TIME&lt;1 HOUR</td>
<td>SELF</td>
<td>1.00</td>
</tr>
<tr>
<td>01/06/2016</td>
<td>22851</td>
<td>S- SPINE CAGE</td>
<td>SELF</td>
<td>2.00</td>
</tr>
<tr>
<td>01/06/2016</td>
<td>22552</td>
<td>S-CERV FUSION PEEK ADDT L</td>
<td>SELF</td>
<td>1.00</td>
</tr>
</tbody>
</table>

Surgeon Total $76,200.00
# Sample of Unreasonable Surgery Center Bill (same surgery)

<table>
<thead>
<tr>
<th>Billing Code(s)</th>
<th>Charge Description</th>
<th>Modifiers</th>
<th>Proc Codes</th>
<th>Billed Amt</th>
</tr>
</thead>
<tbody>
<tr>
<td>22856 22866</td>
<td>TOTAL DISC ARTHROPLASTY</td>
<td></td>
<td>84.62</td>
<td>$36,000.00</td>
</tr>
<tr>
<td>22551 22551</td>
<td>Arthrodesis, anterior interbody, including disc</td>
<td>59</td>
<td>81.02</td>
<td>$12,000.00</td>
</tr>
<tr>
<td>20930 20930</td>
<td>Allograft for spine surgery only; morselized</td>
<td>59</td>
<td>78.09</td>
<td>$6,000.00</td>
</tr>
<tr>
<td>22851 22851</td>
<td>Application of intervertebral biomechanical</td>
<td></td>
<td>81.06</td>
<td>$3,304.00</td>
</tr>
<tr>
<td>22851 22851</td>
<td>Application of intervertebral biomechanical</td>
<td>59</td>
<td>81.06</td>
<td>$3,304.00</td>
</tr>
<tr>
<td>22552 22552</td>
<td>ARTHRODESIS ANTERIOR INTERBODY</td>
<td></td>
<td>81.00</td>
<td>$2,202.15</td>
</tr>
<tr>
<td>99070 99070</td>
<td>Supplies and materials (except spectacles),</td>
<td></td>
<td></td>
<td>$35,120.99</td>
</tr>
<tr>
<td>Diagnosis Codes: M50.22</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Total Billed Charges:** $97,931.14
# Cost of One Surgery

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surgeon:</td>
<td>$75,200.00</td>
</tr>
<tr>
<td>(9:03 a.m. – 12:17 p.m.)</td>
<td></td>
</tr>
<tr>
<td>Surgery Center:</td>
<td>+ $97,931.14</td>
</tr>
<tr>
<td>(Check in 6:40 a.m.)</td>
<td></td>
</tr>
<tr>
<td>(Discharge 2:30 p.m.)</td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL:</strong></td>
<td><strong>173,131.14</strong></td>
</tr>
<tr>
<td>(Approximately 6 hours)</td>
<td></td>
</tr>
</tbody>
</table>
How Do We **Combat** Excessive Medical Bills?
The Law

• Tort law is about making Plaintiff whole; not providing a windfall.

• Evidentiary rules are about admitting all relevant evidence and exploring bias.
The Law

Medical bills must be:

1. Reasonable and necessary to the treatment of the condition.
2. The charges have to be “reasonable and customary” for the community.
3. Plaintiff has a duty to mitigate damages.
4. Defendant has a right to show witness bias.
Medical Bills

Reasonable

Necessary
Collateral Source Rule

- Jury is not to hear about health insurance, Worker’s Comp., Medicare, etc.
Many hospital executives dismiss those list prices — also known as chargemaster prices — as meaningless and misleading, since few patients ever pay them. Commercial insurers often use them as a starting point for negotiating big discounts. Medicare itself pays hospitals predetermined rates based on diagnosis, regardless of what they charge.” – Wall Street Journal (2014)

“On average, hospitals end up receiving only about 35 to 40 percent of their billed charges” and hospital officials are now all too willing to distance themselves from the chargemaster, calling it “irrelevant” and treating it “as if it were an eccentric uncle living in the attic.” – Time Magazine (2013)
The Law

- *Temple University Hospital, Inc. v. Healthcare Management*, 832 A.2d 501 (Penn. 2003) (Reasonable value is the value paid by the relevant community and a hospital’s rates cannot be considered the value of the benefit conferred because it is not what people in the community ordinarily pay for the medical services.)

- *Corsini v. United Healthcare Services, Inc.*, 145 F.Supp.2d 184 (D.Rhode Island 2001) (The amounts charged are amounts that the providers unilaterally decided that their services were worth rather than amounts that the market place determined to be reasonable and customary for those services.)

- *Patterson v. Horton*, 83 Wash.App. 531, 543, 929 P.2d 1125, 1130 (Wash. 1997) (Medical bills, on their own, are not sufficient to show that the billed charges are reasonable.)
The Law

- **Mastronardi v. Zayre Corp.**, 120 R.I. 859, 863, 391 A.2d 112, 115 (1978) (A number of other states have also concluded that medical bills, on their own, are not sufficient to show that the billed charges were reasonable.)

- **Adler v. HSA of New Orleans**, 278 So. 2d 177, 180 (La. App. 1973) (“We are concerned only with the reasonableness of the surgeon’s fees vis a vis the extent of the responsibility of [defendant], not the reasonableness of the amount of the bill as between the surgeon and the patient.”)
Commercial Health and Dental Insurance Data – Commercial health and dental insurance data, which are the type in the FAIR Health Database, are based on charge amounts billed by healthcare providers, as reported by health plans and other healthcare payors in the private insurance system. FAIR Health uses these data to develop medical and dental cost estimates that reflect the fees that healthcare providers bill in different geographic areas. These fees are similar to what health insurance plans may call “usual, customary and reasonable” (UCR) charges. Cost estimates based on FAIR Health data are different from fees established by Medicare, a federal health insurance program that covers individuals ages 65 and older, as well as individuals with end-stage renal disease and certain persons with disabilities. Medicare fees are usually lower than commercial charge amounts. The FH Medical Cost Lookup provides out-of-pocket cost estimates for individuals covered by plans that use either UCR-based or Medicare-based out-of-network reimbursement methods. The data available on the FH Consumer Cost Lookup reflect fees for services provided “out-of-network,” and not the “in-network” fees negotiated by insurers for services obtained from providers who participate in the plan’s network.
Vocabulary

**CPT® or Current Procedural Terminology®** – CPT® is a registered trademark of the American Medical Association ("AMA"). Current Procedural Terminology (CPT) codes are numbers assigned to services and procedures performed for patients by medical practitioners. The codes are part of a uniform system maintained by the American Medical Association (AMA) and used by medical providers, facilities and insurers. Each code number is unique and refers to a written description of a specific medical service or procedure. CPT codes are often used on medical bills to identify the charge for each service and procedure billed by a provider to you and/or your insurer. Most CPT codes are very specific in nature. For example, the CPT code for a fifteen-minute office visit is different from the CPT code for a thirty-minute office visit. You will see a CPT code on your Explanation of Benefits form (EOB). You can also ask your healthcare provider for the CPT code for a procedure or service you will undergo, or have already received.
Healthcare Common Procedure Coding System (HCPCS) codes – There are two main types of HCPCS codes: Level I and Level II codes.

- **Level I** codes are 5-character Current Procedural Terminology (CPT) Codes that are developed and maintained by the American Medical Association. CPT codes refer to professional services such as reading an MRI, giving a shot, seeing a patient for an office visit or performing surgery. There are 3 categories of Level I codes. Category I codes have 5 digits. Category II codes are used for performance measurement and have 4 digits followed by the letter F. Category III codes are used for emerging technologies, and have 4 digits followed by the letter T.

- **Level II** HCPCS codes include one letter followed by 4 digits (e.g., A9999). Most Level II codes refer to services or items such as durable medical equipment (e.g., wheelchairs, crutches), ambulance services, vision and hearing supplies, injectable and chemotherapy drugs and prosthetic devices. Level II HCPCS codes are maintained by the Centers for Medicare and Medicaid Services (CMS), a division of the US Department of Health and Human Services. You may see a HCPCS code on your Explanation of Benefits form (EOB). You can also ask your healthcare provider for the relevant HCPCS code(s) for a procedure or service you will undergo, or have already received.
Usual and Customary Rate (UCR) – A term often used to describe a level of reimbursement that insurers use to calculate reimbursements for out-of-network care. If your plan covers some out-of-network care, your insurer may base the payment on a price that it determines to be “usual, customary and reasonable” in your area. It’s a good idea to find out this rate and then ask your provider how much he or she will charge for the service you need. To understand your plan’s UCR, contact your insurer. That way, you can make an informed decision and you won’t be surprised by a large bill.
Two Ways to **Attack**

1. Direct discovery on market prices.

2. Get an expert to address market prices.
Direct discovery to healthcare providers to show what they truly accept as the value of their services.
Subjects of Discovery

- Subpoena charges to other patients for same procedure
- CPT codes
- Depose Billing Clerk
- Determine if HCP sells receivables
- Establish number of other patients on LOP and/or referred by Plaintiff attorney
- Search docket to see if HCP ever filed collection action for LOP
YOU ARE COMMANDED to appear at the offices of the undersigned counsel on ________________, 2016 at 10:00 a.m., and to have with you at that time and place the following:

1. Medical bills, invoices, payments, charges, payments, reductions, itemizations and billing records regarding (PATIENT NAME), DOB: __________, SS#: xxx-xx-______.

2. Copies of any and all medical charges billed, payments made and discounts provided to patients with the same medical care, costs and medical procedures/surgeries received by (Patient Name) for a three-year period from September 1, 2013 – September 1, 2016 for patients with procedures with the following CPT Codes as listed on your Account Inquiry for (Patient Name): 22551, 22552, 20936, 22845, 22851, 95861, 95940, L8699, L8699, A4649, 99070 and 64483 (for physicians, assistants, nurses, practitioners, etc.) with all patient identifying information redacted.
## Local Spinal Surgeon

<table>
<thead>
<tr>
<th>Procedure Code</th>
<th>Billed Charge</th>
<th>Payments</th>
<th>Insurance Withheld</th>
<th>Contractual Adjustments</th>
<th>WriteOff Adjustments</th>
<th>Refund Amount</th>
<th>Billed Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>20936</td>
<td>$411,180.00</td>
<td>$43,225.12</td>
<td>$1,400.00</td>
<td>$270,858.86</td>
<td>$55,125.31</td>
<td>$758.52</td>
<td>589</td>
</tr>
<tr>
<td>22551</td>
<td>$6,499,300.75</td>
<td>$1,263,437.02</td>
<td>$330.97</td>
<td>$4,359,252.41</td>
<td>$159,830.26</td>
<td>$14,889.41</td>
<td>427</td>
</tr>
<tr>
<td>22552</td>
<td>$787,185.00</td>
<td>$102,794.70</td>
<td>$55.31</td>
<td>$526,943.25</td>
<td>$49,060.54</td>
<td>$0.00</td>
<td>225</td>
</tr>
<tr>
<td>22845</td>
<td>$3,810,167.75</td>
<td>$561,392.07</td>
<td>$129.04</td>
<td>$2,389,061.63</td>
<td>$485,397.41</td>
<td>$5,655.12</td>
<td>607</td>
</tr>
<tr>
<td>22851</td>
<td>$3,683,427.50</td>
<td>$486,142.72</td>
<td>$135.27</td>
<td>$2,442,928.67</td>
<td>$395,415.45</td>
<td>$4,190.87</td>
<td>1,072</td>
</tr>
<tr>
<td>64483</td>
<td>$31,791.00</td>
<td>$4,711.71</td>
<td>$2.92</td>
<td>$235,134.44</td>
<td>$2,139.02</td>
<td>$66.66</td>
<td>29</td>
</tr>
<tr>
<td>64484</td>
<td>$5,401.00</td>
<td>$908.44</td>
<td>$1.35</td>
<td>$4,479.78</td>
<td>$11.42</td>
<td>$0.00</td>
<td>11</td>
</tr>
<tr>
<td>99080</td>
<td>$2,465.00</td>
<td>$2,415.00</td>
<td>$0.00</td>
<td>$0.00</td>
<td>$0.00</td>
<td>$0.00</td>
<td>100</td>
</tr>
<tr>
<td>99199</td>
<td>$335,054.88</td>
<td>$829,933.15</td>
<td>$0.00</td>
<td>$0.00</td>
<td>$10,297.88</td>
<td>$11,010.50</td>
<td>3,441</td>
</tr>
<tr>
<td>99204</td>
<td>$2,483,800.00</td>
<td>$435,713.31</td>
<td>$727.53</td>
<td>$1,954,718.74</td>
<td>$614,463.32</td>
<td>$1,248.52</td>
<td>2,074</td>
</tr>
<tr>
<td>99214</td>
<td>$5,448,475.00</td>
<td>$934,301.61</td>
<td>$1,638.09</td>
<td>$4,261,373.39</td>
<td>$133,884.27</td>
<td>$5,612.01</td>
<td>6,939</td>
</tr>
<tr>
<td><strong>Summary</strong></td>
<td>$24,003,247.88</td>
<td>$4,664,974.85</td>
<td>$4,420.48</td>
<td>$16,232,140.16</td>
<td>$1,352,624.89</td>
<td>$43,431.61</td>
<td>15,514</td>
</tr>
</tbody>
</table>
### Local Surgery Center

<table>
<thead>
<tr>
<th>CPT 22551</th>
<th>Total # of times performed between 3/1/2013 and 9/1/2016</th>
<th>242</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total amount billed between 3/1/2013 and 9/1/2016</td>
<td>$6,380,305.50</td>
</tr>
<tr>
<td></td>
<td>Total amount collected</td>
<td>$996,779.85</td>
</tr>
<tr>
<td></td>
<td>Average payment</td>
<td>$8,376.30</td>
</tr>
</tbody>
</table>
Local Surgery Center

CPT code 22552
Total # of times performed between 3/1/2013 and 9/1/2016
176
Total amount billed between 3/1/2013 and 9/1/2016
$3,059,916.00
Total amount collected
$364,727.48
Average payment
$6,078.79
Local Surgery Center

CPT code 20936
Total # of times performed between 3/01/2013 and 9/01/2016
379
Total amount billed between 03/01/2016 and 09/01/2016
$5,773,724.00
Total amount collected
$782,801.10
Average payment
$5,930.31
For More Information on Healthcare Costs Estimates Visit:

www.fairhealthconsumer.org

FAIR Health is dedicated to sharing information about healthcare prices and health insurance so that you can better manage your family’s healthcare expenses.
Florida’s Supreme Court Strikes Again

Worley vs. Central Florida YMCA – Florida Supreme Court (SC15–1086)

- Cannot ask Plaintiff if attorney referred Plaintiff to a “treating” doctor.
- Cannot discover relationship – billing agreements – between Plaintiff’s attorney and Plaintiff’s treating physicians from other cases in which firm referred other clients.
- “[W]e do not believe that engaging in costly and time-consuming discovery to uncover a ‘cozy agreement’ between the law firm and a treating physician” is appropriate.
- Cannot get LOPs (relationship) for all cases between Plaintiff’s counsel and treating physician.
Conflict Issues

Your partner represents the Healthcare Provider.
The End
WEDNESDAY, JULY 26, 2017
9:30 A.M.
PLENARY PROGRAM

The Swiss Way—Banks, Guns and Happiness
LePetit Palais

Speaker:
Christian Lang
WEDNESDAY, JULY 26, 2017
10:30 A.M.
PLENARY PROGRAM

Commercial Uses and Liability Exposures Associated with Drones
LePetit Palais

Speakers:
Chris McCall
Kate Browne
Jack Delany
WHAT FLIES WHEN IT COMES TO DRONES AROUND THE WORLD

AN OVERVIEW FROM CORSO CLAIMS
<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>5</td>
</tr>
<tr>
<td>Canada</td>
<td>9</td>
</tr>
<tr>
<td>Europe</td>
<td>12</td>
</tr>
<tr>
<td>Germany</td>
<td>13</td>
</tr>
<tr>
<td>India</td>
<td>15</td>
</tr>
<tr>
<td>Mexico</td>
<td>16</td>
</tr>
<tr>
<td>New Zealand</td>
<td>20</td>
</tr>
<tr>
<td>South Africa</td>
<td>22</td>
</tr>
<tr>
<td>Spain</td>
<td>24</td>
</tr>
<tr>
<td>Switzerland</td>
<td>28</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>30</td>
</tr>
</tbody>
</table>
Dear All

Many legal commentators have noted that 2014 may be considered the Year of the Drone as dozens of countries around the world instituted regulations regarding their use.

The purpose of this paper is to provide practical information on the regulatory environment for commercial drones. A Drone page has been set up on OURSPACE and CORSO Casualty & Aviation Claims hopes to add additional countries to this document.

**TEST YOUR KNOWLEDGE OF DRONES**

Which country prohibits drones within 5 kilometers of a ski slope? (a) Canada

Which country was the first to issue regulations on the use of drones? (b) Mexico

Which country only issues permits to fly to citizens and nationals? (c) Germany

Which country requires a drone operator to certify it will comply with all privacy laws? (d) Australia

Which country requires a drone (e) Switzerland
operator to have a minimum of $100,000 in liability insurance?

The answers appear at the bottom of the next page

A Few Reminders

Every country has some form of aviation regulations and a transportation department.

Please remember that just because a country does not have specific rules for commercial drone does not mean you are free to fly. Always check with the regulatory authorities before you use your drone.

In many cases the regulations are going to be linked to the class of airspace your drone will operate in.

Controlled Airspace (Class A-E)
Uncontrolled Airspace (Class F-G) (the US does not have Class F airspace)

The terminology used to describe drones differs from country to country. The most common acronyms for the equipment are:

UAS-Umanned Aircraft System
UAV-Unmanned Aerial Vehicle
RPAS-Remotely Piloted Aircraft Systems

Other important acronyms are:

AGL-Above Ground Level
ICAO –International Civil Aviation Organization
NOTAM-Notice to Airmen
VLOS-Visual Line of Sight

There are many law firms which specialize in obtaining the necessary regularly approvals and have very useful papers on their blogs and websites.
AUSTRALIA

Australia was the first country in the world to regulate remotely piloted aircraft, (RPA) and issued its operational regulations for RPAs in 2002.

The Australian Civil Aviation Safety Authority (CASA) is the government agency responsible for regulating the use of unmanned aircraft operating in civil airspace.

The CASA uses the term "RPA" to refer to remotely piloted aircraft.

The terms "RPAS" and "UAS" refer not only to the aircraft, but also to related systems, including all ground support equipment and personnel.

Australia's General Rules for RPA Operations

RPA are used for "commercial, government or research purposes," whereas model aircraft are used for recreational purposes.

Quiz Answers

No. 1-e  No. 4 -c
No 2-d  No 5-a
No 3-b
RPA activities generally will be approved if the proposed operations are:

- over unpopulated areas;
- outside of controlled airspace;
- up to 400 feet AGL; and
- greater than 3 nautical miles from an aerodrome. (An aerodrome includes small general aviation airfields, large airports and military bases. All airports are aerodromes but not all aerodromes are airports)

Certificates You Will Need

To operate an RPA for commercial purposes, irrespective of size, you will need to obtain the following certificates:

(1) an Unmanned Aerial Vehicle Controllers Certificate; and
(2) an Unmanned Operator's Certificate (UOC).

Areas Addressed in Application for UAV Operators Certificate (UOC)

Applicants must submit a Form 041 Application for UAV Operator's Certificate (“UOC”), which includes questions about:

The proposed operation (e.g., Aerial Surveying, Aerial Spotting, Powerline Inspection, Aerial Photography, Aerial Application, Aerial Advertising, Target Drone, Basic RPAS training, or RPAS type conversion training)

Details concerning the applicant, key personnel, and the proposed operation.

Disclosure of any criminal and/or regulatory action by the applicant and its key personnel.

Information on the Qualifications of the Chief Remote Pilot and, for small RPAs, the Maintenance Controller.

Other areas of focus on the application include:
the type and class and launch mass of the RPA(s);
proposed operating locations;
resources utilized to support the operation;
organizational structure; and
disclosure of any contracted maintenance or training providers.

RPA pilots need to have general aviation knowledge comparable to that required for a private pilot's license, as well as skills specific to operating unmanned aircraft.

The UOC Application Process

Applicants must pay a fee which is calculated by the CASA.

The fee will vary depending on the complexity of the application. The initial certification typically costs around $4000, and the certification is good for one year. The first annual UOC renewal fee is $480, with renewals required every 3 years thereafter.

Applicants must agree to have all their UOC details published on the CASA website.

It typically takes the CASA approximately 12 weeks to process a UOC application

UOC APPLICATIONS should be directed to:
CASA Permission Application Centre
Permissions Issue Section (BNE)
GPO Box 2005 CANBERRA ACT 2601
By fax: 07 3144 7333
By email: regservices@casa.gov.au

Practical Considerations
The CASA is in the process of modernizing and re-writing its RPAS regulations, and anticipates they will be completed by 2016.


CASA has announced it will provide additional guidance to the industry in a suite of advisory circulars (ACs) addressing topics such as Operations, Training and Licensing, Manufacturing and Initial Airworthiness, Maintenance and Continuing Airworthiness, Safety Management/Human Performance, Operations in Controlled Airspace, and Applying for an Operator’s Certificate.

CASA has posted a reading list concerning privacy matters as part of the application process for an unmanned operator's certificate, but CASA describes its role as restricted to RPA safety issues.

The primary governmental office concerned with privacy is the Office of the Australian Information Commissioner. [www.oaic.gov.au]
Transport Canada is the agency responsible for overseeing UAV operations. Its website is www.tc.gc.ca/eng/civilaviation/menu.htm

UAV's are considered aircraft in Canada. All UAV operations must meet "equivalent" levels of safety as manned aircraft. Your UAV will have to be operated "in accordance with the rules governing the flight of manned aircraft to the greatest extent possible".

**General Rules for UAV Operations**

- Do not fly any closer than 5 miles (8 km) from any airport, heliport or aerodrome.
- Higher than 300 feet (90 metres) above the ground.
- Within restricted airspace (such as military bases, prisons, forest fire areas).
- Closer than 100 feet (30 metres) from vehicles, boats, buildings, structures or people.
In populated areas or near large groups of people (such as at sporting events, concerts, festivals, firework shows).
Where or when you could interfere with any first responders (fire department, police, etc) as they conduct their duties.
Near moving vehicles. Avoid highways, bridges, busy streets or anywhere you could endanger or distract drivers.

If you are flying for a fee or your UAS weighs more than 35 kg you will need to obtain a **Special Flight Operations Certificate (SFOC)**.

**Staff Instruction SI 623-00** - which can be downloaded off the website contains all the relevant information.

**Information Required On The SFOC Application**

- The identity of the Applicant and the Operation Manager (the person on the ground with control)
- Details on how the Operation Manager will be contacted
- Description of the type and purpose of the operation
- Dates and times for the proposed operations
- Complete description of the Aircraft to be used and pertinent flight data and manuals
- Plan of the operation and area to be used
- Scale diagram, aerial photograph, large scale topographic chart
- The altitudes and routes for arrival and departure
- The locations and heights of prominent obstacles
Altitude and routes used when performing the operation

UAV Maintenance (generally in accord with manufacturer’s instructions)

Risk Management Assessment

A security plan for the area

Emergency contingency plan

Any other information you wish to bring to Transport Canada’s attention

INSURANCE

Transport Canada requires commercial drones operators to have liability insurance. However, the regulations do not specify the amount of insurance which is required. Anecdotal evidence suggests Transport Canada will require at least $100,000 in liability insurance. We suggest you coordinate with the Regional Office early in the process to try to find out what liability limits they may think are appropriate for your proposed operation.

NUTS & BOLTS

You will need to file your application with the Regional Transport Canada General Aviation Office that governs the area of the flight. The targeted processing time is 20 working days.
EUROPE-It’s a Little More Complicated

The European Aviation Safety Agency (EASA) has issued a basic regulation, **EC Regulation 216/2008**, which governs UAS operations in Europe.

The EC Regulation leaves many aspects of UAS operation to be addressed through national regulation and the Regulation specifically excludes unmanned aircraft weighing less than 150 kg these aircraft remain subject to national legislation.

Unmanned aircraft which weigh more than 150 kg are subject to European Regulation **(EC) No.216/2008**. The design and manufacture of the aircraft must comply with the relevant Certification Specifications similar to manned aircraft. The aircraft must be issued a Certificate of Airworthiness or Permit to Fly.

**Insurance**

The operator must possess third party liability insurance with a minimum of 860K Euros. **EU Reg 785/2004**

The EU set up a UAS initiative in 2011 and launched a study on the integration of UAVs as part of the Single European Sky initiative.

A final report from the European Remotely Piloted Aircraft System Steering Group on the integration of UAVs into European airspace was presented to the European Commission in June 2013, with a view to integration starting in 2016.
GERMANY

The Luftfahrt-Bundesamt ("LBA") is the federal office for civil aviation. The local states within the Federal Republic of Germany are responsible for issuing permits for UAS operations.

Its website is http://www.lba.de/EN/Home/home_node.htm

The German Aviation Act was recently amended to define UAS as “aircraft” if used for purposes other than sports or recreational activity. This was done as a first step to integrate UAS into German airspace.

UAS are regulated by the German Aviation Act ("Luftverkehrsgesetz") and the German Aviation Regulations (Luftverkehrs-Ordnung).

General Rules for UAS Operations

It is generally prohibited to operate a UAS out of the controller’s unaided visual line of sight and as a general matter you cannot operate a UAS which weighs more than 25 kg.

The local authorities may issue a permit as an exception to this rule, if they determine that the proposed operation poses no risk to other aircraft or to public safety or order, and that it does not infringe on individuals rights under data protection laws.
**Ascent Permits** ("Aufstiegsgenehmigung") may be valid for up to 2 years. Permits may be either for a single flight or repeated use.

For unmanned aircraft of less than 5 kg, it is generally possible to obtain a limited permit for operation up to 100 meters from the ground, but not over congested areas or areas otherwise restricted, such as prisons, military complexes, or disaster areas.

**Areas Addressed in Application for UAS Operations**

- Information about the applicant
- Details concerning the purpose of the proposed flight or operation.
- Information about the UAS itself.
- Proof of adequate liability insurance
- Declaration of compliance with privacy/data protection laws.
- A map showing takeoff route and airspace, dates/times of operation, and technical information on the UAS and its payload.
- Recent knowledge and experience or training of pilots/controllers

- Other issues to be addressed may include:

  Absence of safety risks to air traffic, people and property;
  Consent of affected landowners
  Conformity with environmental/conservation laws

Precise restrictions may vary from state to state. News reports indicate the permitting process may be more stringent and protracted in urban areas.

Germany is conducting ongoing evaluation of its UAS regulations and they are expected to adopt new requirements as they gather additional data.
INDIA

Currently there are no regulations regarding UAS in India and many people thought that meant they were permitted. In fact, Amazon Prime India announced it would start drone delivery services in early November. However, on October 7, 2014, the Director General of Civil Aviation issued a Public Notice for Strict Compliance

*Due to lack of regulation, operating procedures/standards and uncertainty of the technology, UAS poses threat for air collisions and accidents. Till such regulations are issued, no non government agency, organization, or an individual will launch a UAS in Indian Civil Airspace for any purpose whatsoever.*
MEXICO

Please remember due to concerns over the North American Free Trade Agreement (NFTA) the Division of Aviation will only issue authorization to Mexican nationals or companies.

The Civil Aviation Act (Ley de Aviación Civil) acknowledges the existence of UAS.

All UAS operations require an Operation Authorization (Autorizacion de Operacion) from the Division of Aviation. The website: http://dgac.sct.gob.mx

The Operation Authorization Application

The application must be filed with the Department of Engineering for Regulations and Certification in the Aviation Division(Direccion de Ingenieria, Normas y Certificacion de la Direccion General Adjunta de Aviacion).
Once you obtain the Authorization it remains valid indefinitely, but is subject to suspension, cancelation or revocation if operations do not comply with any limits contained in the Authorization.

Flight manuals, maintenance manual and any other relevant manuals must be included with the Operation Authorization Application Manual. The Division of Aviation may also require a test flight and inspection.

**INFORMATION REQUIRED ON APPLICATION.**

- Sense & Avoid capabilities
- Planned preflight and taxiing operations
- Take-off, in-flight, landing and post-flight operations
- Accident reporting procedures
- Areas of operations
- Description of communication equipment
- Security and anti-collision methods
- How is aircraft programmed for take-off and landing
- Speed and altitude of proposed flights
- Proposed number of flights
- Risk management.
- The identification of the operator, aircraft, aircraft manufacturer, etc.
- Visibility of the aircraft
- Details of transponder
- Identification of crew members on the ground
- Description of how crew will communicate with air traffic control and other aircraft
- Information on the piloting crew. Must have at least a private pilot license (fixed wing aircraft or helicopter), have passed medical exam; must have at least 50 hours of UAS flight time and recent experience as pilot in command of a UAS

- **Operations Manual.** Must include required procedures for all anticipated operations
Circular CO AV-23/10 R1, issued by the Communication Transportation Department, provides the regulatory scheme for UAS operations.

Mexico categorizes UAS systems based on weight with different regulations for drones weighing over 20kg.

All UAS weighing more than 20 kg. must have:

1. Airworthiness Certificate (Certificado de Aeronavegabilidad) and
2. Type Certificate (Certificado de Tipo o de Aprobacion de Tipo), and must be registered.

INFORMATION REQUIRED ON THE TYPE CERTIFICATE APPLICATION

The application must be filed with the Department of Engineering for Regulations and Certification in the Aviation Division (Direccion de Ingenieria, Normas y Certificacion de la Direccion General Adjunta de Aviacion).

Once you obtain your Type Certificate it remains valid indefinitely, however it can be suspended, cancelled or revoked if operations do not comply with any limit in the Certificate.

The application for Type Certificate has to include:

- An Approval Plan which must contain details regarding the proposed area of operation with coordinates, proposed flight altitude, training procedures for pilots, observers and ground personnel, and documentation showing that such individuals have completed the required training.

- Must also include the pilot's license and medical certificate.

- Airworthiness documentation. Should include details of aircraft characteristics, propulsion systems, avionics, navigation systems,
payload, controls, automatic pilot, communication systems, emergency procedures and systems, maintenance program, software programs.

For UAS **weighing less than 20 kg.**:

- The operator must always have "unaided visual contact" (similar to the line of sight in the US)
- Cannot operate above 150 meters unless in Class F or G airspace
- Are prohibited from dropping or throwing things,

**Restrictions**

The operation of any size drone is prohibited at airports and if your UAS is going to be used for surveillance or patrol it cannot be operated below 150 meters if you are in an area you are in a congested urban areas or over any event attended by more than 1000 people.
NEW ZEALAND

RPAS are regulated by the Civil Aviation Authority of New Zealand (CAA) its website is https://www.caa.govt.nz

CAA is currently working on a Notice of Proposed Rulemaking, but has not provided any estimate of when the draft rules will be completed.

RPAS under 25 kilograms (55.1 pounds) are classified as a "model aircraft."

Model aircraft are currently regulated under Part 101 of the Civil Aviation Rules (CAR).

Subpart E, subsection 201 sets flight restrictions such as a visual line-of-sight during daylight hours, flying below 400' and at least 4 km from any airport.
No RPAS can be flown within 4 km of an uncontrolled aerodrome unless approved by the operator.

You cannot fly within 4 km of a controlled aerodrome without approval from air traffic control, and the pilot in command either has a pilot qualification issued by a model aircraft association or is under the supervision of such a person or a person authorized to give instruction in the operation of radio controlled model aircraft,

Flights over 400 feet are permitted under some circumstances

- You cannot intrude in class C, D, or E airspace
- You cannot enter a designated danger area under Part 71
- You cannot enter a "low flying zone" under Part 71.
- You must also have someone "authorized by a model aircraft association approved by the Director" provide the New Zealand NOTAM Office the name and contact information of the operator, the location of the operation, the date, time and duration of the operation, and the maximum height of the flight.

UAS under 25 kg fall within the model aircraft regulation regardless of who flies them.

UAS weighing between 15 kg and 25 kg must be "constructed and operated under the authority of a model aircraft association approved by the Director."

Currently, the only approved model aircraft association is Model Flying New Zealand.

The CAA offers an "appraisal process" for anyone wanting to operate under CAR Part 101 and will give guidance and advice as to whether a planned operation is compliant.
SOUTH AFRICA

UAS Operations are regulated by the South African Civil Aviation Authority (SACAA). The website is www.caa.co.za

All UAVs are aircraft, and SACAA has the authority under Part 91.01.10 of the Civil Aviation Regulations to prohibit any aircraft operation that endangers public safety.

Hobbyist flights are permitted and are regulated by the Recreational Aviation Administration of South Africa (RAASA)

The RAASA defines a hobbyist as someone who flies for:

Recreation
Sport
Competition
Commercial operation of any UAS is banned. However, interim approvals for certain types of low-risk commercial UAS operations are in the works and will likely be in place by March 2015.

The SACAA website states it is working with ICAO on regulations and standards.

Violators can be fined up to 50,000 Rand (about $4,500) and face up to 10 years in prison if they violate the ban on commercial use of an UAS.
SPAIN

The Spanish Security Air Agency (AESA) is the regulatory agency responsible for commercial drones.

On 4 July 2014, the Spanish government approved Royal Decree 8/2014 a provisional regulatory framework for the commercial operations of drones (the "Regulation") which sets out requirements according to the weight of the unmanned remotely controlled vehicles and the obligations of pilots and operating companies.

The provisional regime allows the use of drones in carrying out aerial works such as: investigation and development activities, aerial agriculture related and treatments that require spreading out substances over the surface or atmosphere, including products for extinguishing fires, aerial surveys, aerial observation and surveillance, including filming and forest fire surveillance activities, aerial advertising, radio and TV emissions, emergency operations, search and rescue, and other types of special works.

Until the definitive regulations are adopted, the operations that can be carried out are limited exclusively to non-controlled air space and to non-populated areas.
The regime establishes certain requirements depending on the weight of the aircraft upon take-off classifying the aircraft in different categories:

- **over 25kg but below 150kg** for all purposes (and over 150kg exclusively for fire extinguishing and surveillance activities) shall be operated in accordance with the requirements and limits set in the relevant airworthiness certificate obtained from the Spanish Security Air Agency (AESA);

- **over 2kg and up to 25kg** must be kept within line of sight at all times by the pilot which is considered to be 500 meters horizontally and 400 feet vertically; and

- only drones **below 2kg** of weight may be flown beyond the line of sight of the pilot, however only up to 400 feet and provided that technical means are put in place to guarantee location at all times. A NOTAM needs to be obtained informing other air operators of the area and conditions where the drone is going to fly.

The Regulation also contains the requirements for testing and business development related flights.

**Requirements Which Apply Regardless of Weight**

There are some requirements that are common to all aircraft as well as for the pilots and companies that operate them which are detailed in Article 50 of the Regulation.

All drones, without exceptions, must have an identification plate fixed to its structure and the companies operating them must have, among other requirements, an operations manual and an aeronautical safety study for each operation.

The Regulation clarifies that drones weighing less than 25kg do not need to be registered in the Aircraft Matriculation Register ("Registro de Matrícula de Aeronaves") under the control of the Spanish Civil Aviation General
Directorate nor have an airworthiness certificate issued by the AESA. Drones above 25kg do need to be registered and obtain an airworthiness certificate in accordance with the Air Navigation Act as amended by the Regulation.

**Pilot Credentials**

All pilots of drones must certify, among other requirements, that they hold a pilot license, including an ultralight aircraft license, or provide sufficient evidence that they have the technical knowledge necessary to obtain said license.

**Insurance**

Drone operators are obliged to obtain an insurance policy covering civil liability in accordance with the Air Navigation Act.

**Restrictions**

Drones may not fly within 8km of an airport

The operator or pilot must not recklessly or negligently cause or permit an aircraft to endanger any person or property.

The Regulation states that the operator, shall ultimately be held responsible for the aircraft and the operation, and for complying with the applicable regulations, particularly those regarding the use of radio spectrum, data protection or the capture of aerial images, and it does not exempt him from personal liability for damages caused by the operation of the aircraft.

**Nuts & Bolts**

From a procedural perspective, drones weighing equal or less than 25kg are subject to a mere prior notice to the Spanish Security Air Agency within at least five days of the scheduled flight (notice which must include all relevant
information regarding the flight and in relation to which the AESA shall issue a written acknowledge of receipt specifying the authorized activity).

Those over 25 kg need specific prior authorization from the AESA. The Regulation establishes the rule of negative administrative silence (against the general principle of positive public administrative rules in Spain) and therefore if the AESA fails to resolve a given request within the legal time period the authorization must be considered denied.
SWITZERLAND

Switzerland is one of the most drone friendly nations in the world. In fact there is a section of Zurich known as the "the silicon valley of robotics and ETH Zurich, is one of the world leading universities in aerial robotics.

The Federal Office of Civil Aviation (FOCA) is the regulatory body responsible for commercial drones

If the UAV's weight does not exceed 30 kilograms it is considered a model aircraft and no authorization is needed as long as the "pilot" has visual contact with the drones but the UAV will have to comply with some regulations

- If you want to use tools such as binoculars or video eyewear you will need to get a permit from the FOCA
- If the "pilot" is using binoculars or video eyewear you will need a second "operator" who can monitor the flight and intervene whenever necessary in the control of the aircraft. The "operator" must be at the same site as the pilot.
- Aerial photographs are permitted provided that the requirements can be made to protect military facilities.
- Attention will be paid and the protection of privacy, respectively, the provisions of the Data Protection Act.
Generally you cannot fly a drone within 100 meters of crowds. You cannot fly your drone within 5 kilometers of a ski slope. Cantons and municipality may adopt additional restrictions on the use of unmanned aerial vehicles. The Canton of Zurich has done so.

The use of aircraft without occupants that weigh more than 30kg requires the permission of the FOCA. An Airworthiness and an Air Operators Certificate is required.

Flight Permits are granted on a case by case basis and once obtained an Operator's certificate is valid for two years.

Order 748.941 contains Restrictions on Model Aircraft

INSURANCE

Liability Insurance to ensure the claims of third parties the operator must carry liability insurance of at least 1M francs unless the aircraft weighs less than 0.5kg.
UNITED KINGDOM

The United Kingdom Civil Aviation Authority ("CAA") regulates civil aviation.

UK regulations generally use the terms UA or RPA to describe the aircraft itself, and UAS for the entire operating system.

EASA-regulated UA (greater than 150 kg) must also be registered with the CAA. Once the CAA processes your application they will issue a registration ID which must be displayed on the aircraft.

Aircraft that weigh 150 kg or less remain under national legislation which, in the UK, is set forth within Air Navigation Order (ANO) 2009.

UA over 20 kg but less than 150 kg are subject to the same regulation as manned aircraft and must qualify for a Certificate of Airworthiness.

It may be possible to obtain an exemption from regulations which it is impossible for unmanned aircraft to comply. If the UA is to be flown no further than 500 feet from the operator and below 400 ft., or within segregated airspace, the CAA will consider exempting it from the Certificate of Airworthiness requirement.
UA with an operating mass of 20 kg or less are defined as “Small UA” and are exempt from most regulations applicable to manned aircraft. You will need a "Permit to Fly" which is relatively easy to obtain.

General requirements are:

- CAA permission required for flights conducted for aerial work (i.e., compensation or pecuniary gain).
- Operation must not endanger anyone/anything.
- Operation must be within remote pilot’s unaided visual line of sight (500 m horizontally, 400 ft. vertically); otherwise, need CAA permission.
- Small UAS used for surveillance purposes have tighter restrictions on minimum distances from people/properties not under operator’s control.

INFORMATION REQUIRED IN APPLICATION FOR OPERATION OF SMALL UAV

- Proof of pilot training
- Overall airmanship skills and awareness and ability to operate the aircraft safely
- A pilot's license is not required and the pilot's knowledge and operating capabilities can be shown through independent assessment.
- Two companies can currently perform such assessments on behalf of the CAA, for a fee: (1) EuroUSC (Basic National Unmanned Aircraft Systems Certificate-Small, or BNUC-s); and (2)ResourceUAS (Remote Pilot Qualification-Small, or RPQ-S).
- Specify type of application (initial issue, renewal or variation to permission for Aerial Work)

- Details about the applicant, including corporate and contact information.
- Pilot information and experience.
• Details about the UAS (manufacturer, type, dimensions, command and control frequency, and number of engines).
• Flying activity details (specific location, nature and purpose of the operation).
• Supporting documentation (photograph of the small UA, operations manual, copy of remote pilot qualification, and insurance details).

Contents of UAS Operations Manual

Among other things, the Operations Manual should address:

• take-off and landing procedures;
• en-route procedures;
• loss of control data link; and
• abort procedures following any critical system failure

Nuts & Bolts Considerations

Completed application form, associated documents and fees must arrive at least 28 days before operations are scheduled to begin.

Initial applications for UAS between 20 kg and 150 kg must include an Airworthiness Assurance.

If seeking flight beyond the VSOL, a separate application for segregated airspace may be required.

Your CAA Permission must be renewed every 12 months. The CAA publishes a list of CAA-authorized commercial UAS operators; the current list contains over 350 operators

Applications should be sent to

Flight Operations Inspectorate (General Aviation)
Civil Aviation Authority
1W Aviation House
Swiss Re
Corporate Solutions

Gatwick Airport South
West Sussex
RH6 0YR
Tel: +44 (0) 1293 573525
Fax: +44 (0) 1293 573973
E-mail: ga@caa.co.uk
USA

The Current Regulatory Environment

Under the 2012 FAA Modernization and Reform Act, Congress mandated that the Federal Aviation Authority (FAA) integrate small UAS, which are defined as systems weighing less than 55 pounds, into the domestic airspace by September 2015.

According to the FAA website, its Notice of Proposed Rulemaking (NPRM) for Small UAS are currently with the Office of Information and Regulatory Affairs (OIRA) for cost/benefit analysis.

The OIRA will meet with groups to hear their concerns about the proposed rule and its analysis will likely to be completed by mid-January 2015. Several FAA officials have stated that the NPRM will come out by the end of December 2014 and since a large number of public comments are expected, the Final UAS Rule won’t be issued until at mid to late 2016.

Recreational drone users can fly within line of sight, away from airports and under 400 feet. Commercial entities, however, are barred from flying drones until the FAA releases its rules.

In late September, commercial users saw a glimmer of hope when the FAA
announced it had granted seven movies production companies regulatory exemptions to fly small UAS at controlled sets. The exemptions are permitted under Section 333 of the modernization act, which gives the FAA more flexibility in allowing some commercial entities to fly small UAS.

As of November 15, 2014, 117 exemption requests had been filed with the FAA, including requests by AIG, State Farm and USAA Insurance, Amazon Prime, Dow Chemical, San Diego Gas & Electric and BNSF railroad. All of the exemption petitions are publicly available at www.regulations.gov

Since the FAA is a safety-oriented agency in theory, there are no limits on what can be done if you can convince the FAA that it can be done safely. The bulk of the Section 333 exemption petitions that have been filed to date make a safety case by comparing what is being done now with what a UAS can do.

What is required for Commercial UAS Operation?

- A Section 333 Exemption
- A Certificate of Waiver or Authorization (COA)
- Notification to the Flight Standards District Office (FSDO) Under Certain Circumstances

Section 333 Authorizations

The FAA has not placed official limits on who can file an exemption request or what types of operations will be considered.

What is the FAA Looking For?

- Outside Controlled Airspace, i.e., Generally Below 400 Feet
- In a Defined, Controlled Area
- Away From Persons or Property
- Within Visual Line-of-Sight
Flown by a Small UAS, i.e., Less Than 55 Pounds
Use a Spotter and Separate Sensor Operator

The FAA Has Ruled Out

- Flight beyond visual line of sight that use GPS or other “sense and avoid” technology
- Flight using First Person View (FPV) technology
- Flight of a UAS over 55 pounds
- Flight of a UAS by a person without a pilot’s license

What Your Petition Should Contain

- A Description of Petitioner
- Qualifications for Approval Under Section 333 of the Reform Act
- Description of the UAS
- Description of Proposed Operations
- Regulations From Which Exemption is Requested (the most common appear to be fuel requirements, altimeter settings, preflight actions, and aircraft worthiness certificates)
- Why the Exemption is in the Public Interest (i.e. why your UAS flights are safer than doing the same actions with a conventional aircraft or helicopter)

Pilot Qualifications and Certifications

- All UAS pilots will require a minimum of a private pilot's license for both safety and national security reasons
- All UAS pilots will require a minimum of a class III Medical Certificate
- All pilots will require experience, both in terms of logged UAS flight hours and flight cycles. The exemption which the film industry obtained required the pilot-in-command to have logged a minimum of 200 flight
cycles and 25 hours of total time as a UAS rotorcraft pilot and at least 10 hours logged as a UAS pilot with a similar UAS type (single blade or multirotor)

Common FAR's Which Will Require An Exemption

Identify the applicable FAR and explain why it cannot be complied with and what alternative action you will take to provide the "Equivalent Level of Safety" to the Regulation.

For example 14 CFR 91.103 requires compliance with the FAA Approved Flight Manual since your UAS will not have an such a manual the UAS's Operations Manual must contain this information and the Pilot must consult it prior to flight, including take off and performance data.

14 CFR 91.119 sets Minimum Safe Altitude Requirements

For the film makers, the FAA required the UAS to be at least 500 feet from any person, vessel, vehicle or structure not involved in the filming, with the possibility of lowering it to 200 feet if approved by the Administrator.

Because the film makers had identified a sterile area, their minimums were the same as for a “sparsely populated area" under 14 CFR 91.119(c) In a “congested area” the minimums would be 2000 feet.

The Federal Aviation Regulations set Minimum Reserve Fuel Requirements but the typical UAS’s battery life cannot meet these requirements when the FAA approved the film makers request it included a requirement that flight be terminated when the battery power reaches 25%. This may change based on how far away from the landing zone the UAS will be operated.

Requirements for The Operations Manual

The Operations Manual should which accompanies the Section 333 exemption petitions should contain all of the specifics of your operation such as:
Mission Identification, Planning, and Documentation
- Aircraft Description, Technical Information and Preflight
- Description of crew roles and qualifications
- Airspace Control and ATC interface
- Normal Operations and Contingency plans
- Aircraft Maintenance Procedures
- Risk Identification, Mitigation and Management

Requirements for the Aircraft Handbook

Must contain all of the specifics of the flight and maintenance of the aircraft and should be based as closely as possible on the Manufacturer’s Instructions:

- How to Fly the UAS
- Ground Link and Ground Station Operation
- How to Maintain the UAS
- How to Maintain the Control and Communications Equipment

How to Get Your COA

Once you have your exemption, any particular flight still has to get approval through the issuance of a Certificate of Authorization (COA) from the FAA Air Traffic Organization.

The FAA has created a new online form to request a COA where you must set forth the specifics of your flight. They can be submitted via email to 9-AJV-115-UASOrganization@faa.gov.

The COA application process is separate from the petition for exemption process. Your COA application must include the Federal Registry docket number associated with your petition for exemption. Both the COA application and the petition for exemption should be submitted under the same name/company name.
The operator will also have to request issuance of NOTAM between 72 and 48 hours prior to the flight to warn other aircraft in the area of the UAS operation.

**When Do You Notify the FSDO**

Each state has its own FSDO and the FAA's website indicates you must advise your local FSDO if you are using a "low flying aircraft".

**Nuts & Bolts**

According to the FAA website

Petitions for Exemption and any supporting materials should be submitted using any of the following methods:

1. Federal eRulemaking Portal: Go to http://www.regulations.gov and follow the online instructions for sending your comments electronically (a petition is submitted as a comment); or
2. Mail: Send your petition to Docket Operations, M-30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001; or
3. Hand Delivery or Courier: Take your petition to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
4. Fax: Fax your petition to Docket Operations at 202-493-2251.

The Petition for Exemption is a public document. It will be available for the public to view and download so you should not include a sensitive business or proprietary information in your petition. If you include a statement that the documents contain competition sensitive information, they will not be posted.
online and they will also be exempt from disclosure under the Freedom of Information Act

Within 1 to 2 weeks of receiving your petition the FAA will post it for public comments. The Public Comment period lasts 21 days and the FAA"s goal is to rule on each petition within 120 days.

Disclaimer
Any legal information contained in this white paper is for informational purposes only. As such, no legal relationship is established by the information contained in this white paper. It's expressly understood that none of the information contained in this white paper is to be considered legal advice by Swiss Re or the authors. Although we believe all the information used was taken from reliable sources, Swiss Re does not accept any responsibility for the accuracy or comprehensiveness of the details given. All liability for the accuracy and completeness thereof or for any damage resulting from the use of the information contained in this white paper is expressly excluded. Under no circumstances shall Swiss Re or its Group companies be liable for any financial and/or consequential loss relating to this white paper.
The Future is Now:
Living and Litigating in the Drone Era

By John J. Delany, III
Delany McBride, Philadelphia

and

Juliana Delany
JOHN (JACK) J. DELANY, III

Managing and founding partner of Delany McBride (PA, NJ, NY, and DE). A Certified Civil Trial Attorney by the Supreme Court of New Jersey and by the National Board of Trial Advocacy. Federation of Defense & Corporate Counsel (FDCC), Vice Chair, Toxic Torts. Adjunct Professor at Jim Beasley Temple Law School, Trial Advocacy Program, LLM. Appointed by the Court of Common Pleas of Philadelphia as a Judge Pro Tem. Author, editor, lecturer. Catastrophic claims trial attorney and National Counsel to several product manufacturers. Named to PA/NJ Super Lawyers 2006-2016. Over 80 major jury trials to a conclusion, hundreds of bench, arbitration and mediation cases resolved, over a billion dollars in construction claim cases resolved, and over $3.5 billion dollars in toxic torts, products, fire loss and transportation cases resolved. Concentration in high-profile, high-stakes litigation against the most prominent plaintiff’s attorneys in the mid-Atlantic states.

Phone: 215.829.4210 – Cell: 215.605.1677
Email: jjd@delanymcbride.com

JULIANA DELANY

More than 30 years of experience as a marketing writer, creative planner and editor for the corporate sector as well as non-profits. Specializing in both print and web communications. Clients include Geisinger Health System, Independence Blue Cross, the Independence Blue Cross Foundation, the University of Pennsylvania and other colleges and universities, and a variety of small businesses.

Email: julidelany@comcast.net
PART I: AN INTRODUCTION TO DRONES

We live in an age when concepts that once existed only in comic books and James Bond films are slowly but surely becoming realities. From cars that drive themselves to recreational jaunts into space, technology is bringing the futuristic fantasies of our childhoods to life—and changing the way we practice law in the process.

Drones, or unmanned aerial vehicles (UAVs), are the most mainstream and visible iterations of this phenomenon. By now you’ve probably seen one snapping pictures at a wedding celebration or hovering over the beach. You’ve seen news stories about drones that deliver packages and drones that carry out military offensives. You may also have read editorials about the culture clash and controversy that drones have caused. Is drone technology a brilliant advance with hundreds of practical applications, or a serious invasion of privacy and a threat to air safety? As with most new technologies, the answer is a matter of perspective.

Brilliant Invention or Privacy Invasion?

Imagine the aftermath of a severe storm in a rural town. Power lines are down and homes lie in ruins. Overturned cars, uprooted trees, and rising floodwaters block rescue vehicles from reaching families suffering from injury, illness, exposure, or hunger. It might be hours, or even days, until relief gets through.

Now, imagine the buzzing of drones as they enter the picture. They take stock of the situation in seconds, sending images in real time to those planning relief. The information they gather can assess the extent of damages, map the clearest and fastest routes to the victims, and deliver lifesaving supplies.

Disaster relief is just one of many valuable uses for drones. From surveying real estate and testing power lines to videotaping sporting events and weddings, from monitoring weather and traffic
patterns to dusting crops, drone use is quickly becoming mainstream (1). Increasingly, drones support the telecommunications networks that power our cell phones. Don’t be surprised if one day soon a drone drops in to verify your insurance claim or read your electric meter. Soon, if Amazon is to be believed, drones will deliver the new book or kitchen gadget you ordered online.

Drones may soon be delivering you to your destination as well, as numerous companies have entered the drone taxi market. Drone taxis are called e-VTOL (electrical Vertical Take Off and Landing) aircraft and fly from vertiports, also known as heliports. Currently, Uber, Google and other companies are working with the City of New York to establish citywide vertiports, and Uber has announced plans to introduce VTOL services in Dallas (which has one of the USA’s largest and most expensive vertiports) and Dubai by 2020 (27). Earlier this summer, the Dubai government approved the use of the Chinese-manufactured Ehang 184 as VTOL aircraft over its roadways, while Singapore has approved the use of the Hoversurf Scorpion and the Volocopter VC200 (manufactured in Russia and Germany respectively) for VTOL use. The state of Nevada is testing the Ehang 184 for passenger use as well, and assisting its manufacturer in navigating the FAA regulatory maze.

The many practical, economical and even heroic uses of drones are obvious. But what about privacy and safety concerns? Does a drone’s unwanted presence in the airspace over your property, snapping pictures that might purposely or inadvertently record your private moments, infringe on your rights as a citizen? Will an influx of drones in our airspace create potentially harmful air traffic safety issues? What happens when a drone’s engine fails and it falls from the sky into a densely populated area?

Whether you are intrigued or annoyed by these versatile aircraft, whether you applaud them or distrust them, they are here to stay, along with regulatory, safety, and – of course - legal challenges. Over the last several years, scores of suits have been filed, and some settled, involving privacy; flying without permission; alleged inappropriate use of drones; alleged head, eye and other injuries caused by drones; and hardware and software issues that allegedly cost commercial drone user’s money and property.

How will the laws surrounding drone use and the subsequent litigation that will emerge affect your practice? You’ll soon find out, but first, some background on these small but mighty aviators.
What Makes a Drone a Drone?

A drone, or UAV, is a flying robot that can be remotely controlled by a human through a controller, which may resemble a video game controller or may be a smart phone, tablet or computer. The controller communicates with the drone through radio waves, often using Wi-Fi to connect directly to an electronic device. The term Unmanned Air System (UAS) refers to a UAV, its controller, and the method of communication that connects the two.

Unlike the remote-controlled helicopter you might have had as a child, a drone can fly semi-autonomously thanks to built-in GPS chips, sensors, and gyroscopes—the same technologies that turn smart phones into self-orienting navigation devices. With this onboard technology, a drone can self-stabilize and hold a GPS-based position without input from a pilot.

A drone also differs from a remote-control aircraft by having multiple rotors, which can give it enough lift to carry a camera and allow it to stay aloft for longer periods of time. More rotor power means that the blades of each rotor can be smaller, making a drone easier and safer to maneuver than a remote-control aircraft.

The power source that makes a drone’s rotors spin is a removable, chargeable battery. Just a few years ago, the average drone could fly for 12 minutes on a fully charged battery. Today, high-end drones can fly for as long as 25 minutes or more. Drones range in size from a few ounces to hundreds of pounds, and can fly up to 100 miles per hour (the maximum speed allowed by law for commercial drones).

As power capabilities have expanded, so has the sophistication of the camera equipment drones carry. Not all drones have built-in cameras, and some without cameras are equipped with an apparatus to attach a camera of the user’s choice. Others are billed as “flying cameras” and are equipped with ultra-high-definition (or 4K) cameras that deliver crystal-clear visual images, and may, like DJI’s Mavic Pro, include a “tripod” setting that slows the drone and stabilizes the camera for even better results.

While early drones were often bulky and difficult to transport, the latest models are built to travel, with sleek designs and convenient carrying cases. Some are even foldable. Pack up your drone, slip it into your backpack or briefcase with its batteries charged, and you are ready to fly.
A Multi-Billion-Dollar Industry – and Growing

Drones are not new: they were first used thirty years ago to spray Japanese rice fields with pesticides in lieu of expensive helicopters (4). By 2000, drones were being used in the military for surveillance and anti-aircraft target practice. Since 9/11, armed drones have been used as weapons platforms throughout the Middle East. (1)

As the world has witnessed the capabilities of drones, its fascination with them, and its ideas for their use, have continued to grow. In 2015, 1.6 million drones were sold for recreational and commercial purposes. A 2016 analysis by Business Insider predicts that by 2021 this figure could reach 29 million, with commercial purchases outpacing recreational ones (1). In 2014, consumers spent $609 million on drones, a figure that is projected to reach $4.8 billion by the end of the decade, according to market researcher Radiant Insights. (13)

China was the first country to capitalize on the trending interest in drones, and the vast majority are still manufactured there, with companies like DJI Innovations and Yuneec leading the pack worldwide. Nevertheless, American manufacturers such as Blade, Hobbico, and 3D Robotics as well as European companies like Paris-based Parrot and Swiss manufacturer Fotokite are gaining traction, and hundreds of countries around the world are now manufacturing drones. (4, 29).

In the rapidly expanding UAV market, there is truly something for every budget, with prices ranging from $9.99 for a Quad Pod 2.4 GHZ Nano Quadcopter (6) to nearly $32,000 for an xFold rigs Dragon X12 U11 (7).

Drone Use: Recreational vs. Commercial

Recreational drone use is defined as the operation of an unmanned aircraft for personal interest or enjoyment. Flying a drone as a hobby or using it to take personal photographs or videos constitutes recreational use (2).

Commercial drone use is defined as the use of drones for any activity for which the owner will be compensated. Examples of commercial drone uses include:
1. **Selling photographs or videos taken from drones.** These include photos and videos of weddings and sporting events; images taken for use in professional films, videos or television; and images used to market real estate, colleges and universities, hospitals and businesses.

2. **Selling services provided by drones.** These include contractual services such as the inspection of industrial equipment and/or factories, the surveying and/or mapping of land, and the surveillance of property for security purposes, as well as services provided to telecommunications companies for the support of networks.

3. **Leasing drones for use by others.** Receiving revenue from others for the use of drones is a commercial use, whether the drones are being used recreationally or commercially by the lessee.

**What About Drone Safety?**

With millions of drones taking to the skies around the world, legitimate safety concerns exist. Outside of military strikes, there have been no reported deaths or serious injuries caused by drones, but the potential is great. The *Washington Post* has reported more than 400 US military drone crashes since 2001.

Consider the chaos and devastation caused when birds get caught in the motors of airplanes (remember Sully’s forced landing in the Hudson River?) or strike airplane windshields. Now, picture the same scenarios with a drone composed of plastic, carbon, and metal parts and the volatile ingredients of a lithium battery. In 2016, a British Airways Airbus A4 carrying 132 passengers is believed to have been struck by a drone as it landed at Heathrow.

In 2014, a 375-pound military drone crashed not far from an elementary school in rural Pennsylvania during training exercises at a nearby military base, and was run over by a civilian car. No one was hurt in either instance, but the consequences of such accidents are potentially tragic. More recently, improper drone use is disrupting many aspects of daily life: In May of this year alone, a drone crashed into fans at a San Diego Padres game and another caused cyclists to crash at the Golden State Race in Sacramento.
**Geofencing**

From ongoing discussions of drone safety and privacy, the concept of geofencing has emerged. Geofencing is the use of virtual fences to keep drones out of certain areas of airspace (32). Geofencing for drones is similar to invisible fencing for dogs, who wear collars that interact with electronic property boundaries. Drones can be programmed to work with GPS and radio signals to avoid restricted areas, or “no-fly zones,” such as the airspace over airports, prisons, or parks. Some manufacturers of high-end drones have taken on the responsibility for including geofencing technology in their products, adding built-in, pilot-activated geofencing capabilities that cause drones to stop automatically at the border of a restricted zone. Currently, there is no consensus on whether geofencing capabilities should be required equipment on drones and, if so, who is responsible for providing them. (31).

**A Risky Proposition**

Drones carry inherent risks. The two major areas of risk associated with drone flight are loss of control and operator judgement (3).

1. **Loss of control:** Equipment failure, including engine or battery failure, that occurs when a drone is taking off, in the air, or landing can result in a pilot’s loss of control of the aircraft and create risk for other aircraft or for people and property on the ground. In addition, a pilot may lose control of a drone from the ground by dropping, breaking, or otherwise damaging the controller, or through physical injury or illness.

2. **Operator judgement:** Drones are potentially dangerous flying machines under the control of pilots who, like all humans, are subject to failures of judgment and perception. It has been suggested that because pilots are a safe distance from their drones when operating them, they may engage in riskier behavior than car drivers, knowing that they themselves are not in immediate danger (10). Pilots operating drones under the influence of drugs or alcohol may be prone to faulty perception and risk taking. Inexperienced pilots may not be familiar with the capabilities of their drones, the effects of weather patterns or geographical features on drone operation, nearby sources of danger, or the laws governing the airspace their drone occupies, all of which can lead to poor judgements…and accidents.
From an insurance standpoint, the risks to consumers from drones fall into three categories (13):

1. **Bodily injury**: Direct injury to a person or indirect injury when a drone causes an accident that impacts an individual.

2. **Property damage**: Direct damage caused to a building, car, or other personal property by a drone, or indirect damage, such as a drone hitting a power line that causes a fire which destroys a home. Property damage not directly caused by a drone may be exacerbated by one, such as when drones interfere in airspace being used to fight forest fires, a documented problem in the western United States (13).

3. **Personal injury**: The unauthorized taking and use of images from a drone that invades an individual’s privacy. The perpetrator may be public (police or other government entity) or private (paparazzi or other press).

The liability related to these risks will be examined more fully later in this paper.

**Regulating a Growing Industry: Who’s in Charge?**

With numerous safety risks, it is critical that drone use be overseen by a regulatory body. In the United States, that body is the Federal Aviation Administration (FAA), which has exclusive sovereignty over the airspace of the United States (21). In Europe, it is the European Aviation Safety Agency (EASA), and in the United Kingdom, the Civil Aviation Authority (CAA). These government agencies and their counterparts in countries throughout the world have scrambled to keep pace with technology, enacting and updating aircraft regulations to apply to drone flight. For the purposes of this paper, we will focus primarily on the U.S. laws, with a brief discussion of the EU’s and UK’s regulations as well.

**U.S. Drone Regulations**

Five years ago, in response to the growing presence of drones in America’s National Air Space (NAS), Congress passed the FAA Modernization and Reform Act of 2012, which tasked the FAA with developing a comprehensive plan for drone regulation (22). In 2014, the National Transportation Safety Board classified drones as aircraft, requiring them to abide by all current FAA regulations (18). Until the summer of 2016, however, clear and distinct FAA rules for drones
did not exist, prompting many individual states to enact or propose regulations of their own. Despite the FAA’s attempts to override them, states, cities, and towns continue to pass new regulations on drone use (23). Currently, 45 states have at least considered drone laws, and 36 states have enacted laws, while an additional four have adopted resolutions. (24)

Following federal regulations as well as those for each individual state has proven challenging for commercial drone pilots, many of whom operate in more than one state. To complicate matters further, drone regulations may be covered by different agencies or departments within each state, making finding and understanding state and local laws difficult. For a state-by-state list of legislative actions, see the National Conference of State Legislature’s Current Unmanned Aircraft State Law Landscape:


Recent Federal Regulations

The FAA released its most comprehensive drone regulations to date in July, 2016. A May, 2017 federal court ruling overturned the FAA’s regulation on recreational drone registration. As of now, the regulations are as follows.

**Registration:** Until May of 2017, The FAA required all drones weighing more than .55 pounds, whether recreational or commercial, to be registered with the FAA. Pilots had to be thirteen years of age and were required to pay $5 for a registration sticker with a unique identification number that had to be displayed on the drone. Pilots who failed to register their drones were subject to civil penalties up to $27,500 and criminal penalties up to $250,000 and/or imprisonment up to three years. (14) These rules are still in place for commercial drone pilots. However, in May of this year, a federal court ruling nullified the registration requirement for recreational drone pilots, finding that the FAA does not have the authority to regulate so-called “model aircraft” (28). Therefore, at the present time, registration rules do not apply to recreational drones. The FAA, which believes registration of all drones is an important safety measure, is expected to contest the ruling.

**Part 101 (recreational use):** The portion of the FAA regulations that deals with recreational drones is known as Part 101. This set of rules applies to all drones flown for hobby or recreational
purposes, including those protected under the Special Rule for Model Aircraft, which prohibits the regulation of hobbyists by the FAA (17). (This is the same rule that covers kites, hot air balloons, and other recreational flying objects.) Based on the recent ruling noted above, Part 101 drones do not need to be registered (30), and the FAA has never required recreational pilots to be certified. Part 101 drones may not be flown for any commercial purpose and may fly no higher than 400 feet above ground level. Unlike commercial drones, the pilot does not need to inform nearby airports that they are flying, but they must agree to follow local community standards of operation, which are commonly based on guidelines from the Academy of Model Aeronautics (AMA)(19). Recreational drone use is prohibited in national parks. State park drone regulations vary by state. (30)

**Part 107 (commercial use):** The FAA’s rules for unmanned commercial drones are known as Part 107, which consists of more than 30 specific limitations and responsibilities for commercial drone pilots. A summary of the most commonly referenced regulations appears below (20). (Visit [https://www.faa.gov/uas/media/Part_107_Summary.pdf](https://www.faa.gov/uas/media/Part_107_Summary.pdf) for the complete list (20).

1. **Limitations:** The following operational limitations apply to all commercial drone pilots. Many of the FAA limitations are waivable by a certificate of waiver.
   
   a. **Weight:** a drone must weigh less than 55 pounds, including its payload or cargo.
   
   b. **Visual line of site (VLOS):** A drone must remain in the VLOS of the pilot at all times, close enough to be seen with unaided vision other than corrective lenses.
   
   c. **Over, under or inside:** A drone may not operate over any person not participating in the flight, under a covered structure, or inside a covered stationary vehicle.
   
   d. **Daylight only:** Drones may fly in daylight and in “civil twilight” (up to 30 minutes before sunrise and 30 minutes after sunset) with anti-collision lighting, but may not fly after dark.
   
   e. **Right of way:** Drones must yield right of way to other aircraft.
   
   f. **Maximum groundspeed:** Drones may not fly faster than 100 miles per hour.
g. **Maximum altitude:** Drones must not exceed 400 feet above ground level or must remain within 400 feet of a structure.

h. **Visibility:** The minimum weather visibility for flying a drone is three miles from the control station.

i. **Airspace:** All airspace in the U.S. is subject to FAA regulation and is classified as either controlled or uncontrolled. In controlled airspace, air traffic controllers are responsible for separating aircraft to prevent collisions. In uncontrolled airspace, this service is not provided.

Drones may fly in Class G (uncontrolled) airspace without permission from Air Traffic Control (ATC) because this airspace is far from airports. Permission from ATC is required for drone flight in Class B, C, D, and E airspace, all of which surround various types and sizes of airports. Class A airspace is above 18,000 feet, much higher than drones are allowed to fly.

Drones use is prohibited in U.S. national parks. State park drone regulations vary by state. (31)

j. **Prohibited piloting:** A pilot may not operate more than one drone at a time, operate a drone from a moving aircraft or other moving vehicle, operate a drone carelessly or recklessly, operate a drone carrying hazardous materials, or operate a drone if he or she has physical or medical conditions that could prevent safe operation.

2. **Responsibilities:** A commercial drone operator has the following responsibilities.

   a. **Certification:** A drone operator must hold a remote pilot airman certificate with a small UAS rating, or must be under the direct supervision of a pilot with this certification and rating. To qualify for this certificate, a person must be at least 16 years of age, be vetted by the Transportation Security Administration (TSA), and pass an aeronautical knowledge test at an FAA-approved testing center. (This test may be waived for pilots already holding a part 61 pilot certificate other than a student pilot certificate.)
b. **Inspection:** The pilot must make his or her drone and associated documents and records available to the FAA upon request.

c. **Reporting:** The pilot must report any flight-related accidents or injuries to the FAA within 10 days of occurrence.

d. **Preflight check:** The remote pilot in command must conduct a pre-flight safety check of the drone before every flight.

**Certification exemptions:** Because remote pilot certification is a time-consuming process and may delay enterprises relying on commercial drone use from entering and succeeding in the marketplace, the FAA has granted the U.S. Secretary of Transportation the authority to exempt drone pilots from the certification process through Section 333 of the FAA Modernization and Reform Act of 2012. Exemptions are awarded on a case-by-case basis with the goals of stimulating the economy and improving drone safety by discouraging illegal operations. (21)

**Drone Regulation in the European Union**

The European Commission has long supported the growth of the drone industry throughout Europe as a means of boosting the economy (12). Before summer 2016, the European Aviation Safety Agency (EASA), the EU body that governs the airworthiness of aircraft in the Single European Sky airspace, regulated only those “civilian drones” (a term used to differentiate them from military drones) weighing over 150 kg (about 330 pounds). Smaller drones used for recreational and commercial purposes were governed by the rules of each EU member state. However, new regulations enacted in 2016 align drones of all sizes under EASA’s authority, with the understanding that circumstances unique to each member country will be taken into account. Data protection regulations enacted around the same time subject operators of drones to tougher standards on privacy and personal data. By EU law, operator of drones weighing more than 20 kg (44 pounds) must purchase minimum levels of liability insurance.

European drone regulations are divided into three categories based on risk assessment. (25) In the open, or low-risk, category, no special authorization is required to fly drones as long as pilots respect restricted zones as identified by the National Aviation Authority (NAA). Specific, or
medium-risk drones require authorization by the NAA. In the certified, or higher-risk category licenses and training comparable to manned aviation are required by the NAA.

For a more detailed explanation of drone regulations in the EU, visit https://www.loc.gov/law/help/regulation-of-drones/european-union.php.

**Drone Regulation in the UK**

The House of Lords estimates than tens of thousands of drones currently operate within the UK, with hundreds being used commercially (9). Civil Aviation Authority (CAA) makes and enforces rules on the operation of drones or, as they are called here, small unmanned aircraft. The Air Navigation Order of 2009 made under the Civil Aviation Act is the U.K.’s primary piece of regulatory legislation, and divides drones into two weight classes: Those under 20 kg (44 pounds) and those over that weight. Owners of drones weighing more than 20 kg are required to obtain a certificate of airworthiness as well as a permit to fly, and all commercial drone pilots must be licensed. As in the U.S. exemptions for certification are considered on a case-by-case basis. Owners of drones weighing more than 20 kg are required to insure their drones.

Drones of all weights are prohibited from dropping articles that would endanger persons or property. As in the United States, the pilot must maintain direct, unaided visual contact with the drone. Regulations prohibit drones within prescribed distances of congested areas, open-air assemblies, vehicles, structures or vessels, and persons not involved in the operation of the drone. In addition, drones may not be flown over restricted areas that include prisons, nuclear power plants, airports and airfields, radio transmission areas, and military testing and pilot training areas. Drones with cameras face stricter regulations than drones without them, and drones from other countries are not allowed to fly over the U.K for the purpose of taking photographs. (9) For a detailed explanation of drone regulations in the U.K, visit https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8&q=Library+of+Congress+Regulation+of+Drones:+united+Kingdom.
PART II: THE FUTURE OF DRONE LITIGATION

If you build it, they will come. (“They” is the plaintiff’s bar, of course!) The lead plaintiff’s firm in tobacco, asbestos, talc and toxic tort litigation, which recovered more than 450 billion dollars against manufacturers, suppliers and insurance companies in those areas, has already ventured into drone-crash lawsuits, and many others are close behind. At www.motleyrice.com/avilation/drone-crash-lawsuits, one can see that the plaintiff’s bar is already poised to capitalize on this new and emerging technology and any misstep that commercial drone companies, manufacturers, suppliers, distributors, designers, component part manufacturers, operators and facility managers may take in this emerging field.

Personal and bodily injury lawsuits have already been filed and the transfer of money from the defense side to the plaintiff’s side has already occurred. This new technology has and will continue to spawn the following types of lawsuits:

Third-Party Litigation

Bodily injury suits – people who are injured by drones, directly or indirectly, will file traditional negligence, strict liability and breach of warranty claims for redress.

Property and business interruption damage suits will be filed to compensate people who have damage to their property or business.

Civil rights/privacy/nuisance litigation – until the law clearly defines one’s privacy and property rights relative to drone activity (flying over another’s property or merely capturing data and images off of another’s property), this area will be ripe for lawsuits. Also, until the scope of power and right for police forces and the governmental entities to perform search and seizure and inspections over individuals and their property are clearly defined, lawsuits will slowly carve out those restrictions.
Regulatory Lawsuits

Regulations, their effect, scope and import will be challenged until they are clearly established by regulatory bodies and the Court. Although the FAA has specific oversight of regulating drones (Part 107), including where and when they can operate and, in the case of commercial drones, who can operate them, there are other federal agencies that tangentially regulate drones. Also, according to the National Conference of State Legislatures [www.NCLS.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx], forty states have now enacted drone legislation, and that number continues to grow. The reason that states have entered the regulatory landscape is that in July 2016, Congress took out the preemption language of the FAA Reauthorization Act of 2016. However, seven states have preempted localities within their states from enacting laws (Arizona, Delaware, Maryland, Michigan, Oregon, Rhode Island and Virginia). State laws on drones mainly deal with operation restrictions, privacy, warrant requirements, weaponization of drones, protection from non-government operators, hobbyists, insurance, commercial use, governmental use, criminal penalties for misuse interference with emergency services, hunting/fishing, security and infrastructure. These laws are rapidly evolving and at the present, there are 38 states that have new legislation pending.

The government’s authority to regulate human behavior will be challenged and the gray areas of the regulations defined by the courts.

Commercial Lawsuits

Patent lawsuits similar to those seen in other new technology fields will emerge as companies attempt to acquire and control their market share. Also, as businesses hire commercial drone companies to perform tasks (farming, inspection, construction, delivery, security), breach of contract claims will arise.

Insurance Coverage Litigation

Insurance companies are insuring the risk associated with commercial drones, therefore we will see the typical insurance coverage litigation. The courts will interpret policy language and its application to factual scenarios. Who will be ensnared in third party litigation? In essence, anyone involved in the design, manufacture, distribution and use of commercial drones is a potential target.
for litigation. One need only look at the many uses of drones and their applications to anticipate how these suits may emerge from those commercial uses. Drones are being equipped with many compatible technologies (3D scanning, mapping, infrared cameras, delivery capsules, extraction devices, weapons and even fish hooks and bait). Humans are involved in design, manufacture, maintenance and operation, and errors will occur. Plaintiff’s bar is poised to capitalize on those errors.

Drones have been utilized by the following industries, which therefore are exposed to liability risk:

(a) the news media: reporting, broadcasting event coverage, entertainment, events/production and management;

(b) cargo transport and delivery;

(c) fire and security monitoring, surveillance and safety;

(d) real estate and development;

(e) construction, engineering, surveying, safety, inspection and architecture;

(f) business and property management firms, utilities (gas, oil, electric, wind, water and solar) including monitoring power lines, cell phone towers, ports, ships, pipelines, timber, stocks, herds, predatory control, crop monitoring, maintenance and growing, strip mining, fishing, waterways, archeology and avalanche control;

(g) photographing, videotaping, mapping, charting and surveying;

(h) advertising and art;

(i) law enforcement, SWAT, border control, FEMA, disaster response search and rescue, inspection, traffic patrol, and traffic flow control;

(j) Human transport;

(k) Recreation;

(l) Litigation.
Rapidly Emerging and Evolving Technologies

From typewriter to laptop, from rotary phone to smart phone, from Victrola to iTunes, from Model T to Tesla: technology is constantly evolving and fusing with other new technologies. Commercial drones will evolve rapidly if the government is a facilitator, not an inhibitor, of progress. It is foreseeable that nanotechnology, artificial intelligence, reusable energy sources, driverless technology, and chip technology will all converge to catapult commercial drone technology forward in land, air, sea, space and inner earth. Also, new capabilities will lead to new applications; think apps and smart phones. Already we have seen those technologies merged in the commercial setting, with drones delivering medications, food products and disaster relief supplies. Soon we will also see them being utilized in the transport of people locally and around the world in the form of drone taxis. How drones are utilized will set the environment in which litigation arises. However, the body of existing jurisprudence will be the legal tenets applied in formulating legal responsibility. The key will be: who will define an entity’s duty and standard of care to others? Will it be the FAA, state government and other regulators, the courts, one’s own policies and procedures, and/or consensus standards organizations?

Bodily Injury/Personal Injury Litigation

Is it foreseeable that a drone can hit a plane, a biker, a person, a car, a ship, a performer, a spectator, or a building, causing personal injury or property damage? Yes! In fact, all of these events have occurred and have caused damage to people and property. What and who caused those impacts will be the subject matter of lawsuits The cause of those injuries and damages may be a product defect (design, warning or manufacturing defect), operator or maintenance error, a software/hardware/power source malfunction, or a facility management issue (permitting a known hazard to exist within a venue without adequate hazard elimination controls or warnings). Those suits will sound in strict liability, negligence, breach of warranty, breach of implied warranties, and negligent misrepresentation. Those legal tenets will define the law to be applied to commercial drone suits. The framework to adjudicate these law suits is already in place, and, in fact, there
have been numerous personal injury lawsuits already initiated in the United States. Here are a few examples:

1. **Wedding lawsuit.** In 2016, Bill Cliff brought his drone to his wedding reception in New Hampshire. While photographing guests on the dance floor, the drone crashed, and struck two guests from Massachusetts. The crash resulted in a lawsuit wherein the plaintiffs suffered alleged concussions and permanent physical and emotional injuries. Bill Cliff admitted that he owned the drone but was not operating it during the time of the crash. He was sued along with the establishment where the accident occurred. The establishment claims that they never gave permission for the drone to be operated inside the wedding hall. This is a case that will define the legal responsibility of the owner and operator of the drone and the owner of the establishment to a guest injured by a drone (34).

2. **USC fraternity suit** – At the University of Southern California, a fraternity was sued when a drone fell from the sky and hit a person attending an outdoor fraternity party. The drone was being operated by a third-party event production company. The company, along with the fraternity, are being sued in that action. Again, their duties to the person injured by a drone will be decided by a jury of their peers, pursuant to traditional negligence principles (35).

3. **Denver Christmas lawsuit** - A Christmas present in Denver, Colorado became the basis of a lawsuit on behalf of a child who was hurt operating the drone in the family’s house. In Richard T. Jackie and Tamson Jackie v. Parrot, S.A., et al., Denver District Court, 2017 CVCV31, it was alleged that the product manufacturer should have provided more detailed warnings of the potential hazards associated with the drone, and should have utilized safer blades and more adequate blade guards and shutoff features in its design (36). This will be a bellwether case that will create precedent in the early stages of drone product liability. It would be wise to observe how the risk utility/alternative designs issues are litigated, along with the adequacy of the warnings and what standards organization are identified as being the “compliance gold standard” for a manufacturer to follow.
Potential Parties in Drone Litigation

The potential parties to personal injury litigation are:

a. The designer, manufacturer and distributor of the drone (hardware, software, materials, rotors, blades, motors, plastics, etc.);

b. Component parts manufacturers of every item within the drone;

c. The operator of the drone;

d. The maintainer of the drone;

e. The company who may employ or permit the operator to utilize the drone; and

f. The premise owner where the drone is being operated.

Primarily, lawsuits will be based on the legal theories of strict liability, negligence and breach of warranty.

Geofencing, avoidance technology, and blade/rotor safety – These safety features and technologies will be at the forefront of bodily injury and property damage lawsuits. In essence, drones can be programmed to stay out of restricted areas and can be designed with object-avoidance technology. Therefore – theoretically - all drones can be manufactured in a matter that prevents them from hitting a person or damaging property, and operator error should be eliminated. I say “theoretically” because we all know safeguards for products (TCO switch, saw guard) can fail, be removed or be modified. However, these safety features will be at the center point of lawsuits. Other areas that will be litigated are the qualifications of an operator, fail-safe designs, and battery and software issues. The FAA and the Alliance for System Safety of UAS through Research Excellence (ASSURE) released a safety report on drones in April 2017. There already exists a body of literature that studies the frequency, extent and cause of drone incidents. It makes sense to become familiar with those studies if you may be involved in this litigation. The key researcher in these studies will become our potential product experts.
Property Damage Lawsuits

There have already been several property damage lawsuits caused by drones hitting power lines, igniting fires, and damaging cars and utility lines. Drones impeding firefighting and emergency response activities have been the subject of lawsuits as well, even though the drones did not cause any impact.

Commercial Litigation

There will be commercial litigation related to component parts, patent infringement and other typical business disputes. There will also be commercial litigation regarding one company hiring a drone company to perform a service (i.e. crop dusting or monitoring, bridge inspection, security surveillance, delivery, etc.), and one of the companies breaching their contractual obligations. The basis for these types of suits will be contract law relative to the commercial service that is being provided via a drone. These types of lawsuits will result in contractual and consequential damages related to these breaches of duty, as well as failure-to-perform damages. The calculation of those damages will occur pursuant to conventional, contractual damage laws.

Regulatory and Governmental Lawsuits

The FAA was charged by Congress in 2012 with devising a regulatory scheme to administer the safe use of commercial drones. Business and industry have complained that the federal, state and local regulatory bodies have not acted swiftly and efficiently enough to promulgate regulations so the industry can move forward. In fact, businesses say the European and Asian regulatory framework is more advanced and business-friendly. This has been an issue with commercial drone delivery and human transportation (taxis). Where regulations are usually blamed for stifling innovation, the opposite has been true to some extent: startup companies want regulations enacted so drones can safely operate, but regulatory bodies have been slow to respond.

There are already numerous lawsuits filed by individuals against regulatory agencies at both the state and federal level; perhaps the most famous is the lawsuit that resulted in the 2017 federal court ruling that the registrations of recreational drones is not required. This was the case of Taylor
v. FAA, which knocked out recreational drone registration requirements set forth by the federal government.

Invasion of Privacy and Breach of Civil Rights

There are numerous police departments and governmental agencies that have been the target of lawsuits from the improper use of drones during surveillance, investigations and the arrest process. This has resulted in legislation to enact regulations at the state and local levels. (Please refer to NCSL website referenced herein to see what state and local regulations may apply to the use by the police force of drones.) A controversial topic is whether drones used by police should be weaponized. Their safe use could certainly save lives, but at what risk of collateral damage?

Invasion of Privacy Lawsuits

One of the first types of lawsuits filed by individuals were by those who believed that their privacy rights were being violated by people flying drones above their properties. The lead lawsuit was brought against William Meredith, the Kentucky man who shot down a drone that he believed was flying over his property in 2015. Meredith dubbed himself the “Drone Slayer” and became an instant internet celebrity because of the event. Eventually, the judge decided the case in his favor and the concept of aerial trespass is ripe for litigation. The U.S. Supreme Court’s decision in U.S. v. Crosby ruled that space in one’s backyard, at eye level, is certainly within the immediate reaches of the enveloping atmosphere that is under the exclusive control of the land owner (33). So, as long as the flight path is indiscriminate and is not over intimate personal space, scrutinized under a reasonable expectation of privacy analysis, then the drone pilot may be within her legal rights in flying the drone over private property. Defining those privacy/property right boundaries will be performed by the courts and legislatures as drones become more ubiquitous. Until there is a clear definition, there will be many lawsuits filed to write that definition. The photos or videos taken by drones in public may not necessarily constitute an invasion of privacy; however, the publication of those digital images might. If the photographer intends to make these images public by means of internet or magazine publication, she should take special care to obscure the image of any subject who has not consented to being photographed. There are several free apps online that can edit images accordingly; failure to edit those images may create legal liability.
Insurance Coverage Litigation

Because numerous insurance companies have ventured into insuring the risk associated with drones, those policies will become the subject of coverage litigation into the future. We anticipate that the policies will be strictly scrutinized and coverages broadened unless, specific and unambiguous policy language is contained within those documents, to exclude certain types of coverage. So far there has not been any significant insurance coverage litigation that has been filed; however, more likely than not, that will occur shortly after a denial of reservation of rights letter goes out.

Regulations and Standards

As with all personal injury lawsuits, government regulations and private consensus standards and organizational guidelines will have an evidentiary effect on litigation. Therefore, if you are to enter this type of litigation, it is critical that you familiarize yourself with the governmental laws, rules, codes, regulations and informal standards that have been adopted by various consensus associations in this field. Those governmental bodies will set the standards, duties and obligations a drone manufacturer or operator will have to abide by. Failure to abide by those rules, regulations or standards may constitute negligence per se, a duty, evidence of negligence or a basis for an expert opinion. Therefore, it is imperative to become familiar with federal and state regulations and any informal governing body consensus standards that may affect drone liability. A manufacturer’s operation and maintenance manual may also become a standard of care/duty that one needs to follow.

The same concepts and judicial principals that apply to product liability in general will also define a party’s duty in drone litigation. The existing body of law, new regulations, and best practices should be guidelines for companies who are involved in the design, manufacture, distribution and/or use of drones. The principle of “safety first” is a corporation’s best protection from lawsuits.

Besides the damages to person, property, image and self that may occur through the use of drones, it is anticipated that lawsuits will emerge in regard to failure to utilize drones to perform certain duties. In other words, new standards may be set for the expected use of drones by companies in areas such as construction, inspection, mapping, and security, and those who do not implement or
utilize drones may fall below the appropriate duty and standard of care. For example, failure to use drones in the safe, comprehensive, and timely inspection of bridges, cell towers and other structures may be grounds for a negligence claim.

**Conclusion: Chart a Winning Course**

If you build it, they will come: consumers, users, insurers, and of course, plaintiff’s attorneys. That mix will always spawn litigation. As drone technology emerges and evolves, so too does the law. As drone use increases, so does risk and exposure.

There are already clear and distinguishable markers in the jurisprudence constellation that will safely navigate your course through these new litigation passageways. Commercial drone manufacturers and operators should develop a proactive, strategic plan to avoid, eliminate, minimize, transfer and/or shift potential liability. Study the history and current developments in this new frontier. Examine the case histories of product manufacturers and learn how they have survived in a litigious environment. The most successful stories should be adapted to meet your clients’ needs. Choose wisely, for our choices determine our destination.
Bibliography:


6) http://www.burlingtoncoatfactory.com/ProductRedirect.aspx


WEDNESDAY, JULY 26, 2017
11:00 A.M.
PLENARY PROGRAM

“Winning” in Mediation with Brain Science
LePetit Palais

Speaker:
Mark LeHocky
Winning at Mediation: Lessons Learned From The Behavioral Sciences

Mark LeHockey © 2017

I will look at any additional evidence to confirm the opinion to which I have already come. --Lord Molson, British politician (1903—1991)

Lord Molson was onto something. The behavioral scientists have confirmed as much. Now it’s time for the rest of us to begin using that science to make mediations more productive.

First, the science: A growing body of behavioral research shows how lawyers and clients – indeed all of us – process and filter information, weeding out unwanted input in favor of self-serving affirmations. In other words, we hear what we want to hear and largely disregard the rest. Call it self-serving bias.

These patterns are as real for organizations as they are for individuals. Take this as gospel from a litigator turned general counsel turned mediator: Groups often model the very same behavior, particularly when dealing with adversarial or unexpected events. More on this later.

Juxtaposed against the behavioral science is the way most commercial mediations take place today. Common practice includes limited pre-mediation dialogue about the merits, mediation statements that are not shared or mimic trial briefs in tone and temperament, and the absence of joint sessions at the mediation itself. As this data underscores, those common practices often minimize rather than maximize the prospects for success at mediation.

The goal of this paper is to promote a form of mediation advocacy that embraces the behavioral science and maps a different course. After two decades mediating and different general counsel roles where these concepts could be tested, I can tell you it works.

Client Perceptions and Overconfidence: Tell me what I want to hear

A growing number of behavioral studies focus on how clients filter information they receive, holding onto the information that affirms pre-conceived notions much better than the data that casts doubt. See, e.g., Donna Shestowsky, PhD., Professor of Law at the University of California, Davis, School of Law, The Psychology of Procedural Preference, How Litigants Evaluate Legal Procedures Ex Ante, Iowa Law Review, Vol. 99, No. 2, pp. 637—710 (2014); See also, George Loewenstein, et al., Self-Serving Assessments of Fairness and Pretrial Bargaining, 22 Journal of Legal Studies, pp. 135, 149-53 (1993).

In one such study, litigants involved in various forms of dispute resolution (trial, arbitration, mediation, etc.) were asked to rate the fairness of those different procedures as well as their own chances of success. In addition to affirming that clients prefer dispute resolution processes like mediation where they maintain the most control, this study revealed that 57% of litigants believe that they had at least a 90% chance of winning, while roughly 24% believed
they had a 100% chance of winning. Shestowsky, Id. at 681—683. I confess to having picked law school in part because there was little math involved, but even I know those numbers don’t add up. These findings reveal an egocentric bias, where litigants construe information in a self-serving way, and in turn believe that their case is much stronger than it really is. Id. at 682.

Attorney Handicapping: The dangers of wishful thinking

Attorneys often fare no better than their clients as to handicapping skills. Multiple behavioral studies reveal that lawyers routinely overestimate their client’s litigation prospects – i.e., the likely outcome at trial – compared to the actual outcome if the case is fully tried. See, Randall Kiser, Beyond Right and Wrong, The Power of Effective Decision Making for Attorneys and Clients (Springer 2010), pp. 29-48. See also, Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, and Elizabeth Lofthus, Insightful or Wishful, Lawyers’ Ability to Predict Case Outcomes, Psychology, Public Policy, and Law, 2010, Vol. 16, Nos. 2, pp. 133-157.

In one set of studies – repeated over different time periods in both California and New York – plaintiffs on average erred in their assessments more often than defense counsel. Specifically, plaintiffs often left money on the settlement table – comparing what they turned down in pretrial settlement offers to the eventual outcome – reflecting a 60% error rate for plaintiffs versus a 25% error rate for defense counsel. Kiser, Id. at 42.

While this data initially sounds encouraging for defendants, it also has a dark side. Specifically, while plaintiff’s average cost of decision error was $73,400, defendants’ average cost of error was over $1,400,000 – 19 times greater. Id. Thus, fewer errors, but exponentially costlier when they hit, both in terms of financial losses and client relations.

Making Use of the Behavioral Science Data in the Mediation Process

After two decades of litigating, I started my first general counsel position. There I inherited a large number and variety of pending disputes – a pattern that repeated itself in two subsequent roles. In each position, I began sorting through how we were handling our cases, including how much we really knew with confidence, how much had we shared with the other side, and what alternatives existed to resolve these disputes.

As to many matters, our current course was well-informed and made great sense. As to others, not so much. The litigation path we were on was usually by the book, and may well have eventually worked in court. But the same questions consistently arose: Did we really know all the key facts? What did the other side see differently? If something was amiss as to our own assessment or theirs, wasn’t it better to sort that out sooner versus later? And did we really need to win or simply to make the dispute go away?

By this time, I had also started mediating at the request of the federal court in San Francisco, and began exploring the behavioral sciences as to how individuals and organizations make decisions about pending or threatened disputes. Then, triggered by these and earlier studies of
how people respond to adverse or catastrophic events, we began experimenting with early
dispute resolution programs that channeled the findings discussed here. The major steps
incorporating these lessons follows, all tested through the practices we employed.

**Pre-mediation substantive dialogue:** When asked, any litigator will say that they talk to
opposing counsel several times before a mediation takes place. Now ask the same litigator how
many times they have had two or more substantive pre-mediation discussions of strengths,
weaknesses and alternatives – in person or on the phone (self-serving letters and emails don’t
count) – and you may get a quite different answer. It may be resistance to sharing too much
information; it may be the notion that substantive merits discussions are best left to the
mediation itself. Either way, a deep dive into the substance of each side’s position is often
delayed until the mediation itself.

The behavioral data argues for the opposite course. Knowing that lawyers and clients view
their prospects through rose-colored glasses, the earlier the substantive dialogue starts, the
better. Even if the information offered isn’t favorable, the sooner it surfaces, the sooner
parties can start revising assumptions and re-examining their position.

This point is even more important as to claims against organizations with many actors in the
mix. Absent substantive exchanges with the other side, groups often tend to coalesce around
untested assumptions and unrealistic settlement expectations. Turning that ship around takes
both time and substantive reasons to change course. Think ocean liner, rather than sail boat.

In both my litigator and general counsel roles, I witnessed the risks of the hermetically-sealed
corporate meeting room. Like needed fresh air, contrary ideas and facts can be rare,
discounted or discouraged, with bad results down the line when reality finally sets in. To avoid
those results, we started requiring multiple substantive conversations between adversary
counsel well before any mediation took place. Our need for more and better information
trumped the notion of playing hide the ball. Our inquiry was simple: *What do you see
differently than we do?* Obviously, the question needed to be accompanied by a genuine effort
to share what we knew or didn’t know. Otherwise, a meaningful exchange was unlikely.

Taking this approach consistently paid off. If our own assessment was thorough and revealed
no major weaknesses, the pre-mediation dialogue often led to a negotiated outcome at an
appropriate level. If on the other hand, the pre-mediation dialogue revealed material bad
news, we would then update key decision-makers and help reset appropriate expectations
before the mediation. And for all the “grey” matters in between, all sides were better prepare
d for the mediation session to follow.

**Sharing mediation submissions:** *Briefs? We don’t have to show you any stinking briefs!*

With apologies to *The Treasure of the Sierra Madre*, the failure to share briefs is a wasted
opportunity, given the need to overcome ingrained biases and the time often needed to do so.
A well-constructed brief focusing on core facts, key legal issues and damage calculations should preview what a judge, jury or arbitrator will hear. If compelling, it should motivate the other side to set reasonable expectations for the mediation. By contrast, failing to share mediation briefs usually leaves the client with only their own counsel’s brief to rely upon. That only reinforces self-serving biases, making it harder to reset expectations later.

Here, tone and temperament are key. To overcome self-serving biases and convince the other side to reassess, you must first be heard. A mediation brief laced with adjectives, invective and insults will assuredly trigger defensive posturing and counter-attacks on the other side, rather than a real exchange on the core issues. And it won’t impress the mediator either. Believe me.

For what it is worth, the inclination to confuse an aggressive tone with effective advocacy appears to start early on. Maybe it’s the many movies, television shows and books that value domineering behavior and discredit a dispassionate discourse. But my Mediation Advocacy students at U.C. Davis’ School of Law learned that the gratuitous use of invective and insult in briefs usually triggered a disappointing grade, for all of the reasons discussed here. It doesn’t work; it’s counterproductive; and it squanders a key opportunity to really be heard by the other side when being heard matters most.

Sharing briefs is arguably more important with multiple actors and constituents on the other side. Organizations with various stakeholders, inside and outside counsel and insurers require consensus to set -- and time to reset -- settlement parameters. Shared briefs provide a substantive basis for reassessment as well as time to do so before the mediation starts. For anyone who has experienced a mediation session that needs to be halted and resumed later after that session uncovers key information that requires a new round of executive conversations, you know what I mean.

Finally, sharing briefs does not foreclose supplemental letters for the mediator’s eyes only with any content deemed helpful but very sensitive. But the default should be to share more, not less. If truly impactful, it will help reset expectations, and hence shouldn’t be held back.

**Joint Sessions: Think conversation, not conflagration**

Joint mediation sessions provide the rare opportunity to be heard directly by the other side, to learn what the other side sees differently, and to dispel misimpressions about you and the strengths of your position. Then why have they fallen out of favor?

Discomfort with a potentially volatile dialogue prompts many attorneys to avoid putting adversaries in the room together. Indeed, most experienced litigators have one or more stories about a joint session gone awry – lawyers behaving badly, clients becoming irate or irrational, and mediators losing control of the room. But lost in these anecdotes is the reality that a properly-conducted joint session is a prime opportunity to challenge assumptions and demonstrate that your story (or theirs) may play well before a judge, jury or arbitrator if the dispute does not settle.
Indeed, didn’t most of us pick litigation as a career because we believed we were effective advocates? If so, we should be able to channel those skills during a direct dialogue with the other side, particularly if we treat the session as a conversation, rather than a conflagration.

Invite conversation by explaining your position in the most fact-based, invective-free manner. Then ask, what’s wrong with our picture? The combination of an insult-free presentation and genuine curiosity at to what the other side sees differently is most likely to overcome the biases of both counsel and client on the other side. Doing so should in turn significantly bridge the gap on an acceptable settlement.

Other reasons proffered for avoiding joint sessions include the absence of clients with real control over the settlement – class actions, for example – and the perception that the adversaries are incapable of rational discourse. Here again, actual practice at our companies produced much better results than predicted if we took the steps outlined here to overcome these pre-existing biases and unduly rosy assessments.

In the class action area, for example, the absence of underlying clients with a significant voice did not deter a meaningful mediation if we held early and substantive pre-mediation conversations, exchanged useful information, and thoroughly and civilly briefed core issues. Indeed, skilled class counsel proved very adept at assessing value, potential future sunk costs, and reaching an appropriate settlement with the aid of a skilled mediator.

As well, predictions of obstreperous mediation behavior from the other side rarely panned out. Experienced counsel on both sides realize the downside of unruly behavior: It only undermines your credibility with the mediator as well as the prospects of overcoming biases and misimpressions from the other side.

**Measuring success**

When we began this approach, our primary benchmark was whether it reduced the overall direct cost of legal disputes in terms of legal fees, in-house legal cost, penalties, settlements. Turns out it did all that, but a lot more. Beyond direct cost savings, the indirect cost of continuing to litigate in terms of lost client time and opportunities was significantly reduced. So were the number of unpleasant surprises and consequences from sorting out these problems later. Money saved; time saved; sometimes people saved as well. Give it a try.

*Mark LeHocky is a former litigator specializing in complex business disputes, the former general counsel to two public companies, and a full-time mediator affiliated with Judicate West. He also designed and taught a course on Mediation Advocacy at the University of California, Davis’ School of Law, based on the principles discussed here. Mark is also named among the Best Lawyers in America for Mediation by U.S. News/Best Lawyers© for three years running. His profile is on [www.marklehocky.com](http://www.marklehocky.com).*
WEDNESDAY, JULY 26, 2017
11:45 A.M.
PLENARY PROGRAM

Todd’s Talks – “Inspirational Leadership”
by Lewis Collins*
LePetit Palais

Speaker:
Lewis F. Collins, Jr.
FDCC 2017 Annual Meeting

Inspirational Leadership

Lewis F. Collins, Jr.

