DRAFTING INDEMNITIES
(and Their Relationship to Insurance)

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LAW RELATED PUBLICATIONS:

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DRAFTING INDEMNITIES

I. INTRODUCTION

A. Allocation of Risks

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." Every provision of a contract is either restating the rule that would be supplied by the court in the absence of the provision or is expressly shifting a risk from one party to the other. The most common contractual methods by which risk is allocated or shifted are by the use of representations and warranties, insurance covenants,[1] and express assumption of liabilities, which can take the shape of indemnity,[2] exculpation,[3] release[4] and limitation of liability provisions.

B. Allocation of Extraordinary Risks

Each contracting party's risk-related goals are to accept no more risk than it can reasonably bear or insure or is willing to accept, and to transfer the balance of the risk to the other party. The following factors are involved in the ultimate determination as to how much risk a party receives or transfers:

- which party is in the best position to control the extent of the occurrence of the risk?
- does one party have specialized knowledge of the type of risks most likely to occur and how to prevent or identify them?
- custom and practice in the particular industry (for example, sellers to buyers; landlords to tenants; owners to contractors; contractors to sub-contractors).
- the bargaining strength of the respective parties.
- statutory and common law public policies.

C. Relationship of Insurance to Contractual Indemnity

Following the discussion of contractual indemnity, this Article will examine how liability insurance can be used to protect an indemnifying party, an indemnitor ("**Indemnifying Party**") for contractually assumed liabilities and to protect an indemnified party, an indemnitee ("**Indemnified Party**") as an additional insured on the Indemnifying Party's liability insurance. Generally, the Indemnifying Party is required by the Indemnified Party to carry liability insurance, such as commercial general liability insurance ("**CGL**") and business auto liability insurance ("**BAP**"), insuring the Indemnified Party as an additional insured ("**Additional Insured**") on the indemnifying party's liability policy ("**Named Insured**"), and workers compensation insurance insuring the Indemnifying Party for injuries to the Indemnifying Party's employees ("**Workers Comp**"). See discussion below of the attached ISO Additional Insured endorsement forms.[5]

In this Article the party that is the Indemnifying Party or the Named Insured, or being both, is referred to as the "**Protecting Party**" and the party that is the Indemnified Party or the Additional Insured, or being both, is referred to as the "**Protected Party**." The contract between the Protecting Party and the Protected Party (*e.g.*, lease, construction contract) that includes the indemnity and insurance specifications to be met by the Protecting Party is referred to as the "**Insured Contract**". See the discussion below of the ISO definition of "Insured Contract" and the attached ISO Commercial General Liability Coverage Form setting out the industry's standard language providing insurance protection and the extent of insurance protection to the Protecting Party for its indemnity in an Insured Contract.

D. Indemnity Absent Contractual Indemnity

Early English and American courts refused to adjust the financial burdens between defendants who were regarded by the court as being equally blame worthy. Therefore, joint tortfeasors who were in "***pari delicto***" had no rights to contribution at common law from other joint tortfeasors, each tortfeasor being jointly and severally liable. However, courts held that they had the power in equity to aid a tortfeasor who was relatively blameless by granting indemnity ("**common law indemnity**"). Prior to 1980, Texas courts viewed the availability of common law indemnity between jointly liable defendants

based on whether: (1) the court viewed the defendants as being equally at fault (*i.e.*, in pari delicto) or (2) the defendants were not equally at fault (not in pari delicto) with common law indemnity being allowed on a case-by-case basis ("an all or nothing approach to indemnification"). Courts envisioned two torts: one tort committed by the defendants against the plaintiff, the second committed by one of the defendants against the other, which gave rise to court-made indemnity.

Prior to the enactment in **1987** of the current scheme of **Comparative Responsibility and Apportionment**, the legislature enacted statutes in 1917 and 1973 establishing rights of contribution between certain jointly liable tortfeasors. In 1917 Texas enacted its first statutory contribution scheme for tort actions, which survives today in Chapter 32 of the Texas Civil Practice and Remedies Code (the "**1917 Statute**" and as amended "**Chapter 32**").[6] In 1973, Texas adopted a comparative negligence statute that also governed contribution in pure negligence cases. Later enactments and amendments extend the comparative responsibility scheme, including contribution claims, to virtually all tort actions (the "**1973 Statute**" and as amended "**Chapter 33**").[7]

In **1980** the Texas Supreme Court in *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980) held that there could not be common law indemnity due to the adoption of the Comparative Negligence and Contribution Statute in 1973. Texas courts have held that Texas' comparative negligence statutes abolished the common-law doctrine of indemnity between negligent tortfeasores.[8]

In **1984** the Texas Supreme Court felt compelled, due to continued inaction of the Texas legislature, to enact by judicial fiat in *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414 (Tex. 1984) its own comparative and contribution scheme to compare the fault or causation of defendants where one or more of the defendants were held liable on theories of negligence, strict liability and breach of contact.

In **1987**, the Texas legislature enacted "**tort reform**" amendments to the Civil Practice and Remedies Code (the "**1987 Statute**"), the genesis of today's Comparative Responsibility and Apportionment legislative risk allocation scheme. The common law principle of joint and several liability for the damages resulting from an "indivisible wrong or tort" was replaced under the 1987 Statute with the "tort reform" concept that a defendant is generally liable

> only for the percentage of the damages found by the trier of fact equal to that defendant's **percentage of responsibility** with respect to the personal injury, property damage, death, or other harm for which the damages are allowed. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a).

Again, in **1995** the Texas legislature enacted further significant "tort reform" amendments to Chapter 33 of the Civil Practice & Remedies Code (the "**1995 Statute**").

The only remaining vestige of common law indemnity involves liability of a purely vicarious nature.[9] An example of pure vicarious liability is a case where an employer, without independent fault, is held responsible for the torts of its employees that were committed within the scope of their employment. Under this circumstance, the employer has a right to bring an action against an employee to recover the full amount of damages that the employer paid as a result of the employee's conduct. *South Austin Drive-In Theatre v. Thompson*, 421 S.W.2d 933, 348 (Tex. Civ. App. – Austin 1967, *writ ref'd n.r.e.*).

II. DRAFTING INDEMNITIES

A. Distinguished from Guaranty and Suretyship

Both guaranty and surety agreements are collateral undertakings dependent upon the existence of another contract or transaction. In *Pham v. Mongiello,* 58 S.W.3d 284 (Tex. App. - Austin [3rd Dist.] 2001, *no writ*), the court found that rules governing guarantees should be analogous to rules governing indemnity agreements; a guaranty of a tenant's obligations should clearly set out what possible charges could be incurred by the tenant, for example, charges arising out of a tenant's negligence. Indemnification is an original undertaking between the Protecting Party and the Protected Party.

B. Elements of an Indemnity

An indemnity is comprised of the following elements:

1. The obligation to "indemnify" and defend.

2. The "indemnitors" (referred to in this Article as the "**Protecting Party**"),

3. The "indemnitees" (the referred to in this Article as the "**Protected Party**"),

4. The events, acts or omissions triggering Indemnified Liabilities (the "**Indemnified Matters**"),

5. The liabilities indemnified (the "**Indemnified Liabilities**"), and

6. Any excluded matters or excluded liabilities (the "**Excluded Liabilities**").

1. To Defend and to Indemnify

a. Duty to Indemnify

An "**indemnity**" is, "I agree to be liable for your wrongs." Indemnity is a shifting of the risk of a loss from a liable person to another. The risk of loss may be contractual or tortious. Many times scriveners use an indemnity provision when they do not know whether the Protected Party is a potentially liable person. Sometimes, an indemnity provision is no more than a restatement of existing duties, "I will indemnify you for my wrongs;" "You will indemnify me for your wrongs." Indemnity agreements are strictly construed in favor of the Protecting Party. However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing. 14 TEX. JUR. 3d Contribution and Indemnification § 14 Form; 26 TEX. JUR. 2d Statute of Frauds § 29.

A defining characteristic of an indemnity agreement is that it "does not apply to claims between the parties to the agreement." *Wallerstein v. Spirt*, 8 S.W.3d 774, 780 (Tex. App. – Austin 1999, no pet.). The Texas Supreme Court in *Dresser Indus., Inc. v. Page Petroleum, Inc.* 821 S.W.2d 359, 362 - 363 (Tex. App. - Waco 1991), *rev'd in part, aff'd in part*, S.W.2d (Tex. 1993):

> [A] contract of indemnity does not relate to liability claims between the parties to the agreement but, of necessity, obligates the indemnitor to protect the indemnitee against liability claims of persons not a party to the agreement.

In *National City Mortgage Co. v. Adams,* 310 S.W. 3d 139 (Tex. App. - Ft. Worth 2010, *no pet.*) the court rejected a lender's argument that it was entitled to be "indemnified" by the borrower for attorney's fees the lender incurred in defending itself in a suit brought by the borrower alleging that the lender had wrongfully paid a draw submitted by the borrower's home contractor. The loan agreement contained the following typical attorney's fee paragraph:

> That Lender will be reimbursed for all expenses of any kind, including without limitation attorney's fees, that may be incurred by Lender in connection with or arising out of this agreement ...
>
> BORROWER AGREES THAT LENDER AND ITS AGENTS AND ATTORNEYS WILL BE INDEMNIFIED AND HELD HARMLESS FROM ANY AND ALL ACTIONS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND OTHER LIABILITIES, INCLUDING WITHOUT LIMITATION ATTORNEY'S FEES, THAT ANY SUCH PARTIES MAY INCUR OR THAT IN ANY WAY RELATE TO OR ARISE OUT OF THE CONSTRUCTION OF THE IMPROVEMENTS, INCLUDING WITHOUT LIMITATION THOSE ARISING OUT OF THE NEGLIGENCE OF LENDER.

The duty to indemnify does not necessarily include a duty to defend. *D. R. Horton-Texas, Ltd. V. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 773, 781 (Tex. App. – Hou. [14th Dist.] 2006), *order withdrawn and judgment aff'd in part, rev'd in part*, 300 S.W.3d 740, 741-745 (Tex. 2009) (noting distinction between duty to defend and duty to indemnify); *Crimson Exploration, Inc. v. Intermarket Management, LLC*, 341 S.W.3d 432, 441 (Tex. App. – Hou. [1st Dist.] 2010).

See in discussion below of Indemnified Matters, the distinction between an "**indemnity against liability**" and an "**indemnity against damages**".

b. Duty to Defend

There is a distinction between the **duty to defend** and the **duty to indemnify**. Indemnification will not ordinarily arise until the Protected Party has been found liable. The duty to defend arises prior to a determination of liability, and is, therefore suitable to a declaratory judgment action. This distinction has played out many times in insured's demanding defense from its insurers. For example, the following insurance cases: *D. R. Horton-Texas, Ltd. V. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 773, 781 (Tex. App. – Hou. [14th Dist.] 2006), *order withdrawn and judgment aff'd in part, rev'd in part*, 300 S.W.3d 740 (Tex. 2009) (noting distinction between duty to defend and duty to indemnify); *English v. BGP Intern., Inc.*, 174 S.W.3d 366, 371 (Tex. App. – Hou [14th Dist.] 2005); *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997); *Lancer Ins. Co. v. Perez,* 308 S.W.3d 35, 40 (Tex. App. – San Antonio 2009), *judgment rev'd*, 345 S.W.3d 50 (Tex. 2011).

The duty to defend can arise in a situation where a Protected Party is sued on various theories, some of which will trigger indemnification while others may not. *English v. BGP Intern., Inc.*, 174 S.W.3d 366, 371 (Tex. App. – Hou [14th Dist.] 2005)

In *Farmers Texas Mutual County Insurance v. Griffin*, 955 S.W.2d 8, 821 (Tex. 1997), the court addressed the separate duty of an insurer to defend its insured and explained

> [a]n insurer's duty to defend and duty to indemnify are distinct and separate duties. Thus, an insurer may have a duty to defend but, eventually, no duty to indemnify."

The court gave an example of how the duties may diverge,

> a plaintiff pleading both negligent and intentional conduct may trigger an insurer's duty to defend, but a finding that the insured acted intentionally and not negligently (i.e., not within the policy's coverage) may negate the insurer's duty to indemnify.

See also *Reser v. State Farm & Fire Casualty Co.*, 981 S.W.2d 260, 263 (Tex. App.–San Antonio 1998, no pet.) noting that the duty to defend is unaffected by the ultimate outcome of the case. See also *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118 (Tex. App. – Hou. [1st Dist.] 2003, *pet denied*); *E & L Chipping Co.*, 962 S.W.2d 272, 274 (Tex. App. – Beaumont 1998, *no pet*.) - if the pleadings do not allege facts that trigger the indemnity, the Protecting Party is not required to defend the Protected Party; *Tesoro* at 125. The "duty to defend" cases have primarily arisen in construing an insurer's duty as opposed to the duty of an Protecting Party. However, the authority of insurance cases has been recognized as being relevant in interpreting the duties of Protecting Parties. *English v. BGP Intern, Inc.*, 174 S.W.3d 366 (Tex. App.–Hou. [14th Dist.] 2005, *no pet. h.*) at fn. 6:

> We recognize that most of the cases addressing this issue, and many of the cases we have cited, involve the duty to defend in the insurance context. However, we find little reason why the principles regarding an insurer's duty to defend should not apply with equal force to an indemnitor's contractual promise to defend its indemnity. .... Based on our interpretation of this provision, it appears BGP agreed to both defend and indemnify English in suits arising from BGP's operations when those operations began before 100 percent of the landowners had consented. Giving reasonable effect to every word used in the contract, and understanding the separate and distinct nature of the two duties, we hold that BGP agreed to defend English-separate and apart from its duty to indemnify-from suits falling within the terms outlined in the contract.

Fisk Electric Co. v. Constructors & Assoc., Inc., 888 S.W.2d 813, 815 (Tex. 1994) stating "[T]he standard for determining whether a contractual indemnitor has a duty to defense is the same as in cases involving an insurer's duty." See generally *Gen. Motors Corp. v. Am. Ecology Envtl. Svcs. Corp.*, 2001 WL 1029519, at 6-8 (N.D. Tex 2001) which applied the same principles regarding the duty of an insurer to defend in the insurance context to the duty of a Protecting Party who has contractually agreed to defend its Protected Party.

2. Protecting Party

a. Common Law Right of Contribution Among Contracting Protecting Parties

When two persons separately indemnify a third party, then as between themselves, each is liable for only half. *Hobbs v. Teledyne Movible Offshore, Inc.*, 632 F.2d 1238, 1241 (5th Cir. Unit A 1980) applying Louisiana law.

This doctrine was recently applied in *Energy Service Co. v. Superior Snubbing Services, Inc*., 236 S.W.3d 190, 194-196 (Tex. 2007). The Texas Supreme Court held that the amendments to the Texas Labor Code did not prevent a Protecting Party from being a third-party beneficiary of another Protecting Party's indemnity thus permitting a settling Protecting Party to obtain indemnification from the other Protecting Party even though there was no privity of contract between them. In *Energy Service*, two contractors worked for an energy company; the two contractors had no contracts with one another, but both had executed contracts with indemnification provisions with the company. The employee of one contractor was injured. When the employee sued, the contractor-employer sought indemnification from the other contractor, claiming to be a third party beneficiary of the indemnification provision between the company and the other contractor.

b. Indemnification by a Protecting Party of Another Protecting Party

The court in *Campbell v. Sonat Offshore Drilling, Inc.*, 27 F.3d 185 (5th Cir. 1994) rejected the argument of Frank's Casing Crews and Rental Tools that it could obtain contribution from Union Texas Petroleum in a case where both Frank's and Union had indemnity agreements naming a liable third party (Sonat Offshore Drilling) as a Protected Party. In an earlier case, *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992) ("***Campbell I***") the court found that Frank was obligated to indemnify Sonat Offshore Drilling for an injury sustained by Frank's employee (Campbell). These cases involved injuries sustained by Campbell, an employee of Frank's Casing Crews and Rental Tools, who was injured while transferring onto the jack-up drilling vessel owned by Sonat Offshore Drilling. Union Texas Petroleum had chartered Sonat's vessel and had agreed to indemnify Sonat for such injuries (the UTP/Sonat Contract). Frank's had agreed to indemnify Union Texas Petroleum and Sonat against liability for injuries to Frank's employees in its contract with UTP (the UTP/Frank's Contract).

In this second case ("***Campbell II***") Frank was attempting to share its liability with Union Texas Petroleum since both Frank and Union Texas Petroleum had indemnified Sonat for injuries to Frank's employees. The court in *Campbell II* found, however, that Frank's indemnity, which was contained in its contract with Union Texas Petroleum, expressly provided that Frank indemnified *both* Sonat and Union Texas Petroleum for injuries to Frank's employee. Union Texas Petroleum did not have to make contribution despite its separate indemnity undertaking in the contract between Union Texas Petroleum and Sonat.

Also see Foreman v. Exxon Corp., 770 F.2d 490, 498 n. 13 (5th Cir. 1985) and *Corbitt v. Diamond M. Drilling Co.,* 654 F.2d 329 (5th Cir. Unit A 1981).

c. Example of Not Being a Protecting Party

In *Jones v. San Angelo Nat. Bank*, 518 S.W.2d 622 (Tex. Civ. App. - Beaumont 1974, *writ ref'd n.r.e.*) the court found that a corporation was not a Protecting Party and refused to require the corporation to make contribution to a shareholder for one half the amount paid by such shareholder to the other shareholder in connection with the paying shareholder's satisfaction of a debt of the corporation pursuant to a corporate dissolution agreement.

3. Protected Party

a. Direct Beneficiaries

(1) Primary Protected Party

Indemnification clauses typically name a primary party and secondary persons, some not even parties to the Insured Contract, as being a Protected Party. For example, an owner may be named as the primary Protected Party in a construction contract requiring the contractor to indemnify the owner for liabilities arising out of the contractor's construction activities.

(2) Secondary Protected Parties

In addition to naming the owner as the primary Protected Party, the owner may also require that the scope of the indemnity include liabilities of other persons by listing them as "additional" protected parties. An example of multiple protected parties is the following provision.

Insured Contract Provision:

> "**Protected Party**" shall include (a) the Owner, the Owner's partners, affiliated companies of Owner or of any partner of Owner, (b) Owner's construction lender, (c) the **Architect**, and (d) as to each of the persons listed in (a)-(c) the following persons: each of such person's respective partners, partners of their partners, and any successors, assigns, heirs, personal representatives, devisees, agents, stockholders, officers, directors, employees, and affiliates of any of the persons listed in this clause.

A similar provision protective of an architect was reviewed in *Foster, Henry, Henry & Thorpe, Inc. v. J. T. Const. Co., Inc.*, 808 S.W.2d 130 (Tex. App. – El Paso 1991, *writ denied*). The court held that an architectural firm was entitled to be indemnified for costs incurred in defending a suit by a property owner for damage resulting from work performed by a contractor in accordance with plans prepared by the architect. The jury found that (a) the contractor was 90% negligent in failing to protect the construction site — resulting in damage to an adjacent property during a substantial rainfall — and (b) the architectural firm was free from fault. The language of the indemnity provision in the owner/contractor agreement stated that the contractor was to indemnify the owner and architect for losses, including attorneys' fees, resulting from the contractor's negligence. This language is similar to the AIA indemnity language.

Insured Contract Provision:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the **Architect** and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to ... injury to or destruction of tangible property ... and (2) is caused in whole or in part by any negligent act or omission of the Contractor ... regardless of whether or not it is caused in part by a party indemnified hereunder.

Other examples of contractual enlargements of direct beneficiaries of an indemnity are **additional insured endorsements** to liability policies and **dual obligee riders** on performance bonds.

The importance of specifically designating in the indemnity clause all of the persons intended to be Protected Parties is emphasized by *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907 (Tex. App. - Amarillo 1997, *no writ*) where the court found that a **consultant** was **not** a Protected Party within the listing of Protected Parties in a indemnity covering the

Insured Contract Provision:

> Operator, its officers, directors, employees and joint owners.

Other provisions of the IADC Drilling Bid Proposal and Daywork Drilling Contract specifically listed "consultants". For example, the provision defining "daywork" stated that

> For purposes hereof the term "daywork" means .... under the direction, supervision and control of Operator (which term is deemed to include an employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations).

Questions concerning the context of "who" and "when" should be resolved. For instance, assume an indemnity provision generally refers to a company's "**officers and directors**" as Protected Parties.

Question: What would happen if a claim were to be made against a party who, at the time the indemnification provision was signed, was an officer or director, but was not an officer or director at the time the claims were made?

To avoid issues of ambiguity, it should be made clear whether the Protected Parties covered are intended to be

Insured Contract Provision:

> all past, present, and future officers and directors

or a variation thereof that defines the scope of the Parties Protected.

b. Third Party and Incidental Beneficiaries

(1) Bonds

Indemnity bonds usually are construed as contracts of indemnity not creating third party beneficiary rights to sue on the bond protecting indemnitee of bond. *Fidelity & Deposit Co. of Maryland v. Reed*, 108 S.W.2d 939 (Tex. Civ. App. - San Antonio 1937, *no writ*); 10 TEX. JUR. 3d, Bonds and Undertakings.

(2) Creditors

It has been held that creditors of the seller of a business are not third party beneficiaries of an "all bills paid" indemnity contained in a contract for the sale of a business so as to revive a claim otherwise barred by the statute of limitations. *House of Falcon, Inc. v. Gonzalez*, 583 S.W.2d 902 (Tex. Civ. App. - Corpus Christi 1979, *no writ*). A creditor of a Protected Party has been held to be merely an incidental beneficiary of an indemnity agreement and does not have the right to bring suit directly against the Protecting Party. *Hurley v. Lano International, Inc.*, 569 S.W.2d 602 (Tex. Civ. App. - Texarkana 1978, *writ ref'd n.r.e.*).

4. <u>Indemnified Matters</u>

a. Causation Triggers to Indemnity

The concept of causation has been addressed by authors of indemnity provisions using a variety of terminology, such as "**due to**", "**caused by**," "**arising out of**," and "**in connection with**".

(1) "Due To"

The phrase "**due to**" has been held to require "a more direct type of causation" than the phrase "arising out of." The Texas Supreme Court in *Utica National Ins. Co. of Texas v. American Indemnity Co.*, 141 S.W.3d 198 (Tex. 2004) held that arising out of" does not require direct or proximate causation, while the phrase "due to" requires a more direct type of causation.

(2) "Caused By"

McDaniel v. Anheuser-Busch, Inc., 987 F.2d 298 (5th Cir. 1993) holding the indemnitor was not obligated to defend the indemnitee against all claims and suits, or for costs incurred in defense of baseless claims, since the indemnity clause required only that the indemnitor indemnify for injuries "**caused by**" acts or omissions of the indemnitee.

The Beaumont Court of Appeals, in *Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App. - Beaumont 1995, *writ denied*), upheld the following provision as covering injuries to an employer's employees caused by the sole negligence of the Protected Party (premises owner) even though injuries to the contractor/employer's employees was not specifically mentioned, and the indemnity provision was worded in terms of injuries "caused by the (contractor/employer)" (the Protecting Party) and did not expressly mention that it covered injuries "caused by" the Protected Party.

Insured Contract Provision:

> By signing the below statement, the seller (meaning Faulk Management as the "seller" of janitorial services) (the **Protecting Party**) agrees to ... indemnify ... Lufkin Industries, Inc. against loss ... **caused by the Seller**, its employees, agents or any subcontractor arising out of or in consequence of the performance of this contract.
>
> It is the intention of the Seller and/or Contractor to indemnify Lufkin Industries, Inc. even in the event that any such claims, demands, actions or liability arises in whole or in part from warranties, express or implied, defects in materials, workmanship or design, condition of property or its premises and/or **negligence of Lufkin Industries, Inc.** or any other fault claims as a basis of liability for Lufkin

Industries, Inc.

(Author inserted **bold** and identification of acts of the Protecting Party as the cause of the Indemnified Liability.)

(3) "Arising Out Of"

The phrase "**arising out of**" has been construed broadly in insurance policy coverage cases. In *General Agents v. Arredondo*, 52 S.W.3d 762 (Tex. App. - San Antonio [4th Dist.] 2001, *no writ*) the court broadly construed "*injuries **arising out of** a contractor's and subcontractor's operations*" contained in a contractor's commercial general liability policy as not being limited to injuries caused by an act of the contractor or subcontractor. The court found that "all that is required is a '**causal connection**.'" The court cited the following authorities for this conclusion:

> *Cf. Midcentury Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 57 (Tex. 1999) ("For liability to "arise out of" in the context of an "additional insured" endorsement does not require that named insured's act caused accident.") Indeed, in more recent cases, the Fifth Circuit has recognized that the phrase "arising out of" is "understood to mean "originating from," "having its origin in," "growing out of," or "flowing from." *American States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998)(quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951)). Thus, a "claim need only bear an "**incidental relationship**" to the excluded injury for the policy's exclusion to apply." *Bailey*, 13 F.3d at 370 (quoting *Continental Cas. Co. v. Richmond*, 763 F.2d 1076, 1080 81 (9th Cir. 1985).

The court in *Sieber & Callicutt, Inc. v. La Gloria*, 66 S.W.3d. 340 (Tex. App. – Tyler 2001, *no writ*) found, in a case where the negligence of the Protected Party (La Gloria) and the negligence of the Protecting Party (Sieber & Callicutt) was determined to be equal, that the negligence of the Protecting Party was a "**substantial factor"** and "**a proximate cause**" of the liability although not the only factor in causing the Indemnified Liability (liability to the estate of a deceased employee of the Protected Party, La Gloria). La Gloria settled the wrongful death action and sued Sieber & Callicutt on Sieber & Callicutt's indemnity in its maintenance contract with La Gloria. The trial court found that there was a reasonable risk that La Gloria would have been found grossly negligent (the man-way cover was in extreme disrepair), Sieber & Callicutt also was negligent (by running a hot water line into the tank and not advising La Gloria), and La Gloria and Sieber were equally negligent. The Protecting Party (Sieber & Callicutt) urged the court to find that the "**arising in any manner**" language in the indemnity did not "provide a lower causal connection than proximate cause" and thus it should not be required to indemnify La Gloria, even for Sieber's proportion of causation. The court rejected Sieber's argument noting that the trial court found that Sieber was negligent and that a component of negligence is proximate cause. Since the indemnity provision expressly provided for Sieber to indemnify La Gloria for Sieber's proportionate share of liability, Sieber was liable to La Gloria for one-half of the settlement.

Insured Contract Provision:

CONTRACTOR agrees to hold harmless and unconditionally indemnify LA GLORIA its directors, officers, agents, representatives and employees against and for all liability, costs and expenses, claims and damages which LA GLORIA at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons or property or both, of CONTRACTOR, its subcontractors and suppliers, or to the persons or property of LA GLORIA, its subcontractors and suppliers, **arising in any manner** from the Work performed hereunder, including but not limited to any negligent act or omission of LA GLORIA, its directors, officers, agents, representatives or employees, provided however, that if the negligence of LA GLORIA shall be found to be greater than or equal to the comparative negligence of the CONTRACTOR, then the CONTRACTOR shall only be liable to LA GLORIA to the extent of the CONTRACTOR'S own negligence.

(4) "In Connection With"

Indemnified Liabilities may be contractually limited to such injuries occurring "**in connection**

with" the work being performed by the Protecting Party. If the indemnity is so limited, then it might be held not to cover the negligent acts of the Protected Party that are unrelated to the performance of the scope of the work by the Protecting Party. *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64, 70 71 (Tex. App. — Tyler 1978, *writ ref'd n.r.e.*); *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806, 832 (Tex. App. — Ft. Worth 1961, *writ ref'd*); and *Martin Wright Electric Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied*, 397 U.S. 1022 (1970). The court in *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex. Civ. App. — Ft. Worth 1961, *writ ref'd*) found that the indemnity agreement of a subcontractor did not include injuries to the subcontractor's employees who had been injured through the negligence of employees of the contractor engaged in work unrelated to the subcontract. However, this result might also be explained as being an attempt by pre-*Ethyl* courts to limit indemnity agreements with the "clear and unequivocal" test. See *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 479 (5th Cir. 1993). In another case, the court held that the subcontractor's indemnity did not extend to the death of the subcontractor's employee caused by the negligent acts of the contractor's employees. *Brown & Root, Inc. v. Service Painting Co.*, 437 S.W.2d 630 (Tex. Civ. App. — Beaumont 1969, *writ ref'd*). The death of the employee of the subcontractor did not "occur in connection with" the subcontracted work, notwithstanding the fact that the employee was engaged in sublet work at the time of the employee's death. The work being performed by the employee of the general contractor was not connected to the work being performed by the employee of the subcontractor. The Brown & Root indemnity clause reads:

Insured Contract Provision:

> Subcontractor agrees to indemnify and to save General Contractor ... harmless from and against all claims ... which may be caused or alleged to have been caused in whole or in part by, or which may occur or be alleged to have occurred **in connection with**, the performance of the Sublet Work.

See also *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex. Civ. App. — Ft. Worth 1961, *writ ref'd*); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963); *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963); and *Alamo Lumber Co. v. Warren*, 316 F.2d 287 (5th Cir. 1963). In *Sun Oil Co. v. Renshaw Well Service, Inc.*, 571 S.W.2d 64 (Tex. Civ. App. — Tyler 1978, *writ ref'd n.r.e.*), the court found that the Protected Party was not entitled to indemnification against injury to a worker injured while driving from the work site after completion of the work. In *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied* 397 U.S. 1022 (1970), the court refused to extend the subcontractor's indemnity to include the death of a subcontractor's employee killed while leaving work after putting his tools away where the death was caused solely by the contractor's negligence.

b. Injuries

(a) "Injuries"

The failure of the indemnity provision to specifically cover "**personal injuries**" was held to be fatal, even though the indemnity provision otherwise would meet the express negligence test, in *Ard v. Gemini Exploration Co.*, 894 S.W.2d 11 (Tex. Civ. App. – Hou. [14th Dist.] 1994, *writ denied*).

(b) Injuries To Employee of Protected Party

In one case, an indemnity provision in a lease whereby the lessee undertook to indemnify the lessor against liabilities arising out of injuries to "**persons whomsoever**" has been construed rather broadly by a court to include the employees of the lessor. *Gulf, C. & S. F. R. Co. v. McBride*, 309 S.W.2d 846, *rev'd on other grounds*, 322 S.W.2d 492 (Tex. 1958). Also see *Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App. - Beaumont 1995, *writ denied*).

(c) Injuries To Protecting Party

An indemnity provision whereby a contractor indemnified a railroad against liability for injuries to the contractor's agents and employees, but did not mention injuries to the contractor, did not indemnify against injuries to the contractor. The Indemnified Liabilities did not include injuries to the Protecting Party, the contractor.

International G.N.R. Co. v. Lucas, 70 S.W.2d 226 (Tex. Civ. App. - Texarkana 1934), *rev'd on other grounds* 99 S.W.2d 297 (Tex. Comm. 1936), later app, 123 S.W.2d 760 (Tex. Civ. App. - Eastland 1938, *writ ref'd*), *cert. denied* 308 U.S. 573 (1939),*aff'd in part and rev'd in part on other grounds* 100 S.W.2d 97 (Tex. Comm. 1937).

(d) Injuries To Employee of Protecting Party

The Texas Supreme Court in *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990) construed the following reference to "**death to persons**" to be specific enough to overcome the Workers' Compensation Bar in holding that an employer had contractually assumed liability to indemnify a third party (Enserch) for liabilities arising out of the concurrent negligence of the third party (the third party's negligent supervision of the employer's work):

Insured Contract Provision:

> (Christie) assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including **death to persons** ... incidental to the performance of this contract by (Christie)....

The supreme court found that this language was sufficient to refer to employees of the Protecting Party (Christie) and therefore met the requirements of the Texas Workers' Compensation Act that permits "an express agreement in writing assuming liability" by an employer for injuries to its employees. The court cited with approval the court of appeals' decision in *Verson Allsteel Press Co. v. Carrier Corp.*, 718 S.W.2d 300 (Tex. App. - Tyler 1985, *writ ref'd n.r.e.*) which held the following similar language sufficient to overcome the Workers' Compensation Bar:

Insured Contract Provision:

> (Carrier) ... covenants to indemnify and hold harmless Verson ... from and against any and all loss, damage, expense, claims, suits or liability which Verson or any of its employees may sustain or incur ... for or by reason of any injury to or death of **any person or persons** or damage to any property, arising out of ... any claimed inadequate or insufficient safeguards or safety devices. *Id.* at 301.
>
> (Court's emphasis.)

The supreme court in *Enserch* distinguished the following provision in *Port Royal Dev. v. Braselton Constr. Co.*, 716 S.W.2d 630, 632 (Tex. App. - Corpus Christi 1986, *writ ref'd n.r.e.*) on the grounds that the language expressly stated that the Protecting Party would not indemnify the Protecting Party for the Protecting Party's own negligence:

Insured Contract Provision - Exclusion:

> The subcontractor agreed to indemnify the contractor from liability for or on account of injury to or death of person or persons ... occurring by reason of or arising out of the act or (negligence) of **Subcontractor ... except the act or (negligence) of the Contractor** in connection with performance of this Contract.
>
> (Emphasis added by Enserch court.)

The Indemnified Liabilities did not include injuries to an employee of the Protecting Party due to the negligence of the Protecting Party.

In *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200, 210 (Tex. Civ. App. – Hou. 1959), *rev'd on other grounds*, 325 S.W.2d 126 (Tex. 1959), and *vacated on other grounds* 326 S.W.2d 915 (Tex. Civ. App. Houston 1959, *no writ*), the court of appeals found that a subcontractor was required to indemnify a contractor for contractor's negligent acts that injured the subcontractor's employees pursuant to indemnity which specifically included injuries to subcontractor's employees; the subcontractor's employees were considered to be "**business invitees**" in the portion of the construction site where injury occurred. The Texarkana Court of Appeals in *Texas Utilities Electric Co. v. Babcock & Wilcox*, 893 S.W.2d 739 (Tex. App. - Texarkana 1995, *no writ*) found that the following indemnity provision did **not** cover injuries to an employee of Flour Daniel, a contractor employed by Texas Utilities, the Protected Party:

Insured Contract Provision:

> [Babcock & Wilcox] agree to indemnify Texas Utilities for claims against Texas Utilities for damages arising from personal injury or death or damage to property of [Babcock's] agents, servants and employees, as well as the agents, servants, and employees of [Babcock's] subcontractor, whether or not arising from sole or concurrent negligence or fault of [Texas Utilities].

(e) Injuries To Independent Contractor of Protecting Party

It has been held that an indemnity provision which clearly limited a contractor's obligation to indemnify a property owner for injuries sustained by the contractor's and its subcontractor's "employees" did not cover an injury sustained by a person while serving as an independent contractor, notwithstanding that the individual was hired, as well as paid, by the contractor. *Ideal Lease Service, Inc. v. Amoco Production Co.*, 662 S.W.2d 951 (Tex. 1983).

Adding "**employees**" or "**agents**" to the list of Protecting Parties may capture damages not otherwise awarded against the Protecting Party in its capacity as employer. See *Fort Worth Elevators, Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934), *overruled on other grounds by Wright v. Gifford Hill & Co.*, 725 S.W.2d 712 (Tex. 1987);

5. Indemnified Liabilities

a. "Liabilities" or "Damages"

(1) Liabilities

Indemnities have sometimes been classified as an "**indemnity against liability**." *Russell v. Lemons,* 205 S.W.2d 629, 631 (Tex. Civ. App. - Amarillo 1947, *writ ref'd n.r.e.*). In the case of a promise to indemnify against liability, a cause of action accrues to the Protected Party only when the liability has become fixed and certain, as by rendition of a judgment. Possibility that liability triggering indemnity will be incurred in pending action is a "future hypothetical event" within meaning of rule that Uniform Declaratory Judgments Acts gives court no power to pass upon hypothetical or contingent situations. *Boorhem-Fields, Inc. v. Burlington Northern Railroad Co.,* 884 S.W.2d 530 (Tex. App. - Texarkana 1994, *no writ*); § 37.001 TEX. CIV. PRAC. & REM. CODE ANN.

(2) Damages

Alternatively, an indemnity may be an "**indemnity against damages**." With respect to a promise to indemnify against damages, a right to bring suit does not accrue until the Protected Party has suffered damage or injury by being compelled to pay the judgment or debt. *Holland v. Fidelity & Deposit Co, of Maryland*, 623 S.W.2d 469, 470 (Tex. App. - Corpus Christi 1981, *no writ*).

b. Contractual Obligations or Torts

Indemnity agreements may cover contractual obligations of others or torts committed by others.

(1) Contractual Obligations

For example, it is not against public policy for a withdrawing officer to indemnify a purchasing shareholder for I.R.S. penalties subsequently imposed on a corporation and its shareholders. *Tubb v. Bartlett,* 862 S.W.2d 740, 751 (Tex. App. - El Paso 1993, *writ denied*). Also, an indemnity can cover **economic damages** to arise in the future to third persons due to the contractual arrangements between contract parties. Such indemnities are not governed by the express negligence or similar doctrine (if they do not involve indemnification against one's future negligence). *Transcontinental Gas Pipeline Corp. v. Texaco,* 35 S.W.3d 658 (Tex. App. – Hou. [1st Dist.] 2000, *no writ*). However, shifting of risk from one contracting party to another contracting party is neither an indemnity nor a release and need not meet the fair notice and express negligence tests otherwise applicable to *"extraordinary"* shifting of risk. *Green International v. Solis*, 951 S.W.2d 384 (Tex. 1997) ("**no-damages-for-delay**" provision in a construction contract that shifted to a subcontractor the economic damages arising out of the risk of a project's delay was enforceable by the contractor, even though the contractor may have caused the delay, if the potential for delay was contemplated by the parties, or if the delay was not for an unreasonable period of time that would justify the subcontractor in abandoning the contract, or if the contractor did

not engage in active interference or wrongful conduct).

Perhaps the result might have been different in *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. App. – Hou. [14th Dist.] 2000, *no writ*) involving an injury to an employee of Foodmaker a/k/a Jack in the Box if the indemnity had covered damages arising out of its breach of contract. In *Foodmaker* there was some evidence that Griffin did not respond to service calls to fix a grease receptacle that it furnished Foodmaker. A Foodmaker employee was injured when he slipped on a greasy ladder attempting to pour hot French fry grease into a ventilator slot 6'10" above the ground. The proper slot was broken. The court said,

> Assuming, without deciding, that Griffin did not respond to one or more service requests in a timely manner, such conduct might constitute a breach of its service contract with Foodmaker but it is not evidence of negligence. The duty to pick up the grease stems solely from the parties' contract.

(2) Torts

(a) Negligence

Indemnity against "**one's own negligence**" has long been recognized in Texas. *See* the discussion of the "express negligence test" as a rule of contract construction below. *Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 624 (Tex. 1963); *Ethyl Corp. v. Daniel Const. Co.,* 725 S.W.2d 705 (Tex. 1987).

In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.,* 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court held that the language of the contractual indemnity provision satisfied the express negligence test even though it did not differentiate between "**degrees of negligence**." Certain "magic" words like "**active**," "**passive**," "**sole**," "**joint**," or "**concurrent**" to describe the degrees of negligence covered were not necessary. The court determined that

Insured Contract Provision:

any negligent act or omission of ARCO

was sufficient to define the parties' intent. *Id.* at 726. Perhaps what is more important is to determine what degree of negligence is excluded from the indemnity. *E.g.,*

Insured Contract Provision-Exclusion:

but not injuries due to the sole negligence of the _____ (*e.g.,* landlord).

(b) Gross Negligence and Punitive Damages

In drafting the classes of liabilities covered by an indemnity care should be given to the scope of Indemnified Liabilities.

Questions: For example, are damages from gross negligence[10] or punitive damages of the Protected Party to be covered? Are the punitive damages of an employee or an agent covered, if the employer is not liable?

In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.,* 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court observed, in a footnote to the opinion, that it was not deciding whether indemnity for one's own gross negligence or intentional injury may be contracted for or awarded by Texas courts. The court stated that "[p]ublic policy concerns are presented by such an issue ... ." *Id.* at 726 n. 2. The San Antonio court of appeals held that an indemnity for one's own negligence also **included all shades** and degrees of negligence, including one's own gross negligence.

In *Webb v. Lawson-Avila Const., Inc.,* 911 S.W.2d 457 (Tex. App. - San Antonio 1995, *writ dism'd by agreement*) the court reviewed an indemnity provision providing that steel erector would indemnify a general contractor

Insured Contract Provision:

irrespective of whether such liability, damages, losses, claims, and/or expenses are actually or allegedly, caused wholly or in part, through the **negligence** of contractor or any of its agents, employees, or other subcontractors (**Bold** added by author.)

The court held this provision was sufficient to provide indemnity for the general contractor from the consequences of all degrees of negligence, including gross negligence.

Also see Sieber & Calicutt v. La Gloria, 66 S.W.3d 340 (Tex. App. – Hou. [12th Dist.] 2001, *no writ*) where the court assumed without discussion that negligence of the Protected Party included its gross negligence. *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex. App. — San Antonio 1989, *no writ*). In this case involving a wrongful death action, the San Antonio Court of Appeals held the following provision did not meet the express negligence test since the negligence of the alleged Protected Party (oil and gas lessee) is not mentioned. The provision is worded as a disclaimer by the operator as to any liability except for gross negligence, and not as an indemnification by the operator for the operator's "disclaimed" but not expressly disclaimed negligence.

Insured Contract Provision:

> [Operator (Bay Rock Corp.)] shall have no liability to owners of interests in said wells and leases (Haring) for losses sustained, or liabilities incurred, except such as may result from gross negligence or from breach of the provisions of this agreement.

Texas allows insurance coverage for punitive damages derivative of gross negligence. *American Home Assur. Co. v. Safway Steel Products Co.,* 743 S.W.2d 693 (Tex. App. - Austin 1987, *writ denied*); *Home Indemnity Co. v. Tyler,* 522 S.W.2d 594 (Tex. App. - Hou. [14th Dist.] 1975, *writ ref'd n.r.e.*). For a discussion of "punitive damages" see *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) and TEX. CIV. PRAC. & REM. CODE §§ 41.001 *et seq*.

(c) Willful Misconduct and Intentional Torts

The court in *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 232 33 (Tex. App. — Hou. [1st Dist.] 1994, *writ denied*) interpreted an **exclusion** from a contractor's indemnity contained in a construction contract between a commercial landlord and its contractor for

Insured Contract Provision-Exclusion:

> any claim aris(ing) out of the sole and **gross negligence** or **willful misconduct** of Owner (the commercial landlord, the Protected Party)
>
> (**Bold** added by author.)

as including as an exclusion of the landlord's "**knowing**" **violation** of the warranty of commercial habitability and/or "knowing deceptive trade practice" in its lease with the injured tenant. This case involved a shoe store that was put out of business in the landlord's shopping center by repeated flooding arising out of the action of a backhoe operator of a subcontractor of landlord's construction contractor. The case involved dual theories of recovery, the negligence of the contractor and the knowing deceptive trade practice and breach of warranty of the landlord. The backhoe operator accidentally broke a sewer line, and covered it up after he discovered his error instead of reporting the accident. The tenant reported to the landlord that water was seeping from a leak in the slab outside of its premises. The landlord, who was unaware of the backhoe operator's actions, repeatedly reassured the tenant after each of several floods, that it had corrected the problem when, in fact, it knew it had not.

The court held that the intent of the parties by excluding gross negligence, also must have intended to exclude **knowing conduct** of the landlord, which is a "more culpable standard than gross negligence." The court noted that to hold otherwise would be to hold that the intent of the parties was that the Protected Party would not be entitled to indemnity for an act done with the mental state at the low end of the "continuum" of culpable mental states, but would be so entitled for an act done with a mental state that is higher on the scale, *i.e.*, an act that is more culpable than another for which they indisputably are not entitled to indemnity. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984).

The issue of the enforceability of an indemnity for an intentional tort (Tenneco's misappropriation and improper use of confidential information obtained in bidding process) was raised in *Tenneco Oil Co. v.*

Gulsby Engineering, Inc., 846 S.W.2d 599 (Tex. App. - Hou. [14th Dist.] 1993, *writ denied*). However, the court of appeals was able to sustain the trial court's summary judgment in favor of Tenneco on the grounds that the indemnity provision in the contract with Gulsby Engineering specifically covered patent infringement suits, and therefore included Tenneco's and Gulsby's joint and several liability for having infringed the unsuccessful bidder's patent.

See Comment by Meagan McKeown, *Indemnification Agreements for Intentional Misconduct: Balancing Public Policy and Freedom to Contract in Texas*, 46 ST. MARY'S L. J. 345, 355 (2015) stating

> Although the Supreme Court of Texas has not yet extended the express intent requirement to cases involving gross negligence or intentional misconduct, some lower courts have considered the issue and reached divergent conclusions as to whether parties can contract for indemnity against gross negligence or intentional acts.[11]

6. <u>Excluded Liabilities</u>

a. Broad Exception for Liabilities of Protected Party

In *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609 (Tex. 1950), 23 A.L.R.2d 1114 (1950), the court refused to extend the lessee's indemnity covering injuries to persons occurring on the leased premises from any cause to include liabilities arising out of defects in the premises where the indemnity contained an exception for

Insured Contract Provision - Exclusion:

any liability which lessor (the Protected Party) would be liable

b. Exceptions for Sole Negligence, Gross Negligence, Knowing Actions, and Willful Misconduct of Protected Party

(1) A Continuum of Culpable Mental States

The court in *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 232 33 (Tex. App. – Hou. [1st Dist.] 1994, *writ denied*) interpreted an exclusion from a contractor's indemnity contained in a construction contract between a commercial landlord and its contractor for

Insured Contract Provision:

any claim aris(ing) out of the sole and gross negligence or willful misconduct of Owner (the commercial landlord, the Protected Party) (Author inserted the parenthetical reference.)

as including as an exclusion the landlord's "**knowing**" violation of the warranty of commercial habitability and/or "knowing deceptive trade practice" in its lease with the injured tenant. This case involved a shoe store that was put out of business in the landlord's shopping center by repeated flooding arising out of the action of a backhoe operator of a subcontractor of landlord's construction contractor. The case involved dual theories of recovery, the negligence of the contractor and the knowing deceptive trade practice and breach of warranty of the landlord. The backhoe operator accidentally broke a sewer line, and covered it up after he discovered his error instead of reporting the accident. The tenant reported to the landlord that water was seeping from a leak in the slab outside of its premises. The landlord, who was unaware of the backhoe operator's actions, repeatedly reassured the tenant after each of several floods, that it had corrected the problem when, in fact, it knew it had not. The court held that the intent of the parties by excluding gross negligence, also must have intended to exclude knowing conduct of the landlord, which is a "more culpable standard than gross negligence." The court noted that to hold otherwise would be to hold that the intent of the parties was that the indemnitees would not be entitled to indemnity for an act done with the mental state at the low end of the "continuum" of culpable mental states, but would be so entitled for an act done with a mental state that is higher on the scale, i.e., an act that is more culpable than another for which they indisputably are not entitled to indemnity. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984).

(2) Exception for Sole Negligence Includes Sole Gross Negligence

The court in *Crown Central Petroleum Corp. v. Jennings*, 727 S.W.2d 739 (Tex. App. - Hou. [1st Dist.] 1987, *no writ*) held that a clause

Insured Contract Provision - Exclusion:

> **excepting** only claims arising out of accidents resulting from the sole negligence of Owner
>
> (**Bold** added by author.)

included accidents arising from the sole gross negligence of the owner.

(3) Exception for Sole Negligence Does Not Affirmatively Create Indemnity for Protected Party's Concurrent Negligence

However, the court of appeals' reliance in *Crown Central Petroleum Corp. v. Jennings* upon its opinion in *Singleton v. Crown Central Petroleum Corp.*, 713 S.W.2d 115 (Tex. App. - Hou. [1st Dist.] 1985, *writ ref'd n.r.e*) was misplaced since, after citing the *Singleton* writ history of "*writ ref'd n.r.e*," the Texas Supreme Court withdrew its opinion and reversed the court of appeals in *Singleton* at 729 S.W.2d 690 (Tex. 1987). The court of appeals both in *Jennings* and *Singleton* erroneously concluded that the above quoted language "**excepting** ..." was an express statement that the concurrent negligence of the Protected Party was indemnified by the Protecting Party. As noted in the discussion of the Texas Supreme Court cases construing *Ethyl*, the Texas Supreme Court held that this type language states what is not to be indemnified, and not what is indemnified.

c. Scope of the Work Limitations

Courts have attempted to limit the scope of the Indemnified Liabilities to job site injuries or activities and work within the scope of the contract.

(1) Contemplated Work

Indemnified Liabilities may be contractually limited to such injuries as "**arise out of**" or are "**in connection with**" the work being performed by the Protecting Party. If the indemnity is so limited, then it might be held not to cover the negligent acts of the Protected Party that are unrelated to the performance of the scope of the work by the Protecting Party. *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64, 70 71 (Tex. App. - Tyler 1978, *writ ref'd n.r.e.*); *Westinghouse Electric Corp. v. Childs Bellows*, 352 S.W.2d 806, 832 (Tex. App. - Ft. Worth 1961, *writ ref'd*); and *Martin Wright Electric Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied*, 397 U.S. 1022 (1970). The court in *Westinghouse Electric Corp. v. Childs Bellows*, 352 S.W.2d 806 (Tex. Civ. App. - Ft. Worth 1961, *writ ref'd*) found that the indemnity agreement of a subcontractor did **not** include injuries to the subcontractor's employees who had been injured through the negligence of employees of the contractor engaged in **work unrelated** to the subcontract. However, this result might also be explained as being an attempt by pre-*Ethyl* courts to limit indemnity agreements with the "clear and unequivocal" test. See *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 479 (5th Cir. 1993).

In another case, the court held that the subcontractor's indemnity did not extend to the death of the subcontractor's employee caused by the negligent acts of the contractor's employees. *Brown & Root, Inc. v. Service Painting Co.*, 437 S.W.2d 630 (Tex. Civ. App. - Beaumont 1969, *writ ref'd*). The death of the employee of the subcontractor did **not** "occur in connection with" the subcontracted work, notwithstanding the fact that the employee was engaged in sublet work at the time of the employee's death. The work being performed by the employee of the general contractor was not connected to the work being performed by the employee of the subcontractor. The *Brown & Root* indemnity clause reads:

Insured Contract Provision:

> Subcontractor agrees to indemnify and to save General Contractor ... harmless from and against all claims ... which may be caused or alleged to have been caused in whole or in part by, or which may occur or be alleged to have occurred **in connection with**, the performance of the Sublet Work.
>
> (**Bold** added by author.)

See also *Westinghouse Electric Corp. v. Childs Bellows*, 352 S.W.2d 806 (Tex. Civ. App. - Ft. Worth 1961, *writ ref'd*); *Ohio Oil Co. v. Smith*,

365 S.W.2d 621 (Tex. 1963); *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963); and *Alamo Lumber Co. v. Warren*, 316 F.2d 287 (5th Cir. 1963).

(2) Job Site

In *Sun Oil Co. v. Renshaw Well Service, Inc.*, 571 S.W.2d 64 (Tex. Civ. App. - Tyler 1978, *writ ref'd n.r.e.*), the court found that the Protected Party was **not** entitled to indemnification against injury to a worker injured while driving from the work site after completion of the work. In *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied* 397 U.S. 1022 (1970), the court **refused** to extend the subcontractor's indemnity to include the death of a subcontractor's employee killed while leaving work after putting his tools away where the death was caused solely by the contractor's negligence.

d. Contemplated Time Covered

Indemnity provisions have been strictly construed to limit the time of the occurrence of the Indemnified Liabilities. In *Manges v. Willoughby*, 505 S.W.2d 379 (Tex. Civ. App. - San Antonio 1974, *writ ref'd n.r.e.*), the court construed an indemnity by a sublessee to the sublessor, which had

Insured Contract Provision:

assumed all obligations

under the lease, as not covering damages to the leased premises which occurred prior to the sublease.

However, an indemnity provision whereby an equipment lessee agreed to indemnify the lessor for loss, damage, and expense incurred to the leased equipment and agreed to be responsible for the return of the leased equipment at its expense did not terminate when the equipment was delivered by the lessee to a third party selected by the lessee, but terminated when actually delivered back to the lessor. *M. M. Sundt Constr. Co. v. Contractors Equipment Co.*, 656 S.W.2d 643 (Tex. App. - El Paso 1983, *no writ*).

e. Negligence of Protecting Parties Not Same as Negligence of Protected Parties

Clearly, provisions requiring the Protecting Parties to indemnify the Protected Parties against loss resulting from the negligent acts or omissions of the Protecting Parties do **not** cover loss caused by the negligence of the Protected Parties. *Humble Oil & Refining Co. v. Wilson*, 339 S.W.2d 954 (Tex. Civ. App. - Waco 1960, *writ ref'd n.r.e.*) and numerous other cases cited herein. Extensive litigation over the intent of the drafters of such indemnity clauses lead the Texas Supreme Court to adopt the "express negligence" test.

C. Requirements for Enforceability

The Texas Legislature and the Texas Supreme Court has imposed certain contract drafting requirements in order for a negligent party to shift its liability to another person.

1. Statutory Limits on Indemnity

A contract of indemnity is not against public policy even if the Protected Party is indemnified against its own negligence, except if there is a specific statute declaring such a contract is void.

a. Construction Contracts

In 2011 Texas adopted an anti-indemnity, anti-additional insured law applicable to construction contracts ("**Texas Anti-Indemnity and Anti-additional Insured Act**". Chapter 151 of the INSURANCE CODE. This effected a major change in Texas construction law.

- It applies to all "**construction contracts**" and agreements collateral to construction contracts, entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier or equipment lessor, and agreements between these parties and an owner's lender regarding an assignment of the construction contract.

- It applies to both public and private construction.

- Except as listed in the last bullet point below, **void and unenforceable** are any requirements to the extent they require an indemnitor to indemnify, hold harmless or defend a party, including a third party, against a

claim caused by the negligence (whether concurrent, sole, strict, gross, etc.) or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract, of the indemnitee, its agents or employees, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. § 151.102 TEXAS INSURANCE CODE.

- Also except as listed below, **void and unenforceable** are any additional insured requirements covering the same liabilities.

- Except indemnity and/or additional insured coverage can be enforced as to

(1) injury or death of an employee of an indemnitor, its agent or subcontractors (see Section 151.103 below),

(2) a cause of action for breach of contract or warranty that exists independently of an indemnity obligation,

(3) indemnity provisions in loan documents, other than construction contracts,

(4) an indemnity provision pertaining to a claim based upon copyright infringement,

(5) an indemnity provision in a construction contract pertaining to (a) a single family house, townhouse, duplex, or land development directly related thereto, or (b) a city public works project, and

(6) several other limited exceptions.

One of the exceptions to Chapter 151's prohibitions is Section 151.103 Exception for Employee Claim (the "**Exception for Employee Claim**"). It provides

> Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

b. Architects and Engineers

Contractual indemnity for malpractice by architects and engineers is void. Only insurance companies may indemnify architects and engineers for malpractice pursuant to professional liability policies. TEX. CIV. PRAC. & REM. CODE ANN. §§ 130.001-.005. This statute does not prevent a negligent contractor from indemnifying a non-negligent architect. *Foster, Henry, Henry, & Thorpe, Inc. v. J. T. Const. Co., Inc.*, 808 S.W.2d 139 (Tex. App. - El Paso 1991, *writ denied*).

This Section was amended effective September 1, 2001, to also provide that:

> A covenant or promise in, in connection with, or collateral to a construction contract other than a contract for a single family or multifamily residence is void and unenforceable if the covenant or promise provides for a registered architect or licensed engineer whose engineering or architectural design services are the subject of the construction contract to indemnify or hold harmless an owner or owner's agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner's agent or employee.

c. Oil and Gas Service Contracts

Indemnity contracts in oil and gas service contracts are void as against public policy unless certain statutory requirements are met. TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001 - .007. This statute is known as the "**Texas Oilfield Anti-Indemnity Statute**"; this statute, formerly TEX. REV. CIV. STAT. ANN. Art. 2212b, was originally enacted in 1973, and amended in 1979. Article 2212b was recodified as Chapter 127 of the Civil Practice and Remedies Code in 1985, and amended again in 1989.[12]

2. Common Law Rules of Contract Interpretation

a. General Rules

(1) Intent

A contract of indemnity is read, as any other contract, to ascertain the intent of the parties.

Ohio Oil Co. v. Smith, 365 S.W.2d 621, 627 (Tex. 1963); *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 637 (Tex. 1963); *Mitchell's, Inc. v. Friedman*, 303 S.W.2d 775, 777-78 (Tex. 1957); and *Sun Oil Co. v. Renshaw Well Service, Inc.*, 571 S.W.2d 64, 68 (Tex. Civ. App.-Tyler 1978, *writ ref'd n.r.e.*).

(2) *Strictissimi Juris*

(a) Strict Construction Limiting Scope of Indemnified Liabilities

Once the intent of the parties is ascertained, the doctrine of ***strictissimi juris*** is applied to prevent the Protecting Party's liability from being extended beyond the terms of the agreement. *Liberty Steel Co. v. Guardian Title Co. of Houston, Inc.*, 713 S.W.2d 358, 360 (Tex. App.-Dallas 1986, *no writ*). Courts have stated that the Protecting Party is entitled to have the indemnity contract strictly construed in the Protecting Party's favor. *Smith v. Scott*, 261 S.W. 1089 (Tex. Civ. App. - Amarillo 1924, *no writ*); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963). Courts examine the "event" to determine whether it is within the scope of Indemnified Liabilities.

The San Antonio Court of Appeals has held that an indemnity for one's own negligence also **includes** all shades and **degrees of negligence**, including one's own gross negligence. *Webb v. Lawson-Avila Const., Inc.,* 911 S.W.2d 457 (Tex. App. - San Antonio 1995, *writ dism'd by agreement*).

(b) Conflicting Terms: Express Duty and Indemnity

Many times a contract containing an indemnity provision will also contain a duty provision or other covenant which conflicts with the indemnity provision. In such cases, the indemnity is strictly construed and effect is first given to the conflicting provision. In *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208 (Ex. 1980), the Texas Supreme Court found that there were conflicting provisions in the contract containing an indemnification provision. Damages resulted from an explosion of a pipe line that transported propane to Kodak's facility. The contract contained both a provision requiring the Protecting Party to hold the oil company harmless from the oil company's own negligence, and a provision which placed responsibility for pipe line breakages on the oil company. The court was applying the "clear and unequivocal' test.

3. Written Contract to Overcome the Worker's Compensation Bar

Unless there is an enforceable written indemnity covering an employer's negligence, a landlord, tenant, or contractor can find itself liable to an employer's injured employee, not only for its own portion of the negligently caused injury but also for the proportionate part attributable to the employer's negligence without the ability to claim back against the employer for contribution. The Workers' Compensation Act bars contribution actions by third parties unless the employer as a Protecting Party has executed before the injury a written indemnity agreement protecting a Protected Party for injuries to the Protecting Party's employees arising out of the employer's negligence. Texas Workers' Compensation Act, TEX. LABOR. CODE ANN. § 417.004.

4. Fair Notice

a. Appearance and Placement

The concept of fair notice was introduced into Texas indemnity law in 1963 by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp*., 365 S.W.2d 631 (Tex. 1963). The supreme court in *Spence* reasoned that

> [t]he obvious purpose of this rule is to prevent injustice. A contracting party should be upon **fair notice** that under his agreement and through no fault of his own, a large and ruinous award of damages may be assessed against him solely by reason of negligence attributable to the opposite contracting party. *Id*. at 634.

The fair notice requirement focuses on the appearance and placement of the provision as opposed to its "content."[13]

b. The UCC Standard

In *Dresser Industries, Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505 (Tex. 1993), the Texas Supreme Court adopted the conspicuousness standard of § 1.201(10) of the Texas UCC, applicable to the sale of goods, and applied it to

indemnities and releases in a case involving the sale of services. The *Dresser* court **struck down** an indemnity located on the back of a work order, in a series of uniformly numbered paragraphs, with no heading and with no contrasting type.

Section 1.201(10) of the Texas UCC provides

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: A NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any term is "**conspicuous**."

TEX. BUS. COMM. CODE § 1.201(10).

c. Actual Notice

The conspicuousness requirement is not applicable when the Protected Party establishes that the Protecting Party possesses actual notice or knowledge of the indemnity agreement.[14]

It has been held that the failure of an owner to call the attention of the contractor to an indemnity provision in a construction contract did not excuse the contractor from the indemnity provision absent proof of fraud, overreaching or mutual mistake.[15]

Question: Does actual knowledge apply to both conspicuousness test and the express negligence requirement?

Some courts have recognized that the "actual notice or knowledge" exception should apply to the procedural requirement (conspicuousness), but not necessarily the substantive requirement (the express negligence rule). See *Sydlik v. REEII, Inc.,* 195 S.W.3d 329, 333 (Tex. App. – Hou. [14th Dist.] 2006, *no pet.*).

Other courts following the maxim that a party's subjective "actual notice or knowledge" of a provision should not alter that provision's objective interpretation. Some Texas appeals courts have cited the "four corners" rule and refused to apply the "actual notice or knowledge" exception to the express negligence rule. *E.g., Silsbee Hosp., Inc. v. George*, 163 S.W.3d 284 (Tex. App. – Beaumont 2005, *pet. ref'd*). The argument is that if the actual notice rule is applied as an exception to the express negligence requirement, the actual knowledge exception would transform the requirement, an issue of law determined by the four corners of the document, into an issue of fact – the existence of notice of the indemnity, and allow parole evidence and testimony of subjective interpretation.