BUTLER Weihmuller Katz Craig

Miami - Tampa - Tallahassee - Mobile - Charlotte - Chicago - Philadelphia - Dallas

Page 238
The Unlikely Leader

- 21 yrs. Old – House of Commons
- Dinner invitation
- Burden on the heart
- 1st time in Parliament
- Inspirational speaker
- Attacked in press
- 10 years of battle
- . . . Betrayal & Defeat!
- Shaping public opinion
- Inspired the public
- 20 years later . . .
“Persuasion is achieved by means of moral character, when the speech shall have been spoken in such a way as to render the speaker worthy of confidence”

Aristotle
Inspiration

The Butterfly Effect...
1864

“One of the greatest displays of leadership in the history of mankind!”
A Nation Torn Asunder
“... the ability to articulate a compelling vision”

“If slavery is not wrong, nothing is wrong”
The Little Rock Nine

1957: Courage and Leadership in Little Rock
5 PRINCIPLES OF INSPIRATIONAL LEADERSHIP

1. Be Humble/Servant
2. Love the People You Lead
3. Stand up to Bullies
4. Communicate Your Beliefs with Passion
5. Surround Yourself with Great People & Empower
#1: Be Humble/Servant

“The President is the steward of the people.”
#2: Love the People You Lead

• “You must love those you lead before you can be an effective leader.”

  – General Eric K. Shinseki, retired U.S. Army Chief of Staff.

• “A general makes wiser choices when he loves those he must place in harm’s way.”
I have decided to stick with love. Hate is too great a burden to share.
#3: Stand Up to Bullies

“Leadership is a potent combination of strategy and character. But if you must be without one, be without strategy.”

General H. Norman Schwarzkopf
#4: Communicate Your Beliefs With Passion

“A genuine leader is not a searcher for consensus but a molder of consensus.”
Reverend Martin Luther King
I Have a Dream
#4: Surround Yourself with Great People & Empower Others

“Never tell people how to do things. Tell them what to do and they will surprise you with their ingenuity.”

General George S. Patton

“Work is done, the job is done, the work is done, the job is done, the job is done.”

Chinese proverb

“When the best leader’s work is done, the people say, ‘We did it ourselves’.”

Chinese philosopher Lao-Tzu

FDCC 2017 Annual Meeting | Inspirational Leadership
We Did it!

- We will go to the moon!

- Inspires to cause greater then own

- Connection with something larger
What Will Inspired Leadership Yield?

- Freeing slaves
- Stirring the hopes of a nation
- Mending divisions between people
- Gaining Equality
- Healing a broken city
- Toppling a dictator
- Shooting for the moon
Inspiration

... to breathe life into
THURSDAY, JULY 27, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

APPELLATE LAW/COMMERCIAL LITIGATION/INTERNATIONAL
A Comparison of Commercial Litigation in Europe and North America
Salon de Musique

Moderator:
William Vita

Speakers:
Jorge Angell
Stephen Feldman
Stephen Carter
Charles Frazier
A Comparison of Commercial Litigation in Europe and North America

2017 FDCC Annual Meeting
Montreux, Switzerland
July 25-29, 2017

William E. Vita, Moderator
Westerman Ball Ederer Miller Zucker & Sharfstein, LLP
(New York)

Jorge Angell
L.C. Rodrigo Abogados
(Madrid, Spain)

Stephen J. Brake
Nutter McClennen & Fish
(Boston, Massachusetts)

Stephen Carter
Carter Perry Bailey, LLP
(London, England)

Charlie Frazier
Alexander Dubose Jefferson & Townsend LLP
(Dallas, Texas)
# Table of Contents

Table of Contents ........................................................................................ i

I. Introduction ................................................................................................. 1

II. The economics of litigation ...................................................................... 1

III. Principles of civil litigation in these jurisdictions ................................... 9
    A. Spain ................................................................................................. 9
    B. United States .................................................................................. 10
    C. England & Wales ............................................................................ 11

IV. Key differences of the respective systems ............................................ 14
    A. Pre-trial discovery .......................................................................... 14
        1. Spain .......................................................................................... 14
        2. United States ............................................................................. 15
        3. England & Wales ....................................................................... 15
    B. Advanced discovery ........................................................................ 15
    C. Conservation of evidence ................................................................ 16
        1. Spain .......................................................................................... 16
        2. United States ............................................................................. 17
        3. England & Wales ....................................................................... 17
    D. Preclusion ......................................................................................... 17
        1. Spain .......................................................................................... 17
        2. United States ............................................................................. 18
        3. England & Wales ....................................................................... 18
    E. Jury trial ............................................................................................... 18
        1. Spain .......................................................................................... 18
        2. United States ............................................................................. 19
3. England & Wales ............................................................... 20

V. Conclusions .............................................................................. 20
William E. Vita

William E. Vita is a Partner in the New York law firm of Westerman Ball Ederer Miller Zucker & Sharfstein, LLP. He is a seasoned litigator with extensive experience in many different areas of complex civil litigation, including: commercial disputes; product liability, employment law; mass torts, premises liability and toxic substances.

His practice has also included cases involving wage and hour laws, banking fraud, intellectual property, medical devices, class actions and multi-district litigation.

He is a cum laude graduate of Boston College Law School and obtained his undergraduate degree at the University of Notre Dame. After law school, he served as an Assistant District Attorney in Brooklyn for five years. Bill spent two of those years in the Rackets Bureau, prosecuting organized crime and complex economic fraud cases. He has tried dozens of cases to verdict throughout New York State.

Bill served as the Chairman of the Product Liability, Construction and Motor Vehicle Law Committee of the New York State Bar Association's Trial Lawyer's Section. He has also held leadership roles in national bar associations, including the Federation of Defense and Corporate Counsel and the Defense Research Institute. He is a Fellow of the Litigation Counsel of America, The Trial Lawyer Honorary Society and currently serves on the University of Scranton's Parents Executive Council.

Jorge Angell

Jorge Angell is the senior partner of L.C. Rodrigo Abogados, specialized in corporate and commercial law, insurance and reinsurance law, private international law, litigation, and arbitration. He graduated in law in 1971. He is a member of the Madrid (Spain) and Lima (Peru) Law Societies. He has practised in Madrid since January 1974.

Jorge acts frequently as an expert in Spanish law before foreign courts, especially English and US courts, and as arbitrator and party counsel in domestic and international arbitrations, as well as party counsel in mediation procedures. He is listed in the arbitrators’ roster of the Arbitration Court of the Chamber of Commerce and Industry of Madrid, of the Madrid Law Society and of the Arbitration Court of the Chamber of Commerce of Lima. He is a member of the ICC Spanish National Committee, the London Court of International Arbitration and the European-Latin American Arbitration Association (ELArb).
Jorge is a frequent lecturer and moderator in conferences and seminars, as well as the author of several articles on corporate, contract, insurance, reinsurance, civil liability and civil/commercial litigation matters.

Jorge is currently the Chairman of the Reinsurance Working Party of the Association Internationale de Droit de Assurances (AIDA). He is a member of the following LPD Committees of the IBA: Business Organizations, Insurance, Litigation (Co-chair for the period 2006/2007) and Arbitration. He is also a member of the Federation of Defence and Corporate Counsel (FDCC) and current International Rep for Spain, Vice Chair of the International Activities Committee and former Vice Chair of the Reinsurance, Excess and Surplus Lines Section. He is also a member of the Professional Liability Underwriting Society (PLUS), SEAIDA (the Spanish section of AIDA); and, also a member of the Credit Insurance Working Party of AIDA, as well as adjunct member of the International Association of Claim Professionals (IACP); member of the Defence Research Institute (DRI), and the Spanish Arbitration Club.


Jorge speaks Spanish and English fluently.

Stephen J. Brake

Stephen J. Brake is a partner in the Litigation Department of Nutter McClennen & Fish LLP, in Boston. He served on the firm’s Executive Committee for 9 years. He practices in a broad range of litigation, including toxic tort, intellectual property, commercial real estate, land use and zoning, and construction litigation.

Steve has represented clients in a broad trial practice for twenty-five years. He has tried over twenty toxic tort and environmental cases to verdicts. He serves as national counsel for a technical paper company in asbestos-related litigation and in that capacity has successfully tried a series of cases to juries, obtaining defense verdicts in a number of jurisdictions, including California, Michigan, Kansas, Pennsylvania and Massachusetts.

Steve has also tried a substantial number of cases involving claims of catastrophic loss, damage or injury. Recently he obtained a defense
verdict for a Massachusetts based company in a four week trial in the Federal District Court in Boston in a case arising from a hotel fire at a luxury hotel in Rome, Italy. The multi-million dollar claim arose from extensive fire-related damage and multiple deaths. Similarly, he obtained a jury defense verdict for a large printing company on a multi-million dollar claim arising from allegations of widespread hazardous exposure to lead dust.

Steve served as Special Assistant Attorney General representing the Commonwealth of Massachusetts in connection with all claims arising from the alleged “sick building” status of the “Ruggles Center,” the former home of the Massachusetts Registry of Motor Vehicles. These matters involved extensive personal injury and property damage claims arising from alleged illnesses at the building in question, along with a thirty-million-dollar claim against the Commonwealth for breach of its lease agreements. After several years of litigation, the matters were successfully resolved with a multi-million dollar payment to the Commonwealth.

He has argued a number of the leading environmental cases in both the First Circuit Court of Appeals and the Massachusetts Supreme Judicial Court, including Trustees of Tufts University v. Commercial Union Ins. Co., which established a multi-year defense cost obligation on the part of insurers as to environmental claims under Massachusetts law.

Steve obtained a multi-million dollar award in favor of a group of industrial companies in a suit against an environmental consultant for breach of that consultant’s obligations to conduct an environmental cleanup. In his extensive experience, Steve has developed a wide-ranging knowledge of the legal, medical and scientific issues that occur in toxic tort, environmental and fire cases.

Steve represents clients in complex commercial litigation matters in state and federal courts and has obtained a number of substantial awards in such cases.

Steve is a member of the Litigation and Environmental Sections of the Boston Bar Association and a fellow of the Massachusetts Bar Foundation. He frequently lectures for Massachusetts Continuing Legal Education, Inc. He is also active in various civic and charitable activities.

During law school, Steve was executive editor of the Boston College Law Review

Stephen Carter

Stephen Carter is one of the founding partners of Carter Perry Bailey LLP, a specialist niche law firm in the City of London, practicing in both contentious and non-contentious insurance and reinsurance,
commercial litigation and arbitration and trust & fiduciary disputes. He graduated in law in 1976 from the University of Durham, England.

Stephen's work has focused on the insurance and reinsurance industry for over 35 years. Prior to forming Carter Perry Bailey, where he is Managing Partner, he was Head of the Insurance and Reinsurance Group at Charles Russell LLP. Stephen has also worked as in-house lawyer to a leading run-off management group. His practice covers a wide range of insurance and reinsurance disputes, both coverage and defense, including litigation and arbitration. He also conducts commercial litigation and arbitration. Much of Stephen's work is international. His non-contentious practice includes advising on insurance policy and reinsurance contract wordings.

Stephen is an accredited ARIAS(UK) arbitrator and is qualified as a Member of the Chartered Institute of Arbitrators (MCIArb). He is a member of the European Users' Council of the London Court of International Arbitration. He has experience of conducting arbitrations both in London and overseas, including the USA, so is familiar with the diverse approaches adopted.

Stephen has for many years been rated in Chambers Guide as a leader in the field of reinsurance and in Legal 500 as a leader in the field of insurance and reinsurance. He has also been designated as a "Super Lawyer" in insurance & reinsurance by Thompson Reuters' publication "Super Lawyers" and is listed as an expert on insurance and reinsurance by “Who's Who Legal". In the FDCC, Stephen is a member and past Chair of the Reinsurance and Surplus Lines Section, Vice-chair of the International Section), a member of the MDR Committee and International Representative for the UK. He is also a member of the ADTA, the British Insurance Law Association, the Institute of Art and Law and the British Institute of International and Comparative Law. He has served as a board member of the Association of Insurance and Reinsurance Service Providers and as an editorial advisory board member of the International Insurance Law Review.

Stephen also serves as a director of Community Reinsurance Corporation Limited, a reinsurer in run-off.

Charlie Frazier

Charlie Frazier is a partner in the Dallas office of the appellate law firm of Alexander Dubose Jefferson & Townsend, LLP, with offices also in Austin and Houston. He has been board certified in civil appellate law by the Texas Board of Legal Specialization since 1994. For over 28 years, his appellate and litigation-support practice has covered many areas of civil law, including substantial experience in complex commercial and
contractual disputes, insurance-coverage and bad-faith disputes, and professional-liability claims. He has written and made presentations on numerous issues pertaining to practice and error preservation in the trial courts, as well as appellate procedure.

Charlie successfully argued before the Supreme Court of the United States on behalf of ten psychiatrists who were sued by a former patient under RICO, claiming that a pattern of racketeering activity existed to keep him under hospitalization. *Rotella v. Wood*, 528 U.S. 549 (2000). The Court rejected the patient’s argument that accrual of a civil RICO claim is postponed until the pattern was or should have been discovered, thereby holding that the patient’s claim was time-barred.

Charlie received his B.A., *magna cum laude*, from Baylor University and his J.D. from the Baylor School of Law, where he was published in the *Baylor Law Review*, on which he held various editorial positions. In between university and law school, Charlie received the M.A. in International Relations from the University of Kent, in Canterbury, England, on a Rotary International Scholarship. He has been listed since 2009 in *Best Lawyers in America* in Appellate Law, and as one of the top 100 lawyers in Texas by *Texas Super Lawyers*. Charlie is a Vice Chair of the Appellate Section of the FDCC, and has participated on several panel presentations at the past several Winter and Annual Meetings. He currently holds, and has held, several leadership positions in the Appellate Advocacy Committee of the DRI. Charlie is a Fellow of the Texas Bar Foundation.
I. Introduction

This paper focuses on the following topics: (1) the economics of litigation in the United States, England & Wales, and Spain, and its impact on efficiency; (2) the principles of litigation in these jurisdictions; and (3) some key differences of the respective systems.

The authors are aware of deeply rooted conceptions regarding the common-law systems and the civil-law systems and their apparently “abyssal” differences. These conceptions are addressed in this paper and later in the panel discussion in an effort to ascertain how realistic they are or if rather some of them are in fact misconceptions.

II. The economics of litigation

A quantitative comparison of commercial litigation in North America and Europe reveals some stark results regarding cost and efficiency. To anyone who has spent considerable time working within the U.S. judicial system, it will probably come as no surprise that on a statistical basis the judicial systems of continental Europe generally produce resolution of disputes more quickly and less expensively than the U.S. System. While speed and cost are, of course, not the only components of an effective judicial system, these components are more readily measurable than the rather vague concept of achieving justice on a case-by-case basis. Further, because the vast majority of cases in North America and the United Kingdom (where judicial promotion of mediation has reduced the number of cases going to trial) and not as many in Continental Europe are ultimately resolved by settlement, an attempt to discern some abstract concept of justice would seem subordinate to the need to move commercial civil cases quickly, efficiently and cost-effectively to a resolution. With that in mind, let’s examine some statistics provided by the U.S. Chamber of Commerce’s Institute for Legal Reform (“ILR”). The following graph is reprinted from ILR’s 2013 study on International Comparisons of Litigation Costs. The ILR studied the cost of “liability” as a percentage of each country’s gross domestic product. Liability costs, in turn, are defined as the cost of processing claims, whether through litigation or other resolution processes.
Here is the graph showing the results:
Figure 1: 2011 Liability Costs as a Fraction of GDP

- China: 0.29%
- Japan: 0.30%
- Netherlands: 0.40%
- Belgium: 0.42%
- Portugal: 0.43%
- Denmark: 0.46%
- France: 0.58%
- Brazil: 0.60%
- Spain: 0.67%
- Germany: 0.68%
- Italy: 0.77%
- Ireland: 0.78%
- United Kingdom: 1.06%
- Canada: 1.19%
- United States: 1.66%
Curiously, although not the topic of our current discussion, the ILR’s findings indicate that two Asian countries, China and Japan, have the lowest liability costs of any of the countries on the chart. Indeed, the cost of liability in the United States is five times that of China and Japan, four times that of the Netherlands, three times that of France and Spain, and two times that of Ireland and Italy. The U.K. and Canada are the only countries beginning to approach the liability cost of the United States. www.instituteforlegalreform.com.

Another set of telling statistics is provided by the World Bank Group. Indeed, the World Bank has an entire website devoted to enforcing contracts and doing business throughout the world. http://www.doingbusiness.org/data/exploretopics/enforcing-contracts.

The World Bank has collated data regarding the time and cost required to resolve commercial disputes throughout the world. It issues rankings based upon three main factors: (1) the amount of time required to resolve a commercial sales dispute; (2) the enforcement costs (fees for courts and attorneys) of achieving that resolution, presented as a percentage of the value of the claim; and (3) the quality of the judicial process. While the quality of the judicial process is somewhat subjective—as it includes factors such as (1) the availability of specialized commercial courts; (2) criteria used to assign cases to judges; (3) availability of electronic case management systems, etc.—the other two factors, specifically the amount of time and the cost required to resolve a commercial dispute, are well worth reviewing.

The World Bank ranks every country in the world on its ability to enforce contracts. South Korea is ranked #1 in the world, while Bangladesh is ranked #189. The United States is ranked #20. Norway (#4), Austria (#10), Germany (#17), France (#18), and Portugal (#19) are all ranked above the United States. Sweden (#22), Denmark (#24), and Spain (#29) are all ranked in close vicinity of the U.S. The U.K. is ranked as #31. Interestingly, the U.K., the one European judicial system based on common law, rather than civil law, ranks behind the U.S. There are, to be sure, some European stragglers, such as Ireland (#90), Italy (#108), and Greece (#133).

It is worth noting that the World Bank ranks the U.K. as one entity, even though there is actually no such thing as “U.K. law” or “U.K. procedure”. What most regard as UK law and procedure is actually the law and procedure of England & Wales, which is applied in the courts of, inter alia, London. This law is often referred to as “English law”. Scotland and Northern Ireland have their own national laws and procedures. We do
not know whether these statistics are compiled combining all U.K. jurisdictions or just England & Wales.

When we use the World Bank statistics to break out the average cost of a claim, represented as a percentage of the value of the claim and the average time it takes to resolve the claim in the court of first instance, the results are instructive, as indicated in this chart.

<table>
<thead>
<tr>
<th>Country</th>
<th>Cost of Claim</th>
<th>Length of Time for Resolution (in Days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Norway</td>
<td>9.9</td>
<td>280</td>
</tr>
<tr>
<td>Portugal</td>
<td>13.8</td>
<td>547</td>
</tr>
<tr>
<td>Germany</td>
<td>14.4</td>
<td>499</td>
</tr>
<tr>
<td>Greece</td>
<td>14.4</td>
<td>1,580</td>
</tr>
<tr>
<td>France</td>
<td>17.4</td>
<td>395</td>
</tr>
<tr>
<td>Belgium</td>
<td>18.0</td>
<td>505</td>
</tr>
<tr>
<td>Spain</td>
<td>18.5</td>
<td>510</td>
</tr>
<tr>
<td>Austria</td>
<td>20.6</td>
<td>397</td>
</tr>
<tr>
<td>Canada</td>
<td>22.3</td>
<td>910</td>
</tr>
<tr>
<td>Netherlands</td>
<td>23.9</td>
<td>514</td>
</tr>
<tr>
<td>Switzerland</td>
<td>24.0</td>
<td>420</td>
</tr>
<tr>
<td>Ireland</td>
<td>26.9</td>
<td>650</td>
</tr>
<tr>
<td>Sweden</td>
<td>30.4</td>
<td>321</td>
</tr>
<tr>
<td>U.S.</td>
<td>30.5</td>
<td>420</td>
</tr>
<tr>
<td>U.K.</td>
<td>43.9</td>
<td>437</td>
</tr>
</tbody>
</table>

We can therefore see that the cost of litigation in each listed European country, except for the U.K., is less than the cost in the U.S. Further, despite their high costs, the U.S. and the U.K. achieve no
significant increase in the time it takes to resolve a matter. Rather, the U.S. and the U.K. rank somewhere in the middle of the pack in this regard.

Of course, one has to look at what is included for the above purposes in the costs of litigating, otherwise these figures may not be as good a guide as they might at first appear. In England, for example, the “loser pays” rule means that generally the loser pays the legal fees of the winner. This means it is very expensive for the loser, but very inexpensive for the winner. Also, if your case is considered good enough, you can obtain insurance against the risk of having to pay the other side’s fees. Another factor is that in England and in the civil jurisdictions of continental Europe, punitive damages are not awarded, as they are in the U.S. The effect of this is that in the U.S. there is potentially very large cost exposure by way of damages which does not exist in England or Europe.

Nevertheless, when one searches for a cause for the rankings of the U.S. and the U.K., one is struck by the obvious distinction that the judicial systems in both the U.S. and the U.K. are common-law systems, while the system of justice in continental Europe is a civil system. Is this difference in systems the primary reason for the greater costs?

If so, why might the Civil System achieve more cost-effective results? An article by Hein Kotz in the *Duke Journal of Comparative and International Law*, Volume XIII: 61, Special Issue 2003, provides some interesting ideas. The article, entitled “Civil Justice Systems in Europe and the United States,” explains in detail the civil procedure in Germany. As we know, in the U.S., civil trials are usually conducted before juries, who must be gathered together for a relatively short period of time to hear and decide disputed facts, which the court uses to issue a judgment in the case. For this reason, American attorneys work in a system in which they conduct substantial and thorough pre-trial discovery, including depositions of each trial witness, so that they can present their case to the jury in a cogent, compelling, and persuasive manner.

Contrast this with the Civil System in continental Europe (and to some extent, even in England & Wales) in which there are no jury trials (except in some criminal cases, for example in Spain and England & Wales). Instead, a judge decides civil disputes without the aid of a jury. Trials are therefore not the theatrical affairs so beloved by Hollywood directors (think Tom Cruise and Jack Nicholson in *A Few Good Men*). Rather, continental European judges hear testimony and receive proffers of evidence from the attorneys in a very low-key and business-like fashion. European judges then review the evidence and often reconvene the case several more times over a course of weeks or months, until all of the
Evidence the judge requires is presented. The English process, on the other hand, leads to a single trial, or trials of split issues, as in the U.S.

The role of the attorneys in this system is to nominate witnesses to testify about precise facts. The judge then reviews these suggested witnesses and decides which ones to call and what order they should be called in (although in England there is more party autonomy in such issues). This is not the case in Spain, where the parties provide personal and professional data of their proposed witnesses. The judge will normally take their declaration, although there are limits to the number of witnesses testifying on the same facts. Unlike a plaintiff in the U.S., a plaintiff in the Civil System does not call a set of witnesses first and then rest before the defendant calls its set of witnesses. If a Civil System judge determines that a party’s suggested witnesses and their knowledge are immaterial or redundant, the judge will not permit them to be called. Once called, witnesses in the Civil System are primarily questioned by the judge. There is no direct or cross-examination, as those terms are used by U.S. attorneys.

This is not the case in Spain either. Perhaps not with the level of background details as in the U.S., but the parties’ attorneys may question both the parties and the witnesses directly and then may cross-examine them. The judge may also question the parties and the fact and expert witnesses and usually this is done in complex cases. The judge may also reject irrelevant questions. The attorneys for the parties may follow-up on some questions asked by the judge.

One consequence of this system is that there is no need for depositions; therefore, depositions do not occur in the Civil System. In fact, attorneys usually have very little to do with the witnesses prior to testimony before the judge. Thus, substantial or detailed preparation of witnesses by attorneys is not the custom and is often frowned upon by judges. Preparation is possible in Spain so long the witness is not told what to answer.

However, there are also no depositions in the English common-law system. The English procedures sit somewhere between U.S. and a Continental European civil law system. In England, the parties call witnesses and prepare their written Witness Statements, which are exchanged at the appropriate stage, generally after discovery. Those Statements stand as the evidence-in-chief of the witnesses, who are then cross-examined on it at trial. It is a procedure similar to that adopted in many forms of international arbitration.
Document discovery is also frequently rudimentary under the Civil System. For example, in France, attorneys are under no obligation to provide any documents as part of the discovery process. They will provide documents that are beneficial to their case, but do not provide documents that might help the other party. Indeed, a French attorney who provided documents that would help the other party would be guilty of legal malpractice. This is also true in Spain, as well, but the parties may compel each other to disclose all sorts of documents related to the case, which will include potentially adverse documents. Judges can make adverse inferences against the party that opposes disclosure with no fair reason. Clearly, litigating in a civil justice system in which parties do not have to bear the enormous cost of substantial document discovery and potentially numerous depositions is bound to be less expensive and quicker than a common-law justice system, in which the parties have the right to choose to have a jury of their peers decide the disputed facts.

Again, the English system sits somewhere between the two. In England, there is no longer the wide-ranging discovery (now called “disclosure”) on the basis of anything “which may fairly lead him to a train of enquiry” as postulated in Compagnie Financiere du Pacifique v Peruvian Guano Co (1882) 11 QBD 55—known as the Peruvian Guano test. Now under English law, each party is under an obligation to give (save for exceptional circumstances) “standard disclosure” to the other party in the course of proceedings, which in essence is any document which:

1. adversely affects your own case: or
2. adversely affects another party’s case; or
3. supports another party’s case.

There are rules as to the lengths to which one has to go to dig out such documents, including disclosure of metadata, deleted electronic documents etc., based in essence on proportionality. The parties have to state what searches they have made and why.

If the above was not enough to explain the difference in cost between the systems, another explanation may be that in most Civil Systems, expert witnesses are retained by the Court, not the individual parties. The position in Spain is different, however. Under normal circumstances, the parties instruct experts and file their opinions with their pleadings. The judge will not appoint an expert unless a party requests an expert and the judge deems the appointment appropriate and relevant. The Court expert is expected to be impartial and to assist the Court in
understanding the relevant issues. This is vastly different from the use of experts in the U.S. In Spain, the parties’ appointed experts are required by law to raise both favorable and adverse facts.

In England the expert witnesses also owe their primary duties to the court. The practice of a single court-appointed expert is growing, especially in smaller claims, but in significant litigation it remains most common for each party to appoint an expert – but this does not alter the fact that the expert’s duty is to the court. Expert witness statements are exchanged and the witnesses are cross-examined on them at trial, just like fact witnesses. However, before trial the experts must meet, without lawyers or clients present, to produce a list of issues on which they agree and disagree, stating what those agreements and disagreements are. This often serves to narrow the issues. At trial “hot-tubbing” can be used, though rarely is (that is concurrent evidence in the witness box together).

Article III of the U.S. Constitution states that all trials shall be by jury. U.S. Const. art. III. This right was expanded with the Seventh Amendment to the U.S. Constitution, which guarantees a jury trial “in suits at common law,” which concerns civil claims. U.S. Const., amend. VII. The U.S. Constitution, as well as the rich and long-held traditions of Common Law, together mean that the European Civil System would never be transferrable to the U.S. However, it is fair to ask whether the higher cost of litigation and claims-resolution that U.S. companies must incur compared to their European counterparts might put them at a competitive disadvantage in the global economy.

III. Principles of civil litigation in these jurisdictions

When comparing civil litigation in common-law and civil-law systems, we should first give some thought to a philosophical issue. What is the underlying philosophy in our respective litigation systems? It is common to hear that litigation in the U.S., England, and Wales is based on the general principle of all cards on the table, whereas civil-law systems do not require the parties to disclose *motu proprio* evidence that would undermine their case. This fundamental difference is key when comparing common-law and civil systems.

A. Spain

The Spanish litigation system does not follow the “righteous judge” model, whose role is to search and find the material truth at all costs. An old expression went along the following lines: “whatever is not in the court file is not in this world.” The Spanish judge is subject to the rule of law. This means that the judge’s discretion when analyzing the evidence and making his decision is subject to the limits, parameters, and criteria
marked in the law. However, it is true that occasionally the courts draw up bespoke solutions in order to provide material justice. This is possible because the courts may interpret the law according to the existing “social reality” at the time the law is to be applied (article 3.1, Civil Code). This allows a considerable degree of discretion. Further, the Spanish procedural system is more adversarial than inquisitorial. However, this does not mean that the judge is a passive and silent spectator of what the parties do. On the contrary, the judge’s role is crucial in many instances of the proceedings.

Regarding access to justice, the approach to this fundamental right of the citizens of a country has varied through the centuries. Currently, in very general terms, we can say it is the rule in Continental Europe, although there are some limitations, such as: restrictions on the amount of permissible contingency fees and allowable class actions; the “loser-pays” rule in regard to costs; court filing fees; and the promotion of ADR to alleviate the burden on the courts.

B. United States

It is commonly agreed that four basic principles underlie the judicial system in the U.S., both federal and state: (1) equal justice under the law; (2) due process of law; (3) the adversary system of justice; and (4) the presumption of innocence. “Equal justice” refers to the goal of the judicial system to treat all persons alike under the law. “Due process” encompasses (a) a person’s right to receive sufficient notice of the claims or charges against her and a fair hearing before a tribunal with the power to decide the matter, and (b) the requirement that legislation be fair and reasonable and further a legitimate governmental objective. The “adversary system of justice” is a procedural system that enables parties to actively put forward a case or defense, without hindrance, before an independent decision-maker. See Black’s Law Dictionary 62 (9th ed. 2009). Lastly, “presumption of innocence” is a fundamental principle in criminal law that “a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence.” Id. at 1306.

The U.S. civil justice system has also been described as “a legal regime that responds to wrongdoing by vindicating the right of the victim to hold the wrongdoer accountable.” Jason M. Solomon, What is Civil Justice?, 44 Loy. of L.A. L. Rev. 329 (2010). And “[t]his ability to confront one who has wronged you, regardless of your station in life, may be a fundamental part of a democratic society.” Id. at 336. Affording access to this system of justice and its underlying principles remains a seminal goal in the U.S., but it continues to be met with challenges. Unlike criminal
cases, the U.S. government has not created a statutory right to counsel in civil cases. And only a few State governments have created such a right. So, “[f]or the most part, no poor U.S. citizen has a constitutional or statutory right to the assistance of counsel for civil litigation in either the U.S. Federal or state courts.” Justice Earl Johnson, Jr., Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies, 24 Fordham Int’l L. J., S87 (2000).

To help remedy this problem, the U.S. Congress created the Legal Services Corporation (LSC) in 1974, a nonprofit corporation, not a federal agency controlled by the government. LSC is operated by an eleven-member board whose members are confirmed by the U.S. Senate. It “funds 134 grantees that operate local, regional, or statewide civil legal assistant programs,” and the LSC president “administers all grants and contracts.” Allan W. Houseman, Civil Legal Aid in the United States, 3 (2015). LSC’s annual funding has ranged from $420 million to $385 million during the last six years. Id. at 1. Of course, this amount falls short of the need, but LSC has aggressively employed technology to increase access to civil legal aid and to the courts, setting as its mission statement “to provide some form of assistance to 100% of persons otherwise unable to afford an attorney for dealing with essential legal needs.” Id. at 2. Filling the gap are hundreds of legal aid organizations across the U.S., both state and privately funded. For example, in 2009 the Texas Access to Justice Foundation provided free civil legal aid to 234,713 individuals, and 104,939 clients’ cases were closed by TAJF grantees. Although Texas attorneys donated over 1.87 million hours of free legal or indirect services to the poor (2015), and over $1 million for legal aid to the poor (2014), this covers only about 50% of qualified individuals in Texas. So obviously more must be done to provide access to legal services.

C. England & Wales

English law has evolved over many years. It is often considered to have dated from the local customs of the Anglo-Saxons. After the Norman conquest of 1066, the Saxon shire courts grew alongside the feudal courts.

1 https://repository.library.georgetown.edu/bitstream/handle/10822/761858/%20Houseman_Civil_Legal_Aid_US_2015.pdf?sequence=1.


A Comparison of Commercial Litigation in Europe and North America
and the ecclesiastical courts. Royal courts grew from the King’s council, presided over by professional judges, which eventually absorbed the baronial and ecclesiastical courts. By 1250, the Royal Judges had amalgamated the various local customs into a system of common law – meaning law common to the whole country.

In the 17th and 18th Centuries, common law absorbed the Law Merchant, the international code of mercantile customs. From the 19th Century onwards, much of the law was incorporated into legislation, though much of that legislation, such as the Marine Insurance Act 1906, was little more than an enactment of existing common law. Common law continues to fill the gaps.

The foundations of the Commercial Court were laid in the latter half of the 18th Century, when trials of commercial actions involving banking, insurance, and shipping took place at the Guildhall in the City of London, leading to the creation of the commercial list by a “Notice as to Commercial Cases” in 1895.

Hence, London has a longstanding tradition whereby cases will be heard by specialist Judges. Barristers who have spent their careers in commercial law in areas such as insurance, reinsurance, shipping, banking, trade and international arbitration are appointed as Judges in the Commercial Court. Likewise, the Technology and Construction Courts. This expertise therefore exists among Judges from first instance, through the Court of Appeal to the Supreme Court. Commercial Court judges therefore understand, e.g., insurance and reinsurance—they do not have to be taught it by the parties.

The system that has evolved, and which U.S. inherited and thereafter separately developed, is an adversarial system in which Judges do not perform an investigatory role, but listen to the cases put by Counsel and the witness, ask questions of them at trial, and on that basis reach their decision. One of the unique aspects of common law, retained in other common-law jurisdictions such as the U.S., is the principle of *stare decisis*—the binding nature of precedent, which is not one of the tenets of Continental European civil systems.

English Court procedure is now set out in the Civil Procedure Rules published by the Ministry of Justice (www.justice.gov.uk/courts/procedure-rules/civil/rules). Rule 1 sets out their “Overriding objective” of “enabling the court to deal with cases justly and at proportionate cost”:

Rule 1.1 (2) continues
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

Under Rule 1.3 “The parties are required to help the court to further the overriding objective”.

This wide ranging set of Rules not only covers the conduct of the litigation itself, but also provides for pre-action protocols, prescribing what has to be covered in the pre-action correspondence, its timing, information provision and the raising and answering of questions, all aimed at avoiding litigation if possible. It leads to a more co-operative conduct of litigation than we see in the USA.

In addition, the combination of expertise and experience in the English Court and judiciary has led to London becoming a leading centre for international dispute resolution. This is enhanced by the parties’ ability to endow the Court with jurisdiction that it would not otherwise have, should they so agree. Hence, many contracts contain English law and jurisdiction clauses, even where there is no other connection to London, and we often see parties agreeing to litigate in London even after a dispute has arisen (e.g., recently in certain pieces of litigation involving Russian parties).
Likewise, London is a major centre of international arbitration, aided by the Commercial Court’s great experience in deciding issues of curial law – in overseeing the arbitral process. Also, unusually and in very limited circumstances, the English Courts can hear issues of law (not fact) arising on appeal from an arbitration (unless the arbitration agreement precludes appeals).

The upshot of all this is that it has been reported by the law Society Gazette (www.lawgazette.co.uk/practice/commercial-court-ahead-of-the-game/5043604.article) that there was a foreign party involved in 81% of claims issued during 2013/14 and in 48% of cases all parties were from outside the U.K.. The U.S. is one of the most common nationalities, along with Russia. Others include Kazakhstan, India, UAE, Bahrain, Germany, BVI, Panama and Switzerland. The courts bring hundreds of millions of Pounds of invisible earnings into the British economy from overseas.

IV. Key differences of the respective systems

A. Pre-trial discovery

Probably the most significant difference is pre-trial discovery.

1. Spain

In Spain, there is no U.S.-style pre-trial discovery. However, the Civil Procedure Act (CPA) provides for certain mechanisms that, at first sight, play a similar but limited role. The CPA differentiates between preliminary evidentiary enquiries, a sort of pre-trial discovery (Articles 256 et seq. CPA) and advanced discovery, including conservation of evidence (Articles 293 et seq. CPA).

Pre-trial discovery is allowed for preparing the lawsuit by making available to the claimant certain documents, namely and strictly limited to wills, corporate documents, and accounting (only for shareholders or partners), insurance policies, matters related to patents or trademarks, or facts related to unfair competition. Additionally, pre-trial testimony may be required over facts related to capacity, representation, or legal standing to appear in court, or to seek disclosure of documents proving that capacity, representation, or legal standing. There are other instances in which pre-trial discovery may take place but would not be relevant for this paper. If the party required to produce the documents refuses to deliver them without fair cause, the court may order the entry in the place where the documents are supposed to be, the taking of the documents and their deposit in the court at the disposal of the party (Article 261 CPA).
The court will assess its jurisdiction on its own motion and, if acceptable, it may request security to the applicant in order to cover possible damages. The security shall be cancelled if no damages are caused, provided proceedings are issued within 30 days after receiving the documents or information requested.

The court will serve the requested party with the application. Should the party oppose, the court will summon the parties to a hearing. If the court finally accepts the application, there is no appeal. But if the court rejects the application, the applicant may appeal to the higher court.

2. United States

Pre-trial discovery in the U.S. is critical in ensuring that facts are revealed, not concealed. Thus, discovery in the U.S. is generally broad. U.S. courts usually permit the discovery of information that is relevant and likely to lead to the discovery of admissible evidence. A document that may be discoverable, however, may not ultimately be admissible at trial. This policy of broad discovery also enables a party to more accurately evaluate the merits of his opponent’s case or defence, as well as to soberly determine his position. This often fosters a resolution before the parties incur the time and expense of trial. To be informed is to be forewarned. Being informed, of course, comes with a cost. State and federal rules have made significant efforts to ensure that discovery is reasonable and properly contained based on the nature of the case without eliminating the ability to learn the material facts.

3. England & Wales

As seen above, the pre-action protocols provide for the provision of information before an action even starts. A Court can also order pre-action disclosure in certain circumstances, but this is rare. Disclosure is part of the standard process, as described above, but relates (other than in exceptional circumstances) only to the parties. Witnesses can be ordered to bring specific documents to trial. Any third party discovery must relate to specified documents, for the existence of which there is evidence—the Court will not countenance a fishing expedition.

B. Advanced discovery

This mechanism intends to avoid the loss of evidence, and may be put in practice before or after litigation begins. The applicant must prove there is a sound risk ("founded fear" is the legal expression) that the evidence could not be produced at the appropriate stage.
The competent court is the one that would deal with the main proceeding if not instigated yet. Evidence must be submitted in accordance with the general procedural rules and, if admitted by the court, the court shall take the relevant steps, including service to the parties concerned, who may plead whatever they may deem convenient or even oppose the taking of evidence.

Evidence so taken would not be valid, if the plaintiff does not file the statement of claim within two months from the date in which the evidence was taken.

C. Conservation of evidence

Before litigation begins or while it is pending, any party may request the court to take the necessary steps in order to avoid destruction of evidence that can be material for the lawsuit. The court can provide a wide variety of measures leading to the preservation of evidence and can order the parties to refrain from taking certain action, or order them to take certain action advising that it may proceed against them for contempt of court. The court should ensure that the following conditions are complied with:

• Evidence should be probative, adequate and useful when proposed;

• Proof of reasons given;

• Availability of the evidence without causing serious inconveniences to the other party or to third parties.

Finally, the court may require security to the applicant before taking the relevant steps or accept a bond from the requested party to compensate any possible damages that may derive from the lack of production of the requested evidence.

1. Spain

Spain banned pre-trial discovery under Article 23 of The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970. However, potential litigants in Spain should be aware that there is a fair degree of evidentiary activity available prior to initiating proceedings in court, although such activity by no means can be characterized as US-style discovery.
2. United States

In federal and state courts, procedures exist to protect against the destruction of evidence during litigation and before trial. If a court finds that a party has spoliated material evidence, it may sanction that party, including instructing the jury that they may presume that the missing evidence, had it been preserved, would have been adverse to the spoliating party. Courts may also issue protective orders that require a party to maintain the condition of a site, such as the location of incident giving rise to the suit, or the condition of personal property.

3. England & Wales

In England, a party to an action must preserve documents. To ensure this, the issuance to potential parties of “litigation hold” letters has increased in its use over recent years.

D. Preclusion

It is said that certain procedural acts are precluded where the parties fail to perform them within the time limits required in the procedural rules.

1. Spain

In Spain, the time limits set out in the CPA are not subject to extension, except in the event of force majeure (article 134, CPA). The force majeure event must be proved by the party wishing to suspend the proceedings. If the court agrees to the extension, the term will start running again once the force majeure has disappeared.

Once the term to do a certain act has expired, the opportunity to carry it out will be forfeited (article 136, CPA). The court’s secretary will attest to the fact and will resolve as appropriate within his powers or will advise the court so that it makes whatever decision may be appropriate.

For instance, the defendant has 20 days to file his defense. If he does not, he will have made default and the court will so declare. If he appears in the proceedings at a subsequent moment, he will be able to continue from that moment onwards, but will be unable to file his defense.

Other events of preclusion have to do with the facts and legal grounds raised in the statement of claim. If the claim can be based on different sets of facts and legal grounds, then all of them must be raised in the claim. It will not be possible to reserve some of them for a subsequent procedure (article 400, CPA).
Likewise, the claimant will be precluded from raising new items of claim once the defendant has responded the original claim. New claims and new defendants may be added before the claim has been responded by the defendant.

As can be seen preclusion is very formalistic in Spain.

As a related issue, the parties may request the suspension of proceedings for 60 days at most. The court will authorize the suspension so long it does not prejudice, in the court’s judgment, the common good or third parties’ interests.

2. United States

Deadlines for producing or answering discovery, amending pleadings, and designating fact and expert witnesses are enforced to affect their purpose of enabling the parties to effectively, but quickly as possible, prepare for trial. However, most deadlines can and will be extended if the party seeking an extension establishes good cause for failing to meet the deadline and that the opposing party will not be prejudiced by the delay.

3. England & Wales

Extensions are allowed, but will only be ordered by the Court if there is good reason. The Courts in recent years have adopted a stricter approach to sanctioning those who miss the time limits ordered by a court, or provided for in the Civil Procedure Rules, without first seeking and receiving a court extension.

E. Jury trial

1. Spain

With regard to jury trials, the approaches used in Continental Europe vary among jurisdictions. The philosophical and constitutional principles that justice must be dispensed by the people was not echoed in Spain for centuries. Distrust of people’s discernment to make decisions over the life, freedom, and property of other people led to a system based on justice dispensed by professional judges, who, are assumed to know the law and be serene, impartial, and independent. Until quite recently, juries were not introduced in Spain, and then only for limited criminal cases, subject to certain restrictions. Jury trials in civil proceedings are not available in Spain.
2. United States

Fundamental right. As mentioned, the right to trial by jury is embedded in the U.S. Constitution, and exists for civil and criminal cases. The Founding Fathers of the U.S. believed that the importance of the right to trial by jury was equal to that of representative government and the rule of law. John Adams (1774): "Representative government and trial by jury are the heart and lungs of liberty." Thomas Jefferson (1801): "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

This federal constitutional right to jury trial in civil cases does not extend to the states, except when a state court is enforcing a federally created right, of which the right is a civil action at law. In all 50 states, however, parties have a right to trial by jury. The Kentucky Constitution, for example, declares the rights of access to the courts and trial by jury to be “sacred” and “inviolate.” Ky. Const. § 7. In most states, a party must request a jury trial, and a party may waive the right to a jury and instead choose to have the dispute decided by the judge.

Declining rate of trials. In recent years, however, fewer civil legal disputes are being decided by trial, much less jury trial. There are several reasons for this decline.

The cost of going to trial—whether with or without of jury—is high, particularly in cases involving complex issues, numerous witnesses and documents, and large legal teams. Also, the unpredictability of what juries will decide—and in many cases how the judge will rule—lead parties to choose the certainty of pre-trial settlement.

Another explanation is that Courts are more frequently deciding cases by summary judgment early in the case, which requires the court to determine that there is no issue of material fact and one party is thus entitled to judgment as a matter of law. Courts also routinely order the parties to mediate their dispute before an independent mediator, which involves relatively low cost. Some judges are simply anti-trial, which is due in part to the ever-increasing number of cases on their dockets.

Alternative dispute resolution, in all of its forms, continues to lead to the decline in the number of trials. Virtually every consumer contract now requires the consumer to waive her rights to litigate any disputes in court. And business entities are requiring their employees and officers to agree to arbitrate any dispute related to the employment relationship. Courts have enforced such arbitration clauses, honoring the freedom of contract. See, e.g., Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421,
A Comparison of Commercial Litigation in Europe and North America

1425 (2017) (a ruling by a court that “singles out arbitration agreements for disfavored treatment violates the Federal Arbitration Act”). Indeed, arbitration of disputes is strongly favored under federal and state policy. The Federal Arbitration Act makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. But although there is a presumption of arbitrability where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at issue, the Supreme Court “has never held the presumption overrides the principle that a court may submit to arbitration “only those disputes . . . the parties have agreed to submit.”” Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 288-89 (2010 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1997)).

3. England & Wales

The only jury trials in civil matters are for defamation. Even then the parties may opt for a Judge only. As in U.S., and as presaged above, alternative dispute resolution, in all of its forms, continues to lead to the decline in the number of trials. The introduction of pre-action protocols has also led to an increase in early settlements.

V. Conclusions

The differences in the litigation systems employed in the United States and Europe (and in particular, Spain) create differences in cost and efficiency that are real and quantifiable. However, there are also other factors involved in choice of law and jurisdiction (and indeed whether to include a litigation or an arbitration clause in contracts), which could be as important as cost, or possibly more so, especially in high value disputes. All these differences should be reviewed and understood by attorneys on both sides of the Atlantic, so that they can accurately and intelligently counsel clients engaged in multinational businesses.
THURSDAY, JULY 27, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

CONSTRUCTION
Contractual Risk Transfer – The Changing World of
Indemnification and Insurance in Construction
Contracts and Litigation

Salle des Fêtes

Speakers:
Marc Harwell
Robert Moore
R. Matthew Cairns
Derek D. Lick
Contractual Risk Transfer: 
The Changing World of Indemnification and Insurance 
in Construction Contracts and Litigation

Construction Section Presentation 
FDCC Annual Meeting 
Montreux, Switzerland 
July 2017 

* * *

Robert C. Moore, 
2RM Risk Services/Southwest Industrial Rigging 
Phoenix, AZ 

R. Matthew Cairns, 
Gallagher, Callahan & Gartrell, 
Concord, NH; 

Derek D. Lick, 
Sulloway & Hollis, PLLC, 
Concord, NH; 

It all started many light years ago in a galaxy far, far away, when the Emperor’s Death Star blew up. Investigation revealed a design defect caused the calamity. The Emperor, as the contractor overseeing the Death Star’s construction, was the target of uncountable lawsuits for wrongful death and the claims were hitting the trillions of dollars. Not even “the Force” could protect him from the endless litigation. Not wanting to face that kind of risk again, the Emperor created the now-infamous indemnification clause – a provision that passed along all responsibility to his subcontractors and which has been the bane of subcontractor’s ever since.

THE OVERVIEW

Well, we all know that indemnification did not start with the destruction of the Death Star. In fact, indemnification first appeared in the 13th century, as a device to allocate the risk of loss of goods transported by sea. From those beginnings, we now have the modern-day indemnification clause. In the construction industry, these clauses are used by upper tier contractors who have decided that to protect, in part, their profitability, their contracts must fully protect them and pass all liability on the job site downstream to the subcontractors who will then pass the liability downstream further to the sub-sub-contractors and so on.

While these clauses serve the interest of the upper tier contractor, they don't reflect the way that a job site actually works. Anyone that has worked in construction understands the reality of the situation, the General Contractor or Construction Manager controls the job site in one form or another and so those entities have certain duties and responsibilities for the safety of all workers. In fact, the Occupational
Safety and Health Administration (“OSHA”) has enacted “multi-employer” work site safety rules that place responsibility on the General Contractor and/or Construction Manager. Also, many state legislatures and courts have decided that allowing all liability to be passed downstream is not good public policy. There is a general feeling that broad indemnification or indemnification for one’s own fault does not promote safety on construction sites. There are statutes in many states that make indemnity clauses void, as against public policy, or limit them in some way. There are also court decisions that strictly interpret indemnity clauses, limiting their effectiveness. However, this has not stopped the upper tier contractors. Upper tier contractors have continually modified their indemnification and insurance requirements to transfer their risks and every subcontractor needs to be prepared to deal with these clauses.

To supplement what we hope to be an interactive session dealing with Risk Transfer, we have provided this summary, along with the following documents:

- A compendium chart of statutes and case law for all 50 states highlighting relevant statutes for indemnification and insurance. In the chart, we note the rules that apply to indemnity, including statutes that may limit indemnity and/or eliminate the “additional insured loophole.”
- A chart with template language to help understand and manage the pitfalls and complications of doing work across state lines, while successfully managing contractual risk transfer. (Note: The template language is drafted in terms of lessors and lessees, but is applicable in the context of contractors and subcontractors.)

At the last construction section meeting in Charleston we reviewed and discussed the “incorporation by reference” doctrine and these new charts will fit well with the potential of having an all-encompassing chart for risk transfer.

THE UPPER TIER CONTRACT

Anyone who runs a business knows that one of the keys to the business’s success is the ability to foster meaningful business relationships. This is especially true in the construction industry. We all have dealt with the general contractor, builder or developer that will want your client to sign a Master Service or a Subcontractor Agreement that is very onerous. Many of the larger contractors, builders and developers (“Upper Tier Contractors”) have sophisticated and knowledgeable lawyers drawing up these agreements, which contain terms that are most favorable to the Upper Tier Contractors. These types of agreements are known as contracts of adhesion or unconscionable contracts. It is important to identify such contracts early in the process, so you can get your clients the best protection possible. Some things your clients alert your clients to contact you include:

- the use of pre-printed form or boiler plate contracts drawn skillfully by the party in the strongest economic position, which try to establish new industry wide standards offered on a take it or leave it basis to the party in a weaker economic position;
- a significant price disparity in the bidding process;
- a denial of basic rights—the upper tier contractor’s contract with the owner is far more fair than your client’s contract with the upper tier contractor;
- the inclusion of penalty clauses;
- the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect;
The subcontractor will not have to indemnify the indemnitee if the indemnitee is sole cause of the loss. All losses even if the indemnitee is 99% at fault and the indemnitor subcontractor is only 1% at fault.

In this scenario, the indemnitee will be indemnified against its own fault. The indemnitor will indemnify the indemnitee for losses/claims resulting from the indemnor’s own negligence. In the scenario, if the indemnitee subcontractor is 1% at fault, generally, it will only be required to indemnify the indemnitee 1%.

Indemnity traditionally requires one party (the indemnitor) to defend and reimburse the other (the indemnitee) against various expenses and losses. Indemnification provisions fall into three broad categories, with some states having a fourth category. Those categories are:

- **Broad**: The indemnitor is assuming an unqualified obligation to defend and hold harmless the indemnitee for all risk and liability, regardless of fault.
- **Limited**: The indemnitor assumes all risk and liability as above, except that it does not assume liability caused by the sole negligence or in many cases willful negligence of the indemnitee.
- **Partial**: The indemnitor and indemnitee assumes only apportioned risk and liability caused by or arising from, the subcontractor’s negligence or fault.
- **Statutory**: The state has passed legislation that limits or eliminates the use of indemnity clauses and in some instances insurance clauses.

The first category of indemnity provisions is a broad provision, where indemnification “arises out of” the indemnor’s work or presence or where an indemnitee is indemnified against its own fault. This is what is considered to be the broadest class of indemnity.

The second type of indemnification provisions provides for indemnification except where the indemnitee is solely the cause of the loss. In this scenario, the indemnitor will indemnify indemnitee for all losses even if the indemnitee is 99% at fault and the indemnitor subcontractor is only 1% at fault. The subcontractor will not have to indemnify the indemnitee if the indemnitee is sole cause of the loss.

The third type of indemnity provision is referred to as partial or pro-rata indemnity. This requires that an indemnitor indemnify for losses/claims resulting from the indemnor’s own negligence. In the scenario, if the indemnitee subcontractor is 1% at fault, generally, it will only be required to indemnify the indemnitee 1%.

In the fourth category are states where there are statutes that declare that indemnity agreements are unconscionable and against public policy. Some courts have found that indemnity clauses in violation of the statute nullify the entire provision, while other courts strike only the language that is null and void. Legislatures have put in many of these anti-indemnity statutes words that give courts broad powers over these agreements. These include words such as; IT IS AGAINST THE PUBLIC POLICY OF THIS STATE TO HAVE ANY AGREEMENT THAT INDEMNIFIES SOMEONE FOR THEIR OWN NEGLIGENCE. Our handout provides you with a state by state analysis.
If your clients perform work in a state that has an anti-indemnity statute, they are fairly well protected from having to bear the cost of claims that are not the result of their liability based on an indemnity agreement. There is of course, one major caveat to this statement, and that is that indemnity protection may not matter if an insurance provision in a subcontract agreement exists and this is allowed by the state where the work is being performed. As long as it is clear, easily readable, and not ambiguous courts in most states may allow an innocent subcontractor to pay all the damages of a negligent contractor, through an insurance agreement.

This would seem to defeat the very purpose of an anti-indemnity statute, as an insurance agreement is just another form of indemnity. However, many states allow this. Some states, however, such as Colorado have anti-indemnity statutes that add additional requirements or limitations. In Colorado, for example, there is a provision in the statute that closes the “additional insured loophole.” Section 13-21-111.5, Colorado Revised Statutes, was amended by the addition of a new subsection (6)(a) to promote, among a variety of other things, what lawmakers believe will bring competition and safety into the Colorado construction industry by taking away indemnity and “additional insured” coverage for a party’s own negligence. There is a general feeling that broad indemnification or indemnification for one’s own fault does not promote safety on construction sites.

**INSURANCE CLAUSES AND THE ADDITIONAL INSURED**

This leads our discussion to one of the most complicated areas of risk management—what coverage is affordable for your clients to provide to an additional insured. As you know, often times your clients are asked to name their customer as an additional insured under their general liability policies. What exactly does this mean? The answer is not simple.

What coverage an additional insured is afforded is dependent on numerous factors, most notably, through which endorsement the additional insured status is conferred. First, it should be noted that through additional insured status, what a party cannot get through indemnity, in most states, that party can try to get through additional insured status. This means that if your client’s customer requests additional insured status under your client’s policy, your client’s insurance carrier may have to pay losses resulting from your client’s customer’s negligence.

Most anti-indemnity states still allow risk transfer through procurement of insurance. There are various reasons that contractors will require additional insured status. As mentioned above, one reason is to obtain broader risk transfer than may be allowed under state anti-indemnity statutes. Other reasons include backing up your client’s indemnity agreements, to insulate a party’s own insurance policy (key reason), to provide direct rights to the additional insured under the policy and for defense coverage purposes.

It is important to note that a certificate of insurance that identifies a party as an additional insured does not give that party additional insured status, as many courts have held. This is because the language on the certificate states that the certificate does not alter or amend insurance coverage. What does however give additional insured status is an endorsement on the policy providing that the party is an additional insured. The coverage that an additional insured is provided varies greatly depending on the endorsement under which additional insured status is provided. IT IS EXTREMELY IMPORTANT TO UNDERSTAND THAT WHEN YOUR CLIENTS ARE PROVIDING ADDITIONAL INSURED STATUS TO AN UPPER
TIER CONTRACTOR, YOUR CLIENT NEEDS TO MAKE SURE ITS POLICY PROVIDES THE COVERAGE THAT IS REQUIRED BY THE CONTRACT (or you must negotiate changes to make sure that it does.)

The endorsement which provides the most coverage for an additional insured is ISO endorsement CG 20 10 11 85. Because of its broad coverage, most insurers refuse to even provide it when additional insured status is requested. The language of the endorsement, in relevant part, states “Who is an insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of ‘your work’ for that insured by or for you.” The “arising out of your work” language has been interpreted very broadly and has been found to provide a basis for providing coverage to an additional insured for its negligence. In some cases, a named insured’s mere presence on the job site was enough to fulfill this “arising out of your work” link that provided coverage to an additional insured under the policy, even though the named insured had nothing directly to do with the accident.

While some contracts do not specify which type of endorsement is required, read the insurance section carefully to determine if the coverage being sought is that which can only be provided through this broad endorsement. While CG 20 10 11 85 is being requested less frequently, some companies still try to request it. In addition, your client does not want to provide additional insured status for the additional insured’s sole negligence. Otherwise, it is quite possible that your client will be paying out huge claims and defense costs on its insurance policies. This AI endorsement, CG 20 10 11 85, affects your client’s loss history and your client’s ability to procure insurance in hard insurance markets. It is recommended that your clients request the following ISO endorsements in all your contracts: CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, and CG 20 34 03 97 because they are currently commercially available.

When determining whether to give a party additional insured status, here are a few things to consider:

- What sorts of coverage are they requesting (e.g., completed ops, ongoing ops)?
- Is additional insured coverage only extended to the additional insured when your conduct DOES NOT cause the claim?
- Is the request for additional insured status in writing?
- If it is in writing, is it possible to limit the circumstances in which additional insured status will be provided in the contract (e.g., named insured will provide additional insured status for bodily injury or property damage proximately caused by the named insured’s negligence)?
- Does it request your client’s policy be primary and non-contributory?
- Why should your client’s insurance be primary to the upper tiered contractor—isn’t this really a way of getting around anti-indemnity laws? Your client should try to avoid this if at all possible, and a pro-rata split based on fault/negligence would be preferable to your client.
- Do they request a waiver of subrogation/lien? Your client does not want to relinquish its rights of subrogation.
- Will your client’s work be commingled with other subcontractors on the site? This may extend your client’s liability.
- What kind of additional insured coverage is your client’s insurer willing to provide?
- Does your client have a good working relationship with the company requesting additional insured status? Does your client feel they operate safely? Is your client willing to take financial responsibility if they cause an accident?
Again, for all additional insured requirements, it is recommended that the following endorsements be used; ISO Form CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, and CG 20 34 03 97.

CHOICE OF LAW, JURISDICTION AND VENUE

Given all of the above and the widely varying state statutes and case law found across the country, it is particularly imperative to review and negotiate, choice of law, jurisdiction and venue clauses in construction contracts. We have provided a compendium of statutes and case law along with this summary, and we suggest, as always, that it is important to review the law of the particular state that is to govern the contract. Furthermore, it is important to consider the venue in which your client will find itself in the event of a dispute.

CONCLUSION

The use of indemnity and insurance clauses is well established in construction contracting, and they are not going away. Also, statutes will continue to be enacted or amended that eliminate or limit such clauses. We hope that the information provided in this summary, the accompanying materials and our presentation will assist you in identifying, reviewing and negotiating such clauses.
Compendium of Statutes and Case Law
Indemnification and Insurance Risk-Shifting
in Construction Contracts
(Updated as of May 1, 2017)

Many of the following states have some statutes or cases that limit indemnity or insurance in construction contracts. We are supplying this FDCC Compendium for use by FDCC members and their clients for the 50 United States. We have assembled the chart below so that you can review if the state that you are doing business in has anti-indemnity statutes, cases, or other issues dealing with your company’s status as contractor, subcontractor, service provider, vendor, architect or engineer. The major thrust of this compendium is to provide the statute and language from cases that will give the reader a better understanding of that any one of the 50 state’s laws. We bring to your attention the distinction between contractor and service provider in some states. For instance, the bare rental of equipment could provide an argument that you are merely providing a service, and are not a subcontractor on the job site. Four jurisdictions now have cases that provide that Equipment Rental companies are not covered by anti-indemnity provisions, Kansas, Indiana, Virginia, and Minnesota. In addition, some states draw the line if the leasing company is providing an operator for the equipment, not a person actually installing the product.

The insurance column is relatively new, given that a minority of states now has laws or cases that limit the upper tier contractor from forcing the subcontractor to obtain insurance that protects the upper tier contractor, from the upper tier contractor’s own fault. Basically, what you used to be able to get in insurance that you could not get in indemnity is now disallowed in some states.

<table>
<thead>
<tr>
<th>State</th>
<th>Statute and Relevant Case Law</th>
<th>Indemnity Except for Sole and/or Willful</th>
<th>Partial Indemnity</th>
<th>Broad</th>
<th>Insurance</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>See Royal Insurance v. Whitaker, 824 So.2d 747 (Al. 2002)</td>
<td></td>
<td>B</td>
<td></td>
<td></td>
<td>Indemnity language must be “clear and unequivocal” No anti-indemnity statute</td>
</tr>
</tbody>
</table>

No statute.

If the parties knowingly, evenhandedly, and for valid consideration, intelligently entered into an agreement whereby one party agreed to indemnify the other for its negligent acts and omissions, and the agreement is expressed in clear and unequivocal language, then that agreement is enforceable. Royal Insurance v. Whitaker.
Found in a variety of contracts, a contractual provision to “hold harmless” is an agreement to indemnify—the promisor assumes liability for all injuries and damages upon the occurrence of a contingency, thus relieving another of liability. See, e.g., Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co., 629 So.2d 633, 639 (Ala.1993). See also Black's Law Dictionary (9th Ed. 2009) (defining “hold harmless” as “[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY[,]” and a “hold-harmless agreement” as “[a] contract in which one party agrees to indemnify the other[ ]”). The contingent term of the hold harmless provision is for Tull Brothers to have been “held liable.” Tull Brothers has submitted no evidence indicating that it has been sued by a third-party and/or that it has had to defend *1259 against a claim by a third-party, for the curative work it performed regarding the window installation. The contingent event then, has not occurred. Under Alabama law, while particular language in an indemnity agreement is not required, the requisite intent of the parties must be clear to establish indemnity; ambiguous language is construed against the drafter. TULL BROTHERS, INC., v. PEERLESS PRODUCTS, INC.

| Alaska     | See AK §45.45.900 | S&W | Anti-Indemnity statute does not apply to a provision, clause, covenant, or agreement of indemnification respecting the handling, containment, or cleanup of oil or hazardous substances as defined in AK 46. |

Indemnification Agreements Contra to Public Policy. A provision, clause, covenant, or agreement contained in, collateral to, or affecting any construction contract which purports to indemnify the promisee against liability for damages for (1) death or bodily injury to persons, (2) injury to property, (3) design defects or (4) any other loss, damage or expense arising under (1), (2), or (3) of this section from the sole negligence or wilful misconduct of the promisee or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable; however, this provision does not affect the validity of any insurance contract, workers’ compensation or agreement issued by an insurer subject to the provisions of AS 21.

Anti-indemnity statute governing agreements “contained in, collateral to, or affecting” construction contracts applied to hoist lease between equipment lessor and construction contractor, where lease contained provision obligating lessor to indemnify contractor for claims arising out of, in connection with or incident to lessor’s performance thereunder, and contained other provisions designating hoist’s use in shopping mall construction project; such reading of anti-indemnity statute was consistent with legislative goal of increasing safety at construction sites. Anti-indemnity statute, which invalidates construction-related agreements to provide indemnity for “sole negligence and wilful misconduct” of indemnitee or others related to indemnitee, forbade indemnity claim against hoist lessor, brought under provision of its lease with construction contractor obligating lessor to indemnify contractor for claims relating to lessor’s performance thereunder, following accident in which subcontractor’s employee’s arm was crushed by hoist component at shopping mall construction site, where jury found that lessee acted with reckless disregard for employee’s interests and safety, as such amounted to finding of “wilful misconduct” within meaning of statute. AETNA CASUALTY v. MARION EQUIPMENT CO.
A covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract that purports to indemnify, to hold harmless or to defend the promisee from or against liability for loss or damage resulting from the sole negligence of the promisee or the promisee’s agents, employees or indemnitee is against the public policy of this state and is void.

In Washington Elementary Sch. Dist. No. 6 v. Baglino Corp., 169 Ariz. 58, 61, 817 P.2d 3, 6 (1991), for example, the Arizona Supreme Court enforced an intermediate form indemnity clause in a construction contract that protected the indemnitee against “any type of damage caused by the negligent behavior of the indemnitor, even though also caused in part by the active negligence of the party indemnified,” upon determining that this was the “clear and unequivocal” intent of the parties. While limited and intermediate form indemnity clauses in construction contracts may be used in Arizona to shift the risk of loss to an indemnitor even as to claims caused in part by the active negligence of the indemnitee, id., broad form indemnity clauses that purport to shift the entire risk of loss to an indemnitor, even as to liabilities caused by the sole negligence of the indemnitee, are “against the public policy of this state” and “void” under Arizona’s anti-indemnity statute, A.R.S. § 32–1159 The courts of the 17 other states that have enacted similar “sole-negligence” anti-indemnification statutes are in broad agreement as to the purpose and effect of such prohibitions. Aetna Cas. & Sur. Co. v. Marion Equip. Co., 894 P.2d 664, 666 n. 1 (Alaska 1995) (listing statutes). As summarized by one commentator, such statutes “achieve a more equitable distribution of costs and risk of injury” in the construction industry, where disparities in bargaining power are common, and misfortune is rarely the fault of one party alone.

| Arizona | See AZ §32-1159; 34-226; 41-2586 | S | This section applies to all contracts entered into between private parties and non-public entities |

| Arkansas | See AR §4-56-104 | P | I | Any contract that attempts to shift venue or jurisdiction to a more favorable place is null/void. Effective July 22, 2015- Special oil and gas rules on indemnification/insurance apply. |

Unenforceable provisions in construction agreements and construction contracts
(a) As used in this section:
(1) “Construction” means any of the following services, functions, or combination of the following services or functions to construct a building, building site, or structure, to construct a permanent improvement to a building, building site, or structure, including sitework:
(A) Alteration; (B) Design;(C) Erection;(D) Reconditioning;(E) Renovation;(F) Repair; or(G) Replacement;
(2)(A) “Construction agreement” means the bargain of the parties in fact, as found in the language of the parties or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in § 4-1-303. (B) “Construction agreement” does not include an insurance contract, a construction bond, or a contract to defend a party against liability; (3)(A) “Construction contract” means the total legal obligation that results from the parties’ agreement as supplemented by any other applicable law (4) “Gas” means natural gas, including casing-head gas and all other hydrocarbons that are not oil under subdivision (a)(5) of this section; (5) “Oil” means crude petroleum oil and other hydrocarbons regardless of gravity that are produced at the well in liquid form by ordinary production methods and is not the result of condensation of gas after it leaves the reservoir; and (6) “Operator” means a person that has the right as a landowner or by agreement with a landowner to enter on the land of another to explore, drill, and develop for the production of brine, oil, gas, and any other petroleum hydrocarbons.

(b) A provision in a construction agreement or construction contract is void and unenforceable as against public policy if it requires an entity or that entity’s insurer to indemnify, defend, or hold harmless another entity against liability for damage arising out of the death of or bodily injury to a person or persons or damage to property, which arises out of the negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers. (c) A provision, covenant, clause, or understanding written in a construction agreement or construction contract that conflicts with the provisions and intent of this section or attempts to circumvent this section by making the construction agreement or construction contract subject to the laws of another state, or that requires any litigation, arbitration, or other alternative dispute resolution proceeding arising from the construction agreement or construction contract to be conducted in another state, is void and unenforceable. (d) A clause described under subsections (b) and (c) of this section is severable from the construction agreement or construction contract and shall not cause the entire construction agreement or construction contract to become unenforceable. (e) The provisions of this section do not affect any provision in a construction agreement or construction contract: (1) That requires an entity or that entity’s insurer to indemnify another entity against liability for damage arising out of the death of or bodily injury to persons, or damage to property, but the indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitee, its agents, representatives, subcontractors, or suppliers; or (2) To provide construction work or services to an operator or other person directly related to activities or operations stemming from the exploration, drilling, production, processing, gathering, or movement of oil or gas, including without limitation the planning, construction, site preparation, or installation of equipment, facilities, or structures, on or off at least one (1) site where any exploration or production operations have occurred, are occurring, or will occur.
furnished by those persons, are against public policy and are void and unenforceable; provided, however, that this section shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer as defined by the Insurance Code.

(b)(1) Except as provided in Sections 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into before January 1, 2013, that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable.

(2) Except as provided in Sections 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into on or after January 1, 2013, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable.

(c)(1) Except as provided in subdivision (d) and Sections 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract entered into on or after January 1, 2013, with the owner of privately owned real property to be improved and as to which the owner is not acting as a contractor or supplier of materials or equipment to the work, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the owner from, liability are unenforceable to the extent of the active negligence of the owner, including that of its employees.

(2) For purposes of this subdivision, an owner of privately owned real property to be improved includes the owner of any interest therein, other than a mortgage or other interest that is held solely as security for performance of an obligation.

(3) This subdivision shall not apply to a homeowner performing a home improvement project on his or her own single family dwelling.

(d) For all construction contracts, and amendments thereto, entered into after January 1, 2009, for residential construction, as used in Title 7 (commencing with Section 895) of Part 2 of Division 2, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract, and amendments thereto, that purport to insure or indemnify, including the cost to defend, the builder, as defined in Section 911, or the general contractor or contractor not affiliated with the builder, as described in subdivision (b) of Section 911, by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, other servants, or other independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties. Nothing in this subdivision shall prevent any party from exercising its rights under subdivision (a) of Section 910. This subdivision shall not affect the obligations of an insurance carrier under the holding of Presley Homes, Inc. v. American States Insurance Company (2001) 90 Cal.App.4th 571. Nor shall this subdivision affect the obligations of a builder or subcontractor pursuant to Title 7 (commencing with Section 895) of Part 2 of Division 2. (e) Subdivision (d) does not prohibit a subcontractor and builder or general contractor from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement does not waive or modify the provisions of subdivision (d) subject, however, to paragraphs (1) and (2). A subcontractor shall owe no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless and until the builder or general contractor provides a written tender of the claim, or portion thereof, to the subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants, including, but not limited to, information provided pursuant to subdivision (a) of Section 910, relating to claims caused by that subcontractor's scope of work. This written tender shall have the same force and effect as a notice of commencement of a legal proceeding. If a builder or general contractor tenders a claim for construction defects, or a portion thereof, to a subcontractor in the manner specified by this provision, the subcontractor shall elect to perform either of the
following, the performance of which shall be deemed to satisfy the subcontractor's defense obligation to the builder or general contractor:

(1) Defend the claim with counsel of its choice, and the subcontractor shall maintain control of the defense for any claim or portion of claim to which the defense obligation applies. If a subcontractor elects to defend under this paragraph, the subcontractor shall provide written notice of the election to the builder or general contractor within a reasonable time period following receipt of the written tender, and in no event later than 90 days following that receipt. Consistent with subdivision (d), the defense by the subcontractor shall be a complete defense of the builder or general contractor of all claims or portions thereof to the extent alleged to be caused by the subcontractor, including any vicarious liability claims against the builder or general contractor resulting from the subcontractor's scope of work, but not including claims resulting from the scope of work, actions, or omissions of the builder, general contractor, or any other party. Any vicarious liability imposed upon a builder or general contractor for claims caused by the subcontractor electing to defend under this paragraph shall be directly enforceable against the subcontractor by the builder, general contractor, or claimant.

(2) Pay, within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees and costs, on an ongoing basis during the pendency of the claim, subject to reallocation consistent with subdivision (d), and including any amounts reallocated upon final resolution of the claim, either by settlement or judgment. The builder or general contractor shall allocate a share to itself to the extent a claim or claims are alleged to be caused by its work, actions, or omissions, and a share to each subcontractor to the extent a claim or claims are alleged to be caused by the subcontractor's work, actions, or omissions, regardless of whether the builder or general contractor actually tenders the claim to any particular subcontractor, and regardless of whether that subcontractor is participating in the defense. Any amounts not collected from any particular subcontractor may not be collected from any other subcontractor.

(f) Notwithstanding any other provision of law, if a subcontractor fails to timely and adequately perform its obligations under paragraph (1) of subdivision (e), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory damages, consequential damages, and reasonable attorney's fees. If a subcontractor fails to timely perform its obligations under paragraph (2) of subdivision (e), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory and consequential damages, as well as for interest on defense and indemnity costs, from the date incurred, at the rate set forth in subdivision (g) of Section 3260, and for the builder's or general contractor's reasonable attorney's fees incurred to recover these amounts. The builder or general contractor shall bear the burden of proof to establish both the subcontractor's failure to perform under either paragraph (1) or (2) of subdivision (e) and any resulting damages. If, upon request by a subcontractor, a builder or general contractor does not reallocate defense fees to subcontractors within 30 days following final resolution of the claim as described above, the subcontractor shall have the right to pursue a claim against the builder or general contractor for any resulting compensatory and consequential damages, as well as for interest on the fees, from the date of final resolution of the claim, at the rate set forth in subdivision (g) of Section 3260, and the subcontractor's reasonable attorney's fees incurred in connection therewith. The subcontractor shall bear the burden of proof to establish both the failure to reallocate the fees and any resulting damages. Nothing in this section shall prohibit the parties from mutually agreeing to reasonable contractual provisions for damages if any party fails to elect for or perform its obligations as stated in this section. (g) A builder, general contractor, or subcontractor shall have the right to seek equitable indemnity for any claim governed by this section. (h) Nothing in this section limits, restricts, or prohibits the right of a builder, general contractor, or subcontractor to seek equitable indemnity against any supplier, design professional, or product manufacturer. (i) As used in this section, “construction defect” means a violation of the standards set forth in Sections 896 and

Maxim Crane Works (Maxim) was hoist by its own petard when the trial court enforced an unfavorable choice-of-law provision in a form contract written by Maxim. After a court trial, the trial court found the indemnity
agreement was inapplicable to Plaintiff's claim under Pennsylvania law, the law that Maxim's form contract with Tilbury specified should govern their agreement. The trial court later Tilbury its attorney fees in full, without apportioning them between defending against the indemnity contract and defending against Gorski's underlying claim. Maxim initially contended that Pennsylvania law applied. Tilbury's counsel then unearthed a Pennsylvania statute providing that an injured worker's employer has no liability to a third party tortfeasor, unless such liability is provided by a written contract entered into prior to the date of the worker's injury. Tilbury argued that because it signed Maxim's contract the day Gorski was injured, not the prior day, the indemnity contract was unenforceable. Maxim lost

You can jurisdiction shop per Maxim Crane.

Subcontractor reasonably interpreted indemnity agreement with general contractor to provide for liability proportionate to subcontractor's share of negligence in causing general contractor's employees' injuries, in providing that general contractor was required to indemnify subcontractor to the extent permitted by law for all claims arising from subcontractor's services except to the extent such claims were caused by the acts or omissions of the subcontractor or subcontractor's employees, and thus the subcontractor's interpretation was sufficient to overcome general contractor's demurrer to subcontractor's claims for breach of contract and express indemnification, even if it also would have been reasonable to interpret the contract to restrict the damages and losses indemnified to the allegations of general contractor's employees' lawsuits against the subcontractor.

<table>
<thead>
<tr>
<th>Colorado</th>
<th>CO §13-21-111.5 (6)(a)</th>
<th>P</th>
<th>I</th>
<th>Indemnification/insurance allowed for pro-rata negligence from the sub</th>
</tr>
</thead>
</table>

(6)(a) The general assembly hereby finds, determines, and declares that:
(I) It is in the best interests of this state and its citizens and consumers to ensure that every construction business in the state is financially responsible under the tort liability system for losses that a business has caused; (II) The provisions of this subsection (6) will promote competition and safety in the construction industry, thereby benefitting Colorado consumers; (III) Construction businesses in recent years have begun to use contract provisions to shift the financial responsibility for their negligence to others, thereby circumventing the intent of tort law; (IV) It is the intent of the general assembly that the duty of a business to be responsible for its own negligence be nondelegable; (V) Construction businesses must be able to obtain liability insurance in order to meet their responsibilities; (VI) The intent of this subsection (6) is to create an economic climate that will promote safety in construction, foster the availability and affordability of insurance, and ensure fairness among businesses; (VII) If all businesses, large and small, are responsible for their own actions, then construction companies will be able to obtain adequate insurance, the quality of construction will be improved, and workplace safety will be enhanced.
(b) Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.
(c) The provisions of this subsection (6) shall not affect any provision in a construction agreement that requires a person to indemnify and insure another person against liability for damage, including but not limited to the reimbursement of attorney fees and costs, if provided for by contract or statute, arising out of death or bodily injury to persons or damage to property, but not for any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitee or the indemnitee's agents, representatives, subcontractors, or suppliers.
(d)(I) This subsection (6) does not apply to contract clauses that require the indemnitee to purchase, maintain, and carry insurance covering the acts or omissions of the indemnitee, nor shall it apply to contract provisions that require the indemnitee to name the indemnitor as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insured coverage provides coverage to the indemnitee for liability due to the acts or omissions of the indemnitor. Any provision in a construction agreement that requires the purchase of additional insured coverage for damage arising out of death or bodily injury to persons or damage to property from any acts or omissions that are not caused by the negligence or fault of the party providing such additional insured coverage is void as against public policy.

(II) This subsection (6) also does not apply to builder's risk insurance.

(e)(I) As used in this subsection (6) and except as otherwise provided in subparagraph (II) of this paragraph (e), "construction agreement" means a contract, subcontract, or agreement for materials or labor for the construction, alteration, renovation, repair, maintenance, design, planning, supervision, inspection, testing, or observation of any building, building site, structure, highway, street, roadway bridge, viaduct, water or sewer system, gas or other distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction.

(II) "Construction agreement" does not include:

(A) A contract, subcontract, or agreement that concerns or affects property owned or operated by a railroad, a sanitation district, as defined in section 32-1-103 (18), C.R.S., a water district, as defined in section 32-1-103(25), C.R.S., a water and sanitation district, as defined in section 32-1-103(24), C.R.S., a municipal water enterprise, a water conservancy district, a water conservation district, or a metropolitan sewage disposal district, as defined in section 32-4-502(18), C.R.S.; or

(B) Any real property lease or rental agreement between a landlord and tenant regardless of whether any provision of the lease or rental agreement concerns construction, alteration, repair, improvement, or maintenance of real property.

(f) Nothing in this subsection (6) shall be construed to:

(I) Abrogate or affect the doctrine of respondeat superior, vicarious liability, or other nondelegable duties at common law;

(II) Affect the liability for the negligence of an at-fault party; or

(III) Abrogate or affect the exclusive remedy available under the workers' compensation laws or the immunity provided to general contractors and owners under the workers' compensation laws.

(g) Choice of law. Notwithstanding any contractual provision to the contrary, the laws of the state of Colorado shall apply to every construction agreement affecting improvements to real property within the state of Colorado.

<table>
<thead>
<tr>
<th>Connecticut</th>
<th>CT §52-572K</th>
<th>P</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hold harmless clause against public policy in certain construction contracts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee's agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) The provisions of this section shall apply to covenants, promises, agreements or understandings entered into on or after the thirtieth day next succeeding October 1, 1977.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Finally, in the course of its extended argument as to why it should not be required to indemnify Direct Invest, KJD invokes General Statutes § 52–572k3 and argues that an owner may only require a contractor to insure against the contractor’s own negligence. The court disagrees. Section 52–572k applies only to agreements arising out of construction contracts. See Travelers Indemnity Co. of America v. Sonitrol Security of Hartford, Superior Court, judicial district of Hartford, Docket No. CV–04–4001676 (March 24, 2006, Keller, J.) (41 Conn. L. Rptr. 39); Braunfeld v. Chase Manhattan Bank of Connecticut, Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV–96–0150010 (October 28, 1998, D'Andrea, J.) (23 Conn. L. Rptr. 279); Courter v. Becker, Superior Court, judicial district of New London, Docket No. CV–96–0537716–S (April 27, 1998, Handy, J.) (22 Conn. L. Rptr. 166). Further, “our courts have recognized the enforceability of hold harmless provisions releasing a defendant from liability for his own negligence where the parties to the contract are both commercial entities ... In modern commerce, indemnity clauses are no longer so unusual as to require such specific mention of the indemnitee’s conduct as being within the scope of the indemnifying obligation.

### Table

<table>
<thead>
<tr>
<th>Delaware</th>
<th>6 DE §2704</th>
<th>P</th>
<th>Borrowed Servant Doctrine</th>
</tr>
</thead>
</table>

(a) A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement (including but not limited to a contract or agreement with the State, any county, municipality or political subdivision of the State, or with any agency, commission, department, body or board of any of them, as well as any contract or agreement with a private party or entity) relative to the construction, alteration, repair or maintenance in the State of a road, highway, driveway, street, bridge or entrance or walkway of any type constructed thereon in the State, and building, structure, appurtenance or appliance in the State, including without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee or indemnitee or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons or damage to property caused partially or solely by, or resulting partially or solely from, or arising partially or solely out of the negligence of such promisee or indemnitee or others than the promisor or indemnitor, or its subcontractors, agents, servants or employees, is against public policy and is void and unenforceable, even where such covenant, promise, agreement or understanding is crystal clear and unambiguous in obligating the promisor or indemnitor to indemnify or hold harmless the promisee or indemnitee from liability resulting from such promisee’s or indemnitee’s own negligence. This section shall apply to all phases of the preconstruction, construction, repairs and maintenance described in this subsection, and nothing in this section shall be construed to limit its application to preconstruction professionals such as designers, planners and architects; provided, however, that this section shall not apply to any obligation owed to the Department of Transportation pursuant to a contract awarded under Title 17 or Chapter 69 of Title 29.

(b) Nothing in subsection (a) of this section shall be construed to void or render unenforceable policies of insurance issued by duly authorized insurance companies and insuring against losses or damages from any causes whatsoever.

(c) Subsection (a) of this section does not apply to any covenant, promise, agreement, understanding, or other provision in a partnership agreement of a partnership (whether general or limited), limited liability company agreement, trust agreement, governing instrument of a trust, certificate of incorporation or bylaw. Maxim Crane Rental company, which provided crane and operator to subcontractor installing air conditioning units, brought third-party complaint against subcontractor, seeking contractual indemnification based on rental contract regarding claim of subcontractor's employee who was injured during construction project. Following a jury trial, the Superior Court, New Castle County, entered judgment in favor of rental company. Subcontractor appealed. The purpose of Section 2704(a) is to make clear that, “a contractual provision requiring one party to indemnify another party for the second party's own negligence, whether sole or partial, 'is against public policy and is void and unenforceable.’” However, the Supreme Court held that: (1) borrowed-servant doctrine did not conflict with statute preventing one party in construction setting from contracting away its own negligence to another party,
(2) crane operator was employee of subcontractor, and thus subcontractor was required to indemnify rental company.
Under common law borrowed-servant doctrine, crane operator was employee of subcontractor installing air conditioning units, not of crane rental company that provided crane and operator to subcontractor pursuant to rental agreement, and thus subcontractor was required under rental agreement to indemnify rental company regarding claim made by subcontractor's employee, who was injured during installation of air conditioning unit; operator was taking direction from subcontractor's crew, operator was under control of subcontractor's crew, and crane operator was told by crew what to do and how to do it. Restatement (Second) of Agency § 227.

<table>
<thead>
<tr>
<th>DC</th>
<th>B</th>
<th>No Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Indemnity agreements are narrowly construed by courts so as not to read into them any obligations that parties never intended to assume, although parties are free to enter into indemnification agreements, even ones providing that employer who would otherwise be protected by workers' compensation statute would indemnify a third party.</strong> If parties seek to provide indemnification not just for the actions of indemnitor, but also for actions of indemnitee, so that indemnitee would be entitled to full reimbursement pursuant to indemnification clause when indemnitee is itself negligent, there must be a clear intention to do so that is apparent from face of contract. If alleged intention to provide indemnitee with indemnification for its own negligence is at all ambiguous, requirement that clear intention to do so be apparent from the face of contract is not satisfied, and no such indemnification will occur. Contractual language is ambiguous if it is susceptible to more than one reasonable interpretation. However, if contract is determined by court to be ambiguous, external evidence may be admitted to explain surrounding circumstances, positions, and actions of parties at time of contracting.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Florida</th>
<th>FL §725.06 SPECIAL RULES</th>
<th>P</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>An indemnity provision for sole or partial negligence must contain a monetary limitation on the extent of indemnification and must state that there is a reasonable commercial relationship to the contract. No indemnity for gross negligence</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(1) Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman or any combination thereof wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any. Notwithstanding the
foregoing, the monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity of contract with such owner shall not be less than $1 million per occurrence, unless otherwise agreed by the parties. Indemnification provisions in any such agreements, contracts, or guarantees may not require that the indemnitor indemnify the indemnitee for damages to persons or property caused in whole or in part by any act, omission, or default of a party other than:

(a) The indemnitor; (b) Any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or (c) The indemnitee or its officers, directors, agents, or employees. However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton or intentional misconduct of the indemnitee or its officers, directors, agents or employees, or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of the indemnitor or any of the indemnitor's contractors, Subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees.

(2) A construction contract for a public agency or in connection with a public agency's project may require a party to that contract to indemnify and hold harmless the other party to the contract, their officers and employees, from liabilities, damages, losses and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party and persons employed or utilized by the indemnifying party in the performance of the construction contract.

(3) Except as specifically provided in subsection (2), a construction contract for a public agency or in connection with a public agency's project may not require one party to indemnify, defend, or hold harmless the other party, its employees, officers, directors, or agents from any liability, damage, loss, claim, action, or proceeding, and any such contract provision is void as against public policy of this state.

(4) This section does not affect any contracts, agreements, or guarantees entered into before the effective date of this section or any renewals thereof.

Forum Shopping Probably Allowed: We reverse the summary judgment entered against Pfaudler on its third-party complaint for indemnity based on its contract with Sylvachem. The contract was made in New York, and for that reason we hold that New York law, under which the indemnity agreement is valid and enforceable, see e.g., Levine v. Shell Oil Company, 28 N.Y.2d 205, 269 N.E.2d 799 (1971), not the law of Florida, under which it is not, see s 725.06, Fla.Stat. (1975), applies. Jemco, Inc. v. United Parcel Service, Inc., 400 So.2d 499 (Fla.3d DCA 1981). Our holding makes it unnecessary to decide whether the parties by providing that their contract “shall be construed in accordance with the laws of the State of New York” expressly selected the law of New York to govern their agreement Boat Town U.S.A., Inc. v. Mercury Marine Division of Brunswick Corporation, 364 So.2d 15 (Fla.4th DCA 1978), with C. A. May Marine Supply Company v. Brunswick Corporation, 557 F.2d 1163 (5th Cir. 1977). Statute requiring indemnification clauses in construction contracts to set monetary limitations on the extent of indemnification and to support indemnification with consideration did not apply to service and maintenance agreement between former parking lot owner and elevator company, as would preclude former lot owner’s third-party breach of contract action for indemnification against current lot owner, where the statute did not enumerate the former lot owner as the type of party to which it applied, and the elevator service and maintenance was not “construction.” Kone, Inc. v. Robinson,

<table>
<thead>
<tr>
<th>Georgia</th>
<th>GA Code §13-8-2(b)</th>
<th>Sole</th>
<th>I</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>General contractor license is required for commercial and specialty contractors, but does not mention cranes or crane rentals specifically. No mention in statute of service provider. Special Rules now apply for architects and other design professionals see below. Anti-Indemnity statute</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
(a) A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to: (1) Contracts tending to corrupt legislation or the judiciary; (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter; (3) Contracts to evade or oppose the revenue laws of another country; (4) Wagering contracts; or (5) Contracts of maintenance or champerty.

(b) A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.

(c) A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement for engineering, architectural, or land surveying services purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, is against public policy and void and unenforceable, except for indemnification for damages, losses, or expenses to the extent caused by or resulting from the negligence, recklessness, or intentionally wrongful conduct of the indemnitee or other persons employed or utilized by the indemnitee in the performance of the contract. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy or project specific policy endorsement.

Under Georgia law, certain exculpatory clauses are void against public policy. O.C.G.A § 13-8-2(b) (providing that contractual agreement “relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances ...” requiring one party to hold harmless the other party against liability or claims for damages, losses, or expenses arising out of injury to persons or property caused by negligence is against public policy and void and unenforceable); Kennedy Development Co., Inc. v. Camp, 719 S.E.2d 442, 444-45 (Ga. 2011) (broadly construing O.C.G.A § 13-8-2(b) and finding indemnification/“hold harmless” provision in assignment agreement purporting to indemnify the indemnitee for its own negligence invalid under Georgia law); Country Club Apartments, Inc. v. Scott, 271 S.E.2d 841, 842 (Ga. 1980) (applying O.C.G.A § 13-8-2 to residential lease agreement and expressly overruling all prior cases in conflict with the public policy set forth in the prior statutory enactments); Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F.Supp.2d 1361, 1370 (N.D. Ga. 1999) (noting Georgia courts' “expansive interpretation” of anti-indemnity statute

<table>
<thead>
<tr>
<th>Hawaii</th>
<th>HI Rev Statute §431:10-222</th>
<th>SW</th>
</tr>
</thead>
</table>

Any covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.
agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition or excavation connected therewith, purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or wilful misconduct of the promisee, the promisee's agents or employees, or indemnitee, is invalid as against public policy, and is void and unenforceable; provided that this section shall not affect any valid workers' compensation claim under chapter 386 or any other insurance contract or agreement issued by an admitted insurer upon any insurable interest under this code.

HRS § 431:10–222 renders invalid any provision in a construction contract requiring the promisor to defend “the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or wilful misconduct of the promisee, the promisee's agents or employees, or indemnitee”; (2) the Pancakes doctrine, 85 Hawai‘i 286, 944 P.2d 83 (App.1997), does not apply to defense provisions in construction contracts; and (3) the scope of a promisor's duty to defend that is imposed by a construction contract is determined at the end of litigation.

<table>
<thead>
<tr>
<th>Idaho</th>
<th>ID Rev Statute §29-114</th>
<th>S</th>
</tr>
</thead>
</table>
| A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.

Negligence of city in failing to discover inadequacy of warning signs at excavation site was similar in character to the negligence of the telephone company for whom the excavation was made by third-party contractor, so that city was not entitled to indemnification by telephone company for liability to injured motorcyclist; city was thus not an “indemnitee” of the telephone company so that indemnity clause in contract between telephone company and excavating contractor requiring indemnification to the telephone company by the contractor for liability caused by the city did not violate the statutory prohibition on contracts calling for indemnity for liability based on the sole negligence of the indemnitee or his “indemnitees.

<table>
<thead>
<tr>
<th>Illinois</th>
<th>740 ILCS 35/1-3 Braye v. ADM, 676 N.E2d 1295 (Ill.1997)</th>
<th>Special Rules</th>
<th>WAIVER OF KOTECKI</th>
</tr>
</thead>
</table>
| With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or...
hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

Construction Contract Indemnification for Negligence Act applied to void insured contract, so as to render inapplicable the “insured contract” exception to the contractual liability exclusion in lessee's commercial general liability insurance policy; Act expressly stated that it voided agreements to indemnify that pertained to construction, and, while agreement did not contain word “construction,” it was evident that agreement involved work dealing with construction, as lessee of agreement was listed as building restoration company, lease stated that equipment was not be removed from jobsite unless approved by lessor in writing, and, thus, lessee was not free to use scaffolding anywhere but location to which it was delivered, and lease required lessor to deliver and assemble scaffolding, which was type of work that dealt with construction. S.H.A. 740 ILCS 35/1.

In Braye, we emphasized that a contract should not be deemed illegal unless it is expressly contrary to the law or public policy. Id. at 216, 222 Ill.Dec. 91, 676 N.E.2d 1295. The law and the public policy of Illinois permit and require that competent parties be free to contract with one another. Id. Whether a contract violates public policy depends on the peculiar facts and circumstances of each case, as well as the language of the contract itself. Id. In addition, “a construction of a contract which renders the agreement enforceable rather than void is preferred.” Id. at 217, 222 Ill.Dec. 91, 676 N.E.2d 1295. Because there is nothing in the record to suggest that upstream contractor construed the indemnification provision as relieving it of liability for its own acts or omissions, “that paragraph did not extinguish [WVB’s] incentive to exercise due care, and the primary purpose behind the Construction Contract Indemnification for Negligence Act was not implicated.” Liccardi, 178 Ill.2d at 550, 227 Ill.Dec. 486, 687 N.E.2d 968. Therefore, we will interpret the contract in a manner that renders the agreement enforceable rather than void, and find that WVB did not expressly require that it be indemnified for its own negligence. Accordingly, the indemnity clause is not void under the Act and can be invoked by WVB to seek indemnification from IRCA for faulty roof work. See id.; Braye, 175 Ill.2d at 217–18, 222 Ill.Dec. 91, 676 N.E.2d 1295 See 933 VAN BUREN CONDOMINIUM ASSOCIATION (Sept 8, 2016)

<table>
<thead>
<tr>
<th>Indiana</th>
<th>IN Code §26-2-5-1</th>
<th>SW</th>
<th>Service providers may be exempt from Anti-Indemnity statute per 7th Circuit</th>
</tr>
</thead>
</table>

All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract except those pertaining to highway contracts, which purport to indemnify the promisee against liability for: (1) death or bodily injury to persons; (2) injury to property; (3) design defects; or (4) any other loss, damage or expense arising under either (1), (2) or (3); from the sole negligence or willful misconduct of the promise or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable.

An indemnity clause involves a promise by one party (the indemnitor) to reimburse another party (the indemnitee) for the indemnitee’s loss, damage, or liability. Mead Johnson & Co. v. Kenco Group, Inc., 899 N.E.2d 1, 3 (Ind.Ct.App.2009). The basic purpose of an indemnity clause is to shift the financial responsibility to pay damages from the indemnitee to the indemnitor. Id. We construe an indemnity agreement to cover all losses and damages to which it reasonably appears the parties intended it to apply. Id. 67 NARI argues, correctly, that this clause does not require NARS to indemnify Menard for negligent acts that are solely attributable to Menard. An indemnification clause that seeks to require indemnification for the indemnitee’s own negligence must “expressly state, in clear and unequivocal terms,” that the parties have agreed to such terms. Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols, 583 N.E.2d 142, 146 (Ind.Ct.App.1991); see also Ind.Code § 26–2–5–1 (1975) (an
Indemnity clause in a “construction or design contract” that indemnifies the indemnitee against liability from the sole negligence of the indemnitee or its agents is “against public policy and ... void and unenforceable”). The clause in this case does not clearly and unequivocally require NARSI to indemnify Menard for Menard's own negligence.

<table>
<thead>
<tr>
<th>Iowa</th>
<th>Indemnification for indemnitees’ sole negligence must be provided by “clear and unambiguous” language</th>
<th>Equipment rental included in statute</th>
</tr>
</thead>
</table>

1. As used in this section, “construction contract” means an agreement relating to the construction, alteration, improvement, development, demolition, excavation, rehabilitation, maintenance, or repair of buildings, water or sewage treatment plants, power plants, or any other improvements to real property in this state, including shafts, wells, and structures, whether on ground, above ground, or underground, and includes agreements for architectural services, design services, engineering services, construction services, construction management services, development services, maintenance services, material purchases, equipment rental, and labor. “Construction contract” includes all public, private, foreign, or domestic agreements as described in this subsection other than such public agreements relating to highways, roads, and streets.

2. Except as excluded under subsection 3, a provision in a construction contract that requires one party to the construction contract to indemnify, hold harmless, or defend any other party to the construction contract, including the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible, against liability, claims, damages, losses, or expenses, including attorney fees, to the extent caused by or resulting from the negligent act or omission of the indemnitee or of the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible, is void and unenforceable as contrary to public policy.

3. This section does not apply to the indemnification of a surety by a principal on any surety bond, an insurer's obligation to its insureds under any insurance policy or agreement, a borrower's obligations to its lender, or any obligation of strict liability otherwise imposed by law.

“An indemnification clause ‘does not apply to claims between the parties to the agreement. Rather it obligates the indemnitee to protect the indemnitee against claims brought by persons not a party to the provision.’” FNBC Iowa, Inc. v. Jennessey Grp., L.L.C., 759 N.W.2d 808, 811 (Iowa Ct.App.2008) (citation omitted).