5. Express Negligence Requirement [16]

a. The Protected Party's Negligence

In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) adopted the "**express negligence**" requirement.[17] In *Ethyl*, the court observed

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that true intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine…. We now reject the clear and unequivocal" test in favor of the express negligence doctrine. *Id.* at 707 – 708.

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did **not** protect (indemnify) a Protected Party for losses and damages caused by the Protected Party's (Ethyl's) negligence:

Insured Contract Provision:

Contractor (Daniel) (the Protecting Party) shall indemnify and hold Owner (Ethyl) (the Protected Party) harmless against **any loss** or damage to persons or property as a result of operations growing out of the performance of this contract

and caused by the negligence or carelessness of Contractor (the Protecting Party), Contractor's employees, subcontractors and agents or licensees.

(Emphasis and parenthetical references added by author).

Id. at 708. This provision does not identify the Owner's (Ethyl's) (the Protected Party's) negligence, as a cause of the liability; it identifies only the negligence of the Contractor (the Protecting Party), as the cause of the liability being indemnified.

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law. *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994).

The following indemnity provision will **not** be enforced to indemnify "y" "for loss caused by y's negligence":[18]

Insured Contract Provision:

x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by the gross negligence or willful misconduct of y"

"Y's" (the Protected Party's) negligence is **not** expressly identified as a cause of the liability.

The anti-indemnity provisions of Chapter 151 of the INSURANCE CODE reduce the number of circumstances in which a Protecting Party is permitted to indemnify a Protected Party in a construction contract. One of the exceptions to Chapter 151's prohibitions is the Section 151.103 Exception for Employee Claim quoted above.

b. The Protecting Party's Negligence

(1) Contractual Comparative Negligence

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did not protect a Protected Party either for the Protected Party's (Owner's) negligence or for the Protecting Party's (Contractor's) negligence causing injuries to the Protecting Party's employee:

Insured Contract Provision:

Contractor (Daniel) shall indemnify and hold Owner (Ethyl) harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor (the Protecting Party), Contractor's employees, subcontractors and agents or licensees.

Id. at 708. The court termed this claim as one for "**comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect even though the indemnity provision expressly refers to the Protecting Party's (Contractor's) negligence! The court stated

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury **jointly and concurrently** with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for **comparative indemnity** so long as they comply with the express negligence doctrine set out herein.

(**Bold** added by author.)

If a Protected Party wants to be indemnified for liabilities caused jointly by the Protected Party and the Protecting Party and so including the contributory share of the Protecting Party, the indemnity must expressly so state.

In *Monsanto Co. v. Owens Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App. - Houston [1st Dist.] 1988, *no writ*), the employee of the subcontractor (Owens Corning) sued the contractor (Monsanto) for personal injuries suffered on the job site. The employee had already collected workers' compensation benefits from the subcontractor. The contractor filed a third party action against its subcontractor seeking contractual indemnity. The court held the following provision in the subcontract did **not** meet the express negligence standard since it did not expressly indemnify the contractor for its own negligence:

Insured Contract Provision:

> (Sub)Contractor (Owens Corning) agrees to indemnify and save Monsanto (Contractor) and its employees harmless against **any and all liabilities**, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out ... as a result of bodily injuries ... to any person or damage ... to any property occurring to or caused in whole or in part by, (Subcontractor) (or any of his employees), any of his (Sub)Subcontractors (or any employee thereof) directly or indirectly employed or engaged by either (Subcontractor) or any of his (Sub subcontractors).
>
> (Emphasis and parenthetical designations added by author.)

The court noted that the term "**negligence**" is not found in the indemnity agreement. The indemnity did not mention indemnifying against the negligence of the contractor. Also, it did **not** mention indemnifying against the **concurrent** negligence of the subcontractor (the Protecting Party). Therefore, the court noted that the agreement

> did not provide for contractual comparative negligence. The indemnity contract neither covered the negligence of the contractor nor the subcontractor. *Id.* at 295.

The indemnity also does not expressly require the employer (Protecting Party) to assume liability for injuries to its employees thereby overcoming the Workers' Compensation Bar.

(2) Contractual Proportionate Sharing

In *Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.3d 340 (Tex. App. - Tyler 2001, *no writ*) the court found that Sieber & Calicutt was at least equally negligent as was La Gloria and therefore La Gloria was entitled to recover indemnity of one half of the amount it paid in settlement of a wrongful death suit brought on behalf of one of its deceased employees. The indemnity provision limited Sieber & Calicutt's indemnity to it proportionate share of liability if its liability was equal to or less than La Gloria's liability. The La Gloria indemnity provision reads as follows:

Insured Contract Provision:

> Contractor (Sieber & Calicutt) agrees to hold harmless and unconditionally indemnify La Gloria, its directors, officers, agents, representatives and employees against and for all liability, costs and expenses, claims and damages which La Gloria at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons or property or both, of Contractor, its subcontractors and suppliers, or to the persons or property of La Gloria, its subcontractors and suppliers, arising in any manner from the Work performed hereunder, including but not limited to any negligent act or omission of La Gloria, its directors, officers, agents, representatives or employees, provided however, that if the negligence of La Gloria shall be found to be greater than or equal to the comparative negligence of the Contractor, then the Contractor shall only be liable to La Gloria to the extent of the Contractor's own negligence.
>
> (Underlining added by author.)

(3) Does Express Negligence Apply to an Indemnity by the Protecting Party as to its Own Negligence?

Question: Is it necessary for an indemnity to expressly cover a Protecting Party's negligence?

Questions: If the Protecting Party is indemnifying the Protected Party for injuries to employees of the Protecting Party, or employees of its agent, or employees of subcontractors of any tier (an indemnity expressly excluded from Chapter 51 Anti-Indemnity and Anti-Additional Insured Act in the Insurance Code as § 151.103 quoted above), does the express negligence doctrine have to be met? As to both the Protecting Party's indemnity for the Protected Party's negligence? And the Protecting Party's indemnity as to its own negligence and the negligence of the subcontractors of any tier?

Several courts have also held that the **doctrine does not apply** when a party does not seek indemnity from its own negligence. In *Paragon Gen. Contractors, Inc. v. Larco Const., Inc.*, a

general contractor sought indemnification against a caulking subcontractor for the cost of repairing water leaks which it claimed were the result of the subcontractor's negligence, breach of contract and breach of warranty. Although the indemnification clause probably would not have passed muster under Fisk, the Dallas Court of Appeals nevertheless reversed a summary judgment for the subcontractor, holding that

> the express negligence doctrine does not apply when the indemnitee does not seek indemnity for its negligence.

M. Sundt Constr. Co. v. Contractors Equipment Co., 656 S.W.2d 643 (Tex. App. - El Paso 1983, *no writ*), a lessee of a crane was required to indemnify the equipment lessor (equipment lease required Sundt to indemnity the equipment supplier for loss "because (or as a result) of the return of the leased equipment") in spite of Texas's "clear and unequivocal" or "express negligence" rule of construction as:

> [t]he obligation to indemnify is absolute, and it arises out of the obligation of Sundt with regard to the return of the equipment and not from any negligence on the part of Contractors [equipment supplier]. Where the damages result from conduct for which indemnity is provided and which does not involve the negligence of the indemnitee, liability is established. In such cases, the "express negligence" rule is not applicable. *Id.* at 645.

Also see *Tutle & Tutle Trucking, Inc. v. EOG Resources, Inc.*, 391 S.W.3d 240, 246 (Tex. App. - Waco 2012), rule 53.7(f) motion granted, (Dec. 27, 2012).

c. Future Negligent Acts or Omissions

The express negligence doctrine applies only to future negligent acts or omissions. *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724, 726 (Tex. 1989); *Dresser Industries, Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1993); *Ethyl Corp. v. Daniel Const. Co*., 725 S.W.2d 705 (Tex. 1987); *Fisk Electric Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813, 814 (Tex. 1994); *Spawglass, Inc. v. E. T. Services, Inc.*, 143 S.W.3d 897, 899-900 (Tex. App. – Beaumont 2004).

6. Strict Liability

a. Indemnification for Strict Liability Arising out of Statutory Liability

In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co*., 890 S.W.2d 455 (Tex. 1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a Protected Party's statutory strict liability to expressly state that it covers such strict liability. The court found that fairness dictates that such an "**extraordinary shifting of risk**" must be clearly and specifically expressed as to non-negligence based statutory strict liability in order to be enforced. Some subsequent court of appeals have been unwilling to extend the express negligence doctrine to non-negligence claims.[19]

b. Indemnification for Strict Liability Arising out of Products Liability

The Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) in *dicta* also recognized that indemnity provisions shifting liability arising out of strict products liability are similarly enforceable, if fair notice has been given, including expressly using the words "**strict liability**".[20] Texas courts generally have cited two policy rationales for the express negligence rule: (1) if a contract explicitly covers all situations where a party might be forced to indemnify another, it prevents the injustice that may occur when an innocent party incurs tremendous cost because of another's liability; and (2) indemnification is an exception to the rule that parties are liable for their own actions. Because these rationales also apply to causes of action other than negligence, the Texas Supreme Court saw no reason to limit the scope of the express negligence rule to negligence.

The Dallas Court of Appeals in *Arthur's Garage v. Racal Chubb*, 997 S.W.2d 803 (Tex. App. - Dallas 1999, *no writ*) [an alarm security products liability case where the tenant indemnified the alarm company from claims by third parties, which included the claim of the landlord] found that the following provision clearly and specifically **covered** the Protected Party's negligence, breach of warranty, and strict product liability:

Insured Contract Provision:

When purchaser (Arthur's Garage), in the ordinary course of business, has the property of others in his custody, or the alarm system extends to protect the property of others, purchaser agrees to and shall indemnify, defend, and hold harmless seller, its employees and agents for and against all claims brought by parties other than the parties to this agreement. This provision shall apply to all claims, regardless of cause, including seller's performance or failure to perform, and including defects in products, design, installation, maintenance, operation or nonoperation of the system, whether based upon negligence, active or passive, warranty, or **strict product liability** on the part of seller, its employees or agents, but this provision shall not apply to claims for loss or damage solely and directly caused by an employee of seller while on purchaser's premises.

(Underling and **bold** added by author.)

c. Indemnification for Strict Liability Arising out of Statutory Environmental Liability

The Fifth Circuit has addressed indemnifications for strict liability under environmental protection laws in *Fina, Inc. v. ARCO*, 200 F.3d 266 (5th Cir. 2000). In *Fina* the court had to determine the enforceability of two indemnity provisions, the first in a 1969 sales contract between ARCO and BP Oil Company (the "**ARCO/BP Agreement**") as to a refinery located in Port Arthur, Texas being acquired by BP from ARCO, and the second in a 1973 sales contract between BP and Fina (the "**BP/Fina Agreement**") whereby Fina acquired the refinery from BP. Fina sued BP and ARCO for $14,000,000 in investigatory and remedial response costs it incurred after it discovered contamination at the refinery in 1989. Fina sought contribution from BP and ARCO under CERCLA. BP counterclaimed that the liability was covered in Fina's indemnity of BP in the BP/Fina Agreement. ARCO counterclaimed that the liability was covered by the indemnity in the ARCO/BP Agreement was assumed by Fina by the BP/Fina Agreement. The BP/Fina Agreement contained an express choice of laws provision choosing Delaware law. The ARCO/BP Agreement was silent as to applicable law. The indemnity provisions are the following:

Insured Contract Provision:

ARCO/BP Agreement. BP shall indemnify, defend, and hold harmless ARCO ... against all claims, actions, demands, losses or liabilities arising from the ownership or the operation of the Assets ... and accruing from and after Closing ... except to the extent that any such claim, action, demand, loss or liability shall arise from the gross negligence of ARCO.

BP/Fina Agreement. Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

As to the BP/Fina Agreement the court first determined that it would uphold the parties choice of Delaware law as the court could not discern a fundamental public policy of the State of Texas that would be violated by applying the "clear and unequivocal" test applicable to the enforceability of indemnity provisions covering the Protected Party's negligence. The court then held that the "all claims" language in the BP/Fina Agreement clearly covered liabilities arising under CERCLA, even though CERCLA was not enacted until 1980. The court noted that unlike Texas no Delaware case had addressed the applicability of the clear and unequivocal test to claims based on strict liability. The court found that the same policy reasons that existed in Texas' extension of the express negligence doctrine to strict liability cases also existed in Delaware to extend the clear and unequivocal test to strict liability claims in interpreting indemnities.

The court rejected BP's argument that normal contract rules of interpretation should apply to interpreting the indemnity. BP argued that the clear and unequivocal test should not apply to indemnification for **prior acts** giving rise to **potential future liability** (with "past" and "future" being determined by reference to the time at which the indemnity provision was signed). The court rejected BP's argument that under Texas law the express negligence doctrine is inapplicable to indemnities for past conduct giving rise to potential future liability and

therefore similarly the court should find that Delaware would not apply the clear and unequivocal test to potential future liability for past acts. The court stated,

> Even as to Texas law, it is not at all clear that BP's conclusion is correct. The language used by the Texas courts is ambiguous: "Future negligence" might refer to **future negligent conduct**, but it also might refer to **future claims based on negligence**. True, the Texas rule does clearly distinguish between (1) indemnification for past conduct for which claims have already been filed at the time the indemnity provision is signed and (2) indemnification for future conduct for which claims could not possibly have been filed at the time the indemnity provision was signed. Still, no Texas case has addressed the applicability of the rule to the rare situation in which a party attempts to invoke the protection of an indemnity agreement against a claim filed ***after*** the indemnity was signed but arising from conduct that occurred ***prior*** to signing of the indemnity.

The court held that under Delaware law the indemnity in the BP/Fina Agreement did **not clearly and unequivocally** require Fina to indemnify BP for its strict liability under CERCLA that arose after the indemnity agreement (the ***"future claim"***) for conduct prior to the indemnity agreement. As to ARCO's "circuitous indemnity obligation" being enforceable against Fina, the court held that the ARCO/BP Agreement did **not** pass the **fair notice test under Texas law** and would not pick up strict liability claims for ARCO's future strict liability for its past conduct. The court noted that Fina's claims under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq*., and § 361.344 of the Texas Solid Waste Disposal Act similarly would not be barred by the indemnity.

7. <u>Other Insured Contract Provisions</u>

a. Defense

(1) "Defense Costs": Precondition - Express Negligence Test Satisfied

In *Fisk Electric Co. v. Constructors & Assoc.s, Inc.*, 888 S.W.2d 813 (Tex. 1994), the Texas Supreme Court found that the express negligence requirement for the enforcement of an indemnity agreement is not an affirmative defense to be alleged and proved by the defendant Protecting Party, but rather is a rule of contract construction. The court held that Fisk's obligation to pay attorney's fees arose out of its duty to indemnify. Absent a duty to indemnify, there is no obligation to pay attorney's fees. The Texas Supreme Court **declined** to carve out an exception to the express negligence rule for contracts which although they did not expressly indemnify the Protected Party for its own negligence, clearly, expressly or broadly covered the Protected Party's defense costs. Also see *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App. – Hou. [1st Dist.] 1995, *writ denied*), holding **no** right to attorney's fees absent an enforceable indemnity provision.

(2) Attorney's Fees

The expense of defending a liability suit and in subsequently enforcing the contractual indemnity are reimbursable when the Protected Party recovers contractual indemnification from the Protecting Party. A Protected Party's attorney's fees in defending a liability suit are recoverable from the Protecting Party as "**indemnified damages**" even though not expressly mentioned in the indemnity provision. Attorney's fees may be awarded to the Protected Party pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001(8) in connection with a suit against the Protecting Party for its breach of its contract of indemnity. *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App. - Dallas 1999, *no writ*). The purpose of indemnification is to make the Protected Party whole. *Tubb v. Bartlett*, 862 S.W.2d 740, 751 (Tex. App. - El Paso 1988, *writ denied*); *Continental Steel Co. v. H. A. Lott, Inc.*, 772 S.W.2d 513, 517 (Tex. App. - Dallas 1989, *writ denied*); *Texas Const. Assoc., Inc. v. Balli*, 558 S.W.2d 513 (Tex. Civ. App. - Corpus Christi 1977, no writ); *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200 (Tex. Civ. App. – Hou. 1959), *rev'd on other grounds*, 325 S.W.2d 126 (1959) and vacated on other grounds, 326 S.W.2d 915 (Tex. Civ. App. – Hou. 1959); *Barnes v. Calgon Corp.*, 872 F. Supp. 349, 353 (E. D. Tex. 1994).

In *Construction Investments and Consultants, Inc. v. Dresser Industries, Inc.*, 776 S.W.2d 790, 792 (Tex. App. Houston [1st Dist.] 1989, writ denied), the court of appeals found the following extensive contract language as ***clearly indicating the intent*** of the Protecting Party to cover the Protected Party's attorney's fees ($142,633.20) where the Protected Party successfully defended against the negligence suit, even though the indemnity provision otherwise would not pass the express negligence test:

Insured Contract Provision

> Contractor (CIC) shall, except as otherwise expressly provided herein, indemnify, protect and save Dresser ... harmless against any and all actions ... including *costs of litigation, attorney fees and reasonable expenses in connection therewith* ... whether or not such loss, injury, or damage shall be valid or groundless, and Contractor agrees that in case Dresser ... shall be made defendant in any suit ..., *Contractor*, immediately upon notice from Dresser, *shall be bound and obligated to assume the defense thereof, including the settlement negotiations and shall pay* ... expenses resulting from ... . *It is understood and agreed by Contractor that in case Dresser is made defendant in any suit or action and Contractor fails or neglects to assume the defense thereof, after having been notified so to do by Dresser, that Dresser may compromise and settle or defend any such suit or action, and Contractor shall be bound and obligated to reimburse Dresser for the amount expended by it in settling and compromising any such claim, or in the amount expended by Dresser in paying any judgment rendered therein, together with all reasonable attorneys' fees incurred by Dresser by reason of its defense or settlement of such claims*.
>
> (*Italics* added by court.) *Id*. at 791.

The court of appeals held that CIC's obligation to indemnify Constructors for attorney's fees and costs in the defense of the underlying suit is separate from CIC's obligation to indemnify Constructors for Constructors' negligence. The court held that

> an Protected Party may recover attorney's fees and costs where it was not found negligent, even though the indemnity provision did not meet the express negligence standard.

(3) Costs and Expenses

However, a different rule may apply to "**costs**" and "**expenses**" beyond attorney's fees. In *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.—Dallas 1999, *no writ*) the court held that failure of the indemnity provision to expressly cover the Protected Party's litigation costs prevented recovery of the following expenses incurred by its attorney: filing fees, courier fees, postage, telephone expenses, long distance charges, and fax charges. The court considered these costs to be included within the hourly billing rates and reasonable fees of the attorney, unless the indemnity contract expressly covered these items as an Indemnified Matter.

(4) Allocation of Costs of Defense if defending Protected Party and Persons Not Indemnified

An example where a Protected Party was **not** fully protected is the case of *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App. – Hou. [14th Dist.] 2000, *writ denied*). In Hess the court found that a portion of the attorney's fees Hess incurred in defending a suit brought by an injured employee of the Wood Group was not covered by the Wood Group's indemnity. Hess sought and obtained reimbursement from the Wood Group for the $200,000 it had paid to settle the claim, but was denied the right to recover 100% of the $141,743.75 in attorney's fees it incurred in defending the claim. The trial court's finding that the $200,000 settlement of the claim was reasonable was upheld by the court of appeals despite the fact that another defendant (Graham) was released in the settlement agreement. The court found that the settlement amount was reasonable as to the potential liability of Hess alone. However, Hess in defending the claim, also was defending a claim against Graham for Graham's negligence. Hess had agreed to indemnify Graham. The Wood Group had indemnified Hess. The trial court held that the Wood Group indemnity did not include Hess' contractual obligation to indemnify

Graham; and thus did **not** include the portion of Hess' fees incurred in defending Graham.

b. Choice of Laws

(1) Insured Contract Without Choice of Law Provision

See *Maxus Exploration Co., f/k/a Diamond Shamrock Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50 (Tex. 1991).

(2) Insured Contract With a Choice of Law Provision

The Texas Supreme Court has adopted the principles set forth in § 187 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) in order to determine if a choice of laws provision is to be enforced. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990).

c. Assignability

The ability to assign an indemnity or to include within the scope of an indemnity subsequent property owners is a valuable right that can add value to a property. A typical contract containing an indemnity may contain a standard "**successor and assign**" provision. Consideration should be given to whether this provision extends to the indemnity obligation. For example, an environmental indemnity from a major oil company in connection with the sale of the company's decommissioned oil refinery can be like an insurance policy against otherwise uninsurable environmental risks.

d. Cumulative or Exclusive Remedy

The indemnity should address whether its rights are exclusive of any other remedy available to the Protected Party. It might be argued that an indemnity was intended to be the exclusive remedy afforded to the Protected Party as to a particular risk. The wording of the indemnity will be strictly construed and might not cover a subsequently occurring risk, unless expressly covered (*e.g.*, change of law or change in classification of a substance to a hazardous substance in the case of an environmental indemnity).

e. Powers Granted to Protected Party

Certain express broad powers granted in an Insured Contract to a Protected Party have been upheld.

(1) Modification of Instruments Increasing Liability

It has been held that an indemnity contract is not contrary to public policy even though the contract makes vouchers or affidavits *prima facie* evidence of any loss paid by the Protected Party and gives the Protected Party power to alter and modify instruments and to execute new obligations that fix the Protecting Party's liability without notice to the Protecting Party. In *Hammond v. Travelers Indem. Co.*, 553 S.W.2d 205 (Tex. Civ. App. – Hou. [14th Dist.] 1977, *no writ*), the court upheld a clause in an indemnification agreement in a surety bond which provided for indemnification of all claims resulting from suretyship, or any renewal, extension, modification, or continuation for suretyship or additional suretyship even though increases in the surety bond were made without the knowledge or consent of the Protecting Party (the surety company).

(2) Expenses Incurred in Good Faith

A provision requiring the Protecting Party (principal on a surety bond) to reimburse the Protected Party for all disbursements made by it in good faith, belief of liability, necessity, or expediency, regardless of whether such factors existed in actuality, has been upheld. *Central Surety & Ins. Corp. v. Martin*, 224 S.W.2d 773 (Tex. Civ. App. - Beaumont 1949, *writ ref'd*); *Shaw v. Massachusetts Bonding & Ins. Co.*, 373 S.W.2d 553 (Tex. Civ. App. - Dallas 1963, *no writ*).

(3) Prior Notice Provision

In a case involving a lease which provided that a landlord's duty to repair the leased premises was conditioned upon the tenant giving notice or upon the landlord obtaining knowledge of the defect, the tenant was **not** entitled to indemnification from the landlord for liability for injuries sustained by the tenant's customer occasioned by an unreported defect in the premises. *Stool v. J. C. Penney Co.*, 404 F.2d 562 (5th Cir. 1968).

(4) Discretion

(a) No Common Law Indemnity for Voluntary Settlements of Indemnified Liability

Settlement by one joint tortfeasor extinguishes any common law and statutory contribution rights such person may have had. *Beech Aircraft Corp. v. Jinkins,* 739 S.W.2d 19 (Tex. 1987); *International Proteins Corp. v. Ralston-Purina Co.,* 744 S.W.2d 932 (Tex. 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(d). In *MAN GHH Logistics GMBH v. Emscor, Inc.,* 858 S.W.2d 41 (Tex. App. – Hou. [14th Dist.] 1993, *no writ*), the court of appeals **denied** both the seller and the buyer of a crane contribution and indemnity against the other after each had separately settled with the claimants for $3,000,000 for deaths and injuries sustained when a 152 foot tower crane fell over while being dismantled. The seller of the crane (Emscor) voluntarily settled two death claims in October, 1990. In November, 1990, the buyer of the crane (MAN GHH) agreed to a $3,000,000 judgment in favor of the two families. Additionally, the court **denied** both the seller and the buyer respectively any right to "contractual contribution" pursuant to the reciprocal indemnity agreements contained in the Asset Purchase Agreement between seller and buyer. The Asset Purchase Agreement provided as follows:

Insured Contract Provision:

Indemnification by Sellers. Sellers (Emscor), jointly and severally, hereby indemnify and hold harmless the Purchaser and its respective successors and assigns from and against any loss, damage, or expense (including reasonable attorney's fees) caused by or arising out of:

(i) any breach or default in the performance by Sellers of any covenant or agreement of Sellers contained in this Agreement;

(ii) any breach of warranty or inaccurate or erroneous representation made by Sellers herein, in any Exhibit hereto, or in any certificate or other instrument delivered by or on behalf of Sellers pursuant hereto;

(iii) third party claims regarding Emscor's management of Purchaser's Wolff tower cranes prior to the Closing Date;

(iv) third party claims regarding any matter relating to title to or Emscor's maintenance of the Purchase Assets prior to the Closing Date; or

(v) any liability arising out of any and all actions, suits, proceedings, claims, demands, judgments, costs, and expenses (including reasonable legal and accounting fees) incident to any of the foregoing.

The court dismissed each party's request for contractual indemnity and/or contribution from the other party. The court found that the quoted provision did not protect the buyer (and conversely the reciprocal provision did not protect the seller) because (1) **it did not provide** that the other party would reimburse the settling party for any voluntary settlements made with any plaintiffs; (2) the provisions did not mention "contribution" and failed to discuss any apportionment of fault; and (3) the provision did not express any intent by the parties for a claim for reimbursement. *Id.* at 43.

(b) No Equitable Right to Settle Indemnified Claim Absent Contractual Right to Settle Without Consent

In *Liberty Steel Co. v. Guardian Title Co. of Houston, Inc.*, 713 S.W.2d 358, 360 (Tex. App. - Dallas 1986, *no writ*), the court held there did **not** exist an **equitable right** in the Protected Party (Guardian Title Co.) to settle a claim (an abstract of judgment bonded around) when the Protecting Party did not voluntarily step in and assume the defense against the adverse claimant. The Protected Party had sent a letter to the Protecting Party requesting the Protecting Party to "honor the terms" of the indemnity agreement. The court found that the indemnity contract **did not contain a provision** obligating the Protected Party to offer to undertake the defense of the claim and that the Protecting Party never made a "tender of the defense" to the Protected Party. Therefore, the Protected Party could not obtain reimbursement of the amount paid to settle the adverse claim when the Protected Party settled the claim in violation of the following contractual provision:

Insured Contract Provision:

> no payment, compromise, settlement, accord or satisfaction shall be made without the prior written approval of Liberty Steel (the Protecting Party)....
>
> (Underlining added by author.)

(c) Settlement Authority

Delegating settlement authority to the Protected Party has been upheld. The Supplement to Manual's Lease attached as a form to this article contains the following provision protective of the Protected Party in the conduct of the defense of an Indemnified Liability:

(1) the Protected Party (Indemnified Person) is permitted to employ its own counsel in addition to the counsel employed by the Protecting Party (the Indemnifying Person);

(2) the cost of the Protected Party's counsel is also an Indemnified Liability;

(3) the Protected Party is given the right to settle claims in the event that the Protecting Party does not provide a defense to the claim; and

(4) amounts paid by the Protecting Party under such circumstances is an Indemnified Liability.

Also see in this form procedures for the Protected Party to determine if the Protecting Party will honor its obligation to provide a defense and, if not, for the Protected Party to employ counsel to defend the claim.

(1) Contracts

A court has upheld a provision in a contract that authorized a right-of-way owner to compromise and settle all claims for damage within the right-of-way in connection with an indemnity provision with a contractor. *Phillips Pipeline Co. v. McKown*, 580 S.W.2d 435 (Tex. Civ. App. - Tyler 1979, *writ ref'd n.r.e.*). *Also see Sieber & Calicutt, Inc. v. La Gloria,* 66 S.W.3d. 340 (Tex. App. – Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology,* 30 S.W.3d 5 (Tex. App. – Hou. [14th Dist.] 2000, *writ denied*) upholding settlement authority granted by an Protecting Party to an Protected Party.

(2) Bonds

An indemnity provision that "any decision, determination, settlement, defense, compromise, or other action in connection with any matter arising under an indemnity bond would be final, conclusive, and unconditionally binding on the indemnitor" has been upheld as not being against public policy. *Engbrock v. Federal Ins. Co.*, 370 F.2d 784 (5th Cir. 1967). In *Ford v. Aetna Ins. Co.*, 394 S.W.2d 693 (Tex. Civ. App. - Corpus Christi 1965, *writ ref'd n.r.e.*), the court upheld an indemnity provision which granted the Protected Party (surety on a performance and payment bond) exclusive power to make conclusive determinations of claims and demands to be paid.

(d) Settlement Standards

(1) Reasonable and Prudent

For a settling Protected Party to recover an amount of the settlement from this Protecting Party, the Protected Party must show the potential liability to a claimant and that the settlement was **reasonable, prudent and made in good faith** under the circumstances. *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.,* 490 S.W.2d 818, 824 (Tex. 1972); *overruled on other grounds by Ethyl Corp. v. Daniel Constr. Co.,* 725 S.W.2d 705, 708 (Tex. 1987); *Sieber & Calicutt, Inc. v. La Gloria,* 66 S.W.3d 340 (Tex. App.-Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology,* 30 S.W.3d 5 (Tex. App. – Hou. [14th Dist.] 2000, *writ denied*); *Texas Property Casualty Ins. Gty. Ass'n v. BSA,* 947 S.W.2d 682 (Tex. App. - Austin 1997); *Getty Oil Corp. v. Duncan,* 721 S.W.2d 475, 477 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*). Absent an unconditional contractual right to settle, a Protected Party who settles a claim without obtaining a judicial determination of his liability, assumes in his action for reimbursement, the burden of proving facts that might have rendered him liable to claimant, as well as the reasonableness of the amount he paid. *Aerospatiale Helicopter Corp. v. Universal Health Services, Inc.,* 778 S.W.2d 492, 500 (Tex. App. - Dallas 1989), *cert. denied*, 498 U.S. 854, 111 S. CT. 149, 112 L. Ed.2d 115 (1990).

Determining whether a settlement of a wrongful death case is reasonable involves experience and specialized knowledge. An attorney must review and analyze, among other things, the underlying facts, the identity of the defendant, the damage elements available to a plaintiff, the specific injuries or losses incurred by a plaintiff, the settlement amounts received in similar cases, the complexity of the case, as well as the strength and resources of the opposing counsel. *See Burrow v. Arce,* 997 S.W.2d 229 (Tex. 1999). *Also see Sieber & Calicutt, Inc. v. La Gloria,* 66 S.W.3d 340 (Tex. App. - Tyler 2001, *no writ*) where court found that La Gloria settlement **was reasonable**, prudent and made in good faith and thus was to be reimbursed by Sieber & Calicutt pursuant to the indemnity agreement between La Gloria and Sieber & Calicutt. The court in *Amerada Hess Corp. v. Wood Group Production Technology,* 30 S.W.3d 5 (Tex. App. – Hou. [14th Dist.] 2000, *writ denied*) **upheld** a settlement as being reasonable and entirely covered by the indemnity agreement even though another defendant was also released because the expert's testimony supported the trial court's finding that the settlement amount was reasonable as to the Protected Party's potential liability independent of the other released defendant's potential liability; no apportionment of the settlement amount was required.

(2) Good Faith

An Protected Party cannot recover to reimburse himself for amounts paid in settlement, if the settlement was not made in good faith. *H.S.M. Acquisitions, Inc. v. West,* 917 S.W.2d 872, 880 (Tex. App.--Corpus Christi 1996, *writ denied*). Additionally, even though an indemnity agreement vests settlement authority in the Protected Party, a contractual requirement of settling in "good faith" can lead to liability on the part of the settling Protected Party. The court in *H.S.M. Acquisitions, Inc.* found the terms of an agreed judgment between a claimant and the Protected Party to be **collusive**, in part because the settling parties agreed to keep the terms of the judgment confidential and not to file an abstract or other public notice of the judgment.

In *Associated Indemnity Corp. v. CAT Contracting, Inc.,* 918 S.W.2d 580 (Tex. App.--Corpus Christi 1966, *no writ*), the court found that an Protected Party breached a covenant of good faith contained in the settlement authorization provision of an indemnity agreement supporting a performance bond when the bonding company (Surety) settled a bond claim without adequate investigation of the circumstances of the claim, and without advance notice to the principal and an opportunity for the principal to argue its case with the obligee. The court further found a common law duty of good faith and fair dealing under these circumstances, the breach of which gave rise to mental anguish damages on the part of the owners of the principal. The provision in the indemnity agreement granted the following settlement authority:

Insured Contract Provision:

> The Surety shall have the exclusive right to decide and determine whether any claim, liability, suit or judgment made or brought against the Surety or the indemnitors or any one of them on any such bond shall or shall not be paid, compromised, resisted, defended, tried or appealed, and the Surety's decision thereon, if made in **good faith**, shall be final and binding upon the indemnitors. An itemized statement of the payments by the Surety for any of the purposes specified herein, sworn to by an officer of the Surety, or the voucher or vouchers for such payments, shall be *prima facie* evidence of the liability of indemnitors to reimburse the Surety for such amounts, with interest.
>
> (**Bold** added by author.)

f. Settlement Agreements.

(a) Effect of Settlement by Plaintiff with a Joint Tortfeasor

(1) One Recovery Rule: Credit for Settlement Payments

Although the court in *Kenneth H. Hughes Interests v. Westrup* found that the defendant (landlord) was liable to the plaintiff (tenant), the landlord's $23,000 liability was more than offset by the $770,000 settlement payment made by its joint defendants, a contractor (which had indemnified the landlord) and the contractor's subcontractor. The court followed the "one recovery" rule announced in *Stewart Title Guaranty Co. v. Sterling,* 822 S.W.2d 1 (Tex. 1991). In that case, the supreme court held that

"(t)here can be but one recovery for one injury, and the fact that more than one defendant may have caused the injury or that there may be more than one theory of liability does not modify this rule." *Sterling,* at 8; and *Ojeda de Toca v. Wise, 748 S.W.2d* 449 (Tex. 1988). *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 233-34, 240 (Tex. App. – Hou. [1st Dist.] 1994, *writ denied*).

(2) Effect of Settlement (by Release and Indemnity) by Plaintiff of a Joint Tortfeasor Which Also is an Protecting Party

In *Martinez v. Gulf States Utility Co.,* 864 S.W.2d 802 (Tex. App. - Houston [14th Dist.] 1993, *writ denied*) the plaintiffs, who were injured when they accidentally touched a high voltage wire, were held to be precluded from recovering against Gulf States, the utility company and owner of the utility pole, because they had previously settled their claim with the contractor, which owed a statutory indemnity to the utility company for such type of accidents. Plaintiff, Daniel Hernandez, was killed, and plaintiffs, Clarence Thompson, Sr. and David Martinez, were injured, in repairing a water well for the defendant property owners, Clarence Thompson, Jr. and Pamela Mendez. Hernandez was killed when Clarence Thompson, Sr., Martinez and Hernandez accidentally touched a high voltage wire.

The court found that a **circuit of indemnity**, created by statute and by contract (the release agreement), had been created by the settlement agreement that precluded recovery by the plaintiff against the utility company. In settling with the property owners, Thompson Jr. and Mendez, the plaintiffs executed a typical release releasing these defendants "for any and all claims, demands ... and causes of action ... whether in contract or in tort ... for and on account of injuries sustained ... (including) any liability for any cross actions seeking contribution and indemnity. ..." TEX. HEALTH & SAFETY CODE ANN. § 752.008 creates a statutory indemnity by persons responsible for having workers near utility lines if they do not follow the advance notice and precautionary procedures established to protect against these type of accidents. The court found that a *circuit of indemnity* existed **precluding** recovery against the utility company since the utility company had a statutory indemnity by the settling defendants, who had a contractual indemnity (release) from the plaintiffs.

Consideration should be given to addressing the level of success that is covered by an indemnity ("success on the merits or otherwise" includes settlement? versus indemnification for "**to the extent successful**").[21]

(3) Express Negligence Rule And Settlement Agreements

(a) The Settlement Agreement Itself

The court in *Martinez v. Gulf States Utility Co.*, 864 S.W.2d 802 (Tex. App. – Hou. [14th Dist.] 1993, *writ denied*), also held that the express negligence doctrine was **not applicable** to the release executed as a part of the settlement agreement since the plaintiff could not claim surprise as to the cross claim by the utility company against the settling defendant for statutory indemnity. The release explicitly contemplated cross actions by the other co-defendant. Liability was certain. *Id.* at 805.

(b) Settlement Authority

If the indemnity clause does not pass the express negligence test and the plaintiff's injuries arise from a negligence claim or through a strict liability claim against the Protected Party, then the Protecting Party is **not** liable for a settlement negotiated by the Protected Party, even though the indemnity agreement contains an absolute power to settle. *Coastal States Crude Gathering Co. v. Natural Gas Odorizing, Inc.*, 899 S.W.2d 289 (Tex. App. - Houston [15th Dist.] 1995, *no writ*) - Coastal not able to collect back on $10,500,000 settlement paid to persons injured by fire and explosion fueled by propane gas odorized and sold by Coastal using odorizing chemicals supplied by Natural Gas Odorizing. Indemnity agreement failed to mention liability arising out of strict liability and was contained on back of purchaser order in inconspicuous fashion (same black ink as rest of order form). The court quoted *Fisk Electric Co. v. Constructors & Associates, Inc.,* 888 S.W.2d 813 (Tex. 1994) in rejecting Coastal's argument that the express negligence test was not applicable where absolute settlement authority granted to the Protected Party:

> The *Fisk* court made explicitly clear that allowing the rule proposed by Coastal

> would "leave indemnitors vulnerable to indemnitees who might settle cases without admitting negligence, leaving the indemnitor to pay the costs of settlement and defense."

Id. at 815.

The court further stated in a footnote that even if a settlement could be contested by the indemnitor, such a result would retard, rather than advance, the policy of preventing satellite litigation surrounding interpretation of indemnity clauses.

(c) Covenants Not to Execute

In *Ard v. Gemini Exploration Co. and Resolve Drilling Co.,* 894 S.W.2d 11 (Tex. App. – Hou. [14th Dist.] 1994*, writ denied*), the court found that a covenant by an injured employee (Ard) of the Protecting Party (RRS Services, Inc.) not to execute (a "**covenant not to execute**") upon the assets of the Protected Party (Resolve) did not extinguish the liability of the Protected Party in such a manner as would prevent the Protected Party and the injured party from realizing upon the Protected Party's excess liability insurance policy.

> Therefore, the fact that the indemnitee, Resolve, will not have to pay any damages does not eradicate Resolve's liability, nor does it eradicate an indemnitor's or an insurer's duty to pay.

The "covenant not to execute" was the result of insurance settlement paid by the Protected Party's primary insurance carrier.

A covenant not to execute is a contract rather than a release. *See Garcia v. Am. Physicians Ins. Exch.,* 812 S.W.2d 25, 33 (Tex. App. - San Antonio 1991), *rev'd on other grounds,* 876 S.W.2d 842 (Tex. 1994); *Y.M.C.A. of Metro. Ft. Worth v. Commercial Standard Ins. Co.,* 552 S.W.2d 497, 595 (Tex. App. - Ft. Worth 1977), *writ ref'd n.r.e., per curiam,* 563 S.W.2d 246 (Tex. 1978). Its legal effect is similar to a "**covenant not to sue**" because it does not eliminate a damage award; the underlying tort liability remains. *Garcia,* 812 S.W.2d at 32-33; *Y.M.C.A.,* 552 S.W.2d at 505. *Also generally see RTC v. Northpark Joint Venture,* 958 F.2d 1313 (5th Cir. 1992) where the court rejected the argument of a guarantor that it had no liability on its guaranty because the debt guaranteed was a non-recourse liability of the note maker.

III. INTERRELATIONSHIP OF INDEMNITY AND INSURANCE

There are two insurance methods to effectuate protection by a Protecting Party of a Protected Party:

A. Indirectly, by the Protecting Party insuring its contractually assumed liability (its indemnity); and

B. Directly, either by the Protecting Party purchasing a CGL policy naming the Protected Party as the Named Insured or by the Protecting Party causing its insurer to list the Protected Party as an additional insured on the Protecting Party's CGL policy.

A. Contractually Assumed Liability Insurance: Coverage for the Protecting Party

1. Exception to an Exclusion

a. Assumption of Tort Liability

Most but not all CGL policies cover the Protecting Party for liability for "bodily injury" and "property damage" arising under an Insured Contract (sometimes referred to as "**contractually assumed liability insurance**"). Coverage is accomplished through the addition to the CGL Policy of an **exception to an exclusion** from coverage. Standard form CGL policies (ISO CG 00 01) provide as to "Coverage A"[22] the following exceptions to the exclusion from coverage of contractually assumed liability:

ISO Policy:

2. Exclusions
This insurance does not apply to:
…
b. Contractual Liability
"Bodily Injury" or "Property Damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does **not apply** to liability for damages:

(1) That the insured would have in the

absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement….

(Emphasis, underlining and **bold**, added by author.)

"**Insured Contract**" is defined in the standard ISO CGL policy form as including to the ISO CG 00 01 04 13 Commercial General Liability Coverage Form, which is attached as an exhibit to this article.

(1) Exceptions 9a – 9e to Exclusion 2b

"**Insured Contract**" is defined in the standard ISO CGL policy form as being one of six specified exceptions to Exclusion 2b. The first five exceptions to the 2b exclusion from coverage, and therefore each qualifying as an Insured Contract, are the following:

ISO Policy:

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

….

(2) Exception 9f to Exclusion 2b

Exception 9f is defined in the standard ISO CGL policy form as including

ISO Policy Provision:

9. "Insured contract" means: …

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) 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.

(Underlining added by author. Also, "You" refers to the named insured.)

b. Named Insured May Not Be Insured for all Contractually Assumed Liabilities

(1) ISO CG 24 26 07 04 - Assumption of Tort Liability Limited to Protected Party's Contributory Negligence

In 2004 ISO adopted an Amendment to the insured contract definition which introduced into the "insured contract" definition a "contributory negligence" condition ("*caused in whole or in party by (the Protecting Party*"). Inclusion of this type language into a CGL policy effectively **eliminates coverage** for the named insured's indemnification of a third party for its **sole negligence**. Care therefore must be taken by named insureds in coordinating and negotiating the terms of their CGL policies and indemnity agreements. It is possible for a named insured to be "uncovered" in such circumstances for an indemnity of another party's sole negligence.

See ISO CG 24 26 07 04 Amendment of Insured Contract Definition, attached as an exhibit to this article.

If this Amendment is coupled with an exclusion from additional insured coverage for an additional insured's sole negligence (as is the case with the current ISO additional insured endorsement forms), the named insured may

find itself acting as the insurer or in breach of its covenants to protect the additional insured/indemnified party!

(2) ISO 21 39 10 93 – Exclusion of Assumed Tort Liability

Another ISO endorsement that may be attached to the Protecting Party's CGL totally eliminates coverage for the Protecting Party for its contractual assumption of the tort liability under its indemnity!

B. Additional Insurance: Coverage for the Protected Party

1. Purpose

Another commonly employed risk transfer technique is to require the Protecting Party to arrange for its insurance to cover the Protected Party as an additional insured. An additional insured endorsement is equivalent to an insurance policy written for the additional insured. The strongest rationale for this request is the perceived fairness of making the Protecting Party's insurance carrier responsible for the increased exposure to loss created for the additional insured due to the Protecting Party's operations, work or control of the premises. Issuance of additional insured endorsements is routine and inexpensive as compared to a separate policy being issued to cover the exposure of the party to be protected. The risk of loss has been factored into the named insured's premium.

An additional insured designation seeks to achieve the following results:

- It provides a limited form of primary coverage for the additional insured.
- It may remove the possibility of subrogation against the additional insured for covered liabilities.
- It provides the additional insured with direct policy rights within the primary insured's policy, including separate defense cost coverage for claims involving the additional insured.
- It provides a "safety net" should the indemnity provision be unenforceable or otherwise be deficient.
- Additional insured endorsements generally do not carve out from the coverage afforded the additional insured loss due to "Personal and Advertising Injury." In these circumstances, protection for the Protected Party's Personal and Advertising Injury is covered whereas without specific endorsement to the named insured's CGL Coverage B, the named insured's indemnity for such liabilities is not reinsured and the named insured not carving out this type of liability is uninsured as to its contractually assumed liability.
- Additionally, additional insured status may automatically entitle the additional insured to the named insured's excess liability or umbrella coverage because such policies frequently cover all insureds (including the additional insureds) under the primary liability policy.

There are important considerations for a Protected Party to remember when evaluating whether to forgo a contractual indemnity by the Protecting Party and to rely solely on being an additional insured on the Protecting Party's CGL policy.

- The policy may be canceled with or without the Protected Party's knowledge.
- The insurer may become insolvent.
- The additional insured's coverage under the Protecting Party's CGL policy is subject to the policy's limits and exclusions from coverage.

2. Covered Matters

Additional insured endorsements (depending on which endorsement is chosen) furnish coverage to an additional insured for liabilities "arising out of" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes.

3. Covered Liabilities

a. Additional Insured's Vicarious Liability for Named Insured's Negligence

Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. An additional insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors*; and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429. It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. *See* the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist*., 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence.

b. Additional Insured's Own Negligence

Depending on the language of the Protecting Party's insurance, the Protected Party **may** be covered for its own negligence, whether sole or contributory, and whether or not the Protecting party is negligent.

c. Interpretation of Additional Insurance Specifications

(1) Express Negligence Requirement Not Applicable to Insurance Specifications

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), *cert. den'd*, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed.2d 45 (1993), (**Getty 2**),[23] the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring the Protected Party (Getty) to be listed as an additional insured on the Protecting Party's (NL Industries') liability policies. In Getty the injuries arose out of Getty's sole negligence; the indemnity provision excluded indemnity for Getty's negligence; the **insurance covenant was silent** as to whether the insurance was or was not to cover injuries due to Getty's negligence; the insurance covenant in the contract provided for NL Industries to maintain commercial general liability insurance and for such insurance to "**extend to and protect Getty**."[24] The court found that there was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies.

Insured Contract Provision:

Seller (NL Industries-the chemical supplier) agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser (Getty - the chemical buyer):

Workmen's Compensation Statutory Employer's Liability	$500,000
General Liability: Bodily Injury	$500,000
...	
Automobile Liability: Bodily Injury	$500,000

All insurance coverages carried by Seller, **whether or not required hereby**, shall extend to and **protect** Purchaser, its co-owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.

Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations or other damages resulting from injury to any person ... arising out of or incident to the performance of the terms of this Order by Seller ... Seller shall **not** be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, **solely**, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

(Emphasis added by author.)

(2) ISO Additional Insured Endorsements

[1] 2004 Additional Insured Amendments

In 2004, ISO revised its additional insured endorsements, including the CG 20 26, CG 20 10 and CG 20 37, to eliminate coverage for an additional insured's sole negligence. The 2004 revisions seek to limit the trigger for additional insured coverage to occurrences caused by the sole or partial negligence of the named insured.

[2] 2013 Additional Insured Amendments – Friend or Foe?

ISO amended most of its additional insured endorsements effective April, 2013, so the new endorsements reflect a 04 13 edition date. These revised endorsements provide that the insurance afforded to the additional insured (the "**2013 Additional Insured Amendments**"):

- Applies only to the extent permitted by law;
- Will be no broader in scope than required by the contract; and
- Will not provide for more than the limit required by the contract or the policy limit, whichever is *less*.

See the following language highlighted in the copies of several ISO Additional Insured forms attached to this article.

ISO Policy:

A. Section II - Who is An Insured …. However:
1. The insurance afforded to such additional insured only applies to the extent permitted by law;[25] and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.
B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:

The most we will pay on behalf of the additional insured is the amount of insurance:
1. Required by the contract or agreement you have entered into with the additional insured; or
2. Available under the applicable Limits of Insurance shown in the Declarations; whichever is less.[26] This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

(Underlining added by author.)

[a] "Coverage Not Be Broader Than Required by the Contract or Agreement"

This change was made to make it clear that additional insured coverage will be no broader than "required" in the underlying contract or agreement. This is to avoid giving an additional insured coverage **broader** than the coverage specified in the contract or agreement. The "required" language stresses the importance of insurance specification drafting.

Questions Will Abound

- What was the parties' intent? If the additional insured endorsement is an 07 04 endorsement but the CGL policy required by the contract is an 04 13, will the endorsement be broader than the underlying policy?
- Will the adjuster have to divine the parties' intent? How will the adjuster divine the parties' intent (ask the parties, read the contract)?
- What if the insurance specifications in the contract merely state that a party is to be an additional insured, and does not specify the scope or limits of coverage?
- Even if the contract's additional insured specification specifies coverage for bodily injury and property damage, what if it does not specify additional insured coverage for otherwise covered risks (*e.g.,* fire damage legal liability coverage or medical payments or completed operations coverage?
- Does the absence of a specific requirement mean that such coverage will not be available to the additional insured? (Narrative form insurance specifications generally do not go into the detail of insurance contracts.)

- Are these questions eliminated by a contract provision that the additional insured coverage will be the broader of the minimum required by the contract or that included within the named insured's policy, or a provision in the contract that states that if the additional insured endorsement contains such "no broader" language, that it shall in no way limit the "breadth" of insurance provided to the additional insured?

- Will the court or the insurance adjuster look to the indemnity provision and its qualifications to determine the scope of additional insured coverage intended?

[b] AIA A201 - Limited Indemnity

A common example is the following limitation contained in the **AIA A201-2007** General Conditions indemnity language (see attached forms, **A201 § 3.18.1** (Indemnification) limiting the contractor's indemnity:

AIA A201 Insured Contract Provision:

> To the fullest extent permitted by law the Contractor shall indemnify, defend and hold harmless Owner … but only to the caused by the negligent acts or omissions of the Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder ….
>
> (Author inserted underlining.)

This language arguably creates only a "**limited form indemnity**", since it does not expressly involve the contractor's assumption of the owner's tort liability. The negligence of the Protected Party is not expressly stated in the "regardless …" language. Similar language was held by a court in *Cabo Const., Inc. v. R S. Clark Const., Inc.*, 227 S.W.3d 314 (Tex. App. – Hou. [1st Dist.] 2007) **not** to meet the express negligence test. The case did not involve the 2007 edition of the A201, but its indemnification provisions are the same. There, a contractor attempted to enforce the AIA indemnification clause against a trenching subcontractor on a grocery store job who left a ditch open, into which a customer fell. In reversing a summary judgment for the contractor, the court held that because the clause

> is unclear as to who is indemnified and for what, the indemnity provision is ambiguous. Ambiguous indemnity provisions are unenforceable.

In another case using language similar to the AIA language, the court in *Gilbane Bldg. Co. v. Keystone Structural Concrete, Ltd.*, 263 S.W.3d 291 (Tex. App. – Hou. [1st Dist.] 2007) held that the following clause is "unclear as to who is indemnified and for what, the indemnity provision is ambiguous. Ambiguous indemnity provisions are unenforceable."

Insured Contract Provision:

> [The subcontractor] agrees to indemnify and hold harmless [the contractor] … from and against claims, damages, losses and expenses … arising out of or resulting from the performance or failure in performance of [subcontractor's] work under this agreement provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property including the loss of use resulting therefrom, (2) is caused, in whole or in part, by any negligent act or omission of [subcontractor] or anyone directly or indirectly employed by [subcontractor] or anyone for whose acts [subcontractor] may be liable, regardless of whether caused in part by a party indemnified hereunder.
>
> (Author inserted underlining.)

The contractor and its subrogated carrier sought indemnification from a subcontractor whose employee fell through a skylight. Gilbane recognized that it could not enforce the clause to recover for its own negligence but it argued that it should be able to recover indemnity if it was "able to establish that the incident … was caused by the negligence of [the subcontractor] in whole or part and not the negligence of Gilbane." The Houston Court of Appeals nevertheless refused to enforce the indemnification, citing *Fisk Elec. Co. v. Constructors & Assocs., Inc.*, 888 S.W.2d 813, 59 A.L.R.5th 893 (Tex. 1994) for the

proposition that the obligation to indemnify "should not depend on the outcome of the underlying suit" and "either the indemnity agreement is clear and enforceable, or it is not."

Question: Is it the intent of the parties to limit the additional insured coverage by this limitation to the indemnity?

(3) Manuscripted Additional Insured Endorsement to Cover Named Insured's Contractually Assumed Liability

One approach parties have used is have the Protecting Party's insurer issue a manuscripted additional insured endorsement that is limited to insured Indemnified Liabilities. In *Certainteed Corp. v. Employers Ins. of Wausau*, 939 F. Supp. 826 (D. Kan. 1996). In *Certainteed* the additional insured endorsement issued by Wausau was a blanket automatic additional insured provision in the CGL policy it issued to its named insured contractor. This provision provided as follows:

Insurance Policy:

> Section Two–Who Is an Insured:
>
> 5. Any person or organization ... for which you have agreed by written contract to procure .... liability insurance, but only for liability arising out of operations performed by you or on your behalf, provided that: ... (b) The insurance afforded to any person ... as an insured under this Paragraph 5 shall include only the insurance that is required to be provided by the terms of such agreement to procure insurance, and then only to the extent that such insurance is included within the scope of this policy.
>
> (Underlining added by author.)

The insurance provision of the construction contract, required the Protecting Party (the named insured contractor providing construction services to the plant owner) to provide insurance coverage for all "**liability assumed**" by the Protecting Party. The construction contract contained an indemnity agreement whereby the Protecting Party indemnified the Protected Party (the additional insured plant owner) for its negligence except if liability was due to its sole negligence of the Protected Party. The court construed the blanket additional insured provision as covering the additional insured's (the Protected Party's) liability for injuries **jointly caused** by the Protected Party and by another contractor (a construction manager) to an employee of the named insured. The court thus held that the scope of the additional insured coverage was the same as the scope of the insurance that the named insured was to procure to protect the named insured on its indemnity.

In *Gilbane Building Co. v. Admiral Insurance Co.,* 664 F.3d 589 (5th Cir. 2011 a manuscripted endorsement was held to insure an additional insured for liability assumed by the named insured by indemnity, even though the indemnity agreement may not have been enforceable under Texas law. The indemnity agreement arguably was unenforceable as it did not expressly indemnify the Protected Party for its own negligence. The additional insured provision in the Protecting Party's CGL insurance reads as follows:

Insurance Policy:

> **Name of Additional Insured Person(s) or Organization(s):** Any person or organization that is an owner of real property or personal property on which you are performing ongoing operations, or a contractor on whose behalf you are performing ongoing operation, ***but only if coverage as an additional insured is required by written contract or written agreement that is an "insured contract***," and provided that the "bodily injury," "property damage" or "personal & advertising injury" first occurs subsequent to execution of the contract or agreement… .
> **A. Section II—Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, *but only with respect to liability for "bodily injury," "property damage" or "personal & advertising injury" caused, in whole or in part, by:*
> *1. Your acts or omissions; or*
> *2. The acts or omissions of those acting on your behalf;*
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above… .
> 9. "Insured contract" means: …
> 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, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
>
> (*Italics* added by the court.)

The court summarized the coverage as follows:

> In other words, the CGL policy provides coverage to additional insureds for their own or their agents' acts or omissions, so long as (the Protecting Party) had previously assumed the liability of the potential additional insured in a written contract. (Author inserted reference to Protecting Party). *Id.* at 592-93.

The court held the unenforceability of the indemnity not relevant to the enforceability of the additional insured protection afforded to the Protected Party stating

> Here, as in Swift, Admiral's argument relies on the policy language defining an insured contract as one that "assume[s] the tort liability of another party," and concludes that an unenforceable provision does not actually assume liability. However, as we explained in Swift, the additional insured question turns not on enforceability, but on whether Empire Steel agreed to "assume the tort liability of another party." In the TCA (the Insured Contract), Empire Steel (the Protecting Party) contracted not only to indemnify Gilbane (the Protected Party), but also to secure insurance on its behalf; by doing so, it agreed to assume Gilbane's tort liability. That provision is not rendered void by the indemnity provision, even if it is unenforceable. As such, Empire Steel agreed to assume Gilbane's tort liability, and Gilbane qualifies as an additional insured. *Id.* at 596. (Author inserted parenthetical identifications.)

(4) Additional Insured Coverage and Scope of Indemnity

(a) Case Where Additional Insured Status Limited to Liabilities Assumed in the Insured Contract

[1] *In re Deepwater Horizon Facts*

In a case arising out of the infamous "British Petroleum" ("**BP**") oil spill in the Gulf of Mexico, the Texas Supreme Court in *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), in answer to two questions certified to it by the Fifth Circuit,[27] held that BP, the developer of an offshore oil field, was **not** an additional insured on the liability insurance policies of Transocean, the rig owner and drilling contractor. At the time of the events giving rise to the litigation, Transocean owned the *Deepwater Horizon*, a mobile offshore drilling unit operating in the Gulf of Mexico pursuant to a Drilling Contract between Transocean and BP. After an explosion, the rig caught fire and fully submersed after burning for more than a day. The incident killed eleven crew members, propagated numerous personal-injury claims, and begat a myriad of claims for environmental and economic damages stemming from the discharge of millions of gallons of oil into the Gulf of Mexico. To cover Transocean's worldwide drilling operations, including its obligations under the Drilling Contract with BP, Transocean maintained a $50 million general liability policy with Ranger Insurance, Ltd. as its primary policy and four layers of excess insurance from a multitude of additional insurers with an additional $700 million in coverage.

[2] District Court

Agreeing with Transocean's insurers, the federal district court held that BP was not an "Insured" on Transocean's insurance for subsurface pollution liability deriving from the *Deepwater Horizon* incident.

[3] Fifth Circuit

On appeal, the Fifth Circuit reversed, holding that Transocean's insurance policies imposed no relevant limitations upon the extent to which BP was covered. The Fifth Circuit later withdrew its decision and certified questions to the Texas Supreme Court. Resting on the court's decision was $750,000,000 of Transocean's insurance coverage. The following is the box score: federal district court – BP gets "0"; Fifth Circuit opinion – BP gets "$750,000,000"; Fifth Circuit withdraws

its opinion and certifies questions to Texas Supreme Court; Texas Supreme Court – BP gets "0". This swing in the results is grounded in a drafter's drafting of insurance specifications and an argument that arose as to the absence of a comma.

[4] Drilling Contract – Indemnity Provisions

In the Drilling Contract, BP and Transocean agreed to a knock-for-knock allocation of risk by contractual indemnities as is standard in the oil and gas industry. "**Knock-for-knock**" indemnity agreements require each party to assume responsibility for injuries to its own employees and damage to its own property without regard to who caused the injury or how the damage occurred. Transocean and BP also agreed to allocate risk of pollution liability regardless of fault. Transocean agreed to indemnify BP for damages resulting from above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risk Transocean did not assume. The pollution indemnity provisions of the Drilling Contract state

Insured Contract Provision:

> 24.1 [Transocean] shall assume full responsibility for and shall protect, release, defend, indemnify, and hold [BP] and its joint owners harmless from and against any ... liability for pollution or contamination, including control and removal thereof, originating on or above the surface of the land or water, from spills, leaks, or discharges ... without regard to negligence of any party or parties and specifically without regard to whether the spill, leak, or discharge is caused in whole or in part by the negligence or other fault of [BP].
>
> 24.2 [BP] shall assume full responsibility for and shall protect, release, defend, indemnify, and hold [Transocean] harmless from and against any ... liability for pollution or contamination, including control and removal thereof, arising out of or connected with operations under this contract hereunder and not assumed by [Transocean] in Article 24.1 above, without regard for negligence of any party or parties and specifically without regard for whether the pollution or contamination is caused in whole or in part by the negligence or fault of [Transocean].
>
> (Author added underlining.)

[5] Drilling Contract – Insurance Provisions

The insurance provision in the Drilling Contract obligated Transocean to acquire various types of insurance, including commercial general liability, including contractual liability insurance for the indemnity agreement, workers' compensation, and employer's liability insurance, and required Transocean to name BP as an additional insured. The Drilling Contract contains the following statement as to the scope of Transocean's insurance in the context of Transocean's and its insurer's indemnity obligations or liabilities.

Insured Contract Provision:

> 20.1 Without limiting the indemnity obligation or liabilities of [Transocean] or its insurer, at all times during the term of this contract, [Transocean] shall maintain insurance covering the operations to be performed under this contract as set forth in Exhibit C.

[6] Drilling Contract – Additional Insured Provision

The additional-insured provision contained in Exhibit C to the Drilling Contract states

> 3. [BP], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers, and agents shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation [,] *for liabilities assumed by [Transocean] under the terms of this contract.*
>
> (Court added *italics*) (Author added underlining and [,] for illustration of BP's argument that the court's interpretation is based on the court's insertion of a comma.)

Transocean's Insurance – Automatic Additional Insured Coverage

BP is BP is not specifically named as an insured in Transocean's insurance policies, endorsements thereto, or in a certificate of coverage. However, Transocean's policies contained an automatic additional insured provision extending "Insured" status to

> Any person or entity to whom the "Insured" (Transocean) is obliged by oral or written "Insured Contract" ... to provide insurance such as afforded by [the] Policy.
>
> (Underlining added by author.)

Additionally, the Transocean policy provided

> Underwriters agree where required by written contract, bid or work order, additional insureds are automatically included hereunder, and/or waiver(s) of subrogation are provided as may be required by contract.
>
> (Underlining added by author.)

Transocean's liability policy defined "Insured Contract" as

> any written or oral contract or agreement entered into by the "Insured" ... and pertaining to business under which the "Insured" assumes the tort liability of another party to pay for "Bodily Injury" [or] 'Property Damage' ... to a "Third Party" or organization.