<table>
<thead>
<tr>
<th>Kansas</th>
<th>Anti-Indemnity statute may not apply to service providers, based on the case law, this may also make bare rental cranes</th>
<th>P for Construction contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>KA statute §16-121 See also Midwest Concrete Placement vs L</td>
<td></td>
<td>P for Construction contracts</td>
</tr>
</tbody>
</table>

See also Midwest Concrete Placement vs L
(1) “Construction contract” means an agreement for the design, construction, alteration, renovation, repair or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation, except that no deed, lease, easement, license or other instrument granting an interest in or the right to possess property shall be deemed to be a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair or maintain improvements on such real property. “Construction contract” shall not include any design, construction, alteration, renovation, repair or maintenance of:
(A) Dirt or gravel roads used to access oil and gas wells and associated facilities; or
(B) oil flow lines or gas gathering lines used in association with the transportation of production from oil and gas wells from the wellhead to oil storage facilities or gas transmission lines.
(2) “Contract” means any construction contract, motor carrier transportation contract, dealer agreement or franchise agreement.
(3) “Damages” means personal injury damages, property damages, or economic loss.
(4) “Indemnification provision” means a covenant, promise, agreement, clause or understanding in connection with, contained in, or collateral to a contract that requires the promisor to hold harmless, indemnify or defend the promisee or others against liability for loss or damages.
(7) “Motor carrier transportation contract” means, with respect to a motor carrier as defined in K.S.A. 66-1,108, and amendments thereto, a contract, agreement or understanding covering:
(A) The transportation of property by a motor carrier;
(B) the entrance on property by the motor carrier for the purpose of loading, unloading or transporting property; or
(C) a service incidental to activity described in clause (A) or (B) including, but not limited to, storage of property.
(8) “Mutual indemnity obligation” means an indemnity obligation in a contract in which the parties agree to indemnify each other and each other's contractors and their employees against loss, liability or damages arising in connection with bodily injury, death and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from the performance of the agreement.
(9) “Promisee” shall include an agent, employee or independent contractor who is directly responsible to the promisee.
(10) “Unilateral indemnity obligation” means an indemnity obligation in a contract in which one of the parties as promisor agrees to indemnify the other party as promisee with respect to claims for personal injury or death to the promisor's employees or agents or to the employees or agents of the promisor's contractors but in which the promisee does not make a reciprocal indemnity to the promisor.
(b) An indemnification provision in a contract which requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions is against public policy and is void and unenforceable.
(c) A provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such other party's own negligence or intentional acts or omissions is against public policy and is void and unenforceable.
(d) This act shall not be construed to affect or impair:
(1) The contractual obligation of a contractor or owner to provide railroad protective insurance or general liability insurance;
(2) an agreement under which an owner, a responsible party or a governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws;
(3) an indemnification agreement that is an integral part of an offer to compromise or a settlement of a disputed claim, if:
(A) The settlement is based on consideration;
(B) the dispute relates to an alleged event that is related to a construction contract and that occurred before the settlement is made; and
(C) the indemnification relates only to claims that have arisen or may arise from the past event;  
(4) the validity of any insurance contract, construction bond or other agreement lawfully issued by an insurer or 
bonding company;  
(5) a separately negotiated provision or provisions whereby the parties mutually agree to a reasonable allocation of 
risk, if each such provision is:  
(A) Based on generally accepted industry loss experience; and  
(B) supported by adequate consideration; and  
(6) an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be 
supported by liability insurance coverage to be furnished by the promisor subject to the following limitations:  
(A) With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage 
and dollar limits of insurance or qualified self-insurance each party as promisor has agreed to obtain for the benefit 
of the other party as promisee.  
(B) With respect to a unilateral indemnity obligation, the indemnity obligation is limited to the extent of the 
coverage and dollar limits of insurance the promisor has agreed to obtain for the benefit of the other party as promisee. Such indemnity obligation shall be at the promisee's expense and shall be a separate liability insurance policy.  
(e) Notwithstanding any contractual provision to the contrary, the laws of the state of Kansas shall apply to and 
govern every contract to be performed in this state. Any litigation, arbitration or other dispute resolution 
proceeding arising from such contract shall be conducted in this state. Any provision, covenant or clause in such 
contract that conflicts with the provisions of this subsection shall be void and unenforceable.  
(f) This section applies only to indemnification provisions and additional insured provisions entered into after 
January 1, 2009.  

Unconscionable clause: The use of preprinted form or boilerplate contracts drawn skillfully by the party in the 
strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the 
party in a weaker economic position; (2) a significant cost-price disparity or excessive price; (3) a denial of basic 
rights and remedies to a buyer of consumer goods; (4) the inclusion of penalty clauses; (5) the circumstances 
surrounding the execution of the contract, including its commercial setting, its purpose and actual effect; (6) the 
hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are 
inconspicuous to the party signing the contract; (7) phrasing clauses in language that is incomprehensible to a 
layman or that divert his attention from the problems raised by them or the rights given up through them; (8) an 
overall imbalance in the obligations and rights imposed by the bargain; (9) exploitation of the underprivileged, 
unsophisticated, uneducated and the illiterate; and (10) inequality of bargaining or economic power between the 
parties.  

The same can be said about the job ticket in this case. The front of the job ticket includes language referring the 
signatory to the reverse side for additional terms; and below the signature line is more language referring the 
signatory to the reverse side for additional contract terms. And although the writing is not in large or conspicuous 
font, there is only one paragraph, consisting of nine lines, on the front of the job ticket and that single paragraph is 
labeled “TERMS AND DISCLOSURE STATEMENT.” There is no extreme fine print, no hidden information, nor 
incomprehensible legalese. Moreover, like Willie, L & S contracted with Midwest on numerous occasions, using the 
same procedures and processes. And while L & S claims that no one read the information on the job ticket or that 
no one from Midwest referred L & S’s agent to the information on the back of the job ticket, failing to read a 
contract does not entitle one to renego on one's obligations.
the Kentucky General Assembly “enacted an anti-indemnification provision related to construction services contracts.” John E. Sebastian, Recent Legislation Affecting the Construction Industry, 26 CONSTRUCTION LAW. 39, 40 (2006). The statute provides that “[a]ny provision contained in any construction services contract purporting to indemnify or hold harmless a contractor from that contractor’s own negligence or from the negligence of his or her agents, or employees is void and wholly unenforceable.” KRS § 371.180(2). A construction services contract is defined as follows:

1. A contract or agreement relating to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate ...; or
2. A contract or agreement relating to the planning, design, administration, study, evaluation, consulting, or other professional and technical support services provided in connection with any of the work or activities described in subparagraph 1. of this paragraph.

A “contractor” is “the person offering a contract for services provided.” KRS § 371.180(1)(b). Therefore, Sunbelt is incorrect in asserting that it is not a contractor under the statute simply because it is not “an entity providing ‘construction services.’ “Sunbelt is a contractor for the purposes of § 371.180(2) because it has offered Mahan a contract for services, specifically the rental of construction equipment.

As Mahan points out, there is no binding authority regarding the proper interpretation of KRS § 371.180. However, Tennessee has a “similar, but not identical, statute[ ] on the enforceability of indemnification provisions in construction contracts.” Asher v. Unarco Material Handling, Inc., No. 06–548–ART, 2011 WL 3104084, at *2 (E.D.Ky. July 26, 2011). The Tennessee statute provides that any indemnification clause in a contract made “relative to” construction activities is void and unenforceable.8 Tenn.Code Ann. § 62–6–123. The Tennessee Court of Appeals has interpreted this statute to apply to agreements regarding the rental of a crane for use in a construction project. Elliott Crane Serv., Inc. v. H.G. Hill Stores, Inc., 840 S.W.2d 376, 379–80 (Tenn.Ct.App.1992) (explaining that even though the rental company was not itself engaged in construction work, the contract was “relative to” the construction project).

Therefore, the indemnity provision contained in the Rental Out Receipt violates KRS § 371.180, and it is unenforceable. As a result, Mahan is entitled to judgment as a matter of law on its claim for a declaratory judgment.

<table>
<thead>
<tr>
<th>Louisiana</th>
<th>LA Rev Statute §9:2780 and 2780.1</th>
<th>INTENTIONAL</th>
<th>P</th>
<th>I</th>
<th>Special statutes limiting indemnity for public contracts and contracts for oil, gas and water wells.</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 2780.1.</td>
<td>Certain contract provisions invalid; motor carrier transportation contracts; construction contracts A. For purposes of this Section, the following terms have the meanings ascribed to them by this Subsection, except where the context clearly indicates otherwise:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2)(a) “Construction contract” shall mean any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property, including any moving, demolition, or excavation, except that</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
no deed, lease, easement, license, or other installment granting an interest in or the right to possess property will be deemed to be a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair, or maintain improvements on such real property. (3) “Indemnitee” means any named party in the contract to whom indemnification is owed pursuant to the terms of the contract. (4) “Indemnitor” means any party to the contract who obligates himself to provide indemnification pursuant to the terms of the contract. (5) “Third party” means any party not subject to the contractual obligations between the indemnitee and indemnor.

B. Notwithstanding any provision of law to the contrary, any provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract or construction contract which purports to require an indemnitee to procure liability insurance covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnor has no control is contrary to the public policy of this state and is null, void, and unenforceable. However, nothing in this Section shall be construed to prevent the indemnitee from requiring the indemnor to provide proof of insurance for obligations covered by the contract.

The Contract contains the following indemnity and insurance provisions:
To the fullest extent permitted by law, the contractor (Ridgemont) shall indemnify and hold harmless Owner (Brookshire) and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys’ fees but only to the extent arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable to the extent that it is determined that Brookshire or any of the other indemnified parties are concurrently negligent with contractor, then each party share [sic] pay its pro-rata shares of the damages and costs of defending the claims. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exists as to any part or person described in this paragraph...2

In connection with Ridgemont’s construction of the grocery store in question, Amerisure issued a policy of insurance to Ridgemont (the “Amerisure policy”) with a policy period of November 1, 2011 to November 1, 2012. Under the Amerisure policy, Ridgemont is the named insured. Although the parties have not provided the Court with the date the grocery store was completed, it is undisputed that Ridgemont’s work was completed at the time the alleged damages in this case arose or manifested themselves.
Berndette Rubin filed suit against Brookshire and other defendants for damages for her injuries. Defendant Brookshire filed a third-party complaint against Ridgemont and Ridgemont’s liability insurer, Amerisure, alleging, inter alia, (1) Ridgemont owes Brookshire tort contribution because Brookshire was at fault; (2) Ridgemont contractually agreed to indemnify and procure insurance coverage for Brookshire; and (3) Brookshire is entitled to insurance coverage for the plaintiff’s injuries under the Amerisure policy issued to Ridgemont. The facts relevant to the instant motion are largely undisputed and involve issues of contract and insurance policy interpretation.

Thus, to the extent Brookshire is seeking indemnification for its own acts of negligence, such agreements for indemnification are null and void under § 9:2870.1. Also void are agreements whereby the indemnor (contractor Ridgemont) is required to procure liability insurance covering the acts or omissions or both of the indemnitee...
(grocery store owner Brookshire).

<table>
<thead>
<tr>
<th>Maine</th>
<th>No anti-indemnity statute</th>
<th>McGraw v. S.D. Warren Co., 656 A.2d 1222 (ME 1995)</th>
<th>B</th>
<th>Indemnification for indemnities’ own negligence is not favored and must be expressed in clear and unequivocal terms</th>
</tr>
</thead>
</table>

No statute
Contract between the owner of a paper plant and a contractor, providing that the owner was entitled to be reimbursed for any damage “caused in whole or in part” by the contractor, did not clearly and unequivocally contemplate that the contractor would be entirely responsible for any damages to the property caused by the owner’s own negligence, as required under Pennsylvania’s Perry-Ruzzi rule to hold the contractor liable for such damages; nowhere in the contract was there any language whereby the contractor assumed responsibility for the owner’s negligence.

<table>
<thead>
<tr>
<th>Maryland</th>
<th>Md. Code Ann., Cts. &amp; Jud. Proc. 5-401</th>
<th>S</th>
<th>Maryland is a sole fault state. Indemnity clauses can decide other insurance issues</th>
</tr>
</thead>
</table>

§ 5-401. Indemnity agreements relating to construction services prohibited
In general
(a)(1) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition, and excavating connected with those services or that work, purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, or the agents or employees of the promisee or indemnitee, is against public policy and is void and unenforceable.

(2) A covenant, a promise, an agreement, or an understanding in, or in connection with or collateral to, a contract or an agreement relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, or an appliance, including moving, demolition, and excavating connected with those services or that work, purporting to require the promisor or indemnitor to defend or pay the costs of defending the promisee or indemnitee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, or the agents or employees of the promisee or indemnitee, is against public policy and is void and unenforceable.

(3) This subsection does not affect the validity of any insurance contract, workers’ compensation, any general indemnity agreement required by a surety as a condition of execution of a bond for a construction or other
contract, or any other agreement issued by an insurer.

Definitions
(b)(1)(i) In this subsection the following words have the meanings indicated.
(ii) “Motor carrier” has the meaning stated in § 11-134.2 of the Transportation Article.
(iii) “Motor carrier transportation contract” means a contract, agreement, or understanding concerning:
A. The transportation of property for compensation or hire by a motor carrier;
B. The entrance on property by a motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or
C. A service incidental to an activity described in item A or B of this subsubparagraph, including storage of property.

2. “Motor carrier transportation contract” does not include:
A. The Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America, as amended by the Intermodal Interchange Executive Committee; or
B. Other agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment.

(iv) “Promisee” includes an agent, employee, servant, or independent contractor who is directly responsible to the promisee, other than a motor carrier that is a party to a motor carrier transportation contract with the promisee, and an agent, employee, servant, or independent contractor directly responsible to that motor carrier.

(2) Notwithstanding any other provision of law, a provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract that purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the promisee against liability for loss or damage resulting from the negligence or intentional acts or omissions of the promisee is against public policy and is void and unenforceable.

Liberty and AMG rely on two cases—St. Paul Fire Ins. v. Am. Int’l Spec. Lines, 365 F.3d 263 (4th Cir.2004) and Wal–Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583 (8th Cir.2002)—to argue that this dispute is resolved by the above indemnification agreement, not the “other insurance” or “excess insurance” provisions in the Zurich and Wausau policies. As the United States Court of Appeals for the Fourth Circuit explained:

the general rule, as stated by a “leading commentator,” is that “an indemnity agreement between the insureds or a contract with an indemnification clause ... may shift an entire loss to a particular insurer notwithstanding the existence of an ‘other insurance’ clause in its policy.”


[Ellis] shall at all times indemnify and hold harmless [AMG] ... from and against any and all claims, losses, liabilities, actions, proceedings and expenses ... arising out of ... any negligent acts or omissions or willful and deliberate misconduct by [Ellis] ...” (Zurich’s Mot. for Summ. J., Ex. 2, Art. 8.7 (emphasis added).) According to Zurich and Ellis however, Ellis promised to indemnify AMG against practically no claims or losses because, the indemnification agreement would become operative only after AMG’s extensive insurance is exhausted.

This Court finds no contractual language suggesting that the parties intended the waiver of subrogation clause to essentially nullify the indemnification provision. Although Zurich and Ellis point to language in the waiver of subrogation clause—“[n]otwithstanding anything in this agreement to the contrary”—this Court finds that this phrase is limited to the parties' agreement to waive subrogation rights and does not extend to the indemnification agreement. Cf. CSX Transportation, Inc. v. Mass Transit Administration, 111 Md.App. 634, 683 A.2d 1127, 1132 (Md.App.1996) (citing Princemont Constr. Corp. v. Baltimore & Ohio R. Co., 131 A.2d 877, 879 (D.C.1957) for the proposition that “when the terms of an indemnity agreement are broad and comprehensive, there is a presumption that ‘if the parties had intended some limitation of the all-embracing language, they would have expressed such limitation.... If the parties wished to limit the scope of the language they could have easily done so; we are not at liberty to do it for them.” )
In another case, the specific contractual clause in question states:
The subcontractor agrees to indemnify and save harmless the owner and General Contractor against loss or expense by reason of the liability imposed by law upon the Owner or General Contractor for damage because of bodily injuries, including death at any time resulting therefrom; accidentally sustained by any person or persons or on account of damage to property arising out of or on account of or in consequence of the performance of this contract only when such injuries to persons or damage to the property are due or claimed to be due to any negligence of the subcontractor, his employees, his agents or servants. This does not violate Maryland’s anti-indemnity law.

<table>
<thead>
<tr>
<th>Massachusetts</th>
<th>MA Ch. 149 §29C</th>
<th>P</th>
<th>A subcontractor may indemnify only for bodily injury or property damage it causes.</th>
</tr>
</thead>
</table>

Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water or other utility line, which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents or subcontractors, shall be void.

As between itself and its subcontractors, the general contractor, Quannapowitt Development, Inc. (Quannapowitt), had an indemnity clause in its subcontracts: i.e., a provision by which Quannapowitt would not be bound to pay any damages on account of injuries claimed by any person working on the construction job. On March 3, 1989 Harnois, an employee of the subcontractor, C & R Development Corporation (C & R), fell down a flight of stairs at the construction site. He brought a third-party action to recover damages for the injuries based on allegations of negligence against Quannapowitt because of its failure to provide a safe work environment. Quannapowitt impleaded C & R as a third-party defendant. As general contractor it sought enforcement of the indemnification provision contained in its subcontract with C & R. Several weeks before the underlying case was scheduled for a jury trial, C & R moved for summary judgment. With a nod to G.L. c. 149, § 29C, a Superior Court judge decided that under the circumstances C & R could not be required to indemnify Quannapowitt and ordered dismissal of the latter's third-party complaint.

From the plain language of § 29C and the legislative history, see Jones v. Vappi & Co., 28 Mass.App.Ct. 77, 81, 546 N.E.2d 379 (1989), it appears that a contractual obligation to indemnify is void whenever it provides for indemnification by a subcontractor regardless of the fault of the indemnitee, or its employees, agents or subcontractors, and this is so even if the indemnitee could prove at trial that the injured employee of the subcontractor was negligent. We have previously noted that by enacting the statute, the Legislature allowed a shifting of the risk of loss for construction workers' injuries to the general contractor in this particular situation. See Speers v. H.P. Hood, Inc., 22 Mass.App.Ct. 598, 601 n. 8, 495 N.E.2d 880 (1986); MacNab, Tort Based and Implied Contractual Indemnity in Massachusetts, 71 Mass.L.Rev. 189 n. 1 (1986). If the focus is on the indemnity agreement itself rather than on the facts of any particular accident, that purpose would be achieved without unduly burdening the courts and the parties with time-consuming assessments of negligence and comparative negligence. **353

Thus interpreted, the statute also has the advantage of clarifying for parties to a construction contract where the burden of acquiring insurance lies. See Shea v. Bay State Gas Co., 383 Mass. 218, 223, 418 N.E.2d 597 (1981), and
cases cited.

Here, the indemnification clause is void under § 29C because it contains a provision requiring the subcontractor to indemnify the general contractor for an injury that may not have been caused by the subcontractor or its employees, agents, or subcontractors—a circumstance prohibited by application of the statute. As a result, dismissal of Quannapowitt's third-party complaint was proper, and submission of the special questions relating to the parties' negligence was unnecessary.

<table>
<thead>
<tr>
<th>Michigan</th>
<th>MI statute §691.991</th>
<th>S</th>
<th>Michigan is a “sole fault” state.</th>
</tr>
</thead>
</table>

691.991. Buildings, real property improvements, highways and other infrastructure; certain contracts for indemnification void
Sec. 1. (1) In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.
(2) When entering into a contract with a Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor for the design of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, or a contract with a contractor for the construction, alteration, repair, or maintenance of any such improvement, including moving, demolition, and excavating connected therewith, a public entity shall not require the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor or the contractor to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor, or the contractor and that of his or her respective subconsultants or subcontractors. A contract provision executed in violation of this section is against public policy and is void and unenforceable.
(3) For the purposes of this section, a contractor may be an individual, sole proprietorship, partnership, corporation, limited liability company, joint venture, construction manager, or other business arrangement.
(4) As used in this section, “public entity” means this state and all agencies thereof, any public body corporate within this state and all agencies thereof, and any nonincorporated public body within this state of whatever nature and all agencies thereof; including, but not limited to, cities, villages, townships, counties, school districts, intermediate school districts, authorities, and community and junior colleges as provided for in section 7 of article VIII of the state constitution of 1963, and their employees and agents, including, but not limited to, construction managers or other business arrangements retained by or contracting with the public entity to manage or administer the contract for the public entity. However, public entity does not include institutions of higher education as described or provided for in section 4 or 6 of article VIII of the state constitution of 1963, or their employees or agents.
(5) Nothing in this act affects the application of 1964 PA 170, MCL 691.1401 to 691.1419.

An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation. In the construction context, indemnity clauses between general
contractors (indemnitees) and subcontractors (indemnitors) are common, with general contractors and subcontractors ultimately liable to the project owner. Michigan law provides contracting parties with broad discretion in negotiating the scope of indemnity clauses. The only legal restriction upon indemnity in the subcontract context is the prohibition on indemnification against the “sole negligence” of the contractor, which is not at issue here.

You [Ahrens] as Subcontractor/Supplier agree to defend, hold harmless and indemnify Miller–Davis Company ... from and against all claims, damages, losses, demands, liens, payments, suits, actions, recoveries, judgments and expenses including attorney's fees, interest, sanctions, and court costs which are made, brought, or recovered against Miller–Davis Company, by reasons of or resulting from, but not limited to, any injury, damage, loss, or occurrence arising out of or resulting from the performance or execution of this Purchase Order and caused, in whole or in part, by any act, omission, fault, negligence, or breach of the conditions of this Purchase Order by the Subcontractor/Supplier, its agents, employees, and subcontractors regardless of whether or not caused in whole or in part by any act, omission, fault, breach of contract, or negligence of Miller–Davis Company. The Subcontractor/Supplier shall not, however, be obligated to indemnify Miller–Davis Company for any damage or injuries caused by or resulting from the sole negligence of Miller–Davis Company.

Miller–Davis Company was an “at risk” contractor for the Sherman Lake YMCA's natatorium project. Miller–Davis hired defendant Ahrens Construction, Inc., as a subcontractor to install similar roof systems on three rooms, including the natatorium. The contract incorporated by reference the applicable project plans and specifications, the American Institute of Architects General Conditions (AIA A201), the project manual, and a written guarantee of Ahrens's work. AIA A201 required the subcontractor to “assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assume[d] toward the Owner and Architect.” It further obligated Ahrens to “bear costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby,” and to correct at its expense any work “found to be not in accordance with the Contract Documents” within one year of Substantial Completion. Ahrens agreed to install all products in accordance with the manufacturer's instructions and the requirements of the plans and specifications. Ahrens further agreed to indemnify Miller–Davis from and against any liabilities, claims, damages, losses, actions, and expenses arising out of the subcontract.

Court's primary task in construing a contract for indemnification is to give effect to the parties' intention at the time they entered into the contract. When construing a contract for indemnification, court determines the parties' intent by examining the language of the contract according to its plain and ordinary meaning; in doing so, it avoids an interpretation that would render any portion of the contract nugatory, and assesses the threshold question whether a contract's indemnity clause applies to a set of facts by a straightforward analysis of the facts and the contract terms. To the extent that subcontractor was obligated to indemnify general contractor for the costs of corrective work to building's roof based on subcontractor's failure to install the roof system in accordance with the plans and specifications, subcontractor's breach of that obligation was the cause of general contractor's claimed damages, as an essential element of general contractor's action for indemnity, regardless of whether subcontractor's nonconforming work was the cause of the water problem in building's natatorium.

| Minnesota | MN statute §337.01 to 337.10 | P | B for Rentals | Indemnitor may indemnify only for its own negligence or breach of contract |
Provisions attempting to change the jurisdiction or venue to another state to get around the anti-indemnity laws are void.

M.S.A. § 337.02
337.02. Unenforceability of certain agreements
An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates; or (2) an owner, a responsible party, or a governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws.

Subdivision 1. Definition. As used in sections 337.01 to 337.05 the following terms have the meanings assigned to them. Subd. 2. Building and construction contract. “Building and construction contract” means a contract for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges. The term does not include contracts for the maintenance or repair of machinery, equipment or other such devices used as part of a manufacturing, converting or other production process, including electric, gas, steam, and telephone utility equipment used for production, transmission, or distribution purposes.

Subd. 3. Indemnification agreement. “Indemnification agreement” means an agreement by the promisor to indemnify or hold harmless the promisee against liability or claims of liability for damages arising out of bodily injury to persons or out of physical damage to tangible or real property.

Subd. 4. Promisee. “Promisee” includes that party's independent contractors, agents, employees or indemnitees.

However, Equipment Rental Agreements are not covered by this statute. In the Untied Rentals case, the court did not have any issues with the following language in a rental agreement:

INDEMNITY/HOLD HARMLESS. TO THE FULLEST EXTENT PERMITTED BY LAW, CUSTOMER AGREES TO INDEMNIFY, DEFEND AND HOLD UNITED HARMLESS FROM AND AGAINST ANY AND ALL LIABILITY, CLAIM, LOSS, DAMAGE OR COSTS (INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES, LOSS OF PROFIT, BUSINESS INTERRUPTION OR OTHER SPECIAL OR CONSEQUENTIAL DAMAGES, DAMAGES RELATING TO BODILY INJURY, DAMAGES RELATING TO WRONGFUL DEATH) CAUSED BY OR IN ANY WAY ARISING OUT OF OR RELATED TO THE OPERATION, USE, MAINTENANCE, INSTRUCTION, POSSESSION, TRANSPORTATION, OWNERSHIP OR RENTAL OF THE EQUIPMENT, INCLUDING, BUT NOT LIMITED TO, WHENEVER SUCH LIABILITY, CLAIM, LOSS, DAMAGE OR COST IS FOUND, IN WHOLE OR IN PART, UPON ANY NEGLIGENT OR GROSSLY NEGLIGENT ACT OR OMISSION OF UNITED OR THE PROVISION OF ANY ALLEGEDLY DEFECTIVE PRODUCT BY UNITED. THIS INDEMNITY PROVISION APPLIES TO ANY CLAIMS ASSERTED AGAINST UNITED BASED UPON STRICT OR PRODUCT LIABILITY CAUSES OF ACTION, BREACH OF WARRANTY OR UNDER ANY OTHER THEORY OF LAW.

LIMITATION OF LIABILITY. In no event shall United be responsible to Customer or any other party for any loss, damage or injury caused by, resulting from or in any way connected with the Equipment, its operation or its use, United's failure to deliver the Equipment as required hereunder, or United's failure to repair or replace non-working Equipment. Customer acknowledges and assumes all risks inherent in the operation, use and possession of the Equipment from the time the Equipment is delivered to Customer until the Equipment is returned to United and will take all necessary precautions to protect all persons and property from injury or damage from the Equipment.

CUSTOMER'S INSURANCE COVERAGE. Customer agrees to maintain and carry, at its sole cost, adequate liability, physical damage, public liability, property damage and casualty insurance for the full replacement cost of the Equipment, including, but not limited to all risks of loss or damage covered by the standard extended coverage.
Indemnification provisions are construed narrowly and are generally not favored under Minnesota law. See Nat’l Hydro Sys., a Div. of McNish Corp. v. M.A. Mortenson Co., 529 N.W.2d 690, 694 (Minn.1995) (holding that, absent certain exceptions, “[a]greements seeking to indemnify the indemnitee for losses occasioned by its own negligence are not favored by the law and are not construed in favor of indemnification”). Indeed, “[a]n indemnification agreement contained in, or executed in connection with, a building and construction contract” is generally unenforceable. Minn.Stat. § 337.02 (2012). Minnesota law recognizes an exception to this rule to the extent that “the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor’s independent contractors, agents, employees, or delegates.” Id.

Appellant argues that because the rental agreement was executed in connection with a building and construction contract, the indemnification provision contained therein is statutorily unenforceable. The district court rejected appellant’s argument, concluding:

It is clear that is not the case. A building and construction contract, as defined by statute is a contract for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges. This was nothing of the sort: it was an agreement to rent equipment.


Thus, where the statutory language is “clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words.” Krueger v. Zeman Const. Co., 758 N.W.2d 881, 885 (Minn.App.2008), aff’d, 781 N.W.2d 858 (Minn.2010) (citations omitted); Minn.Stat. § 645.08(1) (“[W]ords and phrases are construed according to rules of grammar and according to their common and approved usage[.]”). “When a statute’s meaning is plain from its language as applied to the facts of the particular case, a judicial construction is not necessary.” ILHC of Eagan, LLC, 693 N.W.2d at 419. When possible, a law should be construed “to give effect to all its provisions,” Minn.Stat. § 645.16 (2012), and “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” ILHC of Eagan, LLC, 693 N.W.2d at 419.

The Minnesota statute invoked in this case defines a “building and construction contract” as:
a contract for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges. The term does not include contracts for the maintenance or repair of machinery, equipment or other such devices used as part of a manufacturing, converting or other production process, including electric, gas, steam, and telephone utility equipment used for production, transmission, or distribution purposes.
Minn.Stat. § 337.01, subd. 2 (2012).

The court is presented with two separate agreements in this case: an oral contract between a nonparty homeowner and appellant for the construction of a residential deck, and a written contract between appellant and respondent for the rental of equipment. Appellant contends that the rental of the skid loader, auger, and related equipment was done “in connection with” the oral building contract and therefore qualifies as a building and construction contract under a broad reading of the statute. However, appellant has not cited to any persuasive authority to support this position. Chapter 337 generally applies to construction-industry projects. Target Corp. v. All Jersey

Although exculpatory clauses are valid under certain circumstances, the law generally disfavors them and courts strictly construe them against benefited parties. Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn.1982). An exculpatory clause is unenforceable if (1) it is ambiguous in scope, (2) it purports to release the benefited party from liability for intentional, willful, or wanton conduct, or (3) enforcing it would contravene public policy. Id. To determine whether enforcement would violate public policy, courts consider two factors:

1. whether there was a disparity of bargaining power between the parties (in terms of a compulsion to sign a contract containing an unacceptable provision and the lack of ability to negotiate elimination of the unacceptable provision), and

2. the types of services being offered or provided (taking into consideration whether it is a public or essential service). Id. Indemnification clauses also must be expressed in “clear and unequivocal terms” and must not contravene public policy. Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783, 791 (Minn.2005) (quotations omitted). But courts “examine the enforceability of exculpatory and indemnification clauses under different standards.” Id. at 792 n. 6. “Indemnification clauses are subject to greater scrutiny [than exculpatory clauses] because they [not only] release negligent parties from liability, but also may shift liability to innocent parties.” Id. With these principles in mind, we consider whether the liability clause in this case is enforceable. In district court, Carlson conceded that the liability clause is not ambiguous. He does not argue otherwise on appeal. Ambiguity therefore is not a basis for determining that the clause is unenforceable.

3. An exculpatory clause that is the product of disparate bargaining power violates public policy. Id. The use of an adhesion contract, which is “drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere,” may indicate disparate bargaining power. Id. at 924. Here, the contract was drafted by the DNR. Both parties voluntarily agreed to the contract, and it did not involve an otherwise unattainable service. Carlson, a logger for about nine years at the time of signing, was familiar with the DNR contract. He was not unwilling or unknowing, and the contract was not forced on him. These circumstances do not reflect disparate bargaining power. In fact, Carlson arguably had greater knowledge of the contract's subject matter and therefore a superior bargaining position.

4. An exculpatory clause may also violate public policy if it governs the provision of a public or essential service. Id. at 923. A service is considered public or essential if it “is the type generally thought suitable for public regulation.” Id. at 925. A court considers “whether the party seeking exonation offered services of great importance to the public, which were a practical necessity for some members of the public.” Id. at 926. Public or essential services include “common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, employers and services involving extra-hazardous activities.” Id. at 925 (footnotes omitted). The contract at issue here benefitted only Carlson and Barta. It did not involve a service of great importance to the public, nor was it essential.

5. Because there was no disparity of bargaining power and the contract did not involve a public or essential service, the parties' liability clause does not violate public policy.

6. Exculpatory vs. Indemnification Clauses

7. Carlson argues that the liability clause in the parties' contract is one for indemnification and that the clause
is therefore subject to greater scrutiny. “Indemnification clauses are subject to greater scrutiny because they release negligent parties from liability, but also may shift liability to innocent parties.” Yang, 701 N.W.2d at 792 n. 6. But Carlson is not an “innocent party.” The jury apportioned 35% of fault for the accident to him. Moreover, we have considered every possible legal basis to hold that the clause is unenforceable, and we discern no basis to do so. We therefore conclude that the liability clause in the parties' contract is enforceable whether it is construed as an exculpatory clause or one for indemnification.

Mississippi  |  MS statute §31-5-41  |  P  |  Supplying personnel for construction is not construction work.

§ 31-5-41. Hold harmless clauses; exceptions
With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

Contract to supply welders for construction of oil rig was not for “other work dealing with construction” within the meaning of statute invalidating indemnity and hold harmless agreements in construction contracts or other work dealing with construction, and, thus, the statute did not apply to supplier's agreement to indemnify construction contractor and hold it harmless for injury to supplier's employee; the supplier performed no work, but merely provided contract welders to work at the direction of contractor.

While not argued by the parties, the court was compelled to note that this state's public policy, as set forth in Miss.Code Ann. § 31–5–41 (Rev.1990), precludes enforcement of this indemnification agreement. Miss.Code Ann. § 31–5–41 reads as follows:
With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer, or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise, and/or agreement contained therein to indemnify or hold harmless another person from the person's own negligence is void as against public policy and wholly enforceable.
It is clear that this is a construction contract where Anderson seeks indemnification for its negligent actions. Such indemnification is void as against public policy as set forth in Miss.Code Ann. § 31–5–41.

[12] [13] ¶ 36. In addition to being violative of public policy, this claim also fails for lack of consideration. An agreement for indemnification, like any other contract, must be supported by consideration. Anderton v. Business Aircraft, Inc., 650 So.2d 473, 476 (Miss.1995). This is especially true where the occurrence for which indemnification is sought predates the indemnity agreement. This Court has found nothing in the record to indicate any consideration flowing to Accu–Fab so as to compel it to indemnify Anderson for Ladner's injuries.

Missouri  |  MO statute §434.100  |  P  |  A party's agreement to indemnify another person
434.100. Construction contracts holding harmless a person's negligence or wrongdoing are void and contra to public policy, exceptions
1. Except as provided in subsection 2 of this section, in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable.
2. The provisions of subsection 1 of this section shall not apply to:
   (1) A party's covenant, promise or agreement to indemnify or hold harmless another person from the party's own negligence or wrongdoing or the negligence or wrongdoing of the party's subcontractors and suppliers of any tier;
   (2) A party's promise to cause another person or entity to be covered as an insured or additional insured in an insurance contract;
   (3) A contract or agreement between state agencies or political subdivisions or between such governmental agencies;
   (4) A contract or agreement between a private person and such governmental entities for the use or operation of public property or a public facility;
   (5) A contract or agreement with the owner of the public property for the construction, use, maintenance or operation of a private facility when it is located on such public property;
   (6) A permit, authorization or contract with such governmental entities for the movement of property on the public highways, roads or streets of this state or any political subdivision;
   (7) Construction bonds, or insurance contracts or agreements;
   (8) An agreement containing a party's promise to indemnify, defend or hold harmless another person, if the agreement also requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recover the cost of the required insurance in its contract price; provided, however, that in such case the party's liability under the indemnity obligation shall be limited to the coverage and limits of the required insurance; or
   (9) Railroads regulated by the Federal Railroad Administration.
3. For the purposes of this section, “construction work” shall include, but not be limited to, the construction, alteration, maintenance or repair of any building, structure, highway, bridge, viaduct, or pipeline, or demolition, moving or excavation connected therewith, and shall include the furnishing of surveying, design, engineering, planning or management services, or labor, materials or equipment, in connection with such work.
4. The provisions of this section shall apply only to contracts or agreements entered into after August 28, 1999.

Missouri courts recognize an exception to a general rule with insurance coverage dealing with other insurance clauses, especially in cases where the insurance company that is trying to invoke the “other insurance” provision is liable to cover a party’s claim because the company’s insured promised to indemnify that party. Fed. Ins. Co. v. Gulf Ins. Co., 162 S.W.3d 160, 164 (Mo.App. E.D.2005). In Gulf, this court noted that the majority of jurisdictions have concluded that an insurance company that is liable to pay because its insured signed an indemnification agreement cannot use its “other insurance” provision to shift liability to the indemnitee's company:
‘[M]ost, if not all, jurisdictions to have faced the question of whether an indemnification agreement could relieve particular insurers of an obligation to pay, without resort to a separate action to enforce the indemnification agreement, have answered in the affirmative.’ These cases give ‘controlling effect to the indemnity obligation of one insured to the other insured over “other insurance” or similar clauses in the policies of the insurers, particularly where one of the policies covers the indemnity obligation.’
The rationale for this exception is to give effect to the insureds' indemnity agreement. ‘To hold otherwise would render the indemnity contract between the insureds completely ineffectual and would obviously not be a correct result, for it is the parties' rights and liabilities to each other which determine the insurance coverage; the insurance
coverage does not define the parties' rights and liabilities one to the other. To apply the 'other insurance' provisions to reduce the indemnitor's insurer's liability 'would serve to abrogate the indemnity agreement between' the indemnitor and indemnitee owner.

Courts should consider obligations under an indemnity agreement before allocating responsibility for the settlement liability according to the terms of the relevant policies. Id. The Missouri Supreme Court noted that, as a general matter, indemnification agreements must be conspicuous. Id. The Missouri Supreme Court, however, also noted that it has relaxed this requirement when the parties are sophisticated business entities:

The requirement that clauses providing indemnity for one's own negligence be conspicuous remains, particularly for contracts involving consumers. However, in a case such as this, where the parties are contracting for the performance of technical and dangerous work, and where both parties are sophisticated commercial entities, it is not required that the indemnity provision be set apart from the other contractual provisions or that it be labeled as an indemnity provision.

Based on this analysis, the Missouri Supreme Court held that Noranda's indemnification agreement was enforceable because, as between two sophisticated commercial entities, the indemnification language was clear and unambiguous and, therefore, conspicuous. Id. In support of this conclusion, the Missouri Supreme Court referred to its prior decision in Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. banc 2001).

<table>
<thead>
<tr>
<th>Montana</th>
<th>MT statute §28-2-2111</th>
<th>P</th>
<th>I</th>
<th>Anti-Indemnity Act includes insurance but note that project specific insurance can be bought</th>
</tr>
</thead>
</table>

28-2-2111. Construction contract indemnification provisions
(1) Except as provided in subsections (2) and (3), a construction contract provision that requires one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party or the other party's officers, employees, or agents is void as against the public policy of this state.
(2) A construction contract may contain a provision:
(a) requiring one party to the contract to indemnify, hold harmless, or insure the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, only to the extent that the liability, damages, losses, or costs are caused by the negligence, recklessness, or intentional misconduct of a third party or of the indemnifying party or of the indemnifying party's officers, employees, or agents; or
(b) requiring a party to the contract to purchase a project-specific insurance policy, including but not limited to an owner's and contractor's protective insurance, a project management protective liability insurance, or a builder's risk insurance.
(3) This section does not apply to indemnity of a surety by a principal on a construction contract bond or to an insurer's obligation to its insureds.
(4) As used in this section, “construction contract” means an agreement for architectural services, alterations, construction, demolition, design services, development, engineering services, excavation, maintenance, repair, or other improvement to real property, including any agreement to supply labor, materials, or equipment for an improvement to real property.
25-21,187. Contract or agreement; indemnity provision; against public policy; unenforceable; when; construction project; violation of safety practice; liability

(1) In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person’s own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. This subsection shall not apply to construction bonds or insurance contracts or agreements.

(2) No professional architect, professional engineer, or professional land surveyor who is retained to perform professional services on a construction project and no employee of a professional architect, professional engineer, or professional land surveyor who is assisting or representing the professional architect, professional engineer, or professional land surveyor in the performance of professional services on a construction project shall be liable in tort for any case of personal injury to or death of any employee working on a construction project arising out of and in the course of employment on the construction project and occurring as a result of a violation of a safety practice by any third party unless the responsibility for supervision of safety practices has been assumed by contract or by other conduct. This subsection shall not be construed to establish, diminish, or abrogate any duty, standard of care, or liability of any person or individual except as expressly provided in this subsection.

Contract does not have to be signed to be valid. See Omaha Cold Storage v. Fisco. With respect to Fisco’s contention that it never accepted the contract, Fisco states that the contract it received stated: “If accepted please sign and return one copy.” Fisco contends that it never returned the contract to SSD, thus, they did not accept it. However, as SSD notes, silence or actions can also create a binding acceptance. Tilt-up Concrete, 255 Neb. at 147, 582 N.W.2d 604. Here, it is undisputed that SSD performed work for Fisco without receiving the signed contract from Fisco. Nothing in the record indicates that Fisco objected to SSD’s performance. To the contrary, Fisco and SSD behaved as if a contract existed between them. Consequently, the court determines that Fisco accepted the contract and its claim to the contrary is without merit.

Invalid clauses are just stricken
Next, Fisco contends that, under Nebraska law, the contract is unenforceable because it violates Neb.Rev.Stat. § 25–21, 187(1). Specifically, Fisco asserts that the contract’s “indemnification” clause and the “risk allocation” clause violate this statute because these clauses indemnify SSD from its negligence. Neb.Rev.Stat. § 25–21, 187(1), in relevant part, provides:

In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person’s own negligence, then such covenant, promise, agreement or combination thereof shall be void as against public policy and wholly unenforceable. See Neb.Rev.Stat. § 25–21, 187(1).

With respect to the contract’s indemnification clause, the court determines that this statute does not apply. The
contract's indemnification clause does not insulate or hold SSD harmless from its own negligence. The indemnification clause of the contract states that SSD is to be held harmless against claims only when such claims arise “in whole or in part by the negligent act, omission, and/or strict liability of [Fisco], any directly employed by [Fisco] (except SSD).” See Filing No. 58, Contract at 2. Contrary to Fisco's argument, this clause does not indemnify or hold SSD harmless for its own negligent acts.

However, with respect to the contract's risk allocation clause, the court determines that this statute applies and that it restricts the application of such clause. The risk allocation clause, in relevant part states: SSD’s total liability to the Client for any and all injuries, claims, losses, expenses, damages or claim expenses arising out this agreement, from any cause or causes, shall not exceed the total amount of $100,000, the amount of SSD’s fee (whichever is less) or other amount agreed upon ... Such causes include, but are not limited to, SSD's negligence, errors, omissions, strict liability, breach of contract or breach of warranty.

This clause clearly contains language which operates to insulate or limit SSD's liability for its negligent acts, thus, under Neb.Rev.Stat. § 25–21, 187(1), that language violates public policy and is invalid. New Light Co. v. Wells Fargo Alarm Servs., 247 Neb. 57, 525 N.W.2d 25 (Neb. 1994). However, this does not mean that the entire indemnification clause is rendered invalid and unenforceable. “Under Nebraska law, only the portion prohibited by section 25–21, 187 is stricken from the indemnification clause and the language remaining may be interpreted to impose liability on the indemnitor.” See Day v. Toman, 266 F.3d 831, 834 (8 th Cir.2001) (citing Hiway 20 Terminal, Inc. v. Tri–County Agri–Supply, Inc., 232 Neb. 763, 443 N.W.2d 872, 875–76 (Neb. 1989)). Accordingly, under Nebraska law, the court determines that the contract's risk allocation clause is invalid with respect to any claims arising out of SSD's negligence, but remains enforceable in all other respects. Id.

Based on the foregoing, the court determines that the contract between Fisco and SSD is valid and enforceable. The contract's risk allocation clause, however, is invalid with respect to SSD's negligent acts. Contrary to Fisco's assertion, these clauses are not invalid in their entirety or inconsistent with each other. Consequently, Fisco's motion for partial summary judgment is granted only with respect to the enforceability of this clause in negligence actions and is denied in all other aspects. SSD's motion for partial summary judgment, on the other hand, is denied with respect to the enforceability of the contract's risk allocation clause in negligence actions and is granted in all other aspects.

Abild argues that the indemnification clause is invalid due to application of Neb.Rev.Stat. § 25-21,187 (Reissue 1985). That section provides, in relevant part:

*768 In the event that a public or private contract or agreement, for the ... work dealing with construction ... contains a covenant, promise, agreement, or combination thereof, to indemnify or hold harmless another person from that person's own negligence, then such covenant, promise, agreement, or combination thereof is void as against public policy and wholly unenforceable.

The indemnification clause in the subcontract agreement at issue in this case provides as follows:

The Subcontractor agrees to indemnify and save harmless the Contractor from any and all loss or damage (including, without limiting the generality of the foregoing, legal fees, and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph), occasioned wholly or in part by any negligent act or omission of the Subcontractor or that of anyone directly or indirectly employed by them or performing the work of this Subcontractor under the direction of the Subcontractor or anyone for whose acts any of them may be liable in carrying out the provisions of the general contract and of this Subcontract regardless of whether or not it is caused in part by a party indemnified hereunder.

5 As conceded by the appellant Tri-County, the final clause in this agreement, stating that the subcontractor must indemnify the general contractor even if the harm is caused by the negligence of the general contractor, is clearly invalid by application of § 25-21,187. Abild, however, contends that the inclusion of this invalid clause in the agreement renders the whole indemnification provision void and unenforceable. This contention is in error. The portion regarding Abild's potential liability for the negligence of Tri-County can be stricken from the remainder of the indemnification clause, and the language that **876 remains may nonetheless be interpreted to impose liability
on Abild. However, even if the clause were completely invalidated, because of the common-law right of indemnification which exists in this state, Abild could be required to indemnify Tri-County for the damage caused by Abild's negligence, even absent an agreement to indemnify.

This court has addressed the issue of indemnification in *769 situations in which an agreement to indemnify is present and in cases where there is no agreement. As stated by this court in Duffy Brothers Constr. Co. v. Pistone Builders, Inc., 207 Neb. 360, 363, 299 N.W.2d 170, 172 (1980),

“The obligation to indemnify may grow out of an implied contractual relation or out of a liability imposed by law. Thus, where one is compelled to pay money which in justice another ought to pay, or has agreed to pay, the former may recover from the latter the sums so paid, unless the one making the payment is barred by the wrongful nature of his conduct.”

In Tober v. Hampton, 178 Neb. 858, 872, 136 N.W.2d 194, 203 (1965), a case involving no contractual right to indemnification, we followed Louisiana law, stating, “[l]ndemnity is restricted to cases where actual fault is attributed to one party and other party is only technically or constructively at fault, and indemnity is never applicable where both parties are actually in the wrong.” In Tober, we did not define precisely what is meant by the terms “technically or constructively” at fault. Similarly, in Duffy Brothers Constr. Co., supra 207 Neb. at 363-64, 299 N.W.2d at 172, a case involving workers’ compensation benefits and no written provision for indemnity, we stated that

“[t]he right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.”

This court then defined primary versus secondary liability by distinguishing not between degrees of negligence, but between the “difference in the character or kind of the wrongs which cause the injury.” Duffy, supra at 364, 299 N.W.2d at 172.

In a case involving a contract right to indemnity, Farmers Elevator Mut. Ins. Co. v. American Mut. Lia. Ins. Co., 185 Neb. 4, 173 N.W.2d 378 (1969), we denied indemnity to an “actively” negligent joint tort-feasor, as opposed to a *770 “technical, constructive, or passive” joint tort-feasor, barring the claimant from indemnification for his own active negligence. In Farmers Elevator, we left open the question of whether a “technical, constructive, or passive” joint tort-feasor is entitled to indemnity from an active and primary joint tort-feasor, as a determination of that issue was unnecessary for disposition of the case. A determination of this issue is, however, required in the resolution of this case.

6 Although this court has employed different phrasing in cases involving claims for indemnification, the rule of law applicable remains constant. Whether the conduct of the party seeking indemnification, either through an existing contract right or otherwise, amounts to “secondary,” “technical,” “constructive,” “vicarious,” or “passive” negligence is merely a question of semantics, and all of the above terms simply indicate that any conduct other than that which is characterized as direct and active negligence will not bar the claimant from indemnification, if otherwise entitled. More clearly stated, one whose negligence has consisted of mere passive neglect may have indemnity from an active wrongdoer. If one tort-feasor, by active conduct, has created a danger to the plaintiff, and the other has merely failed to discover or to remedy it, the passive tort-feasor may be entitled to indemnification.


| Nevada | No statute See Calloway v. City of Reno, 939P.2d 1020 | B | Indemnity clauses are strictly construed, especially when they are for the indemnitee’s own |

Page 330
No statute
When Developer and Contractor approached the City to build the subject development, the City presented a form agreement entitled “Application for Building Permit.” The application had blank areas for the parties to enter the name of the subject parcel, the price of the permit, and a work description. An indemnity clause, one of only three printed provisions on the application, was located immediately below the applicant’s signature block. The indemnity clause stated that the applicant “agree[s] to ... indemnify and keep harmless the City of Reno ... against all liabilities, judgments, costs and expenses which may anywise accrue against the City of Reno in consequence of the granting of this permit.” Based on this provision, the City sought indemnity from Developer and Contractor for the negligent inspection claim that appellants filed against the City. Developer and Contractor contended, and the district court agreed, that the indemnity clause was an adhesion clause.

We reserve the classification of a contract clause as an adhesion clause for cases where one party has unfairly used its superior bargaining power to force the inclusion of an oppressive and unreasonable clause in a contract. See Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260–61 (1985); Cobb v. Snohomish County, 64 Wash.App. 451, 829 P.2d 169 (1991). We decline to consider adhesion in this case, but affirm the district court’s ruling on other grounds.


In this case, appellants alleged that the City was negligent when it inspected the subject property. However, due to the immunity protection for municipal entities in Nevada, the City cannot be found liable to appellants for negligence in the performance of an inspection. Tahoe Village Homeowners v. Douglas Co., 106 Nev. 660, 662–63, 799 P.2d 556, 558 (1990). Accordingly, the success of appellants' recovery theory against the City rests upon a determination that the City ignored a known defect when it approved the permits for appellants’ homes. Butler, 101 Nev. at 450–51, 705 P.2d at 663. The City, therefore, sought indemnity from Developer and Contractor for any liability it may have for such “reckless” conduct.

The indemnity clause in the permit application is a general “hold harmless” clause. The clause does not expressly state whether the applicant indemnifies the City for the City's negligent, reckless or malicious conduct. Accordingly, we conclude that holding Developer and Contractor liable as indemnitees for the City's negligent, reckless, or malicious conduct would be unjust. Mostyn v. Delaware L. & W.R. Co., 160 F.2d 15 (2d Cir.1947) (indemnity for one's own negligent conduct follows only from an expression of such a purpose beyond any peradventure of doubt); Sweetman v. Strescon Industries, Inc., 389 A.2d 1319 (Del.Super.1978). Instead, we conclude that the provision in question was intended to hold the City harmless for any negligent conduct by Developer and Contractor which could subject the City to liability.

Implied indemnity
The City argues that the doctrine of implied indemnity should be applied in this case. Implied indemnity shifts one joint tortfeasor's liability to another joint tortfeasor on the basis of some pre-existing legal or special relationship between the tortfeasors. See Black & Decker v. Essex Group, 105 Nev. 344, 775 P.2d 698 (1989). However, implied indemnity theories are not viable in the face of express indemnity agreements. Wyoming Johnson, Inc. v. Stag Industries, Inc., 662 P.2d 96, 101 (Wyo.1983). When parties affirmatively deal with the question of indemnity in a
written contract, it is fair to conclude that they intended what was expressed in their agreement, not that some common law rule should govern their rights and liabilities. Booth–Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902, 906–07 (9th Cir.1950). In light of the presence of an indemnity agreement in this case, therefore, we conclude that the doctrine of implied indemnity is inapplicable.

Unless specifically otherwise stated in the indemnity clause, an indemnitor’s duty to defend an indemnitee is limited to those claims directly attributed to the indemnitor’s scope of work and does not include defending against claims arising from the negligence of other subcontractors or the indemnitee’s own negligence.

On general contractor’s claim for breach of indemnification agreement based on landscaping subcontractor’s alleged breach of duty to defend general contractor in suit brought by homeowners for negligent construction of sidewalls and retaining walls, trial court was required to calculate and apportion fees and costs based on what contractor actually incurred in defending claims attributable to subcontractor’s negligence.

Whether landscaping subcontractor’s work in completing rough and final grading of homes was implicated in design, construction or development of sidewalls or retaining walls, which would trigger subcontractor’s contractual duty to defend negligent construction suit against general contractor, was question for jury, in action by contractor for breach of contract.

Subcontractor’s duty to indemnify general contractor pursuant to contract between the parties concerning road improvement project was limited to the extent subcontractor caused the damages, and therefore subcontractor did not have duty to indemnify contractor after jury found that subcontractor did not proximately cause the underlying accident that led to negligence action against contractor and subcontractor; contractual language at issue provided that indemnification would occur “to the extent” that any injury or damage was “caused” by the subcontractor, and indemnity provisions were to be strictly construed.

<table>
<thead>
<tr>
<th>New Hampshire</th>
<th>N.H. statute §338-A:2</th>
<th>P</th>
<th>Indemnification ONLY allowed from party causing damage.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition, or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water, or other utility line, which requires any party to indemnify any person or entity for injury to persons or damage to property not caused by the party or its employees, agents, or subcontractors, shall be void.</td>
</tr>
</tbody>
</table>

While this case is before the statute went into effect, it provides an insight into how indemnity agreements will be enforced. In April 1974, the Lawrence Company entered into a construction contract with the defendant for work to be performed on the defendant’s premises. The contract required the Lawrence Company to purchase and maintain specific insurance coverage, including workmen’s compensation and comprehensive general liability. In fulfillment of the contract, the Lawrence Company obtained both types of insurance from the plaintiff. Both policies were in effect at all relevant times. On October 9, 1974, an employee of the Lawrence Company was injured on the defendant’s premises. As a result of this accident, the employee received workmen’s compensation benefits from the plaintiff as the insurer of the Lawrence Company. The plaintiff seeks to bring a third-party action against the defendant pursuant to RSA 281:14 (Supp.1979) (Workmen's Compensation-Liability of Third Person) to recover the amount it has paid to the injured employee and petitioned for declaratory judgment to determine whether the indemnity clause in the construction contract entitles the defendant to be indemnified by the Lawrence Company if the plaintiff is successful in its third-party suit. If this is the case, then a third-party suit by the insurance carrier would be fruitless because the carrier, as the Lawrence Company’s insurer, would itself be liable for whatever amount it could recover from the Brown Company.
The first issue is whether the indemnity clause in the construction contract requires the Lawrence Company to indemnify the Brown Company for injuries caused by the Brown Company's negligence. Paragraph seven of the contract provides as follows:

“Contractor's Indemnity. Contractor (Lawrence Company) shall indemnify and hold Owner (Brown Company) harmless from any and all loss by reason of property damage, bodily injuries, including death resulting therefrom (and all expenses in connection therewith, including attorneys' fees) sustained or alleged to be sustained by any person or persons, whether they be employees of Owner, Contractor, or members of the public, and without regard to whether the person or persons are working within the scope of their employment, resulting from the acts (or failure to act) of Contractor or sub-contractors, or their employees and agents, or from the performance (or failure of performance) of this Contract. Contractor shall effect coverage by Workmen's Compensation Insurance in conformity with the laws of the State in which the work contemplated by this Contract is to be done and shall indemnify and hold by this Contract Owner harmless from any and all loss by reason of the liability imposed by the applicable Workmen's Compensation Laws; will carry public liability insurance and such other insurance as may be necessary to insure against the risks above assumed by Contractor, and will submit evidence of same satisfactory to Owner on or before signing of this Contract.”

The plaintiff argues that the majority view requires that an indemnity provision clearly, precisely and unequivocally express that it was the intent of the parties to provide indemnity for the owner's own negligence. See, e.g., Laudano v. General Motors Corp., 34 Conn.Sup. 684, 388 A.2d 842 (1977); Norfolk & W. Ry. Co. v. Hardinger Tr. Co., Inc., 415 F.Supp. 507 (W.D.Pa.1976). We disagree that this is the majority view:

“While it has sometimes been stated, in discussion or dicta at least, that specific language is necessary to obligate the contractor to protect the owner against the latter's own active negligence, and that broad general words are insufficient, it has been ruled or recognized by a majority of the courts that express or explicit reference to the owner's negligence is not requisite if the parties' intention to afford such protection clearly appears from the contract or from the language used, the surrounding circumstances, and the objects of the parties.” Annot., 27 A.L.R.3d 663, 678 (1969). Moreover, we find the latter rule to be sounder because it has the effect of upholding the parties' intention. Accordingly, we hold that express language is not necessary to obligate a contractor to protect against injuries resulting from the owner's negligence where the parties' intention to afford such protection is clearly evident. Cf., Laconia Clinic, Inc. v. Cullen, 119 N.H. 804, 408 A.2d 412 (November 14, 1978); Royer Foundry & Mach. Co. v. N.H. Grey Iron, Inc., 118 N.H. 649, 392 A.2d 145 (1978).

In interpreting indemnity provisions the same rules apply as are used to interpret contracts generally. 41 Am.Jur.2d Indemnity s 6 (1968). In this State, the proper interpretation of a contract is that which reflects the intention of the parties at the time it was made. Erin Food Services Inc. v. 688 Properties, 119 N.H. 232, 235, 401 A.2d 201, 203 (1979). In interpreting a contract the court is to consider the written agreement, all its provisions, its subject matter, the situation of the parties at the time it was entered into and the object intended. Thiem v. Thomas, 119 N.H. 598, --, 406 A.2d 115, 118 (August 17, 1979).

The indemnity clause in question essentially has two parts. It requires the contractor to indemnify the owner from any and all loss resulting from: (1) “the acts of (the) contractor”; and (2) “the performance of this contract.” It is the second part of this clause which is at issue, and which cannot be dismissed as mere surplusage. See id.; McGinley v. Insurance Co., 88 N.H. 108, 184 A. 593 (1936). Each part of the indemnity clause serves a different function in the contract. The first part, “losses ... from the acts of (the) Contractor,” assigns liability to the contractor from injuries resulting from any acts of the contractor, whether or not they occur in the performance of the contract. The second part, “losses ... from the performance ... of this Contract,” assigns liability to the contractor for injuries resulting from the performance of the contract irrespective of whose negligent acts caused the injuries.

We construe the language of the second part to include negligent acts by the defendant because it is the only other
interested party likely to be held liable for injuries. Furthermore, such an interpretation gives meaning and effect to all the language in that clause and appears to best reflect the intention of the parties when viewed in the context of the entire contract, the situation of the parties at the time, and the object intended. Thiem v. Thomas supra. The contract called for the Lawrence Company to come onto the premises of the Brown Company to perform construction and repairs. The potential risks to the employees **1114 of both parties as well as to third persons arising out of the performance of the work were to a certain degree unforeseeable. It is reasonable and a common business practice for the parties to agree that one of them bear the cost and responsibility of insuring against the risks resulting from the performance of the contract. See Annot., 27 A.L.R.3d 663 s 2 (1969).
Moreover, the contract required the Lawrence Company to obtain specific insurance to protect against all liabilities assumed under the contract. Such a contractual stipulation supports a finding that the parties intended the indemnity agreement to cover negligence on the part of the owner. See id., at 695. We conclude that the clause at issue requires indemnification of defendant for its own acts of negligence.

<table>
<thead>
<tr>
<th>New Jersey</th>
<th>NJ statute §2A:40A-1</th>
<th>S</th>
</tr>
</thead>
<tbody>
<tr>
<td>2A:40A-1. Construction, alteration, repair, maintenance, servicing or security of building, highway, railroad, appurtenance and appliance; invalidity</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, relative to the construction, alteration, repair, maintenance, servicing, or security of a building, structure, highway, railroad, appurtenance and appliance, including moving, demolition, excavating, grading, clearing, site preparation or development of real property connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents, or employees, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workmen's compensation or agreement issued by an authorized insurer.

A hold harmless clause is basically the assumption, by contract, by one party, the indemnitor, of the liability of another party, the indemnitee, arising out of the contract. Recently enacted chapter 317 of the Laws of 1981 provides that all hold harmless or indemnification clauses in construction contracts are void and unenforceable as against public policy. Chapter 317 was enacted in response to a practice, common in the construction field, for hold harmless agreements to be included in contracts and purchase order forms. Approximately 27 states have enacted some form of restriction on the use of hold harmless clauses. Assembly Bill No. 590 attempts to limit the effect of chapter 317 but prohibiting only such hold harmless clauses which purport to indemnify a person for damages which result from his sole negligence. Thus, a clause which requires a subcontractor to indemnify a contractor for any damage which results solely from the contractor's sole negligence would be unenforceable. Section 2 of Assembly Bill No. 590 would provide the same limitation for indemnification clauses in contracts involving architects, engineers and surveyors which were also prohibited by the enactment of chapter 317.

What remains, then, is the express indemnification clause in the contract between Hall Building and Bee Gee Masonry. The clause provides that Bee Gee:
agrees to indemnify and save harmless the ... general contractor ... against loss or expense by reason of the liability imposed by law upon ... general contractor ... for damage because of bodily injuries ... accidentally sustained by a person ... arising out of or on account of or in consequence of the performance of this Contract, whether or not such injuries to persons ... are due or claimed to be due to any negligence of the subcontractor....
At the time the contract was executed, N.J.S.A. 2A:40A-1 provided that “a ... promise ... relative to the construction ... of a building ... purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property is against public policy and is void and unenforceable.” The effect of this provision, enacted by L. 1981, c. 317, was to invalidate all hold harmless or indemnification clauses in construction contracts as against public policy. It is undisputed that the subject indemnity clause would be unenforceable under former Section 2A:40A-1.

3 However, the present section, as amended by L. 1983, c. 107 § 1 (eff. 3/14/83), prohibits only those indemnification clauses which purport to indemnify for “the sole negligence of the promisee.” Under the section as amended, therefore, the parties’ indemnity clause clearly would be enforceable.

The issue, then, is whether the present Section 2A:40A-1 should be given retroactive effect, as Hall Building urges. No reported decision has addressed this question.

The general rule of statutory construction favors the prospective application of statutes. Gibbons v. Gibbons, 86 N.J. 515, 521, 432 A.2d 80 (1981). There are, however, three exceptions which permit retroactive application of statutes or their amendments: (1) where the Legislature has expressly or implicitly indicated that the **319 statute be applied retroactively, Id. at 522, 432 A.2d 80; (2) where the statute is ameliorative or curative, Id. at 523, 432 A.2d 80; and (3) in the absence of legislative intent that the statute is limited to prospective application, where such considerations as the expectations of the parties warrant retroactive applications, Id. See Communications Workers v. Public Employment Relations Commission, 193 N.J.Super. 658, 663-664, 475 A.2d 656 (App.Div.1984).

Here, there is no expression of legislative intent that the amended statute be limited to prospective application. Rather, the legislative history demonstrates that the amendment was intended to improve the statutory scheme in existence and, indeed, to clarify the purpose behind the original enactment:

This bill amends a recently-enacted law, P.L.1981, c. 317, which prohibits hold harmless clauses in construction contracts which indemnify the promisee for any damages regardless of the extent of his negligence. For example, an agreement between a property owner and a general contractor under the terms of which the general contractor agrees to hold the owner harmless from any and all liability as a result of the negligence or wrongdoing of the general contractor and/or the latter’s subcontractors, is under the law against public policy and is void and unenforceable. It is the contention of Assembly Bill No. 590 that the present law as originally conceived was nothing more than prohibition to prevent indemnification against one’s own negligence. However, as a result of Senate committee amendments to the original bill, certain conventional and proper hold-harmless clauses were prohibited.

By way of background, the reason for these amendments follows: It has been a well settled principle, determined by the courts of this State, that there is no essential public policy impediment to certain hold harmless agreements. The principle derives from recognition that, ordinarily, the responsibility for risk of injury is shifted by the primary parties to insurance carriers, and the parties should be left to determine how the insurance burdens shall be distributed. In effect, it is an allocation of costs which, in practice, finds its way into the contract price.

*254 Assembly Judiciary, Law, Public Safety and Defense Committee Statement to Assembly, No. 590 of 1983 (emphasis supplied).

Hence, the new section falls, at least, under one of the three exceptions outlined in Gibbons v. Gibbons, supra—it is an ameliorative or curative enactment. As counsel for Hall Building correctly notes, the amended section actually mirrors the language of the Assembly Bill behind the original 1981 enactment. The new section merely resurrects the language deleted by the Senate in enacting former Section 2A:40A-1 and thereby restores conventional indemnity and “hold harmless” agreements to their former validity.

| New Mexico | NM statute §56-7-1 | P | See also Oil Field Anti-Indemnity Act Also |
NM Supreme Court held that service providers are covered by this statute. Anti-Indemnity-Insurance/ however, a project specific policy to cover the upstream entities are allowed.

56-7-1. Real property; indemnity agreements; agreements void
A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.
B. A construction contract may contain a provision that, or shall be enforced only to the extent that, it:
(1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents; or
(2) requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.
C. This section does not apply to indemnity of a surety by a principal on any surety bond or to an insurer's obligation to its insureds.
D. The state, a state agency or a political subdivision of the state may enter into a contract for the construction, operation or maintenance of a public transportation system, including a railroad and related facilities, that includes a continuous obligation to procure an insurance policy, including an owner's, operator's or contractor's protective or liability insurance, project management protective liability insurance, builder's risk insurance, railroad protective insurance or other policy of insurance against the negligence of another party to the contract. If the state, a state agency or a political subdivision of the state insured by the risk management division of the general services department enters into a contract to procure insurance as permitted by this section, the cost of any insurance shall be paid by the risk management division of the general services department and shall not be a general obligation of the state, the state agency or the political subdivision of the state.
E. As used in this section, “construction contract” means a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.
F. As used in this section, “indemnify” or “hold harmless” includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.

Original version of anti-indemnity statute applying to agreements between contractor and landowner, which was in force when parties signed agreement, governed and not amended version of statute that was in force when contractor performed work for landowner and accident occurred; original version of statute contained wholesale prohibition against indemnity agreements, while amended version allowed parties to contract for indemnification to compensate indemnitee for negligence of indemnitor, and while original version was silent as to agreements requiring one party to defend or insure another against claims from third party, amended version provided that agreements to defend and insure for acts of indemnitee are void and unenforceable in same manner as agreements to indemnify for the same acts, and as such, it would undermine the parties' justified expectations at time of signing of contract to apply amended version. Provided that a contract is enforceable, courts generally construe it in light of the law that was in existence at the time the contract was signed, in line with court's policy of enforcing the parties' intent and justified expectations at the time they made their agreement.
Generally statutes are to be applied prospectively, absent a clear legislative intent to the contrary, and exception to the prospective application of statutes exists where the statute deals with a remedial procedure. Indemnification provision in the Standard Service Provider Terms and Conditions Agreement between store and plumbing company, which installed diaper changing table in store's restroom which ultimately fell and injured patron, was unenforceable under the original version of the anti-indemnity statute applying to agreements between a contractor and a landowner, and therefore, company had no contractual duty to indemnify store under the Agreement; original version of statute invalidated all indemnity agreements relating to construction contracts, whether they indemnified against the indemnitee's or the indemnitor's negligence. West's NMSA § 56–7–1.

Common law indemnification grants the person who has been held liable for another's wrongdoing an all-or-nothing right of recovery from a third party, such as the primary wrongdoer. Purpose of common law indemnification is to allow a party who has been held liable without active fault to seek recovery from one who was actively at fault, and thus, the right to indemnification involves whether the conduct of the party seeking indemnification was passive and not active or in pari delicto with the indemnitor, and acting in pari delicto refers to the parties being negligent in an equal degree. Common law right to indemnification exists in circumstances in which a landowner is held liable for damages as a passive tortfeasor for failing to discover a dangerous condition on its land created by another tortfeasor. Non-delegable duty doctrine, like vicarious liability and strict liability, allows the plaintiff to recover from a party who was not actively at fault.

Fact that the jury apportioned fault between the parties at trial did not strip away store's common law right of indemnification to obtain full recovery for damages assessed against it from plumbing company, which had installed diaper changing table in store's restroom which fell and injured patron, assuming that store was found by the jury to be a passive tortfeasor, and fact that the jury apportioned fault to store at trial did not establish whether store was a passive tortfeasor and entitled to indemnification because summary judgment was granted before trial and the jury was not instructed on those theories. West's NMSA § 41–3A–1(F).

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Partial Indemnification</th>
<th>NY Indemnification</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>NY statute §5-322.1</td>
<td>P</td>
<td>NY has an anti-indemnity statute which prohibits indemnity for your sole or partial negligence; however, our recommended indemnification provision is a partial indemnification provision, whereby the indemnitee will indemnify you for any claims/damages that arise out of their operation, excluding any indemnification for your negligence.</td>
</tr>
</tbody>
</table>

McKinney's General Obligations Law § 5-322.1
§ 5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases
1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement
relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

2. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to condition a subcontractor's or materialman's right to file a claim and/or commence an action on a payment bond on exhaustion of another legal remedy is against public policy and is void and unenforceable; provided that this subdivision shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer.

3. The provisions of this section shall only apply to covenants, promises, agreements or understandings in, or in connection with or collateral to a contract or agreement, as enumerated in subdivision one hereof, entered into on or after the thirtieth day next succeeding the date on which it shall have become a law.

The Owners are entitled to summary judgment on their contractual indemnification cross claim against NYE. The indemnification clause does not run afoul of General Obligations Law § 5–322.1(1), because it does not purport to indemnify the Owners for their own negligence (Linarello v. City Univ. of N.Y., 6 A.D.3d 192, 193, 774 N.Y.S.2d 517 [1st Dept. 2004] ).


Pursuant to the indemnification agreement, NYE is required to indemnify the Owners for the costs, including reasonable attorneys' fees, they incurred in defending against plaintiff's claims (see Hooper Assoc. v. AGS Computers, 74 N.Y.2d 487, 494, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989] ). Because the amount of those costs and fees cannot be determined on this record, the matter is remanded for that determination (see Fuller–Mosley v. Union Theol. Seminary, 47 A.D.3d 487, 488, 851 N.Y.S.2d 401 [1st Dept.2008] ).

The indemnification clause in the contract between Kit Construction Co., Inc., as general contractor, and Eagle One, as subcontractor, provided, inter alia, that Eagle One was to indemnify and hold harmless, to the fullest extent permitted under law, the owner and general contractor from and against any and all liability resulting from or arising out of claims of injury or death occurring and/or resulting directly or indirectly from the work or the activities of the subcontractor. By its terms, the indemnification clause applied in this case in which Mohan was injured while performing the work or activities of Eagle One, even if Eagle One was not negligent (see Brown v. Two Exch. Plaza Partners, 76 N.Y.2d 172, 178, 556 N.Y.S.2d 991, 556 N.E.2d 430). Moreover, Kit Construction Co., Inc., and Atlantic established their prima facie entitlement to judgment as a matter of law with respect to contractual indemnification by demonstrating that they did not have the authority to supervise or control the performance of Mohan's work and, therefore, were free from negligence. In opposition, Eagle One failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted those branches of the cross motions of Kit Construction Co., Inc., and Atlantic which were for summary judgment on their claims for contractual indemnification against Eagle One (see Grant v. City of New York, 109 A.D.3d 961, 972 N.Y.S.2d 86; Fernandez v. Abalene Oil Co., 91 A.D.3d 906, 910, 938 N.Y.S.2d 119).

45 In order to establish a claim for common-law indemnification, *1079 a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury
(see Hart v. Commack Hotel, LLC, 85 A.D.3d 1117, 1118–1119, 927 N.Y.S.2d 111; Benedetto v. Carrera Realty Corp., 32 A.D.3d 874, 875, 822 N.Y.S.2d 542; Kader v. City of N.Y. Hous. Preserv. & Dev., 16 A.D.3d 461, 463, 791 N.Y.S.2d 634; Hernandez v. Two E. End Ave. Apt. Corp., 303 A.D.2d 556, 556, 757 N.Y.S.2d 65). Here, in addition to establishing that it was not negligent, Atlantic demonstrated that Eagle One had the authority to direct, supervise, and control the means and methods of Mohan's work. However, Eagle One, as Mohan's employer, would only be liable for common-law indemnification if Mohan suffered a grave injury as a result of the accident (see Workers' Compensation Law § 11; Benedetto v. Carrera Realty Corp., 32 A.D.3d at 875, 822 N.Y.S.2d 542). Eagle One established that there was an issue of fact as to whether Mohan suffered a grave injury. Therefore, the Supreme Court erred in granting that branch of Atlantic's cross motion which was for summary judgment on its cross claim for common-law indemnification against Eagle One.

| North Carolina | NC statute §22B-1 | P | Any agreement indemnifying a company for its sole or partial negligence is void. However, under the NC indemnification statute, an indemnitor can indemnify a company for the indemnitor's sole negligence. |

§ 22B-1. Construction indemnity agreements invalid
Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees. This section shall not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer, nor shall this section apply to promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee. This section shall not apply to contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1.

| North Dakota | N.D. Cent | B | Rules of interpretation for indemnity in ND |


§ 9–07–08. Contract Interpreted so IT May be Carried into Effect § 9–07–08. Contract Interpreted so IT May be Carried into Effect Full Text Document for § 9–07–08. Contract Interpreted so IT May be Carried into Effect

§ 9–07–09. Words to be Interpreted in Ordinary Sense § 9–07–09. Words to be Interpreted in Ordinary Sense Full Text Document for § 9–07–09. Words to be Interpreted in Ordinary Sense


Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person. An agreement to indemnify a person against an act thereafter to be done is void if the act is known by such person at the time of doing it to be unlawful. An agreement to indemnify a person against an act already done is valid, even though the act was known to be wrongful, unless it was a felony. An agreement to indemnify against the acts of a certain person applies not only to that person's acts and their consequences, but also to those of that person's agents. An agreement to indemnify several persons applies to each unless a contrary intention appears. One who indemnifies another person against an act to be done by the latter is liable jointly with the person indemnified and separately to every person injured by such act. In the interpretation of a contract of indemnity, unless a contrary intention appears, the following rules are to be applied:

1. Upon an indemnity against liability, expressly or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.
2. Upon an indemnity against claims, demands, damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.
3. An indemnity against claims, demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith and in the exercise of reasonable discretion.
4. The person indemnifying is bound, on the request of the person indemnified, to defend actions or proceedings brought against the latter in respect to matters embraced by the indemnity, but the person indemnified has the right to conduct such defense if that person chooses to do so.
5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by the latter in good faith, is conclusive in the latter's favor against the former.
6. If the person indemnifying, whether that person is a principal or a surety in the agreement, has not had reasonable notice of action or proceedings against the person indemnified or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.
7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying is inapplicable if the person indemnifying had a good defense upon the merits which, by want of ordinary care, the person indemnifying failed to establish in the action.

When one person at the request of another person engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, the former is entitled to be reimbursed in the same manner as a surety for whatever the former may pay.

KLJ argues the district court erred in concluding it had a duty to defend the City under the indemnity provision in KLJ's contract with the City, which states:

Indemnification for Professional Services:
[KLJ] agrees to indemnify, save, and hold harmless the [City] from liability, including all costs, expenses, and reasonable attorneys' fees, which may arise out of or result from [KLJ's] negligent acts or omissions in rendering professional services under this agreement. [KLJ] shall not be responsible for an amount disproportionate to [KLJ's] culpability.

¶ 8 The district court concluded KLJ had a duty to defend the City against SCI and St. Paul's claims, KLJ breached that duty, and the City's costs and expenses were proximately caused by KLJ's breach of the duty to defend: The court finds that SCI's claims, and St. Paul's cross-claim against the City, were matters embraced by KLJ's indemnity to the City against liability arising out of KLJ's professional negligence. SCI was seeking additional compensation from Haggart and St. Paul on the theory that SCI's work conformed to the plans and specifications, and therefore any defects were due to errors in KLJ's plans and specifications and surveying work. The theory of St. Paul's cross-complaint was that if SCI was entitled to more money for its work, it was because of KLJ's actions as the City's agent, and hence the City was liable for any monies owed to SCI. The order denying summary judgment identifies KLJ's negligence as an issue of fact for the jury, and KLJ's “fault” is referenced several times in the special verdict form. The Supreme Court has ruled there is a duty to defend under a professional liability policy “if the

KLJ contends, correctly, that since the jury found SCI was not entitled to additional compensation, the jury never made a finding that KLJ was negligent. KLJ is incorrect, however, in asserting that it had no duty to defend the City unless actual negligence was proven, and that the City “is asking the Court to legislate and rule ... that a clause providing for indemnity if one is negligent requires a duty to defend even if not negligent.” KLJ is wrong because it steadfastly refuses to acknowledge that the legislature has legislated that the “person indemnifying is bound, on the request of the person indemnified, to defend actions brought against the latter *876 in respect to matters embraced by the indemnity.” NDCC § 22–02–07(4). KLJ's duty to defend arises from a statutory rule of interpretation applicable to indemnity contracts.

That statutory duty was activated when the demand was made on KLJ to defend the City “in respect to matters embraced by the indemnity” clause of their contract. KLJ was then required to defend the City “unless a contrary intention appears” in the indemnity clause. Section 22–02–07. KLJ asserts the indemnity provision “explicitly states that KLJ is only obligated to defend in situations when it is negligent”; that assertion is simply wrong as a matter of fact, however, since the “Indemnification for Professional Services” never even mentions a duty to defend. The indemnity provision could have explicitly disclaimed KLJ's statutory duty to defend the City, or limited it to cases where KLJ was actually negligent—but it did not. The language of the contract governs its interpretation if it is clear and explicit, and does not involve an absurdity. NDCC § 9–07–02. It is not absurd—and indeed, it is economically rational—for the indemnity contract to require the project engineer to defend its actions and decisions on the City's behalf, which was merely a passive participant in the dispute over SCI's work.

....

The Court concludes that KLJ breached its duty to defend the City, and that the City's costs and expenses in defending SCI's claims and pursuing indemnity from KLJ after the date of the demand (May 27, 2009), including attorney's fees, were proximately caused by KLJ's breach of the duty to defend.

A

1 [¶ 9] KLJ argues the issue of its contractual liability to the City was decided by the jury and the district court was precluded from further considering whether KLJ had a duty to defend the City under the doctrine of res judicata. KLJ claims the issue of contractual liability was submitted to the jury at the City's request, the City agreed the jury would not have to separately decide whether KLJ was liable if the jury found SCI failed to meet its burden of proving it was entitled to additional compensation, the jury did not find KLJ was liable, and the City cannot ask the court to decide an issue that was submitted to the jury. KLJ contends the City waived any right to have the issue decided by the court.

[¶ 10] In Mills v. City of Grand Forks, this Court explained the doctrine of res judicata:

Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to the parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory.

2012 ND 56, ¶ 8, 813 N.W.2d 574 (quoting Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 10, 791 N.W.2d 33).

[¶ 11] In the jury trial, a thirty-one question special verdict form was used and included questions about whether the City met its burden of proof to demonstrate KLJ was liable under its contract with the City and whether the City met its burden of proof to demonstrate KLJ was liable to the City for indemnity. The jury did not reach these questions because it determined SCI failed to meet its burden of *877 proving it was entitled to additional compensation, and therefore the jury was not required to answer any further questions on the verdict form. The verdict form did not address whether KLJ had a duty to defend the City. The court and the parties discussed the duty to defend issue and the jury instructions before the instructions were finalized. The City requested a special instruction about the duty to defend separate from the special verdict form, there was some discussion about whether the duty to defend issue was a question of law and whether evidence had been presented on the issue,
and the court ruled it would not give the City's requested instruction. The City objected, stating “we’d reserve the right to present that claim subsequent to the verdict then—or to the trial,” and the court responded, “All right.” KLJ did not object to the court’s ruling. Furthermore, in the court’s order to adjudicate the City’s duty to defend claim, the court stated, “The parties have agreed the City’s duty to defend claim is a legal issue for determination by the Court, and the parties shall prepare a briefing schedule for approval by the Court.” KLJ does not dispute this finding. We conclude the district court was not precluded from deciding this issue.

B

2 [¶12] KLJ argues the district court erred in finding it had a duty to defend the City. KLJ contends the indemnity provision required a determination of negligence before KLJ was required to defend or reimburse the City. KLJ argues the court erred in concluding N.D.C.C. § 22–02–07(4) applied and added a duty to defend to the language of the indemnity provision because the contract shows an intention contrary to the statutory provisions and indicates the parties only intended to indemnify if there was a determination that KLJ was negligent.

34567 [¶13] Construction of a written contract to determine its legal effect is a question of law, which is fully reviewable on appeal. Hoge v. Burleigh Cnty. Water Mgmt. Dist., 311 N.W.2d 23, 27 (N.D.1981). An indemnity contract is interpreted applying the general rules for contract interpretation. Id. The indemnity provision should be interpreted to give effect to the parties’ mutual intentions if it can be done consistently with legal principles. Id.; see also N.D.C.C. § 9–07–03. The parties' intent is to be ascertained from the writing alone if possible. Hoge, at 27; see also N.D.C.C. § 9–07–04. We consider the indemnity contract as a whole and give effect to every part. N.D.C.C. § 9–07–06. “In determining whether or not the trial court erred as a matter of law in its construction of the contract we must be guided first by the language of the contract itself, and where the contract is clear and unambiguous there is no reason to go further.” Hoge, at 27. We give words in a contract their plain, ordinary, and commonly understood meaning unless they are used by the parties in a technical sense or a special meaning is given to them by usage. N.D.C.C. § 9–07–09.

8 [¶14] An indemnity is “a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person.” N.D.C.C. § 22–02–01. ‘Indemnification is a remedy which allows a party to recover reimbursement from another for the discharge of a liability which, as between them, should have been discharged by the other.’” Olander Contracting Co. v. Gail Wachter Inv., 2002 ND 65, ¶ 15, 643 N.W.2d 29 (quoting Mann v. Zablotny, 2000 ND 160, ¶ 7, 615 N.W.2d 526). We have recognized that “indemnity is an equitable doctrine, which is not amenable to hard and fast rules.” Mann, at ¶ 7.

*878 910 [¶15] Both the district court and KLJ cited case law interpreting indemnity provisions in insurance policies. However, although the language of non-insurance contractual indemnity provisions is similar to indemnity provisions in insurance policies, the language is interpreted differently. Insurance policies are strictly interpreted against the insurer, who is the indemnitor, because insurance policies are adhesion contracts, the insurance company drafts the policy and has greater bargaining power, the insurance company receives a premium for protecting the insured against liability, and an insurance company's duty to defend is one of the main purposes of an insurance contract. See, e.g., Crawford v. Weather Shield Mfg. Inc., 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424, 430 (2008); Tateosian v. State, 183 Vt. 57, 945 A.2d 833, 838 (2007) (in a non-insurance indemnity agreement the duty to defend and indemnify is incidental to the main purpose of the agreement, unlike an insurance contract). Unlike insurance policies, ambiguities in non-insurance indemnity provisions are strictly construed against the entity receiving indemnity. See, e.g., 41 Am.Jur.2d Indemnity § 14 (2012); Chevron U.S.A., Inc. v. Murphy Exploration & Prod. Co., 356 Ark. 324, 151 S.W.3d 306, 310 (2004); Crawford, at 430; JNJ Found. Specialists, Inc. v. D.R. Horton, Inc., 311 Ga.App. 269, 717 S.E.2d 219, 228 (2011); Blackshare v. Banfield, 367 Ill.App.3d 1077, 306 Ill.Dec. 344, 857 N.E.2d 743, 746 (2006); Martin & Pitz Assoc., Inc. v. Hudson Constr. Servs., Inc., 602 N.W.2d 805, 809 (Iowa 1999); Ramos v. Browning Ferris Indus. of South Jersey, Inc., 103 N.J. 177, 510 A.2d 1152, 1159 (1986); Linkowski v. General Tire & Rubber Co., 53 Ohio App.2d 56, 371 N.E.2d 553, 557 (1977); Sangermano v. Roger Williams Realty Corp., 22 A.3d 376, 377 (R.I.2011); see also DaimlerChrysler Corp. v. Wesco Distrib., Inc., 281 Mich.App. 240, 760 N.W.2d 828, 833 (2008) (construe against drafter and indemnitee).

[¶16] Here, the indemnity provision provides that KLJ agreed to indemnify the City from “liability ... which may
The plain language reflects the parties’ intent that KLJ would indemnify the City only for liability arising out of or resulting from KLJ’s negligence and only for an amount that is proportionate to KLJ’s culpability. The language of the indemnity provision is limited to liability and culpability and does not specifically require KLJ to defend against claims or allegations. The indemnity provision only applies when there has been a determination that KLJ was negligent and when the City’s liability arising out of or resulting from that negligence has been established.

However, N.D.C.C. § 22–02–07 also provides statutory rules for interpreting an indemnity contract, and states:

In the interpretation of a contract of indemnity, unless a contrary intention appears, the following rules are to be applied:

1. Upon an indemnity against liability, expressly or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.
2. Upon an indemnity against claims, demands, damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.
3. An indemnity against claims, demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith and in the exercise of reasonable discretion.
4. The person indemnifying is bound, on the request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defense if that person chooses to do so.
5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by the latter in good faith, is conclusive in the latter’s favor against the former.
6. If the person indemnifying, whether that person is a principal or a surety in the agreement, has not had reasonable notice of action or proceedings against the person indemnified or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.
7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying is inapplicable if the person indemnifying had a good defense upon the merits which, by want of ordinary care, the person indemnifying failed to establish in the action.

(Emphasis added.)

The district court concluded N.D.C.C. § 22–02–07(4) applies and adds a duty to defend to the parties’ indemnity agreement because the agreement does not specifically state KLJ does not have a duty to defend. The provisions of N.D.C.C. § 22–02–07 for interpreting indemnity contracts apply “unless a contrary intention appears” in the contract. We have not interpreted what is required to express a contrary intention in an indemnity agreement. Other jurisdictions have adopted statutes similar to N.D.C.C. § 22–02–07. See Cal. Civil Code § 2778; 18 Guam Code Ann. § 30107; Mont.Code Ann. §§ 28–11–313 to 28–11–317; Okla. Stat. tit. 15, § 427; S.D. Codified Laws §§ 56–3–7 to 56–3–15. However, case law interpreting and applying these other statutes to indemnity contracts is scarce.

Although KLJ did not have a duty to defend, the agreement would require KLJ to reimburse the City for all costs, expenses, and reasonable attorney’s fees the City incurred if the City was held liable arising out of or resulting from KLJ’s negligence. Furthermore, N.D.C.C. § 22–02–07(5) provides that if the indemnitee *882 refuses the indemnitor’s tender of its defense, “a recovery against the latter, suffered by the latter in good faith, is conclusive in the latter’s favor against the former.”

The indemnity language in this case was limited to indemnifying the City for liability resulting from KLJ’s negligence and only in an amount proportionate to KLJ’s culpability. We conclude the statutory duty to defend in N.D.C.C. § 22–02–07(4) does not apply because the indemnity provision expresses a contrary intent.
A contract or agreement which purports to indemnify a company against liability for damages resulting from the negligence of the company is against public policy and void. However, companies based in OH should consider vesting interpretation of the contract in a neighboring state based upon a ruling of an OH Appeals court regarding validity of additional insurance clauses under the OH anti-indemnity statute.

The Ohio Supreme Court held: “R.C. 2305.31 prohibits indemnity agreements, in the construction-related contracts whereby the promisor agrees to indemnify the promisee for damages caused by or resulting from the negligence of the promisee, regardless of whether such negligence is sole or concurrent.”

2305.31 Indemnity agreements as part of construction contract void
A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.

Appellant C.J. Mahan Construction Company (hereinafter “Mahan”) acted as the general contractor on a bridge reconstruction project located on Route 62 and Interstate 77 in the City of Canton. Mahan entered into a subcontract agreement with appellee Mohawk Re–Bar Services, Inc. (hereinafter “Mohawk”). Pursuant to the terms of the subcontract agreement, Mohawk was to supply and install rebar for the construction project. The agreement stated Mahan would provide a crane and crane operator for Mohawk’s use in performing its work.

Paragraph 9 of the subcontract agreement requires Mohawk purchase and maintain workers’ compensation coverage and liability coverage. Mahan required Mohawk to obtain comprehensive general liability, automobile liability, excess liability and Ohio stop gap insurance. Mahan also required Mohawk provide Mahan with an Additional Insured Endorsement ISO Form CG–20 10(11–85) or CG–20 26(11–85) under the comprehensive general liability policy where Mahan is named as an additional insured.
¶ 4 Mohawk purchased a commercial general liability policy and commercial umbrella policy through Cincinnati Insurance Company. The commercial general liability policy did not contain ISO Form CG–20 10(11–85) or CG–20 26(11–85). Instead, the policy contained an Additional Insured Endorsement Form GA 472 01 99.

¶ 5 On October 19, 2001, two employees of Mohawk were engaged in attaching bundles of rebar to a crane operated by a Mahan employee, when the crane came in contact with an overhead electrical power line. As a result, the two employees were electrocuted.

¶ 6 The injured employees initiated this action against Mahan and Mohawk alleging intentional tort against Mohawk and intentional tort and negligence against Mahan. Mahan then demanded Mohawk hold Mahan harmless and provide a defense pursuant to its interpretation of the subcontract agreement. Mohawk and its insurer refused.

¶ 7 Both Mahan and Mohawk subsequently settled with the plaintiffs, resulting in the plaintiffs dismissing their claims against both Mahan and Mohawk.

¶ 8 Mahan issued a “deduct change order” to Mohawk for $125,432.28 for Mohawk's alleged failure to abide by the subcontract agreement. The amount was based on an insurance agent's estimated increase of insurance costs for Mahan's defense against plaintiffs' claims. Mohawk then filed a “lien upon funds” with the Ohio Department of Transportation to attach these funds. The lien failed and ODOT paid the above amount to Mahan. Mahan withheld the funds from Mohawk. It is undisputed Mohawk completed the work in a timely and workmanlike manner.

*2 (¶ 9) Mahan filed a cross claim against Mohawk alleging failure to indemnify, failure to provide the contractually required insurance and failure to hold Mahan harmless. Subsequently, Mohawk cross claimed against Mahan for breach of the subcontract agreement, unjust enrichment, claim on account, payment bond claim, violation of the Prompt Pay Act and declaratory judgment.


Mahan maintains the trial court improperly applied the anti-indemnity statute (Section 2305.31) by granting Mohawk summary judgment as the present case does not involve a “building, structure, highway, road, appurtenance and appliance,” but rather a bridge. Mahan cites Stickovich v. Cleveland (2001), 143 Ohio App.3d 13, 757 N.E.2d 50. However, upon review, we find the Stickovich decision inapplicable as the bridgework involved in the case sub judice connected Route 62 and Interstate 77; therefore the project pertained to a highway or road within the meaning of R.C. 2305.31. Accordingly, the anti-indemnity statute applies.

2 (¶ 36) The subcontract agreement in the case sub judice includes an indemnity clause at paragraph 20, stating:

¶ 37 “Subcontractor agrees to indemnify, protect and save harmless the Contractor from any and all actions, lawsuits, claims, costs, loss, damage, or liability of any kind or nature, including damage to property, even if owned, leased or used by the Subcontractor, or of injuries to persons, including death, whether employees of Subcontractor, which are subject to Workers' Compensation, or others, when such liability results from or on account of any act or omission of Subcontractor or any of his officers, agents, employees or servants, or if such loss or damage is claimed to be as a result of the joint or concurrent acts of contractor and Subcontractor.” (Emphasis added.)

¶ 38 We find, pursuant to Kendall v. U.S. Dismantling Co. (1985), 20 Ohio St.3d 61, 485 N.E.2d 1047, the indemnity clause is void. In Kendall, the Ohio Supreme Court held:

¶ 39 “R.C. 2305.31 prohibits indemnity agreements, in the construction-related contracts described therein, whereby the promisor agrees to indemnify the promisee for damages caused by or resulting from the negligence of the promisee, regardless of whether such negligence is sole or concurrent.

*5 (¶ 40) “Therefore, where the indemnitee in a construction contract is solely liable, or where liability is concurrent to that of the indemnitor, R.C. 2305.31 prohibits indemnity.”

¶ 41 Based upon the above, we find R.C. 2305.21 prohibits the indemnity clause at issue as the language in the agreement clearly indemnifies Mahan for damages claimed as a result of the joint or concurrent acts of Mahan and Mohawk.
Mahan argues whether only Mohawk is liable for negligence, and not Mahan, is a question of fact. However, it is undisputed Plaintiffs' claims against Mahan assert Mahan was independently negligent, not simply vicariously liable for Mohawk's actions or inactions. As noted, supra, Mahan settled with the underlying plaintiffs on the claims of negligence and intentional tort. The case was settled based upon the allegations set forth in the complaint. By settling the underlying litigation, Mahan gave up its right to challenge whether Mohawk was solely liable. Therefore, R.C. Section 2305.31 bars enforcement of the agreement.

In Kemmeter v. McDaniel Backhoe Service (2000), 89 Ohio St.3d 409, 732 N.E.2d 385, the Supreme Court addressed a similar issue, stating:

"Here, the trial court should have first determined whether the causes of action the plaintiff alleged against Fibbe [contractor] arose from activities under Ruehl's [subcontractor] contractual control. If so, Ruehl [subcontractor] could have assumed Fibbe's [contractor's] defense, and the prospect of having to pay the fees of two sets of attorneys would not have arisen. If plaintiff's claims arose from activities under Fibbe's [contractor's] contractual control, then Fibbe [contractor] would have to assume its own defense costs, no matter the outcome at trial.

Clearly, the Supreme Court directed our analysis to the causes of action the plaintiffs alleged against Mahan individually in determining whether the indemnification agreement is void. Here, the plaintiffs alleged negligence and intentional tort against Mahan. Both Mahan and Mohawk settled the claims as alleged with the plaintiffs, without further evidence. There is no dispute the settlement extinguished Mahan's liability to the plaintiffs in the underlying litigation. Further, Mahan did not clearly and expressly reserve rights against Mohawk; therefore, the settlement agreement bars further action. Jones v. Ruhlin Co. (October 24, 1990), Summit Co.App. No. 14568. Mahan cannot now resurrect potential defenses in the underlying litigation to support its arguments herein with regard to the indemnification agreement. We conclude, no genuine issue of material fact remains, and Mohawk is entitled to summary judgment as to the indemnification agreement.

As noted above, the plaintiff employees were employed by Mohawk and were injured while signaling a crane operator employed by Mahan. Mahan argues the crane operator was a borrowed servant, under the direction and control of Mohawk. Again, Mahan settled the alleged negligence and intentional tort claims with the Plaintiffs, thereby waiving its opportunity to present evidence on the borrowed servant issue. Therefore, we find appellant's argument unpersuasive.

The assignments of error are overruled.

In the II and III assignments of error, Mahan asserts a contractual entitlement to retain monies from the contract based upon Mohawk's breach. Accordingly, Mahan concludes its actions did not violate the Ohio Prompt Pay Act.

The statute provides:

"The contractor ... may withhold amounts that may be necessary to resolve disputed liens or claims involving the work or labor performed or material furnished by the subcontractor."

The subcontract agreement between the parties included the following provision:

"Contractor may reserve from any amounts due or to become due to Subcontractor sums equal to any indebtedness owed by Subcontractor for labor or material or equipment or any other obligations of Subcontractor on this project for which Contractor may be liable and as to which Contractor has received notice from Subcontractor or from any claimant. In the event of any breach by Subcontractor of any provisions or obligations of this subcontract, Contractor shall have the right to retain out of and deduct from any payments due or to become due to Subcontractor an amount sufficient to completely protect Contractor from any and all loss, damage or expenses therefore, until the breach has been satisfactorily remedied or adjusted by Subcontractor."

Specifically, Mahan maintains Mohawk breached the indemnity clause of the subcontract agreement; therefore, pursuant to the subcontract agreement, Mahan may retain any payments due or to become due to as a result of Mohawk's breach of the indemnification clause. However, as addressed, supra, we find the
indemnification clause found in the parties' subcontract agreement void as against public policy. Likewise, Mahan's withholding of funds pursuant to the indemnification clause would also violate public policy.

¶ 55 Further, in Electrical–Mechanical, Inc. v. Construction One, Inc., 102 Ohio St.3d 1, 806 N.E.2d 148, 2004–Ohio–1748, the Ohio Supreme Court addressed this issue:

¶ 56 “Therefore, pursuant to R.C. 4113.61(A)(1), if a subcontractor makes a timely request for payment, a contractor must pay the subcontractor in proportion to the work completed within ten calendar days of receiving payment from the owner. A contractor, however, is permitted to withhold “amounts that may be necessary to resolve disputed liens or claims involving the work or labor performed or material furnished by the subcontractor.”

¶ 57 “Failure to comply with these provisions obligates a contractor to pay interest on the overdue payment at a rate of 18 percent per annum. R.C. 4113.61(A)(1) and (B)(1). A subcontractor also may file a civil action to recover the amount due and the statutory interest. R.C. 4113.61(B)(1). If the court determines that the contractor has not complied with the prompt payment statute, the court must award the subcontractor the statutorily prescribed interest. Id. In addition, the prevailing party is entitled to recover reasonable attorney fees, unless such an award would be inequitable, together with court costs. R.C. 4113.61(B)(1) and (B)(3).

*7 ¶ 58 “In the present case, Construction One argues that R.C. 4113.61 permits it to withhold estimated costs of securing a lien substitute, i.e., bond premiums, and anticipated attorney fees directly relating to resolving Masionagle's breaches of the lien-waiver and forum-selection clauses. These breaches, however, did not create “disputed liens or claims involving the work or labor performed or material furnished by the subcontractor,” within the meaning of R.C. 4113.61(A)(1). (Emphasis added.)

¶ 59 “Although these breaches concern disputes arising out of a construction contract, the lien-waiver and forum-selection provisions at issue here are procedural in nature, as they relate either to the right of a party to secure its payment with a lien or to the situs of the tribunal for the adjudication of disputes. They do not, however, concern the substantive aspects of performing the work or labor or providing any material under the contract. Cf. Consortium Communications v. Cleveland Telecommunications, Inc. (Feb. 10, 1998), Franklin App. No. 97APG08–1090, 1998 WL 63538 (permitting a contractor to withhold payment pursuant to R.C. 4113.61 when the parties disputed additional amounts concerning labor-related transportation expenses).

¶ 60 “In R.C. 4113.61, the only justifications for withholding payment relate to disputed liens or claims involving the performance of work or labor or the furnishing of material. If the General Assembly had intended to include other types of disputes, such as those over breaches of lien-waiver and forum-selection clauses, as further justification for a contractor to withhold payment, it could have expanded the statute to include these and other types of disputes. It chose not to do so.”

¶ 61 Upon review, we find Mahan's claims Mohawk breached the subcontract agreement do not involve the performance of the work or labor or the furnishing of material. Accordingly, the trial court properly found Mahan breached the prompt pay statute in withholding the funds from payment.

¶ 62 The second and third assignments of error are overruled.

4 ¶ 63 In the IV, VI, and VIII assignments of error Mahan maintains the trial court erred in not finding Mohawk responsible for indemnifying Mahan as to the intentional tort allegation. Mahan asserts the anti-indemnity statute speaks only to negligence, not an intentional act, and Mohawk owes a defense and insurance coverage to Mahan for the “intentional wrongdoing” allegations of the complaint provided by Cincinnati’s Stop Gap coverage for an intentional act.1

¶ 64 Addressing the argument raised on appeal, Mahan maintains Mohawk was required to name Mahan as an “additional insured” under the insurance policies. Specifically, Mahan asserts Mohawk breached the subcontract agreement by failing to provide the Additional Insured Endorsement Forms CG–20(11–85) or CG–20 26(11–85). Mahan argues Mohawk did not provide the contractually required policy endorsement. Mohawk provided Form GA 472 01 99.