[7] Texas Supreme Court

The Texas Supreme Court described additional insured status under Transocean's policies' as being determined as follows:

> Thus, under the express terms of the policies, additional-insured status hinges on (1) the existence of an oral or written contract, (2) pertaining to the business of an "Insured", and (3) under which an "Insured" assumes the tort-liability of another party and is "obliged" to provide insurance to such other party. The policy further specifies that "where required by written contract, bid or work order, additional insureds are automatically included hereunder....
>
> (Underlining provided by author.)

The court stated the questions to be decided as follows:

> The key points of contention among the parties are (1) whether the language employed in the insurance policies refers to, and thus incorporates, coverage limitations in the Drilling Contract from which BP's additional-insured status derives; (2) whether the Drilling Contract actually imposes any limitation on the extent of additional-insured coverage under the primary-and excess-insurance policies; and (3) who gets the benefit of the doubt if there is any ambiguity.

The court found that the only reasonable construction of the Drilling Contract's additional insured provision was that

> BP is an additional insured **only as to liabilities assumed** by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, BP lacks status as an "Insured" for the same.

(Author added **bold**.)

[8] BP's Argument – the "$750,000,000 Comma"

BP asserted that the court's interpretation was unreasonable because there is a comma before, but not after, the phrase "except Workers' Compensation." BP argued that the court's decision relies upon the court inserting a **comma** where it does not exist (after "Workers' Compensation"). BP argued that the court should not do so when doing so alters the plain meaning of the contract.

[9] Texas Supreme Court – Reasonableness Will Not Turn on Absence of a Comma

The court answered BP stating

> We will not construe the absence of a comma to produce an unreasonable construction…. Our inquiry does not end there, however, as we can only credit Transocean and the Insurers' alternative construction if it is reasonable. We conclude that it is. Transocean and the Insurers' construction is in harmony with the allocation of liabilities in the contract, gives meaning to all the language the parties employed, and is consistent with the standard use of such language and the purpose of such clauses. Additional-insured provisions are often phrased in terms of extending coverage to all policies except workers' compensation policies, which quintessentially involve an employer insuring its own employees. (FN. 15 omitted.) Moreover, a manifest purpose of an additional-insured clause is to provide supplemental protection when the additional insured may be sued for conduct within the contractor's scope of risk. (FN. 16 omitted.) Applying the only reasonable construction of the additional-insured provision, we conclude that BP is an additional insured only as to liabilities assumed by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, **BP lacks status as an "Insured" for the same**.

[10] What is the Effect of the Drilling Contract's Provision that the Insurance and Indemnity Provisions Are Separate and Independent?

The court also rejected BP's argument that the Drilling Contract's provisions providing that the indemnity and insurance provisions were **separate and independent** resulted in the insurance provisions not being limited by the scope of the indemnity. BP pointed to the following language in the Drilling Contract:

Insured Contract Provision:

> [w]ithout limiting the indemnity obligation or liabilities of [Transocean] or its insurer, at all times during the term of this CONTRACT, [Transocean] shall maintain insurance covering the operations to be performed under this CONTRACT as set forth in Exhibit C.

The court held that

> It is immediately apparent from the plain language of this provision that BP's status as an insured is **inexorably linked**, at least in some respect, to the extent of Transocean's indemnity obligations. What is in dispute is the intended breadth of the limiting language in the emphasized portion of the provision." (**Bold** added by author.)

The court continued

> But simply because the duties to indemnify and maintain insurance may be separate and independent does not prevent them from also being **congruent**; that is, a contract may reasonably be construed as extending the insured's additional-insured status only to the extent of the risk the insured agreed to assume. (**Bold** added by author.)

The Texas Supreme Court in *In re Deepwater Horizon* noted that "As the parties acknowledge, Transocean's insurance policies contain no language explicitly limiting the scope of additional insured coverage," but further notes that is not the end of the story, and states

> Thus, while our inquiry must begin with the language in an insurance policy, it does not necessarily end there. In other words, we determine the scope of coverage from the language employed in the insurance policy, and if the policy directs us elsewhere, we will refer to an incorporated document to the extent required by the policy. Unless obligated to do so by the terms of the policy, however, we do not consider coverage

limitations in underlying transactional documents.

The parties involved in the contract in question were of the highest sophistication in the oil and gas business, yet the contract's insurance and risk allocation provisions consumed the attention of both federal courts and a state's supreme court and the extensive efforts of lawyers at multiple levels on both sides of the risk allocation provision after occurrence of the risk.

(b) Cases Where Additional Insured Coverage Limited by Limitations In Insured Contract Incorporated by Reference

The Supreme Court in *In re Deepwater Horizons* noted other cases where the scope of insurance coverage has been determined to be limited by the express and intentional incorporation into the insurance policy of limits or limitations contained in extrinsic documents, such as (a) following form excess-insurance policies which incorporate the coverage terms of underlying primary policies[28] and (b) liability insurance policies that contain language explicitly limiting the scope of additional insured coverage by expressly incorporating the limits for additional insured coverage found in the Insured Contract (see *Urrutia v. Decker*, 992 S.W.2d 440 (Tex. 1999).[29] In *Urrutia t*he issue was whether a vehicle rental agreement was effective to limit an additional insured's liability insurance to $20,000 instead of the $1 million policy limits available under the leasing company's commercial-business automobile policy. In *Urrutia* the policy covered

Insurance Policy:

> [b]oth lessees and rentees of covered autos as insureds, but only to the extent and for the limits of liability agreed to under contractual agreement with the named insured.
>
> (Underlining inserted by author.)

The *Urrutia* court found that the insurance policy's reference to the rental agreement was "explicit" enough to clearly indicate the parties' intent to include the rental agreement and its specification of liability limits as part of the insurance policy. Given the language in the policy, a customer's status as an additional insured depended on the existence of a rental agreement, and coverage was expressly limited to the amount specified in such agreement. *Id.* at 443. The court held that the insurance policy incorporate the rental agreement and that the rental agreement, in turn, limited the customer's liability protection to $20,000. The *Urrutia* court noted

> By tying additional-insured coverage to the terms of an underlying agreement, the parties procure only the coverage the insured is contractually obligated to provide, thereby minimizing the insurer's exposure under the policy and the named insured's premiums. *Id*. at 443.

(c) Cases Where Additional Insured Coverage Not Limited by Scope of Indemnity in Insured Contract

The Texas Supreme Court *In re Deepwater Horizons* distinguished the scope of the additional insured coverage afforded in *In re Deepwater Horizons* from cases where the additional insured coverage was found **not** to be limited by the scope of the protecting party's indemnity in the Insured Contract.

[1] *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*

The Texas Supreme Court reviewed the prior supreme court holding in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008) that was identified in the Fifth Circuit's first certified question to the Texas Supreme Court. The following is one of the questions certified to the court in *In re Deepwater Horizons*:

> 1. Whether *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's cover-age as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "**separate and independent**"?
> (**Bold** added by author.)

***ATOFINA* Facts**

In *ATOFINA*, Triple S Industrial Corp. contracted to perform maintenance and construction work at an ATOFINA refinery under a service contract that contained separate indemnity and insurance provisions. Triple S agreed to indemnify ATOFINA for personal-injury and property loss that was not due to ATOFINA's concurrent or sole negligence, misconduct, or strict liability. Triple S also agreed to carry $500,000 of commercial general liability (CGL) insurance, including coverage for contractual liability insuring the indemnity agreement, and $500,000 in excess insurance that followed the form of the CGL policy. Triple S was also obligated to furnish certificates of insurance naming ATOFINA as an additional insured. Triple S complied with its service-contract obligations by securing a $1 million CGL policy and a $9 million excess policy and furnishing the required certificates. When a Triple S employee drowned at the refinery, his survivors sued Triple S and ATOFINA. Triple S's CGL insurer tendered its $1 million limit to settle the suit, but the excess insurer denied ATOFINA coverage. The court stated the question faced as follows:

> In this case, we examine the interplay between a contractual indemnity provision and a service contract's requirement to name an additional insured. More particularly, we must decide whether a commercial umbrella insurance policy that was purchased to secure the insured's indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party.

The court held that this direct route was available to ATOFINA because it was an additional insured under the Evanston Insurance policy. As such, Evanston Insurance owed ATOFINA a direct obligation as an insured, even though ATOFINA's contract with the general contractor contained indemnity provisions that disclaimed responsibility for ATOFINA's sole negligence. Rather than going through an indemnitor who would seek coverage from the insurance carrier, ATOFINA gives the indemnitee the right to go straight to the source itself and demand coverage from the indemnitor's insurance company.

Two Insurance Policy Provisions

The excess-insurance policy contained the following two independent coverage provisions.
Insurance Policy - Section III.B.6 – Trigger to Coverage:

The first provision in the Protecting Party's insurance, section III.B.6, extended coverage to

> A person or organization for whom [the insured has] agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to **operations** performed by you or on your behalf, or facilities owned or used by you. *Id.* at 664.
>
> (Underlining inserted by author).

The insurer asserted that the accident did not respect Triple S's operations because ATOFINA's sole negligence caused the accident. The *ATOFINA* court disagreed. The *ATOFINA* court distinguished between Triple S's indemnity obligation under the contract and the insurer's indemnity obligation under the terms of the excess policy because the insurer's obligation depended on what it contracted to do, not what the insured contracted with another person to do. Although the underlying Insured Contract did not require Triple S to indemnify ATOFINA for ATOFINA's negligence, the *ATOFINA* court concluded that the insurance policy neither included nor incorporated a similar limitation. Rather, the only restriction on the scope of additional-insured coverage under section III.B.6 was the requirement that the claims involve Triple S's **operations** or facilities. Because the accident was related to Triple S's operations, the claim for which ATOFINA sought coverage was within the scope of the coverage afforded under section III.B.6 of the policy without regard to ATOFINA's culpability.

The *In re Deepwater Horizon* court also noted the following distinction in the facts in *ATOFINA* to the facts in *In re Deepwater Horizon*:

> The existence of a certificate of insurance naming ATOFINA as an additional insured meant that, unlike *Urrutia* and the present case (*In re Deepwater Horizon*), there was no need to look to the underlying service contract

> to ascertain ATOFINA's status as "[a] person or organization for whom you have agreed to provide insurance as is afforded by this policy." See *id.* at 663. Here, at a minimum, the Transocean insurance policies require reference to the underlying Drilling Contract to determine BP's status as an additional insured. Moreover, section III.B.6 of the policy in *ATOFINA* made no reference to the service contract in determining the scope of additional-insured coverage, while the Transocean policies refer to an "Insured Contract" that requires Transocean to provide the insurance as a predicate to status as an "Insured."
>
> (Author inserted reference to *In re Deepwater Horizon*).

Insurance Policy - Section III.B.5 – Coverage of Insured "No Broader Than" - Underlying Insurance (Other than Excess Policy's Limits)

The other provision in the Protecting Party's insurance, section III.B.5, defined an "insured" as

Insurance Policy:

> Any other person or organization who is insured under a policy of "underlying insurance" (but stated that) [t]he coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance." *Id.* at 667.
>
> (Underlining inserted by author).

The *In re Deepwater Horizon* noted that this section in the ATOFINA excess-insurance policy encompassed a narrower extension of coverage because it expressly incorporated limits on coverage by reference to the underlying CGL policy. The court noted that

> We enforced section III.B.5 as written, and because the underlying CGL policy excluded losses caused by ATOFINA's sole negligence, we held that limitation also applied to the excess policy. Our analysis of this second provision affirms the principle from *Urrutia* that an insurance policy may refer to another document to determine the extent to which an additional insured is covered.
>
> *ATOFINA* embodies several principles that are pertinent to the matter at hand. First, it is possible for a named insured to purchase a greater amount of coverage for an additional insured than an underlying service contract requires. Second, the scope of indemnity and insurance clauses in service contracts is not necessarily congruent. Third, and most importantly, we rely on the policy's language in determining the extent to which, if any, we must look to an underlying service contract to ascertain the existence and scope of additional-insured coverage. *In re Deepwater Horizon* at 462.

[2] *Aubris Resources LP v. St. Paul Fire & Marine Insurance Co.*

In *Aubris Resources LP v. St. Paul Fire & Marine Insurance Co.*, 566 F.3d 483 (5th Cir.2009) the Protecting Party's insurance policy provided that

Insurance Policy:

> Any person ... that you agree in a written contract for insurance (the Insured Contract) to add as an additional protected person under this agreement is also a protected person ... if that written contract for insurance (the Insured Contract) specifically requires such coverages for that person...." *Id.* at 487
>
> (Author for clarification added the identification of the Insured Contract as being referred to by the insurance policy language).

Insured Contract's Additional Insured Specification

The additional-insured obligation in the Insured Contract provided that the

Insurance Policy:

> extension of [additional-insured] coverage shall not apply with respect to any obligations for

which [the owner] has ***specifically*** **agreed** to indemnify Contractor. *Id.*

(Underlining added by author).

The *In re Deepwater Horizon* court summarized the *Aubris* court's holding as follows:

> Although the underlying contract included a general indemnity provision, the *Aubris* court construed the term "**specifically agreed**" to mean an extra-contractual agreement to provide indemnification for the specific claim against the owner. *Id.* at 489–90. Because the owner and contractor reached no extra-contractual indemnity agreement specifically related to the litigation in question, the court held that the owner was an additional insured whose coverage was not restricted by the indemnity allocation in the contract. *Id.* at 490.

The *In re Deepwater Horizon* court found that the decision in *Aubris* adhered to *Urrutia* and *ATOFINA* by looking to the language of the underlying contract (to the extent the insurance policy required) to determine whether there was any limit on additional-insured coverage. See *id.* at 487 (observing that the court "consider[ed] the relationship between and among the policy, the additional insured provision in the services agreement, and the indemnity provision in the services agreement"). Having done so, it determined that there simply was no limitation in the contract that was applicable to the additional-insured's coverage demand.

[3] ***Pasadena Refining System, Inc. v. McCraven***

The *In re Deepwater Horizon* court also reviewed the 14th Court of Appeals decision in *Pasadena Refining System, Inc. v. McCraven*, Nos. 14–10–00837–CV, 14–10–00860–CV, 2012 WL 1693697 (Tex. App. – Hou. [14th Dist.] May 15, 2012, *pet. dism'd by agr.*). There, an additional-insured endorsement to a Protecting Party's liability insurance policy extended coverage to

Insured Contract's Additional Insured Specification

> Any person or organization ... for whom the named insured (the Protecting Party) ... has specifically agreed by written contract the (Insured Contract) to procure bodily injury ... insurance, (but restricted such coverage to) liability arising out of the work done by or on behalf of the named insured (the Protecting Party). *Id.* at 16-17.
>
> (Author added parentheticals identifying the parties being referenced)

The *In re Deepwater Horizon* court noted the distinction between the *Pasadena* policy language and the *In re Deepwater Horizon* policy language:

> Unlike the policy language in Pasadena, the Transocean policies require that the additional-insured obligation arise from a contract involving an indemnity agreement and specify that additional-insured coverage is extended as "obliged" and "where required" therein. *In re Deepwater Horizon* at 463 – 464.

[4] ***Becker v. Tidewater, Inc.***

The *In re Deepwater Horizon* court also cited *Becker v. Tidewater, Inc.*. 586 F.3d 358, 370-72 (5th Cir. 2009) which it noted applied maritime and Louisiana law to construe policy language defining an assured as an entity to which the named assured was "obligated by virtue of a contract or agreement to include or name as an assured" as being limited by an indemnity restriction in the underlying service contract). *In re Deepwater Horizon*, at 464 FN. 13.

[5] ***Certain Underwriters at Lloyd's London v. Oryx Energy, Co.***

The *In re Deepwater Horizon* court also cited *Certain Underwriters at Lloyd's London v. Oryx Energy, Co.*., 142 F.3d 255, 258 (5th Cir. 1998) which it noted applied Texas law to construe policy language providing coverage for an additional insured "when required" to call for an examination of the extent of the indemnity agreement in the underlying contract). *In re Deepwater Horizon*, at 464 FN. 13.

d. Caveat

Unfortunately, although additional insured covenants are the most common risk management technique, they are also the most commonly misunderstood, even by professionals in the field–risk managers, insurance agents, lawyers and courts that are called on to interpret them. The most common error is for the party's insurance covenant to fail to specify the terms of coverage and exclusions from coverage to be contained in the additional insured endorsement. For example, a landlord may specify in its lease that the tenant and the tenant's contractors will cause each of their CGL insurers to list the landlord and its management company and contractors as additional insureds on the tenant's and the tenant's contractors' CGL policies. A tenant may specify in its contract with its tenant finish out contractor that the contractor shall cause its CGL insurer to list the tenant, its landlord, and the landlord's lender, management company and contractors as additional insureds on the tenant finish out contractor's CGL policy. The tenant's contractor may specify in its subcontract that the subcontractors list the contractor as an additional insured on the subcontractors' CGL policies.

In each of these cases, the person desiring protection as an additional insured has left it up to the other party's insurance carrier to define the scope of the coverage to be provided. This is equivalent to letting the fox determine how, when, and if to protect the chicken! This mistake has been made because there is no commonly accepted definition of what it is to be an "additional insured." When a party fails to specify more than it be listed generically as an "additional insured," it has opened the door to the other party's insurer picking a form that effectively eliminates coverage for the additional insured.

IV. FORMS

A. Leases

1. Retail Lease - Texas Real Estate Forms Manual (2 ed.), Chapter 71 Leases [30]

Manual's Approach to Reciprocal Indemnities in the Retail, Office Lease. The Texas Real Estate Forms Manual Retail Lease, Office Lease, and Industrial Lease contain mutual indemnities. *E.g.*, in the Retail Lease ¶ B.1.q Tenant indemnifies Landlord. In Retail Lease ¶ C.1.f Landlord indemnifies Tenant. Each indemnity is a broad form indemnity, indemnifying the Protected Party for all liabilities due to the occurrence of an Injury, even if the cause is the sole or concurrent negligence of the Protected Party. The Tenant's indemnity is for Injuries occurring in the Premises. The Landlord's indemnity is for Injuries occurring in the Common Areas. Each indemnity complies with the express negligence and fair notice requirements which are imposed by the court on provisions shifting liability for negligently caused injuries from one liable person to another. Therefore, each indemnity is enforceable as a means of shifting the risk of liability to the Protecting Party for Injuries caused in whole or in part by the sole or concurrent negligence of the Protected Party.

Indemnity for Protected Party's Sole Negligence. Tenant's indemnity in Retail Lease ¶ B.1.q covers all Injuries occurring in the Premises "even if caused in whole or in part by the ordinary negligence of Landlord." Thus Tenant is indemnifying Landlord for its sole negligence, a risk not covered by the standard additional insured endorsement and likely not covered by the "insured contract" provisions of the Tenant's CGL policy. In order to effect this coverage, Tenant will have to have its carrier issue a manuscripted endorsement to its policy. If Tenant does not obtain such manuscripted endorsement, it will find itself in the position of indemnifying Landlord for a liability not reinsured by Tenant's CGL policy.

Standard Endorsement to Additional Insured Coverage. In 2004 ISO revised several of its additional insured endorsement forms to limit coverage to injuries and damages "caused, in whole or in part" acts or omissions of the named insured (e.g., the Tenant).

Standard Endorsement to "Insured Contract" Definition. Additionally, ISO issued a new CGL policy amendment form, CG 24 26 07 04 Amendment of Insured Contract Definition. This amendment form amends the definition of "insured contracts" to limit assumed tort liability to injury or damage "caused, in whole or in part" by (the named insured). A Tenant's CGL policy must be reviewed to determine if either or both of these amendment have been added to the policy. An argument exists as to whether this amendment excludes the sole negligence of the Landlord, as it does not expressly state that the additional insured's sole negligence is excluded from the definition of "insured contract."

"In Whole or In Part". Comparative Indemnity-Indemnifying for One's Own Share of Injury Caused by the Concurrent Negligence of the Protected Party and the Protecting Party. The "in whole ... by ... Landlord" language expressly addresses the issue as to whether the Protecting Party's indemnity covers an Injury caused "solely" by the negligence of the Protected Party. The "**in part ... by ... Landlord**" language expressly addresses the issue as to whether the Tenant's (the Protecting Party's) indemnity is only as to Injuries caused solely by the acts or omissions of the Landlord (the Protected Party) or also covers Injuries caused in part by other persons. However, This language may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or **comparative negligence**. The indemnity provisions do not expressly state that the Protected Party is indemnified for the liability it has due to the negligence of the Protecting Party. This may result in the Protected Party being indemnified by the Protecting Party for the portion of the liability attributable to the Protected Party's negligence but not for the portion attributable to the Protecting Party's negligence. For example, if an employee of the Tenant is injured in the Premises and suit results. Under the facts of the case, the employee's injuries are the result of the joint negligence of "Landlord" and "Tenant." The injured employee is barred from suing its employer (the Tenant) by the Workers' Comp Bar and thus sues the Landlord. Landlord calls on Tenant to defend Landlord from suit relying on Tenant's indemnity in Lease ¶ A.18. Tenant defends. The jury determines that Landlord was 20% negligent and Tenant was 80% negligent. Jury determines damages to the employee are $1,000,000. Landlord seeks indemnity and contribution from Tenant. Tenant pays the 20% allocable to Landlord's 20% share of the award = $200,000. Tenant does not pay the $800,000 attributable to its negligence. Tenant argues that it did not indemnify Landlord for the share of the liability attributable to Tenant's share of the negligence! The Texas Supreme Court in *Ethyl* held that, if indemnity is sought by the Protected Party for the concurrent negligence of the Protecting Party, the indemnity has to so expressly state. The court termed this claim as one for "**comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987).

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law. *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994). The indemnity must expressly state that it indemnifies the Protected Party for liabilities caused in whole or in part by its negligence and not leave it to inference. For instance, "x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by the gross negligence or willful misconduct of y" will not be enforced to indemnify y for loss caused by its negligence.

"Premises". "**Premises**" is defined in the Basic Terms section of the Retail Lease. The risk allocation scheme adopted in the Texas Real Estate Forms Manual for Leases is to allocate responsibility to the Tenant for all Injuries occurring in the Premises and

to allocate to the Landlord responsibility for all Injuries occurring in the Common Areas. The Retail Lease contains reciprocal indemnities with the Tenant indemnifying the Landlord for all Injuries occurring in the Premises and with the Landlord indemnifying Tenant for all Injuries occurring in the Common Areas.

"Occurring". The indemnity language does not expressly address the time of the occurrence. Injuries can occur after the end of the Term of a lease due to acts or omissions occurring during the Term of a lease. The indemnity does state that the indemnity survives the end of the Term of the Lease, but this may address the survivability of the indemnity as to Injuries occurring during the Term of the Lease. The timing issue is addressed by adding the words "**either before or after the end of the Term**" after "occurring in any portion of the Premises."

Survives Termination of Lease. This provision is added to assure the Protected Party that the contractual indemnity does not terminate like the other covenants on the end of the Lease Term. Note, however, that the indemnity does not expressly state that it covers Injuries occurring after the end of the Lease Term but attributable acts or omissions of the Protected Party prior to the end of the Lease Term. The indemnity should be revised to address Injuries occurring in the Premises after the Term attributable to acts or omissions of Tenant during the lease term.

Retail Lease

Basic Information

Landlord: _____.

Tenant: _____.

Premises: Approximate square feet: _____. Name of Shopping Center: _____. Street address/suite: _____. [Include or attach any additional necessary legal description.]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.3. "Common Areas" means all facilities and areas of the Shopping Center that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Shopping Center, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

A.6. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.7. "Lienholder" means the holder of a deed of trust covering the Premises.

….

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.q. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY[31] (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES[32] AND OTHER FEES AND COURT AND OTHER COSTS[33]) OCCURRING[34] IN ANY PORTION OF THE PREMISES.[35] **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES[36] OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS,[37] (iii) WILL SURVIVE THE END OF THE TERM,[38] AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED[39] IN WHOLE[40] OR IN PART[41] BY THE ORDINARY NEGLIGENCE[42] OR STRICT LIABILITY[43] OF LANDLORD BUT WILL NOT APPLY TO[44] THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE[45] OR WILLFUL MISCONDUCT OF LANDLORD AND LIENHOLDER AND THEIR RESPECTIVE AGENTS.**

…

C. Landlord Obligations

C.1. **Landlord agrees to—**

C.1.f. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS OCCURRING IN ANY PORTION OF THE COMMON AREAS.[46] **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

2. Supplement to Manual's Lease

The following form has been drafted to supplement the Manual's Lease form. This supplement contains the following provision protective of the Protected Party in the conduct of the defense of an Indemnified Liability:

- the Protected Party (Indemnified Person) is permitted to employ its own counsel in addition to the counsel employed by the Protecting Party (the Indemnifying Person);
- the cost of the Protected Party's (Indemnified Person's) counsel is also an Indemnified Liability;
- the Protected Party (Indemnified Person) is given the right to settle claims in the event that the Protecting Party does not provide a defense to the claim; and
- amounts paid by the Protecting Party under such circumstances is an Indemnified Liability.

Also see in this form procedures for the Protected Party to determine if the Protecting Party will honor its obligation to provide a defense and, if not, for the Protected Party to employ counsel to defend the claim.

Supplement to Risk Management Provisions

Retail Lease

Date: dd/mm/yy

Landlord: _____

Tenant: _____

This Supplement to the Risk Management Provisions is part of the lease. To the extent there is a conflict between the provisions of this supplement and the lease, this supplement controls.

A. ADDITIONAL DEFINITIONS.

The following are definitions of terms used in this supplement and the lease.

1. **Affiliates.** "**Affiliates**" means with respect to any person or entity, each stockholder, subsidiary, officer, director, member, partner, heir, executor, personal representative, and affiliates.

2. **Attorney Fees.** "**Attorney Fees**" include the Indemnified Person's attorneys' fees and expenses incurred by attorneys, such as postage, courier expenses, long distance charges, travel expenses, and copying costs (whether incurred by an attorney as part of its overhead or to third

party services), incurred in the defense of a Claim or Action or to collect on the indemnity of the Indemnifying Person.

3. **Claim or Action.** "**Claim**" or "**Action**" means any and all claims, actions, causes of action, suit or proceeding (whether in tort or contract, law or equity, or otherwise) against an Indemnified Person with respect to which an Indemnifying Person or an Indemnified Person may have liability or incur a loss.

4. **Court or Other Costs.** "**Court or Other Costs**" include costs of investigation and expert witnesses; filing fees.

5. **Indemnified Persons.** "**Indemnified Persons**" means (a) in the case of the indemnity by Tenant the following persons: Landlord and its Affiliates, agents, its management company, Lienholder, employees, invitees, licensees, or visitors and (b) in the case of the indemnity by Landlord the following persons: Tenant and its Affiliates, agents, employees, invitees, licensees, or visitors.

6. **Indemnifying Person.** "**Indemnifying Person**" means (a) in the case of the indemnity by Tenant the following persons: Tenant and its successors and assigns and (b) in the case of the indemnity by Landlord the following persons: Landlord and its successors and assigns.

7. **Injury.** "**Injury**" includes (a) harm to or death of an employee of either an Indemnifying Person or an Indemnified Person; and (b) bodily injury.

8. **Loss, Liability or Expense.** "**Loss**," "**Liability**" or "**Expense**" includes losses, liabilities, damages (including actual, consequential and punitive), expenses (including consultant and expert fees), charges, assessments, fines, penalties, liens, judgments, settlements, and Litigation Expenses (as herein defined).

9. **Litigation Expenses.** "**Litigation Expenses**" include Attorney's Fees and Court or Other Costs.

10. **Occurrence.** "**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Occurrences include accidents that happen after the end of the Term of the lease but are caused by acts or omissions during the Term of the lease.

B. INDEMNITY.

1. **INDEMNITY BY TENANT.** ¶ *B.1.q* Clause (iv) of the lease is amended to add the words underlined below:

> **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.**

2. **INDEMNITY BY LANDLORD.** ¶ *C.1.f* Clause (iv) of the lease is amended to add the words underlined below:

> **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT OR LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

3. **ENVIRONMENTAL LAW COMPLIANCE; INDEMNITY.** Notwithstanding anything in the lease to the contrary, there is hereby excepted from the mutual indemnities provided by ¶¶ *B.1.q* and *C.1.f* indemnification for Environmental Liabilities. Indemnification for Environmental Liabilities is

separately addressed in the Environmental Liability and Indemnification Addendum to this lease.

C. MANAGEMENT OF CLAIMS.

1. **Notice of Action or Claim.** The Indemnified Person must promptly notify the Indemnifying Person in writing of a Claim or Action and deliver to the Indemnifying Person a copy of the claim, process, and all legal pleadings with respect to the Claim or Action. Receipt of this notice is a condition precedent to the Indemnifying Person's liability to the Indemnified Person with respect to the Injury.

2. **Indemnifying Person's Assumption of the Defense.**

a. **Notice of Assumption.** If an Indemnifying Person wishes to assume the defense of the Claim or Action, it shall do so by sending notice of the assumption to the Indemnified Persons. The Indemnifying Person's assumption of the defense acknowledges its obligation to indemnify.

b. **Selection of Counsel.** Promptly after sending the notice, the Indemnifying Person shall choose and employ independent legal counsel of reputable standing. After sending the notice, the Indemnifying Person is entitled to contest, pay, settle or compromise the Claim or Action as it determines, subject to the provisions of ¶ **C.7** of this supplement.

3. **Indemnifying Person's Declining Defense.** An Indemnifying Person may refuse to provide a defense of the Claim or Action, if it reasonably believes that the Claim or Action, for which a defense is sought, is not required to be defended pursuant to the terms of this lease, and a refusal to defend under such circumstances shall not be a breach of this lease. However, if the Indemnified Person shall be required by a final judgment to pay any amount in respect of any obligation or liability against which the Indemnifying Person is required to indemnify under this lease, the Indemnifying Person shall promptly reimburse the Indemnified Person in an amount equal to the amount of such payment. Further, if such refusal, or any failure, to provide a defense against an Claim or Action is not to have been reasonably justified, then the Indemnifying Person shall be obligated to pay all of the out-of-pocket expenses incurred by the Indemnified Person in defending the Claim or Action or Action, including, but not limited to the value of the time, including travel time, that all of the employees, agents and representatives of the Indemnified Person dedicated to, or expended in furtherance of, the defense of the Claim or Action. The Indemnifying Person, who fails to provide a defense required by this lease to be provided, without any further action required by any Indemnified Person, hereby intentionally relinquishes and waives any and all rights of every nature to dispute, defend against or contest, in any manner (including but not limited to the waiver of every defense of every nature) the claim of the Indemnified Person, regarding the amount of, reasonableness of, necessity for or the Indemnifying Person's obligation to pay, the costs, fees and expenses, and other damages incurred by the Indemnified Person in defending the Claim or Action for which a defense by this lease was refused by the Indemnifying Person.