*8 ¶ 65 Form CG–20 10(11–85) states:

¶ 66 “WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.”
¶ 69) The form provided by Mohawk, GA 472 01 99 states in pertinent part:

¶ 70) “WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.”

¶ 71) “2.e Any person or organization, hereinafter referred to as ADDITIONAL INSURED, for whom you are required to add as an additional insured on this Coverage Part under:

¶ 72) (1) A written contract or agreement; or

¶ 73) (2) An oral agreement or contract where a certificate of insurance showing that person or organization as an additional insured has been issued; but only with respect to liability arising out of your ongoing operations performed for that additional insured by you or on your behalf. A person’s or organization’s status as an insured under this endorsement ends when your operations for that insured are completed.

¶ 74) * * *

¶ 75) 4. COVERAGE: (Section I) is amended to include:

¶ 76) The insurance provided to the additional insured does not apply to “bodily injury”, “property damage”, “personal injury” or “advertising injury” arising out of the

¶ 77) * * *

¶ 78) b. Sole negligence or willful misconduct of, or for defects in design furnished by, the additional insured or its “employees”.

¶ 79) * * *

¶ 80) Mohawk submitted the affidavit of James Randall Stenhouse, Vice President of Leonard Insurance Services, in support of its motion for summary judgment. The affidavit testified Form GA 472 01 99 provides equivalent coverage to the additional insured when an accident or loss occurs while Mohawk is still on the job, as compared to Forms CG–20 10(11–85) or CG–20 26(11–85). Upon review, Mahan did not demonstrate a genuine issue of material fact exists as to the equivalency of the forms.

¶ 81) We agree with the trial court, regardless of which additional insured endorsement is applied, the policy would only cover Mahan for liability arising out of Mohawk’s work for Mahan. As noted supra, the plaintiffs in the underlying litigation alleged negligence against Mahan only, not vicariously through Mohawk; therefore, the additional insured endorsements could not apply as the plaintiffs’ allegations would be excluded as a matter of law under the endorsement because the allegations involved Mahan’s own actions, not Mohawks actions arising out of their work for Mahan.

In December 2003, the city had entered into a contractual agreement with Vandra to rehabilitate Western Avenue. The contract contained this provision:

[Vandra] shall indemnify, keep and save harmless the City * * * against all suits or claims that may be based upon any injury to person or property that may occur, or that may be alleged to have occurred in the course of the performance of this contract by [Vandra], whether or not it shall be claimed that the injury was caused through a negligent act or omission of [Vandra], and whether or not the persons injured or whose property was damaged were third parties * * *, and [Vandra] shall at his own expense defend [the City] in all litigation, pay all attorneys' fees and all costs and other expenses arising out of the litigation or claim incurred in connection therewith; and shall, at his own expense satisfy and cause to be discharged such [judgments] as may be obtained against the City.[...

¶ 7) As a result, the city filed a complaint for declaratory relief against the defendants, seeking a declaration that Vandra owed it contractual indemnity and that Cincinnati, Vandra’s insurer, owed the city insurance coverage as an
additional insured on Vandra's policy.2

{¶8} Cincinnati and Vandra each moved for summary judgment.3 Cincinnati argued that the additional insured endorsement on its insurance policy with Vandra (“Cincinnati policy”) does not afford coverage to the city. Vandra argued that under R.C. 2305.31, it is prohibited from indemnifying the city. The city opposed both motions and filed its own motion for summary judgment, arguing *301 that under the contract, Vandra has a duty to defend, indemnify, and hold the city harmless. The city further argued that it is entitled to coverage as an additional insured on Vandra’s insurance policy with Cincinnati. The trial court denied the city's motion and granted both Cincinnati’s and Vandra’s motions. The court also declared that the Cincinnati policy does not afford coverage, defense, or indemnity to the city for the Dawsons' lawsuit and that the city's construction contract with Vandra does not provide for indemnification of the city for the Dawsons' lawsuit.

| Oklahoma | OK Statute Title 15 §221 | P | I | OK law has an anti-indemnity statute which prohibits indemnity for your own negligence. However; our recommended indemnification provision is partial indemnification provision, whereby the indemnitor will indemnify you for any claims/damages that arise out of their operation, excluding any indemnification for your negligence. |

Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person. An agreement to indemnify a person against an act thereafter to be done is void if the act be known by such person at the time of doing it to be unlawful. An agreement to indemnify a person against an act already done is valid even though the act was known to be wrongful unless it was a felony. An agreement to indemnify against the acts of a certain person, applies not only to his acts and their consequences, but also to those of his agents. An agreement to indemnify several persons applies to each, unless a contrary intention appears. One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately to every person injured by such act. In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.
2. Upon an indemnity against claims or demands, or damages or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.
3. An indemnity against claims or demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands or liability incurred in good faith, and in the exercise of reasonable discretion.
4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity; but the person indemnified has the right to conduct such defense, if he chooses to do so.
5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter,
Harda necessarily sweeps all events, including those occurring because of indemnitee’s actions, into its coverage. It own acts, it need not specifically refer to those acts in order to achieve that result. Although an indemnification agreement must clearly and unequivocally express an intent to exculpate the indemnitee for its own acts, it need not specifically refer to those acts in order to achieve that result. Under Oklahoma law, an intent to exculpate indemnitee for its own acts may be found where language of indemnification is so broad and all-inclusive that it necessarily sweeps all events, including those occurring because of indemnitee’s actions, into its coverage.

EMC relies upon 15 O.S. § 221, a statute evidently not yet the subject of a published decision. Plaintiff alleges that under the contract for services between Routh and itself, Routh was required to procure insurance and indemnify Tyson. “Construction contracts usually transfer liability risks to contractors and downstream subcontractors by way of indemnification and insurance requirements.” Nierengarten, New ISO Additional Insured Endorsements (2014)(available at Westlaw, 44–FALL BRIEF 30). In recent years, such arrangements have seen the rise of state “anti-indemnification” statutes. Some of those statutes make a distinction. “Most anti-indemnification statutes allow the reallocation of risk to an indemnitee’s insurer, so that while an indemnification agreement may be voided by statute, a separate promise to procure insurance designed to shift the same risk is enforceable and unaffected by statutory bars.” 3 Bruner & O’Connor on Construction Law, § 10:91 (2014).3

The Oklahoma statute does not, however, draw this distinction. It provides that (subject to the exceptions in subsection C or D) “a construction agreement that requires an entity or that entity’s insurer to indemnify, insure, defend or hold harmless another entity against liability ... which arises out of the negligence or fault of the indemnitee ... is void and unenforceable as against public policy.” 15 O.S. § 221(B) (emphasis added).

Plaintiff responds that the exception in subsection C applies. That subsection provides that the statute does not bar an indemnity agreement, but that “such indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitee.... “In other words, plaintiff argues, the statute permits indemnification agreements up to the amount of negligence or fault attributable to the indemnitee, which is Routh in this case. To the extent this is correct, subsection C uses the word “indemnify””. The words “insure” and “defend”, which appear in subsection B, are not repeated in subsection C. By its terms (in the court’s reading), 15 O.S. § 221(B) bars plaintiff’s claims against an insurer such as EMC.

*3 Plaintiff alleges that EMC initially offered to provide a defense (# 3 at ¶ 23) but withdrew the offer after a dispute about separate counsel (Id at ¶ 25). Plaintiff alleges estoppel based on these allegations (Id. at ¶ 42). This claim is rejected as well, because Oklahoma law holds that waiver and estoppel are inapplicable to the creation of a contract. Inola Mach. & Fabricating Co. v. Farmers New World Life Ins. Co., 631 F.2d 712, 715 (10th Cir.1980).

Finally, the court does not adopt EMC’s argument that plaintiff’s claim should be dismissed because this court found Tyson immune from liability to Mr. Martinez in the previous litigation. The issue of immunity under the workers’ compensation law must be litigated, which requires defense counsel. An ultimate finding of immunity does not operate retrospectively to negate a duty to defend, if one independently existed.

It is the order of the court that the motion to dismiss of defendant Emcasco Insurance Company (# 13) is hereby granted.

Under Oklahoma law, an agreement to indemnify party for its own negligence must satisfy requirement that parties express their intent to exculpate in unequivocally clear language, agreement must result from arm’s length transaction between parties of equal bargaining power, and exculpation must not violate public policy. Under Oklahoma law, although an indemnification agreement must clearly and unequivocally express an intent to exculpate the indemnitee for its own acts, it need not specifically refer to those acts in order to achieve that result. Under Oklahoma law, an intent to exculpate indemnitee for its own acts may be found where language of indemnification is so broad and all-inclusive that it necessarily sweeps all events, including those occurring because of indemnitee’s actions, into its coverage. U.S. v. Hardage, C.A.10 (Okla.)1993, 985 F.2d 1427.
Under Oklahoma law, indemnity agreement in “repair order” which covered personal injuries growing out of or connected to work performed under order and identified elevator company as tortfeasor to be indemnified, applied to personal injuries that glass company employee sustained while participating with elevator company employees in elevator car top move of large piece of glass, notwithstanding failure to describe “work under this order” to which indemnity applied. Otis Elevator Co. v. Midland Red Oak Realty, Inc., C.A.10 (Okla.2007, 483 F.3d 1095.

Under Oklahoma law, hazardous waste generator was entitled to indemnification from waste transporter under language in contract attachment, which indemnifies question from all losses “resulting from” the transportation or disposal of the generator’s hazardous waste; the term “resulting from” was type of all-inclusive and unambiguous language sufficient to exculpate generator for its strict generator liability under CERCLA. U.S. v. Hardage, C.A.10 (Okla.)1993, 985 F.2d 1427.

Owner of communications tower was not entitled to indemnity for its own negligence in failing to ensure that county employees accessing tower were trained in tower safety, despite indemnity provision in county’s lease agreement with owner; indemnity provision did not mention owner’s negligence nor make it “unequivocally clear” that the parties intended to provide for indemnity against owner’s own negligence, owner continued to maintain its own operations on the tower, owner’s conduct was more than passive, and county did not exercise exclusive control over the tower. Estate of King v. Wagoner County Bd. of County Com’rs, Okla.Civ.App. Div. 2, 146 P.3d 833 (2006), certiorari denied. IndemnityKey Number30(3) IndemnityKey Number33(3)

Indemnification and hold harmless clause in residential alarm security contract clearly expressed an intent to indemnify party from its own negligence, and thus was valid and enforceable. (Per Hargrave, J., with three Judges concurring and two Judges concurring by reason of stare decisis.) Elsken v. Network Multi-Family Sec. Corp., Okla., 838 P.2d 1007 (1992). TelecommunicationsKey Number1406

---

| OR statute §30.140 | P | I | Oregon’s duty to defend has recently been significantly reduced to only a defense for the Lessee’s negligence. |

30.140. Indemnification provisions of construction agreement void

(1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.

(2) This section does not affect any provision in a construction agreement that requires a person or that person’s surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitee, or the fault of the indemnitee's agents, representatives or subcontractors.

(3) As used in this section, “construction agreement” means any written agreement for the planning, design, construction, alteration, repair, improvement or maintenance of any building, highway, road excavation or other structure, project, development or improvement attached to real estate including moving, demolition or tunneling in connection therewith.

(4) This section does not apply to:
(a) Any real property lease or rental agreement between a landlord and tenant whether or not any provision of the lease or rental agreement relates to or involves planning, design, construction, alteration, repair, improvement or maintenance as long as the predominant purpose of the lease or rental agreement is not planning, design, construction, alteration, repair, improvement or maintenance of real property; or

(b) Any personal property lease or rental agreement.

(5) No provision of this section shall be construed to apply to a “railroad” as defined in ORS 824.200.

Defendant argued that O.R.S. 30.140 voids the agreement by NAES to insure Plaintiff against liability for any injury or property damage arising out of NAES’s work for Plaintiff. In relevant part, the statute provides:

(1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.

(2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitee, or the fault of the indemnitee's agents, representatives or subcontractors.

O.R.S. 30.140.

2 O.R.S. 30.140 was enacted to prevent “parties with greater leverage in construction agreements (generally owners and contractors) from shifting exposure for their own negligence—or the costs of insuring against that exposure—to other parties (generally subcontractors) on a ‘take-it-or-leave-it’ basis.” Walsh Constr. Co. v. Mut. of Enumclaw, 189 Or.App. 400, 410, 76 P.3d 164, 169 (2003), aff'd, 338 Or. 1, 104 P.3d 1146 (2005).

3 The statute prohibits “agreements by which a party's insurer would be required to indemnify another party for damages arising from the latter party's negligence.” Walsh Constr. Co. v. Mut. of Enumclaw, 338 Or. 1, 9, 104 P.3d 1146, 1150 (2005). Additionally, as made clear in Walsh, “the statute prohibits not only ‘direct’ indemnity arrangements between parties to construction agreements but also ‘additional insured’ arrangements by which one party is obligated to procure insurance for losses arising in whole or in part from the other's fault.” Id. Given the purpose of the statute, it does not matter that the “shifting allocation of risk is accomplished directly, e.g. by requiring the subcontractor itself to indemnify the contractor for damages caused by the contractor's own negligence, or indirectly, e.g., by requiring the subcontractor to purchase additional insurance covering the contractor for the contractor's own negligence[]” Walsh, 189 Or.App. at 410, 76 P.3d at 169. “[T]he ultimate—and statutorily forbidden—end is the same.” Id.

In Montara Owners Ass’n, the Oregon Supreme Court held, as argued by Plaintiff here, that an indemnification provision subject to O.R.S. 30.140 is not completely void when it requires the indemnitor (usually a subcontractor) to indemnify another (the indemnitee, usually a general contractor) for damages that arise in whole or in part by the negligence of the indemnitee if the provision also allows indemnification for damages that arise in whole or in part out of the negligence of the indemnitor. 353 P.3d at 567–70, 2015 WL 3791636, at **3–6. To the extent the provision requires indemnification for the negligence of the indemnitee, it is void under O.R.S. 30.140(1). Id. at 567–68, 2015 WL 3791636 at *3. But, because the court read subsection (2) as an exception to subsection (1), it held that the indemnity provision remained enforceable to the extent allowed by subsection (2), meaning to the extent it required indemnification for the negligence of the indemnitee. Id. at 568–70, 2015 WL 3791636 at **4–6. Such provisions are “partially enforceable.” Id. at 568, 2015 WL 3791636 at *3. Thus, the Oregon Supreme Court agreed with the Oregon Court of Appeals that the portion of the indemnity provision at issue in Montara Owners Ass’n and which violated O.R.S. 30.140(1) was void, but the portion of the indemnity provision that allowed indemnification for the fault of the subcontractor under O.R.S. 30.140(2), was valid. Id. at 567–70, 2015 WL 3791636 at **3–6; see also id. at 580, 2015 WL 3791636 at *17 (“we hold that ORS 30.140 allows for partial invalidation of overbroad indemnity clauses in construction contracts”).
The result of the Oregon Supreme Court's decision in the instant case means that the additional insured provision in the contract between Plaintiff and NAES is partially enforceable. The Oregon Supreme Court's Montara Owners Ass'n decision forecloses Defendant's argument that O.R.S. 30.140(1) completely invalidates the provision. Under Montara Owners Ass'n, Plaintiff's contract with NAES is void to the extent it requires NAES to make Plaintiff an additional insured for damages caused by Plaintiff's own negligence, but the contract remains enforceable to the extent that it requires NAES to make Plaintiff an additional insured for damages caused by NAES's negligence.

| Pennsylvania | PA statute Title 6 §491 | Perry v. Payne A.5; Ruzzi v. Butler, 588A.2d 1 | B | Anti-indemnity applies only to architects, engineers, or surveyors. No same day or post-accident indemnity clauses. Maxim Crane |

An indemnification clause in the prime contract providing indemnification for a party as to that party's own negligence cannot be incorporated by means of a general pass-through provision in the subcontract from the prime to the subcontract.

A party cannot obtain indemnification for its own negligence unless the contract clearly and unequivocally provides for such indemnification; thus, unless the language of the contract is clear and unambiguous, such that the contract puts it beyond doubt, the court must opt for the interpretation that does not shoulder the indemnitor with the fiscal responsibility for the indemnitee's negligence.

Defense Counsel for Tilbury's counsel found a Pennsylvania statute providing that an injured worker's employer has no liability to a third party tortfeasor, unless such liability is provided by a written contract entered into prior to the date of the worker's injury. Tilbury argued that because it signed Maxim Crane's contract the day Plaintiff was injured, not the prior day, the indemnity contract was unenforceable. Maxim lost in California on this issue.

Appellant herein is seeking indemnification against Appellee for Appellant's own negligence. In such a situation, the Perry–Ruzzi rule is implicated. In Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907), Perry, the owner of a building, was found liable by a jury for a man's death. The man died due to the negligent operation of an elevator by one of the owner's employees. The owner sought indemnification from Payne, the contractor who had constructed the building in question. Payne had relinquished control of the building to the owner but was using the elevator as a staging platform for painting in order to complete its contractual obligations.

¶ 9 Under indemnification language in a bond procured by the contractor, the contractor was responsible for damages arising from accidents to persons passing near the work. The owner contended that the bond indemnified it against all damages arising from injuries to any person close to the work, regardless of whether the injuries were caused by the negligence of the contractor or by the owner's own negligence.

6 ¶ 10 Our Supreme Court declined to give the language that construction. It considered the circumstances and the parties' objective in creating the bond instrument and concluded that the indemnification was intended to apply only to damages or losses occasioned by the contractor's work or negligence. The court stated, "It is contrary to experience and against reason that the contractors should agree to indemnify Perry against the negligence of himself or his employees. It would make them insurers, and impose a liability upon the contractors, the extent of
which would be uncertain and indefinite[.]” Id. at 555. Thus, the Perry Court concluded that a contract will not be construed to provide indemnification against a person's own negligence unless that intent is expressly and unequivocally stated and the circumstances indicate that the contract is intended to so apply.

¶ 11 The Perry rule was reaffirmed in Ruzzi v. Butler Petroleum Co., 527 Pa. 1, 588 A.2d 1 (1991), where a gas station owner hired a contractor to supply and install gasoline tanks. In the construction contract, the owner promised to indemnify the contractor from losses, claims, or injuries caused by any explosion that occurred due to the installation or repair of the tanks. One of the tanks arrived on site with a hole that caused an explosion and injured a person employed by the contractor. A jury found the contractor to be eighty-four percent negligent in causing the injuries. The contractor sought indemnity from the owner. Despite the broad language employed, our Supreme Court declined to construe it as requiring the owner to indemnify the contractor for the contractor's own negligence. It ruled:

The law has been well settled in this Commonwealth for 87 years that if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.

Id. at 4. It reiterated the same logic announced in Perry that indemnity against one’s own negligence is “so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitee intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation.” Id. (quoting Perry, 66 A. at 557).

<table>
<thead>
<tr>
<th>Rhode Island</th>
<th>RI statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>§6-34-1</td>
<td>P</td>
</tr>
</tbody>
</table>

¶ 11 The Perry rule was reaffirmed in Ruzzi v. Butler Petroleum Co., 527 Pa. 1, 588 A.2d 1 (1991), where a gas station owner hired a contractor to supply and install gasoline tanks. In the construction contract, the owner promised to indemnify the contractor from losses, claims, or injuries caused by any explosion that occurred due to the installation or repair of the tanks. One of the tanks arrived on site with a hole that caused an explosion and injured a person employed by the contractor. A jury found the contractor to be eighty-four percent negligent in causing the injuries. The contractor sought indemnity from the owner. Despite the broad language employed, our Supreme Court declined to construe it as requiring the owner to indemnify the contractor for the contractor's own negligence. It ruled:

The law has been well settled in this Commonwealth for 87 years that if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.

Id. at 4. It reiterated the same logic announced in Perry that indemnity against one’s own negligence is “so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitee intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation.” Id. (quoting Perry, 66 A. at 557).

§ 6-34-1. Construction indemnity agreements
(a) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected with a building, structure, highway, road, appurtenance, or appliance, pursuant to which contract or agreement the promisee or the promisee's independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, the promisee's independent contractors, agents, employees, or indemnitees, is against public policy and is void; provided that this section shall not affect the validity of any insurance contract, worker's compensation agreement, or an agreement issued by an insurer.
(b) Nothing in this section shall prohibit any person from purchasing insurance for his or her own protection or from purchasing a construction bond.

In this personal injury action. Plaintiff Richard Cosimini (“Cosimini”) was injured at his job site and collected workers' compensation from his employer, Subcontractor Rusco Steel Company (“Rusco”). Plaintiff subsequently sued the general contractor, Atkinson–Kiewit Joint Venture (“Atkinson–Kiewit”) who in turn filed a third-party complaint against Rusco.

The third-party plaintiff Atkinson-Kiewit and Russo both move for summary judgment on the legal interpretation and impact of two contract provisions, both contained within Article 14 of the Subcontract. This article provides in relevant part:
Indemnity and Insurance. [1] Subcontractor shall indemnify contractor against any claim, loss, damage, expense, or liability arising out of acts or omissions of Subcontractor in any way connected with the performance of this Subcontract unless due solely to Contractor's negligence....
[2] Subcontractor shall, at his own expense, maintain in effect at all times during the performance hereof with insurers and under forms of policies satisfactory to Contractor: [workers' compensation and employer's liability insurance of 1 million dollars naming the Contractor as an additional insured, comprehensive general and automobile liability insurance of 1 million dollars naming the Contractor as an additional insured, and hull and machinery and protection and indemnity insurance of 2 million dollars].
Such insurance shall cover performance of the above indemnity obligation...

Two Rhode Island statutes govern the proper interpretation of this contract. The state legislature requires construction indemnity agreements to meet the following criteria:

*70 (a) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to [construction work] pursuant to which contract or agreement the promisee [or its agent] has hired the promisor to perform work, purporting to indemnify the promisee [or its agent] against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee [or its agent] is against public policy and is void; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement, or an agreement issued by an insurer.

(b) Nothing in this section shall prohibit any person from purchasing insurance for his own protection or from purchasing a construction bond.
R.I. Gen. Laws § 6–34–1 (1985 Reenactment). This section has been interpreted to invalidate an agreement under which a general contractor seeks indemnification from its subcontractor for the consequences of the general contractor's own negligence (or that of its agent). Cosentino v. A.F. Lusi Constr. Co., 485 A.2d 105, 107 (R.I.1984). However, this section permits a general contractor to secure indemnification from a subcontractor for claims resulting from the subcontractor's negligence (or that of its agent). Cosentino, 485 A.2d at 107.
Where a general contractor is sued by an employee of the subcontractor under circumstances covered by the Rhode Island Workers' Compensation Act (“RIWCA”), R.I. Gen. Laws § 28–29–20, the general contractor can obtain indemnification from a negligent subcontractor only if the contract so provides. In the absence of such a contract, the subcontractor is immune, pursuant to the RIWCA, from tortfeasor liability and from the obligation of contribution. Rhode Island law furnishes a workers' compensation scheme in place of other remedies:
The right to compensation for an injury under chapters 29–38, inclusive, of this title, and the remedy therefor granted by those chapters, shall be in lieu of all rights and remedies as to that injury now existing, either at common law or otherwise against an employer, or its directors, officers, agents or employees; and those rights and remedies shall not accrue to employees entitled to compensation under those chapters while they are in effect, except as otherwise provided in §§ 28–36–10 and 28–36–15. R.I. Gen. Laws § 28–29–20. By this provision, the state provides tort immunity to an employer from its own employees and third parties from whom the employee recovers. Ordinarily where two parties jointly cause injury through their negligence, the party sued has a right of contribution from the joint tortfeasor. However, “[i]t is well settled in Rhode Island, as in the majority of jurisdictions, that an employer who has paid workers' compensation benefits cannot be sued as a joint tortfeasor for contribution by a third party even where its concurring negligence has contributed to an employee's injury.” A & B Construction v. Atlas Roofing and Skylight Co., 867 F.Supp. 100, 106 (D.R.I.1994) Although the legislature has abolished the common law right of contribution in this context, parties can create the right to indemnification by contract. “Because it is an independent obligation and was bargained for by the parties, express contractual indemnity is enforceable notwithstanding any exclusive remedy provisions of the applicable workers' compensation scheme.” A & B Construction, 867 F.Supp. at 106.

The contract provides that Rusco shall indemnify Atkinson–Kiewit for all damages recovered against the general
contractor unless Atkinson–Kiewit is found to be solely responsible. Thus, the Subcontract states that Rusco is responsible for full indemnification even where the negligence of both Atkinson–Kiewit and Rusco contributed to the injuries. Pursuant to Rhode Island General Law § 6–34–1, this provision is void as against public policy. Section 6–34–1 instructs that a general contractor can not indemnify itself through its subcontractor against the consequences of the general contractor's own negligence.

45 In the event that the contract calls for a subcontractor to indemnify the general contractor for its own negligence and for that of the general contractor, the former obligation is enforceable, while the latter obligation is unenforceable. First Circuit law permits a court to modify an illegal contract and enforce the revised version, even selectively enforcing some components of a seemingly indivisible clause. See Gormly v. I. Lazar & Sons, Inc., 926 F.2d 47, 50 (1st Cir.1991) (citing Durapin, Inc. v. American Prods., Inc., 559 A.2d 1051, 1058 (R.I.1989)). In doing so, "purported indemnity language is to be strictly construed against the party seeking indemnification." A & B Construction, 867 F.Supp at 107 (citing Di Lonardo v. Gilbane Building Co., 114 R.I. 469, 334 A.2d 422, 423 n. 1 (1975) and Gordon v. Campanella Corp., 112 R.I. 417, 311 A.2d 844, 849 (1973)). Here, it is clear that the parties intended to create a duty to indemnify broader than but including the subcontractor's obligation to indemnify the general contractor in proportion to the subcontractor's negligence. Therefore, I modify the contract (1) to void any portion of the clause purporting to obligate the subcontractor to pay for the general contractor's negligence, and (2) to preserve that portion of the clause requiring Rusco to indemnify Atkinson–Kiewit for those damages attributable to Rusco's percentage of negligence. See Gormly, 926 F.2d 47 (where jury returned a verdict against general contractor and found contractor/subcontractor fault to be 70%/30%, court entered judgment in general contractor's favor for 30% of plaintiff's recovery pursuant to court's modification of an indemnity agreement).

B. Insurance

6 The plain language of the indemnity clause, as originally written, encompasses liability for all damages connected with performance of the Subcontract except those damages resulting from the sole negligence of Atkinson–Kiewit. I have modified the indemnity clause to comply with Rhode Island General Law § 6–34–1. Rusco is now obligated to indemnify Atkinson–Kiewit only for those damages attributable to Rusco's percentage of negligence. The remaining issue is whether the insurance procurement obligation, which states that "insurance shall cover performance of the above indemnity obligation," Subcontract No. 00003–2915, Article 14, is broader than the modified indemnity provision.

I am keenly aware that this clause can be given two different meanings. The Subcontract may be read to state that "insurance shall cover performance of the above indemnity obligation." Subcontract No. 00003–2915, Article 14 (emphasis added). If read with this emphasis, Rusco's insurance procurement obligation extends as far as the indemnity obligation as written, and therefore includes coverage of all liability connected with performance of the Subcontract, unless due solely to the negligence of Atkinson–Kiewit. On the other hand, the Subcontract may be read to state that "insurance shall cover performance of the above indemnity obligation." Subcontract No. 00003–2915, Article 14 (emphasis added). In this case, the scope of the insurance that Rusco was obligated to procure is determined by the scope of the indemnity obligation, as it is legally required to be performed, and therefore includes coverage only of those damages attributable to Rusco's percentage of negligence.

In determining which meaning to give this clause, I am guided by basic contract principles. In interpreting a contract, a court “should review the agreement in its entirety, construe provisions with reference to one another where possible, and read the contract as 'a rational business instrument which will effectuate the apparent intention of the parties.’” Taunton Municipal Lighting Plant v. Quincy Oil Inc., 503 F.Supp. 235, 237 (D.Mass.1980), aff'd, 669 F.2d 710 (Em.App.1982) (citations omitted). See also In re Newport Plaza Associates, 985 F.2d 640, 646 (1st Cir.1993) (noting that a court must construe contractual terms in the context of contract as a whole); Wilmot H. Simonson Co. v. Green Textiles Associates, Inc., 755 F.2d 217, 219 (1st Cir.1985) (stating that "contract interpretation is largely an individualized process, with the conclusion in a particular case turning on the particular language used against the background of other indicia of the parties' intention") (citations omitted).

Accordingly, I extract the apparent intention of the parties from a reading of Article 14 as a whole and in light of the rational business purposes it was written to effectuate. As third-party defendant aptly notes, the purpose of the
insurance procurement clause “is only to insure the solvency of the subcontractor for purposes of the subcontractor's indemnity obligations, if any.” Third–Party Def.’s Mem. in Support of Mot. for Sum. J. at 7. Reading the insurance procurement clause with the emphasis on “performance” is consistent with this rational business purpose. Because I have modified the indemnity clause as written to narrow the indemnification performance legally required of Rusco, the need for insurance to ensure this performance is correspondingly narrowed. Thus, to give effect to the intended meaning of the insurance procurement clause, it must be read to encompass only the judicially modified indemnification clause.

| South Carolina | SC statute §32-2-10 | S | SC is a “sole negligence” state. |

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

Standard Pacific of the Carolinas, LLC (“Standard Pacific”) brought this action against Amerisure Insurance Company (“Amerisure”), seeking a declaration of its rights to a defense and indemnity under an “additional insured” endorsement in an insurance policy. The district court granted summary judgment to Amerisure on Standard Pacific's claim, concluding that the endorsement did not clearly require the insurer to provide “your work” coverage. In our view, however, the district court read the endorsement too narrowly. Rather, construing the policy in favor of the insured, we hold that it provides coverage to Standard Pacific. Accordingly, we reverse.

On June 21, 2008, Terry Shortt fell off his bicycle and broke his back after encountering an allegedly deteriorated section of an asphalt walking path in the common area of Ridge Point Community in Rock Hill, South Carolina. Standard Pacific, formerly known as Westfield Homes of the Carolinas, LLC, was the developer of the Ridge Point Community project. Standard Pacific hired Matthews Construction Company, Inc. (“Matthews”) as the general contractor for the project pursuant to a “Land Development–Construction Agreement” (the “Agreement”). Amerisure was Matthews's insurer. Matthews completed its work at the Ridge Point community in August 2004, about four years before Shortt's accident.

The policy included a “Contractor’s Blanket Additional Insured Endorsement.” J.A. 28. The endorsement provided coverage under the policy to additional parties whom Matthews was required to insure by “written contract or agreement.” The endorsement limited the coverage of such additional parties to liability arising out of:
(a) Premises you own, rent, lease, or occupy, or
(b) Your ongoing operations performed for that additional insured, unless the written contract or agreement or the
certificate of insurance requires “your work” coverage (or wording to that same effect) in which case the coverage provided shall extend to “your work” for that additional insured. The policy defined “your work” as “[w]ork or operations by you or on your behalf” and “[m]aterials, parts or equipment furnished in connection with such work or operations.”

The district court held that the Agreement does not violate South Carolina Code § 32–2–10, which declares construction contracts that indemnify the promisee the promise against liability resulting from their own negligence void as against public policy. That ruling has not been appealed.

Although it is certainly true, as the district court found, that the Agreement does not explicitly refer to “your work” coverage, we conclude that it does include “wording to that same effect” sufficient to trigger coverage. To begin with, the “Liability Insurance” section of the Agreement requires a minimum amount of “Products/Completed Operations” coverage, which South Carolina law recognizes as encompassing coverage for “bodily injury and property damages arising out of your product or ‘your work.’” Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Ill., 338 S.C. 43, 524 S.E.2d 847, 851 (App.1999). Moreover, the “Indemnity” section of the Agreement obligates Matthews to indemnify and hold harmless Standard Pacific “from and against any and all claims, loss, damage or expense ... arising out of or in connection with the performance of the Work or any portion thereof.” J.A. 185 (emphasis added). Although “arising out of” and “performance” are undefined in the Agreement, the meaning of those terms given by other sources supports the conclusion that the parties contemplated “your work” coverage.

In that regard, the Supreme Court of South Carolina has interpreted “arising out of” to mean “caused by” in the context of an exclusionary clause in a general liability policy. McPherson, 426 S.E.2d at 771. Additionally, “performance” is commonly understood to mean “[t]he successful completion of a contractual duty” and is also “termed full performance.” Black’s Law Dictionary 1252 (9th ed.2009). And although “performance” usually “result[s] in the performer’s release from any past or future liability,” id., the parties here specifically contracted for prospective indemnity for claims arising out of the performance of Matthews's work.

<table>
<thead>
<tr>
<th>South Dakota</th>
<th>SD statute §56-3-18</th>
<th>S</th>
<th>SD is a “sole negligence” state.</th>
</tr>
</thead>
<tbody>
<tr>
<td>56-3-18</td>
<td>Indemnity agreement void as to liability for negligence in construction, repair or maintenance of structure or equipment: A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against the policy of the law and is void and unenforceable.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The general rule, which has been adopted in South Dakota and elsewhere in the Eighth Circuit, holds that to relieve a party of the consequences of its own negligence the language of the agreement must be clear and unequivocal. Becker v. Black &amp; Veatch Consulting Engineers, 509 F.2d 42 (8th Cir. 1974); Associated Engineers, Inc. v. Job, 370 F.2d 633 (8th Cir. 1966); Bartak v. Bell-Galyardt &amp; Wells, Inc., 473 F.Supp. 737 (D.S.D.1979), rev’d on other grounds, 629 F.2d 523 (8th Cir. 1980); Scholl Construction Co. v. Koenig, 80 S.D. 224, 121 N.W.2d 559 (1963). There is a split of authority on the question of whether the term “negligence” must actually appear in the agreement in order to relieve a party of the consequences of its own negligence. 41 Am.Jur.2d, Indemnity, s 15; 14 A.L.R.3d 446, 453. The key to interpreting an indemnity agreement is the intention of the parties. United States v. Seckinger, 397 U.S. 203 (1970); Becker, supra; Bartak, supra; Moriarty v. Tomlinson, 58 S.D. 431, 235 N.W. 363 (1931). A number of cases have found the intent to indemnify against a party's negligence, even though the term “negligence” is not actually used, where such intent is clearly expressed. See e.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
violation of law whether willful or negligent, are against the policy of the law.

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own violation of law whether willful or negligent, are against the policy of the law.

A bell ... or a steam whistle ... shall be rung or whistled at the distance of at least eighty rods from the place where ... the railroad shall cross, on the same level, any other road or street, and be kept ringing or whistling until it shall have crossed such road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, and such corporation shall also be liable in damages for all injury which shall be sustained by any person by reason of such neglect.

Therefore, Plaintiff would have been liable as a matter of law for any damages occurring to Houk if the cause of the accident was the train's failure to sound its bell or whistle.

S.D.C.L. 53-9-3 provides:

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own violation of law whether willful or negligent, are against the policy of the law.
Defendant also cites S.D.C.L. 56-3-18 as support for its position that the indemnification agreement is void in this instance. That statute states:  
A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against the policy of the law and is void and unenforceable. This statute was dealt with in Becker, supra. In that case, Defendant Cengas hired Defendant Hood Construction to install a gas pipeline. Cengas also hired an employee of Defendant Black & Veatch Consulting Engineers to inspect the work done by Hood. The pipeline subsequently exploded due to faulty installation. At trial, the jury found all three defendants negligent. Cengas then asked for Hood to indemnify it on the basis of an indemnity agreement. Hood, relying on S.D.C.L. 56-3-18, asserted that the indemnity agreement was violative of public policy. In rejecting this argument, the Eighth Circuit Court of Appeals stated:  
It cannot be said that the acts of negligence involved here constitute “sole” negligence as that term is used in the statute. In reaching this conclusion, we emphasize that we are not here concerned with indemnification by an innocent indemnitee for the sole negligence of the indemnitee.... (A)n contract so construed would be contrary to the public policy of South Dakota and void. Id. at p. 47, n. 6 & 7.

The situation which was not present in Becker-indemnification by an innocent indemnitee for the sole negligence of the indemnitee-is present in this case. The only negligence upon which an award to Houk could be based is the negligence of Plaintiff. Therefore, S.D.C.L. 56-3-18 would appear to render the indemnification agreement void in this case. It is the conclusion of this court that the indemnification agreement in question is void as against public policy under the facts of this case. Therefore, Plaintiff will be denied recovery.

<table>
<thead>
<tr>
<th>State</th>
<th>Statute or Section</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tennessee</td>
<td>TN statute §62-6-123</td>
<td>S</td>
</tr>
<tr>
<td></td>
<td></td>
<td>TN is a “sole negligence” state. Rental companies covered by statute. Loaned Servant Rule valid in Tennessee.</td>
</tr>
</tbody>
</table>

§ 62-6-123. Void contracts; indemnification or hold harmless promises
A covenant promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees or indemnitee, is against public policy and is void and unenforceable.

The plaintiffs, Elliott Crane Service, Inc., and Chris Elliott, have appealed from the non-jury judgment of the Trial Court dismissing their suit against the defendant, H.G. Hill Stores, Inc., for declaratory judgment in regard to the rights of the parties under an equipment rental-indemnity agreement. The indemnity agreement stated:

2. INDEMNIFICATION: Lessee agrees that the equipment and all persons operating such equipment, including Lessor's employees, are under Lessee's exclusive jurisdiction, supervision and control and agrees to indemnify and save lessor, its employees and agents harmless from all claims for death or injury to persons, including Lessor's employees, and from all loss, damage or injury to property, including the equipment, arising in any manner out of
Lessee's operation. Lessee’s duty to indemnity hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys fees and costs of settlement.

Lessee shall not be required to indemnify Lessor for its sole negligence, but, Lessor’s liability for damage caused by the sole negligence of Lessor, its agents and employees, hereunder shall be limited to the amount of Lessor’s liability insurance.

In Eades v. Union Ry. Co., U.S.C.A.Tenn.1968, 396 F.2d 798, cert. den., Union Ry. Co. v. Swift & Co., 393 U.S. 1020, 89 S.Ct. 626, 21 L.Ed.2d 564 (1968) it was held that, under Tennessee law, clear and unambiguous language is required if a contractual provision is to be regarded as indemnifying against the indemnitee's own negligence. In Brogdon v. Southern Ry. Co., U.S.C.A.Tenn.1967, 384 F.2d 220, it was held that indemnity agreements should not be extended to indemnify the indemnitee's own negligence unless the language clearly so provides.

In Crum v. Colman–Cocker Textile Machinery Co., U.S.D.C.Tenn.1978, 467 F.Supp. 6, it was held that a contract of indemnity cannot be construed under the law of Tennessee to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms or unless no other meaning can be ascribed to it. Also said authority holds that general, broad and seemingly all inclusive language in an indemnity agreement is not sufficient under the law of Tennessee to impose liability for indemnitee's own negligence.

In Georgia Kraft Co. v. Terminal Transport Co., U.S.D.C.Tenn.1972, 343 F.Supp. 1240, it was held that clear and unambiguous language must exist in a contract before an obligation to indemnify a party against the consequence of its own negligence may be found.

4 Plaintiff asserts that the indemnity agreement excludes from its provisions the “sole” negligence of Elliott Crane Service, and is therefore not subject to the authorities above cited. However, this exclusion of liability for sole negligence is emasculated by the subsequent language:

but Lessor's liability for damages caused by the sole negligence of Lessor, its agents or employees hereunder, shall be limited to the amount of Lessor's liability insurance.

The uncontroverted evidence is that Elliott was not protected by any liability insurance.

5 There is another ground, not invoked by the Trial Judge, upon which plaintiffs' suit must fail. The uncontroverted evidence is that the employee of defendant who signed the charge ticket had no authority to bind defendant to an indemnity agreement. This Court sustains this defense in addition to the defense of T.C.A. § 62–6–123.

6 Plaintiffs insist that, apart from the indemnity agreement, they are entitled to relief under the “loaned servant theory.”

In Gaston v. Sharpe, 179 Tenn. 609, 168 S.W.2d 784 (1943), the Supreme Court held that, in fixing liability for the negligence of a “loaned servant,” the criterion should be whether, in performing the negligent act, the employee was performing the business of his employer, the owner of the leased machine or that of the lessee. In the cited case, the employer was acting under the specific direction of the lessee “let out some slack in the line.” In the present case, the injury occurred because the boom of the crane contacted a high voltage conductor. Chris Elliott, the operator of the crane testified:

Q. Who was in charge of the safety responsibilities for operating that crane?
A. *381 I think that’s a joint responsibility to me.
Q. Now, if the customer had told you to do something that you knew was unsafe, would you have done it?
A. No, sir.
Q. You would have overridden the customer and told him no, I won't do that?
A. Exactly.
Q. Didn't you have ultimate responsibility for the safe operation of that crane?

... THE WITNESS: When it comes to the ultimate responsibility, yes, sir. I'm the ultimately responsible.

Q. And you had the authority to override anything that the customer wanted that you didn't think was right?
McKinnon argues that Paragraph 19 violates a state statute that prohibits hold harmless or indemnity agreements in construction contracts.

We do not believe, however, that in enacting this statute the legislature intended to repeal the risk-allocation provisions of the Uniform Commercial Code. In the two cases that have upheld the application of the statute, the facts have involved personal injuries and claims against a party involved in some aspect of a construction project. The negligent parties attempted to avoid liability by relying on an indemnity agreement with another party. In both cases, this court held that the statute rendered the indemnity agreement unenforceable. See Carroum v. Dover Elevator Co., 806 S.W.2d 777 (Tenn.Ct.App.1990); Elliott Crane Service v. H.G. Hill Stores, Inc., 840 S.W.2d 376 (Tenn.Ct.App.1992).

The facts of these two cases fit the statute exactly. A negligent party involved in a construction contract cannot insulate itself by having an indemnity or hold harmless agreement with a third party. But the parties to a contract for the sale of goods are still free to allocate the risks between themselves under Tenn.Code Ann. § 47–2–719.

Oil Industry likes to use Texas for venue and jurisdiction clauses which makes Oil and Gas Mutual Indemnity good for downstream contractors especially on Master Service Agreements.

Section 417.004 of the Texas Labor Code governs indemnity agreements when the employee of a covered ‘workers’ compensation employer sues for injuries sustained on the job. It provides:

In an action for damages brought by an injured employee ... against a third party liable to pay damages for the injury ... under this chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement unless the employer executed, before the injury ... occurred, a written agreement with the third party to assume the liability. TEX. LAB. CODE ANN. § 417.004 (West 2015). An insurance certificate is not a written contract. Blue Sky Right of Way, L.L.C., v. Martinez R.O.W. 498 S.W.3d 700, (July 12, 2016).

§ 151.102. Agreement Void and Unenforceable:

Except as provided by Section 151.103, a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitee to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitee or its agent, employee, or subcontractor of any tier.

In this case we determine whether a contractual indemnity clause is enforceable under the fair notice requirements for such agreements. American Home Shield Corporation and American Home Shield of Texas, Inc. (American Home) sought contractual indemnity from Stephen Lahorgue d/b/a Turn–Key Pool & Spa (Turn–Key) in a personal injury suit. Both parties filed motions for summary judgment and the trial court found that the indemnity provision failed to meet both requirements of fair notice: conspicuousness and the express negligence doctrine. The trial court granted Turn–Key’s motion and denied American Home’s.

American Home raises seven issues on appeal. In its first two issues, American Home contends the trial court erred in granting Turn–Key’s motion for summary judgment because the indemnity provision satisfied the fair notice requirements and, alternatively, the record shows Turn–Key had actual notice or knowledge of the indemnity provision. In its next five issues, American Home challenges the trial court’s denial of its motion for summary judgment seeking to enforce the indemnity provision. We conclude the indemnity provision was not conspicuous and that American Home failed to raise a question of fact as to the actual knowledge exception to the fair notice requirements.
This dispute arises out of the explosion of a spa heater that had been serviced by Turn–Key under a servicing agreement with American Home. The injured spa owner sued both American Home and Turn–Key for personal injuries. American Home filed a cross-claim against Turn–Key for contractual indemnity under the terms of the servicing agreement. After settling the underlying personal injury suit, American Home moved for summary judgment against Turn–Key on its indemnity claim. Turn–Key responded and filed a cross-motion for summary judgment on the grounds that the indemnity provision did not satisfy the fair notice requirements for indemnity agreements. American Home filed a response arguing that the indemnity provision did meet the fair notice requirements and that Turn–Key had actual notice or knowledge of the provision, an exception to the fair notice requirements. The trial court denied American Home’s motion and granted Turn–Key’s cross-motion on the grounds that the indemnity provision failed both the conspicuousness requirement and the express negligence test and did not provide fair notice.

### § 13-8-1. Construction industry—Agreements to indemnify

1. For purposes of this section:
   a. “Construction contract” means a contract or agreement relative to the design, construction, alteration, repair, or maintenance of a building, structure, highway, appurtenance, appliance, or other improvement to real property, including moving, demolition, or excavating, connected to the construction contract between:
      i. a construction manager;  
      ii. a general contractor;  
      iii. a subcontractor;  
      iv. a sub-subcontractor;  
      v. a supplier;  
      or
   vi. any combination of persons listed in Subsections (1)(a)(i) through (v).

2. “Indemnification provision” means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:
   a. the damages arise out of:
      i. bodily injury to a person;  
      ii. damage to property; or  
      iii. economic loss; and
   b. the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees.

3. Except as provided in Subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable.

4. When an indemnification provision is included in a contract related to a construction project between an owner and party listed in Subsection (1)(a), in any action for damages described in Subsection (1)(b)(i), the fault of the owner shall be apportioned among the parties listed in Subsection (1)(a) pro rata based on the proportional share of fault of each of the parties listed in Subsection (1)(a), if:
   a. the damages are caused in part by the owner; and
   b. the cause of the damages defined in Subsection (1)(b)(i) did not arise at the time and during the phase of the project when the owner was operating as a party defined in Subsection (1)(a).

5. This section may not be construed to affect or impair the obligations of contracts or agreements, that are in existence at the time this section or any amendment to this section becomes effective.
This case involves interpretation of policy language that extends insurance coverage *597 to Meadow Valley with respect to “liability arising out of [BT Gallegos’s] work.” Citing case law from Texas, Transcontinental contends that the phrase “arising out of” unambiguously provides coverage only for damages caused by BT Gallegos. See Granite Constr. Co., Inc. v. Bituminous Ins. Co., 832 S.W.2d 427, 430 (Tex.App.1992). But see Admiral Ins. Co. v. Trident NGL, Inc., 988 S.W.2d 451, 454–55 (Tex.App.1999) (following majority rule that the phrase “arising out of” does not limit coverage to accidents caused by the named insured). Because the issue of who caused the flooding is disputed in this case, Transcontinental first argues that genuine issues of material fact preclude summary judgment. Transcontinental alternatively argues that the facts, when viewed in the light most favorable to Transcontinental, show that the flood damage was caused by Meadow Valley's negligence and/or inadequate drainage ditches, which were not constructed by BT Gallegos. Thus, Transcontinental contends Meadow Valley is not covered under the policy because BT Gallegos did not cause the flood damage.

¶ 12 In granting summary judgment, the trial court agreed with Meadow Valley’s argument that the “policy does not require a determination of negligence or an assessment of fault” because “the term ‘arising out of’ is not synonymous with the idea of causation or negligence.” Citing case law from other states and federal courts, Meadow Valley contends that the term “arising out of” unambiguously means “‘originating from,’ ‘having its origin in,’ ‘growing out of,’ or ‘flowing from.’” Toll Bridge Auth. v. Aetna Ins. Co., 54 Wash.App. 400, 773 P.2d 906, 908 (1989) (citation omitted); see also McIntosh v. Scottsdale Ins. Co., 992 F.2d 251, 255 (10th Cir.1993) (interpreting the phrase “arising out of” as requiring less than proximate cause). Meadow Valley argues that it is covered under the policy because the diverted water, which ultimately caused the damage, originated from the BT Gallegos project. Meadow Valley further argues that since the policy does not implicate causation or fault, no issues of material fact preclude summary judgment.

1234 ¶ 13 “An insurance policy is merely a contract between the insured and the insurer and is construed pursuant to the same rules applied to ordinary contracts.” Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272, 1274 (Utah 1993). Furthermore, “[i]f a policy is ambiguous, doubt is resolved against the insurer.” Id. “However, if a policy is not ambiguous, no presumption in favor of the insured arises and the policy language is construed according to its usual and ordinary meaning.” Id. Finally, questions of contract interpretation are questions of law; therefore, we accord no deference to the trial court’s interpretation. See Zions First Nat’l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 653 (Utah 1988).

5 ¶ 14 Both parties in this case argue that the policy language is unambiguous, and we agree. Hence, we resort only to the ordinary meaning of the phrase “arising out of” to interpret the policy provision. Established Utah law provides:

“[T]he term ‘arising out of’ is ordinarily understood to mean originating from, incident to, or in connection with the item in question.”

“... As used in a liability insurance policy, the words ‘arising out of’ are very broad, general and comprehensive. They are commonly understood to mean originating from, growing out of, or flowing from, and require only that there be some causal relationship between the injury and the risk for which coverage is provided.”

Viking Ins. Co. v. Wisconsin v. Coleman, 927 P.2d 661, 663 (Utah Ct.App.1996) (quoting National Farmers Union Prop. & Cas. Co. v. Western Cas. & Sur. Co., 577 P.2d 961, 963 (Utah 1978) (citations and internal quotations omitted)). Thus, while some nexus must exist between the flood damage and the BT Gallegos project, the phrase “arising out of” does not require that BT Gallegos cause the damage. See National Farmers, 577 P.2d at 963 (stating “[t]he phrase ‘arising out of’ is equated with origination, growth, or flow from the event” and has “much broader significance than ‘caused by’” (citation and internal quotations omitted)).

6 ¶ 15 Here, a nexus exists between the BT Gallegos project and the flood damage. *598 The drainage box construction required diversion of the existing stream of water. The diversion of water led to the flooding because the diversion and drainage ditches were inadequate to handle the increased water flow created by the storm. Thus, the flooding “originat[ed] from, [was] incident to, [and was] in connection with” the BT Gallegos project. Viking Ins. Co., 927 P.2d at 663 (citations and internal quotations omitted). The trial court therefore correctly concluded that the policy requires Transcontinental to provide insurance coverage, investigate, defend, and indemnify Meadow...
Valley for the flood damage claims.

II. Application of Section 13–8–1 of the Utah Code

7 ¶ 16 Our analysis does not end with a determination that the policy requires Transcontinental to provide coverage. Transcontinental also argues that BT Gallegos “was statutorily prohibited from purchasing any sort of insurance policy which would insure Meadow Valley for Meadow Valley's own negligence.” Section 13–8–1(2) of the Utah Code provides: “Except as provided in Subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable.” Utah Code Ann. § 13–8–1(2) (1999). The issue, then, is whether the insurance provision of the subcontract agreement constitutes an unenforceable indemnification provision.

8910 ¶ 17 “When faced with a question of statutory construction, we look first to the plain language of the statute.” C.T. v. Johnson, 1999 UT 35, ¶ 9, 977 P.2d 479 (citation and internal quotations omitted). “We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.” Id. (citation and internal quotations omitted). Here, the legislature explicitly defined “indemnification provision” as follows:

[A] covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:

(i) the damages arise out of:
(A) bodily injury to a person;
(B) damage to property; or
(C) economic loss; and

(ii) the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees.


¶ 18 Transcontinental focuses on the phrase “agreement ... requiring the promisor to insure” and argues that section 13–8–1 voids any agreement requiring one party in a construction contract to purchase insurance that covers liability stemming from the other party's negligence. Id. We disagree with Transcontinental's interpretation and conclude that the plain meaning of the statute voids only agreements requiring one party in a construction contract to personally insure against liability stemming from the other party's negligence. See Zettel v. Paschen Contractors, 100 Ill.App.3d 614, 56 Ill.Dec. 109, 427 N.E.2d 189, 191 (1981) (“An agreement to obtain insurance is not an agreement of insurance; a person promising to obtain insurance does not by that promise become an insurer ....”); cf. Pickhover v. Smith's Mgmt. Corp., 771 P.2d 664, 669 (Utah 1989) (“An agreement to purchase insurance does not make the party agreeing to provide the insurance an indemnitor.”); Brzeczek v. Standard Oil Co., 4 Ohio App.3d 209, 447 N.E.2d 760, 764 (1982) (concluding that agreement to procure insurance is not against public policy because parties were not trying to exempt themselves from liability, but merely allocating the cost of procuring insurance from a third party).

¶ 19 In this case, the insurance provision of the subcontract agreement requires BT Gallegos to procure insurance and to name Meadow Valley as an additional insured. The provision does not, however, require BT Gallegos to personally insure or indemnify Meadow Valley for liability arising out of Meadow Valley's own negligence. Therefore, the insurance provision of the subcontract agreement does not violate section 13–8–1.

*599 CONCLUSION

¶ 20 The trial court correctly ruled that the policy requires Transcontinental to provide coverage, investigate, defend, and indemnify Meadow Valley. Furthermore, section 13–8–1 does not prohibit BT Gallegos from purchasing insurance that will insure Meadow Valley for its own negligence.
No statute.

The plaintiff brought suit against the defendant claiming that defendant breached its contract by failing to construct the facility in accordance with the contract specifications. The plaintiff also claimed that defendant failed to design the facility properly. It was further claimed that defendant was careless and negligent in the construction design, distribution, and sale of the facility.

The defendant answered and moved for summary judgment, relying on paragraph nine of the contract which, it claims, generally released it from any liability, except for that arising from defects in work or materials which appear within one year of completion of the contract. Paragraph nine of the contract provides, in relevant part:

ONE YEAR LIMITED WARRANTY-Contractor warrants all work and materials furnished under this contract to be free from defects in materials and faulty workmanship under normal use which appear within one (1) year ... Contractor's obligations under this warranty is limited to replacing or repairing at its option without charge any work or materials which examination shall disclose to Contractor's reasonable satisfaction to be defective. THIS WARRANTY IS EXPRESSLY IN LIEU OF ANY OTHER WARRANTY, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND OF ANY OTHER OBLIGATIONS OR LIABILITY ON THE PART OF THE CONTRACTOR.

Defendant argued in its motion for summary judgment that the agreement barred any remedy for plaintiff's loss as the collapse of the facility occurred more than a year after construction, and because the agreement acted as a general release. The court denied the motion. The defendant brings this appeal after the jury verdict and the denial of its motion for judgment notwithstanding the verdict or a new trial.

The only issue before this Court is whether the trial court erred in not granting defendant's motion for summary judgment and in not directing a verdict in its favor based upon the agreement between the parties. It is defendant's position that the above language releases it from any and all responsibility for the design and construction of the building other than the obligation to replace or repair any work and materials which appear defective within one year of completed construction. Defendant asserts that the provision in question **145 is clear and unambiguous such that the plain meaning of the words must apply and no interpretation of the language is necessary.

1 It has long been the law of this jurisdiction that contractual provisions limiting the tort liability of parties to a contract are not per se unconscionable. See Lamoille Grain Co. v. St. Johnsbury & Lamoille County R.R., 135 Vt. 5, 7, 369 A.2d 1389, 1390 (1976); Osgood v. Central Vermont Ry., 77 Vt. 334, 347, 60 A. 137, 141 (1905). Moreover, this Court has consistently stated that *375 when interpreting this type of contractual provision, the applicable rule of construction is the same as that for other questions of contract construction: “Where the language of the agreement is clear, the intention and understanding of the parties must be taken to be that which their agreement declares.” Lamoille Grain, 135 Vt. at 8, 369 A.2d at 1390 (citing Stevens v. Cross Abbott Co., 129 Vt. 538, 283 A.2d 249 (1971)).

2 Application of this rule of construction to particular contract language, however, does not yield an obvious result. The rule of construction can only be applied coherently if the applier recognizes that the meaning of particular contract language, like any other language, is not always absolutely clear. Clarity of language, like ambiguity, is a relative and not an absolute concept. See 4 Williston on Contracts § 609, at 402-04 (3d ed. 1961). It is the degree of clarity that language must convey in order to achieve a particular legal result which is the crucial question.

34 The courts have traditionally disfavored contractual exclusions of negligence liability, and, because of this orientation, have applied more exacting judicial scrutiny when interpreting this type of contractual provision. See Doyle v. Bowdoin College, 403 A.2d 1206, 1208 (Me.1979); Gross v. Sweet, 49 N.Y.2d 102, 106, 400 N.E.2d 306, 308, 424 N.Y.S.2d 365, 367 (1979), Dilks v. Flohr Chevrolet, Inc., 411 Pa. 425, 434, 192 A.2d 682, 687-88 (1963); 4 Williston on Contracts § 602A, at 325-26. In other words, a greater degree of clarity is necessary to make the
exculpatory clause effective than would be required for other types of contract provisions. Heightened judicial scrutiny of contractual disclaimers of negligence liability take the form in Vermont of the rule that because such disclaimers are exculpatory, they must be construed strictly against the parties relying on them. Douglass v. Skiing Standards, Inc., 142 Vt. 634, 469 A.2d 97, 98 (1983).

The most effective way for parties to express an intention to release one party from liability flowing from that party's own negligence is to provide explicitly that claims based in negligence are included in the release. Thus, although a specific reference to negligence liability is not essential to effectively immunize a party from such liability, Douglass, 142 Vt. at 636, 469 A.2d at 98; Lamoille Grain, 135 Vt. at 8, 369 A.2d at 1390, in order for the agreement to have such an effect, “words conveying a similar import must appear.” Gross v. Sweet, 49 N.Y.2d at 108, 400 N.E.2d at 310, 424 N.Y.S.2d at 368; see also Lincoln Pulp & Paper Co. v. Bravo Corp., 436 F.Supp. 262, 273 & n. 10 (D.Me.1977) (A specific reference to negligence or a cognate, or the absence of such a *377 reference, is a significant factor in determining whether a limitation clause excludes liability for damages arising from negligence.).

7 The exculpatory contract language relied on by defendant is contained in a limitation of liability provision of the contract. The title of this paragraph is “One Year Limited Warranty.” The first two sentences of the paragraph, which create the warranty and delineate its scope, refer exclusively to liability for workmanship and materials. Nowhere in these has two sentences, nor in the third sentence, which contains the exculpatory language, is there any specific reference to negligence, tort liability, or any cognate of either of those legal concepts. Moreover, the purported release is located at the very end of a warranty clause of a performance contract which sets forth with particularity the parties’ respective performance obligations in separate paragraphs. Given the manner in which the remainder of the contract is drafted, it defies both logic and common sense that the parties would intend to release the seller from all liability arising out of defective design of the structure by tacking broad exculpatory language to the end of a limited warranty clause. We conclude that the trial court was correct in ruling that the contract language was not an effective release of defendant’s liability for negligent design of the facility.

When reviewing a grant of summary judgment, this Court examines the record to determine independently whether it supports the conclusion that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); see also Security Pac. Nat'l Trust Co. v. Reid, 615 A.2d 241, 243 (Me.1992). In this dispute over parties' contractual obligations, the record consists primarily of the contract itself. We interpret the indemnification provisions of this document as we do all contract provisions to give effect to the intent of the parties as that intent is expressed in their writing. See Eijes v. Carinthia Trailside Assoc., 153 Vt. 355, 359 n. 3, 571 A.2d 49, 52 n. 3 (1989). When the contract language is clear, the intent of the parties is taken to be what the agreement declares. Karlen Communications, Inc. v. Mt. Mansfield Television, Inc., 139 Vt. 615, 617, 433 A.2d 290, 292 (1981).

4 In support of its claim, Simpson relies on § 2(g) of the contract.* In that section, Vescom agreed to: [a]ssume all risk of injury to persons, including himself, his employees and agents, and or damage to property in any manner resulting from or arising out of or in any manner connected with [Vescom's] operations hereunder, and [Vescom] agrees to indemnify and save Simpson harmless from any and all loss ... caused by or resulting from any such injury or damage.

Simpson argues that this broad language requires Vescom to defend and indemnify Simpson against Hamelin's claims, even if Hamelin's injuries were caused by Simpson's own negligence.

*20 We agree. This provision explicitly contemplates claims by security guards, who are employees of Vescom. Moreover, the parties used expansive and unambiguous language to define Vescom's obligation under this provision. Specifically, Vescom agreed to indemnify Simpson for losses resulting from or caused by injuries “in any manner connected with” the security services that Vescom provided for Simpson. An injury suffered by a security guard while the guard is on duty and on Simpson's premises is without question “connected with” Vescom's security operation.

5 Vescom presents two counterarguments, neither of which we find persuasive. **89 Vescom first argues that the
meaning of § 2(g) is ambiguous, because it appears to conflict with § 10 of the contract. In § 10, the parties attempted to limit Simpson's potential liability by affording Simpson the employer-immunity advantages of Vermont's workers' compensation law. See Candido v. Polymers, Inc., 166 Vt. 15, ----, 687 A.2d 476, 478-79 (1996) (addressing issue of multiple employers in workers' compensation context). The contract designated security guards as Simpson's “special employees” and required Vescom employees to agree to this classification in writing. According to Vescom, Simpson did not intend that any claim for damages by an injured security guard would be brought outside the workers' compensation system. Thus, the parties could not have intended Vescom to indemnify Simpson for a claim such as Hamelin's. We do not accept this reasoning. Although the parties attempted to take advantage of the workers' compensation limited-liability provisions, they could not guarantee that the courts would treat Simpson as an employer for purposes of workers' compensation. At the time the contract was drafted, this Court had not yet addressed the issue. Cf. id. at ----, 687 A.2d at 478 (where employee is hired and paid by employment agency, but works on premises of, and is supervised by, manufacturing company, manufacturing company qualifies as statutory employer under workers' compensation act). The parties almost certainly would have considered the possibility that § 10 would not be effective in preventing claims such as this one, and allocated liability accordingly.

In an unrelated case indemnity case, Vescom argues that requiring it to indemnify Simpson for Simpson's own negligence offends the public policy underlying the law of premises liability. See Dalury v. S-K-I, Ltd., 164 Vt. 329, 334-35, 670 A.2d 795, 799 (1995) (by placing responsibility for maintenance of land on those who own or control it, law of premises liability supports ultimate goal of reducing accidents). Citing such public policy concerns, a number of jurisdictions have held that “an indemnification clause does not cover liability for the indemnitee's own negligence unless it expressly so states.” Furlon v. Haystack Mountain Ski Area, Inc., 136 Vt. 266, 269, 388 A.2d 403, 405 (1978); see, e.g., Davis Constructors & Eng'rs, Inc. v. Hartford Accident & Indem. Co., 308 F.Supp. 792, 794-95 (M.D.Ala.1968); Heat & Power Corp. v. Air Prods. & Chems., Inc., 320 Md. 584, 578 A.2d 1202, 1206 (1990). In Furlon, however, we noted that “the question is an open one in Vermont.” Furlon, 136 Vt. at 269, 388 A.2d at 405. We declined to apply the rule in that case, where the parties, a ski resort and a manufacturer of ski lifts, were not marked by a disparity in bargaining power, and the contract merely allocated the cost of liability insurance. Id. at 269-70, 388 A.2d at 405.

| Virginia | VA statute §11-4.1 Green v. Sauder Mouldings, Inc., 2004, 345 F.Supp.2d 610 | S | VA is a “sole negligence” state |

Recent case law provides that the anti-indemnity statute does not apply to rental equipment companies. RSC EQUIPMENT RENTAL, INC., n/k/a United Rentals (North America), Inc., v. The CINCINNATI INSURANCE COMPANY, M.V.E., Inc.

§ 11-4.1. Certain indemnification provisions in construction contracts declared void

Any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto, including moving, demolition and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable. This section applies to such contracts between
contractors and any public body, as defined in § 2.2-4301. This section shall not affect the validity of any insurance contract, workers' compensation, or any agreement issued by an admitted insurer. The provisions of this section shall not apply to any provision of any contract entered into prior to July 1, 1973.

The rental agreement contained an indemnification provision requiring MVE to indemnify RSC under certain circumstances. In full, the provision reads:

Customers Indemnification Customer agrees to reimburse, indemnify, hold harmless and defend, at Customer's expense, RSC, its subsidiaries, parent company, affiliate companies, and their agents, officers, directors and employees, from and against all losses, liabilities, damages, injuries, demands, costs, expenses (including lawyer and investigate fees), claims, fines, settlements or penalties including, without limitation, bodily injury, death, property damage or other damage arising out of any use of the Equipment, any breach of this Agreement, Customer's violation of any applicable regulations, or improper use, possession, operation, erection, dismantling, servicing, or transport involving the Equipment, Customer's contamination of the Equipment by any party, strict liability or negligence claims arising by any party arising out of any defect in the design, manufacture, warnings, instructions, operation, repair or failure to discover a defect, or incurred by RSC in any matter from this transaction, including claims of or liabilities to third parties. Customer agrees to present any claim to his insurance carrier for all such expenses and in the event Customer has no insurance to cover such losses, Customer agrees to pay RSC for such losses.

The rental agreement also contained an insurance provision requiring MVE to procure and maintain a commercial general liability policy providing $1 million bodily injury/property damage liability insurance. In relevant part, the provision reads:

Customer's Insurance Obligation Physical Damage to Equipment: All Customers must provide to RSC, at the time the equipment is rented, a certificate *483 of insurance naming RSC as a loss payee and/or additional insured on said certificate evidencing coverage for physical damage to Equipment. Such physical damage insurance covering the Equipment may not be canceled or materially modified except upon twenty (20) days prior written notice to RSC at the branch office identified on this Agreement. In the event of Customer's failure to provide said certificate of insurance at the time the Equipment is rented, Customer will be charged the LDW Insurance fee as set forth in the agreement. Bodily Injury/Property Damage Responsibility to Third Parties: In addition to the foregoing physical damage insurance for the Equipment, Customer will at Customer's expense, at all times during the term of this Agreement, maintain in force a commercial general liability insurance policy covering bodily injury/property damage liability on the Equipment in an amount not less than one million dollars ($1,000,000) combined single limit. Such third party liability coverage shall be primary, and not in excess or on a contributory basis, and shall provide coverage for liability for injuries and/or damages sustained by any person or persons agents or employees of Customer, and Customer's indemnity obligations herein.

MVE delivered a certificate of insurance from Cincinnati that provided commercial general liability coverage, named MVE as an insured, and complied with the terms of the rental agreement's insurance provision. In addition to this primary policy, MVE obtained a policy from Cincinnati that provided excess coverage of $5 million per occurrence and $5 million in the aggregate. MVE subcontracted with Commonwealth Mechanical Corporation on September 15, 2008, to work at the Restaurant Site, and the subcontract obligated Commonwealth to procure insurance naming MVE as an additional insured and cover MVE for operations at the Restaurant Site. Pursuant to that contract, Commonwealth procured from NGM Insurance Company a policy that provided liability coverage and contained a “Virginia—Contractors Extension Endorsement” which qualified MVE as an additional insured.

On November 24, 2008, Joseph Woods was installing a driveway as part of the construction of the Bojangles in Rustburg. Woods was an employee of J & J Paving, another subcontractor of MVE. While working, Woods was hit in the head and seriously injured by a light post that was moved by the forklift rented by RSC. The forklift was operated by an employee of Commonwealth. J & J Paving paid Woods worker's compensation, his exclusive remedy against J & J Paving and all of the other contractors on the Bojangles job. Woods filed suit on November 9, 2010, in
the Circuit Court of the City of Richmond naming RSC Equipment Rental, Inc., Bojangles' International, LLC, LAT Land Company, LLC, Mountain Food Services, LLC, and GEHL Company as defendants. The case was transferred to the Circuit Court of Campbell County and is currently pending against RSC only, the other defendants having been dismissed. RSC demanded that MVE defend and indemnify RSC against this suit pursuant to the terms of the rental agreement. In a letter to RSC's counsel dated March 2, 2011, Cincinnati agreed to defend RSC; however, Cincinnati reserved its right to assert that the indemnification clause violated Virginia Code 11–4.1 and disputed that the terms of the rental agreement required RSC to be named as an additional insured. RSC claims it had no notice prior to January 6, 2014 that MVE planned to disclaim its defense and indemnification obligations.

The instant motion turns on whether the indemnification clause in the rental contract between RSC and MVE is void and unenforceable under Virginia Code § 11–4.1 because the contract requires MVE to “reimburse, indemnify, hold harmless and defend” RSC. Virginia Code § 11–4.1, reads, in relevant part:

Section 11–4.1 Certain Indemnification Provisions in Construction Contracts declared void

Any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto, including moving, demolition and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable. This section applies to such contracts between contractors and any public body, as defined in § 2.2–4301.

This section shall not affect the validity of any insurance contract, worker's compensation, or any agreement issued by an admitted insurer.

(Emphasis added.)

78 Section § 11–4.1 is an exception to the general public policy of Virginia, which allows parties broad freedom to contract. See, Shuttleworth, Ruloff & Giordano, P.C. v. Nutter, 254 Va. 494, 498, 493 S.E.2d 364, 366 (1997) (observing that Virginia *486 “looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes”). Virginia courts are averse to holding contracts unenforceable on public policy grounds. See Estes Express Lines, Inc. v. Chopper Express, Inc., 273 Va. 358, 641 S.E.2d 476, 480 (2007) (finding broad indemnity agreements enforceable because “it [is] highly unlikely that a party would neglect to exercise ordinary care simply in anticipation that it ultimately might not have to bear the burden of any liability incurred as a result of its failure to exercise ordinary care to avoid personal injury to another”); see also Green v. Sauder Mouldings, Inc., 345 F.Supp.2d 610, 612 (E.D.Va.2004) (finding that “in the context of business negotiations, two entities, as part of the bargain, can agree to an indemnification provision” without violating public policy). Since Virginia Code § 11–4.1 is in opposition to these principles and thus in derogation of the common law of Virginia, it must be construed narrowly. See, e.g., Schwartz v. Brownlee, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (“Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.”).

In a similar case, the United States Court of Appeals for the Fourth Circuit addressed the applicability of Virginia Code § 11–4.1, in Carpenter Insulation & Coatings Co. v. Statewide Sheet Metal & Roofing, Inc., No. 90–2426, No. 90–2471, 1991 WL 120315, at *1–4, 1991 U.S.App. LEXIS 14267, at *3–11 (4th Cir. July 9, 1991). While Carpenter is an unpublished opinion and therefore is not binding precedent, its analysis is nevertheless instructive, and it is the only case within this circuit that gives such guidance. In Carpenter, the challenged contract was one under which Statewide Roofing purchased roofing materials from Carpenter to use “in the business of installing and repairing roofing systems.” Id. at *1, 1991 U.S.App. LEXIS 14267 at *3. The Fourth Circuit held that Virginia Code § 11–4.1 did not invalidate the indemnification provision in the agreement, noting that the contract in question was “a sales agreement for chemical roofing materials, not a construction contract.” Id. at *3, 1991 U.S.App. LEXIS 14267 at *7. The Fourth Circuit did not find that the sale of roofing materials “related to” construction even though those
materials would later be used in construction. Instead, the court focused on the type of contract at issue. Just as “a sales agreement for chemical roofing materials [is] not a construct contract,” in this case a rental agreement for a forklift is not a construction contract. Id.; see also McMunn v. Hertz Equip. Rental Corp., 791 F.2d 88, 92–93 (7th Cir.1986) (stating that while “general language invites broad readings,” an anti-indemnification “statute is directed at a particular problem, construction safety, from which the indemnity agreement in the present case is remote”).

Even if I could read Virginia Code § 11–4.1 broadly enough to encompass rental contracts like the one at issue, by its own language the statute only applies to harms “suffered in the course of performance of the contract.” Va.Code § 11–4.1. In Carpenter, the Fourth Circuit noted that the harms “were not ‘suffered in the course of performance’ of the [contract] ... [r]ather, their alleged injuries occurred during the performance of a [different] contract between Statewide Roofing and Hampton County.” Carpenter, 1991 WL 120315, at *3, 1991 U.S.App. LEXIS 14267, at *7; see also Uniwest Constr., Inc. et al. v. Amtech Elevator Servs., Inc. et al. (“Uniwest I”), 280 Va. 428, 441 699 S.E.2d 223, 230 (2010) (“[T]he unambiguous language of Code § 11–4.1 requires [the Court] to look to the contract containing the provision, not the circumstances from which the claim for indemnification arose, to determine whether an indemnification provision violates Code § 11–4.1.”). It is clear that the contract in this case was a rental agreement rather than a construction contract, and thus the factual distinction between this case and Carpenter is inmaterial.

Special rules on concurrent fault for Partial Indemnity.
Effective: June 7, 2012  West’s RCWA 4.24.115
Validity of agreement to indemnify against liability for negligence relative to construction, alteration, improvement, etc., of structure or improvement attached to real estate or relative to a motor carrier transportation contract
(1) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, a contract or agreement for architectural, landscape architectural, engineering, or land surveying services, or a motor carrier transportation contract, purporting to indemnify, including the duty and cost to defend, against liability for damages arising out of such services or out of bodily injury to persons or damage to property:
(a) Caused by or resulting from the sole negligence of the indemnitee, his or her agents or employees is against public policy and is void and unenforceable;

(b) Caused by or resulting from the concurrent negligence of (i) the indemnitee or the indemnitee's agents or employees, and (ii) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

(2) As used in this section, a “motor carrier transportation contract” means a contract, agreement, or understanding covering: (a) The transportation of property for compensation or hire by the motor carrier; (b) entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or (c) a service incidental to activity described in (a) or (b) of this subsection, including, but not limited to, storage of property, moving equipment or trailers, loading or unloading, or monitoring loading or unloading. “Motor carrier transportation contract” shall not include agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment.

Provision of this section prohibiting an indemnitee from recovering damages resulting from its sole negligence is not applicable to void an indemnification agreement which excludes sole negligence from its provisions. Noia v. Ferrell-Penning, Inc. (1983) 36 Wash.App. 13, 671 P.2d 790, remanded 102 Wash.2d 1010, 688 P.2d 499, remanded 102 Wash.2d 1010, 689 P.2d 1065. Indemnity Key Number 30(1)

The Washington Supreme Court interpreted WRS, §4.24.115 in Austin v. Canron. Canron appealed to the Supreme Court. It argues that clause 8(b) is ambiguous on the issue of indemnification against concurrent negligence. Canron relies on several Washington decisions to assert that the ambiguities of 8(b) should be construed against Austin, who is both the indemnitee and the drafter of the clause. See, e.g., Northern Pac. Ry. v. Sunnyside Valley Irrig. Dist., 85 Wash.2d 920, 540 P.2d 1387 (1975); Tyee Constr. Co. v. Pacific Northwest Bell Tel. Co., 3 Wash.App. 37, 472 P.2d 411 (1970).

The Court of Appeals correctly rejected this argument. Parties are free to establish liability instead of negligence as the triggering mechanism of an indemnity contract. See, e.g., Continental Cas. Co. v. Seattle, 66 Wash.2d 831, 836, 405 P.2d 581 (1965) (“[c]ausation, not negligence, is the touchstone”); see also Jones v. Strom Constr. Co., 84 Wash.2d 518, 521, 527 P.2d 1115 (1974). Here, clause 8(b) provides by its terms that any liability borne by Austin that was caused—or allegedly caused—by Austin's conduct triggers Canron's duty to indemnify Austin completely. The trigger operates independently of how Austin's conduct caused the liability.

Canron also argues that the indemnity clause of its contract with Austin is unenforceable because it fails to express clearly an intent that Canron indemnify Austin in circumstances of concurrent negligence. It claims that the provision binds it to indemnify Austin only for employees' injuries caused by Austin alone. Canron suggests that to bind it to indemnify for liability caused by concurrent negligence, 8(b) would have to read “Subcontractor agrees to indemnify ... Austin against all liability ... caused ... by Austin or Canron.”

Canron bases its argument on Calkins v. Lorain Div. of Koehring Co., 26 Wash.App. 206, 613 P.2d 143 (1980). That court emphasized that public policy disfavors allowing an indemnitee to contract away liability resulting from its own negligence, and courts will enforce such agreements only if expressed in clear terms. The court declared: Where agreements provide indemnity based on concurrent negligence, indemnitees are protected against a liability exposure created by their own negligence. As in situations where the law allows persons to indemnify themselves against liability arising from their sole negligence, an intent to indemnify for concurrent negligence must be clearly expressed.

26 Wash.App. at 210, 613 P.2d 143. The court held the indemnity clause at issue unenforceable because it was ambiguous in three respects: It failed to state expressly an intent (1) to deprive the indemnitor of his immunity as
an employer under the Industrial Insurance Act, (2) to provide indemnity for concurrent negligence, and (3) to provide indemnity in the particular circumstances of the case.

Decisions of this court support the Calkins court’s disfavor of contracts to indemnify a party against losses caused by its own negligence. See, e.g., Griffiths v. Henry Broderick, Inc., 27 Wash.2d 901, 182 P.2d 18 (1947); Jones v. Strom Constr. Co., 84 Wash.2d at 520–21, 527 P.2d 1115. Courts of other jurisdictions agree: “[t]he is a long-established general rule that contracts will not be construed to indemnify a *53 person against his own negligence unless such intention is expressed in clear and unequivocal terms.” Annot., Liability of Subcontractor Upon Bond or Other Agreement Indemnifying General Contractor Against Liability for Damage to Person or Property, 68 A.L.R.3d 7, 69 (1976). At least one court has stated that the purpose of this rule is to prevent injustice, and to insure that a contracting party has fair notice that a large and ruinous award can be assessed against it solely by reason of negligence attributable to the other contracting party. Joe Adams & Son v. McCann Constr. Co., 475 S.W.2d 721, 722 (Tex.1971).

Some courts also agree with Calkins’ second basis for its holding. Because of the disfavor of indemnification of a party against its own negligence, courts have stated that they will not enforce an indemnity provision to indemnify a concurrently negligent indemnitee unless the obligation is expressed in clear and unequivocal language. Annot., supra, at 126. See also Waller v. J.E. Brenneman Co., 307 A.2d 550 (Del.Super.Ct.1973).

2 However, these policy considerations do not require that the Austin-Canron agreement be held unenforceable for failing to expressly mention concurrent negligence. Provision 8(b) provided fair notice to Canron that it would be liable for “all liability” to Canron’s employees caused by Austin’s conduct. In this situation, the Calkins rule is not necessary for notifying Canron of its role as insurer for the indemnitee’s liability. For other cases in which this court has held that an indemnity clause encompassed circumstances of concurrent negligence, see Cope v. J.K. Campbell & Assoc., Ltd., 71 Wash.2d 453, 429 P.2d 124 (1967); Union Pac. R.R. v. Ross Transfer Co., 64 Wash.2d 486, 392 P.2d 450 (1964). At least one other court has noted that parties need not expressly mention concurrent negligence when they instead expressly agree to indemnify the indemnitee against its own negligence. MacDonald & Kruse, Inc. v. San Jose Steel Co., 29 Cal.App.3d 413, 419, 105 Cal.Rptr. 725 (1972).

This court has long preferred to enforce indemnity *54 agreements as executed by the parties. See, e.g., Griffiths v. Henry Broderick, Inc., 27 Wash.2d at 904–06, 910, 182 P.2d 18; Redford v. Seattle, 94 Wash.2d 198, 206–07, 615 P.2d 1285 (1980). We have established specific limits to the enforceability of indemnity contracts to accommodate the statutory mandates of the Industrial Insurance Act, RCW Title 51, see Brown v. Prime Constr. Co., 102 Wash.2d 235, 684 P.2d 73 (1984), and of RCW 4.24.115, see Brame v. St. Regis Paper Co., 97 Wash.2d 748, 649 P.2d 836 (1982). However, as we stated in **196 Northwest Airlines v. Hughes Air Corp., 104 Wash.2d 152, 157–58, 702 P.2d 1192 (1985), the general rules that disfavor an agreement to indemnify an indemnitee against its own negligence do not render such a clause void or unenforceable as a matter of law. Instead, “[w]hat these rules require is that ... the agreement must be clearly spelled out.” 104 Wash.2d at 158, 702 P.2d 1192. Parties rely on indemnity agreements for allocating the responsibility to purchase insurance when a construction project is initiated. Here, Canron and Austin clearly spelled out their allocation of responsibilities. It is not for this court to frustrate such a planning device.

3 Clause 8(b) would have little use if it were construed to obligate Canron to provide indemnity to Austin only when Austin was solely negligent. RCW 4.24.115 would make the clause almost totally unenforceable.

“... Contracts of indemnity, therefore, must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms.”

Union Pac. R.R. v. Ross Transfer Co., 64 Wash.2d 486, 488 [392 P.2d 450] ... (quoting from 27 Am.Jur. Indemnity § 13, at 462 (1940)); ...


This court will enforce a contract that clearly requires *55 indemnification of the indemnitee against losses caused by its own negligence when enforcement of that clause does not violate RCW 4.24.115. We therefore affirm the
§ 55-8-14. Agreements to indemnify against sole negligence of the indemnitee, his agents or employees against public policy; no action maintainable thereon; exceptions

A covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement entered into on or after the effective date of this section, relative to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of any building, highway, road, railroad, water, sewer, electrical or gas distribution system, excavation or other structure, project, development or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable and no action shall be maintained thereon.

This section does not apply to construction bonds or insurance contracts or agreements.

A just public policy demands that indemnity agreements be permitted unless they go beyond mere allocation of potential joint and several liability and indemnify against sole negligence of indemnitee without appropriate insurance fund, bought pursuant to contract, for express purpose of protecting all concerned. Code, 55-8-14. Dalton v. Childress Service Corp., 1993, 432 S.E.2d 98, 189 W.Va. 428.

Contract that provides in substance that A shall purchase insurance to protect B against actions arising from B’s sole negligence does not violate statute, making agreements to indemnify against sole negligence of indemnitee against public policy, since public policy encourages both allocation of risks and purchase of insurance. Code, 55-8-14. Dalton v. Childress Service Corp., 1993, 432 S.E.2d 98, 189 W.Va. 428.

On May 31, 2011, Medford truck driver Timothy Walker (“Mr. Walker”) was sitting seat-belted in his parked coal truck while the truck was being loaded with coal by Elk Run employee Eric Scott Redden (“Mr. Redden”). Mr. Redden had directed Mr. Walker where to park the truck and had begun loading it with coal using a piece of equipment referred to as an “end-loader” or “front-end loader.” During the course of loading the truck, Mr. Redden allegedly lost consciousness and struck the truck with the front-end loader thereby flipping the truck and causing injury to Mr. Walker. Elk Run and Mr. Redden have stipulated that they “will not argue or assert a comparative negligence defense against Plaintiff Timothy Walker at the trial of this matter.” Similarly, there has been no allegation that Medford caused or contributed to the accident in any way.

The instant dispute involves the availability of insurance coverage to Elk Run in relation to the above-described accident. In this regard, the H & D Agreement between Elk Run and Medford contains a broadly worded “Indemnity; Insurance” clause, which states:

9.1 Except as otherwise expressly provided herein, Contractor [Medford] shall indemnify, defend and save harmless Owner [Elk Run], its members, parent companies, sister companies, predecessors, successors, affiliates, insurers, reinsurers, other contractors, successors and assigns, and the officers, directors, shareholders, employees and agents of each of the foregoing (collectively “Owner's Indemnified Persons”) from and against any and all demands, actions, suits, claims, rights, losses (including, but not limited to, diminution in value), controversies, damages, costs, expenses (including, but not limited to, interest, fines, penalties, costs of preparation and investigation, and the reasonable fees and expenses of attorneys, accountants and other professional advisers), and any other liability of whatsoever kind or nature against Owner's Indemnified Persons (collectively, “Losses”), whether on account of
damage or injury (including death) to persons or property, violation of law or regulation, or otherwise, relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, Contractor's performance of the Work [2] or other activities performed pursuant to this Agreement (including work and activities performed by subcontractors) or Contractor's nonperformance or breach of the terms of this Agreement.

In addition, pursuant to the “Indemnity; Insurance” clause of the H & D Agreement, Medford was required to purchase insurance:

9.3 Before commencing Work hereunder, Contractor [Medford] ... shall obtain, and throughout the term of this Agreement maintain, at its sole expense, the following insurance coverages:

(b) Commercial General Liability Insurance with minimum limits of $2,000,000 for each occurrence and $2,000,000 general aggregate, for death, bodily injury and property damage, including coverage for independent contractors, products and completed operations, Blanket Broad Form Contractual, cross-liability, personal injury liability, Broad Form Property Damage, and where an exposure exists, coverage with the explosion, collapse and underground (XCU) hazard exclusions deleted from the policy.

(d) Automobile Liability Insurance, including owned, non-owned and hired vehicle coverage with limits of liability of not less than $2,000,000 combined single limits for death, bodily injury and property damage claims.

B. Except as to workers' compensation insurance, Owner [Elk Run] shall be named as an additional insured.

In apparent accordance with the foregoing provisions, Medford purchased a commercial general liability (“CGL”) policy from Canopius U.S. Insurance, Inc., f/k/a Omega U.S. Insurance, Inc. (“Canopius”), and a related commercial excess liability policy (“excess policy”) from RSUI Indemnity Company (“RSUI”). Additionally, Medford purchased a commercial automobile liability policy, issued by National Casualty Company (“National”), and a related commercial automobile excess liability policy, issued by Scottsdale Insurance Company (“Scottsdale”). Each of these policies provided coverage in the amount of $1,000,000 per occurrence.

Elk Run asserts four errors by the circuit court in finding that Elk Run was not entitled to coverage under the Canopius CGL policy. We address them in turn. First, Elk Run contends that the H & D Agreement between Medford and Elk Run qualifies as an “insured contract.” Accordingly, Elk Run stands in the shoes of Medford for coverage purposes.

789 The Canopius CGL policy defines an “insured contract” in relevant part as:

9.f. That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

“Language in an insurance policy should be given its plain, ordinary meaning.” Syl. pt. 8, Cherrington v. Erie Ins. Prop. & Cas. Co., 231 W.Va. 470, 745 S.E.2d 508 (2013) (internal quotations and citations omitted). Applying the plain language above, it is clear that, insofar as the indemnity agreement between Elk Run and Medford was part of their H & D Agreement and required Medford to “assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization,” it is an “insured contract” under the policy.7 Because *519 **71 the contract between Elk Run and Medford is an insured contract,8 we observe this Court's prior holding that,

“[i]n a policy for commercial general liability insurance ... when a party has an ‘insured contract,’ that party stands in the same shoes as the insured for coverage purposes.” Syl. pt. 7, in part, Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998). Based upon this holding, we conclude that Elk Run “stands in the same shoes as [Medford] for coverage purposes” and is, therefore, an additional insured.

10 Canopius argues that there is no coverage for Elk Run's sole negligence pursuant to the “Blanket Additional Insured Endorsement,” which provides, in relevant part, that [t]he insurance provided to these additional insureds is limited as follows:

1. That person or organization is an additional insured only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused, in whole or in part, by:
a. Your acts or omissions; or
b. The acts or omissions of those acting on your behalf.
(Emphasis added). To the extent that “your” refers to Medford as the named insured, subsection (a) does not apply insofar as the underlying liability does not result from any act or omission by Medford. However, the circuit court also concluded that subsection (b) does not apply based upon its conclusion that Elk Run was not “acting on [Medford’s] behalf” in loading coal onto Medford's truck. We disagree.

A case similar to the instant matter is Norfolk Southern Railway Co. v. National Union Fire Insurance of Pittsburgh, PA, 999 F.Supp.2d 906 (S.D.W.Va.2014). The facts of Norfolk Southern are that employees of Norfolk Southern Railway Company (“Norfolk Southern”) and Cobra Natural Resources, LLC (“Cobra”) were “positioning a train under a coal loading facility.” Id. at 909. During this process, a rail broke causing several cars to derail. One car struck the coal loading facility causing it to collapse. Several lawsuits were subsequently filed against Norfolk Southern. Cobra did not cause the derailment. An agreement between Norfolk Southern and Cobra required Cobra to maintain insurance under which Norfolk Southern was an additional insured. The policy obtained by Cobra provided coverage for additional insureds “only with respect to liability arising out of ‘Your Work’, ‘Your Product’ and to property owned or used by you.” Id. at 912 (internal quotations omitted).9 The district court observed that “[t]he policy defines ‘Your Work,’ in relevant part, as ‘(1) work or operations performed by you or on your behalf; and (2) materials, parts or equipment furnished in connection with such work or operations.’” Id. (emphasis added). The court concluded that the policy provided coverage for Norfolk Southern, the additional insured, because the derailment “arose out of” Cobra’s “work” as defined in the policy. Id. at 914. See also Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co., 480 F.3d 1254, 1264 (11th Cir.2007) (finding coverage for indemnity obligation triggered by accident arising out of indemnitor's work because the work placed indemnitor's employees in the path of accident caused by indemnitee’s negligence); Perkins v. Rubicon, Inc., 563 So.2d 258, 259 (La.1990) (finding indemnity provision requiring injury “arising out of” indemnitor's performance of work required “connexity similar to that required for determining cause-in-fact,” and concluding that injury triggered indemnification because injured employee would not have been present to be *520 **72 injured “but for performance of the work under the contract”). Similarly, we find coverage for Elk Run under the Canopius policy provision qualifying Elk Run as “an additional insured only with respect to liability ... caused, in whole or in part, by: ... [the] acts or omissions of those acting on your [Medford's] behalf.” The underlying injury in this case occurred while an Elk Run employee was loading coal onto a Medford truck. In loading the coal onto the Medford truck, Elk Run was acting on Medford's behalf. First, the H & D Agreement originally acknowledged that Elk Run “shall supply a loader with operator to assist Contractor [Medford ] in the performance of the Work.” The circuit court rejected this clause as evidence that Elk Run's activities were on behalf of Medford because this provision was omitted by an amendment to the H & D Agreement that became effective prior to the incident underlying this claim. To the contrary, however, we find the fact that Elk Run was no longer contractually obligated to supply a loader with operator to assist Medford does not diminish the fact that Elk Run, nevertheless, continued to provide this assistance and, in doing so, was acting on Medford's behalf.

1112 Elk Run next contends that the circuit court erred by finding that the public policy of the State of West Virginia does not permit one to obtain indemnification for one's own conduct. The circuit court relied on W. Va.Code § 55–8–14 (1975) (Repl Vol.2008) as a general source for this asserted public policy. The circuit court’s reliance on W. Va.Code § 55–8–14 is misplaced. That statute expressly applies only to certain types of contracts not at issue in this case; therefore it does not provide a basis for a public policy against all contracts indemnifying one for his or her own conduct. Assuming, arguendo, that W. Va.Code § 55–8–14 did apply, it does not prohibit indemnity contracts for the sole negligence of the indemnitee where the contract includes an agreement to purchase insurance:

W. Va.Code § 55–8–14 requires courts to void a broad indemnity agreement only: (1) if the indemnitee is found by the trier-of-fact to be solely (100 percent) negligent in causing the accident; and (2) it cannot be inferred from the contract that there was a proper agreement to purchase insurance for the benefit of all concerned.

Syl. pt. 2, Dalton v. Childress Serv. Corp., 189 W.Va. 428, 432 S.E.2d 98 (1993) (emphasis added); see also Id., at 431, 432 S.E.2d at 101 (“[A] just public policy demands that indemnity agreements be permitted unless they go beyond a
mere allocation of potential joint and several liability and indemnify against the sole negligence of the indemnitee without an appropriate insurance fund, bought pursuant to the contract, for the express purpose of protecting all concerned. A contract that provides in substance that A shall purchase insurance to protect B against actions arising from B’s sole negligence does not violate the statute as public policy encourages both the allocation of risks and the purchase of insurance.” (emphasis added)). The H & D Agreement between Elk Run and Medford clearly included an agreement to purchase insurance for the benefit of all concerned; therefore, even under Dalton, the agreement is not void and unenforceable. Finally, the circuit court’s conclusion is contrary to this Court’s precedent. Indeed, this Court has expressly declared that “[c]ontracts of indemnity against one’s own negligence do not contravene public policy and are valid.” Syl. pt. 1, Sellers v. Owens–Illinois Glass Co., 156 W.Va. 87, 191 S.E.2d 166 (1972). Accord Syl. pt. 3, Riggle v. Allied Chem. Corp., 180 W.Va. 561, 378 S.E.2d 282 (1989); Syl. pt. 4, State ex rel. Vapor Corp. v. Narick, 173 W.Va. 770, 320 S.E.2d 345 (1984). Consequently, we find the circuit court erred in concluding that the H & D Agreement violated the public policy of this State.

13 Elk Run next asserts that the circuit court erred in finding the language of the H & D Agreement was not sufficiently clear to express that Medford had agreed to indemnify Elk Run for accidents arising from Elk Run’s sole negligence. This Court, in Sellers v. Owens–Illinois Glass Co., 156 W.Va. 87, 191 S.E.2d 166, held that, “[g]enerally, contracts will not be construed to indemnify one against his own negligence, unless such intention is expressed in clear and definite *521 **73 language.” Syl. pt. 3, id. The indemnifying clause at issue in Sellers provided that “ ‘Subcontractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Subcontractor, his agents or employees.’” Id., at 94, 191 S.E.2d at 170. The Court found “[t]he language of the indemnity agreement is not sufficiently clear and definite to require [subcontractor] to indemnify the [contractor], for its sole negligence.” Id. Unlike the agreement in Sellers, the instant agreement was not limited to damages “occasioned by” the indemnitor. Rather, the H & D Agreement required Medford to obtain insurance to broadly indemnify Elk Run for losses “relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, [Medford’s] performance of the Work.” 10 The indemnity clause in the Elk Run/Medford agreement is more broad than a clause found to be sufficiently clear in the case of Eastern Gas & Fuel Associates v. Midwest–Raleigh, Inc., 374 F.2d 451 (4th Cir.1967), which is discussed in Sellers. The Eastern Gas court considered an indemnity agreement requiring the indemnitor to “ ‘protect and indemnify Eastern against loss or damage to property and injury and death to persons resulting from, arising out of or incident to the performance of this contract.’” Id., 374 F.2d at 452. Also pursuant to the agreement, “Midwest would maintain bodily injury and property damage liability insurance to cover any liability arising from the performance of the contract.” Id.

Following an explosion that killed two workers, a judgment was obtained against Eastern for the damages. Eastern then sought indemnification in accordance with its agreement with Midwest. The court held that the “the contract is ‘clear and definite’ in its indemnity of Eastern against all liability arising from performance of the contract, despite its own negligence.” Id., 374 F.2d at 454. Likewise, we find the broad language used in the H & D Agreement, which includes losses relating to or in connection with Medford’s work, either directly or indirectly, is sufficiently clear and definite to express that Medford agreed to indemnify Elk Run for Elk Run’s sole negligence so long as that negligence bore some relation, either directly or indirectly, to Medford’s work. The circuit court erred in finding otherwise.

14 Elk Run’s final argument related to the CGL policy is that the circuit court erred in finding the auto exclusion in the Canopius policy applicable. The Canopius policy contains an exclusion for “ ‘[b]odily injury’ or ‘property damage’ arising out of the ownership, maintenance, use or entrustment to others of any ... ‘auto’ ... owned or operated by ... any insured.” The Medford truck in which Mr. Walker was sitting at the time of his injury qualifies as an “auto” under the Canopius policy. 11 The question, then, is whether the loss was caused by the “use” of the auto. Pursuant to the policy, “[u]se includes operation and ‘loading or unloading.’” 12 Significantly, however, the definition *522 **74 of the term “loading or unloading” contained in the policy clarifies that the term “does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the ... ‘auto.’” (Emphasis added). Given this definition of “loading or unloading,” we must determine whether the front-end loader used to load coal onto the Medford truck is a “mechanical device.”

Because “‘loading or unloading’ does not include the movement of property by means of a mechanical device other than a hand truck,” and because the coal was being loaded onto Medford’s truck using a mechanical device, the loading of the coal was not a “use” of an automobile as excluded by the policy. Accordingly, the circuit court erred in applying the auto exclusion of the Canopius policy as a grounds for finding coverage was not available to Elk Run.13

Based upon our reasoning above, we conclude that the circuit court erred in granting summary judgment to Canopius based upon the court’s erroneous finding that Elk Run was not entitled to coverage under the Canopius policy. We therefore reverse the circuit court’s grant of summary judgment to Canopius. Because we additionally have found coverage for Elk Run under the terms of the Canopius policy, we likewise reverse the circuit court's denial of Elk Run's motion for partial summary judgment. We remand this case for proceedings consistent with this opinion, including the entry of an order granting partial summary judgment to Elk Run on the issue of coverage under the Canopius policy.

| Wisconsin | Statute §895.447 See Mikula v. Miller Brewing Co., 7 N.W.2d 613 | B | Indemnity Agreements are not in violation of the anti-tort law of Wisconsin |

Contractors are required to have the correct credentials for their trade. No mention in statute of service provider W.S.A. 895.447

Certain agreements to limit or eliminate tort liability void

(1) Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.

(2) This section does not apply to any insurance contract or worker’s compensation plan.

(3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.