4. **Indemnified Person's Right to Undertake the Defense.** Despite the provisions of ¶ **C.2** above, an Indemnified Person is entitled (a) to participate in the defense of an Claim or Action and (b) to defend an Claim or Action if

(1) the Indemnifying Person fails or refuses to defend the Claim or Action on or before the ___ day after the Indemnifying Person has given written notice to the Indemnifying Person of the Claim or Action;

(2) in response to a petition by the Indemnified Person, a court of competent jurisdiction rules that the Indemnifying Person failed or is failing to vigorously prosecute or defend such Claim or Action;

(3) such Claim or Action may result in liabilities which would not be fully indemnified

hereunder;

(4) representation of the Indemnifying Person and the Indemnified Person by the same counsel would, in the opinion of that counsel, constitute a conflict of interest; or

(5) the Claim or Action may result in a criminal proceeding against the Indemnified Person.

5. Providing and Assisting with the Defense.

a. Qualification of Counsel. The Indemnifying Person shall provide a defense with qualified counsel that is selected by the Indemnifying Person, and such counsel shall be deemed to have been approved by the Indemnified Person, without further action by the Indemnified Person, unless the Indemnified Person establishes (a) a substantive and material conflict of interest with such counsel; or (b) a fair and substantial cause or reason to withhold such approval, such as the incompetence or significant inexperience of such counsel.

b. Cooperation. The Indemnified Person shall cooperate in the defense and shall make reasonably available all records, witnesses, evidence and other tangible items, in the possession, custody or control of the Indemnified Person, deemed relevant by the Indemnifying Person. The Indemnified Person shall also take all such other action, and sign such documents, as the Indemnifying Person shall deem to be reasonably necessary to defend such Claims or Actions in a timely manner.

6. Litigation Expenses.

a. Expenses Before and After Assumption of the Defense. The Indemnifying Person shall pay for the Litigation Expenses incurred by the Indemnified Person to and including the date the Indemnifying Person assumes the defense of the Claim or Action. Upon the Indemnifying Person's assumption of the defense of the Claim or Action, the Indemnifying Person's obligation ceases for any Litigation Expenses the Indemnified Person subsequently incurs in connection with the defense of the Claim or Action. Despite the previous sentence, the Indemnifying Person is liable for the Litigation Expenses of the Indemnified Person, if (a) the Indemnified Person has employed counsel in accordance with the provisions of ¶ **C.4**; or (b) the Indemnifying Person has authorized in writing the employment of counsel and stated in that authorization the dollar amount of Litigation Expenses for which the Indemnifying Person is obligated.

b. Allocation of Expenses if Defense Involves Additional Matters. Counsel for the defense of the Indemnified Person provided by the Indemnifying Person shall regularly estimate in good faith the portion of all costs, fees and expenses of the defense directly related to the defense of the Claim or Action and to exclude therefrom any costs, fees and expenses due to matters other than the defense of the Claim or Action. Defense counsel shall provide the Indemnified Person and the Indemnifying Person a report setting out this allocation with each billing made by counsel.

7. Compromise and Settlement.

a. General Rule. If an Indemnifying Person assumes the defense of an Claim or Action, it may not affect any compromise or settlement of the Claim or Action without the written consent of the Indemnified Person affected by the compromise or settlement, and the Indemnified Person has no liability with respect to any compromise or settlement any Claim or Action effected without its consent [*add: but such consent shall not be unreasonably withheld*].

b. Exceptions. Despite the provisions of ¶ **C.7a**, an Indemnifying Person may effect a compromise or settlement of an Claim or Action without obtaining the consent of the effected Indemnified Person if the following conditions are met:

(1) There is no finding or admission of any violation of law or any violation of the rights of any

person and no effect on any other Claim that may be made against the Indemnified Person;

(2) The sole relief provided is monetary damages that are paid in full by the Indemnifying Persons; and

(3) The compromise or settlement includes, as an unconditional term, the claimant's or the plaintiff's release of the Indemnified Person, in form and substance satisfactory to the Indemnified Person, from all liability in respect of the Claim or Action.

D. PAYMENT.

The Indemnifying Person shall pay and cause to be discharged any judgment it is obligated to pay pursuant to its indemnity of the Indemnified Persons within 21 days of the judgment becoming a final and unappealable judgment.

3. Mutual Indemnity for Indemnifying Person's Proportionate Share of Responsibility

This indemnity is a form of **mutual limited indemnity** contained in an office lease for a large office building. Each party as an indemnifying person (Protecting Party) indemnifies the other party (Protected Party) for injuries or property damage arising from the act or omission or negligence of the Protecting Party and if the injury or property damage arises from the concurrent negligence of the Protecting Party and the Protected Party, the Protecting Party's indemnity is limited to the percentage of total responsibility of the Protecting Party in contributing to the liability of the Protected Party.

(1) TENANT. TO THE EXTENT PERMITTED BY LAW, TENANT SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE LANDLORD PARTIES AGAINST ANY CLAIM BY ANY THIRD PARTY FOR INJURY TO ANY PERSON OR DAMAGE TO OR LOSS OF ANY PROPERTY OCCURRING IN OR AROUND THE PROJECT AND ARISING FROM THE USE OR OCCUPANCY OF THE LEASED PREMISES OR FROM ANY OTHER ACT OR OMISSION OR NEGLIGENCE OF TENANT OR SUBTENANTS OR ANY OF TENANT'S OR SUBTENANT'S OFFICERS, DIRECTORS, EMPLOYEES, CONTRACTORS OR AGENTS.

(2) LANDLORD. TO THE EXTENT PERMITTED BY LAW, LANDLORD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS TENANT AND ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS AGAINST ANY CLAIM BY ANY THIRD PARTY FOR INJURY TO ANY PERSON OR DAMAGE TO OR LOSS OF ANY PROPERTY OCCURRING IN THE PROJECT AND ARISING FROM ANY ACT OR OMISSION OR NEGLIGENCE OF ANY OF THE LANDLORD PARTIES.

(3) PROPORTIONATE RESPONSIBILITY. THE INDEMNITIES CONTAINED IN THIS SECTION ARE (A) INDEPENDENT OF TENANT'S AND LANDLORD'S INSURANCE (AS APPLICABLE), (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, AND (C) WILL SURVIVE THE END OF THE TERM. NOTWITHSTANDING ANYTHING IN THIS LEASE TO THE CONTRARY, TO THE EXTENT THE INDEMNIFIED LIABILITY, LOSS, COST, DAMAGE OR EXPENSE ARISES OUT OF THE JOINT, CONCURRENT OR COMPARATIVE NEGLIGENCE, CAUSATION, RESPONSIBILITY OR FAULT OF TENANT AND LANDLORD, WHETHER NEGLIGENCE, STRICT LIABILITY, BREACH OF WARRANTY, EXPRESS OR IMPLIED, PRODUCTS LIABILITY, BREACH OF THE TERMS OF THIS LEASE OR WILLFUL MISCONDUCT, THEN THE INDEMNIFYING PARTY'S OBLIGATION TO THE INDEMNIFIED PERSONS SHALL ONLY EXTEND TO THE PERCENTAGE OF TOTAL RESPONSIBILITY OF THE INDEMNIFYING PARTY IN CONTRIBUTING TO SUCH LIABILITY, LOSS, COST, DAMAGE OR EXPENSE OF THE INDEMNIFIED PERSONS.

B. Construction Contracts

1. AIA A201-2007 General Conditions § 3.18 Indemnification

This provision is contained in the AIA A201 General Conditions is the pattern language used in AIA construction contract forms. This language creates a "**limited form indemnity**", since it does not provided for the Contractor's assumption of the Owner's tort liability, but is an indemnity for liabilities to the extent caused by the negligent acts or omissions of the Contractor. The indemnity

language limits the indemnity with:

Insured Contract Provision:

but only to the extent caused by the **negligent acts or omissions of the Contractor**".

Questions:

- Does the "only to the extent" language contemplate indemnity of the Owner in cases where the injury is concurrently caused by the negligence of the Contractor and someone else?
- Even if concurrently caused by the Owner?
- Or, does this language contemplate indemnity of the Owner where the injury is only caused by the Contractor and not by the Contractor and anybody else?
- The third party claim could be the product of the negligence in part of the Contractor and the negligence of the Owner. In such case does this language result in the Contractor indemnifying the Owner both for the share of liability caused by the Contractor and for the share of liability caused by the Owner?
- Note the indemnification of the Owner as to a concurrently caused injury or property damage applies:

Insured Contract Provision:

regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

But also notice that there is no express reference in this language to indemnifying the Owner for the portion of the concurrently caused injury or property damage caused in part by the negligence of the Owner.

- The Texas Anti-Indemnity Act, TEX. INSURANCE CODE Chapter 151 has the following significant express exceptions to the Act's elimination of broad-form indemnity: (1) bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (§ 151.103); (2) claims arising from single-family residential construction (§ 151.105(10)(A)); and (3) claims arising from construction projects insured through CIPs, controlled insured programs (§ 151.105(1)). The AIA form is not tailored to Texas addresses the prospect of statutory prohibitions on indemnity with

Insured Contract Provision:

To the fullest extent permitted by law

Questions:

Does this language extend the scope of the indemnity to indemnify the Owner for injuries to the Contractor's employees concurrently caused in part by the negligence of the Owner as would be permitted by the Texas Anti-Indemnity Act?

- Further, is it the intent of the parties to limit the additional insured coverage of the Owner by th**e** limitation in the AIA indemnity language? Note the AIA forms contemplate that the details of insurance, including the scope of the additional insured coverage, are to be set out in detailed insurance specifications.

The AIA indemnity language is not conspicuous.

§ 3.18 INDEMNIFICATION **§ 3.18.1** To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party

indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

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

(Emphasis added by author.)

2. Modified AIA A201-2007 General Conditions § 3.18 Indemnification

The following indemnity is a combination **limited** indemnity and an **intermediate** indemnity.

Section 3.18.1.1 is a **limited** indemnity by the Contractor indemnifying the Owner for injuries to the extent caused in whole or in part by the Contractor, Subcontractor and other persons for whom Contractor is legally liable, but not to the extent caused in whole or in part by an Owner-Related person.

Section 3.18.1.2 is an **intermediate** indemnity for injuries to the employees of the Contractor, its agents or its Subcontractors of any tier to the extent caused in whole or in part by the negligence of Contractor, Subcontractors of any tier and all other persons for whom Contractor is legally liability even to the extent caused **in part** by the negligence of an Owner-Related Person.

AIA A201 Article 3 Contractor § 3.18.1 is deleted and replaced with the following:

> **§ 3.18.1.1 INDEMNITY FOR THE NEGLIGENCE OF CONTRACTOR-RELATED PERSONS.** TO THE FULLEST EXTENT PERMITTED BY LAW INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE AND NOT WITHIN THE INDEMNITY SET OUT BELOW IN **§ 3.18.1.2**, CONTRACTOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS OWNER, OWNER'S LENDERS, THE ARCHITECT, THEIR RESPECTIVE AGENTS, PARTNERS, PRINCIPALS, EMPLOYEES, SUCCESSORS, AFFILIATES AND ASSIGNS ("***OWNER-RELATED PERSONS***") FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES, LIABILITIES AND EXPENSES (INCLUDING, BUT NOT LIMITED TO, REIMBURSEMENT OF ATTORNEYS' FEES EXPENDED IN LITIGATION OR ARBITRATION OR ENFORCEMENT OF THIS CONTRACT), FOR BODILY INJURY OR DEATH OF PERSONS OTHER THAN AN EMPLOYEE OF CONTRACTOR, ITS AGENTS, OR ITS SUBCONTRACTORS OF ANY TIER, **TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS, OF CONTRACTOR, SUBCONTRACTORS AND ALL OTHER PERSONS FOR WHOM CONTRACTOR IS LEGALLY LIABLE** (A "***CONTRACTOR-RELATED PERSON***"), **BUT NOT TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACT OR OMISSION OF AN OWNER-RELATED PERSON**.
>
> **§ 3.18.1.2 INDEMNITY FOR EMPLOYEE CLAIM.** TO THE FULLEST EXTENT PERMITTED BY LAW INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE, CONTRACTOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER-RELATED PERSONS FROM AND AGAINST A CLAIM FOR THE BODILY INJURY OR DEATH OF **AN EMPLOYEE OF** CONTRACTOR, ITS AGENTS, OR ITS SUBCONTRACTORS OF ANY TIER, **CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS, OF A CONTRACTOR-RELATED PERSON, EVEN TO THE EXTENT CAUSED IN PART BY THE NEGLIGENT ACT OR OMISSION OF AN OWNER-RELATED PERSON.**
>
> THE INDEMNITIES IN THIS **SECTION 3.18.1** (INDEMNIFIED LIABILITIES) SURVIVE TERMINATION OF THE AGREEMENT OR COMPLETION OF THE WORK.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as AIA A201 § 3.18.3 Enforcement Costs:

> **§ 3.18.3 ENFORCEMENT COSTS.** EXPENSES RECOVERABLE BY THE OWNER-RELATED PERSONS AS PART OF THE CONTRACTOR'S INDEMNITY OBLIGATIONS UNDER THIS AIA A201 **SECTION 3.18**

(INDEMNIFICATION) SHALL INCLUDE, WITHOUT LIMITATION, ALL ATTORNEYS' FEES AND ANY COSTS INCURRED BY SUCH OWNER-RELATED PERSONS IN ENFORCING THE PROVISIONS OF THE CONTRACTOR'S INDEMNITY OBLIGATIONS.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as AIA A201 § 3.18.4 Proceedings:

§ 3.18.4 PROCEEDINGS. THE CONTRACTOR SHALL PROMPTLY ADVISE OWNER AND CONSTRUCTION MANAGER IN WRITING OF ANY ACTION, ADMINISTRATIVE OR LEGAL PROCEEDING OR INVESTIGATION AS TO WHICH THIS INDEMNIFICATION MAY APPLY, AND CONTRACTOR, AT CONTRACTOR'S EXPENSE, SHALL ASSUME ON BEHALF OF THE OWNER-RELATED PERSONS AND CONDUCT WITH DUE DILIGENCE AND IN GOOD FAITH THE DEFENSE THEREOF WITH COUNSEL SATISFACTORY TO OWNER; PROVIDED, HOWEVER, THAT OWNER AND THE OTHER OWNER-RELATED PERSONS SHALL EACH HAVE THE RIGHT, AT THEIR OPTION, TO BE REPRESENTED THEREIN BY LEGAL COUNSEL OF THEIR OWN SELECTION AND AT THEIR OWN EXPENSE. IN THE EVENT OF FAILURE BY THE CONTRACTOR TO FULLY PERFORM IN ACCORDANCE WITH THIS INDEMNIFICATION PARAGRAPH, THE OWNER-RELATED PERSONS, AT THEIR OPTION, AND WITHOUT RELIEVING CONTRACTOR OF ITS OBLIGATIONS HEREUNDER, MAY SO PERFORM, BUT ALL COSTS AND EXPENSES SO INCURRED BY THE OWNER-RELATED PERSONS IN THAT EVENT SHALL BE REIMBURSED BY CONTRACTOR TO SUCH OWNER-RELATED PERSONS, TOGETHER WITH INTEREST ON THE SAME FROM THE DATE ANY SUCH EXPENSE WAS PAID BY SUCH OWNER-RELATED PERSONS UNTIL REIMBURSED BY CONTRACTOR, AT THE RATE OF INTEREST PROVIDED TO BE PAID AN JUDGMENTS UNDER THE LAWS OF THE STATE OF TEXAS.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as AIA A201 § 3.18.5 Chapter 151 Texas Insurance Code:

§ 3.18.5 CHAPTER 151 TEXAS INSURANCE CODE. IT IS THE INTENT OF THE PARTIES TO THIS CONTRACT NOT TO VIOLATE THE PROVISIONS OF CHAPTER 151 OF THE TEXAS INSURANCE CODE. IN THE EVENT THAT ANY PROVISION OF THIS CONTRACT VIOLATES THE PROVISIONS OF CHAPTER 151 OF THE TEXAS INSURANCE CODE, THIS CONTRACT SHALL BE REVISED TO LIMIT THIS CONTRACT TO COMPLY WITH CHAPTER 151 OF THE TEXAS INSURANCE CODE.

The following section is added to AIA A201 Article 3 Contractor § 3.18 Indemnification as § 3.18.6 Survival:

§ 3.18.6 SURVIVAL. THE INDEMNITIES IN THIS **SECTION 3.18** (INDEMNIFICATION) SURVIVE COMPLETION OF THE WORK. THE PROVISIONS CONTAINED AIA 201 **SECTION 3.18** (INDEMNIFICATION) SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT, THE FINAL COMPLETION OF THE WORK, AND ANY OTHER SERVICES TO BE PROVIDED PURSUANT TO THE CONTRACT DOCUMENTS.

3. AIA B103 – 2007 Standard Form Between Owner and Architect for a Large or Complex Project.

This provision is contained in the AIA B103 is the pattern language used in AIA architect agreement forms. This language creates a "**limited form indemnity**", since it does not provided for the Architect's assumption of the Owner's tort liability, but is an indemnity for liabilities to the extent caused by the negligent acts or omissions of the Architect. Also note the language **bolded** below, as the AIA has sought to limit its member's exposure to "the available proceeds of insurance coverage." Also, note that the AIA form provides for a mutual waiver of consequential damages.

§ 8.1.3 The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. **The Architect's duty to indemnify the Owner under this provision shall be limited to the available proceeds of insurance coverage**.

§ 8.1.4 The Architect and Owner waive consequential damages for claims, disputes or other matters in

question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

(Author added **bold** for emphasis.)

B103 As Required by a National Architecture Firm.

The following provisions are taken from a B103 with a national stature architectural firm. Note that the architect liability provisions are bifurcated:

- 12.4.1 is an indemnity by the Architect for liabilities incurred by the Owner to third parties caused by the Architect's negligence, but the Architect's liability is **capped** at $3,000,000. This results in a waiver and release of the Architect of liability to the Owner for third party liabilities above $3,000,000 even though the Architect has insurance above that amount.

- 12.4.1.1 imposes a $5,000,000 limitation on the Architect's liability to the Owner for any liabilities incurred by the Owner from any causes include due to the Architect's professional negligence and/or breach of contract even though the Architect has insurance above that amount; but also it provides for a sublimit cap of $3,000,000 for its liability caused by its MEP consultant. Its MEP had only $3,000,000 in professional liability insurance.

§ 12.4. MUTUAL INDEMNITIES.
§ 12.4.1 By Architect. TO THE EXTENT PERMITTED BY LAW THE ARCHITECT AGREES TO INDEMNIFY AND HOLD THE OWNER HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, SUITS, DEMANDS, LOSSES, DAMAGES, COSTS, AND EXPENSES ARISING FROM CLAIMS BY THIRD PARTIES (INCLUDING REASONABLE ATTORNEYS' FEES AND COSTS) TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS, ERRORS, OR OMISSIONS OF THE ARCHITECT OR ANYONE FOR WHOSE ACTS IT IS LEGALLY LIABLE**,** BUT ARCHITECT'S INDEMNITY IS CAPPED NOT TO EXCEED THREE MILLION DOLLARS ($3,000,000) ("**CAP**").

§ 12.4.1.1 Limitation of Liability. The Parties hereby further agree that the Architect's total liability to the Owner for any and all injuries, claims losses, costs, expenses or damages arising out of or in any way related to the Project or this Agreement, from any cause or causes including, but not limited to professional negligence and/or breach of contract shall not exceed Five Million Dollars ($5,000,000). Notwithstanding the foregoing, for any and all injuries, claims, losses, costs, expenses or damages arising out of or in any way related to the Project or this Agreement, from any cause or causes alleging errors or omissions by the MEP Consultant, including breach of contract or professional negligence, the Architect's total liability shall not exceed Three Million Dollars ($3,000,000).

§ 12.4.2 By Owner. TO THE EXTENT PERMITTED BY LAW THE OWNER AGREES TO INDEMNIFY AND HOLD THE ARCHITECT HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, SUITS, DEMANDS, LOSSES, DAMAGES, COSTS, AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES AND COSTS), TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS, ERRORS, OR OMISSIONS OF THE OWNER OR ANYONE FOR WHOSE ACTS IT IS LEGALLY LIABLE**.** ADDITIONAL INSURED COVERAGE OF ARCHITECT IS NOT TO BE LIMITED BY THE TERMS OF THE OWNER'S INDEMNITY.

§ 12.4.3 Proportionate Responsibility. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, TO THE EXTENT THE INDEMNIFIED CLAIM, LIABILITY, SUIT, DEMAND, LOSS, DAMAGE COST OR EXPENSE IS CAUSED BY THE JOINT, CONCURRENT OR COMPARATIVE OR COMPARATIVE NEGLIGENCE, CAUSATION, RESPONSIBILITY OR FAULT OF ARCHITECT AND OWNER, WHETHER NEGLIGENCE, BREACH OF THIS AGREEMENT OR WILLFUL MISCONDUCT, THEN THE INDEMNIFYING PARTY'S OBLIGATION TO THE INDEMNIFIED PERSON SHALL ONLY EXTEND TO THE PERCENTAGE OF THE TOTAL RESPONSIBILITY OF THE INDEMNIFYING PARTY IN CONTRIBUTING TO SUCH CLAIM, LIABILITY, SUIT, DEMAND, LOSS, DAMAGE COST OR EXPENSE OF THE INDEMNIFIED PERSONS.

3. Insurance Forms

a. ISO Endorsements to ISO CGL Policy

(1) CG 20 01 04 13 Primary And Noncontributory-Other Insurance Condition

ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition was introduced in 2013 by ISO to provide an endorsement form to be added to the Named Insured's policy (the protecting party's policy) to reiterate that it provides "primary" coverage and that its issuer "will not seek contribution from any other insurance available to an additional insured". Note, however, that Provision (2) of this endorsement requires that the written agreement of the additional insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured's insurance is primary and will not seek contribution from the additional insured's other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that an ISO CG 20 10 endorsement be added to the Named Insured's policy may not achieve the Additional Insured's objectives, if the written agreement itself does not also specify that the additional insured coverage on the Named Insured's policy is "primary and noncontributory" plus contain language defining what is meant by primary and noncontributory. Note that this new endorsement is worded to apply only where the additional insured is a Named Insured. Many of the parties that require additional insured protection are not named insureds under a CGL policy, e.g., officers, directors, and employees of a primary additional insured. Also note that this new endorsement provides that it applies only if the person or entity is named as an additional insured by an endorsement. Also, note this endorsement endorses the Named Insured's Commercial General Liability Policy and is not an endorsement to the Named Insured's umbrella or excess policy. This result might be avoided if the umbrella or excess policy provides that it is primary and does not require the additional insured's policy to contribute, and the additional insured's policy does not provide that it contributes along with other insurance above the primary contributing policies. This desired result of an additional insured is exacerbated by the standard policy's "other insurance" language that provides the policy is "Excess over: … (b) Any other primary insurance available to you covering liability … for which you have been added as an additional insured." The additional insured's policy does not state it is excess over umbrella policies of the Named Insured on which it has been added as an additional insured.

(2) CG 20 10 04 13 Additional Insured – Owners, Lessees Or Contractors – Scheduled Person Or Organization

The ISO CG 20 10 04 13 Additional Insured Endorsement, is used to schedule an owner (a landlord), a lessee or a contractor on a named insured's CGL policy. It is used to schedule a landlord on the tenant's CGL policy and on a tenant's contractor's CGL policy to schedule a landlord on a tenant's CGL policy.

(3) CG 20 11 04 13 Additional Insured – Managers Or Lessors Of Premises

This endorsement is used when a landlord or the property manager, or both, is to be listed as an additional insured on the tenant's liability insurance policy. A common risk transfer strategy is for a landlord to provide in its lease that its tenant indemnify and make the landlord and its property manager an additional insured on the tenant's CGL policy. These provisions recognize that the tenant's occupancy creates an additional liability exposure to the landlord for injuries and property damage resulting from a tenant's activities.

(4) CG 20 37 04 13 Additional Insured – Owners, Lessees Or Contractors – Completed Operations

This endorsement is used when a landlord or the property manager, or both, is to be listed as an additional insured on the tenant's liability insurance policy. A common risk transfer strategy is for a landlord to provide in its lease that its tenant indemnify and make the landlord and its property manager an additional insured on the tenant's CGL policy. These provisions recognize that the tenant's occupancy creates an additional liability exposure to the landlord for injuries and property damage resulting from a tenant's activities.

(5) CG 20 38 04 13 Additional Insured – Owners, Lessees Or Contractors – Automatic Status For Other Parties When Required In Written Construction Agreement

This form was added by ISO in 2013 to its list of additional insured endorsement forms. Paragraph **.2** extends additional insured coverage to "Any other person … you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above." Make sure that, if automatic additional insured status is being afforded and there is not a direct contract between the Named Insured and the Additional Insured, ISO CG 20 38 is the appropriate endorsement form to attach to the Named Insured's policy. Your examination of the Certificate of Insurance will not confirm which automatic additional insured endorsement form is part of the Named Insured's policy. Many times the parties' written agreement has a laundry list of Additional Insureds. In such circumstances it is not assured that the Insurer will be willing to extend additional insured status to numerous entities with which the Named Insured does not have a contract. CG 20 38 at Paragraph **B.2** excludes coverage for liabilities arising out of the products and completed operations hazard. Also, at Paragraph B.1 the 2013 revision to this endorsement added an exclusion for professional services, including the additional insured's hiring, training or monitoring of employees who perform professional services themselves.

(6) CG 21 39 10 93 Contractual Liability Limitation

In addition to additional insured coverage, Contractual Liability Coverage is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. **ISO CG 21 39 10 93** Contractual Liability Limitation is one of the most egregious endorsements in the insurance industry. The provision of Contractual Liability Coverage includes a series of definitions of an "insured contract." The first five definitions are referred to as incidental provisions, but the sixth definition is the provision that provides for the contractual assumption of tort liability. The sixth type of "insured contract" is most frequently the basis of insurance of a Named Insured on its indemnity of third parties (*e.g.*, indemnity for injuries to an employer's employees; indemnity for injuries to a subcontractor's employees). The **CG 21 39** deletes this sixth definition in its entirety, deleting coverage for an indemnitor's indemnity of a third party for its negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer, unless its indemnity falls within one of the five defined "insured contracts". Anti-Indemnity Statutes in many states preclude enforcement of indemnities as to a third party's negligence, sole or even concurrent, except in statutorily limited circumstances.

(7) CG 24 26 07 04 Amendment of Insured Contract Definition

This endorsement amends the definition of "insured contract" to limit contractual liability coverage insuring the named insured's indemnities for the Protected Party's tort liability to bodily injury and property damage *caused in whole or in part by* the named insured (the indemnifying person). This causation language was added by ISO to eliminate from the Contractual Liability Coverage of "insured contracts" the sole negligence of the indemnified party. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer.

b. ISO Commercial General Liability Coverage Form

(1) CG 20 01 04 13 Primary And Noncontributory-Other Insurance Condition.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION[47]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

Primary And Noncontributory Insurance

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

(1) The additional insured is a Named Insured under such other insurance; and

(2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

(2) CG 20 10 04 13 Additional Insured – Owners, Lessees Or Contractors – Scheduled Person Or Organization.

COMMERCIAL GENERAL LIABILITY

POLICY NUMBER:

CG 20 10 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION[48]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

(3) CG 20 11 04 13 Additional Insured – Managers Or Lessors Of Premises.

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 20 11 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES[49]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designation Of Premises (Part Leased To You):
Name Of Person(s) Or Organization(s) (Additional Insured):
Additional Premium: $
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person(s) or organization(s) shown in the Schedule.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

(4) CG 20 37 04 13 Additional Insured – Owners, Lessees Or Contractors – Completed Operations.

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 20 37 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS[50]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

(5) CG 20 38 04 13 Additional Insured – Owners, Lessees Or Contractors – Automatic Status For Other Parties When Required In Written Construction Agreement.

COMMERCIAL GENERAL LIABILITY
CG 20 38 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT[51]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and

2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above.

Such person(s) or organization(s) 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;

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured described above:

a. Only applies to the extent permitted by law; and

b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for the person or organization described in Paragraph **1.** above are completed.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

2. "Bodily injury" or "property damage" occurring after:

a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement described in Paragraph **A.1.;** or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

(6) CG 21 39 10 93 Contractual Liability Limitation.

Policy Number:

COMMERCIAL GENERAL LIABILITY
CG 21 39 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONTRACTUAL LIABILITY LIMITATION[52]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The definition of "insured contract" in the DEFINITIONS Section is replaced by the following:
"Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement.

(7) CG 24 26 07 04 Amendment of Insured Contract Definition.

POLICY NUMBER: COMMERCIAL GENERAL LIABILITY
CG 24 26 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION[53]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph **9.** of the **Definitions** Section is replaced by the following:

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is **caused, in whole or in part, by** you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph **f.** does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.

b. ISO Commercial General Liability Coverage Form

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph **(1), (2)** or **(3)** above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or

(b) The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1), (3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3), (4), (5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** – Limits Of Insurance.

COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

COVERAGE C – MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers' Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by;

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C;**

b. Damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage **B.**

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to Paragraph **2.** above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

a. Damages under Coverage **A;** and

b. Medical expenses under Coverage **C**

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph **a.** above;

(2) The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) 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.

Paragraph **f.** does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a., b., c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a., b., c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(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.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

4. Temporary Air Rights and Support Agreement

This form was entered into by a Developer to protect the Adjoining Owner of property adjoining the Developer's hotel development site. The Developer requested permission of the Adjoining Owner to put tie back rods into the subsurface of the Adjoining Owner's property. The tie back rods would secure and support the Developer's construction retaining wall. This method was an alternative to a much more expensive method that would have required the retaining wall to be supported and functioning solely by structural elements on the Developer's property. The Developer agreed to install the tie backs in a fashion that would not injure or kill a "heritage" tree on the Adjoining Owner's property. The Adjoining Owner additionally granted the Developer the right to swing its construction crane over the Adjoining Owner's property. The Agreement contains a **limited** indemnity and detailed insurance specifications. The Agreement also contains a 5 year cash escrow to protect the Adjoining Owner against the loss of the heritage tree.

TEMPORARY AIR RIGHTS AND SUPPORT AGREEMENT

This Temporary Air Rights and Support Agreement (this "**Agreement**") is entered into as of _____ (the "**Effective Date**") by and among _____ ("**Adjoining Owner**") and _____ ("**Developer**").

RECITALS

A. Developer Site; Developer Building. Developer is the owner of real property described as Lots ____, Block ____, of The Original City of Austin, Texas, according to the map or plat thereof on file in the General Land Office of the State of Texas (the "**Developer Site**") on which the Developer desires to construct a hotel building and related improvements (the "**Developer Building**"). The Developer Site is depicted on the survey drawing prepared by Surveying & Engineering _____ (sheet 4 of 36) dated _____ as Job No. _____, a copy of which is attached hereto as **Exhibit A** (the "**Developer Site Survey**"). The Developer Site Survey also depicts the Adjoining Property referenced below and a 20 foot wide alley between the Developer Site and the Adjoining Property and labeled on the Developer Site Survey as the "Alley (20' R.O.W. Width)" and referred to herein as the "**Alley**".

B. Adjoining Property. Adjoining Owner is the owner of real property adjacent to the Developer Site ("**Adjoining Property**"), which Adjoining Property is more particularly described as Lot __, Block ___, of the Original City of Austin, Texas, according to the map or plat thereof on file in the General Land Office of the State of Texas. Located on the Adjoining Property is a Texas live oak tree with a diameter of approximately 42 inches which is declared under the ordinances of the City of Austin as a protected "Heritage Tree" (the "**Heritage Tree**"). The Heritage Tree is marked as no. 5002 on the Developer Site Survey. The Developer Site Survey identifies the ground level elevation near the base of the Heritage Tree as being 522' above mean sea level ("**M.S.L.**"), which elevation is referred to herein as the "**Ground Level**" for establishing the above ground "**no fly zone**" and the below ground "**no penetration zone**". The Heritage Tree also is the subject of the Tree Appraisal Report dated ____ prepared by _____, arborist, ASCA Registered Consulting Arborist # ____, a copy of which is attached hereto as **Exhibit B** (the "**Tree Appraisal Report**").

C. Air Rights; Tie Backs; Support; Easement Term. In connection with the construction of the Developer Building, the Developer desires to utilize air rights above a "no fly zone" over the Adjoining Property and Alley for the anticipated swing of the boom of a crane ("**Air Rights**") and to utilize a portion of the Adjoining Property and Alley below the no penetration zone to install tie back rods ("**Tie Backs**") to construct and anchor a retaining wall to be constructed by Developer on the Developer Site to shield and protect construction activities and facilities above and below ground on the Development Site from collapse and intrusion of earthen materials of the Adjoining Property and to assure the lateral support of the Adjoining Tract ("**Support**"). The easements granted by the Adjoining Owner to the Developer hereunder expire on the *earlier* to occur of the completion of the construction of the Developer Building or five years from the Effective Date of this Agreement (the "**Easement Term**").

D. This Agreement. Developer and Adjoining Owner are entering this Agreement to set out their agreement regarding such matters.

AGREEMENT

NOW, THEREFORE, in consideration of the Recitals, the mutual covenants exchanged herein, and conditioned on Developer making of the Payments referenced in Section 10 below on or before the expiration of the dates therein stated, and in consideration of other good and valuable consideration to each of the parties, Developer and Adjoining Owner agree as follows:

1. Air Rights Easement. Adjoining Owner grants Developer an easement (the "**Air Rights Easement**") to swing a construction crane to be located on the Developer Site over the Adjoining Property and the Alley for the Easement Term. The Air Rights Easement shall not extend to that portion of the air rights which are located 60 feet or less (the "**no fly zone**") above Ground Level (as identified in Recital B above) of the Adjoining Property. Developer shall cause the construction crane to be operated in such fashion so that no portion of the boom of the crane, which is carrying any load, shall pass over the Adjoining Property; provided nothing herein prevents portions of the boom, which are carrying no load (such as an unloaded boom, or the tail of a loaded boom), from passing over the Adjoining Property. The construction crane is not to swing above the Adjoining Property or the Alley on the following dates: September 3-5, 2017; October 16-17, 2017; December 4-5, 2017; May 13-14, 2018; October 14-15, 2018; and December 2-3, 2018. The term of the Air Rights Easement shall commence on the Effective Date hereof and expires upon the expiration of the Easement Term.

2. Tie Backs Easement. Adjoining Owner grants the Developer an easement (the "**Tie Backs Easement**") under the portion of the Alley and the southern 10 feet of the Adjoining Property that is below the "no penetration zone", which area below the "no penetration zone" of the Adjoining Property and the Alley is called herein the "**Subterranean Easement Tract**". The Tie Backs Easement is limited to locating in the Subterranean Easement Tract the Tie Backs in compliance with the Tie Back Specifications set out in **Exhibit C** (the "**Tie Back Specifications**"). The "**no penetration zone**" is the portion of the Adjoining Property and the Alley that is between the Ground Level and 10 feet below the Ground Level. Among other matters the Tie Back Specifications specify the length of the Tie Backs, the number of Tie Backs that may be installed into the Subterranean Easement Tract; and their location therein. Developer shall exercise its rights under the Tie Backs Easement in such fashion so as to in no way come into contact with or affect any existing improvements (including utility lines) on either the Adjoining Property or the Alley, or both. The term of the Tie Backs Easement shall commence on the date hereof and shall expire upon expiration of the Easement Term. Upon expiration of the Tie Backs Easement, Developer shall have no obligation to remove the Tie Backs installed in the Tie Backs Easement Tract; prior to the expiration of the Easement Term, Developer shall release all tension on the Tie Backs connection to the retaining wall; and upon expiration of the Tie Backs Easement, the Tie Backs automatically become the property of Adjoining Owner, to the extent located on the Adjoining Property, and may be cut or removed, or both, by the Adjoining Owner. Within 30 days of the installation of the Tie Backs, Developer shall provide the Adjoining Owner with a complete reproducible set of "as-builts", which must show the location of the Tie Backs, including, without limitation, the elevation, length, and angle of each Tie Back. Developer agrees to keep the Adjoining Owner's property free and clear of any liens arising in whole or in part from the Developer's or its contractors actions.

3. Escrow for Heritage Tree. Developer agrees to deposit in escrow with _____Title Company, as the escrow agent, or other title company with an office in Travis County, Texas selected by Developer if _____Title Company of Austin, Inc. does not agree to serve as the escrow agent or resigns as the escrow agent (the "**Escrow Agent**"), the sum of $50,000 (the "**Escrowed Funds**"). The parties shall execute the escrow agreement required by the Escrow Agent to serve as the Escrow Agent (the "**Escrow Agreement**"). The Escrowed Funds shall remain on deposit with the Escrow Agent for a period of up to June 30, 2020, subject to a five-year extension as provided herein (the "**Escrow Term**"). The Escrowed Funds are to be released to Adjoining Owner if, and only if, the Heritage Tree dies within the Escrow Term. The Escrow Term is extended to June 30, 2025 if in the opinion of the Arborist the Heritage Tree is likely to die between July 1, 2025 and June 30, 2030. The parties agree to appoint on or before August 30, 2025 a mutually agreeable arborist to serve as the "**Arborist**". If the parties cannot agree on the person to serve as the Arborist, each party will appoint an arborist and those arborists will choose a third, neutral arborist, who accepts to serve as the Arborist by September 30, 2015. The

Arborist is to issue to Developer and the Adjoining Owner an annual assessment of the health of the Heritage Tree and a reassessment of the Heritage Tree before the end of the Escrow Term. If the Arborist resigns, the parties shall follow the foregoing procedure again to cause the appointment of a successor arborist to serve as the Arborist. Developer agrees to pay the Arborist a reasonable fee to serve as the Arborist. If the Arborist does not issue its opinion on or before, June 30, 2020, the matter is to be determined by court proceeding judgment. Developer agrees to pay the Adjoining Owner $50,000 upon the death of the Heritage Tree on or before June 30, 2025. Adjoining Owner agrees to accept the $50,000 payment in full and final satisfaction of all claims and causes of action it may have against Developer or its successors in interest upon the death of the Heritage Tree on or before June 30, 2025; and upon receipt of the $50,000 payment, Adjoining Owner releases Developer and its successors in interest from all claims and causes of action it may have as to the Heritage Tree. Developer and Adjoining Owner agree to execute any additional documents as may be required by Escrow Agent.

4. Insurance; Contractor Indemnity. Developer agrees to maintain and to cause the contractor ("**Contractor**") operating the crane and constructing the Tie Backs to maintain to the fullest extent permitted by law insurance and provide proof of insurance meeting the Insurance Specifications set out in **Exhibit D** (the "**Insurance Specifications**") at all times during the Easement Term after the commencement of construction of the Developer Building. If the contractor for the crane and the contractor for the Tie Back construction are not the same entity, then each contractor is to comply with the Insurance Specifications. THE CONSTRUCTION CONTRACT WITH THE CONTRACTOR SHALL PROVIDE THAT THE CONTRACTOR AGREES TO THE FULLEST EXTENT PERMITTED BY LAW TO INDEMNIFY, DEFEND AND HOLD ADJOINING OWNER HARMLESS FROM ALL LIABILITY FOR BODILY INJURY OR DEATH OF PERSONS OR PROPERTY DAMAGE ARISING IN WHOLE OR IN PART OUT OF THE NEGLIGENT ACTS OR OMISSIONS OF THE CONTRACTOR OR ITS SUBCONTRACTORS, OR THEIR RESPECTIVE EMPLOYEES OR AGENTS, EXCEPT TO THE EXTENT CAUSED BY THE SOLE OR CONTRIBUTORY NEGLIGENCE OF ADJOINING OWNER, ITS AGENTS, EMPLOYEES OR INVITEES. THE INSURANCE AND INDEMNITY PROVIDED HEREIN AND IN THE CONSTRUCTION CONTRACT ARE HEREBY LIMITED TO COMPLY WITH CHAPTER 151 OF THE TEXAS INSURANCE CODE, AND TO THE EXTENT THAT THE INSURANCE OR INDEMNITY VIOLATE OR EXCEED THE LIMITS PERMITTED BY CHAPTER 151 OF THE TEXAS INSURANCE CODE, THE INSURANCE AND INDEMNITY ARE HEREBY REVISED TO COMPLY WITH CHAPTER 151 OF THE TEXAS INSURANCE CODE.

5. DEVELOPER INDEMNITY. TO THE FULLEST EXTENT PERMITTED BY LAW, INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE, DEVELOPER AGREES TO INDEMNIFY, DEFEND AND HOLD ADJOINING OWNER HARMLESS FROM AND AGAINST ANY AND ALL LIABILITY FOR BODILY INJURY OR DEATH OR PROPERTY DAMAGE ARISING IN WHOLE OR IN PART OUT OF ANY **NEGLIGENT** ACTS OR OMISSIONS OF DEVELOPER OR ITS CONTRACTORS, OR THEIR RESPECTIVE EMPLOYEES OR AGENTS, IN CONNECTION WITH THE EXERCISE OF DEVELOPER'S RIGHTS UNDER THIS AGREEMENT, EXCEPT TO THE EXTENT CAUSED BY THE SOLE OR CONTRIBUTORY **NEGLIGENCE** OF ADJOINING OWNER, ITS AGENTS, EMPLOYEES OR INVITEES. THIS INDEMNITY SURVIVES THE EXPIRATION OR TERMINATION OF THE EASEMENT TERM.

6. RELEASE. DEVELOPER RELEASES ADJOINING OWNER FOR LIABILITY TO DEVELOPER FOR ANY AND ALL PROPERTY DAMAGE AS MAY ARISE OUT OF THE HERITAGE TREE, WHETHER OR NOT ARISING OUT OF ADJOINING OWNER'S NEGLIGENT ACTS OR OMISSIONS, IN WHOLE OR IN PART, BUT NOT TO THE EXTENT CAUSED BY ADJOINING OWNER'S WILLFUL MISCONDUCT.

7. Conformity with Law; and Performance. Developer shall cause all activities conducted by it, its contractors or any other party acting under this Agreement to be performed in full compliance and conformity with all applicable federal, state and local laws, ordinances, rules and regulations; shall be done in a good and workmanlike manner; and shall be performed so as to not adversely affect the lateral support of the Adjoining Property, both during the Easement Term and thereafter. Developer agrees not to lower the grade of the Alley and to not damage Adjoining Owner's property.

8. Binding Effect. The Agreement inures to the benefit of and binds Developer, Adjoining Owner, and their respective successors and assigns as owners of the Developer Site and the Adjoining Property as applicable, during the period of such party's ownership of the Developer Site or Adjoining Property, as applicable, and constitutes a covenant running with the land. Notwithstanding anything in this Agreement to the contrary, upon conveyance of all its interest in the Developer Site and Adjoining

Property, as applicable, Developer, Adjoining Owner, or their respective successors and assigns, shall have no further liability as to matters thereafter accruing under this Agreement, but rather the then current owner of the applicable tract shall be liable for such obligations arising during the period of its ownership. The easements herein granted are revocable by the Adjoining Owner if Developer fails to comply with the terms and conditions of this Agreement, including but not limited to providing the insurance or making the Payments required herein. Either party may waive any default of the other at any time, without affecting or impairing any right arising from any subsequent or other default.

9. Miscellaneous. Notice shall be deemed to have been duly served if delivered in person to an officer or employee of the party for which it was intended; of if delivered at, or sent by certified mail or by courier service providing proof of deliver to, to the last business address for the addressee known to the party giving notice. This Agreement is governed by and to be construed and interpreted under the laws of the State of Texas. The prevailing party in any legal proceedings between the parties as to this Agreement is to be reimbursed by the losing party for the prevailing party's legal fees. Venue for disputes and legal proceedings between the parties shall be in Travis County, Texas. Easements granted by the Adjoining Owner are granted subject to the all matters of record as of the Effective Date affecting the use of the Adjoining Property or the Alley. Easements granted as to the Alley are only to the extent of the right, title and interest of Adjoining Owner in the Alley. This Agreement must, in the event of any dispute over its meaning application, be interpreted fairly and reasonably. Either party may record this Agreement in the Official Public Records of Travis County, Texas.

10. Payments. Developer agrees to make the following payments (the "**Payments**") on or before June 30, 2015: (a) payment of $20,000 to the Adjoining Owner to provide for nourishment and structural changes to promote the health of the Heritage Tree; (b) deposit of the $50,000 in Escrowed Funds with the Escrow Agent; and (c) payment to the Adjoining Owner of the actual amount of attorney's fees it has incurred in this matter, but not to exceed $5,000.

SIGNATURE PAGE AND ACKNOWLEDGEMENTS

EXHIBIT A TO TEMPORARY AIR RIGHTS AND SUPPORT AGREEMENT

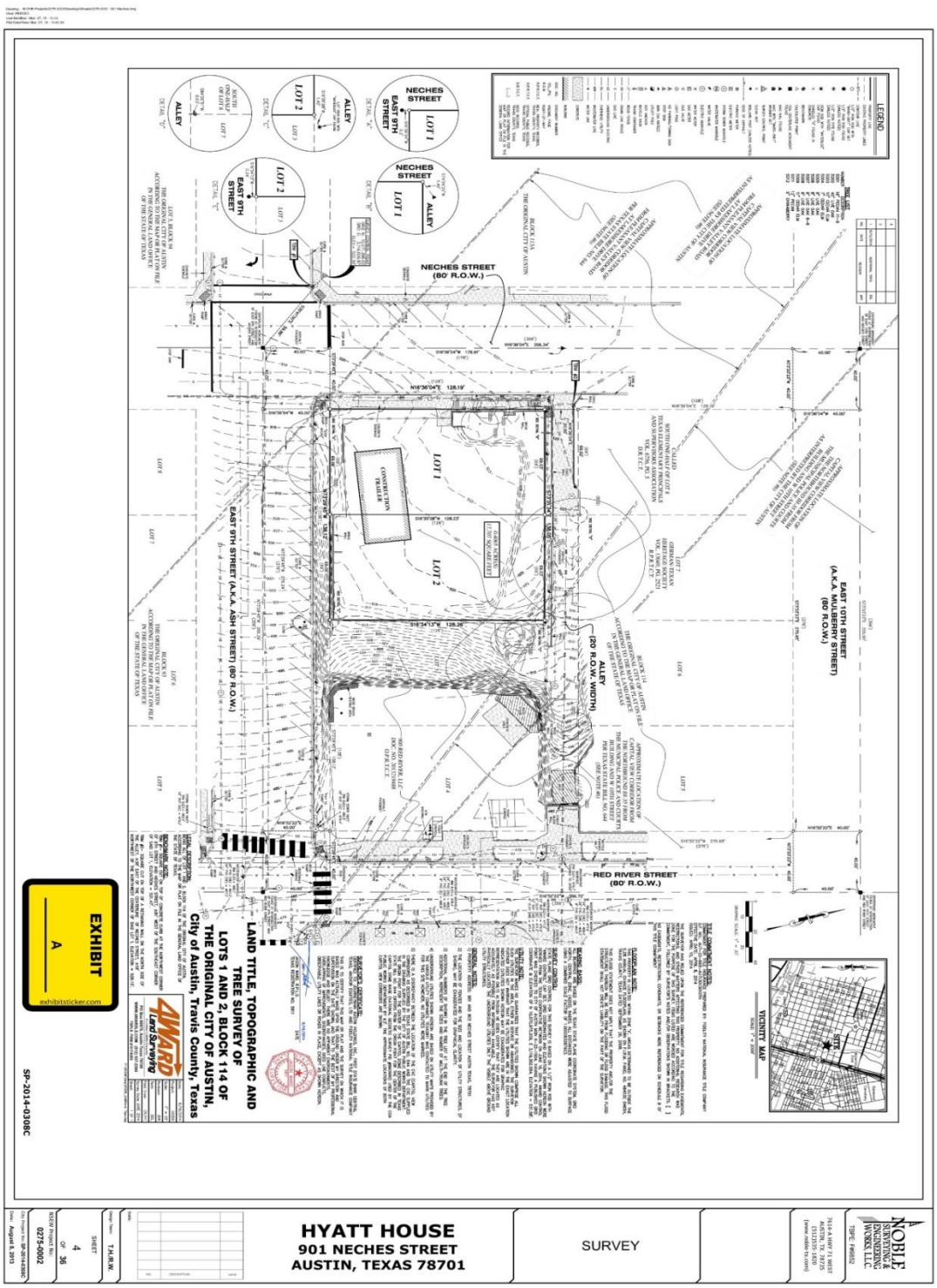


EXHIBIT B - TREE APPRAISAL REPORT TO TEMPORARY AIR RIGHTS AND SUPPORT AGREEMENT

Tree Appraisal Report

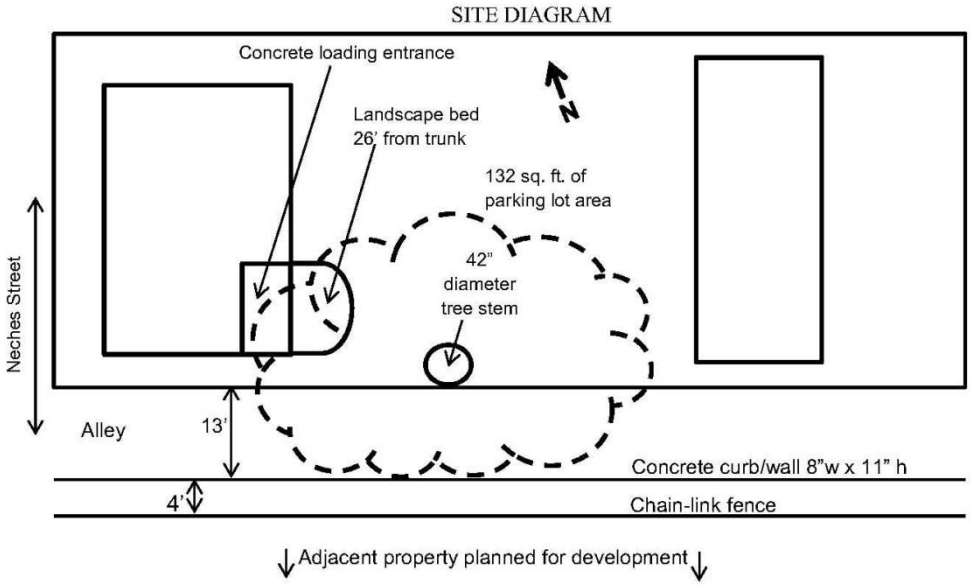
Heritage Oak Tree at 905 Neches Street in Austin, Texas

(pages of report omitted.)

SUBJECT TREE AND SITE DIAGRAM

The subject tree is a Quercus fusiformis, known as Texas live oak or escarpment live oak. Its diameter at breast height is 42 inches.

The following diagram is not to scale and does not show the entire German-Texan property, nor all structures on it. The canopy shape is not exact. The diagram functions to show the subject tree's location, its proximity to the planned development site, and its relationship to other elements referenced in this report.



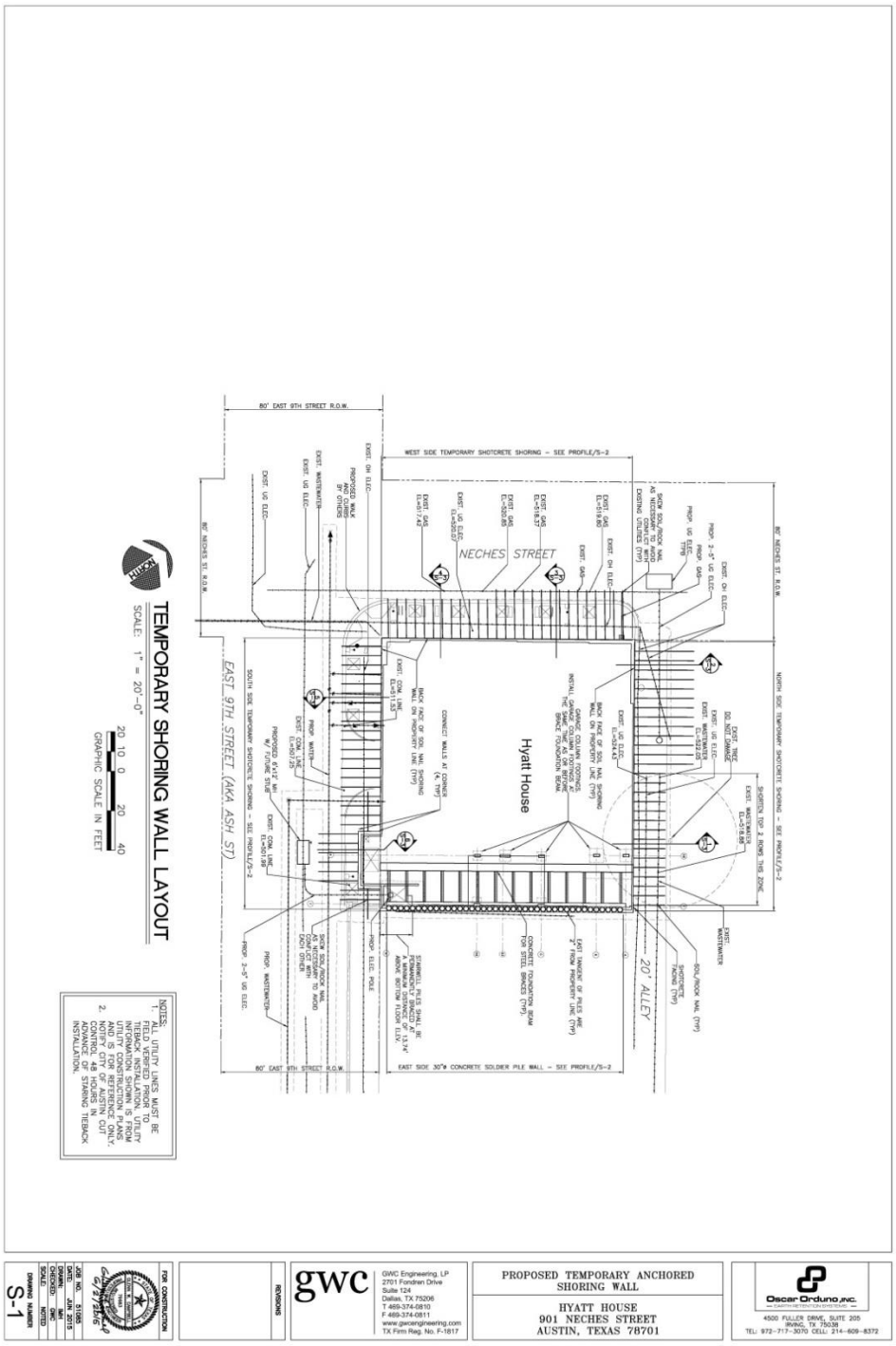
APPENDIX

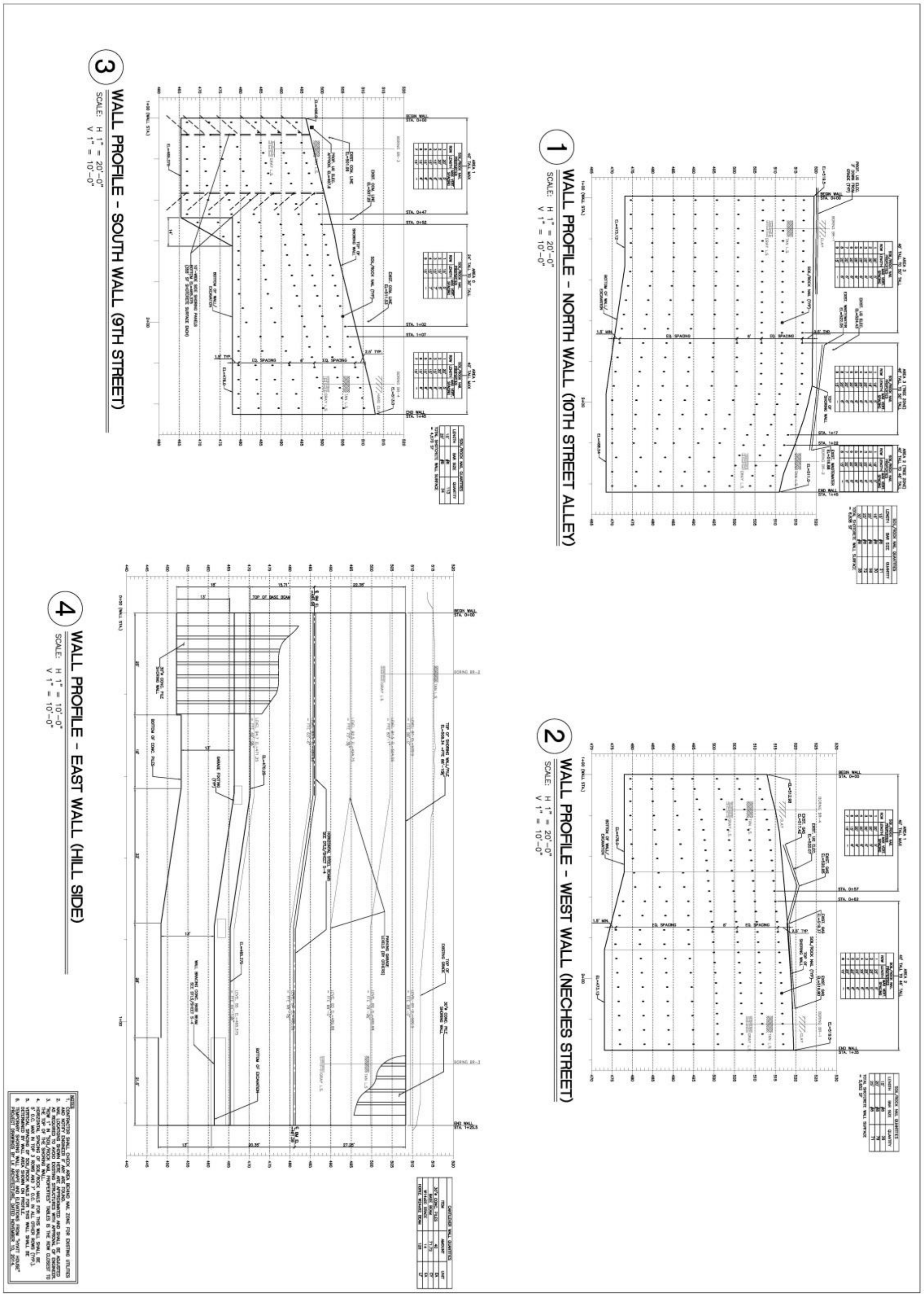
Photo Documentation

The following photos were taken on June 3, 2015. Other than cropping the photo in Figure 4, no editing has been performed on any photos.

Figure 1: Yellow arrows show sloping; orange arrow indicates landscaped area 26 feet from stem; blue arrow indicates alley. Curb is visible at alley, beyond which is the adjacent property planned for development.

EXHIBIT C - TIE BACK SPECIFICATIONS TO TEMPORARY AIR RIGHTS AND SUPPORT AGREEMENT TO TEMPORARY AIR RIGHTS AND SUPPORT AGREEMENT





FOR CONSTRUCTION

JOB NO. 51085
DATE: JUN 2015
DRAWN: IMH
CHECKED: GWC
SCALE: NOTED
DRAWING NUMBER S-2

REVISIONS

gwc

GWC Engineering, LP
2701 Fondren Drive
Suite 124
Dallas, TX 75206
T 469-374-0810
F 469-374-0811
www.gwcengineering.com
TX Firm Reg. No. F-1817

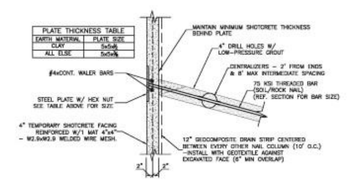
PROPOSED TEMPORARY ANCHORED SHORING WALL

HYATT HOUSE
901 NECHES STREET
AUSTIN, TEXAS 78701

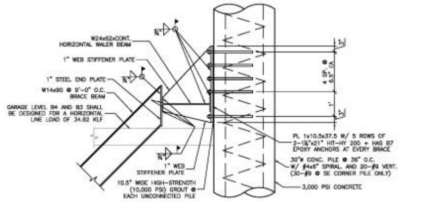
Oscar Orduno, INC.
— EARTH RETENTION SYSTEMS —
4500 FULLER DRIVE, SUITE 205
IRVING, TX 75038
TEL: 972-717-3070 CELL: 214-609-8372

FOR CONSTRUCTION	gwc GWC Engineering, LP 2701 Fondren Drive Suite 124 Dallas, TX 75206 T 469-374-0810 F 469-374-0811 www.gwcengineering.com TX Firm Reg. No. F-1817	PROPOSED TEMPORARY ANCHORED SHORING WALL HYATT HOUSE 901 NECHES STREET AUSTIN, TEXAS 78701	Oscar Orduno, INC. 4500 FULLER DRIVE, SUITE 205 IRVING, TX 75038 TEL: 972-717-3070 CELL: 214-609-8372
REVISIONS			

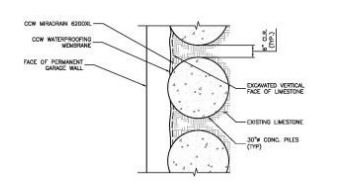
JOB NO. 51065
DATE: JUN 2015
DRAWN: MH
CHECKED: OM
SCALE: NOTED
DRAWING NUMBER S-3



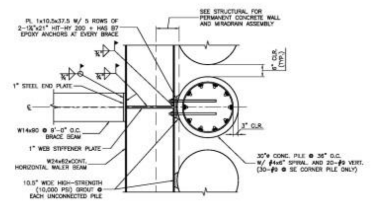
1 TYPICAL SOIL NAIL AND FACING DETAIL
SCALE: NTS



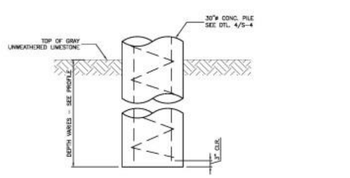
4 CONCRETE PILE BRACE CONNECTION DETAIL
SCALE: NTS



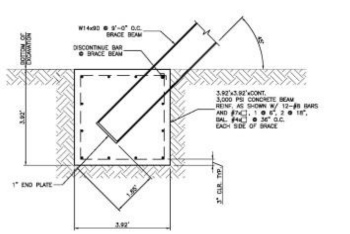
2 EAST WALL WATERPROOFING DETAIL
SCALE: NTS



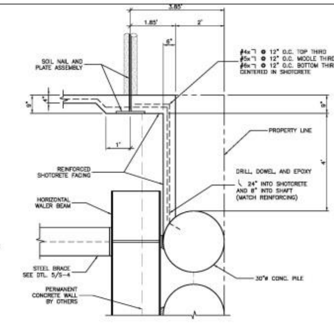
5 CONCRETE PILE BRACE CONNECTION PLAN
SCALE: NTS



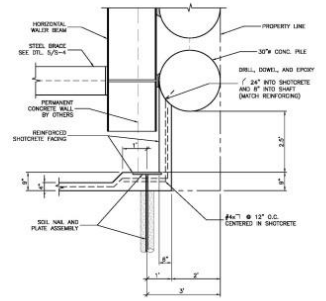
3 CONCRETE PILE EMBEDMENT DETAIL
SCALE: NTS



6 BRACE FOUNDATION BEAM DETAIL
SCALE: NTS



7 SHORING PLAN AT NE CORNER
SCALE: NTS



8 SHORING PLAN AT SE CORNER
SCALE: NTS

GENERAL NOTES

1. THESE DRAWINGS PROVIDE INFORMATION SPECIFIC TO THE DESIGN AND INSTALLATION OF THE TEMPORARY RETENTION SYSTEM FOR HYATT HOUSE. REFERENCE APPROVED PLANS FOR ALL OTHER INFORMATION.
2. ANY PROPOSED EXCAVATION BELOW THE SOIL NAIL WALL MUST BE BE APPROVED BY THE DESIGN ENGINEER BEFORE EXCAVATION IS MADE.
3. GENERAL CONTRACTOR SHALL FIELD STAKE ALIGNMENT OF EXTERIOR WALL FACE INSTALLATION.
4. CONTRACTOR SHALL TAKE CARE IN PREVENTING PONDING OF WATER ADJACENT TO THE WALL THROUGHOUT THE DURATION OF THE PROJECT.
5. ALL BURIED UTILITIES WITHIN THE LIMITS OF CONSTRUCTION INCLUDING THE ADJACENT RIGHT-OF-WAY SHALL BE EXPOSED TO FIELD VERIFY LOCATIONS BY OTHERS PRIOR TO RETENTION SYSTEM INSTALLATION.
6. IN THE EVENT OF SOIL NAIL CONFLICT WITH ANY EXISTING UTILITIES OR STRUCTURES, SOIL NAIL SPACING, INCLINATION, AND/OR SKEW SHALL BE FIELD ADJUSTED WITH APPROVAL OF DESIGN ENGINEER.