Statute voiding agreements in construction contracts to limit or eliminate tort liability, thereby limiting parties' common-law right to contract freely, must be interpreted narrowly, placing least possible restriction on common-law right. Wausau Paper Mills Co. v. Chas. T. Main, Inc., W.D.Wis.1992, 789 F.Supp. 968. ContractsKey Number114

Since this section, voiding agreements in construction contracts that limit or eliminate tort liability, limited the common law right to freely contract, Court of Appeals had to interpret this section narrowly, placing the least possible restriction on the common law right. Gerdmann by Habush v. U.S. Fire Ins. Co. (App. 1984) 350 N.W.2d
Indemnity clause neither limited nor eliminated property owner's tort liability to third parties but, rather, made contractor the insurer should damages result, so that this section, voiding agreements in construction contracts that limit or eliminate tort liability did not void such clause in contract between property owner and contractor. Gerdmann by Habush v. U.S. Fire Ins. Co. (App. 1984) 350 N.W.2d 730, 119 Wis.2d 367. Indemnity Key Number 30(5) 3. Question of law

Interpretation of this section, voiding agreements and construction contracts that limit or eliminate tort liability, is a question of law. Gerdmann by Habush v. U.S. Fire Ins. Co. (App. 1984) 350 N.W.2d 730, 119 Wis.2d 367. Contracts Key Number 142

| Wyoming | No anti-indemnity statute, except oil, gas, mining industry including rental equipment WY § 30-1-131 | B | Indemnification for indemnitee's own negligence must be stated in clear and unambiguous terms. |

All agreements, covenants or promises contained in, collateral to or affecting any agreement pertaining to any well for oil, gas or water, or mine for any mineral, which purport to indemnify the indemnitee against loss or liability for damages for:
(i) Death or bodily injury to persons;
(ii) Injury to property; or
(iii) Any other loss, damage, or expense arising under either (i) or (ii) from:
(A) The sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee or any independent contractor who is directly responsible to such indemnitee; or
(B) From any accident which occurs in operations carried on at the direction or under the supervision of the indemnitee or an employee or representative of the indemnitee or in accordance with methods and means specified by the indemnitee or employees or representatives of the indemnitee, are against public policy and are void and unenforceable to the extent that such contract of indemnity by its terms purports to relieve the indemnitee from loss or liability for his own negligence. This provision shall not affect the validity of any insurance contract or any benefit conferred by the Worker's Compensation Law [§§ 27-14-101 through 27-14-805] of this state.
ALABAMA INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL ALABAMA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY ALABAMA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY ALABAMA LAW. Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

ALABAMA INSURANCE – To the fullest extent permitted by Alabama law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site, The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to
Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

ALASKA INDEMNIFICATION AND RELEASE PROVISIONS –-- IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL ALASKA LAWS including AK§45.45.900., AND TO THE FULLEST EXTENT PERMITTED BY ALASKA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSEE’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY ALASKA LAW. – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee is required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee is not required to indemnify Lessor for any claim from the sole negligence or willful misconduct of the Lessee or the Lessee’s agents, servants or independent contractors who are directly responsible to the Lessee. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

ALASKA INSURANCE – To the fullest extent permitted by Alaska law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional
and coverage to coverages prior to the occurrence happens, involving direct, indirect the leased Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor's investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to investigation or adjustment (including but not limited to, attorneys' fees and costs, private

Furthermore, as part of Lessee's additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

ARIZONA INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL ARIZONA LAWS including §32-1159; §34-226 and §41-2586, AND TO THE FULLEST EXTENT PERMITTED BY ARIZONA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY ARIZONA LAW. Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify Lessor for liability for loss or damage resulting from the sole negligence of the Lessor or the Lessor’s agents, employees or Indemnitees. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand.

ARIZONA INSURANCE – To the fullest extent permitted by Arizona law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the

...
following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability ("CGL") insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee's primary and excess/umbrella policies must be endorsed so they are primary and non-contributory to all of Lessor's insurance policies; d) inland marine/all-risk and or builder's risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor's officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor's benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

ARKANSAS INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL ARKANSAS LAWS INCLUDING AR §4-56-104, AND TO THE FULLEST EXTENT PERMITTED BY ARKANSAS LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY ARKANSAS LAW. Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee and Lessee’s insurer is required to indemnify, defend, and hold harmless the Lessor against liability for damage arising out of the death of or bodily injury to a person or persons or damage to property, which arises out of the negligence or fault of Lessee, its agents, representatives, subcontractors, or suppliers. Lessee shall not be responsible to indemnify nor hold harmless Lessor for damage from death or bodily injury to a person or damage to property arising out of the sole negligence of the Lessor, its agent, representative, subcontractor, or
The Lessee's obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee's additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys' fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor's insurance carriers or Lessor's third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

ARKANSAS PARTIAL INSURANCE – To the fullest extent permitted by Arkansas law, and pursuant to AR §4-56-104, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment's arrival on the job site that insures Lessor for the acts or omissions of the Lessee, to the extent that such additional insured coverage provides coverage to the Lessor for liability due to the acts or omissions of the Lessee. The Lessee shall procure the following coverage's for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary noncontributory commercial general liability ("CGL") insurance on an occurrence basis, including bodily injury and property damage coverage with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form noncontributory insurance in the amount of at least $5,000,000 and Lessee's primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor's insurance policies; d) Builder's Risk which includes an all-risk physical damage insurance for the Equipment, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) the Lessee must use the following ISO endorsements which provide various coverages and also provide additional insured status for the Lessor and Lessor's officers, directors, shareholders, members, managers, partners and employees along with all affiliated partnerships, joint ventures, corporations of Lessor and anyone else who Lessor is required to name as an additional insured, which must be included as additional insured on all liability insurance policies (including any excess/umbrella policies that must also follow form of the CGL policy CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, CG 24 04 05 09 all must be used and modified but only to the extent required by AK §4-56-104; g) Lessee shall provide punitive damage coverage for Lessor's benefit on all liability policies unless prohibited by state law; h) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, i) Lessee shall provide all insurance certificates to Lessor when requested; j) all policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured's including additional insured's prior to cancellation or nonrenewal; k) all of Lessor's policies, and the policies of anyone Lessor is required to insure are excess over all of Lessee's policies l) all of Lessor's policies, and the policies of anyone Lessor is required to insure are excess over all of Lessee's policies; m) all policies must remove any exclusion for explosion, collapse and underground operations (XCU) and n) all policies must remove the "employer's liability exclusion" for all additional insureds; o) all policies must include coverage for blanket contractual liability for the obligations assumed hereunder and also for the liabilities assumed in the Indemnity section above. The Lessee is required to provide a project specific insurance policy for the above referenced commercial general liability insurance or may substitute a commercial general liability insurance policy with an owner's or contractors protective insurance, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy. In the event of loss, proceeds of property damage insurance on the Equipment shall first be made payable to Lessor before any person or entity receives a payout from the Builder's Risk policy. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above
cov
with any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

CALIFORNIA INDEMNIFICATION, RELEASE PROVISIONS AND RISK OF LOSS for SERVICE VENDOR:  – – IT IS THE PARTIES' INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL CALIFORNIA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY CALIFORNIA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR'S AND LESSEE'S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE'S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES' INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY CALIFORNIA LAW. It is the parties' intent that this contract comply with all applicable California laws and the parties further believe and this contract is not subject to CA Civ. Code §2782 and further Lessor and Lessee agree that this agreement is a service contract and not a construction contract, Therefore, Lessee shall indemnify Lessor against all claims, actions, proceedings, costs, damages, and liabilities arising in any manner out of, connected with, or resulting from the operation or handling of the Equipment on Lessor’s job site including without limitation any injury, liability or death of worker or other persons and any loss or damage to property whether the liability, loss or damage is caused by or arises out of the negligence of Lessor’s employees or otherwise. Lessee agrees to indemnify Lessor for Lessor’s own fault or negligence for any claim arising out of Lessee's work, whether the negligence or fault of the Lessor is direct, indirect or derivative in nature. Lessee’s duty to indemnify shall include all costs or expenses arising out of or connected with all claims specified herein, including all court and or arbitration costs, filing fees, attorney’s fees, duty to defend and costs of settlement and Lessee further agrees to indemnify Lessor against all loss of or damage to the Equipment which occurs while said Equipment is on Lessee’s job site. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

CALIFORNIA PARTIAL INDEMNIFICATION – However, if this is found to be a construction contract, then the following indemnity provision shall apply: To the fullest extent permitted by California law, Lessee agrees to indemnify and save Lessor, its employees and agents harmless from all claims for death or injury to persons, including Lessor’s employees, of all loss, damage or injury to property, including the Equipment, arising in any manner out of Lessee’s operation. Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, except that Lessee shall not be required to indemnify Lessor for Lessor’s active negligence or willful misconduct, whether such negligence or fault of the Lessor be direct, indirect, or derivative in nature. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or
procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

CALIFORNIA INSURANCE – To the fullest extent permitted by California law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessor’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone who Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

COLORADO INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL COLORADO LAWS, AND TO THE FULLEST EXTENT PERMITTED BY COLORADO LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY,
INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE
EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY
COLORADO LAW. It is the parties intention that all provisions of this contract comply with CO §13-21-111.5. Lessee’s
duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court
and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Pursuant to C.R.S.A. 13-21-111.5, Lessee
shall not be required to indemnify, insure, or defend in litigation Lessor against liability for damage arising out of death
or bodily injury to persons or damage to property caused by the negligence or fault of the Lessor or any third party
under the control or supervision of the Lessor. The Lessee’s obligations hereunder shall further not be limited by
the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive
any of the above obligations. This provision is separate and distinct from any other provision or paragraph in
this contract, including any provision or paragraph concerning partial indemnification or procurement of
insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand.
Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any
investigation or adjustment (including but not limited to, attorneys’ fees and costs, private
investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use
the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s
insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or
occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident
involves personal injury, death or damage to the leased Equipment or other property or all of these.

COLORADO INSURANCE. To the fullest extent permitted by Colorado law and pursuant to C.R.S.A. 13-21-111.5 the
Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on
the job site and this insurance is for the protection of Lessor for liability and covers the acts or omissions of the Lessee.
The Lessee shall procure the following coverage’s for Lessor: a) worker’s compensation and employer’s liability
insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-
contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property
damage coverage with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c)
excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary
and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s
insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance,
on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for
its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood,
exlosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by
insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella
policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members,
managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone
whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements
to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20
28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all
must be used and modified but only to the extent required by C.R.S.A. 13-21-111.5; h) Lessee shall provide punitive
damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name
Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor
when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over
all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days
advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s
policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies
must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include
coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in
the Indemnity section above. The Lessee is required to provide a project specific insurance policy for the above
referenced commercial general liability insurance or may substitute a commercial general liability insurance policy with
an owner’s or contractor’s protective insurance, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy which is in compliance with C.R.S.A 13-21-111.5. In the event of loss, proceeds of property damage insurance on the Equipment shall first be made payable to Lessor before any person or entity receives a payout from the Builder’s Risk policy. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

**CONNECTICUT INDEMNIFICATION AND RELEASE PROVISIONS** — IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL CONNECTICUT LAWS including §52-572K, AND TO THE FULLEST EXTENT PERMITTED BY CONNECTICUT LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY CONNECTICUT LAW. — Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to indemnify Lessor against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of the Lessor, Lessor’s agents or employees. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

**CONNECTICUT INSURANCE** — To the fullest extent permitted by Connecticut law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured.
Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

DELAWARE INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL DELAWARE LAWS including 6 DE §2704, AND TO THE FULLEST EXTENT PERMITTED BY DELAWARE LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY DELAWARE LAW. Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to indemnify or hold harmless Lessor or its agents, servants, or employees, from damages arising from liability for bodily injury or death to persons or damage to property caused partially or solely by the Lessor or its subcontractors, agents, servants, or employees. The parties agree that Delaware law recognizes and allows the borrowed servant doctrine in that the personnel operating or using the Equipment are the employees of the Lessee as borrowed servants and not the employees of the Lessor even if the employees are paid by the Lessor. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these. The parties agree that Delaware law recognizes and allows the borrowed
servant doctrine in that the personnel operating or using the Equipment are the employees of the Lessee as borrowed servants and not the employees of the Lessor even if the employees are paid by the Lessor.

**DELAWARE INSURANCE** – To the fullest extent permitted by Delaware law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes all risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured's, including additional insured's, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

**DISTRICT OF COLUMBIA INDEMNIFICATION AND RELEASE PROVISIONS** – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL DISTRICT OF COLUMBIA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY DISTRICT OF COLUMBIA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSEE’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY DISTRICT OF COLUMBIA LAW. Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or
The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

DISTRICT OF COLUMBIA INSURANCE – To the fullest extent permitted by District of Colombia, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to provide at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any
necessary endorsements added to the insurance policies applicable to this lease.

**FLORIDA INDEMNIFICATION AND RELEASE PROVISIONS** — — IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL FLORIDA LAWS including FL §725.06, AND TO THE FULLEST EXTENT PERMITTED BY FLORIDA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY FLORIDA LAW. — — Customer’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, reasonable attorneys’ fees and costs of settlement. Customer shall be required to indemnify Contractor for Contractor’s own negligence or fault, whether the negligence or fault of the Contractor be direct, indirect or derivative in nature and whether the damages claimed are caused in whole or in part by the acts, errors or omissions of the Contractor its employees and agents. Furthermore, the indemnification above shall not be limited in any way by any limitation on the type of damage, compensation or benefits payable by or for the Customer under workers’ compensation acts, disability benefits acts, or other employee benefits acts. If this Crane Contractor Agreement is for the performance of work on a public project, Contractor’s indemnification obligations are further limited by FL ST §725.06(2) and (3). Specifically, on public projects Customer shall only indemnify, hold harmless and defend Contractor and its employees and agents from liabilities, damages, losses, and costs, including but not limited to, reasonable attorneys’ fees, to the extent caused by the negligence, recklessness or intentional wrong misconduct of Customer and persons employed or utilized by Customer in the performance of the public project. The Customer’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Contractor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning indemnification or procurement of insurance. If any word, phrase, or sentence of this paragraph or any other paragraph is declared invalid, then all other words, phrases, or sentences of all paragraphs of this contract shall stand. If this paragraph or any other paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Customer’s additional obligations hereunder, Customer shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Contractor, Contractor’s attorney’s, Contractor’s insurance carriers or Contractor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the Equipment, whether or not such accident involves personal injury, death or damage to the Equipment or other property or all of these. Pursuant to the provisions of FL ST § 725.06 the parties hereby agree that the indemnification obligations of the above paragraph are limited to the amount of $5,000,000.00. The parties hereby further agree that this limitation bears a commercially reasonable relationship to the contract and is incorporated as part of the project specifications or bid documents, if any, and further, that the amounts of the indemnification limitation specified herein bear a commercially reasonable relationship to the contract in light of the risks to person and property which may arise from or relate to the project and work contemplated by this agreement. The parties acknowledge and agree that in so far as commercially reasonable monetary limit of $5,000,000.00, among other factors, the parties specifically have taken into account the availability and cost of insurance for contractor’s such as the Contractor and the costs of other risk transference devices enumerated in this agreement , the limited scope of the Work of the Contractor, the risks associated with the Work of the Contractor (Crane Owner) from national standards including ASME Standard B30.5 (2014), the compensation paid to the Contractor, the safety requirements for this job and the other benefits exchanged between the parties including but not limited to reduced insurance costs by not having duplicative insurance in connection with this Subcontract. As noted above, the parties further agree that this section’s obligations along with insurance section’s requirements are hereby made a part of the Project specifications and bid documents. The Customer’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Contractor shall not operate to waive any of the above obligations. This provision is separate and distinct from any
other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of the Customer’s additional obligations hereunder, Customer shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Contractor. Contractor’s insurance carriers or Contractor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the agreement Equipment, whether or not such accident involves personal injury, death or damage to the agreement Equipment or other property or all of these. Customer and Contractor expressly acknowledge and agree that these indemnification provisions pertain only to claimed damages arising from this contract or its performance and, also, that these provisions shall not require Customer to indemnify Contractor for damages to persons or property caused in whole or in part by any act, error, or omission of a party other than: (a) Customer; (b) Customer’s contractors, sub-contractors, sub-sub-contractors, material men or agents or any tier or their respective employees. However, such indemnification shall not include claims of, or damages resulting from gross negligence or willful, wanton, or intentional misconduct of the Contractor or its officers, directors, agents or employees, or for statutory violations or punitive damages except and to the extent the statutory violations and punitive damages are caused by or result from the acts, errors or omissions of the Customer or any of Customer’s contractors, sub-contractors, sub-sub-contractors, materialmen or agents of any tier or their respective employees.

FLORIDA INSURANCE – To the fullest extent permitted by Florida law the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Customer shall procure the following coverages for Contractor (Crane Company): a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Customer’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Contractor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by Florida Law; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be made payable to Customer. Customer’s agreements to indemnify and hold Contractor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the
Customer may perform under this lease agreement without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Contractor's right to maintain any breach of contract action against the Customer. Customer hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Customer understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this subcontract.

GEORGIA INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL GEORGIA LAWS including GA Code §13-8-2, AND TO THE FULLEST EXTENT PERMITTED BY GEORGIA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR'S AND LESSEE'S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE'S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY GEORGIA LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor's own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, pursuant to Georgia Code §13-8-2, Lessee is not required to indemnify, hold harmless, insure, or defend the Lessor including its officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the Lessor, or its officers, agents, or employees. The indemnification above shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the Lessee under workers' compensation acts, disability benefits acts, or other employee benefits acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

GEORGIA INSURANCE – To the fullest extent permitted by Georgia law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment's arrival on the job site. Pursuant to GA Code § 13-8-2, the Lessee shall not be required to insure Lessor, including Lessor’s officers, agents, or employees against liability or claims for damages, losses, or expenses, including attorneys’ fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the Lessor or its officers, agents, or employees. The Lessee shall procure the following coverage’s for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverage with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s
insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by GA Code § 13-8-2; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. The Lessee can provide a project specific insurance policy for the above referenced commercial general liability insurance or may substitute a commercial general liability insurance policy with an owner’s or contractor’s protective insurance, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy as long as the policies provide the same or better coverages for the Equipment. In the event of loss on the Builder’s Risk policy, proceeds of property damage insurance on the Equipment shall first be made payable to Lessor before any person or entity receives a payout from the Builder’s Risk policy. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

HAWAII INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL HAWAII LAWS including HI Rev Statute § 431:10-222, AND TO THE FULLEST EXTENT PERMITTED BY HAWAII LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY HAWAII LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify Lessor for liability for bodily injury to person or damage to property caused by or resulting from the sole negligence or willful misconduct of the Lessor, the Lessor’s agents or employees. The Lessee’s obligations hereunder shall

Page 397
further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

HAWAII INSURANCE – To the fullest extent permitted by Hawaii, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the flood, explosion, overturn, accident, and acts of God liabilities assumed in the Indemnity section – but not be limited to, rights of subrogation and lien rights. The Lessee shall name as an additional insured, partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as additional insured; and o) all Lessee’s policies must include coverage for blanket insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above.

In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

IDAHO INDEMNIFICATION AND RELEASE PROVISIONS –– IT IS THE PARTIES INTENT THAT THIS PROVISION
IS SPECIFICALLY IN COMPLIANCE WITH ALL IDAHO LAWS including ID Rev Statute §29-114, AND TO THE FULLEST EXTENT PERMITTED BY IDAHO LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY IDAHO LAW. –– Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. However, the Lessee shall not be required to indemnify Lessor for liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the Lessor, the Lessor’s agents, employees or indemnitees. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

| IDAHO INSURANCE – To the fullest extent permitted by Idaho, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor's policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in |
addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

ILLINOIS INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES' INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL ILLINOIS LAWS including 740 ILCS 35/1, (Indemnification Act), AND TO THE FULLEST EXTENT PERMITTED BY ILLINOIS LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY ILLINOIS LAW. -- Customer's duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys' fees and costs of settlement (See also Section 2 below). Furthermore, the Customer WAIVES ANY RIGHT OF CONTRIBUTION AND WAIVES ANY AFFIRMATIVE DEFENSE THAT IT MAY HAVE PURSUANT TO Kotecki vs. Cyclops and/or the Illinois Worker's Compensation Act and in addition to the above requirements of indemnification, Customer shall indemnify and hold harmless the Lessor, Lessor's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Lessee's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property including loss of use therefrom, which is caused in whole or in part by negligent acts or omissions of the Lessee, the Lessee's subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, loss, or expense is caused in part by a party indemnified hereunder. In compliance with the Indemnification Act, Lessee shall not be required to indemnify Lessor for Lessor's own negligence. The indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker's compensation acts, disability benefit acts, any and all liability insurance, or other employee benefit acts. This provision is separate and distinct from any other phrase, sentence, provision or paragraph in this contract, including any phrase, sentence, provision or paragraph concerning indemnification and procurement of insurance. If any part of any paragraph is declared invalid, then all other parts of all paragraphs of this contract shall stand and not be affected.

ILLINOIS INSURANCE -- To the fullest extent permitted by Illinois, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability ("CGL") insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder's risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured,
Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; 
g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed hereunder and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

INDIANA INDEMNIFICATION, RELEASE PROVISIONS AND RISK OF LOSS FOR SERVICE VENDOR: – – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL INDIANA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY INDIANA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY INDIANA LAW. – – It is the parties’ intent that this contract comply with all applicable Indiana laws, the parties further agree after consulting with their respective attorney’s that the Lessor is not considered to be a contractor or subcontractor but a vendor, and to the fullest extent permitted by Indiana law Lessor and Lessee agree that this agreement is a service contract and not a construction contract. Lessee agrees to indemnify Lessor for Lessor’s own fault or negligence for any claim arising out of Lessee’s work, whether the negligence or fault of the Lessor is direct, indirect or derivative in nature. Lessee’s duty to indemnify shall include all costs or expenses arising out of or connected with all claims specified herein, including all court and or arbitration costs, filing fees, attorney’s fees, duty to defend and costs of settlement and Lessee further agrees to indemnify Lessor against all loss of or damage to the Equipment which occurs while said Equipment is on Lessee’s job site. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any
kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

If this contract is found to be a "construction contract" within the meaning of 26-2-5-1, then the following indemnify provision shall apply:

**INDIANA INDEMNIFICATION AND RELEASE PROVISIONS** – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL INDIANA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY INDIANA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY INDIANA LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify Lessor for death or bodily injury to persons; (2) injury to property; (3) design defects; or any combination of these from the sole negligence or willful misconduct of the Lessor, the Lessor's agents, servants, or independent contractors who are directly responsible to the Lessor. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

**INDIANA INSURANCE** – To the fullest extent permitted by Indiana, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessor shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 04 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of
Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

IOWA INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL IOWA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY IOWA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY IOWA LAW. – – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not indemnify, hold harmless, or defend Lessor or Lessor’s employees, consultants, agents, or others for whom Lessor is responsible, against liability, claims, damages, losses, or expenses, including attorney’s fees, to the extent caused by or resulting from the negligent act or omission of the Lessor or Lessor’s employees, consultants, agents, or others for whom the Lessor is responsible. However, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker’s compensation acts, disability benefit acts, or other employee benefit acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance, and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

IOWA INSURANCE – To the fullest extent permitted by Iowa, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory
insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

KANSAS INDEMNIFICATION, RELEASE PROVISIONS AND RISK OF LOSS for SERVICE VENDOR: LESSOR AND LESSEE AGREE AND INTENT THAT THIS AGREEMENT IS A SERVICE CONTRACT AND NOT A CONSTRUCTION CONTRACT. – – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL KANSAS LAWS, AND TO THE FULLEST EXTENT PERMITTED BY KANSAS LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY KANSAS LAW. – – – Lessee agrees to indemnify Lessor for Lessor’s own fault or negligence for any claim arising out of Lessee’s work, whether the negligence or fault of the Lessor is direct, indirect or derivative in nature. Lessee’s duty to indemnify shall include all costs or expenses arising out of or connected with all claims specified herein, including all court and or arbitration costs, filing fees, attorney’s fees, duty to defend and costs of settlement and Lessee further agrees to indemnify Lessor against all loss of or damage to the Equipment which occurs while said Equipment is on Lessee’s job site. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is
declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

However, if this agreement is found to be a construction contract, then the following indemnity provision shall apply: IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL KANSAS LAWS, AND TO THE FULLEST EXTENT PERMITTED BY KANSAS LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY KANSAS LAW. – – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Pursuant to K.S.A. § 16-121, Lessee shall not be required to indemnify Lessor for Lessor’s own negligence, intentional acts, or omissions. However, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker’s compensation acts, disability benefit acts, or other employee benefit acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance, and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning indemnification and procurement of insurance. If any word, phrase, or sentence of this paragraph or any other paragraph is declared invalid, then all other words, phrases, or sentences of all paragraphs of this contract shall stand. If this paragraph or any other paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

KANSAS VENDOR INSURANCE – To the fullest extent permitted by Kansas, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured,
Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by K.S.A. § 16-121; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

However, if this agreement is found to be a construction contract, then the following Insurance provision shall apply: KANSAS INSURANCE –To the fullest extent permitted by Kansas law, and in accordance with the parties intent to provide the Lessor with the broadest coverage possible, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. Pursuant to K.S.A. § 16-121 (c), Lessee shall not be required to provide liability coverage to Lessor, as an additional insured, for Lessor’s own negligence or intentional acts or omissions. In all other circumstances, Lessee shall procure the following coverages for Lessor: a.) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) commercial general liability (CGL)insurance on an occurrence basis, including bodily injury and property damage coverage with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by K.S.A. § 16-121; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of
Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

KENTUCKY INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL KENTUCKY LAWS, AND TO THE FULLEST EXTENT PERMITTED BY KENTUCKY LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY KENTUCKY LAW. – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not indemnify or hold harmless Lessor from Lessor’s own negligence or from the negligence of Lessor’s agents, or employees. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

KENTUCKY INSURANCE – To the fullest extent permitted by Kentucky, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated
partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

LOUISIANA INDEMNIFICATION AND RELEASE PROVISIONS FOR ALL TRANSPORTATION CONTRACTS AND RIGGING/CONSTRUCTION CONTRACTS PURSUANT TO LSA-R.S. 9:2780.1 EXCEPT FOR CONTRACTS FOR WELLS FOR OIL, GAS, OR WATER, OR DRILLING FOR MATERIAL PURSUANT TO LSA-R.S. 9:2780)– — IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL LOUISIANA LAWS including LSA-R.S. 9:2780.1, AND TO THE FULLEST EXTENT PERMITTED BY LOUISIANA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY LOUISIANA LAW. — — Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorney’s fees and costs of settlement. Lessee shall not be required to indemnify Lessor, Lessor’s agents or employees, or any third parties over which Lessee has no control, or for Lessor’s own negligence, intentional acts or omissions or the negligence, intentional acts or omissions of any agent or employee of Lessor. However, the indemnification above shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the Lessee under workers’ compensation acts, disability benefits acts, or other employee benefits acts. It is the intention that the Lessee has recovered the cost of required insurance in the price for this contract, Lessee’s liability shall be limited to the amount of the proceeds that were payable under the insurance policies Lessee was required to obtain. Such insurance coverage is provided only when the indemnitor is at least partially at fault or otherwise liable for damages ex delicto or quasi ex delicto. If the indemnification and insurance sought is limited by applicable Louisiana law and this is where the work is being performed, then the said indemnification and insurance herein shall be similarly limited to conform to such law, it being the intention of the parties that this indemnification and insurance procured for the indemnitee shall be as broad as possible under applicable Louisiana law. If this paragraph or any clause or sentence is declared invalid, then all other paragraphs, clauses and sentences of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or
other items) initiated by the Lessor, Lessor's insurance carriers or Lessor's third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these. This section applies to this agreement, but only if this agreement is determined to be a construction contract.

LOUISIANA INDEMNIFICATION AND RELEASE PROVISIONS (FOR ALL CONTRACTS RELATED TO WELLS FOR OIL, GAS, OR WATER, OR DRILLING FOR MINERALS PURSUANT TO LSA-R.S. §9:2780) — IT IS THE PARTIES' INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL LOUISIANA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY LOUISIANA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR'S AND LESSEE'S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE'S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES' INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY LOUISIANA LAW. — Lessee's duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys' fees and costs of settlement. Lessee shall not be required to indemnify Lessor for Lessor's own or concurrent negligence. However, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker's compensation acts, disability benefit acts, or other employee benefit acts. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning indemnification and procurement of insurance. If any paragraph, sentence or clause is declared invalid, then all other paragraphs, sentences or clause of this contract shall stand.

Lessee agrees to indemnify, defend and hold harmless the Lessor for any non-construction or non-transportation work to the fullest extent permitted by law, including Lessor's own fault or negligence; Lessee understands that Lessor is providing a service as a vendor and is not a contractor and as such LSA-R.S. §9:2780.1 does not apply to non-construction work performed by Lessor. To the extent that it is determined LSA-R.S. §9:2780.1 does apply, the indemnity shall be properly limited to comply with same.

The parties expressly agree that this indemnification agreement may limited by the above Louisiana statutes when construction work is being provided, however it is the parties intent that the following applies to work performed by the Lessee:

a. full indemnity in the event liability is imposed against the indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and
b. partial indemnity in the event of any actual negligence on the part of the indemnitees either causing or contributing to the underlying claim, in which case indemnification will be limited to any liability imposed over and above the percentage attributable to actual fault whether by statute, by operation of law, or otherwise. Where partial indemnity is provided under this agreement costs, professional fees, attorney's fees, expenses, disbursements, etc. shall be indemnified on a pro rata basis.

Indemnification under this paragraph shall operate whether or not indemnitor has placed and maintained the Insurance specified herein. Recovery of attorneys' fees, costs, court costs, expenses and disbursements hereunder shall include all those attorneys' fees, costs, court costs, expenses and disbursements incurred in the defense of the underlying claim, in the enforcement of this agreement, in the prosecution of any claim for indemnification hereunder, and in pursuit of any claim for insurance coverage required. Indemnitor shall also keep Indemnitee subject to such suit, demand or proceeding fully informed as to the progress of such defense and afford all Indemnitees, an opportunity to participate on an equal basis with indemnitor in the defense or settlement of such matter.

LOUISIANA INSURANCE — To the fullest extent permitted by Louisiana, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment's arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits.
of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessee when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

MAINE INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL MAINE LAWS, AND TO THE FULLEST EXTENT PERMITTED BY MAINE LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY MAINE LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessee shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s
Insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these. Lessee shall indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor is direct, indirect or derivative in nature.

MAINE INSURANCE – To the fullest extent permitted by Maine, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be named as an additional insured; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessee. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

MARYLAND INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL MARYLAND LAWS, AND TO THE FULLEST EXTENT PERMITTED BY MARYLAND LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY
MARYLAND LAW. -- Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee is not required to indemnify Lessor against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the Lessor, or the agents or employees of the Lessor. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessee’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

MARYLAND INSURANCE -- To the fullest extent permitted by Maryland, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability
policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

**MASSACHUSETTS INDEMNIFICATION AND RELEASE PROVISIONS** – It is the parties' intent that this provision is specifically in compliance with all Massachusetts laws including MA Ch. 149 §29C, and to the fullest extent permitted by Massachusetts law, Lessee agrees to indemnify, release, and save Lessor, its employees and agents harmless from all claims or loss for death or injury to persons including Lessor's and Lessee's employees, of all loss, damage or injury to property, including the equipment, arising in any manner out of Lessee's operation or use of the equipment. It is the parties’ intent that this duty to indemnify is as broad as permitted by Massachusetts law. – Lessee's duty to indemnify hereunder shall include costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys' fees and costs of settlement. Lessee shall not be required to indemnify Lessor for injury to persons or damage to property not caused by the Lessor or its employees, agents or subcontractors. The Lessee's obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee's additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys' fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor's third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

**MASSACHUSETTS INSURANCE** – To the fullest extent permitted by Massachusetts, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment's arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contribution commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contribution insurance in the amount of at least $5,000,000 and Lessee's primary and excess/umbrella policies must be endorsed so that they are primary and non-contribution to all of Lessor's insurance policies; d) inland marine/all-risk and or builder's risk which includes an all-risk physical damage insurance, on a primary non-contribution basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor's officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor's benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lesser's policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee's policies; l) all Lessee's policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured's, including additional insured's, prior to cancellation or non-renewal; m) all Lessee's policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee's policies must remove the
"employer's liability exclusion" for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed hereunder and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

**MICHIGAN INDEMNIFICATION AND RELEASE PROVISIONS** — IT IS THE PARTIES' INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL MICHIGAN LAWS, AND TO THE FULLEST EXTENT PERMITTED BY MICHIGAN LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY MICHIGAN LAW. — Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify Lessor for liability arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the Lessor, his agents or employees. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand.

Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

**MICHIGAN INSURANCE** — To the fullest extent permitted by Michigan, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability ("CGL") insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000 in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for
all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

MINNESOTA INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL MINNESOTA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY MINNESOTA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY MINNESOTA LAW. – – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not indemnify the Lessor if the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the Lessor or the Lessor’s independent contractors, agents, employees, or delegates. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.
MINNESOTA INSURANCE – To the fullest extent permitted by Minnesota, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

MISSISSIPPI INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL MISSISSIPPI LAWS, AND TO THE FULLEST EXTENT PERMITTED BY MISSISSIPPI LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY MISSISSIPPI LAW. – – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to indemnify or hold harmless Lessor for Lessor’s own negligence The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and
**MISSISSIPPI INSURANCE** – To the fullest extent permitted by Mississippi, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment's arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability ("CGL") insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessor's primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor's insurance policies; d) inland marine/all-risk and or builder's risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor's officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor's benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor's policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee's policies; l) all Lessee's policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured's, including additional insured's, prior to cancellation or non-renewal; m) all Lessee's policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee's policies must remove the “employer's liability exclusion” for all additional insureds; and o) all Lessee's policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

**MISSOURI INDEMNIFICATION AND RELEASE PROVISIONS** – It is the parties intent that this provision is specifically in compliance with all Missouri laws, and to the fullest extent
PERMITTED BY MISSOURI LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY MISSOURI LAW. - – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys' fees and costs of settlement. Pursuant to V.A.M.S. 434.100, Lessee shall not be required to indemnify or hold harmless Lessor for Lessor’s own negligence or wrongdoing. However, pursuant to V.A.M.S. 434.100 (2) (1) The Lessee shall indemnify and hold harmless Lessor from the Lessee’s own negligence or wrongdoing and the negligence or wrongdoing of the Lessee’s subcontractors and suppliers of any tier. The Lessee's obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

MISSOURI INSURANCE – To the fullest extent permitted by Missouri, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to
Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

MONTANA INDEMNIFICATION AND RELEASE PROVISIONS –– IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL MONTANA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY MONTANA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY MONTANA LAW. –– Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, reasonable attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, pursuant to MCA §28-2-2111, Lessee is not required to indemnify, hold harmless, insure, or defend the Lessor or the Lessor’s officers, employees, or agents for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the Lessor or the Lessor’s officers, employees, or agents. Lessee’s indemnity obligations require the Lessee to indemnify, hold harmless, and insure the Lessor and the Lessor’s officers, employees, or agents for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, only to the extent that the liability, damages, losses, or costs are caused by the negligence, recklessness, or intentional misconduct of a third party or of the Lessor or the Lessee’s officers, employees, or agents. The indemnification above shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the Lessee under workers’ compensation acts, disability benefits acts, or other employee benefits acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

MONTANA INSURANCE –– To the fullest extent permitted by MCA §28-2-2111, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall not be required to insure Lessor, including Lessor’s officers, agents, or employees against liability or claims for damages, losses, or expenses, including reasonable attorneys’ fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from negligence of the Lessor or its officers, agents, or employees. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverage with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella...
following form non-contributory insurance in the amount of at least $5,000,000 and Lessee's primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor's insurance policies; d) inland marine/all-risk and or builder's risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor's officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by by MCA §28-2-2111; h) Lessee shall provide punitive damage coverage for Lessor's benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor's policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee's policies; l) all Lessee's policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured's, including additional insured's, prior to cancellation or non-renewal; m) all Lessee's policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee's policies must remove the “employer's liability exclusion” for all additional insureds; and o) all Lessee's policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. The Lessee is required to provide a project specific insurance policy for the above referenced commercial general liability insurance and excess/umbrella or the Lessee may substitute a commercial general liability insurance policy with an owner's and contractor's protective insurance or a project management protective liability insurance policy. In the event of loss, proceeds of property damage insurance on the Equipment shall first be made payable to Lessor before any person or entity receives a payout from the Builder's Risk policy. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

NEBRASKA INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NEBRASKA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY NEBRASKA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR'S AND LESSEE'S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE'S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES' INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NEBRASKA LAW. -- Lessee's duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys' fees and costs of settlement. Lessee shall not be required to indemnify Lessor for Lessor's own negligence. The Lessee's obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial
indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

NEBRASKA INSURANCE – To the fullest extent permitted by Nebraska, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

NEVADA INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NEVADA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY NEVADA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT,
ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NEVADA LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage anddown time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

NEVADA INSURANCE – To the fullest extent permitted by Nevada, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability
NEW HAMPSHIRE INSURANCE – To the fullest extent permitted by New Hampshire, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and/or builder's risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any

NEW HAMPSHIRE INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NEW HAMPSHIRE LAWS, AND TO THE FULLEST EXTENT PERMITTED BY NEW HAMPSHIRE LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NEW HAMPSHIRE LAW. – – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to indemnify Lessor for injury to person or damage to property not caused by Lessee or Lessee’s employees, agents, or subcontractors. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.
exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

NEW JERSEY INDEMNIFICATION AND RELEASE PROVISIONS –– IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NEW JERSEY LAWS, AND TO THE FULLEST EXTENT PERMITTED BY NEW JERSEY LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NEW JERSEY LAW. –– Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify or hold harmless the Lessor against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the Lessor, its agents, or employees. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

NEW JERSEY INSURANCE – To the fullest extent permitted by New Jersey, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000 in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for
all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

NEW MEXICO INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NEW MEXICO LAWS, AND TO THE FULLEST EXTENT PERMITTED BY NEW MEXICO LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATIONS OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NEW MEXICO LAW. -- Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Pursuant to NM ST § 56-7-1, Lessee shall not be required to indemnify, hold harmless, insure, or defend against liability, claims, damages, losses or expenses, including attorneys’ fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the Lessor, its employees or agents. However, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker’s compensation acts, disability benefit acts, or other employee benefit acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance, and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning indemnification and procurement of insurance. If any word, phrase, or sentence of this paragraph or any other paragraph is declared invalid, then all other words, phrases, or sentences of all paragraphs of this contract shall stand.

NEW MEXICO INSURANCE To the fullest extent permitted by New Mexico, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. Pursuant to NM ST § 56-7-1, Lessee shall not be required to indemnify, hold harmless, insure, or defend against liability, claims, damages, losses
or expenses, including attorneys’ fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the Lessor, its employees or agents. Notwithstanding the above, the Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2028 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by NM ST § 56-7-1; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of the Builders Risk policy on the Equipment shall be made payable to Lessor. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

NEW YORK INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NEW YORK LAWS, AND TO THE FULLEST EXTENT PERMITTED BY NEW YORK LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NEW YORK LAW. -- Lessee's duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys' fees and costs of settlement. Lessee shall not be required to indemnify or hold harmless Lessor against liability for damage arising out of bodily injury to
persons or damage to property contributed to, caused by or resulting from the negligence of the Lessor its agents or employees or indemnitees, whether such negligence be in whole or in part. This restriction on indemnity shall not affect the validity of any insurance contract, workers’ compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude Lessor requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the Lessee, whether or not the Lessor is partially negligent. **The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.**

NEW YORK INSURANCE – To the fullest extent permitted by New York, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability
policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

NORTH CAROLINA INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NORTH CAROLINA LAWS including NC statute §22B-1, AND TO THE FULLEST EXTENT PERMITTED BY NORTH CAROLINA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NORTH CAROLINA LAW. – – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to indemnify or hold harmless Lessor for Lessor’s independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the Lessor or the Lessor’s independent contractors, agents, employees or indemnitees. However, the Lessee shall indemnify and hold harmless the Lessor from the sole negligence of the Lessee, or the Lessee’s independent contractors, agents, employees or indemnitees. This provision shall not affect an insurance contract, workers’ compensation, or any other agreement issued by an insurer. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

NORTH CAROLINA INSURANCE – To the fullest extent permitted by North Carolina, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss
Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor's policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

NORTH DAKOTA INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL NORTH DAKOTA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY NORTH DAKOTA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR'S AND LESSEE'S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES' INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY NORTH DAKOTA LAW. – Lessee's duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. The Lessee's obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

NORTH DAKOTA INSURANCE – To the fullest extent permitted by North Dakota, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder's risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and
all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

OHIO INDEMNIFICATION AND RELEASE PROVISIONS — IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL OHIO LAWS, AND TO THE FULLEST EXTENT PERMITTED BY OHIO LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY OHIO LAW. —— Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. It has been mutually agreed by the parties (Lessor and Lessee) that Lessee waives its immunity under the Worker’s Compensation Act, Title XLI, Chapter 4123, as allowed under R.C. 4123.74. Lessee shall not be required to indemnify Lessor, its independent contractors, agents, employees, or Lessor’s indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the Lessor its independent contractors, agents, employees, or Lessor’s indemnitees. However, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker’s compensation acts, disability benefit acts, or other employee benefit acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance, and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning indemnification and procurement of insurance. If any word, phrase, or sentence of this paragraph or any other paragraph is declared invalid, then all other words, phrases, or sentences of all paragraphs of this contract shall stand. If this paragraph or any other paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall
bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private
investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment,
and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s
third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or
indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased
Equipment or other property or all of these.

OHIO INSURANCE –To the fullest extent permitted by Ohio, the Lessee agrees to purchase, maintain and carry the
following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following
coverages for Lessor: a.) worker's compensation and employer's liability insurance, with limits of at least the statutory
minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance
on an occurrence basis, including bodily injury and property damage coverages with minimum limits of
$1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory
insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed
so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or
builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the
full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes,
including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God
occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for
all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured,
Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated
partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional
insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to
Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20
26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent
required by Ohio Law; h) Lessee shall provide punitive damage coverage for Lessor's benefit on all liability policies,
unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j)
Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of
anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be
endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional
insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion,
collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion”
for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the
obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. Lessee's
agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an
alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive
any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining
the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain
any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and
any and all lien rights (including those arising from worker's compensation/employer's liability policies or other
employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its
insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that
this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any
necessary endorsements added to the insurance policies applicable to this lease.

OKLAHOMA INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES INTENT THAT THIS
PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL OKLAHOMA LAWS, AND TO THE FULLEST EXTENT
PERMITTED BY OKLAHOMA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS
EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS
INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY,
INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE
To the fullest extent permitted by Oklahoma the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site: Pursuant to OK ST T. 15 § 221, Lessee shall not be required to indemnify, insure, defend or hold harmless another entity against liability for damage arising out of death or bodily injury to persons, or damage to property, which arises out of the negligence or fault of the Lessor, its agents, representatives, subcontractors, or suppliers. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

Oklahoma Insurance – To the fullest extent permitted by Oklahoma the Lessee agrees to purchase, maintain and carry the following insurance coverages:

1. **Worker’s Compensation and Employer’s Liability Insurance**: With limits of at least the statutory minimum or $1,000,000, whichever is greater.
2. **Primary Non-Contributory Commercial General Liability (CGL)**: On an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate.
3. **Excess/Umbrella Following Form Non-Contributory Insurance**: In the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies.
4. **Inland Marine/All-Risk and Builder’s Risk**: To cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term.
5. **All Policies**: To be written by insurance companies acceptable to the Lessor; for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured. Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by Oklahoma Law.
6. Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; and
   i. Lessee shall name Lessor as a Primary Loss Payee on all insurance policies.
    j. Lessee shall provide all insurance certificates to Lessor when requested.
   k. All of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies.
   l. All Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal.
   m. All Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); and
   n. All Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. The Lessee is required to provide a project specific insurance policy for the above.
referred commercial general liability insurance or may substitute a commercial general liability insurance policy with an owner's or contractor's protective insurance, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy which is in compliance with OK ST T. 15 § 221. In the event of loss, proceeds of property damage insurance on the Leased Equipment shall be made payable to Lessor before any other payments are made. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurer on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

OREGON INDEMNIFICATION/INSURANCE, IT IS THE PARTIES INTENT THAT ALL PROVISIONS OF THIS AGREEMENT ARE IN COMPLIANCE WITH O.R.S. STATUTE §30.140

OREGON INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL OREGON LAWS, AND TO THE FULLEST EXTENT PERMITTED BY OREGON LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY OREGON LAW. – Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Pursuant to O.R.S. § 30.140, Lessee, Lessee’s surety or insurer shall not be obligated to indemnify Lessor against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the Lessor. However, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker's compensation acts, disability benefit acts, or other employee benefit acts. The Lessee's obligations hereunder shall further not be limited by the amount of its liability insurance, and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning indemnification and procurement of insurance. If any word, phrase, or sentence of this paragraph or any other paragraph is declared invalid, then all other words, phrases, or sentences of all paragraphs of this contract shall stand. If this paragraph or any other paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee's additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

OREGON INSURANCE – To the fullest extent permitted by Oregon, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. Pursuant to O.R.S. 30.140, Lessee, Lessee’s surety or insurer shall not be obligated to provide coverage to Lessor against liability for damage arising out of death or bodily injury to persons or damage to property arising out of the fault of the Lessor, or the fault of the Lessor's agents, representatives or subcontractors. Notwithstanding the above, the Lessee shall procure the
following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by O.R.S. 30.140; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

PENNSYLVANIA INDEMNIFICATION AND RELEASE PROVISIONS -- -- IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL PENNSYLVANIA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY PENNSYLVANIA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSEE’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY PENNSYLVANIA LAW. -- -- Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee agrees to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. Further, Lessee shall be required to indemnify Lessor for any and all of Lessor’s own negligence or fault including gross negligence of the Lessor or Lessor’s employees, agents or any other person. However, the indemnification above shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the Lessee under workers’ compensation acts, disability benefits acts, or other employee benefits acts, including but not limited to the
Pennsylvania Worker’s Compensation Act, 77P.S.§ 481. Lessee waives any immunity provided pursuant to the Act and any immunities of any similar Act or statute. The Lessee’s obligation to indemnify Lessor shall survive the termination of this agreement. The Lessee hereby releases Lessor and all of its employees, agents, workman, officers or shareholders of and from any claim for damages or injury that may occur or have occurred as a result of such operations, including but not limited to claims caused or alleged to have been caused in whole or in part by the acts or negligence of the Lessor, its employees, agents, workman, officers or shareholders. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

**PENNSYLVANIA INSURANCE** – To the fullest extent permitted by Pennsylvania the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the
Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

RHODE ISLAND INDEMNIFICATION AND RELEASE PROVISIONS — IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL RHODE ISLAND LAWS, AND TO THE FULLEST EXTENT PERMITTED BY RHODE ISLAND LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY RHODE ISLAND LAW. — Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to indemnify Lessor, or Lessor’s independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons, or damage to property, proximately caused by or resulting from the negligence of Lessor or Lessor’s independent contractors, agents, employees, or indemnitees. However, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damage, compensation, or benefits payable by or for the Lessee under worker’s compensation acts, disability benefit acts, or other employee benefit acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance, and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning indemnification and procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

RHODE ISLAND INSURANCE — To the fullest extent permitted by Rhode Island the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) the Lessee must use the following ISO endorsements at a minimum (ISO Forms CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, CG 24 04 05 09) which provide various coverages and also provide additional insured status for the Lessor, and Lessor’s officers, directors, shareholders, members, managers, partners and employees along with all affiliated.
partnerships, joint ventures, corporations of Lessor and anyone else who Lessor is required to name as an additional insured, any and all excess/umbrella policies that must also follow form of the CGL policy; g) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies unless prohibited by state law; h) Lessee shall name Lessor as a Loss Payee on all insurance policies; i) Lessee shall provide all insurance certificates to Lessor when requested; j) all policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s including additional insured’s prior to cancellation or nonrenewal; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure are excess over all of Lessee’s policies; l) all policies must remove any exclusion for explosion, collapse and underground operations (XCU) and all policies must remove the “employer’s liability exclusion” for all additional insureds; m) all policies must include coverage for blanket contractual liability for the obligations assumed hereunder and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

SOUTH CAROLINA INDEMNIFICATION AND RELEASE PROVISIONS —— IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL SOUTH CAROLINA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY SOUTH CAROLINA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY SOUTH CAROLINA LAW. —— Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify Lessor for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of Lessor, its independent contractors, agents, employees, or indemnitees. Nothing contained in this section shall affect a promise or agreement whereby the Lessee shall indemnify or hold harmless the Lessor or the Lessor’s independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the Lessee, its agents or employees. The provisions of this section shall not affect any insurance contract or workers’ compensation agreement. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.
SOUTH CAROLINA INSURANCE – To the fullest extent permitted by South Carolina the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

SOUTH DAKOTA INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL SOUTH DAKOTA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY SOUTH DAKOTA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY SOUTH DAKOTA LAW. -- Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to indemnify or hold harmless Lessor against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of Lessor or its agents, employees, or indemnitees. The Lessee’s obligations hereunder shall further not be limited by the
amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this lease shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

SOUTH DAKOTA INSURANCE – To the fullest extent permitted by South Dakota the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include the following ISO endorsements to provide additional insured status and coverage to Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

TENNESSEE INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES INTENT THAT THIS
PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL TENNESSEE LAWS, AND TO THE FULLEST EXTENT PERMITTED BY TENNESSEE LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY TENNESSEE LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify nor hold harmless the Lessor against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the Lessor, the Lessor’s agents or employees or indemnitees The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

TENNESSEE INSURANCE – To the fullest extent permitted by Tennessee the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 28 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 30 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section.
above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

TEXAS INDEMNIFICATION AND RELEASE PROVISIONS (FOR ALL CONTRACTS EXCEPT FOR CONTRACTS PERTAINING TO A WELL FOR OIL, GAS, OR WATER OR TO MINE FOR A MINERAL) –– IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL TEXAS LAWS, AND TO THE FULLEST EXTENT PERMITTED BY TEXAS LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY TEXAS LAW. –– LESSEE’S DUTY TO INDEMNIFY HEREUNDER SHALL INCLUDE ALL COSTS OR EXPENSES ARISING OUT OF ALL CLAIMS SPECIFIED HEREIN, INCLUDING ALL COURT AND/OR ARBITRATION COSTS, FILING FEES, ATTORNEYS’ FEES AND COSTS OF SETTLEMENT. PURSUANT TO V.A.T.S. INSURANCE CODE §151.102 LESSEE SHALL NOT BE REQUIRED TO INDEMNIFY, HOLD HARMLESS, OR DEFEND ANY PARTY AGAINST A CLAIM CAUSED BY THE NEGLIGENCE OR FAULT, THE BREACH OR VIOLATION OF A STATUTE, ORDINANCE, GOVERNMENTAL REGULATION, STANDARD, OR RULE, OR THE BREACH OF CONTRACT OF THE LESSOR, ITS AGENT OR EMPLOYEE, OR ANY THIRD PARTY UNDER THE CONTROL OR SUPERVISION OF THE LESSOR, OTHER THAN THE LESSEE OR ITS AGENT, EMPLOYEE, OR SUBCONTRACTOR OF ANY TIER. HOWEVER, THE INDEMNIFICATION OBLIGATION ABOVE SHALL NOT BE LIMITED IN ANY WAY BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGE, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR THE LESSEE UNDER WORKER’S COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE LESSEE’S OBLIGATIONS HEREUNDER SHALL FURTHER NOT BE LIMITED BY THE AMOUNT OF ITS LIABILITY INSURANCE AND THE PURCHASE OF SUCH INSURANCE FOR LESSOR SHALL NOT OPERATE TO WAIVE ANY OF THE ABOVE OBLIGATIONS. THIS PROVISION IS SEPARATE AND DISTINCT FROM ANY OTHER PROVISION OR PARAGRAPH IN THIS CONTRACT, INCLUDING ANY PROVISION OR PARAGRAPH CONCERNING PARTIAL INDEMNIFICATION AND PROCUREMENT OF INSURANCE.

MUTUAL INDEMNIFICATION (ONLY FOR CONTRACTS PERTAINING TO A WELL FOR OIL, GAS, OR WATER, OR TO MINE FOR A MINERAL, PURSUANT TO V.T.C.A. CIVIL PRACTICE CODE §127.001-127.007) – TO THE FULLEST EXTENT PERMITTED BY LAW, LESSOR AND LESSEE AGREE TO INDEMNIFY EACH OTHER AND EACH OTHER’S CONTRACTORS AND THEIR EMPLOYEES AGAINST LOSS, LIABILITY OR DAMAGES ARISING IN CONNECTION WITH BODILY INJURY, DEATH, AND DAMAGE TO PROPERTY OF THEIR RESPECTIVE EMPLOYEES, CONTRACTORS OR THEIR EMPLOYEES, AND INVITEES OF EACH PARTY ARISING OUT OF OR RESULTING FROM THE PERFORMANCE OF THE CONTRACT. THIS PROVISION ONLY APPLIES TO CONTRACTS FOR A WELL FOR OIL, GAS, OR WATER, OR TO MINE FOR A MINERAL, PURSUANT TO V.T.C.A. CIVIL PRACTICE CODE §127.001-127.002. THIS PROVISION IS SEPARATE AND DISTINCT FROM ANY OTHER PROVISION OR PARAGRAPH CONCERNING INDEMNIFICATION AND PROCUREMENT OF INSURANCE. IF THIS PARAGRAPH IS DECLARED INVALID, THEN ALL OTHER PARAGRAPHS OF THIS CONTRACT SHALL STAND.
It is further the parties intention that if an action for damages is brought by an injured employee against a third party liable to pay damages for the injury under the Texas Labor Code that results in a judgment against the Lessor or a settlement by the Lessor, the employer is liable to the Lessor for reimbursement or damages based on the judgment or settlement since the employer/ Lessor executed, before the injury occurred, this written agreement with the third party to assume the liability of the Lessor. TEX. LAB. CODE ANN. § 417.004 (West 2015)

TENSA INSURANCE – To the fullest extent permitted by Texas, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. Pursuant to V.A.T.S. INSURANCE CODE §151.104, additional insured coverage shall be limited in scope, in the same manner as set forth in the INDEMNIFICATION section above, such that it shall not provide coverage which is prohibited for an agreement to indemnify, hold harmless, or defend. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance with minimum limits of $1,000,000 per occurrence and $2,000,000 in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee's primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies and Lessor's policies are excess to Lessee's policies; d) inland marine/all-risk and or builder's risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by V.A.T.S. INSURANCE CODE §151.104; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) All Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) All Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

UTAH INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL UTAH LAWS AND IN ACCORDANCE WITH U.C.A. 1953 § 13-8-1., AND TO THE FULLEST EXTENT PERMITTED BY UTAH LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND
SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY UTAH LAW. — Lessee’s duty to indemnify hereunder shall include costs or expenses arising out of claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall not be required to insure, hold harmless, indemnify, or defend Lessor or others against liability if the damages arise out of (A) bodily injury to a person; (B) damage to property; or (C) economic loss; and the damages are caused by or resulting from the fault of the Lessor its agents or employees. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

PARTIAL INSURANCE – To the fullest extent permitted by Utah law, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site and pursuant to U.C.A. 1953 § 13-8-1 the Lessee shall not be required to insure Lessor or others against liability if the damages arise out of (A) bodily injury to a person; (B) damage to property; or (C) economic loss; and the damages are caused by or resulting from the fault of the Lessor, or its agents or employees. The Lessee shall procure the following coverage’s for Lessor which are not prohibited by U.C.A. 1953 § 13-8-1: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general (“CGL”) liability insurance on an occurrence basis, including bodily injury and property damage coverage with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 20 33 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09 all must be used and modified but only to the extent required by U.C.A. 1953 § 13-8-1; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion"
for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. The Lessee may substitute a commercial general liability insurance policy with an owner’s and/or contractor’s protective insurance or a project management protective liability insurance policy. In the event of loss on the Builder’s Risk policy, proceeds of property damage insurance on the Equipment shall first be made payable to Lessor before any person or entity receives a payout from the Builder’s Risk policy. Lessee's agreements to indemnify and hold Lessor harmless from any liability, damage and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor's right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

VERMONT INDEMNIFICATION AND RELEASE PROVISIONS — IT IS THE PARTIES' INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL VERMONT LAWS, AND TO THE FULLEST EXTENT PERMITTED BY VERMONT LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR'S AND LESSEE'S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE'S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY VERMONT LAW. — Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

VERMONT INSURANCE — To the fullest extent permitted by Vermont, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability ("CGL") insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God.
occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

VIRGINIA INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL VIRGINIA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY VIRGINIA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY VIRGINIA LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify or hold harmless Lessor against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of this contract, caused by or resulting solely from the negligence of the Lessor or its agents or employees, however, this limitation shall not affect the validity of any insurance contract, workers’ compensation, or any agreement issued by an admitted insurer. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s
VIRGINIA INSURANCE – To the fullest extent permitted by Virginia, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

WASHINGTON INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL WASHINGTON LAWS, AND TO THE FULLEST EXTENT PERMITTED BY WASHINGTON LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY WASHINGTON LAW. – – Lessee’s duty to partially indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’
fees, duty to defend and costs of settlement, except that Lessee has no duty to indemnify, which includes duty to
defend liability, for damages arising out of such services or out of bodily injury to persons or damage to property
resulting from the sole negligence of the Lessor, its agents or employees. In accordance with RCWA 4.24.115 if
liability is caused by or resulting from the concurrent negligence of (i) the Lessor or the Lessor’s agents or employees,
and (ii) the Lessee or the Lessee’s agents or employees. Lessee shall indemnify Lessor only to the extent of Lessee’s
negligence. This agreement specifically and expressly provides therefor and waives the Lessee’s immunity under
industrial insurance, Title 51 RCW. This agreement specifically and expressly provides therefor and the waiver was
mutually negotiated by the parties pursuant to RCWA 4.24.115(b). The partial indemnification above shall not be
limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the
Lessee under workers’ compensation acts, disability benefits acts, or other employee benefits acts. The Lessee’s
obligations hereunder shall further not be limited by the amount of its liability insurance, and the purchase of such
insurance for Lessor shall not operate to waive any of the above obligations. Each provision, sentence and phrase is
separate and distinct from any other provision, sentence or phrase in all sections of this contract, including any
provision or paragraph concerning partial indemnification or procurement of insurance. If any paragraph, sentence or
phrase is declared invalid, then all other paragraphs, sentences or phrases of this contract shall stand.

WASHINGTON INSURANCE – To the fullest extent permitted by Washington, the Lessee agrees to purchase,
maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall
procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of
at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general
liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with
minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form
non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies
must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland
marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory
basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and
all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of
God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor;

f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured,
Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated
partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional
insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to
Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20
26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for
Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss
Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of
Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l)
all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all
insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any
exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the
“employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket
contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity
section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to
Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in
addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall
not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this
lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the
Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all
rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability
policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue
to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee
understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

| WEST VIRGINIA INDEMNIFICATION AND RELEASE PROVISIONS – – IT IS THE PARTIES’ INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL WEST VIRGINIA LAWS, AND TO THE FULLEST EXTENT PERMITTED BY WEST VIRGINIA LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY WEST VIRGINIA LAW. –– Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. However, the Lessee shall not be required to indemnify Lessor against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the Lessor, its agents or employees. The indemnification above shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the Lessee under workers’ compensation acts, disability benefits acts, or other employee benefits acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

| WEST VIRGINIA INSURANCE – To the fullest extent permitted by West Virginia the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss |
Payee on all insurance policies, j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s; prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

WISCONSIN INDEMNIFICATION AND RELEASE PROVISIONS – IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL WISCONSIN LAWS, AND TO THE FULLEST EXTENT PERMITTED BY WISCONSIN LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY WISCONSIN LAW. – – Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorneys’ fees and costs of settlement and all costs and attorney fees associated with enforcing this agreement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

WISCONSIN INSURANCE – To the fullest extent permitted by Wisconsin, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker’s compensation and employer’s liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or
builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker’s compensation/employer’s liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.

WYOMING INDEMNIFICATION AND RELEASE PROVISIONS -- IT IS THE PARTIES INTENT THAT THIS PROVISION IS SPECIFICALLY IN COMPLIANCE WITH ALL WYOMING LAWS, AND TO THE FULLEST EXTENT PERMITTED BY WYOMING LAW, LESSEE AGREES TO INDEMNIFY, RELEASE, AND SAVE LESSOR, ITS EMPLOYEES AND AGENTS HARMLESS FROM ALL CLAIMS OR LOSS FOR DEATH OR INJURY TO PERSONS INCLUDING LESSOR’S AND LESSEE’S EMPLOYEES, OF ALL LOSS, DAMAGE OR INJURY TO PROPERTY, INCLUDING THE EQUIPMENT, ARISING IN ANY MANNER OUT OF LESSEE’S OPERATION OR USE OF THE EQUIPMENT. IT IS THE PARTIES’ INTENT THAT THIS DUTY TO INDEMNIFY IS AS BROAD AS PERMITTED BY WYOMING LAW. -- Lessee’s duty to indemnify hereunder shall include all costs or expenses arising out of all claims specified herein, including all court and/or arbitration costs, filing fees, attorney’s fees and costs of settlement. Lessee shall be required to indemnify Lessor for Lessor’s own negligence or fault, whether the negligence or fault of the Lessor be direct, indirect or derivative in nature. The indemnification above shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the Lessee under workers’ compensation acts, disability benefits acts, or other employee benefits acts. The Lessee’s obligations hereunder shall further not be limited by the amount of its liability insurance and the purchase of such insurance for Lessor shall not operate to waive any of the above obligations. This provision is separate and distinct from any other provision or paragraph in this contract, including any provision or paragraph concerning partial indemnification or procurement of insurance. If this paragraph is declared invalid, then all other paragraphs of this contract shall stand. Furthermore, as part of Lessee’s additional obligations hereunder, Lessee shall bear the cost of any investigation or adjustment (including but not limited to, attorneys’ fees and costs, private investigator/adjuster fees and costs, expert fees and costs, costs of storage and down time for inability to use the Equipment, and costs of testing of property, Equipment, or other items) initiated by the Lessor, Lessor’s
insurance carriers or Lessor’s third party adjusters into any accident of any kind, when such accident, or occurrence happens, involving directly or indirectly the leased Equipment, whether or not such accident involves personal injury, death or damage to the leased Equipment or other property or all of these.

WYOMING INSURANCE – To the fullest extent permitted by Wyoming, the Lessee agrees to purchase, maintain and carry the following insurance coverages prior to the Equipment’s arrival on the job site. The Lessee shall procure the following coverages for Lessor: a) worker's compensation and employer's liability insurance, with limits of at least the statutory minimum or $1,000,000, whichever is greater; b) primary non-contributory commercial general liability (“CGL”) insurance on an occurrence basis, including bodily injury and property damage coverages with minimum limits of $1,000,000 per occurrence and $2,000,000, in the aggregate; c) excess/umbrella following form non-contributory insurance in the amount of at least $5,000,000 and Lessee’s primary and excess/umbrella policies must be endorsed so that they are primary and non-contributory to all of Lessor’s insurance policies; d) inland marine/all-risk and or builder’s risk which includes an all-risk physical damage insurance, on a primary non-contributory basis, to cover the full insurable value of the Equipment, including any boom or jib, for its loss or damage from any and all causes, including, but not limited to, overloading, misuse, fire, theft, flood, explosion, overturn, accident, and acts of God occurring during the rental term; e) all policies are to be written by insurance companies acceptable to the Lessor; f) for all liability insurance policies (including any excess/umbrella policies) Lessee shall name as an additional insured, Lessor and Lessor’s officers, directors, shareholders, members, managers, partners and employees, all affiliated partnerships, joint ventures and corporations of Lessor and anyone whom Lessor is required to name as an additional insured; g) Lessee shall use all of the following ISO endorsements to provide additional insured status and coverage to Lessor: CG 2001 04 13, CG 20 10 10 01, CG 20 37 10 01, CG 20 28 07 04, CG 20 34 03 97, CG 2033 10 01, CG 20 26 04 13, CG 2038 04 13, CG 25 03 03 97, or CG 24 04 05 09; h) Lessee shall provide punitive damage coverage for Lessor’s benefit on all liability policies, unless prohibited by state law; i) Lessee shall name Lessor as a Primary Loss Payee on all insurance policies; j) Lessee shall provide all insurance certificates to Lessor when requested; k) all of Lessor’s policies, and the policies of anyone Lessor is required to insure shall be excess over all of Lessee’s policies; l) all Lessee’s policies shall be endorsed to require the insurer to give at least thirty (30) days advance notice to all insured’s, including additional insured’s, prior to cancellation or non-renewal; m) all Lessee’s policies must remove any exclusion for explosion, collapse and underground operations (XCU); n) all Lessee’s policies must remove the “employer’s liability exclusion” for all additional insureds; and o) all Lessee’s policies must include coverage for blanket contractual liability for the obligations assumed here-under and also for the liabilities assumed in the Indemnity section above. In the event of loss, proceeds of property damage insurance on the Equipment shall be first made payable to Lessor. Lessee’s agreements to indemnify and hold Lessor harmless from any liability, damage, and loss are in addition to, and not an alternative to, these insurance provisions and the purchase of any of the above coverages shall not operate to waive any of the above indemnity provisions. To the extent that the Lessee may perform under this lease without obtaining the above coverages, such an occurrence shall not operate, in any way, as a waiver of the Lessor’s right to maintain any breach of contract action against the Lessee. Lessee hereby agrees to waive any and all rights of subrogation and any and all lien rights (including those arising from worker's compensation/employer's liability policies or other employee benefit programs, commercial general liability policies, or similar policies) which may accrue to it or its insurers. This shall include, but not be limited to, rights of subrogation and lien rights. The Lessee understands that this waiver shall bind its insurers of all levels, and agrees to put these insurers on notice of this waiver and to have any necessary endorsements added to the insurance policies applicable to this lease.
THURSDAY, JULY 27, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

EMPLOYMENT PRACTICES AND WORKPLACE LIABILITY
Guns In The Parking Lots And Employees Smoking Weed:
What Employers Need To Know In The New Frontier Of
Workplace Safety
Salon Rotary

Speakers:
Caroline J. Berdzik
Michelle R. Stewart,
Amy L. Miletich
Kay H. Hodge
Guns in the Parking Lots and Employees Smoking Weed: What Employers Need to Know in the New Frontier of Workplace Safety

2017 FDCC Annual Meeting
Montreux, Switzerland
July 27, 2017

Presented by:

Caroline J. Berdzik, Goldberg Segalla—Princeton, NJ

Michelle R. Stewart, Hinkle Law Firm LLC—Overland Park, KS

Amy L. Miletich, Miletich PC—Denver, CO

Kay H. Hodge, Stoneman, Chandler & Miller LLP—Boston, MA

Paul M. Finamore, Niles, Barton & Wilmer, LLP—Baltimore, MD
INTRODUCTION

Employers continue to be faced with new and evolving challenges as general societal issues work their way into workplaces across the country. Hot button issues, such as guns and drugs, have resulted in heightened risks for employers, both from an employee/employer relations perspective, as well as potential liability to third parties and possible litigation from employees. Unfortunately, like much of employment law, there are no simple answers to the issues posed by guns and marijuana in the workplace. Many of the issues require a state-specific review. This paper will provide an overview of the patchwork of laws throughout the country and recent case law involving guns and marijuana in the workplace and offer some practical tips for employers on how to navigate these tricky issues.

GUNS IN THE WORKPLACE

With the backdrop of recent mass shooting incidents, there is heightened concern and awareness of guns in any location and heated debate on both sides of the issue. Second Amendment rights are zealously guarded and treasured by many and these rights are further protected by some state laws that allow employees to carry weapons on workplace property. According to a CDC publication from 2014, there were more than 700 workplace homicides per year, mostly by firearms. The Federal government has been reluctant to adopt any national standard regarding banning firearms from American workplaces. In fact, OSHA has rejected such requests. However, the general duty clause of OSHA at Section 5(a)(1) of the Occupational Safety & Health Act of 1970 states that employers are required to provide their employees with a place of employment free from recognizable hazards that are causing or likely to cause death or serious harm to employees. In light of this, there may not be an official standard, but employers
are required to protect workers from unnecessary harm, if there is a feasible method to mitigate against hazard.

Some state laws have addressed the OSHA provisions in their workplace gun laws. For example, Tennessee clarified that the decision of an employer to permit employees with gun permits to carry handguns on the property did not constitute an occupational safety and health hazard. *Tenn. Code Ann.* § 50-3-201(d) (2012). Additionally, under Texas law, the presence of a firearm on an employer’s property under the law does not constitute a failure by the employer to provide a safe workplace under the OSHA Act. *Tex. Lab. Code* § 52.063(b) (2011).

Depending on the industry, guns in the actual workplace may be appropriate or even necessary. In courthouses sheriff’s officers are typically armed just as in retail establishments, which many times have security guards that carry weapons. Not surprisingly, an analysis of the US Bureau of Labor Statistics Census of Fatal Occupational Injuries shows that that retail establishments account for 27% of workplace homicides while government offices represent 17% of homicides. Clearly, there is a balancing of workplace safety and the rights of employees to have weapons on company property, but as with any workplace policy, it needs to be disseminated to employees in clear and unmistakable terms setting out permissible areas for guns to be kept in the workplace. Further, signage in conspicuous locations may be required by law and even if not required by law, may be advisable to alert individuals as to the company’s policy.

**I. Current Legal Trends: Firearms in Employers’ Parking Areas**

Employers have an inherent interest in controlling the conduct of their employees while at the employers’ places of business or on their premises. An employee’s conduct in the workplace can expose his/her employer to significant liability under the tort doctrines of vicarious liability and negligent hiring/supervision. Through the use of employment agreements
and policies, employers attempt to regulate their employees’ actions and their workplace environments. Given the ongoing debate regarding the role of firearms in American society, it is no surprise that some employers adopt employment policies that address the right of employees to possess firearms in parking areas controlled by the employers.

This portion of the paper provides a summary of the laws adopted by various states with regard to an employer’s ability to adopt employment policies restricting firearms in the employer’s parking area. It then discusses the challenges against these statutes by brought employers, as well as lawsuits employees have brought against their employers for policies regarding firearms. Lastly, this portion of the paper addresses the options available to employers and recommendations for employment policies that regulate firearms in employers’ parking areas.

II. State Parking Area Firearms Statutes

In recent years, numerous state legislatures have adopted statutes which directly address an employer’s ability to restrict its employees’ firearms in its parking areas.1 As of the publication deadline for this paper, twenty-six states in the United States have adopted such a statute. Generally, these statutes can be categorized as follows: (a) statutes which permit employers to restrict firearms in their parking areas; (b) statutes which prohibit employers from restricting firearms in their parking areas; (c) statutes which prohibit employers from restricting firearms in their parking areas with regard to licensed persons; and (d) miscellaneous statutes which otherwise address an employer’s ability to restrict firearms in its parking areas. Section II provides a general discussion of each of these categories of “parking area firearm statutes.”

A. Statutes Permitting Employers to Restrict Firearms in Parking Areas

---

1 Donald Sanders et al., The Employer’s Conundrum of Firearms and Parking Lots, 25 S. L.J. 25 (Spring 2015).
Missouri, Ohio, South Carolina, and Tennessee have each adopted statutes which effectively permit an employer to restrict its employees’ possession of firearms in the employer’s parking areas. In each of these states, a private employer may prohibit employees from carrying firearms while on the employer’s property, including the employer’s parking areas.\(^2\) Ohio’s statute contains an exception to this general rule: an employer which is a private college or university may not restrict a person with a concealed handgun license from keeping a firearm inside such person’s own locked vehicle on the employer’s premises.\(^3\) Missouri’s and Tennessee’s statutes expressly state that carrying a firearm in a vehicle is not a criminal offense, but they leave the door open for employers to take disciplinary action for an employee who violates the employer’s prohibition on firearms in its parking areas.\(^4\)

Michigan has adopted a statute which likely falls within this category, although it does not directly address parking areas.\(^5\) Michigan’s statute allows employers to prohibit their employees from carrying a concealed pistol “in the course of [their] employment.”\(^6\) Although the statute is unclear whether the “course of employment” covers an employer’s parking areas, Michigan courts have ruled that the “course of employment” includes parking areas in workers’ compensation cases.\(^7\) Thus, there is a considerable argument that Michigan’s statute permits an employer to restrict its employees’ possession of firearms in its parking areas.

**B. Statutes Prohibiting Employers from Restricting Firearms in Parking Areas**

By and large, the most common parking area firearm statute adopted by the states is a statute that prohibits employers from restricting employees’ firearms in their parking areas.

---


\(^3\) [Ohio Rev. Code. Ann. § 2923.126(B)(5), (C)(1).]


\(^6\) Id.

Statutes of this type have been adopted by Alaska, Arizona, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, North Dakota, Oklahoma, Texas, and Utah.\(^8\)

Effectively, these statutes operate to prohibit an employer from restricting its employees from possessing or carrying a firearm in parking areas owned or controlled by the employer. Of course, these statutes vary in particular substance across the jurisdictions. For example, Alaska’s and Indiana’s statutes prohibit any person—not limited to employers—from restricting the possession of a firearm in a vehicle that is legally on such person’s premises.\(^9\) Arizona’s statute is similarly broad and prevents any “property owner, tenant, public or private employer or business entity” from prohibiting the possession of a firearm in vehicles in its parking areas.\(^10\) Other states, such as Kansas and Mississippi, have adopted statutes which only prohibit employers from restricting their employees’ firearm possession in their parking areas.\(^11\)

The parking area firearm statutes under this category typically contain exceptions that allow firearm restriction. Most statutes allow the restriction of firearms if such restriction is permissible under federal or state law, such as for school zones.\(^12\) Additionally, most statutes permit an employer to prohibit firearms within a vehicle owned or operated by the employer or used in the course of employment.\(^13\) Some of the parking area firearm statutes under this category allow firearm restriction by an employer under limited circumstances. Several of these statutes only prohibit the restriction of firearms which are locked in an employee’s vehicle or are

---

\(^8\) ALASKA STAT. § 18.65.800 (2016); ARIZ. REV. STAT. ANN. § 12-781.A (2016); IND. CODE § 34-28-7-2 (2016); KAN. STAT. ANN. § 75-7c10 (2016); KY. REV. STAT. ANN. § 237-106 (2016); LA. REV. STAT. ANN. § 32:292.1 (2016); MINN. STAT. § 624.714 (2016); MISS. CODE ANN. § 45-9-55 (2016); N.D. CENT. ANN. § 62.1-02 (2016); OKLA. STAT. tit. 21, § 1290.22 (2016); TEX. LAB. CODE ANN. § 52.061 (2016); UTAH CODE ANN. § 34-45-103 (2016).

\(^9\) ALASKA STAT. § 18.65.800; IND. CODE § 34-28-7-2.

\(^10\) ARIZ. REV. STAT. ANN. § 12-781.A.

\(^11\) KAN. STAT. ANN. § 75-7c10; MISS. CODE ANN. § 45-9-55.

\(^12\) ARIZ. REV. STAT. ANN. § 12-781.C; IND. CODE § 34-28-7-6; KY. REV. STAT. ANN. § 237-106; N.D. CENT. ANN. § 62.1-02; OKLA. STAT. tit. 21, § 1280.1; TEX. LAB. CODE ANN. § 52.062.

\(^13\) ARIZ. REV. STAT. ANN. § 12-781.C; MINN. STAT. § 624.714.
not visible in plain sight.\footnote{14} They do not prohibit the restriction of firearms that violate this requirement.

Also, a few of the parking area firearm statutes permit an employer’s restriction of firearms in its parking areas if the employer provides a secured parking area.\footnote{15} Alaska, Arizona, Louisiana, Mississippi, and Utah currently have some form of a secured parking area exception.\footnote{16} In order for a parking area to qualify for such an exception, the parking area must either contain a security guard or have access that is restricted to the general public.\footnote{17} Some states also require the employer to provide alternate parking in which its employees may possess firearms, or a secure storage facility for its employees’ firearms.\footnote{18}

\section*{C. Statutes Prohibiting Employers from Restricting Firearms in Parking Areas with Regard to Licensed Persons}

A significant number of states have adopted parking area firearm statutes, which only prevent the restriction of firearms possessed by certain licensed individuals. Laws of this nature have been enacted in Alabama, Florida, Georgia, Illinois, Maine, Nebraska, and Wisconsin.\footnote{19} In order to qualify for protection under the statute, an employee must hold a valid concealed carry license or similar license under the laws of the applicable state.\footnote{20}

With the exception of the fact that these statutes only protect licensed firearm carriers, these statutes are generally similar in substance to the statutes discussed in Section II.B above.

\footnotetext{17}{\textit{See, e.g.}, \textit{Ariz. Rev. Stat. Ann.} § 12-781.C.}
\footnotetext{18}{\textit{See, e.g.}, \textit{Utah Code Ann.} § 34-45-103.}
For example, the statutes in Alabama, Florida, Georgia, Illinois, Maine, and Nebraska all require a firearm to be secured in some manner in the vehicle.\textsuperscript{21} This secure storage may merely require that the employee’s vehicle be locked, or it may require the firearm to be kept out of plain view or locked in a glove compartment, trunk, or other compartment.\textsuperscript{22} Also, as with some of the statutes addressed in Section II.B, Georgia’s statute contains an exception for when an employer provides a parking area which is secured from public access.\textsuperscript{23}

\textbf{D. Miscellaneous Statutes}

Several states have statutes that do not clearly fit into any of the above categories. For example, Colorado has adopted a very narrow statute which affects a public school’s ability to restrict firearms in its parking areas as an employer.\textsuperscript{24} Under the statute, a public school employer in Colorado may not restrict the right of a person with a concealed carry permit to possess a handgun in such person’s vehicle on the school premises (or locked vehicle, if the person is not in the vehicle).\textsuperscript{25}

Another common statute is a statute similar to Idaho’s statute. Idaho’s statute does not directly address whether an employer is permitted to restrict, or prohibited from restricting, its employees’ possession of firearms in its parking areas. However, the statute encourages a policy of no firearm restriction by granting employers immunity from claims for civil damages involving their policies specifically permitting their employees to store firearms in their vehicles on the employer’s premises.\textsuperscript{26} Statutes which provide such immunity or liability protection, such

\textsuperscript{23} \textsc{Ga. Code Ann.} § 16-11-135.
\textsuperscript{24} \textsc{Colo. Rev. Stat.} § 18-12-214(3)(a) (2016).
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textsc{Idaho Code Ann.} § 5-341 (2016).
as Idaho’s, are commonly found as a part of the statutory schemes of states which prohibit employers from restricting firearms in their parking areas.27

III. Employer Challenges to Statutes

In response to the recent emergence of parking area firearm statutes, employers have challenged the application and validity of such statutes.28 Typically, employers have based their legal challenges on two arguments: (1) the federal Occupational Safety and Health Act of 1970 (the “OSH Act”) preempts the parking area firearm statutes; and (2) the parking area firearm statutes are unconstitutional violations of the employers’ property rights.29 The typical employer arguments are best illustrated in the 2009 Ramsey Welch Inc. v. Henry decision from the U.S. Circuit Court of Appeals for the Tenth Circuit (the “Tenth Circuit”).

In Ramsey Welch, a number of employers located in Oklahoma filed suit against the State of Oklahoma to challenge Oklahoma’s parking area firearms statute.30 As discussed above in Section II, Oklahoma’s statute prevents Oklahoma employers from prohibiting their employees from storing their firearms in locked vehicles on the employers’ property.31 The employers argued that the Oklahoma statute was invalid because it was preempted by the OSH Act and a violation of their property rights.32 The U.S. District Court for the Northern District of Oklahoma ruled that the OSH Act preempted the Oklahoma statute because it impermissibly conflicted with the employers’ ability to comply with the OSH Act’s requirements.33

28 See, e.g., Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009).
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
The employers in *Ramsey Welch* argued that the Oklahoma statute prevents compliance with the OSH Act’s general duty which requires employers to furnish each of their employees with “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” They argued that workplace violence is a recognized hazard and, as such, employers must be allowed to restrict firearms in their parking areas in order to comply with the OSH Act. The Tenth Circuit rejected this argument and ruled that the OSH Act defers to state and local law enforcement agencies to regulate workplace violence.

The employers also argued that the Oklahoma statute unconstitutionally violates their property rights. They alleged that the Oklahoma statute effectively deprives them of their right to exclude others from their property. The employers argued that the Oklahoma statute fails to serve a legitimate governmental interest and, thus, violates the U.S. Constitution’s Due Process Clause. The Tenth Circuit rejected this argument as well, stating that state governments have a legitimate interest in increasing the safety of the community.

The Tenth Circuit’s decision in *Ramsey Welch* illustrates that employers will have significant, if not insurmountable, difficulties in challenging parking area firearm statutes. Although the Tenth Circuit’s opinion drew considerable scholarly criticism, it seems unlikely that courts will be inclined to overturn parking area firearm statutes.

IV. Employee Lawsuits Against Employers

---

34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
40 Id.
In addition to challenges by employers, parking area firearm statutes have become the subject of litigation in wrongful termination lawsuits by employees. This Section IV discusses several of these wrongful termination cases and their result.

In *Mitchell v. University of Kentucky*, the Kentucky Supreme Court ruled that a public university’s discharge of an employee for storing a pistol in his vehicle on campus was wrongful termination.\(^{42}\) The discharged employee had a valid concealed carry license and stored the pistol in a hidden manner in his vehicle.\(^{43}\) Although the employee’s storage of the pistol in his vehicle complied with the requirements of Kentucky’s parking area firearm statute, the university terminated him for possessing a deadly weapon on its property.\(^{44}\) The Kentucky Supreme Court ruled that the university wrongfully terminated the employee in violation of Kentucky’s parking area firearm statute and strong public policy in favor of the right to bear arms.\(^{45}\)

In *Caterpillar Inc. v. Sudlow*, the Indiana Court of Appeals determined that Indiana’s parking area firearm statute also expressed a strong public policy in favor of the right to bear arms.\(^{46}\) Indiana’s statute allows an employee to store a concealed firearm in his locked vehicle on his employer’s property if it is stored out of plain sight.\(^{47}\) An employee was terminated because he stored his pistol in plain view in his vehicle in his employer’s parking area.\(^{48}\) The employee filed suit against his employer alleging wrongful termination in violation of the Indiana statute’s public policy.\(^{49}\) The Indiana Court of Appeals recognized that Indiana’s statute is a clear expression of public policy in favor of employees possessing firearms in vehicles;

\(^{42}\) *Mitchell v. Univ. of Ky.*, 366 S.W.3d 895 (Ky. 2012).

\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) Id.


\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.
however, it also ruled that the termination did not violate this policy because the employee’s firearm storage did not comply with Indiana’s statute.\textsuperscript{50}

In \textit{Hansen v. America Online, Inc.}, three employees were terminated for storing firearms in their vehicle trunks in their employer’s parking area.\textsuperscript{51} This termination occurred before the Utah state legislature had enacted its parking area firearm statute.\textsuperscript{52} The employees argued their termination violated a public policy in favor of permitting the storage of firearms in vehicles, primarily based on a statute preventing state and local governments from prohibiting individuals from transporting firearms in vehicles.\textsuperscript{53} The Utah Supreme Court refused to extend the public policy reach of the statute to encroach upon an employer’s ability to control its employees’ conduct through employment policies.\textsuperscript{54}

As the foregoing cases illustrate, parking area firearm statutes may serve as the basis for an employee’s wrongful termination claim if the employee is terminated in violation of such statutes.

\textbf{V. Employment Policy Options}

As Section II illustrates, approximately one-half of the states in the United States have some form of parking area firearm statute. These statutes may vary in substance across jurisdictions, but they all affect an employer’s ability to prohibit its employees’ possession of firearms in its parking areas. The logical conclusion based on recent court decisions is that courts are hesitant to question the public policy justifications underlying these parking area firearm statutes. Given that some of these statutes impose civil or even criminal penalties on

\footnotesize
\begin{itemize}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Hansen v. Am. Online, Inc.}, 96 P.3d 950 (Utah 2004).
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.}
\end{itemize}
violators, employers are recommended to adopt employment policies which are intricately drafted in accordance with the applicable parking area firearm statute.

In developing a parking area firearm policy, employers must carefully analyze the applicable state law, including any parking area firearm statute. An employer must determine whether the applicable parking area firearm statute permits firearm restriction, prohibits firearm restriction, or only prohibits firearm restriction under certain circumstances (i.e. for concealed carry licensees). An additional consideration is whether the employer wants its policy to apply to all employees or a specified category of employees. For example, an employer may desire to allow its security personnel to store firearms in their vehicles at work.

As discussed in Section II, some parking area firearm statutes allow an employer to restrict its employees’ firearm possession in its parking areas if the parking area is secure and not open to public access. Similarly, some statutes allow firearm restrictions if the employer provides an alternate parking area or a storage area for firearms at the entrance to its secured parking areas. If the provision of security, alternate parking, or firearm storage is economically feasible, an employer may want to explore those options and adopt a policy of firearm restriction. Additionally, an employer may wish to implement a notice provision (if allowed by law) into its policy, which requires employees to provide notice to the employer when they choose to store a firearm in their vehicles in the employer’s parking areas.

The bottom line is that employers must be aware of the applicable parking area firearm statutes, if any, and craft their firearm policies in accordance with such statutes. These firearm policies must be unambiguously written and clearly communicated to employees in order to eliminate as much risk of misunderstanding as possible.

VI. Conclusion

55 See KY. REV. STAT. ANN. § 237-106; OKLA. STAT. tit. 21, § 1289.27.
In recent years, parking area firearm statutes have become increasingly prevalent. The substantive effect that these statutes have on employers varies depending on the applicable jurisdiction, but they all influence the firearm policies implemented by employers. A prudent employer must have a thorough understanding of the parking area firearm statutes that are applicable to its operations, and should develop firearm policies consistent with such statutes.

MARIJUANA IN THE WORKPLACE:

CURRENT ISSUES FACING EMPLOYERS IN THE EVER-CHANGING LANDSCAPE OF MARIJUANA LEGALIZATION

I. Introduction

Although the use of marijuana remains illegal under federal law, many states have legalized or decriminalized the use of marijuana in some form. As of May 2017, eight states, including Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington, along with the District of Columbia have legalized the recreational use of marijuana; and twenty-nine states and the District of Columbia have legalized medical marijuana.

The legalization and decriminalization of marijuana presents new and unique challenges for employers, particularly with respect to workplace safety. Employers must balance the need to provide a safe workplace with the rights of employees to use marijuana for medical and recreational purposes. This portion of the paper will examine the current status of the law concerning marijuana and its effect on the workplace. It will also address the rules and regulations concerning drug testing by employers.

II. Current Status of Marijuana Legalization

a. State Marijuana Laws
In 1996, California became the first state to allow for the medical use of marijuana. Since then, twenty-eight other states, the District of Columbia, Guam, and Puerto Rico have enacted similar laws. See State Medical Marijuana Laws, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (Apr. 21, 2017). As of May 2017, a total of twenty-nine states, the District of Columbia, Guam, and Puerto Rico now allow for comprehensive public medical marijuana and cannabis programs. Id.

In November 2012, Colorado and Washington became the first states to legalize, regulate, and tax small amounts of marijuana for recreational use by individuals over the age of twenty-one. As of 2017, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington, and the District of Columbia have all legalized the recreational use of marijuana. In these nine jurisdictions, an individual twenty-one years old or older can possess a limited amount of marijuana. For instance, in Alaska, Colorado, and Washington, an individual may possess up to one ounce of marijuana, in the District of Columbia, an individual may possess up to two ounces, and in Oregon an individual can possess up to eight ounces.

Marijuana has become a lucrative business in the states that have legalized such use. In 2016, Colorado’s marijuana market sold over one billion dollars of legal marijuana. Huddleston, Tom, Colorado Topped $1 Billion in Legal Marijuana Sales in 2016, http://fortune.com/2016/12/13/colorado-billion-legal-marijuana-sales/ (Dec. 13, 2016). Given the significant revenue and jobs created by the industry, states with legal marijuana are likely to continue to support and fight for the industry despite the conflict with the federal law discussed below.

b. Federal Marijuana Law
Congress enacted the Controlled Substances Act (CSA) as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. P.L. 91-513, 84 Stat. 1236 (1970). The intent of the CSA is to regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes, and to prevent these substances from being diverted for illegal purposes. The CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five schedules based on the substance’s medical use, potential for abuse, and safety or dependence liability. 21 U.S.C. §§801 et seq.

Schedule I substances are deemed to have no currently accepted medical use in treatment and can only be used in very limited circumstances, whereas substances classified in Schedules II, III, IV, and V have recognized medical uses and may be manufactured, distributed, and used in accordance with the CSA. Marijuana has been listed as a Schedule I controlled substance. Therefore, the CSA prohibits the manufacture, distribution, dispensation and possession of marijuana even when state law authorizes its use to treat medical conditions.

Due to the number of states legalizing marijuana, the U.S. Department of Justice issued a guidance to all U.S. Attorneys concerning marijuana enforcement under the CSA. The guidance states that the Department expects states that have legalized marijuana to establish strict regulatory schemes. See Guidance Regarding Marijuana Enforcement, https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (Aug. 29, 2013). According to the press release issued with the guidance, the expectation is that these regulatory schemes “must be tough in practice, not just on paper, and include strong, state-based enforcement efforts, backed by adequate funding.” Justice Department Announces Update to Marijuana Enforcement Policy, https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-
policy (Aug. 29, 2013). The press release further states that based on assurances from states that they would impose appropriately strict regulatory systems, the Department is “deferring its right to challenge [state] legalization laws at this time.”

Since the issuance of the August 29, 2013 guidance, the Department has yet to interfere with states’ legalization of marijuana. Nonetheless, given the change in administration, it is unclear whether the Department will continue to abide by its statements in the press release and guidance. On April 5, 2017, Attorney General Jeff Sessions issued a memorandum concerning the Task Force on Crime Reduction and Public Safety. In that memorandum, Sessions stated that the Task Force will be reviewing “existing polices in the areas of charging, sentencing, and marijuana to ensure consistency with the Department’s overall strategy on reducing violent crime and with Administration goals and priorities.” See Update on the Task Force on Crime Reduction and Public Safety, https://www.justice.gov/opa/press-release/file/955476/download (Apr. 5, 2017) (emphasis added). The Task Force is expected to report back with initial recommendations concerning marijuana policy by July 29, 2017. As Sessions has not explicitly set forth his position on marijuana, there is some uncertainty as to whether the Task Force’s review will result in a change in policy concerning state legalization of marijuana.

III. Marijuana Use by Employees

Although the conflict between state and federal law creates confusion for employers concerning the legality of marijuana use by employees, it has not stopped employees from using it. According to the annual Quest Diagnostics Drug Testing Index, most recently updated on May 16, 2017, drug use in the American workforce has reached the highest positivity rate in twelve years. See Increases in Illicit Drugs, Including Cocaine, Drive Workforce Drug Positivity to Highest Rate in 12 Years, http://www.questdiagnostics.com/home/physicians/health-
According to the study, marijuana positivity in oral fluids testing, which detects recent drug use, has increased nearly seventy-five percent since 2013. Id. Additionally, marijuana positivity rates in Colorado and Washington, the first states to legalize recreational marijuana, outpaced the national average for the first time since legalization. Id. In Colorado, marijuana positivity increased eleven percent since 2015, and in Washington, marijuana positivity increased nine percent since 2015. Id.

Given the prevalence of marijuana use in our society, employers must establish clear policies and procedures for addressing marijuana use by employees. When employers have explicit drug policies, employees may still be terminated for violating those policies, even if marijuana is legal in their state. Despite the recent trend towards legalization, courts have consistently rejected claims by employees for wrongful discharge relating to marijuana use.

For example, in Roe v. TeleTech Customer Care Mgmt. LLC, 257 P.3d 586, 589 (Wash. 2011), an employee was using medical marijuana to treat her migraines in compliance with the Washington State Medical Use Marijuana Act (MUMA). After she failed an initial drug screening, the employer terminated the employee for violating the employer’s drug policy. Id. Following her termination, the employee alleged that she had been wrongfully terminated in violation of public policy and the MUMA. Id. The Supreme Court of Washington held that the MUMA does not prohibit an employer from discharging an employee for authorized use of medical marijuana. Id. at 590. In so holding, the court found that the MUMA only provides an affirmative defense to state criminal prosecutions of medical marijuana users and does not require an employer to accommodate an employee’s off-site use of medical marijuana. Id. The only reference to employment in the MUMA is an explicit statement against requiring employers to accommodate on-site medical marijuana use. See id. (“Nothing in [the MUMA] requires any
accommodation of any on-site medical use of marijuana in any place of employment”). The court further held that an explicit statement against on-site accommodation does not mean an implicit obligation to accommodate off-site medical marijuana use. Id. at 591. Additionally, the court ruled that the MUMA does not demonstrate a clear public policy to allow an employee to bring a wrongful termination claim for using medical marijuana. Id. at 597.

In Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012), an employee was using medical marijuana to treat his sinus cancer and brain tumor in compliance with Michigan’s Medical Marijuana Act (MMMA). The employee was injured on the job and was given a drug test in accordance with the employer’s drug policy. Id. at 432. After failing the drug test, the employee showed his employer his medical marijuana registration card. Id. Despite his qualifying card, the employee was terminated for violating the employer’s drug policy. Id. Under MMMA, “a qualifying patient…shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau.” Id. at 435. At issue was the meaning of the term “business” under MMMA. Id. at 435. The district court found that the word “business” means the type of licensing board and does not govern private employment actions. Id. at 435-36. On appeal, the Sixth Circuit upheld the district court’s ruling that MMMA does not govern private employment actions and only gives medical marijuana users protections from state prosecutions. Id. at 435. In so holding, the court agreed with the district court’s finding that the “MMMA contains no language stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses.” Id.
In *Coats v. Dish Network, LLC*, 350 P.3d 849, 850 (Colo. 2015), the Colorado Supreme Court affirmed the Colorado Court of Appeals’ decision that an employee’s off-duty medical marijuana use was not a “lawful” activity under Colorado’s “lawful activities statute,” C.R.S. § 24-44-402.5. In *Coats*, the employee filed a wrongful termination lawsuit alleging that his employer violated the “lawful activities statute,” which makes “it an unfair and discriminatory labor practice to discharge an employee based on the employee’s lawful outside-of-work activities.” *Id.* The employee was a quadriplegic, who was using medical marijuana off-duty in compliance with the Colorado medical marijuana statute. *Id.* He was terminated after failing a random drug test in violation of the employer’s drug policy. *Id.* At issue was whether the use of marijuana in compliance with Colorado’s medical marijuana statute, but in violation of federal law, was a “lawful” activity under Colorado’s lawful activities statute. *Id.* The court reasoned that an activity was “lawful” if it was permitted by both federal and state law. *Id.* at 852. Because marijuana was illegal under federal law pursuant to the federal Controlled Substances Act (CSA), the Court held that an employee’s off-duty marijuana use was not a “lawful activity” protected by Colorado’s lawful activities statute. *Id.* at 853.

Although all of the above courts rejected the employees’ claims for wrongful discharge, it is important to note that none of the legalizing statutes at issue in the above cases contained explicit protections for employees. The extent and scope of state legalizing statutes vary greatly. Some states have specifically provided legal protections for employees who use marijuana in accordance with state law. For example, the Arizona medical marijuana legalizing statute states, “[u]nless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a
person based upon either: (1) the person’s status as a cardholder; or (2) a registered qualifying patient’s positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.” Ariz. Rev. Stat. § 36-2813(B).

Similarly, under Illinois law, an employer cannot penalize or refuse to employ an individual solely because of that individual’s status as medical marijuana cardholder unless failing to do so would cause the employer to lose a monetary or licensing-related benefit under federal law. 410 Ill. Comp. Stat. Ann. 130/40. Given the differences in state legalizing statutes, employers must ensure that their policies and practices comply with their state’s law and do not violate any protections afforded to employees.

IV. Drug Testing in the Workplace

Although the majority of states now permit the use of marijuana in some form, many also still permit employers to implement drug-free workplace policies. To ensure compliance with these drug-free policies, employers may decide to drug test their employees. Employers should, however, be aware of the state and federal laws and regulations which may limit when, how, and where testing can be performed.

A. Drug Testing of Applicants

Approximately forty percent of U.S. workers are currently subjected to drug tests during the hiring process. Although courts will still employ a balancing of the applicant’s privacy interests against the employer’s interest in testing, it is generally easier to justify drug testing of applicants rather than employees. Most state and federal courts recognize that current employees have a greater expectation of privacy than applicants. Applicants are free to refuse a test and seek employment elsewhere, whereas current employees are not. In addition, employers
generally have a greater need for and interest in drug testing applicants, because an employer has not had an opportunity to observe the applicant over a period of time.

For example, in *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997), the California Supreme Court upheld a pre-employment drug testing program by the City of Glendale, pursuant to which all applicants were drug tested after the City extended a conditional offer of employment. The Court found this pre-employment testing was justified under the California Constitution because of the significant problems posed for the City by employees who abused drugs and alcohol, including absenteeism, increased safety concerns, tardiness, reduced productivity, and increased risk of turnover. The court found the City had a legitimate and substantial interest in determining whether an applicant was currently engaged in such conduct before hiring.

If, however, an employer cannot establish a sufficient interest in the testing, some courts require reasonable suspicion to test even applicants for employment. For example, in *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008), an applicant for a position at a public library challenged a pre-hire drug testing requirement. The Ninth Circuit Court of Appeals found that because the city did not demonstrate a special need to drug-screen for the position at issue, the testing violated the Fourth Amendment of the U.S. Constitution, which requires individualized reasonable suspicion of alcohol/drug use.

**B. Drug Testing of Current Employees**

As stated above, the standard for drug testing current employees is generally more stringent than it is for applicants. Current employees have a greater expectation of privacy, and an employer’s need for the testing is diminished by its ability to observe the employee over time. Whether drug testing of current employees is appropriate generally turns on the reason for the
Drug testing is typically conducted for one of the following reasons: (1) testing based on "reasonable suspicion" of drug use, (2) random testing, (3) testing for safety sensitive positions and (4) post-accident/injury testing.

i. **Reasonable Suspicion**

Courts have consistently permitted drug testing of current employees upon reasonable suspicion of drug use. To establish a reasonable suspicion, employers must demonstrate specific, objective facts and rational inferences from those facts supporting the conclusion that an employee was under the influence of intoxicants. *Kraslawsky v. Upper Deck Co.*, 65 Cal.Rptr.2d 297 (Cal. Ct. App. 1997).

Examples of factors that might create a reasonable suspicion of drug/alcohol use include: direct observation of drug use; physical symptoms of drug use; abnormal conduct; reliable sources reporting use; erratic behavior while at work or significant deterioration in work performance; evidence of use, possession, selling, soliciting, etc. of drugs while at work or working. To ensure testing is only conducted when appropriate, it is important to train management on the signs of drug use and to document all signs that were present prior to performing a drug test on an employee.

ii. **Random Testing**

Random drug testing is essentially testing without reasonable suspicion of drug use. State laws vary on whether random drug testing is appropriate; however, even in states where random testing is allowed, advance notice of the testing is typically required. In addition, random testing is often allowed for "safety sensitive" positions.

iii. **Testing for Safety Sensitive Positions**

Courts have deemed the following positions safety-sensitive:

- Commercial drivers of vehicles in excess of 26,000 pounds, vehicles with 15 or more passengers, drivers who transport hazardous materials. *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991).
- Natural gas and hazardous liquid pipeline employees. *IBEW, Local 1245 v. Sinner*, 913 F.2d 1454, 1456 (9th Cir. 1990).
- Chemical weapon plant employees who have access to areas in which experiments are performed. *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989).
• Construction and maintenance workers who operate power tools and heavy equipment in close proximity to coworkers, and perform most work in or around a trench. *Smith v. Fresno Irrigation Dist.*, 84 Cal.Rptr.2d 775 (Cal. Ct. App. 1999)

iv. Post-Accident/Injury Testing

Post-accident drug testing is testing that is triggered by the occurrence of an accident, rule violations, or other incident. Historically, post-accident testing has been permitted for safety-sensitive positions, however, courts have often required reasonable suspicion to perform a post-accident/injury drug test for non-safety sensitive position.

In May 2016, the Occupational Safety Health Administration (OSHA) issued a final rule that will likely impact the practice of post-accident drug testing. The new rule requires employers to (1) have a reasonable procedure for employees to report work-related injuries and illnesses, and (2) not to discriminate or retaliate against employees who report such injuries or illnesses. See 29 C.F.R. § 1904.35. Under the new regulation, a “procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.” *Id.* Although the new regulation does not explicitly reference drug testing, the preamble to the final rule states:

OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting…. [T]his final rule does not ban drug testing of employees. However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses. To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer’s understanding of why the injury occurred, or in any other way contributing to workplace safety. Employers need not specifically suspect drug use before testing, but there should be a reasonable
possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed any way that may be perceived as punitive or embarassing to the employee is likely to deter injury reporting.

*Improve Tracking of Workplace Injuries and Illnesses, Final Rule, 81 Fed. Reg. 92, 29673 (May 12, 2016).*

Based on the preamble to the final rule, it appears as though OSHA is taking the position that blanket post-accident drug testing could be considered a violation of the OSH Act and that there must be “reasonable possibility” of drug or alcohol use to justify requiring the employee to submit to a drug or alcohol test after an accident or injury. The preamble does, however, provide for an exception to the “reasonable possibility” standard, and permits employers to conduct drug testing to comply with requirements of a state or federal law or regulation. *See Id.*

The new regulations were originally supposed to go into effect on November 1, 2016, however, a consortium of business advocacy groups filed a lawsuit challenging the anti-retaliation provisions of the rule. Based on this lawsuit, OSHA agreed to delay implementation of the rule until December 1, 2016 so that the court could resolve the issue before employers would be required to comply with the rule. On November 28, 2016, a U.S. District Court Judge of the U.S. District Court for the Northern District of Texas issued a ruling denying the plaintiffs’ request for a preliminary injunction, which permitted OSHA to proceed with implementation of the new rule on December 1, 2016. The judge did not rule on whether the new rule and OSHA’s interpretations were actually lawful, but rather only determined that the employer plaintiffs could not establish a substantial threat that irreparable harm would occur if the rule was permitted to take effect on December 1, 2016. The lawsuit is still pending, and the court has yet to rule on the actual merits of the case.
Although the lawsuit is still pending, as of December 1, 2016, OSHA is able to conduct inspections to determine whether a safety incentive or drug-testing program retaliates against an employee for reporting an injury or illness. Until there is a final determination by a court, employers should assume that they are required to comply with the new rule. Employers should review their policies and procedures to ensure compliance. In particular, employers should review any blanket post-accident drug testing policies to ensure that they qualify under the exception to the new rule.

V. Conclusion

Despite the fact that marijuana remains illegal under federal law, state legalization of marijuana does not appear to be a fleeting trend. Employees are using marijuana more than ever, and employers must address the issue. Implementation of explicit polices and procedures concerning marijuana use and drug testing can assist employers in ensuring a safe workplace. Employers must, however, be aware of all state, local, and federal laws governing the use of marijuana and must ensure that their polices and procedures comply with the applicable laws.

Implications Under the National Labor Relations Act

Under the National Labor Relations Act (“the Act”), an employer of a unionized workforce is required to bargain with its employees’ exclusive collective-bargaining representative when making material and substantial changes in wages, hours, or any other term of employment considered a mandatory subject of bargaining under Section 8(a)(5) of the Act. An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing the mandatory subjects of bargaining without first providing their bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962). Mandatory subjects of bargaining include those matters that are “plainly germane to the

It is long-settled that safety and health conditions in the workplace are mandatory subjects of bargaining. NLRB v. Gulf Power Co., 156 NLRB 622 (1966), enf’d 384 F.2d 822 (5th Cir. 1967). Thus, employer policies prohibiting guns and other weapons and implementing drug prevention/testing procedures are mandatory subjects upon which a union has the right to bargain. Johnson-Bateman Co., 295 NLRB 180 (1989). See, e.g., Con-Vey Keystone, Inc. & United Steelworkers of Am., AFL-CIO, E 36-CA-8300, 1999 WL 33453686 (NLRB Div. of Judges July 29, 1999) (employer’s unilateral implementation of policy prohibiting firearms on company property violates Act); Delta Tube & Fabricating Corp., 323 NLRB 856, 857-58 (1997) (employer’s unilateral implementation of drug testing policy, violated Section 8(a)(5) and (1)).

Importantly, the Board has generally limited the rights conferred by the Act to current employees. Thus, the Board has long-held that unionized employers will not violate the Act by unilaterally implementing drug testing programs designed to screen applicants for employment. See Star Tribune Division, 295 NLRB. 543 (1989). The Board reasons that because job applicants are not employees as defined by the Act, such testing does not “vitally affect” the working conditions or terms and conditions of employment of bargaining unit employees. Id. at 548.

It must also be remembered that unions can waive or bargain away their right to negotiate about mandatory subjects of bargaining. In Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992), for example, the Court of Appeals concluded that a collective bargaining agreement’s broad management rights provision allowed the employer to unilaterally implement a policy
providing for drug testing where there was an “articulable belief” that an employee was under the influence at work and making the sale of illegal drugs a dischargeable offense. *Id.* at 935. The management rights provision stated that “except as specifically limited by the express language of this Agreement. . .the Company has and retains exclusively to itself. . . the exclusive right. . .to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct.” *Id.* Reversing the Boards’ finding that the provision was not a “clear and unmistakable wavier” of the union’s right to bargain, the Court found the drug testing policy to be a reasonable rule of employee conduct over which the employer had exclusive rights. *Id.* at 937.

I. **Guns**

Although an employer’s safety-related policies are mandatory subjects of bargaining, that “does not mean that a state . . . may not also grant employees independent, non-negotiable state law rights and forbid employers from bargaining those rights away.” *McKnight v. Dresser, Inc.*, 676 F.3d 426, 432 n.4 (5th Cir. 2012). As a result, although an employer would likely be able to determine whether employees are able to have guns on their person while working, several states have attempted to limit the right to ban guns off an employer’s property. For example, there are several recent state laws that prohibit employers from disciplining licensed gun owners who keep guns locked in their cars on company property. Such laws would arguably trump any employer policy allowing for discipline – even if the union agreed to it in a collective bargaining agreement.

II. **Marijuana**

State laws legalizing recreational marijuana use create some murkier issues. To start, the distribution or sale of marijuana remains illegal under federal law and labeled a “serious crime”
by the Department of Justice. See James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (August 29, 2013). And while the DOJ and other federal agencies had in recent years indicated a “hands-off” approach to state laws legalizing marijuana and their repercussions (for example, the Treasury Department allows banks to provide financial services to marijuana businesses and the Internal Revenue Service collects taxes from marijuana sales), the Trump administration has indicated that it may reverse course and enforce federal marijuana laws. See, e.g., Sari Horwitz, How Jeff Sessions Wants to Bring Back the War on Drugs, Wash. Post, April 18, 2017.

For its part, the NLRB has agreed to hear complaints brought by unions on behalf of marijuana workers alleging that their employers had engaged in anti-labor tactics to discourage unionization, including retaliating by cutting their wages and hours, reclassifying them as agricultural workers, who are exempt from NLRB jurisdiction, and unlawful surveillance and interrogation. See, e.g., Compassionate Care Foundation, Case Number: 04-RC-143834 (filed Jan. 5, 2015); Northeast Patients Group d/b/a Wellness Connection of Maine, Case Number: 01-CA-104979 (filed May 13, 2013). Indeed, the NLRB’s General Counsel went so far as to issue a non-binding opinion memo stating its belief that the NLRB has jurisdiction over the medical marijuana industry, notwithstanding its illegality under federal law. NLRB Office of the General Counsel Advice Memorandum, Cases 01-CA-104979; 01-CA-106405 (Oct. 25, 2013). Thus, for the time being, the NLRB appears to claim jurisdiction over the marijuana industry. It is not yet clear whether the NLRB’s position will change under the new administration.

More broadly, most of the state laws legalizing recreational marijuana use have explicit exemptions for workplace drug policies. In Massachusetts, for example, the law includes
language stating that “the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees” is not changed. 2016 Mass. Acts c. 334. Thus, in the union setting, collective bargaining agreement provisions prohibiting employee drug use and providing for drug testing remain valid and enforceable.

In addition, many unionized employers are in industries that require compliance with federal requirements, such as transportation companies subject to U.S. Department of Transportation regulations. See 49 C.F.R. Part 40. These regulations require comprehensive drug and alcohol testing guidelines for employees in safety sensitive positions. Id. Federal contractors and federal funds recipients are also generally required to comply with the federal Drug-Free Workplace Act of 1988, which mandates that employers maintain a “drug-free workplace.” See 41 U.S.C. § 81. These federal law requirements are not modified by the state recreational use laws.

More difficult questions arise where an employer does not have a specific drug prohibition or testing policy in force. Unionized employers must demonstrate just cause for discharge or other discipline for employee marijuana use. While employers have been historically successful in relying on safety reasons – not to mention the laws making marijuana use illegal – this may now be more difficult when an employee uses “legal” (at least under state law) recreational or medical marijuana only while off-duty and is not impaired at work.
THURSDAY, JULY 27, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

EXTRA-CONTRACTUAL LIABILITY/REINSURANCE, EXCESS AND SURPLUS LINES/PROPERTY INSURANCE
Can we Talk? The Importance of Communication when Dealing with Excess and Reinsurers

Salles des Congrès

Speakers:
Thomas N. Leidell
Andrew Downs
Kim Jackson
DISCOVERY OF RESERVE
AND REINSURANCE COMMUNICATIONS

Presented at:
FDCC Annual Meeting
Fairmont Le Montreux Palace
Montreux, Switzerland
July 27, 2017

Author:
Tania Rice
Squire Patton Boggs (US) LLP
INTRODUCTION

In cases where an insurer is a party to an action, numerous discovery disputes have centered on a litigant’s ability to discover the insurer’s loss reserve information and communications with its reinsurers. The litigant (generally the insured or a co-insurer) may request this information in discovery, hoping to find something in the insurer’s internal communications and information that comports with the litigant’s theory of the case. There is no clear rule as to the discoverability of reserves and reinsurance communications. Many courts have noted that this information often has little, if any, relevance, because they reflect the insurer’s compliance with statutory reserving requirements and internal business decisions. Typically, this information is not relevant to coverage determinations. However, a number of courts have also held that this information can be relevant and discoverable particularly in bad faith cases, depending on the allegations, as issues related to the insurer’s subjective opinions and knowledge may be implicated. While the results of similar discovery disputes cannot be predicted with crystal clarity, examining rulings from various jurisdictions and case circumstances provides some guidance.

I. DISCOVERY OF RESERVES

The unique nature of loss reserves has led to countless discovery disputes in insurance litigation. Often required under state laws, reserves are funds insurers set aside to cover payment in the event of future liability. They reflect estimates of potential exposure on a claim; they do not reflect actual settlement authority. Courts have noted that reserves generally do not represent “an evaluation of coverage based upon a thorough factual and legal consideration.” Reserves are often impacted by

---

1 See, e.g., N.Y. Ins. Law § 1303; Cal. Ins. Code § 923.5.
2 See, e.g., Cal. Ins. Code § 923.5 (insurers must “maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses and claims for which the insurer may be liable”); Signature Dev. Companies, Inc. v. Royal Ins. Co. of Am., 230 F.3d 1215, 1224 (10th Cir. 2000) (reserves are “merely an amount [the insurer] set aside to cover potential future liabilities.”); Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1613 (1996) (a reserve is “the amount anticipated to be sufficient to pay all obligations for which the insurer may be responsible under the policy with respect to a particular claim”); Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 623 A.2d 1099, 1109 (Del. Super. Ct. 1991) (“Reserves are accounting entries which an insurance company regularly uses to set aside sufficient funds in the event of policyholder liability. . . . [T]he establishment of reserves is an appropriate business decision justified by the necessity of preserving financial stability in the event of liabilities which cannot be predicted with any degree of certainty.”).

considerations other than a pure factual and legal analysis of the claim, such as state law regulations and business and tax considerations. In practice, most companies will put some value towards any case, since it is a best practice to generally consider a compromise if it is found fair and reasonable.

In seeking to protect its reserve information from discovery, an insurer may argue that its internal business decisions regarding the amount of funds to set aside for a claim have nothing to do with legal issues such as actual liability. After all, reserves are only an estimate of potential exposure—often established early at the first notice of an insured’s claim, before any detailed factual analysis—and not a thorough evaluation of the insurer’s actual obligations. An insurer may cry unfairness at being mandatorily by regulation to set reserve amounts, only to have those amounts used against it in litigation; regularly requiring production of reserves would only undermine the purpose of setting them, incentivizing underestimation rather than a conservative approach to setting aside sufficient funds. On the other hand, an insured seeking production of reserve information may argue that, while a reserve may not represent the most in-depth analysis of a claim’s value, it certainly has some tie to the insurer’s evaluation of the claim. The insurer’s internal assessment may be relevant, particularly in bad faith cases where the insurer’s state of mind is at issue. The insured may hark back to the generally broad leeway for discovery.

An insurer may object to discovery of its reserves based on relevance grounds. In deciding whether reserves are sufficiently relevant to compel discovery, courts generally look to the type of claim being brought. Where parties are seeking a coverage determination, courts typically hold that reserves are not relevant. Reserves do not constitute an admission of liability or the existence of coverage. Reserves can only

355289, at *2-3 (N.D. Ohio Feb. 15, 2006) (a reserve “is not necessarily based on a full knowledge of the facts and the law of the case”).
6 J.C. Assocs., 2003 WL 1889015, at *1 (“If reserve information is always available and state law does not require its calculation, there is a risk that insurers will understate the reserve lest it be used against them. Whatever societal interest there is in the accuracy of reserves is foregone if insurance companies yield to the temptation to state them inaccurately, lest they be used as damaging admissions against their interests.”).
7 See Fed. R. Civ. Proc. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . . .”); see also, e.g., Cal. Civ. Proc. Code § 2017.010 (a party may discover matter that is “relevant to the subject matter involved in the pending action” and “reasonably calculated to lead to the discovery of admissible evidence”).
evidence an insurer’s subjective view of the claim, which is not at issue in a coverage action.

In bad faith cases, the relevance of reserves becomes a more difficult question. Some courts have made blanket holdings that reserves are relevant in bad faith cases, where the insurer’s subjective beliefs and actions are at issue. Many courts look to the bad faith allegations to make an individualized determination as to whether issues are raised that render the reserves relevant. Issues for which courts have found that reserves may be relevant include:

- Whether the insurer thoroughly investigated the claim (making the thoroughness of the reserve evaluation relevant);
- Whether the insurer acted in bad faith by making a settlement offer to the insured for less than the insurer’s understanding as to the value of the claim;
- Whether there was a difference between what the insurer believed it owed on a claim and what it communicated to its insured; and
- Whether the insurer was unreasonable in refusing to accept a settlement offer in an underlying case, where it had assigned a higher value to the claim.

Some courts have differentiated bad faith claims where the insurer issued a “first party” policy (where the insurer compensates the insured directly for its losses) versus a “third party” liability policy (where the insurer defends and indemnifies the insured against third party claims). In a “first party” case the issues are usually limited to the existence of coverage and whether the insurer’s actions were in good faith, rendering reserves largely irrelevant. In a “third party” case reserves may be more relevant, because the insurer has a duty to defend as long as there is potential coverage; evidence that an insurer believed there was potential liability (such as may be found in

reserve information) may be probative where the insurer denied a defense of the claim.\textsuperscript{15}

Discovery disputes over reserves may also raise privilege issues. There is a split in authority as to whether reserves may be privileged under the work product doctrine. Courts that held reserves privileged found that they were prepared in anticipation of litigation—a party’s evaluation of the amount it may pay in litigation seems anathema to discovery.\textsuperscript{16} However, other courts have held that reserves were not privileged, recognizing that insurance companies may establish reserves as a matter of course at the first notice of an insured’s loss claim, as part of regular claims adjusting and before the start of any litigation.\textsuperscript{17}

The result of a discovery dispute over reserve information is often fact- and jurisdiction-dependent. Table 1 is a survey of several cases examining the discoverability of reserve information.

\section*{II. DISCOVERY OF REINSURANCE DOCUMENTS AND COMMUNICATIONS}

Federal Rule of Civil Procedure 26(a)(1)(A)(iv) requires, as part of the parties’ initial disclosures, the production of “any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.” Most federal courts have held that reinsurance agreements must be produced under Rule 26(a) where the primary insurer is a named party, because the reinsurer may have a duty to indemnify the primary insurer.\textsuperscript{18} However, reinsurance agreements need not be

\begin{footnotesize}
\footnotesize
\begin{enumerate}
\item[15] Id.
\end{enumerate}
\end{footnotesize}
produced under Rule 26(a) when the primary insurer is not a party. They also may not need to be produced in state court actions where Rule 26(a) does not apply.

Most courts hold that communications and other documents between an insurer and its reinsurer are generally not relevant and not discoverable. Reinsurance information reflects a business decision by the primary insurer to spread risk or to satisfy statutory reserve requirements, so it is not typically relevant to the claims in a case. As with loss reserves, reinsurance communications are discoverable in certain cases where they may have relevance to the issues raised. Courts have held that they may be relevant (and are thus discoverable) to show the insurer’s interpretation of the policies at issue, whether the insurer believed the claims were covered by the policies, the thoroughness of the insurer’s claims investigations, or combat defenses such as lost policy, late notice, or misrepresentation. In arguing that reserves are not relevant, an insurer may choose to describe the contents of the communications or request an *in camera* review to demonstrate lack of relevance.

Insurers may also object to the production of reinsurance communications if they are protected by the attorney-client or work product privileges.

---

27 See *ContraVest Inc.*, 2017 WL 1190880, at *11.
Table 1: Survey of Several Cases Addressing Discovery of Reserve Information

<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Mirarchi v. Seneca Specialty Ins. Co., 564 F. App'x 652, 654-55 (3d Cir. 2014)</em></td>
<td>Third Circuit Court of Appeals</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The insured brought this action alleging the insurer acted in bad faith in handling its claim for property damage, including delaying payment and offering a smaller settlement than the ultimate value of the claim. The insured sought discovery of the loss reserves, arguing that they demonstrate that the insurer knew the claim was worth more than what it offered to pay. The court upheld a denial of this discovery, finding that the reserves were not relevant because in this case they represented the insurer’s estimate of what it could be required to pay, rather than an evaluation of coverage based on thorough factual and legal consideration.</td>
</tr>
<tr>
<td>*St. Paul Fire &amp; Marine Ins. Co. v. Drummond Co., Inc., No. 2:11-CV-02695-JEO, 2012 WL 12897960, at <em>6 (N.D. Ala. May 1, 2012)</em></td>
<td>U.S. Dist. Court, Northern District of Alabama</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The Magistrate Judge granted a motion to compel reserve information, finding that the insurer’s estimate of its own liability was relevant to determining whether its settlement offer was in good faith.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
<td>-----------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Paul Johnson Drywall, Inc. v. Phoenix Ins. Co.</em>, No. CIV. 13-8124-PCT-PGR, 2014 WL 1764126 (D. Ariz. May 5, 2014)</td>
<td>U.S. Dist. Court, District of Arizona</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court granted the insured’s motion to compel the production of reserve information, finding that it may lead to the discovery of admissible evidence because it is relevant to the insurer’s internal assessments about coverage and valuation, and the insurer’s good or bad faith in handling and investigating the claims.</td>
</tr>
<tr>
<td><em>Spahr v. Amco Ins. Co.</em>, No. CV 09-9174-PA (AGRX), 2010 WL 11459909 (C.D. Cal. Sept. 29, 2010)</td>
<td>U.S. Dist. Court, Central District of California</td>
<td>Bad faith</td>
<td>Yes</td>
<td>In granting a motion to compel the production of reserve information, the Magistrate Judge noted that although reserves are not an admission of liability or the value of a claim, they may be relevant where the insurer’s subjective state of mind is at issue. The Magistrate found the reserve information relevant in this case, where the insurer was alleged to have attempted to compel the insured to accept a lesser sum in settlement as compared to the value of the claim.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-----------------------------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Flintkote Co. v. Gen. Acc. Assur. Co. of Canada</em>, No. C 04-01827 MHP, 2009 WL 1457974 (N.D. Cal. May 26, 2009)</td>
<td>U.S. Dist. Court, Northern District of California</td>
<td>Bad faith/ breach of contract</td>
<td>Yes</td>
<td>The insured brought this action against its insurer alleging bad faith related to failing to defend the insured against asbestos-related claims, while the insurer allegedly knew that the claims were covered. The court found that in this case, the reserve information may be relevant to show a difference between what the insurer believed it would have to pay on the claim and what it communicated to the insured.</td>
</tr>
<tr>
<td><em>Bernstein v. Travelers Ins. Co.</em>, 447 F. Supp. 2d 1100 (N.D. Cal. 2006)</td>
<td>U.S. Dist. Court, Northern District of California</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging that the insurer acted in bad faith in delaying payments and making a settlement offer to the insured that allegedly fell well below what the insurer knew it owed. The Magistrate Judge granted a motion to compel the production of reserve information, finding that in this case, that information may be relevant to issues such as the difference between the insurer’s internal valuation of the claim and the settlement amounts offered.</td>
</tr>
<tr>
<td><em>Am. Prot. Ins. Co. v. Helm Concentrates, Inc.</em>, 140 F.R.D. 448, 450 (E.D. Cal. 1991)</td>
<td>U.S. Dist. Court, Eastern District of California</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The insured alleged that the insurers acted in bad faith in denying coverage under their commercial “all-risk” policies, where the insured claimed losses related to a machinery failure in its tomato processing plant. The Magistrate Judge denied a motion to compel discovery of reserve information, finding that the insurer’s estimation of potential liability was not relevant in this “first party” case, where the issues were limited to whether the loss was covered and whether the insurer acted in good faith in investigating and denying coverage.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------------------------------------</td>
<td>-------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>J.C. Assocs. v. Fid. &amp; Guar. Ins. Co., No. CIV.A. 01-2437 RJJLM, 2003 WL 1889015, at *1 (D.D.C. Apr. 15, 2003)</td>
<td>U.S. Dist. Court, District of Columbia</td>
<td>Coverage</td>
<td>No (irrelevant and work product privileged)</td>
<td>The Magistrate Judge denied a motion to compel the discovery of reserve information, finding that a reserve is not an admission of potential liability if it was set based on considerations other than an assessment of liability, such as state law regulation or tax or financial considerations. The Magistrate Judge noted that the societal interest in accurate reserves is diminished if they are always made available and insurers are tempted to understate them. Finally, the Magistrate Judge found that reserves are probably privileged as work product, because “their raison d'être is the existence of litigation against the insured or its anticipation.”</td>
</tr>
<tr>
<td>Athridge v. Aetna Cas. &amp; Sur. Co., 184 F.R.D. 181, 192-93 (D.D.C. 1998)</td>
<td>U.S. Dist. Court, District of Columbia</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The plaintiff (an assignee of the insured) alleged that Aetna acted in bad faith and in breach of its duties to its insured in declining to defend or indemnify the insured, and sought discovery of reserve documents. The Magistrate Judge noted the broad standard for relevance at the discovery stage, and found that the reserve information was relevant to the thoroughness with which Aetna acted.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-----------------------</td>
<td>--------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Indep. Petrochem. Corp. v. Aetna Cas. &amp; Sur. Co.</em>, 117 F.R.D. 283 (D.D.C. 1986)</td>
<td>U.S. Dist. Court, District of Columbia</td>
<td>Coverage</td>
<td>No (irrelevant)</td>
<td>The Magistrate Judge denied the insured’s motion to compel the discovery of reserve information, noting that a reserve estimate does “not normally entail an evaluation of coverage based upon a thorough factual and legal consideration when routinely made as a claim analysis.” Thus, reserves have “very tenuous relevance, if any relevance at all.” The Magistrate also noted that where reserves are established with legal input, they may be privileged.</td>
</tr>
<tr>
<td><em>Liberty Mut. Fire Ins. Co. v. APAC-Se., Inc.</em>, No. 1:07-CV-1516-JEC, 2008 WL 11320055, at *10-11 (N.D. Ga. May 16, 2008)</td>
<td>U.S. Dist. Court, Northern District of Georgia</td>
<td>Coverage and bad faith</td>
<td>No (irrelevant)</td>
<td>Liberty Mutual filed this action seeking a declaration that the insured settled the underlying lawsuit without consent. The insured counterclaimed alleging bad faith. The insured asserted that reserve information was relevant to show Liberty Mutual’s beliefs about the actual settlement value. However, the Magistrate Judge denied the motion to compel, finding that the insured failed to establish that the reserves were relevant because there was no showing that Liberty Mutual set its reserves based on an individualized assessment of the case.</td>
</tr>
<tr>
<td><em>Cent. Georgia Anesthesia Servs., P.C. v. Equitable Life Assur. Soc. of U.S.</em>, No. 5:06-CV-25 (CAR), 2007 WL 2128184, at *2-3 (M.D.</td>
<td>U.S. Dist. Court, Middle District of Georgia</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court granted a motion to compel the production of reserve information, stating that it was choosing to follow the line of cases that hold that reserves are generally discoverable in bad faith cases. Specifically, at issue in this case was “the intended numerical value of the benefits suckled by the insurer.</td>
</tr>
</tbody>
</table>

investigated the claim, bearing on the question of bad faith.
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am., No. 1:13-CV-01316-JMS, 2014 WL 7360049, at *6 (S.D. Ind. Dec. 23, 2014)</td>
<td>U.S. Dist. Court, Southern District of Indiana</td>
<td>Coverage</td>
<td>No (irrelevant)</td>
<td>The only issue in this action was the existence of coverage. The court noted that loss reserves are “precautionary estimates unrelated to the merits of a claim,” and held that they were not relevant to the coverage issues in this case.</td>
</tr>
<tr>
<td>Meighan v. TransGuard Ins. Co. of Am., 298 F.R.D. 436, 444 (N.D. Iowa 2014)</td>
<td>U.S. Dist. Court, Northern District of Iowa</td>
<td>Bad faith/ breach of contract</td>
<td>No (privileged work product)</td>
<td>The insured brought this action alleging breach of contract and bad faith denials of occupational injury insurance coverage relating to an injury he suffered while working as an independent contractor driving semi-tractor-trailers. The Magistrate Judge denied the insured’s motion to compel discovery of reserve information, finding that the reserves were prepared in anticipation of litigation and were thus work product.</td>
</tr>
<tr>
<td>U.S. Fire Ins. Co. v. Bunge N. Am., Inc., 244 F.R.D. 638, 644-45 (D. Kan. 2007)</td>
<td>U.S. Dist. Court, District of Kansas</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court noted the broad nature of the relevance inquiry in discovery and found that the amounts of the reserves—including any changes to those amounts—could lead to admissible evidence relating to the insurers’ own beliefs about coverage and their liability, as well as their good or bad faith in handling and investigating the claims.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-----------------------------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Culbertson v. Shelter Mut. Ins. Co., No. CIV.A. 97-1609, 1998 743592 (E.D. La. Oct. 21, 1998)</strong></td>
<td>U.S. Dist. Court, Eastern District of Louisiana</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The Magistrate Judge granted a motion to compel the production of reserve information, “choos[ing] to follow that line of cases which hold that reserve information is discoverable where a claim of bad faith is asserted.” The Magistrate Judge found that the reserve information could lead to admissible evidence related to how thoroughly the insurer investigated the insured’s claim.</td>
</tr>
<tr>
<td><strong>Savoy v. Richard A. Carrier Trucking, Inc., 176 F.R.D. 10, 12 (D. Mass. 1997)</strong></td>
<td>U.S. Dist. Court, District of Massachusetts</td>
<td>Bad faith</td>
<td>No (confidential)</td>
<td>The Magistrate Judge held that information regarding the reserve (such as the time it was established) may be relevant to the bad faith claim, going to issues such as the thoroughness of the insurer’s investigation, and should be produced. However, the Magistrate held that the amount of the reserve need not be produced, as this “goes to the heart of [the insurer’s] legal strategy” and its production could negatively affect the legal positions of the insurer as well as the insured in the underlying claim.</td>
</tr>
<tr>
<td>*<em>Jefferson Davis Cty. Sch. Dist. v. RSUI Indem. Co., No. CIV.A.208-CV-190KSMTP, 2009 WL 1658478, at <em>3 (S.D. Miss. June 11, 2009)</em></em></td>
<td>U.S. Dist. Court, Southern District of Mississippi</td>
<td>Bad faith/ breach of contract</td>
<td>Yes</td>
<td>The Magistrate Judge noted that district courts in the Fifth Circuit have generally ruled that reserve information is discoverable in bad faith claims, as the insurer’s estimate of the value of the claim may be relevant in the bad faith context. The Magistrate Judge granted a motion to compel the production of reserve information.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>------</td>
<td>-------------------</td>
<td>---------</td>
</tr>
<tr>
<td><em>Starr Indem. &amp; Liab. Co. v. Cont'l Cement Co.</em>, No. 4:11CV809 JAR, 2012 WL 6012904, at *3-4 (E.D. Mo. Dec. 3, 2012)</td>
<td>U.S. Dist. Court, Eastern District of Missouri</td>
<td>Coverage</td>
<td>Yes</td>
<td>The court found that the reserve amount set was not subject to the work product privilege, although information about the process of setting reserves was protected.</td>
</tr>
<tr>
<td><em>Spirco Envtl., Inc. v. Am. Int'l Specialty Lines Ins. Co.</em>, No. 4:05 CV 1437 DDN, 2006 WL 2521618 (E.D. Mo. Aug. 30, 2006)</td>
<td>U.S. Dist. Court, Eastern District of Missouri</td>
<td>Bad faith/breach of contract</td>
<td>No (privileged work product)</td>
<td>The Magistrate Judge found that the reserve information was protected by the work product doctrine, because it was an opinion regarding liability in potential litigation.</td>
</tr>
<tr>
<td><em>OOIDA Risk Retention Grp., Inc. v. Bordeaux</em>, No. 315CV00081MMDVPC, 2016 WL 427066, at *10 (D. Nev. Feb. 3, 2016)</td>
<td>U.S. Dist. Court, District of Nevada</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court found that the &quot;bulk of cases&quot; have concluded that reserve information is relevant in bad faith cases, and compelled discovery.</td>
</tr>
<tr>
<td><em>866 E. 164th St., LLC v. Union Mut. Fire Ins. Co.</em>, No. 16-CV-03678 (SN), 2016 WL 6901321, at *2 (S.D.N.Y. Nov. 23, 2016)</td>
<td>U.S. Dist. Court, Southern District of New York</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging that its insurer acted in bad faith in denying its claim related to property damage. The Magistrate Judge held that reserve amounts were discoverable. The Magistrate found that, as evidenced by the timing, the reserves were not privileged because they were established as part of the process of adjusting the insurance claim, and were not part of the litigation strategy.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>--------------------------------------</td>
<td>-------------------------------</td>
<td>--------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. H &amp; R Block, Inc., No. 12 CIV. 1505 AT HBP, 2014 WL 4377845 (S.D.N.Y. Sept. 4, 2014)</td>
<td>U.S. Dist. Court, Southern District of New York</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The Magistrate Judge found the reserve information “sufficiently relevant to be discoverable,” finding that the depth of the reserve analysis was relevant to the issues of whether the insured performed a thorough analysis of the claims or whether it lacked sufficient information to properly evaluate the claims.</td>
</tr>
<tr>
<td>Champion Int'l Corp. v. Liberty Mut. Ins. Co., 128 F.R.D. 608, 612 (S.D.N.Y. 1989)</td>
<td>U.S. Dist. Court, Southern District of New York</td>
<td>Coverage</td>
<td>Yes</td>
<td>The insured brought this action seeking indemnification from its insurers for amounts paid on the underlying products liability claims. The court upheld the Magistrate’s determination that the reserve information was not privileged and that it was sufficiently relevant to compel production.</td>
</tr>
<tr>
<td>Bondex Int'l, Inc. v. Hartford Acc. &amp; Indem. Co., No. 1:03CV1322, 2006 WL 355289, at *2-3 (N.D. Ohio Feb. 15, 2006)</td>
<td>U.S. Dist. Court, Northern District of Ohio</td>
<td>Bad faith/breach of contract</td>
<td>No (irrelevant and privileged work product)</td>
<td>The Magistrate Judge denied a motion to compel reserve information, finding that it is not relevant because it is often a business decision that “is not necessarily based on a full knowledge of the facts and the law of the case.” The Magistrate Judge also found that, to the extent it is based on legal input, reserve information is privileged work product that reflects the mental impressions of the attorneys or risk management department regarding an evaluation of the lawsuit.</td>
</tr>
<tr>
<td>Soc'y Corp. v. Am. Cas. Co. of Reading, PA., No. 1:91CV0327, 1991 WL 346302 (N.D. Ohio July 24, 1991)</td>
<td>U.S. Dist. Court, Northern District of Ohio</td>
<td>Coverage</td>
<td>Yes</td>
<td>The insured brought this action seeking reimbursement for amounts paid in underlying claims. The court held that reserve information was relevant and must be produced in this case, because one of the issues raised in the insurer’s defenses is that the settlement entered into by the insured was unreasonable. The court found that</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>--------------------------------------------</td>
<td>---------------</td>
<td>--------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Mirarchi v. Seneca Specialty Ins. Co., No. CIV.A. 10-3617, 2011 WL 2982401 (E.D. Pa. July 22, 2011), aff’d, 564 F. App’x 652, 654-55 (3d Cir. 2014)</strong></td>
<td>U.S. Dist. Court, Eastern District of Pennsylvania</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The insured brought an action for bad faith related to the insurer’s handling of his claim for losses arising out of a fire. The court held that reserve information was not protected by the work product privilege, because it was not prepared by or for an attorney and was prepared in the ordinary course of business instead of in anticipation of litigation. As to relevance, the court noted that reserves may be set according to varying criteria, and are only a preliminary estimate of potential liability that does not necessarily take into account all factual and legal components of the claim. The court held that the reserve amounts were irrelevant. However, the court noted that facts considered in setting the reserve amounts may be relevant.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>------</td>
<td>-------------------</td>
<td>---------</td>
</tr>
<tr>
<td><em>N. River Ins. Co. v. Greater N.Y. Mut. Ins. Co.</em>, 872 F. Supp. 1411, 1411 (E.D. Pa. 1995)</td>
<td>U.S. Dist. Court, Eastern District of Pennsylvania</td>
<td>Bad faith</td>
<td>Yes</td>
<td>North River (an excess insurer) brought this action against Greater New York Mutual Insurance Co. (a primary insurer), alleging that Greater New York refused in bad faith to settle the underlying claim within its policy limits when the claim later resulted in a much higher judgment. The court found that the reserves set by Greater New York must have some relationship to Greater New York’s estimation of its potential liability and its analysis of settlement value, and thus this information was relevant to the question of whether Greater New York acted in bad faith during settlement negotiations.</td>
</tr>
<tr>
<td><em>ContraVest Inc. v. Mt. Hawley Ins. Co.</em>, No. 9:15-CV-00304-DCN, 2017 WL 1190880, at *11-12 (D.S.C. Mar. 31, 2017)</td>
<td>U.S. Dist. Court, District of South Carolina</td>
<td>Bad faith</td>
<td>Yes</td>
<td>In an action for bad faith failure to defend and indemnify the insured’s claim, the court found that reserve information could be relevant to the extent it revealed the insurer’s assessment of the validity of the claim for coverage. The court upheld the magistrate judge’s recommendation compelling production, finding that the magistrate did not err in failing to conduct an <em>in camera</em> inspection before holding that the documents should be produced as potentially relevant, where it had not been timely</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-----------------------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>First Horizon Nat'l Corp. v. Houston Cas. Co.</em>, No. 2:15-CV-2235-SHL-DKV, 2016 WL 5869580, at *14-15 (W.D. Tenn. Oct. 5, 2016)</td>
<td>U.S. Dist. Court, Western District of Tennessee</td>
<td>Bad faith/breach of contract</td>
<td>No (irrelevant)</td>
<td>The Magistrate Judge held that reserve information was irrelevant and denied a motion to compel production of this information, finding that reserves “are a business judgment and do not reflect a legal determination of the validity of the insured’s claim.”</td>
</tr>
<tr>
<td><em>First Horizon Nat'l Corp. v. Certain Underwriters at Lloyd's</em>, No. 211CV02608SHMDKV, 2013 WL 11090763, at *9 (W.D. Tenn. Feb. 27, 2013)</td>
<td>U.S. Dist. Court, Western District of Tennessee</td>
<td>Bad faith/breach of contract</td>
<td>No (irrelevant)</td>
<td>The court denied a motion to compel, holding that reserve information is not relevant because it reflects an estimate of potential liability that may not be based upon a thorough factual and legal analysis. The court also noted that, to the extent reserves are established based on legal consideration, they are most likely privileged under the work product doctrine.</td>
</tr>
<tr>
<td><em>Trinity E. Energy, LLC v. St. Paul Surplus Lines Ins. Co.</em>, No. 4:11-CV-814-Y, 2013 WL 12124022 (N.D. Tex. Mar. 8, 2013)</td>
<td>U.S. Dist. Court, Northern District of Texas</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging that its insurer acted in bad faith in denying its claim for coverage for damages arising out of a malfunctioning gas well, alleging that the insurer misrepresented the coverage provisions and handled the claim in a manner calculated to construct a pretext for denying it. The Magistrate Judge granted a motion to compel discovery of reserve information, finding that it was relevant by showing, for example, that the insurer knew liability was clear but denied coverage unreasonably.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>------------</td>
<td>--------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Swicegood v. Medical Protective Co.</em>, No. 3:95-CV-335-D, 2004</td>
<td>U.S. Dist. Court, Northern District of Texas</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging bad faith by the insurer in failing to settle a third party claim brought against the insured. The court held that reserve information could be relevant, because it could tend to show that the insurer should have accepted the settlement offers (i.e., if it had valued the claim at a higher amount).</td>
</tr>
<tr>
<td><em>Isilon Sys., Inc. v. Twin City Fire Ins. Co.</em>, No. C10-1392MJP</td>
<td>U.S. Dist. Court, Western District of Washington</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court found that reserves must be produced (subject to privilege redactions where individual case reserves were calculated by attorneys), because the reserves were approved by upper management and were made by persons with knowledge of the policies, so the reserve information was likely relevant.</td>
</tr>
<tr>
<td><em>Heights at Issaquah Ridge Owners Ass’n v. Steadfast Ins. Co.</em>, No. C07-1045RSM</td>
<td>U.S. Dist. Court, Western District of Washington</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The court denied the plaintiff’s motion to compel the production of reserve information, finding that there was no showing of how the reserve information would be relevant to the bad faith claim.</td>
</tr>
</tbody>
</table>
| *Nicholas v. Bituminous Cas. Corp.*, 235 F.R.D. 325 (N.D.W. Va. 2006) | U.S. Dist. Court, Northern                 | Bad faith  | No (privileged)     | The plaintiffs brought this third-party bad faith action alleging the insurer failed to acknowledge coverage and failed to effectuate a prompt, fair
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District of West Virginia</strong></td>
<td>work product</td>
<td>and equitable settlement. The court found that reserve information was relevant to whether the insurer acted in bad faith, because the reserves reflected the insurer’s belief regarding what coverage existed and its estimate regarding potential liability. However, the court found that the reserves were prepared in anticipation of litigation and thus were protected by the work product privilege.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1611-16 (1996)</strong></td>
<td>California Court of Appeal</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought a bad faith action against his professional liability insurer. The court held that reserve information was relevant in this case as, for example, it may be relevant to issues of the insurer’s state of mind regarding its claims handling practices and the applicable coverage.</td>
</tr>
<tr>
<td><strong>Loyal Order of Moose, Lodge 1392 v. Int’l Fid. Ins. Co., 797 P.2d 622, 628 n.14 (Alaska 1990)</strong></td>
<td>Alaska Supreme Court</td>
<td>Bad faith</td>
<td>Yes</td>
<td>In an action for bad faith related to a bond surety’s failure to investigate and respond to claims, the court noted that it disagreed with the lower court’s ruling denying discovery of loss reserves. The court opined that loss reserves were reasonably calculated to lead to the discovery of admissible evidence, and were not privileged because they were made in the ordinary course of business rather than in anticipation of litigation.</td>
</tr>
</tbody>
</table>
| **Hoechst Celanese Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 623 A.2d 1099, 1109-10 (Del.)** | Delaware Superior Court | Coverage | No (irrelevant) | The insured brought this action seeking a coverage determination related to claims involving a defect in its residential plumbing systems. The insured sought to discover reserve information, asserting that the establishment of reserves evidences an acknowledgment by the insurers of
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Super. Ct. 1991)</td>
<td></td>
<td></td>
<td></td>
<td>their liability for the claims. The court denied the insured’s motion to compel this discovery, holding that reserves are irrelevant because reserves “do not represent an admission or evaluation of liability.”</td>
</tr>
<tr>
<td>Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chem. Co., 558 A.2d 1091 (Del. Super. Ct. 1989)</td>
<td>Delaware Superior Court</td>
<td>Coverage</td>
<td>No (irrelevant)</td>
<td>National Union, The Travelers Indemnity Company, and American Motorists Insurance Company brought a coverage action seeking a declaratory judgment as to whether they were obligated to defend and indemnify Stauffer Chemical Company for liabilities arising from disposal of waste materials. Stauffer sought to discover reserve information to show the insurers believed their policies covered these types of hazardous waste claims. The court held that the reserves information was not relevant and not reasonably calculated to lead to the discovery of admissible evidence, because the reserves information are hypothetical internal estimates and are “not closely connected with the interpretations of the policies.” “The fact that reserves were established does not necessarily mean that the insurers believed that such claims would be covered by the policies.”</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>--------------------------------------</td>
<td>------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>State ex rel. Erie Ins. Prop. &amp; Cas. Co. v. Mazzone</em>, 218 W. Va. 593 (2005)</td>
<td>West Virginia Supreme Court of Appeals</td>
<td>Bad faith</td>
<td>No (but left open for subsequent request for the discovery based on a more thorough factual showing of relevance)</td>
<td>The court noted that “the relevancy of reserve information turns on the unique factors presented in each case”—including the method the insurer uses to set reserves and the purpose for which the reserve information is sought. The court reversed an order compelling the production of reserves, finding that the lower court did not make a sufficient factual analysis of the relevancy in this action, but noted that the court was not prohibiting a subsequent application for disclosure of reserves based on a proper factual basis.</td>
</tr>
</tbody>
</table>
THURSDAY, JULY 27, 2017
9:00 A.M. - 9:45 A.M.
PLENARY PROGRAM

The Law Firm of the Future: Real Estate, Technology and Millennials
LePetit Palais

Speakers:
Sherry Cushman
Mike Lucey
FDCC Annual Meeting

Associates and Office Space

Mike Lucey
Gordon & Rees
THINGS TO THINK ABOUT

- Associate mobility is a given
- Timekeepers in work stations
- Shared space/work at home
  - More conference rooms
    - “Community Offices”
    - “Quiet Rooms”
- No Prima Donnas
- IT – Printers/Faxes/Scanners
PAPERLESS OFFICE

- 16 sq. ft. per lawyer for filing cabinets
- 120 lawyers
- $50 per sq ft. occupancy cost per year
- $96,000: Occupancy cost of cabinets per year

**Now**: 1-1.5 sq. ft. per lawyer for filing

**Cost**: $6-9,000
IF YOU CAN’T COMPLETELY RECONFIGURE YOUR SPACE

- Get rid of the library
- Administrative “teams”
  - Go paperless
  - Work at home
- Beef up remote access/technology and cyber security
  - Cut back on printers
  - Time entry on cell phones
  - Pool non lawyer timekeepers
THURSDAY, JULY 27, 2017
9:45 A.M. - 10:30 A.M.
PLENARY PROGRAM

Trial Masters – Buffalo Airline Crash Part Deux
LePetit Palais

Speakers:
Neil Goldberg
Paul Jepsen
DISCOVERY OF RESERVE
AND REINSURANCE COMMUNICATIONS

Presented at:
FDCC Annual Meeting
Fairmont Le Montreux Palace
Montreux, Switzerland
July 27, 2017

Author:
Tania Rice
Squire Patton Boggs (US) LLP
INTRODUCTION

In cases where an insurer is a party to an action, numerous discovery disputes have centered on a litigant’s ability to discover the insurer’s loss reserve information and communications with its reinsurers. The litigant (generally the insured or a co-insurer) may request this information in discovery, hoping to find something in the insurer’s internal communications and information that comports with the litigant’s theory of the case. There is no clear rule as to the discoverability of reserves and reinsurance communications. Many courts have noted that this information often has little, if any, relevance, because they reflect the insurer’s compliance with statutory reserving requirements and internal business decisions. Typically, this information is not relevant to coverage determinations. However, a number of courts have also held that this information can be relevant and discoverable particularly in bad faith cases, depending on the allegations, as issues related to the insurer’s subjective opinions and knowledge may be implicated. While the results of similar discovery disputes cannot be predicted with crystal clarity, examining rulings from various jurisdictions and case circumstances provides some guidance.

I. DISCOVERY OF RESERVES

The unique nature of loss reserves has led to countless discovery disputes in insurance litigation. Often required under state laws, reserves are funds insurers set aside to cover payment in the event of future liability. They reflect estimates of potential exposure on a claim; they do not reflect actual settlement authority. Courts have noted that reserves generally do not represent “an evaluation of coverage based upon a thorough factual and legal consideration.” Reserves are often impacted by

1 See, e.g., N.Y.Ins.Law § 1303; Cal. Ins. Code § 923.5.
2 See, e.g., Cal. Ins. Code § 923.5 (insurers must “maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses and claims for which the insurer may be liable”); Signature Dev. Companies, Inc. v. Royal Ins. Co. of Am., 230 F.3d 1215, 1224 (10th Cir. 2000) (reserves are “merely an amount [the insurer] set aside to cover potential future liabilities.”); Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1613 (1996) (a reserve is “the amount anticipated to be sufficient to pay all obligations for which the insurer may be responsible under the policy with respect to a particular claim”); Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 623 A.2d 1099, 1109 (Del. Super. Ct. 1991) (“Reserves are accounting entries which an insurance company regularly uses to set aside sufficient funds in the event of policyholder liability. . . . [T]he establishment of reserves is an appropriate business decision justified by the necessity of preserving financial stability in the event of liabilities which cannot be predicted with any degree of certainty.”).
3 Lipton, 48 Cal. App. 4th at 1613.
considerations other than a pure factual and legal analysis of the claim, such as state law regulations and business and tax considerations. In practice, most companies will put some value towards any case, since it is a best practice to generally consider a compromise if it is found fair and reasonable.

In seeking to protect its reserve information from discovery, an insurer may argue that its internal business decisions regarding the amount of funds to set aside for a claim have nothing to do with legal issues such as actual liability. After all, reserves are only an estimate of potential exposure—often established early at the first notice of an insured’s claim, before any detailed factual analysis—and not a thorough evaluation of the insurer’s actual obligations. An insurer may cry unfairness at being mandated by regulation to set reserve amounts, only to have those amounts used against it in litigation; regularly requiring production of reserves would only undermine the purpose of setting them, incentivizing underestimation rather than a conservative approach to setting aside sufficient funds. On the other hand, an insured seeking production of reserve information may argue that, while a reserve may not represent the most in-depth analysis of a claim’s value, it certainly has some tie to the insurer’s evaluation of the claim. The insurer’s internal assessment may be relevant, particularly in bad faith cases where the insurer’s state of mind is at issue. The insured may hark back to the generally broad leeway for discovery.

An insurer may object to discovery of its reserves based on relevance grounds. In deciding whether reserves are sufficiently relevant to compel discovery, courts generally look to the type of claim being brought. Where parties are seeking a coverage determination, courts typically hold that reserves are not relevant. Reserves do not constitute an admission of liability or the existence of coverage. 


6 J.C. Assocs., 2003 WL 1889015, at *1 (“If reserve information is always available and state law does not require its calculation, there is a risk that insurers will understate the reserve lest it be used against them. Whatever societal interest there is in the accuracy of reserves is foregone if insurance companies yield to the temptation to state them inaccurately, lest they be used as damaging admissions against their interests.”).

7 See Fed. R. Civ. Proc. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . . .”); see also, e.g., Cal. Civ. Proc. Code § 2017.010 (a party may discover matter that is “relevant to the subject matter involved in the pending action” and “reasonably calculated to lead to the discovery of admissible evidence”).

In bad faith cases, the relevance of reserves becomes a more difficult question. Some courts have made blanket holdings that reserves are relevant in bad faith cases, where the insurer’s subjective beliefs and actions are at issue. Many courts look to the bad faith allegations to make an individualized determination as to whether issues are raised that render the reserves relevant. Issues for which courts have found that reserves may be relevant include:

- Whether the insurer thoroughly investigated the claim (making the thoroughness of the reserve evaluation relevant);
- Whether the insurer acted in bad faith by making a settlement offer to the insured for less than the insurer's understanding as to the value of the claim;
- Whether there was a difference between what the insurer believed it owed on a claim and what it communicated to its insured; and
- Whether the insurer was unreasonable in refusing to accept a settlement offer in an underlying case, where it had assigned a higher value to the claim.

Some courts have differentiated bad faith claims where the insurer issued a “first party” policy (where the insurer compensates the insured directly for its losses) versus a “third party” liability policy (where the insurer defends and indemnifies the insured against third party claims). In a “first party” case the issues are usually limited to the existence of coverage and whether the insurer’s actions were in good faith, rendering reserves largely irrelevant. In a “third party” case reserves may be more relevant, because the insurer has a duty to defend as long as there is potential coverage; evidence that an insurer believed there was potential liability (such as may be found in reserve information) may be probative where the insurer denied a defense of the claim.

15 Id.
Discovery disputes over reserves may also raise privilege issues. There is a split in authority as to whether reserves may be privileged under the work product doctrine. Courts that held reserves privileged found that they were prepared in anticipation of litigation—a party’s evaluation of the amount it may pay in litigation seems anathema to discovery. However, other courts have held that reserves were not privileged, recognizing that insurance companies may establish reserves as a matter of course at the first notice of an insured’s loss claim, as part of regular claims adjusting and before the start of any litigation.

The result of a discovery dispute over reserve information is often fact- and jurisdictional-dependent. Table 1 is a survey of several cases examining the discoverability of reserve information.

II. DISCOVERY OF REINSURANCE DOCUMENTS AND COMMUNICATIONS

Federal Rule of Civil Procedure 26(a)(1)(A)(iv) requires, as part of the parties’ initial disclosures, the production of “any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.” Most federal courts have held that reinsurance agreements must be produced under Rule 26(a) where the primary insurer is a named party, because the reinsurer may have a duty to indemnify the primary insurer. However, reinsurance agreements need not be produced under Rule 26(a) when the primary insurer is not a party. They also may not need to be produced in state court actions where Rule 26(a) does not apply.


Most courts hold that communications and other documents between an insurer and its reinsurer are generally not relevant and not discoverable. Reinsurance information reflects a business decision by the primary insurer to spread risk or to satisfy statutory reserve requirements, so it is not typically relevant to the claims in a case. As with loss reserves, reinsurance communications are discoverable in certain cases where they may have relevance to the issues raised. Courts have held that they may be relevant (and are thus discoverable) to show the insurer’s interpretation of the policies at issue, whether the insurer believed the claims were covered by the policies, the thoroughness of the insurer’s claims investigations, or combat defenses such as lost policy, late notice, or misrepresentation. In arguing that reserves are not relevant, an insurer may choose to describe the contents of the communications or request an in camera review to demonstrate lack of relevance.

Insurers may also object to the production of reinsurance communications if they are protected by the attorney-client or work product privileges.

---


### Table 1: Survey of Several Cases Addressing Discovery of Reserve Information

<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Mirarchi v. Seneca Specialty Ins. Co.</em>, 564 F. App’x 652, 654-55 (3d Cir. 2014)</td>
<td>Third Circuit Court of Appeals</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The insured brought this action alleging the insurer acted in bad faith in handling its claim for property damage, including delaying payment and offering a smaller settlement than the ultimate value of the claim. The insured sought discovery of the loss reserves, arguing that they demonstrate that the insurer knew the claim was worth more than what it offered to pay. The court upheld a denial of this discovery, finding that the reserves were not relevant because in this case they represented the insurer’s estimate of what it could be required to pay, rather than an evaluation of coverage based on thorough factual and legal consideration.</td>
</tr>
<tr>
<td><em>St. Paul Fire &amp; Marine Ins. Co. v. Drummond Co., Inc.</em>, No. 2:11-CV-02695-JEO, 2012 WL 12897960, at *6 (N.D. Ala. May 1, 2012)</td>
<td>U.S. Dist. Court, Northern District of Alabama</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The Magistrate Judge granted a motion to compel reserve information, finding that the insurer’s estimate of its own liability was relevant to determining whether its settlement offer was in good faith.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-----------</td>
<td>--------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Paul Johnson Drywall, Inc. v. Phoenix Ins. Co., No. CIV. 13-8124-PCT-PGR, 2014 WL 1764126 (D. Ariz. May 5, 2014)</strong></td>
<td>U.S. Dist. Court, District of Arizona</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court granted the insured’s motion to compel the production of reserve information, finding that it may lead to the discovery of admissible evidence because it is relevant to the insurer’s internal assessments about coverage and valuation, and the insurer’s good or bad faith in handling and investigating the claims.</td>
</tr>
<tr>
<td><strong>Spahr v. Amco Ins. Co., No. CV 09-9174-PA (AGRX), 2010 WL 11459909 (C.D. Cal. Sept. 29, 2010)</strong></td>
<td>U.S. Dist. Court, Central District of California</td>
<td>Bad faith</td>
<td>Yes</td>
<td>In granting a motion to compel the production of reserve information, the Magistrate Judge noted that although reserves are not an admission of liability or the value of a claim, they may be relevant where the insurer’s subjective state of mind is at issue. The Magistrate found the reserve information relevant in this case, where the insurer was alleged to have attempted to compel the insured to accept a lesser sum in settlement as compared to the value of the claim.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Flintkote Co. v. Gen. Acc. Assur. Co. of Canada</em>, No. C 04-01827 MHP, 2009 WL 1457974 (N.D. Cal. May 26, 2009)</td>
<td>U.S. Dist. Court, Northern District of California</td>
<td>Bad faith/breach of contract</td>
<td>Yes</td>
<td>The insured brought this action against its insurer alleging bad faith related to failing to defend the insured against asbestos-related claims, while the insurer allegedly knew that the claims were covered. The court found that in this case, the reserve information may be relevant to show a difference between what the insurer believed it would have to pay on the claim and what it communicated to the insured.</td>
</tr>
<tr>
<td><em>Bernstein v. Travelers Ins. Co.</em>, 447 F. Supp. 2d 1100 (N.D. Cal. 2006)</td>
<td>U.S. Dist. Court, Northern District of California</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging that the insurer acted in bad faith in delaying payments and making a settlement offer to the insured that allegedly fell well below what the insurer knew it owed. The Magistrate Judge granted a motion to compel the production of reserve information, finding that in this case, that information may be relevant to issues such as the difference between the insurer's internal valuation of the claim and the settlement amounts offered.</td>
</tr>
<tr>
<td><em>Am. Prot. Ins. Co. v. Helm Concentrates, Inc.</em>, 140 F.R.D. 448, 450 (E.D. Cal. 1991)</td>
<td>U.S. Dist. Court, Eastern District of California</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The insured alleged that the insurers acted in bad faith in denying coverage under their commercial “all-risk” policies, where the insured claimed losses related to a machinery failure in its tomato processing plant. The Magistrate Judge denied a motion to compel discovery of reserve information, finding that the insurer’s estimation of potential liability was not relevant in this “first party” case, where the issues were limited to whether the loss was covered and whether the insurer acted in good faith in investigating and denying coverage.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>------</td>
<td>-------------------</td>
<td>---------</td>
</tr>
<tr>
<td>J.C. Assocs. v. Fid. &amp; Guar. Ins. Co., No. CIV.A. 01-2437 RJLJM, 2003 WL 1889015, at *1 (D.D.C. Apr. 15, 2003)</td>
<td>U.S. Dist. Court, District of Columbia</td>
<td>Coverage</td>
<td>No (irrelevant and work product privileged)</td>
<td>The Magistrate distinguished this action from a “third party” liability policy case, in which the establishment of a reserve could be probative of the insurer’s belief regarding potential liability; in those cases, acknowledging the potential for liability but failing to settle or defend the claim is relevant to the issue of bad faith. The Magistrate Judge denied a motion to compel the discovery of reserve information, finding that a reserve is not an admission of potential liability if it was set based on considerations other than an assessment of liability, such as state law regulation or tax or financial considerations. The Magistrate Judge noted that the societal interest in accurate reserves is diminished if they are always made available and insurers are tempted to understate them. Finally, the Magistrate Judge found that reserves are probably privileged as work product, because “their raison d’etre is the existence of litigation against the insured or its anticipation.”</td>
</tr>
<tr>
<td>Athridge v. Aetna Cas. &amp; Sur. Co., 184 F.R.D. 181, 192-93 (D.D.C. 1998)</td>
<td>U.S. Dist. Court, District of Columbia</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The plaintiff (an assignee of the insured) alleged that Aetna acted in bad faith and in breach of its duties to its insured in declining to defend or indemnify the insured, and sought discovery of reserve documents. The Magistrate Judge noted the broad standard for relevance at the discovery stage, and found that the reserve information was relevant to the thoroughness with which Aetna</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>-----------------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Indep. Petrochem. Corp. v. Aetna Cas. &amp; Sur. Co.</em>, 117 F.R.D. 283 (D.D.C. 1986)</td>
<td>U.S. Dist. Court, District of Columbia</td>
<td>Coverage</td>
<td>No (irrelevant)</td>
<td>The Magistrate Judge denied the insured’s motion to compel the discovery of reserve information, noting that a reserve estimate does “not normally entail an evaluation of coverage based upon a thorough factual and legal consideration when routinely made as a claim analysis.” Thus, reserves have “very tenuous relevance, if any relevance at all.” The Magistrate also noted that where reserves are established with legal input, they may be privileged.</td>
</tr>
<tr>
<td><em>Liberty Mut. Fire Ins. Co. v. APAC-Se., Inc.</em>, No. 1:07-CV-1516-JEC, 2008 WL 11320055, at *10-11 (N.D. Ga. May 16, 2008)</td>
<td>U.S. Dist. Court, Northern District of Georgia</td>
<td>Coverage and bad faith</td>
<td>No (irrelevant)</td>
<td>Liberty Mutual filed this action seeking a declaration that the insured settled the underlying lawsuit without consent. The insured counterclaimed alleging bad faith. The insured asserted that reserve information was relevant to show Liberty Mutual's beliefs about the actual settlement value. However, the Magistrate Judge denied the motion to compel, finding that the insured failed to establish that the reserves were relevant because there was no showing that Liberty Mutual set its reserves based on an individualized assessment of the case.</td>
</tr>
<tr>
<td><em>Cent. Georgia Anesthesia Servs., P.C. v. Equitable Life Assur. Soc. of U.S.</em>, No. 5:06-CV-25 (CAR), 2007 WL 2128184, at *2-3 (M.D.</td>
<td>U.S. Dist. Court, Middle District of Georgia</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court granted a motion to compel the production of reserve information, stating that it was choosing to follow the line of cases that hold that reserves are generally discoverable in bad faith cases. Specifically, at issue in this case was “the intended numerical value of the benefits...”</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>-------------------------------</td>
<td>--------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Ga. July 25, 2007</em>)</td>
<td></td>
<td></td>
<td></td>
<td><strong>payable under the policy,” and the court found that “the reserve may reveal what [the insurer] understood the benefit under the policy to be at the time they entered into the agreement.”</strong></td>
</tr>
<tr>
<td><em>Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am.</em>, No. 1:13-CV-01316-JMS, 2014 WL 7360049, at *6 (S.D. Ind. Dec. 23, 2014)</td>
<td>U.S. Dist. Court, Southern District of Indiana</td>
<td>Coverage</td>
<td>No (irrelevant)</td>
<td>The only issue in this action was the existence of coverage. The court noted that loss reserves are “precautionary estimates unrelated to the merits of a claim,” and held that they were not relevant to the coverage issues in this case.</td>
</tr>
<tr>
<td><em>Meighan v. TransGuard Ins. Co. of Am.</em>, 298 F.R.D. 436, 444 (N.D. Iowa 2014)</td>
<td>U.S. Dist. Court, Northern District of Iowa</td>
<td>Bad faith/breach of contract</td>
<td>No (privileged work product)</td>
<td>The insured brought this action alleging breach of contract and bad faith denials of occupational injury insurance coverage relating to an injury he suffered while working as an independent contractor driving semi-tractor-trailers. The Magistrate Judge denied the insured’s motion to compel discovery of reserve information, finding that the reserves were prepared in anticipation of litigation and were thus work product.</td>
</tr>
<tr>
<td><em>U.S. Fire Ins. Co. v. Bunge N. Am., Inc.</em>, 244 F.R.D. 638, 644-45 (D. Kan. 2007)</td>
<td>U.S. Dist. Court, District of Kansas</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court noted the broad nature of the relevance inquiry in discovery and found that the amounts of the reserves—including any changes to those amounts—could lead to admissible evidence relating to the insurers’ own beliefs about coverage and their liability, as well as their good or bad faith in handling and investigating the claims.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>------------------------------------------------</td>
<td>------------------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Culbertson v. Shelter Mut. Ins. Co.</em>, No. CIV.A. 97-1609, 1998 WL 743592 (E.D. La. Oct. 21, 1998)</td>
<td>U.S. Dist. Court, Eastern District of Louisiana</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The Magistrate Judge granted a motion to compel the production of reserve information, “choos[ing] to follow that line of cases which hold that reserve information is discoverable where a claim of bad faith is asserted.” The Magistrate Judge found that the reserve information could lead to admissible evidence related to how thoroughly the insurer investigated the insured’s claim.</td>
</tr>
<tr>
<td><em>Savoy v. Richard A. Carrier Trucking, Inc.</em>, 176 F.R.D. 10, 12 (D. Mass. 1997)</td>
<td>U.S. Dist. Court, District of Massachusetts</td>
<td>Bad faith</td>
<td>No (confidential)</td>
<td>The Magistrate Judge held that information regarding the reserve (such as the time it was established) may be relevant to the bad faith claim, going to issues such as the thoroughness of the insurer’s investigation, and should be produced. However, the Magistrate held that the amount of the reserve need not be produced, as this “goes to the heart of [the insurer’s] legal strategy” and its production could negatively affect the legal positions of the insurer as well as the insured in the underlying claim.</td>
</tr>
<tr>
<td><em>Jefferson Davis Cty. Sch. Dist. v. RSUI Indem. Co.</em>, No. CIVA.208-CV-190KSMTP, 2009 WL 1658478, at *3 (S.D. Miss. June 11, 2009)</td>
<td>U.S. Dist. Court, Southern District of Mississippi</td>
<td>Bad faith/ breach of contract</td>
<td>Yes</td>
<td>The Magistrate Judge noted that district courts in the Fifth Circuit have generally ruled that reserve information is discoverable in bad faith claims, as the insurer’s estimate of the value of the claim may be relevant in the bad faith context. The Magistrate Judge granted a motion to compel the production of reserve information.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-------------------------------------</td>
<td>--------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Starr Indem. &amp; Liab. Co. v. Cont'l Cement Co.</em>, No. 4:11CV809 JAR, 2012 WL 6012904, at *3-4 (E.D. Mo. Dec. 3, 2012)</td>
<td>U.S. Dist. Court, Eastern District of Missouri</td>
<td>Coverage</td>
<td>Yes</td>
<td>The court found that the reserve amount set was not subject to the work product privilege, although information about the process of setting reserves was protected.</td>
</tr>
<tr>
<td><em>Spirco Envtl., Inc. v. Am. Int'l Specialty Lines Ins. Co.</em>, No. 4:05 CV 1437 DDN, 2006 WL 2521618 (E.D. Mo. Aug. 30, 2006)</td>
<td>U.S. Dist. Court, Eastern District of Missouri</td>
<td>Bad faith/breach of contract</td>
<td>No (privileged work product)</td>
<td>The Magistrate Judge found that the reserve information was protected by the work product doctrine, because it was an opinion regarding liability in potential litigation.</td>
</tr>
<tr>
<td><em>OOIDA Risk Retention Grp., Inc. v. Bordeaux</em>, No. 315CV00081MMDVPC, 2016 WL 427066, at *10 (D. Nev. Feb. 3, 2016)</td>
<td>U.S. Dist. Court, District of Nevada</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court found that the “bulk of cases” have concluded that reserve information is relevant in bad faith cases, and compelled discovery.</td>
</tr>
<tr>
<td><em>866 E. 164th St., LLC v. Union Mut. Fire Ins. Co.</em>, No. 16-CV-03678 (SN), 2016 WL 6901321, at *2 (S.D.N.Y. Nov. 23, 2016)</td>
<td>U.S. Dist. Court, Southern District of New York</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging that its insurer acted in bad faith in denying its claim related to property damage. The Magistrate Judge held that reserve amounts were discoverable. The Magistrate found that, as evidenced by the timing, the reserves were not privileged because they were established as part of the process of adjusting the insurance claim, and were not part of the litigation strategy.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-----------------------------</td>
<td>--------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. H &amp; R Block, Inc., No. 12 CIV. 1505 AT HBP, 2014 WL 4377845 (S.D.N.Y. Sept. 4, 2014)</td>
<td>U.S. Dist. Court, Southern District of New York</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The Magistrate Judge found the reserve information “sufficiently relevant to be discoverable,” finding that the depth of the reserve analysis was relevant to the issues of whether the insured performed a thorough analysis of the claims or whether it lacked sufficient information to properly evaluate the claims.</td>
</tr>
<tr>
<td>Champion Int'l Corp. v. Liberty Mut. Ins. Co., 128 F.R.D. 608, 612 (S.D.N.Y. 1989)</td>
<td>U.S. Dist. Court, Southern District of New York</td>
<td>Coverage</td>
<td>Yes</td>
<td>The insured brought this action seeking indemnification from its insurers for amounts paid on the underlying products liability claims. The court upheld the Magistrate's determination that the reserve information was not privileged and that it was sufficiently relevant to compel production.</td>
</tr>
<tr>
<td>Bondex Int'l, Inc. v. Hartford Acc. &amp; Indem. Co., No. 1:03CV1322, 2006 WL 355289, at *2-3 (N.D. Ohio Feb. 15, 2006)</td>
<td>U.S. Dist. Court, Northern District of Ohio</td>
<td>Bad faith/breach of contract</td>
<td>No (irrelevant and privileged work product)</td>
<td>The Magistrate Judge denied a motion to compel reserve information, finding that it is not relevant because it is often a business decision that &quot;is not necessarily based on a full knowledge of the facts and the law of the case.&quot; The Magistrate Judge also found that, to the extent it is based on legal input, reserve information is privileged work product that reflects the mental impressions of the attorneys or risk management department regarding an evaluation of the lawsuit.</td>
</tr>
</tbody>
</table>
| Soc'y Corp. v. Am. Cas. Co. of Reading, PA., No. 1:91CV0327, 1991 WL 346302 (N.D. Ohio July 24, 1991) | U.S. Dist. Court, Northern District of Ohio | Coverage                   | Yes                | The insured brought this action seeking reimbursement for amounts paid in underlying claims. The court held that reserve information was relevant and must be produced in this case, because one of the issues raised in the insurer’s defenses is that the settlement entered into by the insured was unreasonable. The court found that
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Mirarchi v. Seneca Specialty Ins. Co.</em>, No. CIV.A. 10-3617, 2011 WL 2982401 (E.D. Pa. July 22, 2011), aff’d, 564 F. App’x 652, 654-55 (3d Cir. 2014)</td>
<td>U.S. Dist. Court, Eastern District of Pennsylvania</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The insured brought an action for bad faith related to the insurer’s handling of his claim for losses arising out of a fire. The court held that reserve information was not protected by the work product privilege, because it was not prepared by or for an attorney and was prepared in the ordinary course of business instead of in anticipation of litigation. As to relevance, the court noted that reserves may be set according to varying criteria, and are only a preliminary estimate of potential liability that does not necessarily take into account all factual and legal components of the claim. The court held that the reserve amounts were irrelevant. However, the court noted that facts considered in setting the reserve amounts may be relevant.</td>
</tr>
<tr>
<td><em>Fid. &amp; Deposit Co. of Maryland v. McCulloch</em>, 168 F.R.D. 516, 526 (E.D. Pa. 1996)</td>
<td>U.S. Dist. Court, Eastern District of Pennsylvania</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>Fidelity issued a Pension and Welfare Fund Fiduciary Responsibility Policy covering claims for breach of fiduciary duty against the insured and persons for whom the insured is legally responsible. Fidelity asserted that it was not obligated to cover violations other than ERISA violations, and that it was not obligated to provide coverage against the underlying claims. The insured sought reserve information, arguing that it is relevant to (1) contradict Fidelity’s assertion that it bears no liability for the claims, and (2) support the argument that Fidelity raised its reserves as legal fees mounted, indicating that Fidelity sought...</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>------</td>
<td>-------------------</td>
<td>---------</td>
</tr>
<tr>
<td>N. River Ins. Co. v. Greater N.Y. Mut. Ins. Co., 872 F. Supp. 1411, 1411 (E.D. Pa. 1995)</td>
<td>U.S. Dist. Court, Eastern District of Pennsylvania</td>
<td>Bad faith</td>
<td>Yes</td>
<td>North River (an excess insurer) brought this action against Greater New York Mutual Insurance Co. (a primary insurer), alleging that Greater New York refused in bad faith to settle the underlying claim within its policy limits when the claim later resulted in a much higher judgment. The court found that the reserves set by Greater New York must have some relationship to Greater New York’s estimation of its potential liability and its analysis of settlement value, and thus this information was relevant to the question of whether Greater New York acted in bad faith during settlement negotiations.</td>
</tr>
</tbody>
</table>
| ContraVest Inc. v. Mt. Hawley Ins. Co., No. 9:15-CV-00304-DCN, 2017 WL 1190880, at *11-12 (D.S.C. Mar. 31, 2017) | U.S. Dist. Court, District of South Carolina | Bad faith | Yes | In an action for bad faith failure to defend and indemnify the insured’s claim, the court found that reserve information could be relevant to the extent it revealed the insurer’s assessment of the validity of the claim for coverage. The court upheld the magistrate judge’s recommendation compelling production, finding that the magistrate did not err in failing to conduct an in camera inspection before holding that the documents should be produced as potentially relevant, where it had not been timely
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Horizon Nat'l Corp. v. Houston Cas. Co., No. 2:15-CV-2235-SHL-DKV, 2016 WL 5869580, at *14-15 (W.D. Tenn. Oct. 5, 2016)</td>
<td>U.S. Dist. Court, Western District of Tennessee</td>
<td>Bad faith/breach of contract</td>
<td>No (irrelevant)</td>
<td>The Magistrate Judge held that reserve information was irrelevant and denied a motion to compel production of this information, finding that reserves “are a business judgment and do not reflect a legal determination of the validity of the insured’s claim.”</td>
</tr>
<tr>
<td>First Horizon Nat'l Corp. v. Certain Underwriters at Lloyd’s, No. 211CV02608SHMDKV, 2013 WL 11090763, at *9 (W.D. Tenn. Feb. 27, 2013)</td>
<td>U.S. Dist. Court, Western District of Tennessee</td>
<td>Bad faith/breach of contract</td>
<td>No (irrelevant)</td>
<td>The court denied a motion to compel, holding that reserve information is not relevant because it reflects an estimate of potential liability that may not be based upon a thorough factual and legal analysis. The court also noted that, to the extent reserves are established based on legal consideration, they are most likely privileged under the work product doctrine.</td>
</tr>
<tr>
<td>Trinity E. Energy, LLC v. St. Paul Surplus Lines Ins. Co., No. 4:11-CV-814-Y, 2013 WL 12124022 (N.D. Tex. Mar. 8, 2013)</td>
<td>U.S. Dist. Court, Northern District of Texas</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging that its insurer acted in bad faith in denying its claim for coverage for damages arising out of a malfunctioning gas well, alleging that the insurer misrepresented the coverage provisions and handled the claim in a manner calculated to construct a pretext for denying it. The Magistrate Judge granted a motion to compel discovery of reserve information, finding that it was relevant by showing, for example, that the insurer knew liability was clear but denied coverage unreasonably.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>------------------------------------</td>
<td>-----------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Swicegood v. Medical Protective Co.</em>, No. 3:95-CV-335-D, 2004 WL 1698285 (N.D. Tex. July 29, 2004)</td>
<td>U.S. Dist. Court, Northern District of Texas</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The insured brought this action alleging bad faith by the insurer in failing to settle a third party claim brought against the insured. The court held that reserve information could be relevant, because it could tend to show that the insurer should have accepted the settlement offers (i.e., if it had valued the claim at a higher amount).</td>
</tr>
<tr>
<td><em>Isilon Sys., Inc. v. Twin City Fire Ins. Co.</em>, No. C10-1392MJP, 2012 WL 503852, at *2 (W.D. Wash. Feb. 15, 2012)</td>
<td>U.S. Dist. Court, Western District of Washington</td>
<td>Bad faith</td>
<td>Yes</td>
<td>The court found that reserves must be produced (subject to privilege redactions where individual case reserves were calculated by attorneys), because the reserves were approved by upper management and were made by persons with knowledge of the policies, so the reserve information was likely relevant.</td>
</tr>
<tr>
<td><em>Heights at Issaquah Ridge Owners Ass’n v. Steadfast Ins. Co.</em>, No. C07-1045RSM, 2007 WL 4410260, at *1-4 (W.D. Wash. Dec. 13, 2007)</td>
<td>U.S. Dist. Court, Western District of Washington</td>
<td>Bad faith</td>
<td>No (irrelevant)</td>
<td>The court denied the plaintiff’s motion to compel the production of reserve information, finding that there was no showing of how the reserve information would be relevant to the bad faith claim.</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>------</td>
<td>-------------------</td>
<td>---------</td>
</tr>
<tr>
<td><strong>District of West Virginia</strong></td>
<td><strong>work product)</strong>*</td>
<td><strong>Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1611-16 (1996)</strong></td>
<td><strong>Bad faith</strong></td>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td><strong>Loyal Order of Moose, Lodge 1392 v. Int’l Fid. Ins. Co., 797 P.2d 622, 628 n.14 (Alaska 1990)</strong></td>
<td><strong>Bad faith</strong></td>
<td><strong>Yes</strong></td>
<td>In an action for bad faith related to a bond surety’s failure to investigate and respond to claims, the court noted that it disagreed with the lower court’s ruling denying discovery of loss reserves. The court opined that loss reserves were reasonably calculated to lead to the discovery of admissible evidence, and were not privileged because they were made in the ordinary course of business rather than in anticipation of litigation.</td>
<td></td>
</tr>
</tbody>
</table>
| **Hoechst Celanese Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 623 A.2d 1099, 1109-10 (Del.)** | **Coverage** | **No (irrelevant)** | The insured brought this action seeking a coverage determination related to claims involving a defect in its residential plumbing systems. The insured sought to discover reserve information, asserting that the establishment of reserves evidences an acknowledgment by the insurers of
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Type</th>
<th>Discovery Allowed?</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Super. Ct. 1991)</td>
<td></td>
<td></td>
<td></td>
<td>their liability for the claims. The court denied the insured’s motion to compel this discovery, holding that reserves are irrelevant because reserves “do not represent an admission or evaluation of liability.”</td>
</tr>
<tr>
<td>Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chem. Co., 558 A.2d 1091 (Del. Super. Ct. 1989)</td>
<td>Delaware Superior Court</td>
<td>Coverage</td>
<td>No (irrelevant)</td>
<td>National Union, The Travelers Indemnity Company, and American Motorists Insurance Company brought a coverage action seeking a declaratory judgment as to whether they were obligated to defend and indemnify Stauffer Chemical Company for liabilities arising from disposal of waste materials. Stauffer sought to discover reserve information to show the insurers believed their policies covered these types of hazardous waste claims. The court held that the reserves information was not relevant and not reasonably calculated to lead to the discovery of admissible evidence, because the reserves information are hypothetical internal estimates and are “not closely connected with the interpretations of the policies.” “The fact that reserves were established does not necessarily mean that the insurers believed that such claims would be covered by the policies.”</td>
</tr>
<tr>
<td>Case</td>
<td>Court</td>
<td>Type</td>
<td>Discovery Allowed?</td>
<td>Summary</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>-------------------------------</td>
<td>--------------</td>
<td>-------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>State ex rel. Erie Ins. Prop. &amp; Cas. Co. v. Mazzone, 218 W. Va. 593 (2005)</td>
<td>West Virginia Supreme Court of Appeals</td>
<td>Bad faith</td>
<td>No (but left open for subsequent request for the discovery based on a more thorough factual showing of relevance)</td>
<td>The court noted that “the relevancy of reserve information turns on the unique factors presented in each case”—including the method the insurer uses to set reserves and the purpose for which the reserve information is sought. The court reversed an order compelling the production of reserves, finding that the lower court did not make a sufficient factual analysis of the relevancy in this action, but noted that the court was not prohibiting a subsequent application for disclosure of reserves based on a proper factual basis.</td>
</tr>
</tbody>
</table>
THURSDAY, JULY 27, 2017
10:30 A.M. - 12:00 P.M.
PLENARY PROGRAM

Keynote Speaker and Power Panel:
The Emotional Power of Belonging & Maximizing the Return on Diversity and Inclusion Initiatives*

LePetit Palais

Speaker:
Nia Joynson-Romanzina
The Emotional Power of Belonging:
Maximizing the Return on Diversity and Inclusion

We have arrived in the age of intangibles. In the age of intangibles organizations, transformation and Diversity & Inclusion are at a crossroads. In the age of intangibles organizations will wake up to the necessity and value of what cannot be easily measured. Organizations are slowly and painfully waking up to the fact that their current operating models are out of sync with reality. It is becoming clearer that execution has become a real problem. Initiatives fail, they derail. Data on successful execution is dismal. Current approaches to successful strategy execution are ineffective, near obsolete. Leaders are grasping at straws, struggling to find the key to successfully drive change and excellence in execution.

The reasons behind the derailment of execution are intangible – they ARE the intangibles, and we need a strategy that will tackle these intangibles. But what are these intangibles? Think leadership, loyalty, trust, engagement, motivation. As we explore how to manage these intangibles we will start paying attention to the conduit, instead of the outcome. We will pay attention to the vehicle that will lead us to successfully executing our goals, rather than focusing on the goals in isolation. To achieve success, we need to ask ourselves, ‘what makes these outcomes happen?’ ‘what leadership do we need to navigate and harness the intangibles?’.

Recent leadership models have focused on behavior, but in the age of intangibles behavior has taken us so far but cannot take us any further. We have gone as far as we can go by measuring behaviors. We’ve come to this point because we thought that behavior was something that we could control, something we could measure. To get to the next level we have to broaden our lens and focus beyond behavior. Successful market leaders of tomorrow will know that they have to access hearts and minds to be successful.
The emotional power of belonging is the vehicle for accessing hearts and minds. This is an untapped resource where organisations have not yet dared to go. This is the next frontier. This is where transformation and D&I is going. This is where market leaders are going. Market leaders are becoming power players in the Economy of Belonging.

The ROI of Diversity: Diversity of Perspectives

By becoming power leaders in the Economy of Belonging these leaders are accessing the most effective turnaround tools for harnessing the intangibles: The power of belonging and its inherent diversity. The power of belonging opens the door the true ROI of Diversity: Diversity of Perspectives, that of thought, opinion and experience. It is the power of belonging that unleashes diversity of perspectives, because in the Economy of Belonging, everyone belongs. The emotional power of belonging is the fuel which powers Diversity of Perspectives.

Individual icebergs

In the Economy of Belonging, visible diversity will no longer be enough, we will actively seek complex diversity. Social demographics is no longer sufficient as the key indicator of diversity. We will move beyond visible diversity to what really defines an individual and how their uniqueness adds value. Complex diversity goes beyond the visible, it champions the uniqueness in all of us.

When we seek complex diversity, we recognize that everyone has their own individual iceberg. That each one of us is more than what we see. Not all men are the same; not all women are the same; not all Chinese are the same; white, straight men are also diverse. We are all made up of a myriad of facets. Shaped by our upbringing, circumstances, society, family, friends. Each one of us is diverse. Each one of us is unique. There’s no such thing as non-diverse.
Diversity will no longer be defined by the differences of people in the organisation: Diversity will be defined by the differences of perspectives in the room.

**Excellence in execution**

The real value of Diversity of Perspectives is as a conduit to success, a vehicle to achieve excellence in execution. We will see Diversity of Perspectives as a conduit to outcomes. Diversity of Perspectives will be the go to turnaround tool for managing intangibles and successful execution: Excellence in execution in both speed and quality.

The Power of Belonging and Diversity of Perspectives are becoming a strategic advantage in execution from an operational stand point. In order to access true Diversity of Perspective you must have cultivate an inclusive sense of belonging. You cannot have Diversity of Perspective without the power of belonging.
The Outcomes

The outcomes you can expect from Diversity & Inclusion and as we broaden what gets measured:

\[
\text{Diversity & Inclusion} = \text{Value Add + Risk Mitigation + Strategic Advantage}
\]

1. Value Add > Operational optimization
2. Risk Mitigation > Improved Risk Management
3. Strategic Advantage > Talent Magnet + Client Engagement

Value add > Operational optimization

It's a paradox. Diversity of Perspectives looks like it takes longer. In reality the time you spend on it upfront you get back 10-fold on the back end. If you’re trying to execute a strategy you have to reduce the drag, the power of belonging reduces the drag by:

i. **Early warning systems for bad decision making**: Combats institutional blindness. The more similar the individual icebergs in the room the faster and more rigid a system will form – it creates blind spots. It disrupts stagnant systems, stops the rationalisation of warnings by the group, removes illusions of invulnerability and unquestioned belief. Open the door to the wisdom of crowds - The diverse group always outperforms the homogenous group in problem solving and it expands the reservoir of experiential “tacit” knowledge that’s difficult to articulate, is owned by employees, and is the source of solutions.

ii. **Creates more willingness to make a leap of faith**: It will take you to the next level of engagement and opens the door to trust. There has been too much focus on purpose and vision and mission. What really matters is that you are in it together, you’re not alone. You follow leaders through change and uncertainty, allows people to take a leap of faith. What they measure, when driving transformation, is what is the willingness to take the leap of faith.

iii. **Mountains become mole hills**: Obstacles become speed bumps rather than major barriers that shut everything down. “Benefit of the doubt” becomes the de facto starting point for everyone when things go south, not only for the inner circle.

Risk mitigation > Improved risk management

i. **Two side of the same cultural coin**: The main pillars of a healthy D&I Culture are fully aligned with a healthy Risk Culture. Diversity of perspectives, complex diversity and an environment of inclusive trust that allows people to show their vulnerabilities and mitigate the dark side of risk.
ii. **Refined risk identification and perception:** Some groups perceive risk differently to others. Expert groups are more likely to be tolerant of uncertainty. Gender, ethnic background, religious viewpoint and social class have all been shown to affect risk perception.

iii. **Open the door to healthy conflict:** Is a pressure valve against uniformity. Dissipates Group think and those who oppose the groups decisions will no longer be belittled or even considered stupid – they will be welcomed. (Definition: Group think occurs when the group is willing to take more risk than any of the individuals present would themselves).

**Strategic advantage > Global talent magnet + Client engagement**

I. **Global Talent Magnet**

i. **Emotional power of belonging is the Best Countermeasure against poaching:** The bond of belonging is the new organisational glue. It is how we motivate, engage and create loyalty. The personal power of belonging can trump money. In the war for talent the power of belonging is the best countermeasure against poaching. It deters people from being seduced by more money or position.

ii. **The changing face of talent:** Future-proof your organisation as the talent pool shrinks, changes its face, global and less mobile.

iii. **Boosting the employee brand (and Employer Value Proposition):** Organizations that are diverse are like a pot of honey for more diverse talent – it’s a virtuous cycle.

II. **Client engagement**

i. **Loyal client base:** Allowing company to ward off low-cost competitors. Positions past the price.

ii. **Key to new and under-served niche markets:** You will be able to tap into previously denied access points to invisible and influential local networks.

iii. **Savvy solutions:** Greater nuanced and targeted service and product design.
Questions for FDCC Diversity Panel:

1. Can you tell us a bit about how you make the case for diversity in your organization—What do you think are the most effective ways to make this case, or what strategies do you see as key for developing innovative diverse teams? Can you suggest some pragmatic and implementable actions?

2. What’s in it for me? (how to maximize the return on investment in diversity and inclusion initiatives -- directed to the audience—mostly made up of men)
   a. U.S. News and World Report rankings “Best Lawyers“ include diversity and inclusion criteria as part of their algorithm
   b. More business from companies who value diversity and inclusion—diversity and inclusion is happening from the top down and bigger companies are willing to pay smaller to mid-size firms from their big budgets.
   c. The next level of innovation in ideas and products

3. Can you give an example or examples of programs or policies that have made a difference when it comes to diversity in the work place?

4. What has helped you be a more effective advocate, or what advice would you have for others who want to advocate?

5. How can I gauge the success of my workplace diversity program? Are there certain metrics that you (the panelists use)?

6. What advice do you have for those who want to be advocates for diversity but aren’t sure where to start? (e.g. what should they do, what is an important first step?) How does diversity affect the hiring process if at all? What are the advantages of diversity and inclusion in recruiting, especially among Millennials who may reject old ways?

7. What positive role can lawyers and legal departments play as gatekeepers of information and as leaders in diversity and inclusion initiatives?

8. Issues surrounding diversity differ worldwide—different countries have different biases and therefore have different strengths and weaknesses when it comes to diversity. What are some of those differences, particularly between the U.S. and European Countries?
EXTRA QUESTIONS:

9. I know you touched on this in the presentation, but how will diversity help my company compete?

10. A lot of what you talked about today centered around the gap (especially at the top) between men and women when it comes to career development. In your view, what are some systematic challenges women face and what role can advocates and managers play in addressing these challenges?
FRIDAY, JULY 28, 2017
7:45 A.M. – 8:45 A.M.

SUBSTANTIVE SECTION MEETINGS

ENERGY UTILITIES LAW/TOXIC TORT AND
ENVIRONMENTAL LAW

Walking the Tightrope: Balancing the Defense in a War on Multiple Fronts

Salles des Congrés

Speakers:
G. Bruce Parkerson
J. Richard Caldwell Jr.,
Michael J. O’Connor
Walking the Tightrope: Balancing the Defense in a War on Multiple Fronts.

Introduction:

This paper analyzes aspects of the aftermath of the gas pipeline explosion in San Bruno, CA on September 9, 2010, which resulted in 8 deaths, multiple injuries and millions of dollars in property damage. Pacific Gas & Electric (PG&E) was forced to defend hundreds of civil lawsuits and claims, while at the same time being the subject of intense inquiries by several regulatory agencies at the state and federal level. Federal criminal charges were brought against PG&E in the Northern District of California, which ultimately resulted in the company’s conviction on several counts. The paper also explores the difficulties inherent in fighting multiple battles on multiple fronts, arising from the same set of circumstances, where each action in any context is likely to affect the defense in the others.

Overview:

On September 9, 2010 at 6:11 p.m., an explosion occurred that caused a 28 foot section of steel pipe weighing 3,000 pounds to be ejected from a crater created by the explosion, landing 100 feet from the crater in the middle of Glenview Drive in a residential area of San Bruno, California. The explosion occurred due to the rupture of a high-pressure transmission gas pipeline beneath the residential streets of San Bruno, which is 11 miles southwest of San Francisco.

The rupture of the pipeline immediately released high pressure natural gas that instantly ignited; the resulting inferno destroyed 38 nearby homes and damaged 70 other houses; 600 firefighting personnel responded to the scene; 300 homes were evacuated; eight people were killed and 58 others were injured; in all, 47.6 million cubic feet of gas was released from the ruptured pipe before gas flow was cut off.1

Pacific Gas & Electric Company (“PG&E”) owned and operated the gas transmission pipe that was buried under the residential neighborhood of San Bruno. This specific 30-inch transmission pipe was designated as “Line 132” by PG&E. It had been installed in 1956 before the passage of the Pipeline Safety Act that resulted in Pipeline Safety Regulations becoming effective on April 30, 1971.2 Gas distribution companies like PG&E operate gas pipelines subject to the provisions of the Pipeline Safety Regulations.

Pursuant to 49 U.S.C. sec. 60101, et seq., the federal government regulates the safety of the transportation of natural gas through pipelines. The Pipeline Hazardous Materials Safety Administration (“PHMSA”) is an arm of the U.S. Department of Transportation that regulates the pipeline industry. State regulatory bodies like the California Public Utilities Commission (“CPUC”) receive certification to regulate utilities operating within each State. The CPUC was certified with the responsibility to enforce Pipeline Safety Regulations, which are the minimum

1 Accident Report, National Transportation Safety Board, NTSB/PAR-11/01
2 49 C.F.R. Part 192.1 et seq.
standard for transmission and distribution pipelines. These regulations address standards for the installation of pipe, maintenance of pipe, and the training and qualifications of persons employed by the operator of the pipe. These training requirements address specific “covered tasks” that include the operation of emergency cut-off valves.

Within minutes of the explosion on September 9, 2010, PG&E was informed of the incident. It sent an employee to San Bruno twelve minutes after the explosion to investigate the fire, but he was not qualified to operate the valve to stop the flow of gas. Thirty minutes after the rupture, two off-duty PG&E employee mechanics, who heard media reports of the fire and were qualified to operate valves, proceeded to the valve locations to close upstream and downstream valves.

Gas transmission lines such as the one in San Bruno are located throughout the United States in both densely populated areas and rural areas. There are 300,000 miles of transmission lines throughout the United States. As recognized by one of the investigating panels, these gas transmission pipes are usually “designed and constructed with sufficient safety margins to accommodate uncertainty in factors such as loading, materials and operating environments.”

Because the subject line was installed prior to the inception of the Pipeline Safety Regulations in 1971, the applicable standards for its installation were “then current industry standards.” Namely, ASA B31.1.8 provided the standards for strength of pipe, installation, welding and inspections. There was no requirement for pressure testing the pipeline prior to putting it into service.

The section of pipe that failed included three of the six smaller sections of pipe called “PUPS.” Specifications for pipe construction at the time of installation required a minimum length of five feet for any section of pipe, but none of the PUPS in the San Bruno section of Line 132 were that long.

The Pipeline Safety Regulations prescribe that each segment of pipe operated by a natural gas distributor has a maximum allowable operating pressure (“MAOP”) established for the pipe. If the pipe was installed prior to the effective date of the Pipeline Safety Regulations, then the MAOP was established by the highest actual operating pressure during the five years preceding 1970. PG&E had a pressure log from 1968 that indicated that Line 132 had previously operated at a pressure of 400 psig, which then established the maximum pressure for Line 132. The pipeline had never previously ruptured in the 52 years that it was operated by PG&E.

The National Transportation Safety Board (“NTSB”), which investigates accidents involving transportation, directed the investigation. Because natural gas pipelines transport natural gas, the NTSB has jurisdiction to investigate such accidents. The NTSB investigation included representatives from the CPUC, PG&E, PHMSA, the City of San Bruno, engineers and scientists at California Local 20 and the International Brotherhood of Electric Workers Local 1245.

---

3 Report of Independent Review Panel, Executive Summary
4 Incident Investigation Report, Consumer Protection and Safety Division, California Public Utilities Division
5 Id.
6 Id.
The NTSB investigators immediately observed that the ruptured pipe had a longitudinal seam in it. They also noticed the short sections of pipe (the PUPS), which were not common for transmission lines. PG&E initially informed the NTSB that the pipe was seamless, but all of the sections of the ruptured pipe clearly contained a longitudinal seam.

PG&E was unable to produce any records demonstrating that any inspection of the welds had occurred or that a strength test was done on the subject segment of Line132. According to Ravindra M. Chhatre, the NTSB investigator in charge, the NTSB immediately became concerned about the accuracy of records and the recordkeeping procedures of PG&E. The initial investigation indicated that the pressure in the pipe at the time of rupture had spiked to 386 psig, i.e., less than the MAOP.

As the NTSB investigation was getting well underway, the CPUC passed a resolution on September 23, 2010 directing the assembly of an Independent Review Panel (“Panel”) consisting of technical experts. Simultaneous with the ongoing NTSB investigation, the Panel heard presentations from eight persons in top management of PG&E and interviews of another 30 employees of PG&E. The Panel submitted over 100 data/document requests to PG&E. The Panel was interested in determining how the pipe was “stable” for 50 plus years of operation without failing.

In January 2011, the NTSB recommended testing of the pressure capacity of all transmission lines operated by PG&E with oversight by the CPUC. It also issued initial recommendations that PHMSA expeditiously inform the pipeline industry of the circumstances of the San Bruno incident so that other operators could proactively implement corrective measures. The NTSB immediately made recommendations for better recordkeeping.

On August 30, 2011, the NTSB issued a strong report critical of both PG&E and the CPUC. Deborah A. P. Hersman, the Chairman of the NTSB, summarized the criticisms in an interview in which she stated that the NTSB determined that the cause of the accident was (1) flawed pipe, (2) flawed operations of PG&E, and (3) flawed oversight (critical of the CPUC and PHMSA). In addition, PG&E had a flawed emergency response in which the damages were made worse. The NTSB pointed out that Line 132 failed to have any automatic shut off valves or remote control valves (even though they were not required).

The NTSB investigation determined that the incident occurred when PG&E was replacing a power supply that was supposed to not cause an interruption of power. However, power was lost and valves opened, resulting in pressure increasing to 386 psig. The NTSB found that a seam weld of the pipe had not been fully welded at the connection points of each section of pipe. Three of the PUPS did not have welding on the inside of the pipe, in violation of the standards that existed at the time of installation. The NTSB determined that the rupture occurred at a defective seam weld of a substandard yield strength. The yield strength on all six PUPS were lower than the designated yield strength for industry standards at that time.

The NTSB also found that PG&E had not done any mechanical tests on the lines. PG&E was not able to produce any documentation of an inspection of the welds in 1956 when the pipes were installed.
The NTSB concluded that the accident was preventable. If PG&E had engaged in an effective quality control program at the time of construction, the absence of welds on the inside of the PUPS would have been readily discovered. The Chief of the Pipeline Investigative Division, Robert Trainor, stated that the accident was preventable. Had PG&E had an effective quality control program at the time of construction, the defectively welded pipe never would have been placed into service. Second, if PG&E had pressure tested the line (although not required by regulations), the inferior piece of pipe likely would have failed during the test.

The NTSB criticized the CPUC and PHMSA for not verifying what PG&E was doing. As Hersman stated, “when companies violate the trust, then the penalties need to be high.”

To prevent another accident, NTSB called upon PHMSA to require transmission pipeline operators to install sensors to determine the exact location of a rupture when it occurs and to require the installation of automatic shut-off valves. The NTSB also called upon PHMSA to run effective audits of pipes to require the routine testing of the strength of the pipe. The NTSB also recommended retraction of the grandfather clause that allowed operators to not test older pipelines that were installed before regulations were enacted.

In its opening statement to the jury in the criminal trial of PG&E in July/August 2016, the prosecutor stated that PG&E made “deliberate choices to not follow these minimum safety requirements.” PG&E “knew its records were inaccurate and had missing information, but it chose to still rely on those records and make decisions about the safety of the pipelines.” According to prosecutors, “PG&E knew it had hundreds of unstable threats on its pipelines, . . . and it needed to test these pipelines to make sure that they were still safe to operate. Instead of a test that it knew would test the integrity of the pipeline, the safety of the pipeline to operate, it chose a cheaper test, a deliberate choice that it knew it could not.”

The Pipeline Safety Regulations require companies like PG&E to have an integrity management program designed to identify threats and manage the risks associated with the factors that can cause failure of a pipe. The NTSB pointed out that integrity management programs are designed to schedule the pipe for testing before it fails. This was particularly relevant to high pressure pipe operated in what was known as High Consequence Areas, i.e., densely populated places. These integrity management rules required accurate data gathering and integration, threat identification and risk assessment, all of which the NTSB and the CPUC criticized PG&E for failing to do. Notably, PG&E had the second highest amount of high pressure transmission pipeline in High Consequence Areas, second only to Sempra’s Southern California Gas and San Diego Gas.

After the NTSB report was issued, it did not take long for PG&E to react. In early December 2011, PG&E announced that it would accept responsibility for damages claims by the persons and entities who sustained damages as a result of the incident. This included accepting responsibility for the claims by the families of those persons killed and injured as well as those persons whose houses were destroyed or damaged.

---

7 Opening Statement, Prosecution, June 17, 2016, Page 3
8 Id.
9 Id.
10 Report of Independent Review Panel, Executive Summary, Footnote 3
The CPUC subsequently issued an equally scathing report of PG&E on January 12, 2012, finding that PG&E violated “then-current industry standards” for the construction of the pipelines, therefore creating an unsafe condition for 50 plus years in violation of Pipeline Safety Regulations. CPUC also criticized PG&E for not providing it accurate information.

The CPUC-directed Independent Review Panel found that the engineers at PG&E knew that the pipe was not seamless even though it was reported as being seamless for purposes of integrity management. The reports for integrity management purposes were taken from accounting records instead of engineering records. The Panel identified a flaw in the way in which PG&E gathered data in failing to include a step “whereby knowledgeable engineers could find and correct . . .” the misidentification of the pipe as seamless.

Ultimately, the CPUC made 41 recommendations including changing the procedures of PG&E regarding (a) data gathering, recording and reporting, (b) operating the pipeline, (c) maintaining the pipeline, and (d) training personnel who operate and maintain the pipeline.

On April 1, 2014, the Justice Department issued a twelve count indictment of PG&E for violation of the minimum safety standards contained in the Pipeline Safety Act. The twenty-one page indictment detailed the provisions and purposes of the Pipeline Safety Regulations, specifically 49 C.F.R. 192.709 and 192.917-919. The indictment alleged that PG&E knowingly and intentionally violated the provisions requiring proper recordkeeping and data gathering to properly assess threats to the integrity of the pipeline.

Prosecutors of PG&E used profit motivation to criticize PG&E in their opening statement in the criminal trial in June 2016; prosecutors pointed out that “PG&E was cutting its spending in areas that insured the safe operations of its pipelines, at the very same time it was taking actions to maximize its profits for the corporation.” With respect to recordkeeping, prosecutors argued that “PG&E knew it needed to have certain information to make decisions about the safe operation of its pipeline. PG&E knew its information was missing or inaccurate and still made decisions based on this faulty information.”

The prosecutors picked up on this failure of PG&E to properly gather and integrate information. As argued by prosecutors, “in Count 2, the government is going to prove that PG&E beyond a reasonable doubt knowingly and willfully failed to gather and integrate information.” “At the same time it was telling regulators that it had integrated all of its information, it was getting email after email from employees saying: There are tons of errors in our system. We have missing information. We have inaccurate information. Still, you will see that PG&E chose to rely on that integrated system.”

---

11 Independent Review Panel, Executive Summary
12 Id.
13 Id.
14 Opening Statement, Prosecution, Page 20
15 Opening Statement, Prosecution, Page 6
16 Opening Statement, Prosecution, Page 9
17 Opening Statement, Prosecution, Page 10
Interestingly, the opening statements in the criminal trial did not touch upon the contributing cause to the apparent failure of Line 132. The Panel had found that the City of San Bruno had done a sewer replacement project in 2008 that utilized pipe bursting technology, which was conducted close to where Line 132 ruptured.\textsuperscript{18} This type of work triggers other sections of the Pipeline Safety Regulations regarding damage prevention and coordination of construction work undertaken around pipelines that could impair the integrity of the gas pipeline.\textsuperscript{19} The Panel pointed out that PG&E had not done any preconstruction engineering analysis to determine if the sewer line work would impair the integrity of the gas pipeline.\textsuperscript{20} In addition, the Panel noted that the nearby 2008 sewer replacement work provided an opportunity for PG&E to replace this section of pipe.\textsuperscript{21} Regardless, even if the City of San Bruno activities contributed to the cause of the propagation of a defect, the sewer work was a “threat” that a proper integrity management program should have considered.

The prosecutors in the criminal trial also picked up on integrity management. “You will hear that in anticipation of the audit, there was a spreadsheet created of all of the unstable and active threats on its pipelines. This spreadsheet shows 84 miles of pipeline in High Consequence Areas, areas where people can get hurt, that had never had a pressure test and where the pressure on that pipeline went over what was allowed . . . . you’re going to see that there was a decision to make a document that attempted to justify these overpressures . . . . you’re going to hear from the senior engineer in risk management who wrote this document, and I expect you to hear that he felt so uncomfortable about this document that after the audit was over, he shredded it.”\textsuperscript{22} In addition to shredding that document, the CPUC also found that PG&E had erased a digital video recording made during the incident at its Brentwood control room.

On August 9, 2016, a federal jury found PG&E guilty of obstruction and of five counts of violating Pipeline Safety Regulations. On January 26, 2017, the federal court issued a sentence of a fine of $3 million, five years probation, independent safety monitoring by a court appointed master and 10,000 hours of community service. In addition, PG&E was required to place advertisements of its wrongdoing and commitment to safety.

Almost one year before the July/August 2016 criminal trial, PG&E announced in August 2015 that it paid the $300 million find levied by the CPUC. PG&E did not appeal the regulatory fine. In addition, the CPUC order required PG&E to refund customers $400 million and to pay $850 million for gas system safety improvements.\textsuperscript{23}

PG&E also settled all of the claims of victims and families for more than $500 million. It also established a $50 million trust for the City of San Bruno related to recovery. It contributed $70 million to support the City’s and community’s recovery efforts.\textsuperscript{24}

\begin{flushright}
\textsuperscript{18} Id. \\
\textsuperscript{19} Report of Independent Review Panel, p. 11 \\
\textsuperscript{20} Id. \\
\textsuperscript{21} Report of Independent Review Panel, Footnote 5 \\
\textsuperscript{22} Opening Statement, Prosecution, p. 19 \\
\textsuperscript{23} Press Release, August 13, 2015 \\
\textsuperscript{24} PG&E News Release, August 13, 2015
\end{flushright}
PG&E also ultimately agreed to pay an $86.5 million penalty to settle allegations that it engaged in “improper back door communications with State regulators” in the wake of the San Bruno explosion. The penalty required a $6 million payment to San Bruno and San Carlos, and then forego recovery of $63.6 million in revenue that it would have otherwise collected from customers in 2018 and 2019.

**Strategic and Tactical Issues in Defending Against Multiple Attacks**

The experience of PG&E in the aftermath of the San Bruno explosion is an example of the complex, multi-layered scenarios which the defense must confront. As mentioned above, in these types of situations lawyers for a company must be fully prepared for battle on 3 fronts: (1) civil lawsuits arising out of the incident or condition, (2) governmental investigations, often at the federal, state and even local level, and (3) criminal charges against the company and possibly its employees. These types of proceedings may occur more or less simultaneously, or in something of a progression. Indeed, there may even be congressional investigations into the perceived misdeeds, adding yet another layer of complexity to the defense lawyers’ tasks.

Challenges of this type, while not common, do occur: other examples being the Takata airbag litigation, the GM ignition switch cases, the Toyota unwonted acceleration litigation and, of course, reverberations from the BP oil spill have not yet died away. However one of the scenarios presents itself, certain features will be present. At least one of the prime difficulties is that every submission, witness interview, deposition, oral or written statement or other procedure done in one context will affect every other component of the case. The title of this paper refers to a balancing act. Defending a Company in one of these multipronged proceedings is indeed a balancing act, perhaps akin to walking a tight rope while trying to deflect spears, arrows and other projectiles thrown by plaintiffs’ lawyers, regulators and prosecutors.

As if these challenges were not enough, because all of these cases are high profile by definition, there is inevitably the pitiless light of media coverage, rendering even the most

---

25 In the instance of the San Bruno disaster, PG&E aggressively pursued settlement of the civil death, personal injury and property damage claims, so that by the time the criminal case was filed, all or virtually all of these claims had been settled.
26 Takata agreed to plead guilty to one count of wire fraud on Feb. 27, 2017. See, United States v. Takata Corp., E.D. Mich., case no. 2:16-cr-20810, docket no. 23. It also agreed to pay fines totaling approximately $1,000,000,000.
28 In 2014, Toyota entered into a Deferred Prosecution Agreement with United States Department of Justice, providing $1.2 billion fine, admitting to concealing and making deceptive statements about the effects which could lead to unintended acceleration in its cars. [https://www.justice.gov/iso/opa/resources/68320143199424073725.pdf](https://www.justice.gov/iso/opa/resources/68320143199424073725.pdf)
29 There are of course other types of cases in which the incident in question gives rise to both criminal charges and civil actions. For example, a schoolteacher may be criminally charged with abuse of a student, and at the same time be the subject of a lawsuit by the student and his family. A similar situation may arise in the instance of an impaired driver who causes an accident resulting in injuries or death. The situations, however, seldom result in notoriety, at least outside the local area, and are not within the ambit of this paper.
innocuous written or oral communication on behalf of the Company subject to misinterpretation, which can in turn lead to even more media attention, little of which can be expected to be favorable. Of course, media coverage and political interest go hand-in-hand, and such cases all too often tend to take on a life of their own. Prosecutors anxious for self-advancement may be expected to seize the opportunity to exploit the occurrence for their own purposes, sometimes regardless of the real merits of the controversy.

The odyssey of PG&E during the 6½ years following the San Bruno tragedy contained all of the above elements. Serious problems were encountered in the course of the defense against the various aspects of the legal assaults, including the difficulty in identifying and producing data on the pipeline itself, and mistakes in the actual production of documents. However, PG&E and its counsel seem to have calculated that extremely aggressive efforts to settle the civil cases were essential, and the diversion of the cases into a mass tort proceeding under California procedure aided the resolution of these claims within 3 years, well before the criminal indictment was issued.\(^\text{30}\)

Another common feature of this class of cases is that plaintiffs' counsel will certainly be cooperating closely with regulatory authorities and prosecutors to bring maximum advantage to their clients from difficulties experienced by the Company in defending against proceedings in the civil, regulatory and criminal arenas. As the "Yates Memorandum"\(^\text{31}\) makes clear, close communication between civil plaintiffs' counsel and government prosecutors is not only to be expected, but encouraged. As stated above, intense media publicity will be an issue with which the company's counsel will have to contend, but this is nothing compared to the scrutiny that plaintiffs' lawyers will give to every document and every oral pronouncement of the company.

Cases such as the San Bruno gas explosion represent a convergence of problems, which must be recognized by counsel and the Company itself, and dealt with as soon as it becomes apparent. Some instances, such as the San Bruno explosion and the BP oil spill are immediately recognizable as disasters of the first magnitude. In other instances, such as the GM ignition switch matter, the true parameters of the problem only gradually reveal themselves. Certainly,

\(^{30}\) PG&E “San Bruno Fire” Cases, JCCP no. 4648, Superior Court, San Mateo County

\(^{31}\) Assistant Attorney General Sally Q. Yates, “Individual Accountability for Corporate Wrongdoing” Sep. 29, 2015
This memorandum included 6 points guiding federal policy in bringing criminal charges against corporate employees:

1. To be eligible for any cooperation credit, corporations must provide the Department all relevant facts about individuals involved in corporate misconduct (emphasis added);
2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
4. Absent extraordinary circumstances, no corporate resolution should provide protection from criminal or civil liability for any individuals;
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases; and
6. Civil attorneys should evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.
there have been and will be situations which fall all along this spectrum. The point is that as soon as the scope of the problem is recognized, an appropriate team must be set up to address it, which is likely to include Corporate Counsel, senior management, regulatory, public relations, and, technical employees, the Board and Outside Counsel. It can be extremely helpful to have at least the outline of a mobilization plan in place to deal with such problematic occurrences, with positions into which appropriate personnel can be slotted, depending upon the precise nature of the situation with which the corporation is faced.

As mentioned above, in a multi-forum case, evidence (including deposition testimony) gathered in the course of regulatory or criminal proceedings will affect, sometimes dramatically, civil lawsuits, and vice versa. This factor makes it all the more necessary for the Company and its counsel to immediately begin a swift, thorough investigation (the two terms are not mutually exclusive) of the facts and circumstances surrounding the problem at hand.

In the San Bruno case, the NTSB began its investigation of the explosion virtually immediately. It effectively took charge of the overall investigation to the extent that PG&E had difficulty even communicating with its own employees about the disaster without specific permission from the NTSB. To say that this hamstrung PG&E's investigatory efforts would be an understatement.

At the same time, the CPUC was conducting its own investigation, parallel to and in conjunction with the NTSB effort. One of the counts of the criminal Indictment of PG&E involve the mistaken submission to the CPUC of a draft of a policy pertaining to pipeline safety which had not yet approved by management. This mistake was eventually recognized, and the correct policy in effect at the time of the explosion was sent to the CPUC. Nonetheless, this error formed the basis of the count of the Indictment which alleged obstruction of the agency's work, even though the NTSB itself never made an issue of the mistake. This is a dramatic illustration of the point made above concerning the effects of actions in one forum on the results in another.

A major consequence of the interrelationship of civil, regulatory and criminal proceedings concerns individual company employees, and statements made by them in the differing contexts. It should be realized by everyone involved that comments or submissions made in civil or regulatory proceedings can have a significant impact in a contemporaneous or subsequent criminal case. For this reason, issues relating to the protections against self-incrimination may take on outsized importance throughout the entire course of all aspects of the civil, regulatory and criminal cases.


33 The prosecution characterized these events as an attempt to criminally mislead the NTSB investigators. https://www.justice.gov/usao-ndca/pr/pge-found-guilty-obstruction-agency-proceeding-and-multiple-violations-natural-gas
A corporation, of course, has no Fifth Amendment privilege available to it.\textsuperscript{34} Individual employees do enjoy the protection of the Fifth Amendment privilege against self-incrimination, although in practice, such protection can be limited, sometimes to the extent of being almost illusory.

One of the first issues confronting counsel in this type of event is to determine whether a given oral statement (deposition, interview or formal or informal interview) or written submission has the potential for incriminating either the Company or the employee. In some instances, where the magnitude of the disaster is evident, and the consequent probability of legal proceedings more readily foreseeable, Fifth Amendment issues may be anticipated from the beginning. In other situations, where the parameters of the event or condition unfold more slowly, internal or external communications which seem relatively innocuous at first may cast a more sinister shadow in the context of subsequent proceedings.

The \textit{Yates Memorandum}\textsuperscript{35} makes clear that individual corporate employees are and will continue to be prime subjects of focus in federal criminal investigations and prosecutions. As a prosecution strategy, the \textit{Yates} approach is calculated to drive a wedge between a company and its employees, including those employees who might otherwise provide key evidence in support of the company.\textsuperscript{36} Even before the Yates Memorandum came into effect, federal prosecutors were increasingly targeting employees, at least in part to gain leverage against the corporations involved.\textsuperscript{37}

For example, the \textit{Yates Memorandum} itself provides that, in order to gain credit for cooperation with the prosecution, the company must pledge, among other things, to disclose “\textit{all relevant facts}” (emphasis added) which might tend to show wrongdoing on the part of its employees.\textsuperscript{38} In other words, to gain cooperation credit, and hopefully lessen any penalty, the company must be prepared to sacrifice the well-being of its employees, even those who have loyally supported the company throughout the controversy.

Likewise, corporate employees giving interviews or providing statements or other evidence may well be placed in the uncomfortable situation of providing information which may redound to their detriment any subsequent criminal proceeding. Those who have conducted internal investigations on behalf of corporations have become well familiar with the "Upjohn Warning,"\textsuperscript{39} which in essence refers to a warning given to an employee by lawyers acting on behalf of the company that the lawyer is acting on behalf of the company, not the employee. The warning is intended to ensure that the employee understands that the company can waive the

\textsuperscript{35} See footnote 31 above.
\textsuperscript{36} There is no evidence that the DOJ under the new administration is altering its approach. See, \url{https://www.law360.com/articles/879816/sessions-hints-yates-memo-fraud-to-stay-on-doj-radar}
\textsuperscript{38} See, footnote 31 supra.
\textsuperscript{39} \textit{Upjohn v. United States}, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed. 2d 584 (1981), holding that a corporation may assert attorney-client privilege to prevent disclosure of communications between company lawyers and employees.
attorney-client privilege and disclose information provided by the employee, even if the employee objects. This kind of warning, of course, gives little comfort to employees who may begin to understand that they can be involved in a serious criminal investigation.

The problem is compounded by the government tactic of essentially "deputizing" the Company to conduct the government's investigation. This may be required as a part of the Company's obligation to disclose everything relevant to the problem at hand, and the Company "cooperates" by interviewing in-depth all employees who may be potentially involved. Such a tactic shifts the burden and expense of the investigation from the government to the Company, and may also have the effect of easing evidentiary problems for the prosecution in any subsequent criminal case. In short, pressure exerted upon a company by the governmental authority to “cooperate” can create an irreconcilable conflict of interest between the company and its employees.

Such pressures not only arise in the context of regulatory criminal investigations by the government. After virtually any kind of well-publicized event such as the San Bruno gas pipeline explosion, plaintiffs’ lawyers are certain to begin filing civil actions against the Company, as well as possibly against individual employees, within a very short time. When this occurs, depositions of company employees can be expected to follow very shortly. Both corporate and outside counsel must be familiar with potential Fifth Amendment issues in order to protect both employees and the company, at least to the maximum extent possible.

When confronted with this type of dilemma, perhaps the initial step is to attempt to stay the civil actions until the termination of criminal or regulatory proceedings. Courts often utilize a balancing test in determining such motions, and plaintiffs’ lawyers are certain to strenuously oppose any such stay.

If discovery in the civil matters proceeds, vigilance with respect to invocation of Fifth Amendment protections must be heightened. At the very least, if an employee declines to testify because of the privilege against self-incrimination, the court in the civil case may well instruct the jury that adverse inferences may be drawn against the defendant company because of the refusal to testify. Besides the legal inference, practical consequences of a jury hearing an employee of the client company “take the 5th” will undoubtedly be devastating.

40 Ordinarily, of course, information gathered by a private entity is not subject to evidentiary restrictions, such as protections afforded by the Fifth Amendment, where the company threatens employees with termination or other sanctions. This is not universally the case, however. See, United States v. Stein, 440 F. Supp. 315, 319 (S.D.N.Y. 2006), aff'd 541 F.3d 130 (2d Cir. 2008). There, the court concluded that the prosecution had improperly influenced the company to force a waiver of Fifth Amendment rights by company employees, and suppressed potentially incriminating statements by the employees.

41 The initial lawsuits arising out of the San Bruno explosion were filed within days following the incident. See, e.g., DiTrapani v. Pacific Gas & Electric, case no. CIV 499291, Superior Ct., San Mateo County, CA, filed September 29, 2010.


43 All of the problems discussed in this paper are heightened in the context of “apex” depositions, in which any testimony by top corporate officials will draw scrutiny from regulators, prosecutors, plaintiffs’ counsel and the media.
Faced with the minefield of potential exposure, as well as possible civil liability, it will not be surprising that some employees may choose to undertake close cooperation with regulatory or prosecution authorities. In these situations, the government strategy of driving a wedge between the Company and its employees has succeeded, to the benefit of the government and plaintiffs.

In *United States v. Pacific Gas & Electric*, arising out of the San Bruno explosion, as bad as the results of the ordeal were for PG&E, they could undoubtedly have been much worse. The company very aggressively sought to settle the civil claims, and was successful in doing so well before the criminal trial was held. No individual employees were named as criminal defendants. The financial penalties, although severe, did not threaten the existence of the corporation. Thus, through cogent management of the various aspects of the crisis, perhaps combined with some good fortune, PG&E was able to avoid the fate of companies such as Arthur Anderson, the accounting firm ensnared in the Enron scandal. Arthur Anderson successfully fought all of the charges brought against them, only to be forced out of business because of the fallout from the Enron web of allegations.

As mentioned above, defending one of these multi-forum cases, which almost by definition tend to be “bet the company” matters, can be one of the most challenging tasks of any lawyer. Lawyers involved in these situations tend to grow older rather quickly, and hopefully wiser.

Rudyard Kipling once wrote a poem in which he prophesied the probabilities of success in life:

"*If you can keep your head when all about you Are losing theirs and blaming it on you...*"  

The same qualities extolled by the poet can aid in successfully handling such matters.

**Balancing Act Continued: The Respective Duties and Relationships Between In-House and Outside Counsel**

Successfully representing a Company which faces a complex, multilayered scenario requires dedicated and sophisticated in-house and outside lawyers working in a coordinated and collaborative manner, each within their defined roles. The potential risk for a Company to face this scenario has vastly increased over the past few years. This trend is likely to continue, given the dramatic increase in communication trends, with the near instantaneous ability to reach the world to “expose” corporate mistakes, whether based in fact or not. Accordingly, prudence

---

44 Rudyard Kipling, "If" (1909)
45 For purposes of this paper, a complex, multilayered scenario is defined to be a substantial piece of civil litigation against a company which invokes potential criminal issues, financial issues, reputational issues and/or individual corporate officer exposure.
46 Examples, just in the month of April 2017, include United Airlines, American Airlines, Wells Fargo and Uber.
suggests that companies should consider planning for such a scenario, so as to have the responsive legal structure in place in the event it needs to defend itself in a complex multilayered scenario.

This section is intended to address, from a legal perspective, a structure which may be used in the representation of a Company defending itself in a complex multilayered scenario. As is always the case, there is no “one size fits all approach,” and the structure addressed herein must be modified to fit the specific Company, and of course, the specific complex multilayered scenario at issue.

Any time a Company hires Outside Counsel to defend it in litigation, it should hire and assemble a team, develop the overall message and strategic plan, collaborate with each other, engage in ongoing reporting, and manage the staffing and budget, however, in complex multilayered cases, each of these steps is much more complicated and much more critical.

Hire and Assemble the Team:

In the event that a Company is faced with a complex multilayered scenario, it will quickly turn to the General Counsel for guidance and advice. From that point forward, the General Counsel’s office should take the lead in coordinating all legal related activities that touch the scenario in any way. The General Counsel’s office may internally assume this role as the ultimate coordinating authority, which I recommend, or may delegate some of this role to Outside Counsel. Any such delegation, however, comes with the loss of significant Company input at each stage of the Company’s defense.

To the extent that a team is not already in place, immediately after an incident, the General Counsel must select the team members and assign specific roles for the representation of the Company and potentially for individual employees/executives. If the General Counsel has had experience with many firms with diverse practice areas, he/she should have numerous options when choosing the most appropriate Outside Counsel and other team members for the particular scenario the Company is then facing.

The most common outside members of the team to be selected are in the following areas of expertise:

- Civil/ tort/ personal injury/ property litigation;
- Regulatory activity and filings (e.g. SEC, Utility Commission, FDA);
- Criminal defense;
- Public Relations/Crisis Communication (engaged by Outside Counsel);
- Shareholder litigation;
- Insurance coverage; and
- Local counsel.

In addition, the General Counsel’s office should designate the in-house attorney(s) responsible for document management retention and legal holds to properly preserve evidence.
Develop the Overall Message and Strategic Plan:

Immediately after assembling the team, the General Counsel’s office should educate Outside Counsel on the particular scenario at issue. In the event that Outside Counsel has no previous working relationship with the Company, General Counsel should also educate them on the background of the Company, its executives, its culture and the specific Company employees that will be involved in the matter. Once the relationship has started to develop, General Counsel should provide Outside Counsel and other outside consultants with an overview of what is most important to the Company in handling this matter, be it resolution, as quickly as possible, containing reputation, damage, or aggressively defending the product or the actions of the Company, as well as the consistent message that the Company wants to present on all fronts throughout the matter.

The General Counsel’s office should prepare the written strategic plan to achieve the desired results using that “overall message.” The strategic plan must be reassessed during the course of the matter, and to the extent they are modified, the General Counsel’s office must immediately notify the team members.

Once all team members understand the overall message and strategic plan, the General Counsel’s office should take the following steps:

- Define and document the roles of each law firm, in-house department, or outside consultant;
- Establish and communicate short term, mid-term and long-term goals and objectives consistent with the strategic plan;
- Identify necessary reporting protocols, including to whom, the format, and frequency of reporting;
- Have prepared joint defense agreements and retain non-lawyer consultants on a privileged basis, if possible;
- Establish secure websites and databases; and
- Propose and receive Board and Senior Management approval of the strategic plan and overall message.

Collaborate with Team Members:

General Counsel’s Office

The General Counsel’s office should lead (or quarterback) the responsive team given its position within the Company and access to outside legal talent. The General Counsel must be involved in the strategy, direction and important decisions, but should not manage the details of the day to day litigation.

Through-out the representation, the General Counsel’s office should interface with the:

- Board of Directors;
- C-Suite Executives, such as CEO and CFO;
• Management operating groups involved in the matter;
• Public Relations/Crisis Management teams – both inside and outside the Company;
• In-house Regulatory Department;
• In-house Investor Relations Department;
• Human Resources Department relating to employees involved;
• Outside Counsel; and
• Insurance companies regarding the matter.

The General Counsel’s office is uniquely positioned to understand the Company’s day to
day response activities and long term resolution strategy and is in a position to communicate
with and manage the Company’s in-house departments and consultants. The General Counsel’s
office must evaluate each material action taken by the Company or its lawyers as to its short and
long term impact on the Company and how it relates to other material actions underway.

Use of the General Counsel’s office as the lead/quarterback is also significant in that this
allows maximum potential use of the attorney-client and attorney-work product privileges in the
response to the complex, multilayered scenario. State law will vary regarding the extent of the
privilege in each context, particularly with respect to the nature and extent of any joint defense
agreement and the privilege, and whether the attorney client privilege extends to crisis
communication experts and public relations experts.

Outside Counsel

To be truly effective and valuable in the context of a complex multilayered scenario,
Outside Counsel must fully understand the scenario, the Company, the strategic plan, the overall
message and the resolution path. Outside Counsel must recognize that their role is not isolated to
the traditional defense lawyer representation in smaller, less complex cases. They must
understand that they are part of a larger team of professionals working to move toward resolution
of a high-profile matter in a way that limits the financial, reputational and regulatory impact on
the Company, and do so as quickly and efficiently as possible. In order to do that well, they
must make efforts to get to know personally, the Company’s Senior Management and involved
employees, and also work collaboratively with the Company’s other team members and
consultants as necessary.

To the extent Outside Counsel has not previously worked with the Company, Outside
Counsel, either in the interview stage, or if retained, prior to meeting with the Company, should
familiarize himself/herself with the Company. Outside Counsel should (i) read everything
available regarding the scenario; (ii) read the Company’s annual report; (iii) review the
Company’s website and Facebook page, if applicable; (iv) research social media as to public
perceptions of the Company; (v) if possible, learn about the backgrounds of the senior executive
team and Board of Directors; and (vi) learn, to the extent possible, about the Company’s goals
and objective separate and apart from the scenario itself. All these actions will allow Outside
Counsel to understand the Company, and thus will increase the effectiveness of the
communication with the Company, and the Company’s representation.
Outside Counsel needs to act within their role, but be available to assist other team members when in the best interest of the Company. They must provide effective communication to the General Counsel’s office with timely and material updates and provide concise analysis and recommendations of a course of action throughout their representation of the Company, but especially if the case takes an unexpected turn. They must always project the best of the Company in Court, in filings, and in the community.

If Outside Counsel is representing an individual employee, they should perform the same duties and activities for that individual as they would for the Company. In addition, they need to communicate and collaborate with counsel for the Company. They also need to consider 5th Amendment and immunity issues as they relate to the individual and the Company and whether the individual will provide testimony on behalf of the Company in coordination with Company counsel. They must understand that any document retention issues will involve personal versus Company documents.

Other Team Members

While most of the documents and filings submitted on behalf of the Company may be prepared by Outside Counsel, the General Counsel must ensure that the ideas and perspectives of the other team members are integrated into all responsive actions taken by Outside Counsel so that there are no missteps or unfortunate public relations, regulatory or criminal exposure blunders.

Engage in Ongoing Reporting- Follow the Protocol:

The General Counsel will be tasked by the Board of Directors and the CEO to have current information at all times, and thus Outside Counsel must be proactive in supplying this information to the General Counsel’s office. The General Counsel’s office needs to determine the frequency and depth of information to be provided to the Board of Directors and to Senior Management of the Company. Whatever frequency is decided upon, each timely update should include:

- What has occurred since the last report;
- What will occur over next 30-60 days;
- Whether the short and long term objectives have been achieved;
- Whether there is a material issue or risk to be concerned about and to be monitored; and
- General observation (catch-all).

Just as the General Counsel’s office needs to engage in ongoing reporting to the Board of Directors and Senior Management of the Company, Outside Counsel representing the Company must keep the General Counsel’s office timely informed of all developments with regular ongoing reporting with at least the same information listed above. This will allow the General Counsel to provide the necessary information to the Board and Senior Management and allow the General Counsel’s office to keep all parties involved in the Company’s representation on the same page. In addition, it is important that Outside Counsel understand that:
• Every public/private filing must be reviewed to the extent it could impact regulatory or criminal actions;
• Every public filing and public document must be consistent with the Company’s legal and public relations goals and with the overall message;
• Every private filing must be reviewed to the extent of risk in the event it were to become public; and
• Every Court Appearance or Letter to Opposing Counsel must be understood to be a potential public statement or document to be used against the Company.

Manage Staffing and Budgeting:

Preparing a budget for a complex multilayered scenario is very difficult because there are so many components. Outside Counsel should provide the General Counsel with a draft budget and other team members should do the same. Once the General Counsel reviews the respective budgets, the General Counsel’s office can develop a draft budget for the entire multilayered scenario, with the understanding that things may change significantly.

Staffing is also difficult in a complex multilayered scenario. The strategic plan should include a plan that allows the General Counsel’s office to track the in-house lawyers working on the case as well as the number and seniority level of attorneys the Outside Counsel expects to work on the case in order to manage the legal fees.

During the process, the General Counsel’s office probably will not focus on the fees and expenses, but will be looking at the results achieved at each step along the way. However, after the process is over, the General Counsel’s office will begin to focus on the fees and expenses, and they need to be reasonable and within line with the draft budget provided to the General Counsel. To the extent that unforeseen circumstances require a significant increase in costs, this needs to be communicated to the General Counsel as soon as possible.
FRIDAY, JULY 28, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

HEALTHCARE PRACTICE/PROFESSIONAL LIABILITY/LIFE, HEALTH AND DISABILITY SECTION

The New Long Term Care Regulations: What does the first major overall of OBRA regulations in 25 years mean for the industry and litigation in this arena?

Salon de Musique

Moderator:
D. Jay Davis, Jr.

Speakers:
Caroline J. Berdzik
Charles E. Griffin
Neil H. Ekbloom
The New LTC Regulations: What Does The First Major Overhaul of OBRA Regulations In Twenty-Five Years Mean For The Industry In Litigation In This Area?

FDCC Annual Meeting
July 2017
Montreux, Switzerland
By: Caroline J. Berdzik, Esquire
Goldberg Segalla LLP

Using the New CMS SNF Conditions of Participation as a Sword In Nursing Home Cases

Background

In 1987, the Centers for Medicare and Medicaid Services (“CMS”) adopted a comprehensive survey and certification system that related to abuse, neglect and waste in federal programs. The Nursing Home Reform Act, which was codified as part of the Omnibus Budget Reconciliation Act of 1987 (“OBRA”), set forth survey enforcement requirements and services to be delivered to nursing homes residents. Non-compliance with the regulations provides for penalties, such as termination from the Medicare/Medicaid program, temporary management, denial of payment for new admissions and other significant penalties. Further, the federal regulations specifically allow states to establish regulations for denial of payment for all residents, a directed plan of correction, denial of payment for new admissions and other CMS approved. These regulations serve as the basis for the survey activities for the purpose of determining whether a facility actually meets the requirements for participation in Medicare and Medicaid. 42 C.F.R. §§43.2 43.75. In 2010, the Affordable Care Act (“ACA”) set forth some additional regulatory oversight for nursing homes and provided additional tools to potentially be used in the arsenal of plaintiffs’ attorneys. In nursing home litigation, the plaintiffs’ bar has somewhat cleverly and successfully morphed these conditions of participation into the “standard of care” in nursing home malpractice claims which has resulted in an increase in frequency and severity of these claims.
The New Regulations

In 2015, CMS introduced the first sweeping change of regulations for skilled nursing facility (“SNF”) conditions of participation in Medicare/Medicaid, representing the most significant changes since 1987. The regulations in Phase 1 were implemented by November 28, 2016 (with the exception of the arbitration ban as discussed in further detail below). The regulations in Phase 2 must be put into effect by November 28, 2017, and the regulations in Phase 3 must be implemented by November 28, 2019. The new revisions overhauled the requirements for participation and have provisions from the Affordable Care Act, including various compliance and ethics requirements and performance improvements processes. Although there have been many changes proposed, highlighted below are some changes which we believe will impact litigation in this arena. Defense attorneys should be mindful of these changes and utilize them proactively in the defense of these malpractice cases.

Care planning under §483.21 requires a base care plan for residents within 48 hours of their admission to the SNF. This care plan cannot be just a cookie-cutter care plan, but must have person-centered care that meets the professional standards of quality care. In nursing home litigation, the care plan is traditionally a subject area prone to much criticism by plaintiff’s counsel. Too often, the care plan is not adequate, is not updated, or, in many circumstances, not even followed. With the new changes to the regulations under §483.21, these new regulations should make defense of care plans easier for SNFs.

As previously stated, the revised regulations require that care plans must be completed within 48 hours of the resident’s admission. Previously, the requirement was 21 days. By getting a very early baseline of residents near the time of their admission, it will be helpful in the defense of pressure sore and fall cases, as those issues will be identified earlier at the admission,
and prophylactic measures can be put in place sooner. Additionally, the revised regulations require that there is an assessment of the resident’s baseline, which is critical in making arguments in these cases that there were pre-existing medical conditions which caused or contributed to the resident’s adverse outcome.

Furthermore, what is interesting about the revised regulations concerning care plans is the specific delineation of the family or lack of family involvement in the care planning of the resident. Many times, in the defense of these cases, it is evident that families are not involved with the care planning process and then feign ignorance when they pursue litigation. In support of its changes to the regulations, CMS cited a 2012 report that saw significant gaps in care planning. It found that 91% of the records reviewed did not contain evidence that either the resident, the resident’s power of attorney, or the resident’s family even participated in the care planning process. The 21 day requirement was found to not really address what was going on with the resident at the time of admission. The change to 48 hours for an initial care plan will be particularly helpful in litigation, as many times litigation is initiated by very short-term residents that may not even remain in the facility for 21 days.

Another significant change in the regulations are revisions to staffing under §483.35. With the revised conditions of participation, an assessment of the competency of the nursing staff and an analysis of the acuity of the population of the nursing home is required. Many times, plaintiffs’ firms argue that the staffing at the particular SNF is not only insufficient, but is not equipped to handle behavioral and memory care issues, which are becoming more prevalent in nursing homes. By requiring facilities to conduct this type of analysis and evaluation, this information can be used to combat arguments regarding understaffing, as well as failing to staff
to acuity level, which can knock the wind from these staffing arguments that plague and unnecessarily burden many of these nursing home malpractice cases.

The electronic submission of staffing information, otherwise known as PBJ data, which was set forth in Section 6106 of the ACA, is going to be utilized by the plaintiffs’ bar in these malpractice cases. It went into effect in July of 2016. The so-called objective of this data collection was to help CMS rate SNFs. Providers must collect direct care staffing and census data, which will be submitted for every fiscal quarter. This data includes the number of hours each staff member is paid for working each day within a quarter and the facility census on the last day of each of the three months within a quarter. There are also specific reporting periods and due dates for the data. The first submission was due on November 14, 2016, and there already have been submissions in February and May of this year, with the next one being on August 14, 2017. Defense attorneys must become intimately familiar with the PBJ data being submitted by their clients in the defense of these nursing home cases because the plaintiff’s bar will be combing through the data to try and support allegations of understaffing and staffing that is not reflective of the acuity of the nursing home.

Furthermore, §483.75 (quality assurance and performance improvement) requires SNFs to develop, implement and maintain effective quality programs. The compliance and ethics program in §483.85 piggybacks onto what was already set forth in the ACA. It requires every provider with five or more facilities to have a compliance and ethics program which has policies and procedures that can reduce the prospect of violations. This represents a significant change. The previous compliance guidelines of 2000 and 2008 were voluntary. Under these new regulations, facilities can be cited for failure to have a compliance program. However, it is not sufficient just to have a compliance program; the program has to be functioning and
promulgated. Hallmarks of an effective compliance program include: a code of conduct, a compliance officer and compliance committee, sanction screening, effective training and education programs, auditing and monitoring programs, enforcement systems, and measures to deal with non-compliance and periodic reassessments of the program.

As a result of this requirement, it is going to be somewhat more difficult in the defense of long-term care cases with respect to having to identify who are the higher level personnel at the facility that have responsibility for the compliance program. However, the existence of a robust compliance plan that is effective will also help mitigate against many of the mantras and themes echoed by the plaintiffs’ bar about lack of oversight, fraud, waste and abuse in SNFs.

CMS was set to ban arbitration agreements in SNFs back in October 2016. Under 42 C.F.R. Section 483.70(n), CMS was intending to cut off Medicare or Medicaid funding to SNFs that entered into pre-dispute arbitration. The court in American Health Care Association v. Burwell, (N.D. Miss. Nov 7, 2016) issued a preliminary injunction. In a memo issued in December 2016, CMS stated it would not enforce the ban until the injunction was lifted. The memo further provides that facilities will not be surveyed about arbitration agreements. On Friday, May 9, 2017, the Trump administration hosted consumer organizations who were concerned about the enactment of this rule. About a week prior to this meeting, CMS sent a proposed rule to OMB to revise requirements that were imposed on arbitration agreements in SNFs. It is anticipated that this rule may repealed by CMS in the near future. This will be welcome news to SNFs, who view arbitration as a more effective and less costly manner to adjudicate nursing home malpractice claims.
CONCLUSION

Defense practitioners should and must utilize the CMS regulations to tell their version of events. Long-term care is directed at relieving conditions that result from chronic physical or mental disorders, which by their nature are unavoidable. Defense practitioners also need to understand that the regulations are apply solely in regards to funding by Medicare and Medicaid. The regulations require substantial compliance, which is not the same as the standard of care. The plaintiffs’ bar conflates these two concepts.

According to the most recent CNA Aging Services Claims Report, resident falls and pressure ulcers represent the highest percentage of closed claims. These conditions implicate these tags: F309, F314, and F323. Consequently, a critical component to attacking plaintiffs’ allegations in these nursing home malpractice cases is to conduct targeted discovery which seeks regulatory specificity. As opposed to general and broad interrogatories, defense counsel should specifically ask plaintiffs’ counsel which regulations or F tags were violated. If plaintiffs fail to identify this information, defense counsel should consider motion practice before trial to preclude the introduction of these regulations. This tactic should also be deployed during the depositions of plaintiff’s expert witnesses. Generally, defense attorneys do not ask the experts what specific regulations were violated. If these questions were asked, it would be interesting to see whether any specific F tags or violations would actually be cited by these so-called experts.

In short, the new revised regulations provide an opportunity for defense attorneys and providers to turn nursing home litigation on its head in a proactive manner. While these regulations impose more requirements on providers, many of the requirements can effectively be used to counter time-tested arguments raised by the plaintiff’s base on understaffing, lack of
training, fraud, waste and abuse and improper documentation. Defense practitioners should become familiar with these regulations and use them strategically.
FRIDAY, JULY 28, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

LAW PRACTICE MANAGEMENT
In Advance of the Crisis: An Ounce of Prevention and Preparation

Salle des Fêtes

Moderator:
John Quinn

Speakers:
Sheryl Willert
Michael Shalho
EFFECTIVE TOOLS FOR LIMITING LIABILITY AND MANAGING LAW FIRM CRISIS

FDCC Annual Meeting
Montreux, Switzerland
July 25-29, 2017

Presented by:

Sheryl J. Willert, Esq.
WILLIAMS, KASTNER & GIBBS PLLC
Seattle, Portland

Michael D. Shalhoub, Esq.
GOLDBERG SEGALLA LLP
New York

John E. Quinn, Esq.
MANIER & HEROD
Nashville
Benjamin Franklin stated that “An ounce of prevention is worth a pound of cure.” This advice aptly equally applies to our law firms as well as our clients. We cannot allow ourselves and our law firms to be like the proverbial cobbler whose children have no shoes. We regularly dispense advice – which we get paid good money to provide – to our client about crisis preparation, management and prevention. We must follow our own advice.

What are we talking about? A setting in which “bad conduct” has or may result in financial harm to our law firm and may adversely impact its public image. While it seems simple and trite to say that we must respond to “bad” behavior promptly and effectively, such a response may be delayed and/or minimized when the alleged bad actor is a firm leader, in firm management, a big rainmaker, a public spokesperson or a major stakeholder. While internal decision makers may feel less threatened by taking a “let us just chat with him about what happened and tell him not to do it again” approach, such action may be inadequate to quell the adverse behavior. As importantly, it may provide the foundation for adverse traditional or social media reports that the firm did nothing or the firm buried the conduct under the rug or finally, the firm did nothing because the “bad actor” was too important to the firm’s bottom line.

Depending on the circumstances, law firms may have legal, ethical and societal obligations to intervene promptly and effectively when bad acts occur internally, are committed externally or have an impact on the firm’s image. If the “best defense is a good offense” then the firm must implement its internal guidelines for investigating the alleged misconduct, taking corrective actions and making any needed reports outside of the law firm to entities such as clients, regulatory bodies or legal authorities. In addition, the firm should begin to articulate how it will respond if knowledge of the alleged misconduct becomes public. When the law firm follows its guidelines internally and as dictated by the law, the firm has set the initial cornerstone in place for distancing itself from the alleged misconduct at
a later date when litigation arises, a criminal investigation is begun or the media start a firestorm.

I. ENTERPRISE RISK MANAGEMENT – A TALE OF A TARNISHED IMAGE

While our large company clients have probably embraced and implemented a response plan to multiple types of crises such as a response to Hurricane Katrina or to a hacker who discloses personal data, many of those plans focus on the need to promptly take measures to protect confidential data, financial practices and business operations.

Even those well-prepared companies fail to consider the potential risk associated with a crisis that may be caused by people who are ultimately responsible for the image and management of the company.

The issues and risks that our clients face are no different than those that we and our law firms face, and the upsides, downsides, strategies and tactics are similar as well.

- Just think about the debacle that United Airlines faced this past spring when it had police drag a kicking, screaming and bleeding physician off an airplane, and then promptly blamed the passenger. This image problem can attach equally as fast to professional services companies like law firms.

- Just think about the accounting conglomerate PWC and its goof up of the announcement of the Best Picture at the 2017 Oscar’s ceremony. The immediate fallout was very negative, but they implemented an effective image restoration plan by their immediate response to the situation.

- Just think about Fox News and the late Roger Ailes, Bill O’Reilly and the response of Fox over the years, and then acutely in the last year and several months to its handling of sexual harassment and work environment claims.
Failing to be forward thinking about what happens when an actor who is related to your law firm, internally or externally, engages in conduct unrelated to the company that adversely impacts the culture of the firm, the firm image and/or can have damaging consequences to the financial status of the firm. This type of risk of undesirable conduct is one which is off track and off message for the firm and difficult to manage. Moreover, the impact of this type of risk is not generally quantifiable but has the potential to have a devastating impact on your law firm on multiple fronts.

Taking an example from the corporate world, for years Subway ran an advertising campaign featuring its consumer “Jared” Fogle who lost 200 pounds by eating only Subway sandwiches each day and walking. His story aired to encourage other consumers to purchase Subway sandwiches and to improve their lifestyle. Subway attributed one third to one half of its growth in sales to Fogle, with revenue having tripled from 1998 to 2011. Murray, Rheana, (June 9, 2013). “Subway commercial spokesman Jared Fogle marks 15 years of turkey subs and keeping the weight off”. Daily News (New York City.) Jared expanded his media role and began to speak to students about healthy living and making choices that impacted their lives. Unbeknownst to Subway and completely unrelated to Jared’s role as a Subway media representative, Jared was involved in viewing child pornography and was interested in sex with minors. Jared was arrested and charged on November 19, 2015 with possessing child pornography and traveling to pay for sex with minors. After entering a guilty plea, he was sentenced to 15 years, 8 months of incarceration and ordered to pay $1.4 million in restitution, fined $175,000 and to forfeit $50,000 in assets.

What was Subway’s response? In August, 2015, Subway responded with a simple statement, “We no longer have a relationship with Jared and have no further comment.” A few days later, the company tweeted that “this does not reflect our brand values.” These responses did little to quell the discussions which continue
about what Subway knew and when and whether it had taken actions expeditiously enough.

There was no “evidence” presented by the media or the prosecutor’s office to suggest that Jared’s sexual misconduct was known by or facilitated through Subway. No one publicly alleged that Jared had access to children because of his media role. The news coverage revealed there was a franchisee who reported concerns to the organizational head of a group of franchisees of Subway. He did not report the information to anyone in the organization - thus the company denied any knowledge. Still, there was very negative fallout from Jared’s terrible conduct - not one whit of which involved the company.

II. ASSEMBLING THE TROOPS - GETTING LEADERSHIP AND THE FIRM ON THE SAME PAGE

Consultants and scholars of enterprise risk management obviously recommend that a company (or lawyer or law firm, which is the focus of this presentation) take steps ahead of any crisis to develop a plan of action that can be promptly implemented, including the selection of a spokesperson to address the media and protocol for investigating and responding to allegations or disclosure of misconduct. The following recommendations should be considered to timely and effectively respond to adverse circumstances.

1. Develop an enterprise risk management plan before any crisis occurs.

2. Get law firm management and the partners buy-in on the enterprise risk management plan before a crisis arises.

3. Follow through on the plan including annual review of compliance with policies and procedures.

4. Hold management – both lay management, and the partners in management - accountable for all failure of compliance and implement changes where necessary.
5. Do not delay compliance – the excuse of budgetary constraints or those built into the inefficiency of a law firm partnership structure will not be met with sympathy.

6. Recognize that in the case of bad actors, there is almost always something that provides prior evidence or clues that things were going south before it becomes a matter of wider interest – pay attention and do not ignore the warning signs or sweep the clues under the rug – follow up and follow through.

7. Be brave in your response – always do what is in the best interest of the law firm – not just the personal best interest of the person(s) who is the point person for resolving and responding.

8. Communication should be early and often.

9. The loudest voice is not always the best voice to follow when deciding the course of action.

10. Consult with counsel – particularly when the decision is to own whatever has occurred because how you communicate to your partners and to the public will be key to avoiding litigation and liability.

III. IT IS NOT WHAT YOU SAY, AS MUCH AS WHO AND HOW YOU SAY IT-THE MESSAGE AND THE MESSENGER

There are many things upon which many experts and publications agree when it comes to responding to a crisis. One commentator, Bill Salvin, summed up the three most important things that any business can do in the face of a crisis, including one where it is the face of the corporation or some other extremely highly placed individual within or affiliated with the company that is the real or
perceived culprit. According to Salvin, the three most important things are a) honesty, b) speed and c) images.¹

Salvin accurately advises that it is imperative that every voice of the company be a “straight shooter” and actually advise both the internal and the external audience in a manner that is factual and completely truthful. In this current age of cynicism, this may not be expected, however, it is important that every company and law firm adopt the concepts that many parents try very hard to convey to their children – your integrity and your reputation are really your only true assets. Protect them.

Addressing the issue of speed, Salvin reminds us that the dynamics of a crisis can change quite rapidly based on events which are completely out of the company’s control – think about PWC, United Airlines or Fox News. Consequently, it is imperative that once the team has been identified, you must empower your team to make the tactical decisions required to communicate and respond to events as they unfold - and not wait for every partner, or even every influential partner to sign off on the tactical response.

Finally, Salvin also reminds us that all people believe what they see over what they hear. You can have great talking points and a great spokesperson destroyed because the words are out of sync with the images coming from the scene. Another great reason for an external focus during a crisis is that the first images of a crisis will likely not come from inside the organization.

When thinking about images, it is important that internal communication assets such as social media and websites be used to project positive images. Moreover, the law firm should permit traditional and other media access so that it does not appear that the firm is attempting to hide the ball. PWC did an excellent job in this regard in the wake of its mistake during the Oscars.

In reflecting on the three keys set out by Salvin, there are several things on which the law firm should focus in order to facilitate compliance with these concepts. To facilitate honest communication, in advance of the crisis, the firm should carefully examine who will make up the leadership team that will actually decide and provide the direction that the law firm will take in order to appropriately and accurately respond to the crisis. In other words, who will be the decision makers behind the face of the truth?

A determination of who is considered leadership for purposes of responding to the crisis may be completely different than leadership for purposes of day to day operations of the firm. Leadership for crisis and image management should always include legal counsel, human resources, a technology specialist, a public relations specialist as well as at least one senior partner within the firm and most importantly, someone with institutional memory. Although the need for institutional history may seem like an odd concept, history generally repeats itself and having someone who has knowledge of what did and did not work for the firm historically is always helpful. It is a practical fact of life in a law firm structure that a member of the managing committee be involved as she is directly responsible to the partners, and has been put in that role because of their trust in her to help manage situations like this. One should also remember that there should be flexibility in assembling this team. Who is on the team should be reflective of the events and not just a stagnant group.

On the issue of speed, it imperative that the law firm institute a prompt investigation. So, what does that look like?

The investigation must be swift but it must also be fair, consistent and balanced. Although the firm may be interested in ending the pain of the bad publicity quickly, at the end of the day, it is also interested in making certain that everyone is treated in a fair and objective manner. Consequently, a prompt decision should be made about who should investigate the matter. This decision is best made by contacting counsel and turning to someone experienced in
investigations, who is not otherwise affiliated with the firm and who will make an excellent witness in the event the firm decides that it wants to use the investigation (and therefore the investigator) as a part of any defense strategy that might be lodged either in criminal or civil litigation or even in the public eye.

Selecting the Messenger

Selection of a spokesperson is an art and not a science. Highly informed individuals have great degrees of disagreement as to whom and what role should be served by the spokesperson. The art is constantly changing, as society’s expectations for instant and accurate information evolve.

The “who” in the selection process is one of the most critical, yet often difficult actions which the firm will face. While many very accomplished lawyers can effectively run a law firm, try a lawsuit or negotiate and be the spokesperson for others, those same individuals may not be the best choice to be the spokesperson for your law firm in a crisis. Then again, they may in fact be the right person.

Many lawyers, like many engineers, may not possess the ability to use “people speak” and explain what occurred. Trial lawyers might, but then again their skill in a courtroom may not translate to effective communication in a crisis. And many trial lawyers are like the lone-wolf, and may not be an effective team member in a crisis.

If the firm is being accused of having knowledge of the allegedly bad acts or that it should have known about the acts, the spokesperson needs to have sufficient stature to project the internal and external image that the allegations are being taken seriously, that the spokesperson is familiar with the internal processes implemented to encourage reporting of misconduct and responding to it and to be able to stand firm and committed to a statement that the acts of the individual are solely those of the individual and not the firm.
Experts in the field have much to say about who should assume the role of messenger. However, regardless of who is selected, there are some recurring themes about the personal characteristics that should be possessed by the spokesperson, including savvy, experience, the ability to speak with authority and accuracy, the ability to remain focused and facilitate dialogue, the ability to be firm and the ability to avoid hurt feelings when he/she is excluded from discussions which may be subject to the attorney-client privilege or which may constitute attorney work product. ²

There are a myriad of reasons why the person selected as the spokesperson should have these characteristics. Every reader can close his or her eyes and hear the loop on CNN and other stations of the one statement that some corporate CEO wishes had never been uttered by the corporate spokesperson.

Today’s news is no longer about the in-depth story. Instead, news – national, local and even hyper-local - is a soundbite intended to catch attention and increase ratings. Consequently, it is important that the spokesperson be savvy enough to understand the meaning of questions which are being asked by reporters, how to convey the concepts in a way that will be used by the reporter, be respected enough to be listened to by those who report the news and understand the importance of being accurate so that there will not have to be constant backtracking and recasting of what was said. (Here is where one might feel sorry for Sean Spicer). Although it is impossible to completely control the message (there is always the possibility for statements being taken out of context), at the end of the day, the right spokesperson will actually capture the attention of the

press and the public in a way that will effectively convey that the firm has compassion and is making every effort to do the right thing.

So, who should not be the spokesperson? Again, the authorities on the subject will most likely tell you that you should not proffer someone who has the ability to make legally binding admissions on behalf of the entity. Unfortunately, this may be something that is unavoidable since even if the spokesperson is not a “speaking agent” for the company. The Court of Public Opinion – every day citizens of the United States – will certainly believe that when any company or law firm hires or uses a spokesperson, that person’s comments are intended to be a reflection of the entity for which the spokesperson speaks.

Many expert crisis managers argue that one category of spokespersons to be avoided are lawyers. Well, when the entity in the crucible of a crisis is a law firm that is unavoidable. The law firm’s litigation counsel should be avoided as the firm spokesperson, unless the matter is already at the trial stage. Why? Simply put, it is important to avoid revelation of privileged communications, work product and other strategies. Instead, it is best to keep those individuals in the background as part of the leadership team that will help to navigate the waters of the crisis internally. When either in-house or outside counsel have the ability to think long term and see the big picture and are single mindedly focused on what is in the best interest of the entity at issue and cannot be inappropriately swayed by the opinions of higher ups in the organization or big corporate shareholders, they are in a much better position to coordinate and guide the process if they are not the public voice of the entity in a crisis.\(^3\) On the other hand, and there is always at least one other hand when attorneys are speaking or thinking, an outside firm may be permitted to be a spokesperson for the findings if the law firm wishes to release the results of the investigation.

\(^3\) “The Lawyers Role in a Company Crisis” Mike Androvett, Mark Annick and Mary Flood, Androvett Legal Media & Marketing. See also, “Are You Prepared to Handle a Crisis on Your Campus,” The Jane Group, Cheney & Company, Sept. 2015.
A third category of individuals that experts suggest be closely scrutinized before they are selected as the corporate spokesperson is the corporate CEO. In the law firm context, the managing partner may or may not be the best person to project the image that the firm in crisis wishes to project to the public even if those characteristics are necessary in order to maintain internal confidence.4

What is the Job of the Spokesperson?

The job of the spokesperson is to manage the law firm’s image and to convey the firm’s message. The image is nothing more than the manner in which the firm is perceived by anyone who chooses to pay attention to the firm. The image is the message, and the message is the image. Consequently, when commentators discuss the need to manage an image during the course of a crisis, what they are really suggesting is that a firm or company not only manage that which is being communicated orally but also that which is being communicated through photographs, television ads, product literature, tweets, texts, emails and internal memoranda and other communications. Collectively, these and many other things come together to make the firm’s image.

In the face of the National Labor Relations Board’s liberal interpretation of the rights of employees to communicate about terms and conditions of employment, management should be careful about any efforts to restrict employee communications about evolving events. However, one technique that may be used is to actually enlist the assistance of the firm’s employees in projecting, improving or securing the reputation of the firm. This objective can be achieved by providing truthful and accurate information to its employees about what is taking place, the impact that the events may have on them and others and what the firm is doing in response. This information should be communicated not only in writing but through large group meetings, smaller groups, focus groups and other mechanisms that may be appropriate for the size of your law firm. Communication cannot be a

4 See, Crisis Communication Plan: A PR Blue Print by Sandra K. Clawson Freeo at http://www.niu.edu/newsplace/crisis.html
one-time occurrence, if it is to be effective, it must be regular. Once the communication has begun, it is equally important to listen to the response to that communication. There is truth in the concept that diversity of ideas can bring better thoughts to a situation than simply considering the concepts set forth by people of like minds. Once the communication with employees has begun, employees can become the ambassadors for the firm.

What are the Best Ways to Achieve the Objective?5

There are some things about which experts in the crisis communication and management field agree when it comes to the public response to addressing a crisis. The one thing that almost everyone who has ever been trained in crisis management has learned is that “it is a no-no to say, ‘no comment.’” However, there are several others that should be listed for those who will ultimately have to advise on crisis management or be the face of your law firm in a crisis.

1. Never speculate
2. Speak clearly and calmly
3. Be plain spoken – avoid jargon
4. Establish good eye contact – how you look is as important as what you say
5. Be consistent in your message – tell them what you are going to tell them, tell them what you want them to hear, tell them what you said.
6. Rehearse – it will feel more natural
7. Communicate facts
8. Control the message
9. Be creative – have an imagination
10. Acknowledge and thank your allies.

---

IV. CONCLUSION

Law firms can avoid or minimize risk of liability and, perhaps even worse, the destruction of the firm’s reputation for trust, honesty and reliability ‘if’ the appropriate plan is formulated and implemented ahead of the crisis. The firm must not only have policies and procedures in place to outline unacceptable conduct, establish mandatory reporting of misconduct and follow through with implementing the policies and procedures, but the firm must have an enterprise risk management plan that focuses on crises caused by its most important assets – its people. A firm will fail to distance itself from allegations of misconduct and enterprise liability if it failed to identify the types of misconduct that were intolerable ahead of the alleged act and trained employees, including leadership, about what is and is not acceptable. Having laid the groundwork for educating employees, investigating complaints and taking actions promptly will go a long way to eliminate or reduce enterprise liability for the bad acts. However, even the best plan will not stop the media from seeking to connect the dots and get the public to associate the bad actor with the firm. Having a spokesperson who can stand strong in the face of such media mudslinging and who can knowledgeably and credibly deny that the firm was aware of the misconduct and/or is acting promptly to remediate the conduct will help obtain a balance of appropriate action by the firm in the public eye.

Of course, depending on the size of your law firm, and its geographic reach, the things we talk about here will need to be scaled up or down. The bad acts of the secretary for a sole practitioner or a several lawyer law firm may or may not be catastrophic to that firm. The “may be” catastrophic is the part that you need to plan for.

No matter the size of your firm, Big Law or a small law firm in a small community, take the time to consider the unknowable or the unthinkable. If you get that call or email tomorrow, what is the process that you will start to
implement? If you have a plan and a process, you are more likely to get through the crisis less damaged than if you had no plan and had to deal on an ad hoc basis with a rapidly evolving crisis. The simple act of deciding what to say and who to say it may take too much time than if at least in advance you knew who the spokesperson would be.
FRIDAY, JULY 28, 2017
7:45 A.M. – 8:45 A.M.
SUBSTANTIVE SECTION MEETINGS

PRODUCTS LIABILITY/PREMISES LIABILITY/INTELLECTUAL PROPERTY
Emerging issues in Third-Party Litigation Funding
Salon Rotary

Speakers:
Scott M. Incerto
Chris Warren-Smith
Susan Dunn
Daniel McGrath
LITIGATION FUNDING: A Global Perspective

I. INTRODUCTION

Litigation funding by third party investors and institutions has been growing and evolving at an impressive pace in jurisdictions across the globe. Australia and the United Kingdom, in particular, have taken progressive strides in the past fifteen years to abolish longstanding champerty doctrines and to develop markets for litigation funding. This has resulted in competitive pressure on American and European jurisdictions, which appear to be moving towards a greater acceptance of litigation funding.

The basic litigation funding business model, which is really akin to a contingency fee save that the funding source is not the lawyer running the case, but a third party investor—funding legal and other ancillary costs related to a claim in exchange for a share of the damages if the claim succeeds—is highly attractive for both claimants requiring funding and investors looking for above-average returns. Investors looking to build a portfolio may be attracted to litigation funding due to the fact that its returns are uncorrelated to the stock market or other classes of assets. For impecunious plaintiffs, litigation funding increases access to justice by allowing those with meritorious claims to bring lawsuits they would otherwise be unable to bring and to avoid being forced to settle at a discount because they have run out of funds. For the increasing number of corporations now using funding, it helps them stretch diminishing legal budgets and contemplate the pursuit of claims where typically they can only contemplate defending claims.

For defendants, in currently limited circumstances, litigation funding allows corporations to shift costs and hedge the risks associated with litigation. As the foremost concern for financiers is to get paid, money flows into cases that appear more likely than not to have a positive outcome for the investor. At the same time, the rule that higher risks can mean higher returns also applies here, and it may still be possible to get multiple litigation funders on board for more challenging cases if the potential rewards are high enough.

This article contains an overview of the major trends that underpin the growth of this fast-growing and relatively new industry. It addresses important litigation funding issues in various jurisdictions—including Canada, Europe, Singapore, Hong, Kong, Australia, and the United States—of which litigants, attorneys, and funders should be aware.
II. THE BASICS OF THIRD PARTY FUNDING (‘TPF’) ARRANGEMENTS

A Third Party Funder will fund all the costs of a piece of litigation in return for a share of the proceeds, typically, only if the claim is successful and monies are recovered. Currently, it is primarily used in the commercial context, in both litigation and arbitration, though some group consumer claims are being funded (in addition to those plaintiff law firms in the US which fund such claims on a contingency fee basis).

TPF’s origins were in its use in the insolvency context, driven by those companies who had no alternative if they were to be able to pursue a claim. TPF is now being used in all types of litigation.

A Funder will typically look for the following characteristics in a case it is considering funding:

- An opponent who has the means to pay the amount being claimed
- An identifiable realistic minimum claim value
- A carefully thought out budget for running the case through final hearing to ensure the party is fully resourced should the case not settle. This is one of the most challenging aspects of the Funder’s assessment.
- Legal merits which based on the assessment at the time funding is sought, suggest that the claim is more likely than not to succeed.

Costs covered by a funder might include:

- Lawyers’ fees
- Experts’ costs
- Court or arbitration fees
- Travel and translation costs
- Provision for opponent’s costs in jurisdictions where such costs are payable
- Any other costs which might be required to secure a successful conclusion for the claim

There are a range of funders in the market. The key matters for any prospective funded party and their representatives to consider are that the funder has the funding to see each case through to conclusion, that the funder does not exercise leverage to put that funding at risk and that the funder does not seek to control the way in which the claim is to be run (though in Australia the funder is permitted to do so).

Once the funder has satisfied itself the claim is one they wish to support, they typically enter into a funding agreement with the funded party, who in turn engages its lawyer in the usual way. The client
is billed as usual, but the funder discharges those bills in line with the agreed budget set out in the funding agreement.

While there is limited use of funding currently by defendants, there is no reason why a mechanism for using it cannot be workable. Certain defendants have viable, valuable counterclaims. Those can clearly be funded in the usual way as a claimant seeking funding.

Where a defendant is seeking funding to cover costs to defend a potential liability, the main question is how they agree they will pay the funder on success. That requires valuing what liability the funding is being used to defend, the likelihood of success of defending such a claim and then agreeing the fee the defendant will pay the funder from success. As the funder funding a claimant needs to know who the opposing party will pay on success, the funder will need to establish how a funded defendant can pay the agreed fee to the funder on success.

III. PICKING THE RIGHT FUNDER AND DEAL

A. Considerations

The continuing development and expansion of the third party funding market has led to an increasing range of funders to choose from. Greater experience is leading to the ability to source more flexible and bespoke arrangements for particular cases. Certain funders will have different specialisms and risk appetites to others. A number will allow flexibility in structuring the risks and rewards of the various interested parties, affording greater flexibility in structuring the deal.

There are some important considerations when selecting the right funder and deal structure:

- **The nature and size of the dispute:** Some funders specialise in particular areas (e.g. IP litigation, arbitration) and will more readily consider particular types of claims. Different funders will consider different sizes of claims and their funding models may vary as a result.

- **Credit risk:** The nature of the funders’ own arrangements may need to be considered to ensure that a potential funder will be credit worthy for the life of the dispute – confirmation should be sought from the funder not just about its capital adequacy but what level of leverage it exercises with its capital to ensure the funding of the claim is not put at risk part way through the claim.

- **Level of control:** Although all funders will avoid breaching the applicable laws, within these constraints some tend to exercise more control over disputes than others.

- **Use of brokers:** It is possible to involve third party brokers who will provide advice to a potential funded party about the funding and “After-the-Event” Insurance (‘ATE’, which covers the opponents’ costs where those are payable on a loss) options available in the market.
• **Your client**: The effect of the funding arrangement is that your client from whom you will receive instructions, presumably the Plaintiff/Claimant, is “spending somebody else’s money”. The terms of the Funding Agreement can be critical to ensuring a satisfactory outcome for all concerned, particularly the contractual terms involving dispute resolution around decision-making and providing instructions, accepting or rejecting settlements and termination.

• **Flexibility**: Experienced funders are increasingly more flexible in structuring returns at different stages of a dispute, leading to better incentives and settlement outcomes for funded parties. This includes flexibility in structuring the returns of the Plaintiff/Claimant and funder respectively and the risk and reward structure in the fee arrangement of the law firm pursuing the claim.

Greater experience is leading to increased transparency around these important factors. Potential funded parties are well served to consider the wider market when looking to structure their funding arrangements.

**B. A Proposed Model Litigation Funding Contract**

There are no model contracts in the industry and most funders (rightly or wrongly) view their funding agreement as conferring some form of competitive advantage and thus are kept confidential. Some in the litigation finance world propose that funding agreements be structured differently than they are currently. Professor Maya Steinitz has written extensively about litigation finance contracts in the United States.¹ She advocates for litigation finance contracts to follow a venture capital model, arguing that the economics of litigation funding is similar to that of VC, as both are characterized by extreme uncertainty, information asymmetry, and agency costs.² She argues that litigation funders should be viewed as real parties in interest and be able to exercise some influence over the litigation they fund.³ Recognizing that having the funder exercise actual control over the litigation would likely be a violation of champerty laws, she proposes that the contract give the funder some influence over the settlement outcome by requiring that the litigant give prior notice of settlement offers to the funder and give good faith consideration to the funder’s analysis of the offer.⁴ The plaintiff therefore retains ultimate control of the settlement decision, avoiding the violation of champerty laws and ethical codes.⁵

Professor Steinitz also argues that litigation finance contracts employ staged funding. Staged funding makes access to capital depend on the whether the entrepreneur has met the funder’s expectations

---

¹ For a more detailed look at professor Steinitz’s ideas and to see her proposed model litigation finance contract, see Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711 (2014). Further information can be found at Professor Steinitz’s website, http://litigationfinancecontract.com/.
³ *Id.* at 732.
⁴ *Id.* at 738, 741.
⁵ *Id.* at 741.
as set out in the contract. Whether the contractually-stated expectations are being met is assessed at various points in time called “milestones.” If the funder is satisfied when the milestone is reached, it may invest further—if it is not, it may exit. Professor Steinitz attempts to adapt this venture capitalist model into a litigation financing contract. She structures the financing as a series of securities sales to funders that occur at various milestones in the litigation. The litigant and funder agree on a potential value for the litigation, the funder commits a certain amount of capital that it will invest at each milestone, and the parties negotiate an initial investment. The securities that are sold at each milestone are “shares” in the litigation proceeds. The price of these shares is negotiated after various milestones (the close of discovery, for example) and the newly-negotiated price will reflect the parties’ improved ability to assess the risk that the claim will fail to pan out as expected. Professor Steinitz’s model contract also attempts to reduce the uncertainty inherent in litigation funding by providing downside protections for both the funder and the litigant. If the claim turns out to be less valuable than the parties anticipated, then it will be issued additional “shares.” The model contract also gives the plaintiff a right to a minimum recovery—which the parties will negotiate at the outset.

As most litigation finance contracts are kept confidential, it will be difficult to see if financiers and litigants adopt the provisions in this proposed litigation finance contract. Regardless of whether they do, it is likely a good idea for litigation funders and recipients to be aware that there are alternative ways to structure finance contracts. Funders should make sure that their arrangements are both fair to litigants and economically sound. Attorneys who work with clients who seek litigation funding or who help negotiate funding arrangements should bear in mind that there are ways to minimize risk to the parties while keeping the agreement fair to all involved. Potential financing recipients should ensure that they actively negotiate the terms of the litigation finance contract (and seek legal counsel if need be).

IV. LEGALITY OF THIRD PARTY FUNDING

United States

Litigation funding by third parties – as opposed to funding by one’s law firm - is a relatively new phenomenon in the United States, and regulation by the various states is inconsistent. In the absence of formal regulation of litigation funding by many states, courts have assessed the validity and enforceability of litigation funding agreements under a variety of legal theories. Though litigation funding is growing more widespread throughout the country, it is not without its share of detractors. Lisa Rickard, president of the U.S. Chamber of Commerce’s Institute for Legal Reform wrote in 2014

---

6 Id.
7 Id. at 745.
8 Id.
9 Id.
10 Id. at 746.
11 Id. at 746-747.
12 Id. at 747.
that "litigation financing is a sophisticated scheme for gambling on litigation, and its impact on American companies is unambiguous: more lawsuits, more litigation uncertainty, higher settlement payoffs to satisfy cash-hungry funders, and in some instances, even corruption."\(^{13}\) Despite the Chamber’s worries, litigation funding continues to grow in the United States.

Litigation funding is often challenged as violating the common law doctrines of champerty or maintenance in the United States. These doctrines have existed historically in many common law jurisdictions to preclude frivolous litigation and to prevent disinterested parties encouraging lawsuits. They arose in medieval England and were intended to prevent wealthy feudal lords from funding poor people’s legal claims against their personal or political enemies. In general, maintenance prohibits a third party from helping someone else maintain a lawsuit by providing financial assistance. Champerty is simply maintenance for profit—that is, paying another person’s legal fees in exchange for a share of the winnings. Many states are moving away from antiquated concepts like maintenance and champerty, however, and "[t]he consistent trend across the country is toward limiting, not expanding, champerty’s reach."\(^ {14}\) Many jurisdictions have abolished the doctrine of champerty altogether, determining that it is no longer required to "prevent the evils traditionally associated with the doctrine as it developed in medieval times."\(^ {15}\) Other states—such as Arizona, California, Connecticut, New Jersey, New Hampshire, New Mexico, and Texas—take the position that the doctrine of champerty was never adopted from England, and thus, it does not apply.\(^ {16}\)

Though some states still maintain laws against champerty and maintenance, many states recognize champerty only as an affirmative defense by a party to prevent enforcement of the allegedly champertous agreement.\(^ {17}\) In some states, the timing of the litigation funding contract is what is relevant—contracts entered into after the action is commenced are not champertous because they do not stir up litigation. In New York, for example, the affirmative defense of champerty is not available where a transaction occurs after the commencement of an action and simply assigns an interest in the proceeds of the claim.\(^ {18}\)

---


\(^{14}\) Del Webb Comtys, Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011).


\(^{17}\) See 720 Ill. Comp. Stat. Ann. 5/32-12 (“If a person officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, with a view to promote litigation, he or she is guilty of maintenance and upon conviction shall be fined and punished as in cases of common barratry.”); Sneed v. Ford Motor Co., 735 So. 2d 306, 315 (Miss. 1999); Robertson v. Town of Stonington, 750 A.2d 460, 463 (Conn. 2000); Rolleston v. Cherry, 487 S.E.2d 354, 359 (Ga. Ct. App. 1997); Agar Sch. Dist. No. 58-1 Bd. of Educ. v. McGee, 527 N.W.2d 282, 288 (S.D. 1995).

\(^{18}\) See Fahrenholz v. Sec. Mut. Ins. Co., 13 A.D.3d 1085, 1086 (N.Y. App. Div. 2004) (holding that loans made after an action had already been commenced were not champertous because they were not made “with the intent and for the purpose of bringing an action”).
Other states do not view litigation funding contracts through the lens of champerty. Colorado has held that litigation financing counts as a loan under its commercial code and requires litigation financiers to be licensed as lenders. Louisiana’s Attorney General has classified litigation financing as a loan—despite that fact that the litigant’s obligation to repay the funder “may be conditioned on an uncertain event.” Similarly, in 2012, the Maryland Commissioner of Financial Regulation issued cease and desist orders against several litigation funders for engaging in usurious lending. The Michigan Court of Appeals has held that litigation funding may sometimes constitute a usurious loan, especially if the funder has an absolute right to repayment at the time the money is given to the litigant. Other states have struck down funding agreements on other bases. For example, an Alabama appellate court held that litigation funding agreements were invalid on public policy grounds because they amounted to illegal gambling contracts.

Although the trend is towards abolishing champerty laws, there are still a few states that have struck down litigation funding agreements as violating these prohibitions. In a recent decision by the Court of Appeals in New York, the court affirmed summary judgment deciding that an agreement was champertous and illegal, even though it facially fell within a safe harbor section of New York’s champerty statute (Judiciary Law Section 489(1)). The Court of Appeals determined the entity that owned the securities claim at issue, but did not want to bring it for PR reasons, entered into a “sham transaction” with an undercapitalized assignee, which did not want to assume the $500,000 risk required to qualify for the safe harbor protection afforded by the statute. The terms of the assignment constituted a scheme to avoid the champerty law in the court’s view and was, therefore, illegal.

Some litigation funders have attempted to circumvent state prohibitions on champerty by providing that disputes between the funder and litigant be heard in states that are less hostile to litigation funding. Not all courts are receptive to this practice. In one case, a Minnesota appellate court held that a district court did not abuse its discretion by refusing to enforce a forum-selection clause in a litigation funding agreement. The court pointed out that the forum selection clause was inconsistent with Minnesota’s strong local interest against champerty. Even if the forum selection clause is enforced, it may not be possible to avoid application of the champerty laws. In a case in the Eleventh

---

19 Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400 (Colo. 2015).
22 Lawsuit Fin. v. Curry, 261 Mich. App. 579, 581 (Mich. Ct. App. 2004). The plaintiff in Lawsuit Financial v. Curry was a litigation funding company that brought an action against a funding recipient to recover the money owed to it under the funding agreement. The trial court dismissed the suit and the appellate court affirmed, finding that contingent advances it made to the litigant were a loan “because at the time the advances were made, plaintiff had an absolute right to repayment.” Id. at 588. Part of the court’s reasoning rested on the fact that the defendant in the lawsuit had already admitted liability and the jury had already returned verdict of $27 million in damages. Id. Since the advance counted as a loan and the interest exceeded the maximum lawful interest rate of seven percent, the court found it clearly usurious under Michigan law, Id. at 591.
23 Wilson v. Harris, 688 So. 2d 265 (Ala. Civ. App. 1996). Notably, the Wilson court also pointed out that the agreement was closely akin to champerty and violated public policy. Id. at 270.
26 Id.
Circuit, the court pointed out that honoring a forum selection clause would not affect the law that was applied in the case.28

More recently, the trend in the United States appears to be toward regulation of litigation funders as opposed to outright prohibition. Indeed, South Carolina has abolished the doctrine of champerty and has now moved toward regulating litigation financing.29 Since 2007, Arkansas, Indiana, Maine, Nebraska, Ohio, Oklahoma, Tennessee, and Vermont have all enacted statutes regulating litigation funding companies.30 Many of these statutes are similar in what they require of litigation funders—often things such as notice and disclosure provisions, standard contract language, bans on attorney referral fees, and agreement by the funder that it has no right to control the litigation. Some states impose more restrictions than these. Arkansas subjects litigation funders to the maximum interest rate—as specified by statute and the Arkansas Constitution—of 17%.31 Tennessee has enacted a 10% fee cap for consumer litigation funding transactions in response to concerns that litigation funders were charging exorbitant fees.32 It has been suggested that interest rate caps such as these have had the effect of driving many litigation funders out of these states.33

Interestingly enough, many litigation funders appear to be lobbying for regulation of their industry. The Alliance for Responsible Consumer Legal Funding—a trade group representing about half of the established businesses in the pre-settlement funding industry—put out a press release celebrating the rules put in place by Vermont and Indiana in 2016.34 The Alliance describes itself as “advocat[ing] at the state and federal levels to recommend regulations that preserve consumer choice” in legal funding.35

A further consideration, which is briefly addressed below in Sections VI(A), (C), and (D), are the various state ethics rules that regulate the relationships between lawyers and their clients. Unlike the antiquated doctrine of champerty, these rules are showing no signs of decline. Therefore, care must be taken to ensure not only that a funding agreement is legal in a given jurisdiction, but also that the attorneys can ethically represent a client who is a party to such an agreement.

28 Rucker v. Oasis Legal Fin., L.L.C., 632 F.3d 1231 (11th Cir. 2011). The court said that the “plaintiffs [sic] argument . . . ignores the fact that the Illinois court hearing this case will apply Alabama law, and must therefore give proper deference to the Alabama precedent . . . . Thus, enforcement of the forum selection clause has no impact on whether the purchase agreements themselves are unenforceable under Alabama law as illegal gambling contracts.” Id. at 1237.
32 Tenn. Code Ann. § 47-16-110 (2014). Oddly, the Tennessee statute only covers financiers that lend to “consumers,” who are defined as “natural persons” in the statute—this rule may therefore be inapplicable to funders who finance lawsuits brought by corporations. Id. at § 47-16-102.
34 Press Release, Alliance for Responsible Consumer Legal Funding, Landmark Legal Funding Laws in Vermont and Indiana Set the Standard for Consumer Protection (June 27, 2016).
Canada

In Canada, third party funding is most commonly seen in the class action and personal injury context. This is largely due to the availability of third party funding (public and private) in class action cases. In some provinces, public funding is available for class action cases – in Ontario and Quebec this has been available for many years. More recently however, court-approved private third party funding arrangements are also being utilized.

Private third party funding is a relatively recent development, and as a result, funding of commercial litigation is far less common. In the class action context, private third party funding arrangements must be approved by the court. To date, at least nine have been approved, including four in Ontario, as well as in Alberta and Nova Scotia. Though not yet been tested by the courts, it is likely that the principles set out in those judgments will apply to third party funding of commercial cases and there will be a general acceptance of funding of those cases by the courts.

The courts have held that private third party funding arrangements are not necessarily champertous in Canada, however they may be improper in certain circumstances, including where they facilitate "officious intermeddling" by the third party. The courts have in the past found agreements that allow the funder to attend settlement discussions and unilaterally withdraw from the litigation on short notice to be improper. To avoid such issues, the third party funding agreement will need to be carefully drafted and compensation arrangements for the funder must be reasonable and fair. Canadian courts have proved willing to impose limits on third party funding arrangements, including the level of compensation for a funder. In one case, an Ontario court held that the proposed funding agreement went too far because under its terms the funder might have received more than 50 per cent of the Claimant's recovery. In another case, the court held that the funder's commission should be consistent with the commission that would be payable to the public Fund (ten percent).

The commissions received by third party funders in cases where the arrangement received court approval typically range between 5 percent and 10 percent. This is significantly lower than the share of recoveries received in other jurisdictions. Compare for example, the rates recoverable in England – in

---

36 The Quebec Legislature created the Fonds d’aide aux recours collectifs (the Fonds), which provides financial support for counsel fees, notices to class members, costs, and disbursements. See An Act Respecting the Fonds d’aide aux actions collectives, CQLR c F-3.2.0.1.1, s. 29 (Can.). More than one third of the 776 applications for funding from the Fonds in the past decade have been successful. The Fonds is supported by provincial subsidies and recoveries made under legislation permitting the Fonds to recover a percentage of any amount awarded to class members in a Quebec class action on settlement or judgment, regardless whether they were supported by the Fonds. In Ontario, the legislature created the Class Proceedings Fund (the Fund) to provide financial support for disbursements and adverse costs awards. Law Society Act, RSO 1990, c. L.8, s 59.1 (Can.). The Class Proceedings Committee determines whether to fund a case by considering the merits of the case, fund raising efforts, use and control of funds, public interest, the likelihood of certification, and the amount of funding required. In return, the Fund may recover a 10 percent levy on any monetary award or settlement in the funded class action in addition to repayment of all amounts provided to the plaintiff. In 2014, the Fund provided $1,329,046 in funding and approved 11 new applications.

37 Fehr v. Sun Life Assurance Co. of Canada, 2012 (CanLII 2715, para 90 (Can. O.N. S.C.).
40 Id. at paras 58 and 60.
a recent decision the English High Court held that obtaining funding at a recovery rate of either a multiplier of 300% of the amount funded or 30% of the damages recovered, whichever is the higher, reflected standard market rate.44

Europe
In much of Europe, third party funding is common. Third party funding is an accepted practice in many European jurisdictions, including England and Wales, Germany, the Netherlands, Austria and Switzerland, among others. In some however, such as Denmark, France and Poland, although not prohibited, there are no rules or regulations nor any case law on third party funding, so the courts’ approach to issues arising from funding is largely untested.

Some European jurisdictions, such as England and Wales, have seen a significant increase in third party funding of claims—both litigation and arbitration—since 2002. Certain features of the English legal system make England attractive for funders as well as claimants, as explained in an endorsement by appeal court Judge Jackson in a substantial review completed in 2013. Further, the English legal profession is permitted to offer (and has embraced) innovative fee arrangements such as conditional fee arrangements and “damages-based agreements” (the UK’s equivalent of contingency fee agreements). Such arrangements, coupled with third party funding and after-the event costs insurance, can enable claimants to bring claims on effectively a “risk-free” basis.

In addition to more conventional third party funding arrangements, a model of funding sometimes seen in parts of mainland Europe (particularly Holland) is one where the funder takes an assignment of the claims from the Plaintiff/Claimant. The funder then funds and pursues the claim in its own name and on its own account. This model has been accepted in a number of EU Member States,45 however, assignments of claims in the same way in, for example, England and Ireland are not permitted.

Ireland, in contrast has an uncommonly restrictive stance to third party funding. The common law rules of maintenance and champerty are enshrined in statute and continue to prohibit funding by third parties with no legitimate interest in the proceedings. In other jurisdictions, such as England and Wales, equivalent maintenance and champerty prohibitions have been decriminalised, softened and/or removed entirely. However, that is not the case in Ireland where the courts have continued to uphold the statutory prohibition. Most recently, in February 2016, the High Court of Ireland ruled that third party funding of litigation is illegal despite the Plaintiff/Claimant’s argument that funding provided access to justice, as the claim could not have been prosecuted without third party support.46 On May 23, 2017, the Irish Supreme Court upheld the lower court’s decision, ruling that litigation funding arrangements are illegal under Irish law.47 Notably, however, the Supreme Court took care to suggest

---

45 E.g., Germany and the Netherlands.
that the legislature may wish to revisit the laws on champerty, writing that litigation funding is “a complex, multi-faceted issue, more suited to a full legislative analysis.”

The power to regulate third party funding is not delegated to the EU and instead remains with individual EU Member States. In most European jurisdictions, third party funding is unregulated. In many jurisdictions however, solicitors’ rules of conduct will regulate related aspects (such as the legality of contingency fee arrangements). In England, there is a voluntary Code of Conduct for Litigation Funders which has been in existence since 2011. This covers capital adequacy requirements for funders as well as rights to terminate or control proceedings. The Association of Litigation Funders is the body responsible for overseeing this self-regulation. Currently, eight funders are members of that association which means that the majority of funders operating in the jurisdiction are unregulated. Notwithstanding that, the UK Government stated this year that it does not believe that a case has been made out for moving away from voluntary regulation.

In June 2013, the European Commission has issued a non-binding recommendation to EU Member States in respect of funding collective anti-trust damages cases. To date, these have not been adopted at the national level in EU Member States. In France however, the national bar association recently recommended the adoption of legislation to incorporate the European Commission’s recommendations in the French Civil Code.

Singapore

In March this year, new legislative amendments came into force in Singapore which introduced a legal framework for third party funding in international arbitration. Prior to this, third party funding was prohibited in Singapore under the doctrines of maintenance and champerty. This legislation abolished those common law doctrines, though reiterated that contracts affected by maintenance and champerty continue to be contrary to public policy and illegal. The Act carved out an exception for third party funding if used by eligible parties in prescribed categories of proceedings – currently limited to international arbitration and related proceedings (including related litigation and mediation). It is possible that in due course, the legislation might be extended to permit third party funding of litigation and domestic arbitration.

Funding is regulated in Singapore, as the new law also prescribed criteria and qualifications that funders and funding contracts must meet to fund claims in Singapore, including that the funder must carry on the "principal business" of funding dispute resolution proceedings (in Singapore or

48 Id.
50 Id. The eight member-funders are Augusta Ventures LLP, Burford Capital, Calunius Capital LLP, Harbour Litigation Funding Ltd., Redress Solutions PLC, Therium Capital Management Ltd., Vannin Capital PCC, and Woodsford Litigation Funding Ltd.
elsewhere) and satisfy certain capital adequacy limits. Professional conduct rules for lawyers in Singapore have also been amended to incorporate rules relating to third party funding arrangements which are aimed at avoiding conflicts of interests that might arise as a result of such arrangements.

Hong Kong

Hong Kong has traditionally been hostile to third party funding, largely due to concerns over the doctrines of maintenance and champerty. Third party funding of litigation is unlawful in Hong Kong save where it protects a party’s right of access to justice, the third party has a legitimate interest in the matter, or where there are certain recognised exceptions including insolvency proceedings. As a result, third party funding is most common in insolvency proceedings. The question of whether or not third party funding in arbitration is unlawful is not clear with the most recent decision on this issue leaving the question open. In 2016 however, a sub-committee of Hong Kong’s Law Reform Commission recommended that Hong Kong law be amended to clarify that third party funding in arbitration is in fact permitted, and legislation opening up the jurisdiction to funding is expected to be passed in June 2017.

It is expected that regulation of funding will be imposed given that the Law Reform Commission’s recommendations included establishing a system of safeguards to protect against perceived risks of third party funding. Commonly raised concerns include that third party funding could give rise to undisclosed conflicts of interest, or lead to breaches of confidentiality or to funders exercising excessive control over proceedings.

Australia

Third party funding is permitted in Australia. It is one of the largest and most developed funding markets, alongside the UK, US and Germany, and a significant number of cases are funded. Third party funding is largely unregulated in Australia, though there are federal regulations (subject to criminal sanctions) that require funders to have in place adequate processes to deal with conflicts of interest. Third party funding agreements are also subject to the general supervision of the courts as well as consumer protection regimes. Funding arrangements can be set aside by the courts if found to be in breach of public policy or an abuse of process.

V. IS FUNDING GOOD OR BAD FOR DEFENDANTS?

Third party funding is increasing the number of meritorious claims which need to be settled or resolved through litigation or arbitration. Third party funding does provide access to justice for parties which would otherwise not be able to afford to pursue the claims, as well as being available to parties that could fund claims but choose instead to source external funding. This can also benefit corporations and other business entities that bring the occasional commercial suit.

54 See for example, Taylor & Anor v Hobson & Ors [2016] QSC 226.
A potential disadvantage for defendants is that the existence of third party funding—with the potentially differing interests of the funded party, third party funder and law firm involved—can create conflicting positions between them and make disputes more difficult to settle. For example, the fact a third party funder is taking a significant share of a settlement, in addition to a law firm taking an uplift or success fee, may mean that it is more difficult to persuade a funded party to enter into settlement. At the same time, these difficulties can occasionally create opportunities for defendants (see below).

There are certain advantages afforded to defendants as a result of third party funding. In applicable jurisdictions, the funder will need to ensure that security for costs at a sufficient level is provided so a defendant will be able to proceed to trial knowing it will recover the majority of its costs on success. The need to provide security for costs in “loser pays” jurisdictions also provides the opportunity for a defendant to challenge the way in which the security is provided in order to seek to gain an advantage. These challenges can enable a defendant to understand certain aspects of the funding and ATE arrangements, which they can seek to use to their advantage in negotiations.

The existence of a third party funder can create positive dynamics from the perspective of the defendant. The fact that a third party has formed the view that the merits of the claim are sufficiently promising to invest money in that claim suggests that it is potentially meritorious. Further, funding arrangements will almost certainly involve costs budgeting and/or alternative fee arrangements for the law firm involved with a result that costs will be managed more carefully on the Plaintiff/Claimant’s side than might otherwise be the case leading to lower costs payment as part of a settlement or following an unsuccessful defence.

Many funders charge on a sliding scale basis, i.e. they are entitled to receive more from the proceeds of a claim as it progresses. Therefore, where a defendant is made aware that the opposing party is funded, it makes sense to engage with the opposing party early in the process when the amount the funded party will be paying to the funder will be less than closer to trial – funding can provide an opportunity for more meaningful early interactions with the claimant.

The different interests of the funded party, third party funder and law firm can enable a defendant to use the financing dynamics to its advantage during settlement negotiations. One or more of them will not infrequently need to renegotiate certain aspects of their arrangements in order to accept a settlement. A defendant with an understanding of the dynamics can use them to seek to create conflicting interests in order to negotiate a reduced settlement (more on this in Section VI(C) below). For example, a settlement offer can be structured on the basis of one figure for damages and the balance for costs (or, alternatively, on the basis that costs are to be taxed), creating pressure on the plaintiff and funder to force the law firm to renegotiate its success fee downwards.
VI. CURRENT ISSUES

A. Confidentiality and Privilege

Third party funders will often need access to confidential and case-sensitive information in order to consider a party’s application for funding as well as on an ongoing basis once funding has been agreed upon in the course of proceedings. Rules of privilege vary across jurisdictions as do approaches to the confidentiality of third party funding arrangements. In a world where disputes increasingly involve multiple jurisdictions, each with a different view on what is privileged, maintaining privilege across borders is an increasingly complex matter. Actions in one jurisdiction can affect privilege claims in another jurisdiction. Parties must consider issues of privilege, under the laws of all relevant jurisdictions, particularly before exchanging sensitive communications with third party funders. Failure to do so risks having to later disclose such communications.

United States

It appears that many courts in the United States have come down on the side of broad-sweeping protection of litigation funding documents.55 Some states that statutorily regulate litigation funders explicitly extend attorney-client privilege to litigation financiers.56 Courts in states that do not statutorily regulate litigation funders have likewise found that communications between funders and attorneys representing the recipient of the funds are privileged. In a case from the U.S. District Court for the Eastern District of Pennsylvania, the court quashed subpoenas that had been issued to financial funders that had been asked to evaluate the plaintiff’s case in order to determine the feasibility of funding. The court determined that the requested materials were protected by the work product doctrine and by the attorney-client privilege under the common-interest doctrine (which protects communications between parties with a shared common interest in litigation strategy.)57

---

55 Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd, Case No. 3:15-CV-01735-H (RBB), 2016 WL 7665898, at *5 (S.D. Cal. Sept. 20, 2016) (pointing out that many courts have found that work product protection is applicable to litigation finance documents); United States v. Homeward Residential, Inc., Case No. 4:12-CV-461, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016) (“The Court finds that the litigation funding information is protected by the work product doctrine. The litigation funding documents were between [litigant] and actual or potential litigation funders and were used to possibly aid in future or ongoing litigation.”); United States v. Ocwen Loan Serv., LLC, Case No. 4:12-CV-543, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016) (same); Doe v. Soc’y of Missionaries of Sacred Heart, No. 11 cv 02518, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014) (“[T]he Financing Materials identified by Plaintiff in his privilege log constitute opinion work product. These materials incorporate opinions by Plaintiff’s counsel regarding the strength of Plaintiff’s claims, the existence and merit of certain of Defendants’ defenses, and other observations and impressions regarding issues that have arisen in this litigation.”); Mondis Tech., Ltd. v. LG Elecs., Inc., Civil Action Nos. 2:07 CV 565 TJW CE, 2:08 CV 478 TJW, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011) (“All of the documents were prepared . . . with the intention of coordinating potential investors to aid in future possible litigation. The Court holds that these documents are protected by the work product protection.”).

56 See Ind. Code Ann. § 24-12-8-1 (2016) (“No communication between the consumer claimant’s attorney in the civil proceeding and the [litigation funder] with respect to the [funding] transaction limits, waives, or abrogates the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney client privilege.”); Neb. Rev. Stat. Ann. § 25-3306 (2010) (“No communication between the attorney and the civil litigation funding company as it pertains to the nonrecourse civil litigation funding contract shall limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.”); Vt. Stat. Ann. tit. 8, § 2255 (2016) (“A communication between a consumer’s attorney and the company shall not be discoverable or limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.”).

least two additional courts have recently held that litigation funding documents are protected by the attorney-client privilege and work product doctrine for similar reasons.  

A majority of courts that have addressed the issue have held that a claim of work-product privilege is not waived because the party claiming that privilege has shared information about the case with the third-party funder. Under the work-product doctrine, waiver of work-product privilege “occurs when the protected communications are disclosed in a manner that substantially increases the opportunity for potential adversaries to obtain the information.” Even though the potential funders are certainly third parties for purposes of this inquiry, courts have tended to find that disclosure of this information does not waive work-product protection, especially when the documents are subject to non-disclosure agreements. However, at least one court has found that communications between a potential litigant and a third-party funder are not privileged if they occur before any funding agreement is actually consummated, so any documents disclosed to a third-party funder before a funding agreement is reached may not be protected.

Canada
The courts' approach to privilege of communications with third party funders is not consistent in Canada. In one case (in the context of a class action), the Supreme Court of British Columbia found that privilege potentially attached both to communications between a funded party and its funder as well as to the funding agreement itself. In respect of the funding agreement, privilege might attach if the substance of a funding agreement relates to the funded party's litigation strategy, budget, and other highly sensitive matters. However, in another case (also in the context of a class action), the Ontario Supreme Court held that a funding agreement is not privileged and should not contain privileged information. In light of the divergent authority on this issue, parties should exercise caution when communicating or sharing sensitive privileged materials with funders. Confidential information should be provided to funders only on a need to know basis and through a carefully controlled process.

Europe
The approach to privilege varies quite significantly across Europe. The most marked differences are seen between civil law jurisdictions (such as France and Germany) and common law jurisdictions (such as England and Wales). These differences are largely driven by the fact that in litigation in most civil law jurisdictions, there is no equivalent obligation of disclosure/discovery as found in

---

58 See, e.g., In re Int’l Oil Trading Co., 548 B.R. 825, 835 (Bankr. S.D. Fla. 2016) (concluding that the documents concerning the negotiation of a litigation funding agreement were protected by the attorney-client privilege and the work-product doctrine and citing the “common enterprise approach”); Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. 07C-12-134-JRJ, 2015 WL 1540520 at *4 (Del. Super. Ct. Mar. 31, 2015) (concluding that litigation funding documents were protected by the attorney-client privilege and the work-product doctrine).


61 See Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376 (D. Del. 2010) (combining analysis of attorney-client privilege and work-product doctrine principles and rejecting plaintiff’s argument that the district court erred in finding that no common interest existed between plaintiff and the litigation funder prior to the deal being consummated).


English and US litigation. Therefore, in most civil law jurisdictions, lawyers have professional obligations to keep client information confidential, but there is no concept of client-lawyer privilege. As a result, unless the third party funder is also the solicitor’s client, communications with the funder will not be privileged. However, given the limited disclosure/discovery obligations on parties, there would be limited circumstances where a party could be compelled to disclose communications with funders to an opposing party. In most civil law jurisdictions, there have been no cases of attempts to compel disclosure of communications with third party funders.

Privilege is a fundamental legal right and a powerful legal tool under English law, entitling parties to resist disclosure of confidential material in the context of legal proceedings (arbitration, litigation and most investigations). There are, however, strict rules on when privilege applies. Not all communications with lawyers and other advisers will be protected. Importantly, privilege can be lost by circulating privileged material without adequate safeguards. Voluntary disclosure of privileged communications or documents to third parties, including funders, has the potential to result in a loss of privilege (although that is not necessarily the case if proper protections are taken).

There are two main types of privilege under English law that are relevant. Legal advice privilege (akin to the US concept of attorney-client privilege) protects confidential communications, whether written or oral, between a lawyer and a client for the purpose of giving or receiving legal advice. Legal advice privilege applies in both contentious and non-contentious contexts. Litigation privilege (akin to the US work product doctrine) protects confidential oral or written communications between client or lawyer (on the one hand) and third parties (on the other), or other documents created by or on behalf of the client or lawyer, which come into existence once litigation is in contemplation or has commenced for the dominant purpose of use in the litigation. In addition, common interest privilege may arise where one party shares a privileged document or communication with another party who has a common interest in the subject matter of the document or communication at the time when the document or communication is shared (rather than when it came into existence; joint privilege would instead cover that scenario). The shared document or communication remains privileged against the rest of the world. The dominant view in the industry is the communications with third party funders will be protected by common interest privilege. However, this question has not been tested by the courts so caution should be exercised.

To limit the risk of losing privilege, parties must share privileged documents or communications with funders under express conditions of confidentiality. It is often advisable that parties enter into a confidentiality (or non-disclosure) agreement or a common interest agreement with any prospective funders as well as the funder ultimately engaged. In addition, parties should carefully consider what materials need to be shared. There is a balance to be struck between limiting the risk of disclosure and meeting a funder’s requirement that they receive adequate information (when considering an offer for funding and while proceedings are ongoing).
Australia

Australia’s client privilege laws are found in the uniform Evidence Acts. Those are based on common law privilege rules (though there are some differences) and are therefore similar to privilege under English law. The privileges relevant to these issues are again legal advice privilege and litigation privilege. In brief, privilege attaches to confidential communications between a client and lawyer where the communication is for the dominant purpose of obtaining legal advice or in respect of legal proceedings (anticipated or actual). There have been a number of recent cases which address claims to privilege over privileged materials shared and communications with third party funders. In a recent case, the New South Wales Court of Appeal confirmed that confidential disclosure of an already privileged document to a funder for a purpose connected with the litigation will not amount to a waiver. Care however should always be exercised when sharing privileged documents with funders as there have been instances of courts accepting arguments that communications with a dominant purpose of seeking to obtain funding (rather than a dominant purpose of obtaining legal advice in respect to legal proceedings) do not attract privilege.

Specific complexities arise in the context of class actions. In Australia, it is not uncommon for class action lawyers to undertake a significant amount of investigation and legal analysis of a claim, and communicate with third parties including funders, well before a representative plaintiff is identified and proceedings are commenced. Courts have taken different approaches to the question of whether, in those circumstances, privilege can attach to a) the lawyer’s work product; and b) the lawyer’s communications with third party funders. In a recent case, the court held that client legal privilege could apply to an analysis of a case’s merits produced by the lawyer for the funder, as at that time the lawyer was acting (albeit informally) for the funder. Client legal advice could also attach to the lawyer’s internal documents created for the dominant purpose of obtaining advice from counsel, as it was there acting its own “client”. But privilege could not attach to correspondence with the funder concerning proposed funding arrangements, as those were created not for the dominant purpose of legal advice, but instead were “commercial negotiations between … two arm’s length parties”. This case turned on the facts, so it is not clear that in all circumstances, such materials produced prior to the existence of a “client” would be privileged. Again, care should be exercised.

Care should also be exercised as to what documents are shared with the funder. Solicitors acting for parties in legal proceedings are under an implied undertaking not to use or allow the use of documents discovered in proceedings for any collateral or ulterior purpose (whether the solicitor’s, client’s or anyone else’s). Breach of that implied undertaking will amount to contempt of court by the solicitor. In one case, the court considered a funded party’s ability to share with its funder documents discovered by the opposing party in the proceedings. The court held that a general licence to

64 Evidence Act 1995 (Cth) s 118 (Austl.).
65 Evidence Act 1995 (Cth) s 119 (Austl.).
67 Id. (Lemming, dissenting) See also, Hastie Grp. Ltd (In liq) v Moore & ors [2016] NSWSC 1315 (Austl.).
68 IOOF Holdings Ltd v Maurice Blackburn Pty Ltd [2016] VSC 311 (Austl.).
disclose documents on the broad basis that the funder has a legitimate interest in the proceedings is not a sufficient basis for such disclosure.\textsuperscript{69}

\textit{Singapore and Hong Kong}

Both Singapore and Hong Kong recognise legal professional privilege, and protections are available under both common law and statute. Being founded on the common law, their rules of privilege are similar to those found in England. It is possible that Singapore and Hong Kong courts will take a similar approach to the English courts when dealing with questions of communications with and documents disclosed to funders. However, given the infancy of their third party funding regimes, it is an open question. Issues of privilege may be addressed by subsidiary legislation and regulations in due course.

\textbf{B. Disclosure}

A related issue is disclosure of third party funding – including the existence of funding arrangements as well as the specific terms of the funding agreement. Again, the approach to this issue varies across jurisdictions.

\textit{United States}

Vermont is the only state that specifically provides in its litigation funding statute that communications between a consumer’s attorney and the company are not discoverable.\textsuperscript{70} Most courts that have been faced with the question of whether the details of a funding arrangement are discoverable have decided that they are not.\textsuperscript{71} The United States Bankruptcy Court for the Southern District of Florida applied the common interest and agency exceptions to the attorney-client privilege to protect communications made between a claimant and litigation funder from discovery.\textsuperscript{72} While the court protected these communications from disclosure, it noted this protection did not extend to the request for production of the litigation funding agreement as the funding agreement was classified as a contract rather than a communication. The Court applied the work product doctrine to protect certain portions of the funding agreement, while determining that other sections were discoverable.\textsuperscript{73}

Courts analyzing the discoverability of litigation funding documents are often mindful of the fact that such documents have little relevance outside of the fact that they show the funder’s assessment of the strengths and weaknesses of the case. Courts have held that a funder's assessment of a plaintiff’s likely recovery should not be used to influence the factfinder's resolution of the claim's merits any more than an adversary should be able to call its adversary's attorneys to testify about the legal

\textsuperscript{69} QPSX Ltd. v Ericsson Australia Ltd (No 5) [2007] FCA 244 (Austl.).
\textsuperscript{71} VHT, Inc. v. Zillow Grp., Inc., C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (denying a motion to compel the disclosure of any litigation funding agreement on relevance grounds); contra Cobra Int’l, Inc. v. BCNY Int’l, Inc., No. 05-61225-CIV, 2013 WL 11311345, at *3 (S.D. Fla. Nov. 4, 2013) (holding that a litigation funding agreement was relevant and not protected from discovery by any privilege).
\textsuperscript{73} Id.
weaknesses of their client's case. 74 Sometimes, state courts have found that litigation funding documents are not even relevant to the case. In one New York case, the defendants moved to compel production of materials that related to plaintiff's litigation funding. The court denied the defendants' motion, stating that the documents were not relevant to any party's claim or defense. 75 Thus, the court disposed of the issue on relevance grounds without even reaching the question of whether or not the documents were protected by privilege or the work-product doctrine.

While courts have found litigation funding documents may be irrelevant to determining the merits of a case, it is worth questioning whether a party should be required to disclose the existence of a litigation funding agreement at the outset of a case, in much the same way that defendants are required to disclose insurance coverage. 76 Federal Rule of Civil Procedure 26(b)(1) provides that the scope of discovery shall be "proportional to the needs of the case [and considers] …the parties' resources.…and whether the burden or expense of the proposed discovery outweighs its likely benefit." Federal courts consider the scope of permissible discovery under Fed. R. Civ. P. 26 in all cases and often must also consider parties' financial resources in connection with the scope (and cost) of completing discovery. Because defendants are required, among other disclosures, to set forth what insurance coverage may finance the party's defense or indemnity in a case, it may likewise be reasonable to require litigants who are prosecuting or defending a claim using a third-party's resources to disclose the same. Because a litigation financier's business purpose is to raise funds to prosecute or defend a claim or defense in litigation and make a profit, the financing entity's role and the existence of a litigation funding agreement should potentially be considered relevant to a court's consideration of the proportionality of discovery because such parties likely have more financial resources to contribute to the litigation process than they would if not for the financier. This is particularly germane to class action litigation wherein individual litigants' interests may be considerably more modest than plaintiffs in non-class action matters. While the Federal Rules do not specifically require disclosure of litigation funding agreements at this time, several federal courts require disclosure of interested parties to a litigation that may have a financial, or other, interest in the claim. 77


74 See, e.g., Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 741 (N.D. Ill. 2014) (explaining that a litigant should not be able to cross-examine the other side’s attorney about that party’s legal vulnerabilities, as it would be irrelevant and highly prejudicial).
Procedure 26(a)(1)(A), adding litigation funding agreements to the list of required “initial disclosures” that parties must exchange at the outset of any federal litigation. Obviously we can expect renewed opposition to this proposal from litigation funders and other groups, and whether the proposal will lead to any changes remains to be seen.

Canada
There are conflicting decisions among the superior courts of different Canadian provinces regarding the confidentiality or privilege attaching to third party funding arrangements. In Ontario, the terms of funding arrangements have been held to be not privileged – a motion to approve third party funding must be made on notice to the defendant and the motion should be open to the public.78 By contrast, in Nova Scotia and Alberta, Saskatchewan, motions for third party funding have been made ex parte, subject to a sealing order and without published reasons.79

There is limited judicial guidance on privilege and confidentiality concerns arising from third party funding arrangements. In one judgment, the court held that defendants are normally entitled to participate in motions for third party funding because their interests are affected;80 no privilege attaches to the terms of a third party funding arrangement,81 and the open court principle requires the motion for third party funding to be open to the public.82

Europe
Again, there is a division between the approach to disclosure taken in civil and common law European jurisdictions. In most jurisdictions in Europe, there is no obligation to disclose third party funding agreements or even the fact that funding is in place. However, in jurisdictions where a funded party may claim the cost of funding, disclosure of the funding agreement may be required. In most European jurisdictions disclosure is not a material risk.

There is no general obligation on parties to disclose third party funding. In limited circumstances, a court might order disclosure – a recent example was where the court ordered the funded party to disclose the identity its funder, in the context of the non-funded party’s application for security for costs against those third party funders.83 The generally accepted position is that courts are unlikely to order disclosure of funding arrangements without a particular reason which justifies their disclosure.

Australia
There is no general obligation on parties to disclose funding arrangements, save in respect of Federal class actions where disclosure is mandated. Third party funding agreements, and the question of

78 Fehr, 2012 CanLII 2715 (Can. O.N. S.C.), paras 103, 112, 139, 142, and 154, 158.
81 Id. para 141.
82 Id. para 158.
privilege attaching to them, have however been considered in numerous cases. There is no presumption that funding agreements are privileged. Documents (such as funding agreements and retainer letters) created for the purpose of establishing a funding relationship are generally not privileged unless they expressly or impliedly disclose legal advice. The provisions of the Australian uniform Evidence Acts (discussed above) must be satisfied. Whether it does so would depend upon the particular terms of the agreement and on the facts of the particular case. A recent Australian Federal Court case considered a party’s claim to redact a funding agreement on grounds of privilege. The court held that redaction could not be justified on legal privilege grounds as the funding agreement was not created for the dominant purpose of giving or receiving legal advice. However, certain parts of the funding agreement could be redacted on the basis of appropriate claims for confidentiality — including the funder’s fee as well as clauses dealing with settlement mechanisms and termination. In doing so, the court sought to “strike a balance between the rights and interests of the parties as they are, or may be, affected by the involvement of … the funder.”

**Singapore and Hong Kong**

The Singapore (the Legal Profession (Professional Conduct) Rules 2015 require legal practitioners to disclose to the court or arbitral tribunal and to every other party to proceedings: (i) the existence of any third-party funding contract related to the costs of such proceedings; and (ii) the identity and address of any funder involved, at the date of commencement of proceedings, or as soon as practicable after the third-party funding contract is entered into.

Hong Kong is expected to introduce a Code of Conduct for third party funding, to cover (among other things) issues of disclosure of funding arrangements.

**C. Control of Proceedings**

The permissible level of control (if any) third party funders may exert over proceedings will vary from jurisdiction to jurisdiction. Concerns can be raised over the influence third party funders may have over proceedings. Third party funders will in most instances have a direct financial interest in the outcome of a dispute, and so the perceived risk is that the funder might seek to interfere with the conduct of the proceedings. It is easy to see where tensions could arise—for example, if it is in a funder’s interest, it might seek to exert pressure over the funded party to agree to settlement terms even where the party might instead wish to proceed with the claim. Another related area of tension is that, if the terms of the funding agreement allow, a funder might withdraw funding upon limited notice, leaving the party unable to continue the claim. Many of these issues can be avoided by a properly drafted funding agreement which, for example, ensures that the funder does not have excessive control and may not unreasonably withdraw funding.

**United States**

---

84 Coffs Harbour City Council v Australian and New Zealand Banking Grp. Ltd. [2016] FCA 306 (Austl.).
The general rule in the United States seems to be that the litigant and his attorneys—rather than the litigation funder—must control the litigation. For example, Model Rule of Professional Conduct 5.4(c) provides that, “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” As the comments to Model Rule 5.4 make clear, this means that even if a third party (i.e., a litigation funder) is paying a lawyer’s fees, the lawyer’s obligation to render professional judgment in the client’s best interest remains unchanged. See id. cmt. 1, 2.

Some jurisdictions may allow the lawyer to comply with his ethical requirements by advising the client of the potential that the funding company may seek to exert control over the proceedings, and ensuring that, even if the client assents to that input or control, the lawyer maintains her independent judgment and loyalty to the client. E.g., New York City Bar Formal Op. 2011-2, Third Party Litigation Financing (June 1, 2011), http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2011-2-third-party-litigation-financing (last visited June 6, 2017) (“While a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation, including the decisions of whether to settle or the amount to accept in any settlement.”) (emphasis added). This is consistent with Comment 2 to Model Rule 5.4, and Model Rule 1.8(f), which provide that a “lawyer may accept compensation from a third party as long as there is no interference with the lawyer’s independent professional judgment and the client gives informed consent.”

Consistent with the ethics rules, nearly every state that has a statute regulating litigation financing contracts requires that the financing entity agree to not participate in decisions about how to conduct the case or whether to settle. States that allow litigation funding often look at whether or not the financier is controlling the litigation when attempting to determine whether or not the agreement should be enforced. Courts in South Carolina, for example, currently look to several factors in determining whether an agreement should be voided on public policy grounds (as champerty has been abolished as a defense there), including whether a funder is acting as an “officious intermeddler”—that is when he or she offers unwanted advice or otherwise attempts to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit.

A North Carolina court held that a litigation funding company’s contract to advance $3,000 to a personal injury plaintiff was not void as champertous. The agreement assigned the proceeds of the plaintiff’s personal injury claim to the company rather than assigning the claim itself. Thus, the court explained, the agreement was not per se champertous because the assignment did not give the

company any control over the underlying litigation. In a recent case, a North Carolina court again used the Odell analysis in determining that an agreement was champertous. The court distinguished Odell from the case at hand, finding that the funder in the DesignLine case gave input and approval of strategic decisions about the case.

In 2016, the Delaware Superior Court rejected claims of champerty with respect to a third-party litigation funding agreement entered into by Charge Injection Technologies Inc. to fund its suit against DuPont. CIT had entered into a funding agreement, which DuPont challenged as champertous. The court dismissed the champerty argument, reasoning that the agreement at issue expressly provided that the funder lacked “any rights as to the direction, control, settlement, or other conduct” of the litigation. This ruling undoubtedly suggests that litigation funding agreements may be subject to champerty challenges where there is evidence of actual control by the funder.

More recently, there is a trend of litigation funding companies investing not just in individual cases, but compiling portfolios of cases with one or more law firms. A funder’s investment in a portfolio of cases housed at a single law firm brings up questions about the firm or attorney’s ability to perform their due diligence on behalf of the client whose case is being funded. According to one of the prominent litigation funding firms, the funder assesses the perceived “quality” of the lawyers pursuing the claim, and their funding agreements indicate that if counsel is replaced, the client may choose from a certain set of “top law firms,” pre-approved by the funder. A second litigation funding firm says that when they receive new cases without “sufficient trial power” they determine who the “right” lawyer is for a particular case. Also, a litigation funding firm who has successfully recovered profits from cases defended by certain firms may be more likely to provide that firm additional funding for new cases, which raises the question of whether a law firm will be more loyal to the funding firm, rather than their client because they may continue to get more business from the funder. This concern over loyalty to the actual client is not much different from that created when a law firm receives a significant volume of business from a single insurance carrier. Another potential risk of portfolio investments by litigation funding firms are potential disagreements between the funder and the law firm about litigation strategy, again calling into question the firm’s ethical duty to provide independent judgment on behalf of the client.

Canada

89 Id.
91 Id. at 4.
92 Julie Triedman, Arms Race; Deep-pocketed litigation funders are throwing investor dollars into lawsuits. Is that really such a good thing?, 38 Am. Law 74, (January 11, 2016) (discussing one litigation funder’s investments in portfolios totaling 50% of its investments in 2015. See also Julie Triedman, Burford Boasts Big Year, Invenf $100M in Law Firm Portfolio, Am Law Daily (March 23, 2016) (discussing Burford Capital Ltd’s investment into a portfolio with a large global law firm and the funder’s global growth in litigation funding efforts).
93 Id.
94 Id.
95 Roy Strom, Seed Capital; A newly launched law firm strikes a litigation funding dealin-and doesn’t keep it secret, 39 Am. Law. 9 (June 1, 2017).
As with most questions relating to third party funding, the court’s approach to the permissible level of control exercisable by a third party funder of commercial disputes is likely to be influenced by the courts’ approach to the issue in the context of class actions. To be court-approved, a third party funding arrangement in a class action must not diminish the representative plaintiff’s rights to instruct and control the litigation. 96 Third party funding agreements should therefore acknowledge that the plaintiff/claimant instructs the lawyers and that the lawyer’s duties are to the plaintiff/claimant. Examples of improper arrangements include allowing a funder to attend settlement discussions or to unilaterally withdraw from the litigation on short notice.

Europe
Yet again, there is a clear divide between common law and civil law jurisdictions. In civil law jurisdictions, the restrictions on third party funders’ exercising undue control over proceedings are largely driven by professional conduct obligations on lawyers which require them to exercise independence when acting on behalf of their client. Civil law jurisdictions do not contain equivalent rules to the common law doctrines of maintenance and champerty. Maintenance refers to an unconnected third party assisting to maintain litigation (for example, by providing financial assistance). Champerty is a form of maintenance, whereby a third party pays some or all of the litigation costs in return for a share of the proceeds. Generally speaking, the only constraint around control arises from the lawyer’s professional conduct obligations and not any common law or equivalent doctrines for many European jurisdictions.

Although the doctrines of maintenance and champerty are now significantly diluted in England, third party funders are not permitted to exercise undue control over proceedings. What constitutes undue control will be dependent on the funder’s powers as set out in the funding agreement and on the facts. A funding agreement that affords the funder too much power to intervene, the right to withdraw unreasonably or indeed unreasonably high commissions (which must always be considered on a case by case basis), may prove champertous and/or in breach of public policy. In a recent case, the Court of Appeal confirmed that rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals not of itself be champertous, and in fact was to be expected. 97 Furthermore, an ongoing review by independent counsel was also viewed as prudent, perhaps essential, to reduce the funder’s risk of liability for indemnity costs. An earlier case also upheld the legality of a funding agreement which gave a third party funder the opportunity to counsel the Plaintiff/Claimant and its lawyers on settlement, advise and consult with damages experts, and to itself provide forensic accounting services. 98 This case might be considered exceptional on its facts and viewed at best as a high water mark.

Singapore and Hong Kong

96 See E. Eddy Bayens and others v Kinross Gold Corp. and others, 2013 ONSC 4974.
Both Singapore and Hong Kong recognise concepts of maintenance and champerty (though in Singapore, the common law torts have been abolished, and contracts affected by maintenance and champerty remain contrary to public policy and illegal). Given the infancy of their third party funding regimes, it is an open question as to how Singapore and Hong Kong courts will approach the question of funders’ control over proceedings. This is an issue that might also be addressed by subsidiary legislation and regulations in due course.

Australia
Australia allows third party funders significantly more control over proceedings. In one case, the High Court of Australia allowed funders to have an active role in the case, including to provide all instructions to the solicitors, settle the claim for no less than 75 percent of the amount claimed, and receive up to 33.3 percent of any amount that the claimants recovered. Such conditions were held to be neither against public policy nor an abuse of the court’s process. 99

D. Recovery of Costs
There are two aspects here – recovery by a successful party of its costs against a third party who funded the losing party and recovery by a successful party of its own costs of obtaining funding. Both are emerging issues.

United States
Unlike England, the United States is not a “loser pays” jurisdiction. Instead, the American rule is generally followed—each party must bear its own costs and pay its own attorney’s fees. Thus, litigants in American jurisdictions seldom end up on the hook for the other side’s attorney’s fees. Litigation funders should be aware, however, that an increasing number of statutory and contract claims contain fee-shifting provisions. The Copyright Act, for example, provides for the recovery of attorney fees by the prevailing party, as do many other statutes, such as the FLSA, ERISA, ADEA, FDCPA, and FCRA. Furthermore, breach of contract claims in many states allow for the recovery of attorneys’ fees by the prevailing party. No American case has yet addressed the mechanics of cost recovery when a losing party is funded by a litigation funder, nor the recovery by the successful party of the costs of obtaining funding.

Here again, attorneys’ ethical rules come into play. These rules prohibit a lawyer or law firm from sharing fees with a non-lawyer, except in very limited circumstances. 100 This prohibition is exemplified by Model Rule of Professional Conduct 5.4(a). A litigation funding agreement can comply with Model Rule 5.4(a) through careful drafting. The simple expedient of providing that the funder is repaid by the client/customer, from the proceeds of litigation (such as damages), and not from any share of the attorneys’ fees, should take the agreement outside of Rule 5.4(a)’s limited scope. By contrast, an

99 Campbell Cash & Carry Pty Ltd. V. Fostif [2006] HCA 41 (Austl.).
100 None of the limited exceptions are likely to apply to litigation funding. See Model Rule of Professional Conduct 5.4(a)(1)–(4).

Europe
In many civil law jurisdictions, courts cannot impose costs orders against a third party funder of an unsuccessful litigant. It is likely that this attitude towards funding is influenced by the fact that in many jurisdictions, recoverable legal costs are limited.

This is quite different to the English approach. In English litigation, the Court of Appeal recently confirmed that a third party funder of an unsuccessful litigant may be liable to contribute toward the successful litigant’s costs, even on an indemnity basis, though currently that contribution is limited to the amount of funding provided. In practice, many funders will insist that a party obtain After The Event Insurance to cover adverse costs risk. In the context of English seated arbitration, the outcome is not quite as simple – the tribunal may not have jurisdiction to make a costs award against a funder, given that it is unlikely to be a party to the arbitration agreement. Whether the tribunal has jurisdiction will depend on the procedural law and rules governing the particular arbitration. Either way, if an unsuccessful party is unable to meet an adverse costs award/order, the successful party may find itself unable to recover the full amount from the funder (or indeed any of the sum owed). A party whose opponent is funded should consider whether to make an early application for security for its costs.

The question of recovery of the costs of third party funding also differs in arbitration and in litigation. In litigation, notwithstanding that English courts apply the “loser pays” principle, costs of funding (and other success fees) are not recoverable from the losing party. In arbitration however, they might be recoverable. The English High Court recently upheld a decision of an arbitrator who awarded the successful party not only its legal costs of the arbitration on an indemnity basis, but also its costs of obtaining third party funding (i.e., 300 percent of the amount advanced or 35 percent of the damages awarded, whichever is the higher) – this amounted to an additional costs award of £1.9 million. This is the first time an English Court has considered a tribunal’s power to award such costs. It is not yet clear whether this decision represents the orthodoxy and the (new) rule or is simply an unusual exception and exercise of discretion due to the extreme facts of the case, where the arbitrator had

101 When costs are assessed on the indemnity basis, any doubt as to the reasonableness of costs incurred is resolved in favor of the receiving party. This is the opposite of the approach from when costs are assessed on the standard basis.


103 The definition of “costs” in the Civil Procedure Rules is narrower than section 59 of the Arbitration Act which refers to “legal or other costs of the parties” (emphasis added). In similar vein, since April 2013, after-the-event insurance premiums and the success fee on a conditional fee agreement have ceased to be recoverable from the other side in litigation before the English courts.

been highly critical of the paying party’s conduct. Either way it is increasingly likely that parties to
London-seated arbitrations will now look to recover assorted other costs.

**Australia**

Australian courts may make a non-party costs orders against a third party funder of an unsuccessful
litigant, requiring it to contribute toward the successful litigant’s costs.105

**Singapore and Hong Kong**

Given the infancy of their third party funding regimes, it is an open question as to how Singapore and
Hong Kong courts will approach the question of funders’ control over proceedings. This is an issue
that might also be addressed by subsidiary legislation and regulations in due course.

**E. Security for Costs**

**United States**

Security for costs is rarely an issue in the United States, as most American statutes lack fee-shifting
provisions. However, when a case does involve fee-shifting, courts may sometimes require litigants
to post bonds. Bonds in excess of $10,000 have been imposed in intellectual property cases.106 As
of yet, no American court has addressed whether a court can require a litigation funder to post bond.
However, it seems unlikely that such an order would be possible unless the funder were a party in the
litigation.

The issue of security for costs may also arise occasionally in the context of class action lawsuits—in
particular whether or not funding agreements are relevant to class certification issues, such as
adequacy of class counsel. In one case, a court compelled a class action plaintiff to produce a
litigation funding agreement because it was relevant to class counsel’s adequacy.107 It is important to
note, however, that the plaintiff conceded relevance and failed to assert that the agreement was
privileged. In a class action where a plaintiff does not concede relevance and fail to assert privilege, it
appears less likely that a court will compel details of a litigation funding document.108

**Canada**

The Ontario courts in Canada have grappled with the ability of a third party funder to provide sufficient
financing.109 The funding agreement in that case indemnified the plaintiff against exposure to adverse
costs in return for a 7 percent share of the proceeds of any recovery subject to certain maximum

105 Gore v Justice Corp. Pty Ltd [2002] FCA 354 (Austl); Ryan Carter and Esplanade Holdings Pty Ltd. v. Caason Inv. Pty Ltd &

106 See Selletti v. Carey, 173 F.3d 104, 111 (2d Cir. 1999) (holding that the requirement of a security bond in the amount of
$50,000 in a Copyright Act suit was “well within the district court’s discretion”); Beverly Hills Design Studio (N.Y.) Inc. v. Morris,
126 F.R.D. 33, 39 (S.D.N.Y. 1989) (requiring security for costs and attorneys’ fees in the amount of $20,000 in a copyright
and trademark infringement action); see also Anderson v. Steers, Sullivan, McNamar & Rogers, 998 F.2d 495, 496 (7th Cir.
1993) (affirming a $10,000 bond requirement in an action for trademark infringement and unfair competition).


amounts. The funder had no assets in Canada. As a condition of approving the funding arrangement, the court required that the funder post security for the defendants’ legal costs.

Europe

With a few exceptions such as England, security for costs orders are generally rare in Europe. Furthermore, generally such orders cannot be made against a funder unless it is itself a party to the proceedings. A number of class actions in Europe have however been dismissed where a litigation funder has insufficient resources to fund the action. Challenging a funder’s financial standing in this way is not necessarily easy. Firstly, in many jurisdictions, parties are not obliged to disclose funding arrangements. Secondly, the party challenging the funder’s financial standing is often required to establish that the fund is unable to finance the costs – it may not be enough simply to refer to the fund’s financial standing, the defendants may have to put forward more facts and circumstances to argue that the fund would not be able to pay the costs.

English courts may order a claimant party (this only applies to defendants where they are pursuing a counterclaim) to provide security for costs of the proceedings in certain circumstances, as prescribed by the Civil Procedure Rules. Security cannot be ordered against an individual claimant unless they live outside of England and only against a corporate claimant where the defendant can demonstrate the claimant is not able to pay the defendant’s costs if the case is lost.

English courts may also make an order against someone other than the claimant, such as a funder, who has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property which the claimant may recover in the proceedings. At the heart of the court’s decision to make an order for security is whether there is reason to believe that it will be unable to pay the defendant’s costs if ordered to do so. The fact that a party is funded is not determinative of that question, though it may be a factor considered by the court. English courts will also consider the availability of any After The Event Insurance policy, and available guarantees or indemnities in respect of costs. Courts have accepted ATE insurance as sufficient to dismiss an application for security for costs, but this will depend on the circumstances including the identity of the insurer and the terms of the policy. Where the terms might allow the insurer to avoid paying out under the policy, then it may not prove sufficient.

Australia

Australian courts may order that a party must provide security for costs. That a party is funded will be a relevant factor to a security for costs application. The court will also consider any indemnity given

---

110 Id. para 6.
111 Id. para 3.
112 Id.
115 Geophysical Serv. Centre v Dowell Schlumberger (ME) Inc [2013] EWHC 147 (TCC); Premier Motorauctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor [2016] EWHC 2610 (Ch).
by the funder to meet adverse costs as well as its ability to do so. It will also consider the availability of any After The Event Insurance policy, and available guarantees or indemnities in respect of costs. In practice, if a matter is funded, an order for security for costs will often be ordered.

**Singapore and Hong Kong**
The new Singapore regulations impose capital adequacy obligations on third party funders, including that a funder have access to funds immediately within its control, including within a parent corporation or the Third-Party Funder's subsidiary, sufficient to fund the dispute resolution proceedings in Singapore. Given the infancy of the Singapore and Hong Kong third party funding regimes, it is not yet clear how Singapore and Hong Kong courts will approach the question of security for costs.

**VII. CONCLUSION**

Litigation funding is a global growth industry that will likely only expand in the coming years. Indeed, litigation funding offers benefits both to litigants and to society in general. Litigation funding can offer plaintiffs increased access to justice, allowing litigants with meritorious claims to avoid having to settle prematurely because they have exhausted their funds. Litigation funding equalizes the bargaining power between defendants that have extensive experience with the legal system and inexperienced plaintiffs who are unable to pay litigation costs. Litigation funding allows parties to hedge risks that they are otherwise ill-suited to bear and offers attractive assets to investors. As demand from investors grows, it is clear that litigation funding will continue to expand, which may benefit litigants, businesses, and law firms. At the moment, however, litigation funding is inconsistently regulated in many jurisdictions and the contours of its legality are often still murky. It is important for litigation funders and attorneys handling litigation funding matters to be mindful of the laws of the jurisdictions in which they operate and proceed with knowledge of the risks they face.
FRIDAY, JULY 27, 2017
9:00 A.M. - 9:30 A.M.
PLENARY PROGRAM

Trial Masters – Trial Technology in Action
LePetit Palais

Speakers:
Bob Christie
Tom Oakes
FRIDAY, JULY 27, 2017
10:45 A.M. - 12:15 A.M.
PLENARY PROGRAM

Keynote Speaker – Nontombi Tutu
LePetit Palais

Speaker:
Nontombi Tutu
SPEAKER BIOGRAPHIES
Jorge Angell  
L.C. Rodrigo Abogados

He is the senior partner of L.C. RODRIGO ABOGADOS. Born on August 15, 1946. Graduated in Law in 1971. Member of the Madrid (Spain) and Lima (Perú) Law Societies. He practices in Madrid since January 1974.

Jorge Angell is actively involved in corporate law matters, particularly in companies' acquisitions, insurance and reinsurance, litigation, arbitration and mediation related to commercial matters. He is the legal advisor and the secretary of the Board of Directors of several companies.

He advises in all areas of insurance and reinsurance, from regulatory aspects related to the operation of insurance companies and brokers under the EU establishment and freedom to provide services regimes, to the liquidation of insurance companies, coverage advice, policy drafting and claims handling, namely in Directors & Officers and third party liability insurance.

He has frequently acted as expert in Spanish law before foreign courts, especially English and US courts, and as arbitrator and party counsel in domestic and international arbitrations. He is listed in the arbitrators’ roster of the Arbitration Court of the Chamber of Commerce and Industry of Madrid and of the Madrid Law Society. Member of the ICC Spanish National Committee and the London Court of International Arbitration.

He is a frequent lecturer and moderator in conferences and seminars. Author of several articles on corporate, contract, insurance, civil liability and civil/commercial litigation matters.

Jorge Angell is member of the following LPD Committees of the International Bar Association: Business Organizations, Insurance, and Litigation (Co-chair for the period 2006/2007). He is also a member of the Federation of Defense and Corporate Counsel (FDCC) in which he serves as vice-president of the International Activities Committee, former Chair of the International Practice and Law Section and former vice-president of the Reinsurance, Excess and Surplus Lines Section; of SEAIDA (the Spanish section of the Association Internationale de Droit de Assurances - AIDA -), the Reinsurance (vice-president) and Credit Insurance Working Groups of AIDA Europe and the Spanish Arbitration Club. He is also a member of the Professional Liability Underwriting Society (PLUS).

Caroline J. Berdzik
Goldberg Segalla

Caroline J. Berdzik, Chair of the firm’s Health Care Practice Group and Co-Chair of its Employment and Labor Practice Group, devotes her practice to helping corporate clients navigate the panoply of employment law issues, from proactive counseling through dispute resolution and trial. She represents companies in diverse industries such as health care, transportation, retail, construction, insurance, and finance, as well as nonprofit organizations and educational and religious institutions.

In every matter, Caroline draws upon her previous experience as an in-house counsel to bring a deep understanding of and sensitivity to the daily challenges and cost considerations companies face. Accordingly, in her role as advisor and advocate, she functions as a virtual extension of clients’ in-house legal and human resources teams, working in integrated partnership with them to protect the company’s best interests and bottom line.

She regularly provides employers with strategic business advice on critical human resources issues that arise out of the employment relationship, from hiring to termination, with an emphasis on preventing future disputes and minimizing risk. Toward this end, she frequently provides practical in-house training on a multitude of human resources topics for employers and insurance companies. When needed, Caroline brings a proven track record to the defense of self-insured and insured companies in discrimination, harassment, retaliation, family medical leave, whistleblower, and wage/hour actions in federal and state courts, alternative dispute resolution forums, and state and federal administrative agencies. She also routinely advises businesses in the critical areas of wage and hour compliance and in drafting and enforcing restrictive covenants.

Caroline has significant experience handling Title III ADA accessibility compliance concerns and litigation for financial institutions, shopping centers, transportation companies, medical providers, retailers, and other places of public accommodation.

Her intimate knowledge of the long-term and post-acute care industry is frequently called upon by clients and industry insiders. Caroline often defends skilled nursing facilities and related entities in professional liability claims and provides risk management solutions to help avoid or mitigate future claims. She is a prolific speaker and writer in the areas of employment law, social media, risk management, and wage and hour issues in the transportation, health care, retail, and other industries.

Prior to joining Goldberg Segalla, Caroline was the assistant general counsel for New Jersey’s largest privately held long-term-care company. Among her many duties, she successfully managed a diverse litigation portfolio in the areas of professional and general liability, employment, and commercial law. In this role, she supervised legal counsel nationwide, established risk management strategies, and reduced legal spend.

Caroline has earned numerous honors that recognize the value of her legal services and her dedication to the community. These include being named one of the “Best 50 Women in Business” by NJBIZ and regular inclusion among the top legal practitioners in New Jersey and the New York Metro area.
Stephen J. Brake
Nutter McClennen & Fish

Stephen J. Brake is a partner in Nutter McClennen & Fish’s Litigation Department and served on the firm’s Executive Committee for 9 years. He practices in a broad range of litigation, including toxic tort, intellectual property, commercial real estate, land use and zoning, and construction litigation.

Environmental, toxic tort and catastrophic loss

Steve has represented clients in a broad trial practice for twenty-five years. He has tried over twenty toxic tort and environmental cases to verdicts. He serves as national counsel for a technical paper company in asbestos-related litigation and in that capacity has successfully tried a series of cases to juries, obtaining defense verdicts in a number of jurisdictions, including California, Michigan, Kansas, Pennsylvania and Massachusetts.

Steve has also tried a substantial number of cases involving claims of catastrophic loss, damage or injury. Recently Steve obtained a defense verdict for a Massachusetts based company in a four week trial in the Federal District Court in Boston in a case arising from a hotel fire at a luxury hotel in Rome, Italy. The multi-million dollar claim arose from extensive fire-related damage and multiple deaths. Similarly, he obtained a jury defense verdict for a large printing company on a multi-million dollar claim arising from allegations of widespread hazardous exposure to lead dust.

Steve served as Special Assistant Attorney General representing the Commonwealth of Massachusetts in connection with all claims arising from the alleged “sick building” status of the “Ruggles Center,” the former home of the Massachusetts Registry of Motor Vehicles. These matters involved extensive personal injury and property damage claims arising from alleged illnesses at the building in question, along with a thirty million dollar claim against the Commonwealth for breach of its lease agreements. After several years of litigation, the matters were successfully resolved with a multi-million dollar payment to the Commonwealth.

He has argued a number of the leading environmental cases in both the First Circuit Court of Appeals and the Massachusetts Supreme Judicial Court, including Trustees of Tufts University v. Commercial Union Ins. Co., which established a multi-year defense cost obligation on the part of insurers as to environmental claims under Massachusetts law.

Steve obtained a multi-million dollar award in favor of a group of industrial companies in a suit against an environmental consultant for breach of that consultant’s obligations to conduct an environmental cleanup.

In his extensive experience, Steve has developed a wide-ranging knowledge of the legal, medical and scientific issues that occur in toxic tort, environmental and fire cases.

Construction matters

Steve has handled extensive construction-related litigation. Recent matters include:

• Claims for a Boston-area university and other education institutions involving roof failures arising from construction negligence
• Claims arising from substantial cost overruns incurred in connection with rebuilding a large paper manufacturing facility
• Claims arising from the failure of cutting-edge power plants to provide required levels of electricity output
• Valuation claims for electric power facilities
• Representation of a major condominium project in Massachusetts in successfully pursuing claims arising from multi-million dollar construction failures

Steve has represented parties in a substantial number of lengthy construction arbitrations, obtaining several substantial awards or defeating the claims asserted against his clients.

Land use and zoning matters

Steve has represented parties in a variety of disputes relating to the commercial development of land, trying numerous such cases to judgment in Massachusetts Superior and Land Courts, including:
• Representing the developer attempting to refurbish a large mall structure near Boston
• Representing several major retailers in defeating zoning challenges to various permitted expansions
• Representing a developer of retail facilities in adverse possession involving centuries old buildings
• Defeating a challenge to the permits for a large residential development in the City of Boston

Commercial Litigation Matters

Steve represents clients in complex commercial litigation matters in state and federal courts and has obtained a number of substantial awards in such cases.

Steve is a member of the Litigation and Environmental Sections of the Boston Bar Association and a fellow of the Massachusetts Bar Foundation. He frequently lectures for Massachusetts Continuing Legal Education, Inc. He is also active in various civic and charitable activities.

During law school, Steve was executive editor of the Boston College Law Review.
R. Matthew Cairns
Gallagher, Callahan & Gartrell

Matt Cairns represents the interests of individuals, insurers, manufacturers, transportation and other companies in diverse commercial, complex and traditional litigation matters in all state and federal courts and state agencies. He also serves as general counsel to several closely held businesses in New Hampshire. He is also experienced in general corporate and municipal representation, and risk management training.

Since 1996, Matt has been an active member, award recipient, and leader of DRI — The Voice of the Defense Bar, the largest international organization of attorneys committed to defending the interests of businesses and individuals in civil litigation. In October 2011, Matt completed a one-year term as the 2011 president of DRI.

Matt is selected for inclusion in The Best Lawyers in America® in the fields of Labor & Employment Litigation, Municipal Litigation, Personal Injury Litigation and Construction Litigation, for which Best Lawyers® further recognized him as "Lawyer of the Year" 2015, Concord, NH. He has also been selected to the list of New England Super Lawyers® since 2007. Matt is the only New Hampshire lawyer listed in the International Who’s Who of Business Lawyers 2014 under Product Liability Defense.

His other active affiliations include: Federation of Defense and Corporate Counsel (FDCC), International Association of Defense Counsel (IADC), National Foundation for Judicial Excellence (NFJE), Tri-State Defense Lawyers Association (TDLA), and the New Hampshire Bar Association.

Matt teaches and writes on topics of leadership, Medicare reimbursement, electronic discovery, products liability, professional liability and other legal issues. He was the First Circuit editor for DRI’s Daubert On-Line newsletter from 2006-2008.

He is admitted to the New Hampshire Supreme Court, United States District Court for the District of New Hampshire, United States Bankruptcy Court for the District of New Hampshire, the First Circuit Court of Appeals, and the United States Supreme Court.

He is a 1983 graduate of Brown University, and graduated from Case Western Reserve School of Law in 1986.
Dick Caldwell has been a Board Certified Civil Trial Lawyer since 1983. He is engaged in civil trial and appellate practice, concentrating in the defense of product liability, insurance, professional liability, and commercial litigation. Dick was resident in Rumberger, Kirk & Caldwell’s Orlando office until the opening of the firm’s Tampa office in 1991, where he now practices.

Dick is a past member of the Supreme Court Committee on Standard Jury Instructions, and has served on The Florida Bar Civil Procedure Rules Committee as well as the Appellate Rules Committee, which drafted the current Florida Appellate Rules. He has lectured on appellate practice and product liability in Florida Bar CLE seminars, and is the author of the chapter on “Defenses” in the Florida Bar CLE handbook on product liability, as well as the chapter on “Florida Law” in the DRI Product Liability Handbook.

In addition, he is a member of the Committee on Product Liability Litigation of the Section of Litigation and the Product, General Liability, and Consumer Law Committee of the Tort and Insurance Practice Section, both of the American Bar Association. Dick is also an emeritus member of the Product Liability Advisory Council (PLAC).

Dick maintains membership in the Federation of Defense and Corporate Counsel (FDCC), Florida Defense Lawyers Association, the Defense Research Institute, and the Federal Bar Association. He is admitted to practice before the Supreme Courts of Florida, Alabama, and Texas, the United States District Courts for the Northern, Middle, and Southern Districts of Florida, the Northern, Middle, and Southern Districts of Alabama, the United States Court of Appeals for the Fifth, Sixth, and Eleventh Circuits, and the United States Supreme Court. He received his B.A. from the University of Florida in 1965, and then served as a captain in the United States Army from 1965 to 1968. Dick completed his J.D. at the University of Florida College of Law in 1970. He served as Editor of the University of Florida Law Review and published a Case Comment and a Note in the University of Florida Law Review.

In 1971, Dick served as law clerk for Judge Spencer C. Cross, Fourth District Court of Appeals. He also served as City Attorney and Prosecutor for Ocoee, Florida, from 1973 to 1975.
Bob Christie
Christie Law Group

The founding principal of Christie Law Group, Bob brings over 35 years of trial experience and expertise to the firm. He has tried scores of cases throughout Washington State and the U.S. District Courts in Washington and Alaska, argued appeals in all divisions of the Washington Court of Appeals, the Washington State Supreme Court, the Ninth Circuit Court of Appeals, the Federal Circuit Court of Appeals, and the U.S. Supreme Court (on briefs). Bob is widely recognized as one of the foremost lawyers defending police officers and their agencies in civil rights cases in Washington. He also represents professionals, individuals, and companies in litigation ranging from malpractice, products liability, transportation liability, road design, premises liability, commercial litigation, employment, construction, and many other categories of civil disputes. He works extensively in cases involving death and serious injury, and is often called to serve as trial counsel in defense of significant claims. Working occasionally on behalf of catastrophically injured individuals and damaged business owners, Bob has also achieved several multi-million dollar verdicts and settlements.

Admitted to membership in the Federation of Defense & Corporate Counsel, Bob chaired the substantive law section on Civil Rights and Public Entity Liability, responsible for authoring periodic newsletters to section members and substantive articles for the FDCC Quarterly. In August 2016, he was elected as one of eight senior directors, and he has served as an instructor at the FDCC’s Litigation Management College. Bob also served as co-chair of the Washington Pattern Instruction subcommittee charged with drafting civil rights instructions for use in Washington’s superior courts.

Bob writes and lectures frequently on risk management issues, civil rights, governmental entity liability, and trial technology and presentation strategies.
Sherry Cushman
Cushman Wakefield’s Legal Sector Advisory Group

Sherry Cushman is the Executive Managing Director of Cushman Wakefield’s Legal Sector Advisory Group. She has spent her 31-year career exclusively advising tenants in the Washington, D.C. Metropolitan area and throughout the United States. Sherry’s focus is on implementing real estate solutions that closely integrate her client’s business, financial and operational goals for single and multi-office tenants. She has extensive experience in working with partnerships, boards and finance committees adding tremendous value to the consensus building and decision making process.

Sherry has represented tenants in over 15 million square feet of tenant prime lease, lease restructures/renewals, build-to-suits and base building transactions. Sherry’s expertise is with non-profits, professional services and corporate clients.
Jay is a partner in the law firm of Young Clement Rivers, LLP. Jay is chair of the firm's Professional and Medical Liability practice groups and the firm's Business Litigation practice group. He serves also on its Management committee. He practices primarily Professional Liability, Medical Malpractice, Legal Malpractice, Nursing Home and Assisted Living, Business, and Real Estate litigation. He is a member of the South Carolina State Bar, the Fourth Circuit Court of Appeals, the United States District Court for the District of South Carolina, the Charleston County Bar Association, the American Bar Association, the South Carolina Defense Trial Attorneys Association and the Defense Research Institute. Jay is rated AV® Preeminent TM Peer Review Rated by Martindale Hubbell in the areas of litigation, Medical malpractice, and Professional Liability.

Jay is also rated AV® Preeminent Peer Review Rated Judicial and bar member edition by Martindale Hubbell. Jay has also been selected as a member of Super Lawyers® in the areas of Professional Liability defense. Jay has been elected to Best Lawyers in America® as well. Jay is a member of the American Board of Trial Advocates (“ABOTA”). He is also a member of the Federation of Defense and Corporate Counsel (“FDCC”) where he serves as chair of the Healthcare Law Section.

Jay also serves as the FDCC liaison to the Medical Liability Committee of the Defense Research Institute (“DRI”). He currently serves on the South Carolina State Bar Association Committee for Professional Liability. He is a past member of the Executive Board of the South Carolina Defense Trial Attorneys Association. He is a member of the American Bar Association’s section on Business Law. Jay has served as an adjunct professor of law at the Charleston School of Law where he taught litigation. He has also been certified by the South Carolina Supreme Court Commission on Alternative Dispute Resolution as a civil mediator. He has been selected to the Super Lawyers® Business Edition.

Jay grew up in Charleston and graduated from Porter Gaud School in 1984. He earned his Bachelor of Arts degree from the University of Georgia in 1988. He earned a Masters Degree from the College of Charleston in 1993. Jay then graduated cum laude from the University of South Carolina School of Law. He was admitted to the South Carolina Bar that same year.

Jay has also been a frequent speaker and presenter on issues related to litigation and insurance defense including medical malpractice, trial techniques, cross examination, risk management, lender liability, and professional malpractice issues. He has presented to the South Carolina Defense Trial Attorneys Association, the Federation of Defense and Corporate Counsel, South Carolina Medical Association, The South Carolina Hospital Association, the Medical University of South Carolina, Roper Hospital, Palmetto Richland Hospital, The South Carolina Dental Association, the South Carolina Neurological Association. He has also served as a lecturer on behalf of the National Business Institute on Medical Malpractice, Legal Liability, and Real estate liability issues.


While in law school, Jay was a member of the Order of the Coif, Order of the Wig and Robe, an editor for the South Carolina Law Review, a member of the South Carolina Moot Court Bar, and listed in the Who's
Who of American Law Students. Jay also served as the Associate Editor for the South Carolina Law Review Symposium on the "Restatement (Third) of Unfair Competition."

Jay has been active in community organizations in the Charleston area. He has been appointed to the First Citizens Bank advisory board. He is a member of the Board of Directors of Charleston Day School. He is a past member of the Board of Directors of the South Carolina Maritime Foundation, the Low Country Children's Museum, American Heart Association Heart Ball Executive Leadership Team, and the Charleston Metro Chamber of Commerce Board of Economic Advisers. He has served on the Communities in Schools Board of Directors, as a United Way Account Executive, as a member of the Youth Service Charleston Advisory Council, is a graduate of Leadership Charleston, and as a Junior Achievement Volunteer. He is an active member of St. Philips Episcopal Church and a former member of the Vestry. Jay is a member of the Clergy Society, Widows and Orphans Society, and the Charleston Club.
Andrew B. Downs is a Shareholder in Bullivant Houser Bailey PC, resident in its San Francisco, California office and is a member of the firm’s Board of Directors. Admitted in both California and Nevada, Andy practices throughout both states handling coverage and extra-contractual claims. Andy presently represents insurers regarding commercial property policies, commercial liability policies, professional liability policies, Directors & Officers’ policies and marine and inland marine policies.

A former member of the Federation’s Board of Directors and the Program Chair for the 2015 Annual Meeting as well as the Federation’s voice on social media from 2013 to 2015, Andy has been recognized by Chambers USA as one of California’s top insurance lawyers from 2010 through 2017. He has also been a Northern California Super Lawyer since 2006. He is currently the Co-Chair of the American College of Coverage and Extracontractual Counsel’s Cyber Insurance and Computer Crime Committee, and was the Co-Program Chair for the ACCEC’s Third Law School Symposium earlier this year. He is also a former chair of ABA/TIPS’ Property Insurance Law Committee, a former member of the PLRB’s Claims Conference Committee, and a member of the Editorial Board of West’s Insurance Litigation Reporter.

Outside the office, Andy is a Nationally Certified Official for USA Swimming at sanctioned swim meets at the local and national levels as well as serving as a Referee/Starter at High School meets in Northern California.
Susan Dunn
Harbour Litigation Funding Ltd.

Harbour Litigation Funding Ltd co-founder Susan has been described by Litigation Funding Magazine as the Grand Dame of litigation funding because of her extensive experience in this area.

Since 2002, she has originated and managed over 150 litigation funding cases totaling over £3bn in claim value. Susan also featured in The Lawyer’s Hot 100 for her work in developing the use of litigation funding by lawyers, insolvency practitioners and claimants. She qualified as a solicitor in 1992 and has worked as a commercial litigator in both the UK and the United States where she was also a diplomat (Vice-Consul Investment) for the British Government.

In 2006, Susan was pivotal in the publication of the UK’s Civil Justice Council report which endorsed litigation funding. This in turn led to both the Chapter 11 of the Jackson Review of Costs, published in 2011, and to the completion of the Code of Conduct in England and Wales for Litigation Funders which was introduced in 2011. It also led to the formation of The Association of Litigation Funders in the UK of which she is a founding director.

In 2007 she co-founded Harbour. Subsequently, Susan has been instrumental in raising two further funds meaning that Harbour now advises on over £400 million of assets under management.
Daniel Eckhart
Swiss Re

Daniel Eckhart has a unique profile at Swiss Re, he is the head of community management, where he helps Swiss Re build, maintain and foster a best-in-class open culture where ideas, opinions and knowledge are openly shared. At the same time, he is a screenwriter and has been 'Grimme-Prize' nominated. He is the author of the novels The Champ, Barnaby Smith and Home.

Daniel believes that open culture leads to greater motivation and empowerment for the entire workforce. His role is to motivate employees at Swiss Re to bring their whole self to work - not just their business expertise, but also their life experiences. The more employees bring life to work, the more work becomes part of life. Hence, the time spent becomes vibrant, passionate and fully engaged.

His goal is to make Swiss Re a powerhouse of fully lived and expressed inclusion and diversity. He believes that Swiss Re needs employees' uniqueness, and diversity of thought. A lived diversity of thought needs courage. It needs courage to expose yourself, courage to speak your mind, courage to challenge, and courage to simply be a human being who also happens to be a Swiss Re expert.

While not at work, he is busy writing.
Neil H. Ekblom
Ekblom & Partners, LLP

Neil Harkin Ekblom is a trial lawyer, defense attorney and healthcare lawyer. His firm provides litigation assistance in healthcare, professional liability and related tort and health law contractual matters. Clients include municipalities, medical centers, hospitals, nursing homes, a wide variety of healthcare related entities, surgeons and their practices, commercial landlords, and manufacturing companies. Mr. Ekblom has more than 50 jury defense verdicts in multiple state and federal courts involving a variety of professional liability and healthcare related matters. He represents non-healthcare related professionals, officers and directors, and entities in litigation matters requiring medical and healthcare expertise.

Mr. Ekblom lectures to healthcare related businesses and insurance companies on litigation avoidance and risk management. He has spoken on federal and state fraud and abuse laws as well as employer responsibilities. He has published articles on risk avoidance in trade journals.

Mr. Ekblom obtained his law degree from Georgetown University Law Center in Washington, D.C. He served as an Assistant District Attorney in New York City for four years. He is rated AV Preeminent by Martindale-Hubbell and is admitted to practice in New York, New Jersey and Florida as well as the Southern District in New York and New Jersey District Court.

Mr. Ekblom lives in Bergen County, New Jersey with his wife Frances, son Neil, Jr. and daughter Margaret. He participates with his wife in hospital and community volunteer organizations in New Jersey and New York.
Mr. Finamore is a trial lawyer admitted to practice in Maryland and the District of Columbia. In the Niles, Barton & Wilmer Litigation Department, Mr. Finamore has been retained as lead counsel on a wide variety of cases in the areas of general liability, professional liability, and employment law. His experience includes litigation of various first and third party insurance claims including insurance fraud, professional liability claims involving accountants, insurance agents, and dentists, among others, as well as the defense of employment claims.

In addition to his litigation practice, Mr. Finamore regularly counsels employers on employment issues, workplace policies, and compliance with federal, state, and local employment laws. As a trial lawyer, Mr. Finamore understands the importance of providing his clients with practical advice to assist them with balancing business risk while avoiding unnecessary litigation. He began practicing in employment law while serving on active duty in the US Army Judge Advocate Generals Corps at Aberdeen Proving Ground.

Mr. Finamore is rated AV-Preeminent® by Martindale-Hubbell, awarded by peer review, for the highest standards of professional skill and ethics. He has been recognized as a top attorney in general litigation and employment and labor by Maryland Super Lawyers magazine (2008-2017). He is a member of the Federation of Defense & Corporate Counsel (FDCC) and a Fellow of the Litigation Counsel of America. Mr. Finamore serves on the DRI Employment Law Steering Committee as Liaison to the FDCC and as Litigation Tactics Chair. He has published articles with DRI, the FDCC and PLUS. Mr. Finamore has lectured extensively regarding numerous litigation topics and on employment law.

Mr. Finamore is a member of the Management and Compensation Committees and Chair of the Diversity Committee. Mr. Finamore is also actively involved in the community, having previously served on the Board of Directors of Boys Hope Girls Hope of Baltimore. BHGH is a privately funded, non-profit organization that provides at-risk children with a stable home, high quality education, and support to reach their full potential. He currently serves on the Board of Trustees of Mount de Sales Academy in Catonsville, Maryland.
Charlie Frazier
Alexander Dubose Jefferson & Townsend, LLP

Charlie Frazier’s successful argument before the Supreme Court of the United States is just one highlight in a distinguished appellate practice in both federal and state courts. In that case, Charlie won a unanimous decision on behalf of ten psychiatrists who were sued by a former patient under the Racketeer Influenced and Corrupt Organizations (RICO) Act, claiming that a pattern of racketeering activity existed to keep him under hospitalization. The Court rejected the patient’s argument that accrual of a civil RICO claim is postponed until the pattern was or should have been discovered, thereby holding that the patient’s claim was time-barred. Charlie has argued many times before the United States Court of Appeals for the Fifth Circuit and the Texas Supreme Court, and has appeared in all 14 intermediate Texas courts of appeals.

Board certified in civil appellate law by the Texas Board of Legal Specialization since 1994, Charlie's appellate and litigation-support practice covers all areas of civil law. In particular, he has extensive experience with commercial disputes, insurance-related issues, and professional-malpractice claims. His work with insurance clients sometimes takes him to London, bringing back fond memories of his time at the University of Kent at Canterbury on a Rotary International scholarship, through which he earned a Master's Degree in International Relations.

Charlie has written and spoken on a variety of topics, including authoring a chapter on the effect of a party’s bankruptcy on an appeal in A Defense Lawyer’s Guide to Appellate Practice (DRI 2004), and the chapter on Texas supersedeas law in Superseding and Staying Judgments: A National Compendium (ABA TIPS 2007).

Since 2009, he has been listed in Best Lawyers in America, and has been featured as one of the top 100 appellate litigation attorneys in Texas in Texas Super Lawyers. Charlie is a member of the by-invitation-only Federation of Defense and Corporate Counsel, which assists in establishing standards for providing competent, efficient, and economical legal services, as well as to encourage and provide for its members’ continuing legal education. Charlie currently serves as vice-chair of the FDCC’s Appellate Law Section. He has also held various leadership positions in the Appellate Advocacy Committee of the Defense Research Institute.

Charlie received his B.A., magna cum laude, from Baylor University and his J.D. from the Baylor School of Law, where he was published in the Baylor Law Review, of which he also was a member of the editorial board. Charlie is licensed to practice before all Texas state courts, as well as the Supreme Court of the United States, the United States Court of Appeals for the Second and Fifth Circuits, and the United States District Courts for the Northern, Eastern, Southern, and Western Districts of Texas.
Neil Goldberg
Goldberg Segalla

Neil Goldberg has defended products liability, pharmaceutical, medical device, trucking, toxic tort, and other complex catastrophic cases across the United States for a number of New York Stock Exchange companies. He is past President of the Defense Research Institute (DRI), the largest organization of civil defense attorneys in the United States. He is the past President and Board Chairman of the Lawyers for Civil Justice. He is the past Chair of DRI's Products Liability Committee as well as the past Chair of the New York State Bar Association's Products Liability Committee. Neil is on the Executive Committee of the USLAW Network and is on the Advisory Board of the Bureau of National Affairs’ (BNA) Product Safety & Liability Reporter.

Neil’s most recent trial arose from the February 2009 crash of Colgan Flight 3407 that resulted in the deaths of 50 people. This was one of only a few such trials conducted in the United States in the last 30 years.

Neil has been editor, co-editor, or contributing author for seven books on the defense of complex personal injury cases. He is the Co-Editor-in-Chief of the two-volume treatise, Preparing For and Trying the Civil Lawsuit, second edition, published by the New York State Bar Association, 2004. Neil is also Editor-in-Chief and contributing author to Products Liability in New York, Strategy and Practice, second edition (2012). He is the Editor-in-Chief of DRI's Daubert Compendium.

Neil is a frequent lecturer on the defense of product liability and personal injury actions. He has lectured for Lloyds of London, the Defense Research Institute, Practicing Law Institute, the American Bar Association, New York State Bar Association, Southern Methodist University and other prestigious organizations throughout the United States and Europe.
Charles E. Griffin
Butler Snow O’Mara Stevens & Cannada

Charles E. Griffin is a member at Butler, Snow, O’Mara, Stevens & Cannada, PLLC. His practice areas include insurance and commercial litigation, healthcare related litigation and financial services litigation. He has experience handling malpractice claims, nursing home defense, predatory lending and predatory insurance practice claims.

Mr. Griffin was an Eastland Scholar at the University of Mississippi Law School. He served as a Congressional Intern in Washington, DC at the U.S. House of Representatives. His experience includes service as a Special Assistant Attorney General, Municipal Prosecutor, Municipal Public Defender, Municipal Judge, City Attorney and former General Counsel for the Mississippi Department of Energy and Transportation. Mr. Griffin is a former Instructor at Jackson State University and former Board Member of North Mississippi Rural Legal Services.

Mr. Griffin is an elected member of the American Law Institute. He is also an elected member of the Federation of Defense & Corporate Counsel (FDCC) and the International Association of Defense Counsel (IADC). He has been listed in Mid-South Super Lawyers (since 2006) and has been named as one of the top 50 attorneys in Mid-South Super Lawyers (Mississippi, 2006, 2009 and 2010). Mr. Griffin speaks frequently to many groups, including the American Law Institute; American Bar Association (ALI-ABA), the National Bar Association, Litigation Counsel of America, the Defense Research Institute and the National Business Institute. He is a member of Alpha Phi Alpha, Phi Alpha Delta and the Community Foundation of Greater Jackson, Mississippi. He is also a Fellow of the Litigation Counsel of America (LCA) and is a co-founder of the LCA Diversity Law Institute.

Mr. Griffin is an authority on diversity in the legal profession and has conducted extensive research on diversity relating to minority defense lawyers and minority defense law firms. He is available to advise individuals, corporations, law firms, associations and other groups on topics of diversity, substantive commercial law, insurance and general litigation.
Marc Harwell
Leitner, Williams, Dooley & Napolitan, PLLC

Mr. Harwell’s practice emphasizes civil defense litigation concerning employment law (Title VII, retaliatory discharge, ADA, FMLA, no-compete agreements, etc.) personal injury (trucking industry, automobile accidents, premises liability, products liability), construction law, professional liability, and insurance coverage. He represents one of the larger insurance carriers for all of its insurance coverage and bad faith litigation in the State of Tennessee. He is also a Rule 31 Listed General Civil Mediator.

In 2016, CityScope magazine named him one of Chattanooga’s top thirty business leaders. He is a member of the Board of Directors for the Hamilton County Bar Association. He is a Fellow of the Chattanooga Bar Foundation. Since 2011, he has been a Master of the American Inns of Court. From 2009 to 2015, he served as a Member of the Disciplinary Hearing Committee for the Tennessee Supreme Court’s Board of Professional Responsibility.

He was elected to the Board of Directors for ALFA International in October 2014, and his term will run until 2017. From 2013 to 2014, he served as Chair of the Transportation Section of the American Law Firm Association, International (ALFA). From 2005 until approximately 2010, he served as Co-Editor of the Transportation Update of ALFA. For ALFA, he has been a Steering Committee Member for the Employment Law Section since 2004. From approximately 2004 to the present, he has edited the Tennessee Employment Law Compendium.

Mr. Harwell is a member of the Federation of Defense and Corporate Counsel (FDCC), which is by invitation only and requires extensive peer review of all candidates for admission. In 2016, he was appointed Chair of the Construction Section. Since 2011, he has served as Vice-Chair of the Transportation Section. He is Vice-Chair of the Admissions Committee and the Projects and Objectives Committee and is Ex-Officio of the FDCC/IADC Law Firm Management Conference.

From 1992-2001, he served on the Board of Directors of the American Heart Association, Hamilton County Unit (Board Chairman, 2000-2001). He has been involved with the BigBrothers-BigSisters of Chattanooga (2001-2005); St. Paul’s Episcopal Church (Co-Chairman 2003 Stewardship Campaign and 2006 Discernment Committee); and The Arts and Education Council (Co-Chairman 2003 Annual Fund Raising Event). He has served as Chairman of Siskin Physical Rehabilitation Foundation Mardi Gras Fundraiser. From 2006-07, Mr. Harwell served on the Steering Committee for Siskin Children’s Institute 365 Club Annual Campaign. For 2007-2009, he served as the co-chairman for Siskin 365 Club Annual Campaign. For 2016 – 2017, he is the Chair of Spectrum Art Selection Committee for the Hunter Museum of American Art.

In 1995, he became a member of Leitner, Williams, Dooley & Napolitan. From approximately 2003 to 2011, he was the Chairman of the Hiring Committee for all of the offices of the firm.
Mr. Harwell was born in Winston Salem, North Carolina in 1964. He received both his B.A. (with honors, 1986) and his J.D. (1989) from the University of Tennessee. While at UT, he was on staff of the Tennessee Law Review. He is the author of "Constitutional Law — Eighth and Fourteenth Amendments — Capital Punishment," 55 TENNESSEE LAW REVIEW 391 (1988). He served as a Graduate Student Representative to the University.
Marc Harwell
Leitner, Williams, Dooley & Napolitan, PLLC

Mr. Harwell’s practice emphasizes civil defense litigation concerning employment law (Title VII, retaliatory discharge, ADA, FMLA, no-compete agreements, etc.) personal injury (trucking industry, automobile accidents, premises liability, products liability), construction law, professional liability, and insurance coverage. He represents one of the larger insurance carriers for all of its insurance coverage and bad faith litigation in the State of Tennessee. He is also a Rule 31 Listed General Civil Mediator.

In 2016, CityScope magazine named him one of Chattanooga’s top thirty business leaders. He is a member of the Board of Directors for the Hamilton County Bar Association. He is a Fellow of the Chattanooga Bar Foundation. Since 2011, he has been a Master of the American Inns of Court. From 2009 to 2015, he served as a Member of the Disciplinary Hearing Committee for the Tennessee Supreme Court’s Board of Professional Responsibility.

He was elected to the Board of Directors for ALFA International in October 2014, and his term will run until 2017. From 2013 to 2014, he served as Chair of the Transportation Section of the American Law Firm Association, International (ALFA). From 2005 until approximately 2010, he served as Co-Editor of the Transportation Update of ALFA. For ALFA, he has been a Steering Committee Member for the Employment Law Section since 2004. From approximately 2004 to the present, he has edited the Tennessee Employment Law Compendium.

Mr. Harwell is a member of the Federation of Defense and Corporate Counsel (FDCC), which is by invitation only and requires extensive peer review of all candidates for admission. In 2016, he was appointed Chair of the Transportation Section. Since 2011, he has served as Vice-Chair of the Transportation Section. He is Vice-Chair of the Admissions Committee and the Projects and Objectives Committee and is Ex-Officio of the FDCC/IADC Law Firm Management Conference.

From 1992-2001, he served on the Board of Directors of the American Heart Association, Hamilton County Unit (Board Chairman, 2000-2001). He has been involved with the BigBrothers-BigSisters of Chattanooga (2001-2005); St. Paul’s Episcopal Church (Co-Chairman 2003 Stewardship Campaign and 2006 Discernment Committee); and The Arts and Education Council (Co-Chairman 2003 Annual Fund Raising Event). He has served as Chairman of Siskin Physical Rehabilitation Foundation Mardi Gras Fundraiser. From 2006-07, Mr. Harwell served on the Steering Committee for Siskin Children’s Institute 365 Club Annual Campaign. For 2007-2009, he served as the co-chairman for Siskin 365 Club Annual Campaign. For 2016 – 2017, he is the Chair of Spectrum Art Selection Committee for the Hunter Museum of American Art.

In 1995, he became a member of Leitner, Williams, Dooley & Napolitan. From approximately 2003 to 2011, he was the Chairman of the Hiring Committee for all of the offices of the firm.
Mr. Harwell was born in Winston Salem, North Carolina in 1964. He received both his B.A. (with honors, 1986) and his J.D. (1989) from the University of Tennessee. While at UT, he was on staff of the Tennessee Law Review. He is the author of "Constitutional Law — Eighth and Fourteenth Amendments— Capital Punishment," 55 TENNESSEE LAW REVIEW 391 (1988). He served as a Graduate Student Representative to the University.
Scott Incerto is Head of Commercial Litigation, United States for Norton Rose Fulbright.

With over 30 jury cases tried in his career, along with numerous arbitration, appellate and ADR proceedings, Scott brings exceptional depth of litigation experience to his areas of specialization. Scott has represented a wide range of clients from diverse industries (including financial services, technology, manufacturing, and construction) in high value, multi-jurisdictional litigation. His experience extends from complex commercial to high-value personal injury litigation; from class action and mass tort litigation to administrative actions and arbitration; and from government to internal corporate investigations.

The common denominators among Scott’s diverse client representation in handling significant dollar exposure cases are experience, credibility and courtroom skill.
Kim Jackson

Kim M. Jackson is a partner of Bovis, Kyle, Burch & Medlin, LLC, a southeastern United States law firm with its home office in Atlanta, Georgia. His practice is primarily insurance coverage advice and litigation, professional liability defense litigation, and general liability defense litigation typically focusing on premises liability. Kim is a frequent CLE speaker and panelist on issues dealing with attorney ethics and liability, insurance coverage and bad faith, and litigation practice. His CLE presentation experience includes Georgia CLE conferences, conferences with a national audience, and national CLE webinars. Kim is also a frequent author on issues dealing with attorney ethics, attorney liability and litigation practice, including published articles in professional magazines and chapters in Lexis-Nexis Practice Guides. Kim is a Georgia Super Lawyer, thrice designated as one of the Top 100 lawyers in Georgia by that publication, including Top 100 in 2017. Kim graduated from Wabash College with B.A. in mathematics and economics and graduated Order of the Coif from the University of Kentucky College of Law. Kim is licensed to practice law in Georgia, Texas and Kentucky. He lives near Atlanta, Georgia with his wife, also an attorney, and two children.
Paul Jepsen
DecisionQuest

Mr. Jepsen has developed trial strategies from a social science perspective for twenty-nine years. He has provided jury research and trial consulting on several thousand civil and criminal cases in both State and Federal courts with an expertise that includes overall trial strategy, opening statements, witness evaluation and preparation, demonstrative exhibits, voir dire, verdict and damages risk analysis, and juror questionnaires. Mr. Jepsen is also a published author and frequent speaker on these issues.

Mr. Jepsen has interviewed tens of thousands of jurors and prospective jurors, and has conducted numerous juror opinion and venue surveys. He has been qualified in Federal Court as an expert regarding jury selection, communication, and persuasion and have had affidavits accepted for use by the Court, in federal and state courts throughout the country.

Mr. Jepsen is skilled in simplifying complex arguments or processes into language and concepts that jurors will remember. In addition, he frequently provides risk assessment for litigants including the research-based assessment of case outcome and damage awards. Mr. Jepsen is experienced with empirical research design and analysis, and has provided voir dire and jury selection assistance on over 800 cases.

Mr. Jepsen has authored many professional articles about jury decision making in publications such as National Law Journal, DRI For the Defense, ABA TIPS, Inside Litigation, Atlantic Coast In-House, and the FICC Quarterly. Mr. Jepsen recently authored the Jury Selection Chapter for West Publishing’s “Handling Business Tort Cases,” book. He has lectured and conducted seminars on voir dire, jury selection, and jury behavior for national and state bar associations, and for other legal education programs sponsored by organizations such as the Defense Research Institute (DRI), the American Association For Justice (ATLA/AAJ), the American Law Firm Association International (ALFA International), and the National Association of Criminal Defense Lawyers (NACDL).
Nia Joynson-Romanzina

Nia Joynson-Romanzina is a D&I futurist specialising in the emotional power of belonging. She advocates winning hearts and minds to unleash the ROI of D&I: Diversity of Perspectives. Nia knows what it means to be different "I grew up in Wales, where we always had to fight for our identity, the right to speak our own language and to be who we are."

Former Managing Director and Global Head of Diversity & Inclusion for UBS and Swiss Re, Nia combines International Development at the United Nations and European Commission, with hands-on FTSE 500 global executive experience. Her involvement in inclusion started early in her career. She worked to integrate excluded groups into the workforce at the European Commission and on socio-economic programmes, ranging from rehabilitating child soldiers in Mozambique, to water sanitation in Asia, to child-care in Italy [NJ1] with iNGOs.

She navigated unchartered territories with the United Nations, exploring the emerging power of the Internet. Inclusive values lay at the core of her work to bridge the growing digital divide, such as a UN / MIT joint-project providing digital access to Mayan Farmers in Mexico.

During her varied career Nia discovered somethings rarely discussed: What happens at that table makes - or breaks – any change or D&I initiative. Diversity was polarising. But everyone agreed on the value of diversity of perspectives. Inclusion was desired around the world, but very few could tell you what inclusion was.

Named it the Daily Telegraph’s "Global Diversity List: Top 10 Diversity Consultant 2016", Nia is the brains behind the award winning Own the Way You WorkTM. This approach positions trust at the epicentre of agile working and deep flexibility: how, when and where we carry out our tasks. To date It has been adopted in over 40 locations globally, resulting in higher productivity, elevated engagement, increased retention and lower absenteeism.

An adjunct professor at IMD Business School, and featured Huffington Post Blogger, she is frequently quoted in publications and articles such as Act Like a Leader Think Like a Leader by Herminia Ibarra (Thinkers50), Future Work by Alison Maitland and George Washington University’s Diversity Dividends.

She sits on the Harvard’s Women Leadership Board, the EDGE Global Advisory Council, the WIN International Board of Advisors and the IMD Strategies for Leadership Advisory Board. She holds a Bachelors in Political Science from the University of Cardiff, an MSc in Development Management and an MA in Mass Communications from Leicester University. She is a Certified Executive Coach (ACC, CPCC) and Certified Change Manager (PROSCI).

Originally from Wales, Nia lives in Zurich, Switzerland with her Swiss husband and two, Welsh speaking, daughters. When not actively championing her cause, she enjoys being with and cooking for her family and friends at home overlooking Zurich lake and the Swiss Alps. She loves to keep mentally and physically fit through yoga, hiking and running.
Thomas Leidell

Tom joined Tokio Millennium Re Ltd in March 2007, and is Sr. Vice President - Compliance & Secretary for the U.S. Operations. His initial role was head of claims which expanded to additional duties which include overseeing Compliance, Legal, Internal Audit and Corporate Secretary functions. With a career that has spanned over 36 years, Tom has enjoyed the benefit of being with some top level Insurance/Reinsurance companies such as XL Insurance, Munich-America Re, ACE, Cigna, Home Insurance, Chubb and the Hartford. His work experience includes serving in various roles in both field and head office executive operations, principally focusing on claims technical and administration.

Tom received his Masters at The University of Michigan and Bachelors of Science from The University of Florida. He has served a two-year term as President of “The Loss Executives Association” and also serves as an International Chair for the Claims and Litigation Management Alliance (CLM). Tom is also a member of the FDCC (Federation of Defense & Corporate Counsel), US Law, Member of the advisory committee for Legal and Claims for the Reinsurance Association of America (RAA), Association of Insurance Compliance Professionals (AICP), The Institute of Internal Auditors (IIA) and has presented regularly at insurance executive summits and conferences.
Derek D. Lick
Sulloway & Hollis, PLLC

Derek D. Lick concentrates his practice in litigation, including providing legal defense to insured parties sued in state and federal courts and representing clients in disputes involving personal injury matters, commercial disputes and disputes involving construction, development and real-estate projects, and construction payment and performance bond claims.

Mr. Lick has represented clients in federal court, in all ten of the state’s superior courts, as well as before the New Hampshire Supreme Court. He has successfully defended personal injury suits at jury trial for the operator of Verizon Wireless Arena and the association promoting Laconia Motorcycle Week, a high-profile case that garnered daily media coverage. He has also represented one of the largest and most successful property developers in New Hampshire at trial and successfully defended it from claims in excess of $10 million, while also obtaining an award for the client on counterclaims and for partial attorneys’ fees.

On occasion, Mr. Lick has also represented clients before the New Hampshire Legislature. He was part of a team of Sulloway & Hollis attorneys working on behalf of the New Hampshire Medical Society who helped draft and successfully advocate for passage of two significant bills that became law – one that reined in a court-created expansion of medical liability and a second that created a screening panel mechanism for medical injury suits.

Mr. Lick joined Sulloway & Hollis in 1999. Prior to entering practice, Mr. Lick worked on Capitol Hill, serving as the Press Secretary for Democratic Congressman Martin O. Sabo, the Chairman of the House Budget Committee and a senior member of the House Appropriations Committee. As the Press Secretary, Mr. Lick was responsible for developing and implementing the Congressman’s media strategy in Washington, D.C. and in the Congressman’s Minneapolis, Minnesota district, one of the country’s top-20 media markets.
Mike Lucey
Gordon & Rees

Mike Lucey began his legal career at Gordon & Rees in 1980, and has been a partner in the San Francisco office since 1987. Mr. Lucey served as firm wide Managing Partner from 1998 to 2006, where he led Gordon & Rees through a transition from a regional law firm to a national platform.

Mr. Lucey started the Employment Group at Gordon & Rees, which is now the largest firm-wide practice group. For over 25 years he has specialized in employment law and related litigation and has obtained defense verdicts in numerous cases involving discrimination, harassment and retaliation under Title VII, FEHA, ADA, FMLA, and B&P Code Sec. 17200. Mr. Lucey also advises management on compliance with employment laws, including the investigation and evaluation of internal complaints of harassment and discrimination. He is also outside employment counsel to several Bay Area law firms, to whom he provides employment advice.

Mr. Lucey is one of the most experienced trial lawyers at Gordon & Rees and is a fellow of the American College of Trial Lawyers, one of the premier legal associations of America. The college is composed of the best of the trial bar from the U.S. and Canada. Fellowship in the college is extended by invitation only to experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Members cannot exceed one percent of the total lawyer population in the state. Mr. Lucey is also a member of the American Board of Trial Advocates (ABOTA), which is comprised of the top trial lawyers on both sides of the bar.
Daniel McGrath
Hinshaw & Culbertson

Mr. McGrath is the Leader of Hinshaw's Product Liability Practice Group and a member of the firm's Executive Committee. He was, when a non-equity partner, selected by his peers at the firm to be its first elected representative serving on the firm's Executive Committee. Mr. McGrath is also immediate past chairperson of DRI's Toxic Tort & Environmental Law Committee. Mr. McGrath presently serves as Chairperson of the DRI Jury Trial Preservation Task Force and as a member of DRI's Issues & Advocacy and Engagement Committees.

Mr. McGrath represents major manufacturers, distributors, and service provider businesses in product liability, toxic tort, environmental, medical device, construction and commercial matters. He regularly defends clients in consolidated, mass tort and multi-district litigation in a variety of jurisdictions as well as in national and regional forums.

With more than 30 years of trial and litigation experience, Mr. McGrath has represented clients in a broad variety of product liability cases including matters where chemicals, coatings, appliances, foods, beverages, outdoor power equipment, glass, lawn and garden equipment, medical devices and equipment, and fluid control equipment were at issue in the federal and state courts of 13 states.

Amy L. Miletich, a founding member of the Denver, Colorado firm Miletich PC, has been defending employers for over 20 years. Her practice is focused on employment law matters, civil litigation and insurance law. She has been a frequent speaker on employment related topics and has published several articles on employment law. In 2014, Ms. Miletich was elected a National Director of the Defense Research Institute. She is the former Chair of the Defense Research Institute’s Employment and Labor Law Committee.

Ms. Miletich has been recognized as a Colorado Super Lawyer every year since 2007 in employment defense. She has been named one of the Top 50 Women Colorado Super Lawyers and is listed in Best Lawyers in America. She is AV Preeminent® Rated by Martindale-Hubbell. Ms. Miletich serves as a Vice Chair of the Federation of Defense and Corporate Counsel’s Admissions Committee and is a member of the International Association of Defense Counsel.

Ms. Miletich’s firm is certified by the Women’s Business Enterprise National Council and is a member of the National Association of Minority and Women-Owned Law Firms.
Robert Moore
2RM Risk and Captive Management

Robert an officer and GC for 2RM Risk and Captive Management. He is the managing member of 3 companies that he formed to bring value to the Heavy Equipment Construction Field. He started practicing law while in law school trying felon cases in 1976, and moved on to be a first chair felony trial prosecutor. He has worked at Great American Insurance Company, and as a partner at Stone & Moore in Chicago. Ten years ago he left the active practice of law, to work exclusively in the Crane, Rigging, Millwright, Concrete Pump and Specialized Transportation arena. He is a managing member of a claims company, risk management/loss control company and captive management company. He and his wife, Catherine, live in beautiful Chattanooga, TN. At our last conference in Charleston, SC, he spoke at the construction section meeting on the topic of “incorporation by reference.”
Tom Oakes
Thomas G. Oakes and Associates

Thomas G. Oakes is the founder of Thomas G. Oakes Associates. He is a former official court reporter with the Court of Common Pleas in Philadelphia and the United States District Court for the Eastern District of Pennsylvania. After leaving the employ of the Federal Government in 1986, Mr. Oakes established his firm as one of the leading firms in the Philadelphia, New Jersey, New York area. By the year 1999, Oakes expanded its marketplace to a national company, providing services across the United States.
Michael J. O’Connor  
Salt River Project

Michael was named Salt River Project’s (SRP) Associate General Manager and Chief Legal Executive Law and Human Resources on July 25, 2011. Based in Tempe, Arizona, SRP is one of the nation’s largest publicly owned electric and water utilities, with annual operating revenues of approximately $3.0 billion, and a balance sheet measuring some $11 billion. In his position, Michael reports directly to Mark Bonsall, the SRP General Manager/Chief Executive Officer. In addition to leading the SRP Legal Department, Michael also is responsible for SRP’s Human Resources, Environmental Management, Land, and Risk Management Departments.

Prior to joining SRP, Michael was a partner at Jennings, Strouss & Salmon. Michael joined Jennings Strouss in 1985 and practiced law at the firm until 2012 in the areas of utilities and energy companies, products liability, complex commercial litigation, insurance coverage and bad faith, and professional malpractice defense.

Michael earned his B.A. degree in Political economy from the Johns Hopkins University in 1982. He earned his J.D. degree, magna cum laude, from the George Washington University National Law Center in 1985. He is a member of the American College of Trial Lawyers, Federation of Insurance Corporate Counsel, International Association of Defense Counsel, Defense Research Institute, Arizona Association of Defense Counsel, Tort Trial Insurance Practice Section, American Bar Association, Trial Practice Section, State Bar of Arizona and Maricopa County Bar Association.

Born in New York State, Michael and his wife Michelle have four children: Matthew, a junior at Scottsdale Community College, and triplets, Michael a sophomore at Johns Hopkins University, Alexandra a sophomore at New York University, and Samantha a sophomore at Santa Clara University.

Michael has received several honors and recognition while in private law practice: AV Preeminent Peer Review Rated, Listed, The Best Lawyers in America (2005-2012), Listed, Southwest Super Lawyers (2009-2012), AB Top Lawyer, Product Liability, Arizona Business Magazine and Best of the Bar, The Business Journal and was selected as a fellow of the American College of Trial Lawyers, a member of the International Association of Defense Counsel, and the Federation of Corporate Counsel.

Michael has been active in several community activities over the years including, but not limited to, Board of Directors of the St. Joseph’s Hospital Foundation, the Advisory Board of Directors of the Rodel Foundation, Desert Voice’s Oral Learning Center, Brophy Dad’s Club, North Scottsdale Little League (President), and Valley of the Sun United Way.

Michael is very interested in promoting education and health issues in the State of Arizona. In September 2012, Michael became a member of the Rodel Foundation of Arizona’s Advisory Council Board. On January 25, 2013, Michael became a member of the Board of Directors of St. Joseph’s Foundation.
G. Bruce Parkerson  
Plauche Maselli Parkerson, LLP

Bruce is a partner at Plauche Maselli Parkerson, LLP and has tried more than 40 cases to verdict and has handled hundreds more. He represents natural gas distributors, gas transmission companies, manufacturers, hotels and insurers in cases involving wrongful death, personal injury and property damage. He handles complex cases involving fires and explosions, natural gas leaks, carbon monoxide poisoning, toxic exposure, product liability, breach of contract, and premises liability. He has worked with experts in a broad variety of disciplines ranging from accident reconstruction to physics and metallurgy. He has also tried cases involving the enforceability of indemnity provisions and additional insured status.

Since 1995, Bruce has been a frequent speaker at conferences sponsored by natural gas industry associations. He has spoken regarding the investigation of fires and explosions as well as topics involving expert evidence.

Bruce is a Fellow in the American College of Trial Lawyers. He has also been chosen by his peers as a "Super Lawyer" in the fields of utility law and commercial litigation. He has been recognized by his peers as among the Best Lawyers in America in the fields of products liability and commercial litigation.
Diane Polscer
Gordon & Polscer, LLC

Diane Polscer is a founding member of Gordon & Polscer, L.L.C. and has been the managing partner since the firm’s inception in 1994 in Portland, Oregon, and Seattle, Washington. Gordon & Polscer was named, once again, one of the 2016 U.S. News & World Report - Best Lawyers “Best Law Firms,” recognized as Tier 1 in Portland for Insurance Law. Diane focuses her practice on insurance coverage, commercial litigation, and a wide range of business and insurance disputes.

Diane was admitted to the United States Supreme Court in October, 2014. She has been selected for inclusion in Super Lawyers since 2006 - the eleventh consecutive year she has been named to this peer-elected distinction that is only awarded to the top 5% of attorneys in Oregon. She was featured in the 2014 Oregon Super Lawyers Magazine, August Edition; click here to read the full article. She was also named a Corporate Counsel Super Lawyer. In addition, Diane has been recognized as one of the “Best Lawyers in America” from 2011 - 2017 and has been a Martindale-Hubbell 5.0 AV Preeminent Rated Lawyer for over 20 years.

Diane has extensive commercial and complex civil litigation experience, including work on numerous bad faith claims and appeals. She is a frequent speaker and author, and a past faculty member of the National Institute for Trial Advocacy. She served as past Chair of the Excess and Reinsurance Subcommittee of Defense Research Institute (DRI) Insurance Law Committee. She is currently Chair of the Federation of Defense and Corporate Counsel (FDCC) Diversity Committee and past Chair of the Insurance Coverage Section of the Federation of Defense and Corporate Counsel (FDCC). In May 2016 Diane was selected to serve on United Heritage Mutual Holding Company Insurance Boards as Vice Chairman of the Board. She has been a member of the Board of Directors since 2013.

Diane is a co-founder of and regular contributor to the National Insurance Law Forum, which is a national law blog devoted solely to legal and legislative developments in the area of insurance law. The blog is run by Gordon & Polscer in conjunction with five other nationally recognized insurance law firms. You can view the blog and subscribe to updates here.

Diane is the president of the Oregon Chapter of the International Network of Boutique Law Firms (www.INBLF.com). INBLF is an organization of preeminent single-discipline law firms throughout the United States and includes some of the world’s most prominent full-service law firms in foreign nations. Diane is also a member of the National Association of Women Lawyers (NAWL); a member of the National Association of Minority & Women Owned Law Firms (NAMWOLF), and currently serves on NAMWOLF’s Admissions Committee; a Senior Fellow of the Litigation Counsel of America (LCA) and a founding member and chair of the LCA Insurance Litigation Institute.
John E. Quinn is a principal in Manier & Herod and the Chair of the firm’s Litigation section. Mr. Quinn practices in the areas of Civil Litigation, Personal Injury, Professional Negligence, Products Liability, Toxic Tort Litigation, Commercial & Business Litigation, and Insurance Litigation.

Mr. Quinn was recently named the Chair of the Technology/E-Commerce Section of the Federation of Defense and Corporate Counsel (FDCC). In addition to this, he has been appointed to the Admissions Committee of the FDCC, the Sites Committee of the FDCC, and is the Tennessee State Representative for the FDCC.
Michael Shalhoub
Goldberg Segalla LLP

Michael Shalhoub is a proven trial lawyer who focuses his practice on product liability defense for the medical device and pharmaceutical industries. In his more than 30 years of experience, he has resolved more than 100 cases at the trial stage and achieved numerous defense verdicts. His experience includes cases involving product liability as well as medical malpractice, business and commercial disputes, insurance coverage, construction accidents, and general liability.

Mike is a Co-Chair of Goldberg Segalla’s Life Sciences Practice Group and a nationally recognized authority on product liability defense, medical device litigation, and trial technique. He is the former Chair of the international Federation of Defense and Corporate Counsel’s Product Liability Section and its Drug, Medical Device, and Biotechnology Section. Mike is also a past member of the Board of Directors of the 22,000-plus-member Defense Research Institute and a past Chair of DRI’s Medical Liability and Health Care Law Committee. He has written and lectured for national audiences on emerging trends in drug and medical device litigation, Daubert preclusion of scientific expert testimony, and other topics. He is the co-editor of Life Science Matters, Goldberg Segalla’s blog covering the latest legal developments involving medical devices and pharmaceuticals.

In the area of medical liability, Mike has defended many types of health care malpractice actions including pharmacy malpractice, dentist malpractice, medical malpractice, physical therapy malpractice, and nursing malpractice, as well as licensing and disciplinary actions for health care providers. The specialties of his clients and cases range from anesthesiology to urology and from catastrophic loss to minor cases. He has also represented a number of major hospitals in medical malpractice cases as self-insured entities.

Mike brings to each matter exceptional scientific and technical understanding developed through his experience handling dozens of complex, high-exposure product liability cases across the country. He has defended manufacturers that span the full spectrum of health-related and personal care products, ranging from medical laser components, anesthesia machines, CPAP machines, eye care products, and joint implants to denture cream, hair care products, hospital and home care safety devices, and mobility aids. He is integrally involved in the firm’s role as science counsel for a major product manufacturer in the dental adhesive cream federal multi-district litigation. Mike’s recent work also includes defending a golf car manufacturer in personal injury cases involving rollover accidents.

Mike has been selected by his peers and clients for inclusion in Best Lawyers in America and New York Super Lawyers for a number of years, and he was named among the Top 25 Attorneys in Westchester County in Super Lawyers several times.
Michelle R. Stewart
Hinkle Law Firm,

Ms. Stewart is a leader in the litigation practice group and is the Member in charge of the Hinkle Law Firm’s Kansas City office. She has been in practice since 1999 and focuses her practice on litigation in employment, construction and legal malpractice/professional negligence matters. She has significant trial experience in state and federal courts in both Kansas and Missouri. In addition, she acts as employment counsel for multiple businesses and governmental entities, advising them on matters ranging from compliance with federal and state employment statutes to creation of personnel handbooks.

Michelle also argues cases in front of both the Kansas and Missouri Courts of Appeal. In 2003, she was named one of the up and coming lawyers in Missouri Lawyers Weekly. Michelle was included in the elite group of Kansas and Missouri Rising Stars in employment litigation in 2008, 2009 and 2011 and has been named a Super Lawyer consistently since 2012. In 2010, Michelle received the David A. Dixon Appellate Advocacy Award in recognition of outstanding achievement in appellate practice. Beginning in 2011 through the present, Michelle was named one of the Best Lawyers in Kansas City by Ingram’s Magazine.

Michelle is a member of the Federation of Defense and Corporate Counsel and serves on the Membership Committee as State Liaison for Kansas. Membership in FDCC is limited to 1400 members world-wide and candidates go through a selective nominating process. She is also an Associate Member of the American Board of Trial Advocates (ABOTA). Membership in ABOTA is by invitation only and achieving the rank of Associate requires twenty (20) jury trials as lead counsel. Michelle is a Fellow of the Litigation Counsel Of America. The LCA is a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Fellowship in the LCA is highly selective and by invitation only. Fellows are selected based upon excellence and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation.
Sonia Studer
Nestle

Ms. Studer is passionate about Human Resources and has over 15 year’s international experience in that area.

She is business and value driven, and strong in engaging and motivating teams. Her diverse background being German, Algerian and Swiss generated her interest in joining an international company such as Nestlé that values and respects different cultures and other ways of thinking. After her economics studies and work experiences at Credit Suisse and DHL, she joined Nestlé at the headquarters in Switzerland. She then quickly moved to the UK to work for Nestlé Purina Petcare European Head office. Afterwards, she joined Nestlé Nespresso Switzerland as Head of Human Resources. Her interest and enthusiasm for people development and her international coaching certification, took her to her next position where she set up the centre of expertise of HR Talent management & Learning at Nestlé in Switzerland. This led her to her current role as Global Head of Diversity & Inclusion, guiding Nestle’s teams across the world to create the enabling conditions in their workplace to value and leverage the different cultures, ways of thinking, unique skills, knowledge and experiences of our people.
William Vita
Westerman Ball Ederer Miller & Sharfstein, LLP

Bill Vita is a Partner in Westerman Ball Ederer Miller & Sharfstein’s Litigation Department. Bill is a seasoned litigator with extensive experience in many different areas of complex civil litigation including commercial litigation, business torts, product liability, construction litigation, breach of contract disputes, employment disputes and mass torts.

Bill is a cum laude graduate of Boston College Law School and obtained his undergraduate degree in English at the University of Notre Dame. Immediately after law school, he served as an Assistant District Attorney in Brooklyn for five years. Bill spent two of those years in the Rackets Bureau, prosecuting organized crime and complex economic fraud cases.

Bill served as the Chairman of the Product Liability, Construction and Motor Vehicle Law Committee of the New York State Bar Association’s Trial Lawyer’s Section. He has also held leadership roles in national bar associations, including the position of Vice-Chair of both the Commercial Litigation Section and the Employment Practices Section of the Federation of Defense and Corporate Counsel. He has also been a member of both the Commercial Litigation Committee and the Product Liability Committee of the Defense Research Institute. He is a Fellow of the Litigation Counsel of America, The Trial Lawyer Honorary Society.

Bill currently serves on the University of Scranton’s Parent’s Executive Council and has previously served as the President of the Board of Directors of the Gerald Ryan Outreach Center, a non-profit organization serving one of Long Island’s poorest communities. He also served as a Board Member for Catholic Charities’ Campaign for Human Development.
Natalie Vloemans

*Ploum Lodder Princen*


Natalie heads the insurance team of Ploum Lodder Princen, which team consists of lawyers specialised in contractual insurance law, liability and litigation, financial services, professional liability, D&O liability and construction related claims. Their services address the many aspects of the insurance industry. The team advises insurance and reinsurance companies, intermediaries and insured parties on insurance and reinsurance products (including policy conditions), insurance claims, cover-related disputes, liability risks, corporate matters and regulatory aspects encountered by intermediaries and (re)insurance companies in establishing and running companies in the Netherlands. Ploum Lodder Princen is one of the very few mid-sized firms that is able to provide multi-disciplinary services on the field of insurance matters. The reason for the team’s involvement in most major calamities matters is the fact that Ploum can offer a collaboration of the environmental team, the criminal team and the civil team.

Natalie has specific expertise in matters involving the construction, (petro)chemical industry, energy and logistics sectors. Furthermore, she frequently handles asbestos-related matters and other matters involving toxic substances.

Natalie also has a more general commercial litigation practice including national and international arbitration. She has acted as arbitrator and as counsel in arbitrations under the ICC Rules, the Swiss rules, the NAI (Netherlands Arbitration Institute), the Arbitration Institute for the construction industry and ad hoc arbitration. Natalie is member of the board and president-elect of the Dutch Arbitration Association.

Natalie is known in the market for her practical approach and is mentioned as a leading individual in reference guides such as Chambers Legal, Legal 500 and Who’s Who.
Joyce Wang
Carlson Calladine

Joyce C. Wang is a founding partner of Carlson, Calladine & Peterson LLP and a nationally recognized litigator in the area of insurance coverage and bad faith. For over 25 years, she has represented national and international property and casualty insurers and reinsurers, as well as policyholders in complex commercial property and casualty insurance disputes. She is the head of the firm’s cyber coverage practice and is admitted in California and Hawaii.

Ms. Wang’s experience includes cases arising from catastrophes such as September 11, Hurricane Katrina, and the Honshu Tsunami, as well as large industrial and energy losses, cyber attacks and fraud. She has successfully obtained summary judgment upholding denial of coverage under a CGL policy on the grounds the conduct alleged was not an “accident” under California law. Her effective advocacy and professionalism enable her to successfully resolve many disputes before trial by way of dispositive motions. Through her extensive knowledge of insurance policies, case law, insurance regulations and statutes she has earned a national reputation in the field.

Ms. Wang was instrumental in the 9th Circuit appeal in Northrop Grumman Corp. v. Factory Mutual Insurance Co., resulting in a ruling that the Policy’s Flood exclusion clearly and unambiguously applied to hurricane storm surge. She subsequently obtained summary judgment on the bad faith, misrepresentation and fraud causes of action on the grounds that Factory Mutual’s position was reasonable as a matter of law.

Ms. Wang is a past chair of the Property Insurance Law Committee (ABA) and an active member of the Federation of Defense and Corporate Counsel and the American College of Coverage and Extracontractual Counsel. She is a frequent panelist on insurance and bad faith law both here and abroad. California Lawyer Magazine voted her one of the 25 most influential lawyers in California after she argued before the California Supreme Court on behalf of a class of children affected by lead poisoning. She has been selected as a Northern California Super Lawyer every year since it began in San Francisco in 2004. Ms. Wang was recognized by San Francisco Magazine in 2012 as a Top Woman Attorney in Northern California, and by Fortune Magazine in 2013 as a Woman Leader in the Law.

Ms. Wang is admitted to all California State Courts, the U.S. District Court (Northern, Central and Eastern Districts of California) and the Ninth Circuit Court of Appeals.
Chris Warren-Smith
Morgan, Lewis & Bockius LLP

Chris Warren-Smith advises on commercial and international dispute resolution, regulatory enforcement proceedings and corporate investigations across all sectors. He advises clients on a broad range of compliance and regulatory issues including corruption, financial crime and fraud. Chris practises in the financial services and professional indemnity fields, representing major financial and professional organisations and insurers in connection with civil and regulatory proceedings. He has a strong banking and financial services practice through extensive experience representing financial institutions across all business lines.

Chris acts for financial institutions, corporations, professionals and insurers in all forms of mainstream and alternative dispute resolution and regulatory and professional investigations. His experience covers heavyweight litigation, arbitration and judicial review proceedings but also issues arising with a diverse range of bodies ranging from the Treasury Select Committee to the Financial Ombudsman Service. His experience of investigations ranges from the Financial Conduct Authority (“FCA”) and Lloyd's of London proceedings in the UK to those of foreign regulators such as the US Department of Justice and the SEC, and includes regulators and professional bodies in many other jurisdictions throughout the world. He has particular experience in both group actions and litigation funded disputes.
Laurent Wehrli
Mayor of Montreux
[information compiled from his website; not sure how current it is]

Prior to becoming Mayor of Montreux, Laurent Wehrli received his Bachelor Letters (MA) from the University of Lausanne (1982-1987). He was a journalist by profession from 1988-1990. He served as the editor of an economic monthly magazine from 1990-1992 and then Secretary-General of the Vaud Department for Education from 1992-1993, and he managed cross-border and European Affairs of the Canton of Vaud from 1992-2002. He became Mayor of the City of Montreux on July 1, 2011, where he is responsible for economy, culture and tourism.

Notably, Mayor Wehrli is also a Member of Parliament (since 2002), former president of the Grand Council of the Canton of Vaud (2013-2014), former Vice President of the Management Board (2002-2012) and Chairman of the Foreign Affairs Committee (2008-2013).

Mayor Wehrli lives Glion, he is a married father of five and is grandfather to two grandchildren. His hobbies include photography and skiing.
Sheryl Willert
Williams, Kastner & Gibbs, PLLC

Sheryl Willert is a member in Williams, Kastner & Gibbs’s Seattle office and served as the firm’s Managing Director from 1996-2001 and again from 2006-2013. Ms. Willert continues to serve the firm on its Board of Directors and chairs the firm’s Diversity Committee.

Ms. Willert concentrates her legal practice on counseling, investigations and dispute resolution. She has broad experience in all aspects of employment law for unionized and nonunionized employers in both the public and private sectors. A nationally recognized speaker and author on such topics as employment discrimination, implicit bias, compliance and privacy matters, Ms. Willert has been “AV Preeminent”- the highest peer-review rating available, for over 25 years. She has worked locally with various organizations and individuals on a wide range of legal issues.

Ms. Willert is a past president of DRI-The Voice of the Defense Bar, the nation’s largest association of civil defense attorneys with more than 22,000 members. She has the distinction of being both the first female and the first African-American to serve as an officer of the DRI.

Ms. Willert is also a member of the American Bar Association, the National Bar Association, the American College of Trial Lawyers and the Litigation Counsel of America. She serves on the advisory board for the National Employment Law Institute (NELI) and is on the board of directors of the USLAW Network.
Marc Young
Cokinos Young

Marc Young is a co-founder of Cokinos Young and is at the helm of our newest office in Austin. Marc handles a wide variety of claims, such as product liability, construction defects, premises liability, commercial disputes and trucking accidents. Marc is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and has tried well over 100 cases in both state and federal courts. He continues to try a significant number of cases each year.

Marc is knowledgeable and well-versed in matters relating to products liability, trucking and transportation law, including many lawsuits involving death or other serious injuries. Marc heads up the firm’s Tort Litigation Section, which deals primarily with the defense of corporations and individuals sued for claims involving personal injury and property damage. Marc also remains active within the defense bar by writing, speaking and chairing important committees and subcommittees.