SETTLEMENT MONITORING

1. SETTLEMENT MONITORING SHALL BE PERFORMED BY A TEXAS REGISTERED PROFESSIONAL LAND SURVEYOR.
2. INITIAL READINGS SHALL BE TAKEN PRIOR TO EXCAVATION AND ONCE WEEKLY AFTER EXCAVATION UNTIL 30 DAYS AFTER COMPLETION OF THE RETENTION SYSTEM. READINGS SHALL EMAILED TO THE ENGINEER THE DAY THEY ARE TAKEN.
3. SETTLEMENT MONITOR POINTS SHALL BE ALONG THE STREET CURB AND STREET CENTERLINE AT 50-FOOT INTERVALS. ADDITIONALLY, READINGS SHALL BE TAKEN AT ALL SYSTEM WASTEWATER PIPE MANHOLE COVERS AND FLOWLINES AT MANHOLE LOCATIONS AND ALL EXPOSED WATER LINE VALVE STEMS.
4. MONITOR POINT LOCATIONS SHALL BE FIELD ADJUSTED AS REQUIRED TO AVOID CONFLICTS WITH EXISTING/PROPOSED IMPROVEMENTS AND SHALL BE TIED TO BENCHMARKS THAT ARE AT LEAST 50-FEET AWAY FROM EXCAVATION AND SHALL BE A TYPE THAT IS VANDAL-PROOF AND NOT DISTURBED BY PEDESTRIAN OR VEHICULAR TRAFFIC.
5. THE MAXIMUM ANTICIPATED GROUND MOVEMENT IS 0.500" HORIZONTAL AND VERTICAL WITHIN A HORIZONTAL DISTANCE OF 22 FEET MEASURED FROM THE FACE OF VERTICAL RETENTION.
6. SURVEY DATA INDICATED HORIZONTAL OR VERTICAL MOVEMENTS IN EXCESS OF THE ANTICIPATED AMOUNTS SHALL BE REPORTED IMMEDIATELY TO THE CITY OF AUSTIN.

DESIGN ASSUMPTIONS

1. DESIGN OF RETENTION SYSTEM IS BASED ON BORING LOGS PREPARED BY RONE ENGINEERING; 1421 WELLS BRANCH PKWY., SUITE 302; PFLUGERVILLE, TEXAS 78660; TEL: 512-462-2733; PROJECT NO. 14-19578; DATED 12-10-2014 AND SUPPLEMENTAL LETTER (ADDENDUM NO. 5) CONFIRMING SOIL PROPERTIES DATED 05-28-2015.

LEAN CLAY:	Phi=14	c=200	gamma=125	qs=600psf
TAN WEATHERED LIMESTONE:	Phi=28	c=500	gamma=137	qs=2000psf
GRAY UNWEATHERED LIMESTONE:	Phi=38	c=1000	gamma=150	qs=6000psf

2. SOIL NAIL RETENTION SYSTEM ON NORTH, WEST & SOUTH WALLS IS DESIGNED FOR A MAXIMUM SURCHARGE OF 250 PSF.
3. FACTOR OF SAFETY FOR THE THE SOIL NAIL RETENTION STRUCTURES (TEMPORARY STRUCTURES) = 1.35 (MIN).
5. FACTOR OF SAFETY FOR CONCRETE PILE DESIGN (PERMANENT STRUCTURE) = 1.6.
6. EQUIVALENT FLUID PRESSURE (EAST WALL DESIGN) = 35 PCF.

HAND RAIL NOTES

1. GUARDRAIL SYSTEM SHALL BE CAPABLE OF WITHSTANDING, WITHOUT FAILURE, A FORCE OF AT LEAST 200 POUNDS APPLIED WITHIN 2 INCHES OF THE TOP EDGE, IN ANY OUTWARD OR DOWNWARD DIRECTION, AT ANY POINT ALONG THE TOP EDGE.
2. WHEN THE 200 POUND TEST LOAD SPECIFIED IN NOTE 1 IS APPLIED IN A DOWNWARD DIRECTION, THE TOP EDGE OF THE GUARDRAIL SHALL NOT DEFLECT TO A HEIGHT OF LESS THAN 39 INCHES ABOVE THE WALKING/WORKING LEVEL.
3. ANGLE IRON POSTS SHALL BE ASTM A36, MINIMUM YIELD STRESS OF Fy=36 KSI.
4. WIRE CABLE USED FOR TOP AND MID RAILS SHALL BE NEW ⅜" 7x19 GALVANIZED AIRCRAFT CABLE.
5. TURNBUCKLES SHALL HAVE A BREAKING STRENGTH EQUAL OR GREATER THAN THE ⅜" 7x19 GALVANIZED AIRCRAFT CABLE.
6. THE LENGTH OF THE CABLES SHALL NOT EXCEED 120 FEET WITHOUT BEING TERMINATED.
7. CABLES SHALL BE TERMINATED AT ALL 90° TURNS.
8. ALL TERMINATIONS SHALL HAVE LOOPED CONNECTIONS WITH A MINIMUM OF THREE WIRE ROPE CLAMPS, LINE SPLICES SHALL NOT BE PERMITTED.
9. TURNBUCKLES SHALL BE INSTALLED ON TOP CABLE AND MID CABLE AT A SPACING NOT TO EXCEED 120 FEET.
10. ALL TOP AND MID RAIL CABLES SHALL BE INITIALLY TENSIONED TO ACHIEVE COMPLIANCE WITH OSHA SUBPART M.
11. WIRE ROPE SHALL BE FLAGGED AT NOT MORE THAN 6-TALL INTERVALS WITH HIGH VISIBILITY MATERIAL.
12. GENERAL CONTRACTOR SHALL MAINTAIN GUARDRAIL SYSTEM FOR THE DURATION FOR FALL PROTECTION.
13. INSPECTION OF PERIMETER OF ENTIRE GUARDRAIL SYSTEM SHALL BE PERFORMED BY GENERAL CONTRACTOR AT A FREQUENCY TO ENSURE CONTINUOUS COMPLIANCE WITH OSHA SUBPART M. ANY DEFICIENCIES OBSERVED DURING INSPECTIONS SHALL BE PROMPTLY COMMUNICATED FOR IMMEDIATE CORRECTION.

SOIL/ROCK NAIL SYSTEM

1. #8 GRADE 75 SOIL NAILS SHALL CONFORM TO ASTM A615 GRADE 75.
2. SOIL NAIL PLATES SHALL BE ASTM A36 STEEL.
3. ALL SOIL NAIL HEX NUTS SHALL BE CAPABLE OF DEVELOPING THE ULTIMATE TENSILE CAPACITY SOIL NAIL BARS.
4. GROUT SHALL BE 4,000 PSI (MIN. 28-DAY COMPRESSIVE STRENGTH) NEAT CEMENT MIX.
5. SHOTCRETE FOR TEMPORARY FACING SHALL ACHIEVE 4,000 PSI MINIMUM 28-DAY COMPRESSIVE STRENGTH.
6. STEEL REINFORCEMENT SHALL CONFORM TO ASTM A615, GRADE 60. ALL LAP SPLICES SHALL BE ACI CLASS "B" TENSION LAP SPLICES.
7. WELDED WIRE FABRIC REINFORCEMENT SHALL CONFORM TO ASTM A185 (Fy=65,000 PSI).
8. GEOCOMPOSITE DRAIN MATERIAL SHALL BE J-DRAIN 200 OR EQUAL.

CONCRETE

1. ALL CONCRETE SHALL UTILIZE CRUSHED LIMESTONE AGGREGATE AND SHALL DEVELOP A MINIMUM COMPRESSIVE STRENGTH OF 3,000 PSI AT 28 DAYS.
2. MAXIMUM SIZE OF COARSE AGGREGATE SHALL BE 1 1/2".
3. ALL CONCRETE SHALL BE DESIGNED, MIXED, TRANSPORTED, AND PLACED IN ACCORDANCE WITH THE LATEST SPECIFICATIONS OF THE AMERICAN CONCRETE INSTITUTE.

DRILLED PIERS

1. DRILLED PIERS ARE TO BE FOUNDED AS SHOWN ON THE DRAWING.
2. THE BOTTOM OF ALL PIERS SHALL BE SMOOTH, DRY AND FREE OF ALL LOOSE MATERIAL BEFORE POURING CONCRETE.
3. DRILLED PIERS SHALL BE CONCRETED WITHIN FOUR (4) HOURS OF EXCAVATION.
4. THE CONTRACTOR SHALL VERIFY THE DEPTH OF THE PIER PRIOR TO CUTTING PIER REINFORCING CAGES. PIER STEEL SHALL BE DELIVERED TO THE JOB SITE IN STANDARD 60 FOOT LENGTHS AND CUT AS REQUIRED.
5. CONTINUOUS INSPECTION OF PIER DRILLING OPERATIONS BY A GEOTECHNICAL OR STRUCTURAL ENGINEER IS REQUIRED TO ASSURE PROPER BEARING STRATUM IS PENETRATED, THAT THE PIER HOLES ARE CLEAN AND DRY AT TIME OF CONCRETING, AND PROPER CONCRETING PROCEDURES ARE USED IN CONSTRUCTING THE PIERS.

REINFORCEMENT

1. ALL #3 BARS SHALL CONFORM TO ASTM SPECIFICATION A615, GRADE 40. ALL OTHER REINFORCING STEEL SHALL CONFORM TO ASTM A615, GRADE 60. FOREIGN STEEL IS ACCEPTABLE IF MILL CERTIFICATES OF COMPLIANCE WITH ASTM ARE PROVIDED.
2. ALL REINFORCEMENT SHALL BE DESIGNED AND DETAILED IN ACCORDANCE WITH THE LATEST EDITION OF THE ACI "MANUAL OF STANDARD PRACTICE FOR DETAILING CONCRETE STRUCTURES" (ACI 315).
3. ALL REINFORCING BAR BENDS SHALL BE MADE COLD. GRADE 60 BARS MAY BE BENT IN THE FIELD ONE TIME ONLY.
4. HOOK ALL BEAM BARS AT DISCONTINUOUS ENDS.
5. ALL HOOKS SHALL BE ACI STANDARD 90 DEGREE HOOKS UNLESS DETAILED OTHERWISE.
6. REINFORCEMENT IN SHALL BE SUPPORTED TO PROVIDE THE FOLLOWING MINIMUM CONCRETE COVER:

CAST AGAINST AND PERMANENTLY EXPOSED TO EARTH	3 INCHES
FORMED, EXPOSED TO EARTH OR WEATHER	2 INCHES

7. ALL BAR LENGTH AND DIMENSIONS ARE OUT-TO-OUT AND DO NOT INCLUDE HOOKS AND BENDS.
8. STIRRUPS OF THE SIZE AND SPACING SCHEDULED SHALL PROVIDE THE COVER LISTED ABOVE. HOOKS ON STIRRUPS SHALL BE 90 DEGREES AND SHALL HAVE 4 INCH MINIMUM EXTENSIONS.

CONSTRUCTION SEQUENCE:

1. INSTALL CONCRETE SOLDIER PILES.
2. EXCAVATE LIMESTONE DOWN TO WALER BEAM ELEVATION, INSTALLING SOIL NAIL SYSTEM ON NORTH, WEST, AND SOUTH WALLS AS EXCAVATION ADVANCES (INCLUDING NE CORNER, DETAIL 7/S-4, AND SE CORNER, DETAIL 8/S-4).
3. EXCAVATE EAST LIMESTONE FACE AT 45° ANGLE DOWN FROM BOTTOM OF STEEL WALER TO CONCRETE FOOTING ELEVATION, LEAVING LIMESTONE WEDGE IN PLACE TO SUPPORT CONCRETE SOLDIER PILES.
4. INSTALL STEEL WALER BEAM AND WEB STIFFENER PLATES ONTO CONCRETE SOLDIER PILE WALL.
5. EXCAVATE AND INSTALL GARAGE COLUMN FOOTINGS ON GRID 6.
6. EXCAVATE 3.92'x3.92' CONCRETE FOOTING BEAM.
7. INSTALL STEEL BRACES AT 45°.
8. INSTALL CONCRETE AND REINFORCING INTO CONCRETE FOOTING BEAM AND ALLOW TO FULLY CURE.
9. EXCAVATE LIMESTONE FROM BETWEEN STEEL BRACES.
10. EXCAVATE LIMESTONE FROM UNDER STEEL BRACES.
11. CONSTRUCT GARAGE FOUNDATION FOOTINGS, FLOOR LEVEL B5 (WITH RECTANGULAR LEAVE-OUT HOLES AROUND STEEL BRACE BEAMS) AND CONCRETE WALL ON WEST FACE OF EAST SOLDIER PILE WALL UP TO BOTTOM OF GARAGE FLOOR LEVEL B4 AND B3.
12. CONSTRUCT EAST PORTION OF GARAGE FLOOR LEVELS B4 AND B3 WITH RECTANGULAR LEAVE-OUT HOLES AROUND STEEL BRACE BEAMS.
13. ALLOW EAST PORTION OF GARAGE FLOOR LEVELS B4 AND B3 TO FULLY CURE.
14. DISASSEMBLE STEEL BRACE BEAMS (CUT BRACE BEAMS AT CONCRETE FOOTING BEAM), STEEL WALER BEAM, AND REMOVE.
15. FILL IN RECTANGULAR LEAVE-OUT HOLES IN GARAGE FLOOR LEVEL B5 AND EAST GARAGE FLOOR LEVELS B4 AND B3 WITH CONCRETE.
16. CONSTRUCT REMAINDER OF GARAGE.

Oscar Orduno, INC.
— EARTH RETENTION SYSTEMS —
4500 FULLER DRIVE, SUITE 205
IRVING, TX 75038
TEL: 972-717-3070 CELL: 214-609-8372

PROPOSED TEMPORARY ANCHORED SHORING WALL

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T 469-374-0810
F 469-374-0811
www.gwcengineering.com
TX Firm Reg. No. F-1817

REVISIONS

FOR CONSTRUCTION

GLENN W. CAMPBELL
79883
6/2/2015

JOB NO.	51085
DATE:	JUN 2015
DRAWN:	IMH
CHECKED:	GWC
SCALE:	NOTED

DRAWING NUMBER
S-4

EXHIBIT D - INSURANCE SPECIFICATIONS TO TEMPORARY AIR RIGHTS AND SUPPORT AGREEMENT

Section 1. By the Developer: In addition to the General Requirements in Section 3 below, the following Insurance in accordance with the following Specifications, Coverages, Limits & Other Requirements.

<table>
<tr><th>No.</th><th>Specifications</th><th>Coverages, Limits & Other Requirements</th></tr>
<tr><td>1.</td><td colspan="2">Commercial General Liability. Developer is to maintain commercial general liability insurance (“CGL”) and, if necessary, a commercial umbrella/excess insurance policy, issued on an Occurrence Basis meeting at least the following specifications, and in the case of an umbrella/excess insurance policy the additional specifications listed in Spec. 2 below, but only to the extent permitted by law.</td></tr>
<tr><td>1.1</td><td>Minimum Limits</td><td>The minimum limits of coverage are not to be less than the following amounts (which amounts may be satisfied by primary and umbrella or excess policies – see Spec. 2 below):<table><tr><td>$1,000,000</td><td>Per Occurrence</td></tr><tr><td>$1,000,000</td><td>General Aggregate.</td></tr><tr><td>$1,000,000</td><td>Products/Completed Operations Aggregate</td></tr><tr><td>$1,000,000</td><td>Personal and Advertising Injury Limit.</td></tr></table></td></tr>
<tr><td>1.2</td><td>General Aggregate</td><td>If the CGL insurance contains a General Aggregate Limit, it shall apply separately to this Project and Developer Site.</td></tr>
<tr><td>1.3</td><td>Form</td><td>This insurance is to be issued on an ISO CG 00 01, or equivalent, and shall cover liability arising from premises, operations, hire of contractors (independent contractors coverage).</td></tr>
<tr><td>1.4</td><td>Insured Contracts</td><td>Coverage shall include but not be limited to liability assumed by Developer under this Agreement (including the tort liability of another assumed in a business contract).</td></tr>
<tr><td>1.5</td><td>Additional Insureds</td><td>This insurance is to be endorsed with an ISO CG 20 10 Additional Insured Endorsement, or equivalent, listing or covering Adjoining Owner as additional insured. This insurance is to be endorsed with an ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement to schedule Owner as an additional insured for the entirety of the 5-year post-completion period.</td></tr>
<tr><td>1.6</td><td>Primary</td><td>This insurance shall be endorsed to provide primary and non-contributing liability coverage by a ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition, or equivalent. It is the specific intent of the parties to this Agreement that all insurance held by Adjoining Owner shall be excess, secondary and non-contributory.</td></tr>
<tr><td>1.7</td><td>Waiver of Subrogation</td><td>This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to Adjoining Owner.</td></tr>
<tr><td>1.8</td><td>Notice</td><td>This insurance is to contain a provision for 30 days’ prior written notice by insurance carrier to Adjoining Owner required for cancellation.</td></tr>
<tr><td>1.9</td><td>Certificate of Insurance</td><td>A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Developer to Adjoining Owner as certificate holder.</td></tr>
</table>

Section 2. By the Contractor: In addition to the General Requirements in Section 3 below, the following Insurance in accordance with the following Specifications, Coverages, Limits & Other Requirements.

<table>
<tr><th>No.</th><th>Specifications</th><th>Coverages, Limits & Other Requirements</th></tr>
<tr><td>2.</td><td colspan="2"><u>Commercial General Liability</u>. Contractor is to maintain commercial general liability insurance (“CGL”) and, if necessary, a commercial umbrella/excess insurance policy, issued on an Occurrence Basis meeting at least the following specifications, and in the case of an umbrella/excess insurance policy the additional specifications listed in Spec. 2 below, but only to the extent permitted by law.</td></tr>
<tr><td>2.1</td><td>Minimum Limits</td><td>The minimum limits of coverage are not to be less than the following amounts (which amounts may be satisfied by primary and umbrella or excess policies – see Spec. 2 below):<table><tr><td>$10,000,000</td><td>Per Occurrence</td></tr><tr><td>$10,000,000</td><td>General Aggregate.</td></tr><tr><td>$10,000,000</td><td>Products/Completed Operations Aggregate</td></tr><tr><td>$10,000,000</td><td>Personal and Advertising Injury Limit.</td></tr></table></td></tr>
<tr><td>2.2</td><td>General Aggregate</td><td>If the CGL insurance contains a General Aggregate Limit, it shall apply separately to this Project and job site.</td></tr>
<tr><td>2.3</td><td>Post-Completion Coverage</td><td>Contractor agrees to maintain Products-Completed Operations coverage with respect to “Bodily Injury” and “Property Damage” caused, in whole or in part, by Contractor’s work at the Premises and Property for a period of 5 years after final completion of the construction of the Developer's Building. This insurance is to be endorsed with an ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement, or equivalent, to schedule Adjoining Owner as an additional insured for the entirety of this post-completion period.</td></tr>
<tr><td>2.4</td><td>Form</td><td>This insurance is to be issued on an ISO CG 00 01, or equivalent, and shall cover liability arising from premises, operations, hire of subcontractors (independent contractors coverage), incidental design liability arising from the contractor’s construction means and methods.</td></tr>
<tr><td>2.5</td><td>Insured Contracts</td><td>Coverage shall include but not be limited to liability assumed by Contractor under the construction contract (including the tort liability of another assumed in a business contract).</td></tr>
<tr><td>2.6</td><td>Additional Insureds</td><td>This insurance is to be endorsed with an ISO CG 20 10 07 04 Additional Insured Endorsement, or equivalent, listing or covering Adjoining Owner as additional insureds. This insurance is to be endorsed with an ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement to schedule Adjoining Owner as an additional insured for the entirety of the 5-year post-completion period.</td></tr>
<tr><td>2.7</td><td>Primary</td><td>This insurance shall be endorsed to provide primary and non-contributing liability coverage by a ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition, or equivalent. It is the specific intent of the parties to this Agreement that all insurance held by Adjoining Owner shall be excess, secondary and non-contributory.</td></tr>
<tr><td>2.8</td><td>Waiver of Subrogation</td><td>This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to Adjoining Owner.</td></tr>
<tr><td>2.9</td><td>Notice</td><td>This insurance is to contain a provision for 30 days’ prior written notice by insurance carrier to Adjoining Owner required for cancellation.</td></tr>
<tr><td>2.10</td><td>Certificate of Insurance</td><td>A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Adjoining Owner.</td></tr>
</table>

Section 3. General Insurance Requirements.

.1 Policies. All policies must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* A-, or better, and admitted to engage in the business of insurance in the State in which the Improvements are located.

.2 Forms. If the forms of policies, endorsements, certificates, or evidence of insurance required by these Insurance Specifications are superseded or discontinued, Adjoining Owner will have the right to require other equivalent forms. Any policy or endorsement form other than a form specified in this Exhibit must be approved in advance by Adjoining Owner.

.3 Certificate of Insurance; Copies of Policies. Developer and Contractor each is to provide Adjoining Owner with evidence of insurance prior to entry by Contractor on the property and thereafter is to provide Owner refreshed evidenced of continued insurance after the expiration of the current policies at least 30 days prior to the expiration of the current policies or on replacement of each coverage within 10 days and within 10 days of Adjoining Owner's request for an updated certificate. Evidence of insurance is to be on the most current ACORD forms and certified to Adjoining Owner as the certificate holder. The evidence of insurance shall be completed in form acceptable to Adjoining Owner, and shall set out in addition to the information required by the ACORD forms for completion the following: (a) the additional insured status and waivers of subrogation as required by these insurance specifications; (b) the primary and non-contributing status required by these insurance specifications; (c) state the amounts of all deductibles and self-insured retentions; (d) be accompanied by certified copies of all endorsements required by these insurance specifications; and (e) be accompanied by the insurer's certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation will be sent to the Adjoining Owner. If requested in writing by Adjoining Owner, Developer and Contractor will provide to Adjoining Owner a certified copy of any or all insurance policies including endorsements.

.4 Limits. "**Limits**" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Developer or Contractor maintains greater limits, then these specifications shall not limit the amount of recovery available to Adjoining Owner and the limits specified above as the minimum limits are increased to the greater limits.

.5 Minimum Requirements. It is expressly understood and agreed that the insurance coverages required herein (a) represent Owner's minimum requirements and are not to be construed to void or limit the Developer's or Contractor's indemnity obligations as contained in the Agreement or Contract Documents nor represent in any manner a determination of the insurance coverages Developer or Contractor should or should not maintain for its own protection; and (b) are being, or have been, obtained by Developer or Contractor in support of its liability and indemnity obligations under the Agreement or the construction contract.

5. USTS Removal Agreement

The following agreement was executed by the Buyer of a filling stationed to be converted by the Buyer into a CVS style convenience store. This agreement was an exhibit to the sales contract. The Buyer agreed to decommission the service station after closing, including removing the USTs and remediating any contamination discovered at the site. The Buyer tested the filing station for contamination during the sales contract's due diligence period. The Buyer agreed to indemnify the Seller from all claims arising out of the contamination of the site or its decommissioning, even to the extent caused in whole or in part by the negligence of Seller or its strict liability. Attached to the Agreement are detailed insurance specifications.

USTS REMOVAL AGREEMENT

This USTs Removal Agreement is made by and among _____ ("**Property Seller**"), _____ ("**USTs Seller**") [collectively ""**Sellers**"], and _____ ("**Buyer**") and is effective as of _____ __, 2017 (the "**Effective Date**").

RECITALS

A. Property. Property Seller, USTs Seller and Buyer entered into a Purchase and Sale Agreement whereby Orange Development, LLC as Buyer contracted to purchase from Property Seller the following described land together with the improvements and rights and appurtenances thereto (the "**Property**"):

> Lot __, _____ Addition, an addition in Travis County, Texas according to the map or plat thereof recorded in Volume __, at Page ___ et seq. of the Plat Records of Travis County, Texas.

B. Buyer. Additionally, pursuant to the Purchase and Sale Agreement, Buyer contracted to purchase from USTs Seller and take ownership, and agreed to remove after closing of the sale of the Property, the underground storage tanks and underground storage tank systems [both as defined in 30 Texas Administrative Code ("**T.A.C.**") §§ 334.2(114) and (115)], including without limitation fuel dispensers, lines, piping, pumps, bins and barrels, and all other related systems and equipment located on the Property (collectively, the "**USTs**"), which are owned by USTs Seller. Currently located on the Property is a gasoline service station branded Chevron with the USTs, an ancillary small convenience store, and car wash (the "**Service Station**"). The Property including the Service Station was leased under a Station Lease that has terminated. The USTs Seller supplied gasoline to the tenant under a Fuel Supply Contract, which has terminated.

C. Closing of the Sale. The Purchase and Sale Agreement provides for USTs Seller, Property Seller, and Buyer to enter into this USTs Removal Agreement at the closing of the sale of the Property to Buyer to provide for and cause the removal of the USTs after closing, subject to the provisions hereof.

D. Construction of a CVS Store. Buyer is purchasing the Property from Property Seller for the purpose of construction of a CVS store on the Property after demolition by Buyer of the Service Station.

E. Testing for Contamination. As a condition to the closing of the sale of the Property, Orange Development, LLC caused to be conducted by the environmental consulting firm Terracon Consultants, Inc. ("**Terracon**") prior to closing, at its expense, tests including those described in the reports attached as **Exhibit B** ("**Testing Reports**") to determine if the contents of the USTs have leaked or are leaking ("**Contamination**").

F. Decommissioning the Service Station. Pursuant to the Purchase and Sale Agreement, Buyer, Property Seller and USTs Seller enter into this USTs Removal Agreement to set out (1) Buyer's agreement to cause the removal of the USTs, properly dispose of the USTs, delineate the extent of any Contamination, and complete the remediation of any Contamination indicated in the Testing Reports or discovered in the removal of the USTs in compliance with all laws ("**Decommissioning the**

Service Station"), (2) Buyer's agreement to pay the costs of Decommissioning the Service Station ("**Costs"**), and (3) Buyer's release and indemnification of Property Seller, USTs Seller and Bill Broaddus (the "**Seller Parties**") for all claims or liabilities arising out of the condition of the Property and the USTs, including any Contamination, or arising out of Decommissioning the Service Station.

G. Escrow Agreement. Pursuant to the Purchase and Sale Agreement and this USTs Removal Agreement, Property Seller, USTs Seller and Buyer entered into an Escrow Agreement with _____Title Company ("**Escrow Agent**") in accordance with which Buyer is to deposit with Escrow Agent monies to be disbursed pursuant hereto ("**Escrow Funds**").

NOW, THEREFORE for a valuable consideration, and in consideration of the mutual covenants and representations herein contained, Property Seller, USTs Seller, and Buyer agree as follows:

1. Decommissioning the Service Station. Buyer agrees to cause Decommissioning of the Station as soon as reasonably possible as follows (the "**Work**"):

a. Tank Removal and Corrective Actions. The following ("**Tank Removal and Corrective Actions**"):

(1) Tank Removal. Removal of the USTs and any related petroleum based products from the Property ("**Tank Removal**").

(2) Soil and Gas Corrective Actions. Performance of required corrective actions for any soil or soil gas contamination in excess of current Texas Commission on Environmental Quality ("**TCEQ**") action levels relating thereto ("**Soil and Soil Gas Corrective Actions**").

(3) Corrective Actions. Provision of corrective actions deemed necessary by TCEQ related to any petroleum contamination documented above current TCEQ action levels in that certain Phase I Environmental Site Assessment Report prepared by Terracon for Buyer, that certain Limited Site Investigation Report prepared by Terracon for Buyer, and that certain Supplemental Site Investigation Report prepared by Terracon for Buyer to the satisfaction of TCEQ ("**Groundwater Corrective Actions**"; collectively with Soil and Soil Gas Corrective Actions, the "**Corrective Actions**").

(4) Documentation of Tank Removal and Corrective Actions. Documentation of the Tank Removal and Corrective Actions in accordance with TCEQ requirements (submission of a Release Determination Report inclusive of TCEQ Form 0621 and amended UST Registration Form 0724).

(5) No Further Action Letter and Other Documentation. Procurement of a "no further action" letter, LPST Case Closure Letter, or other similar documentation from TCEQ confirming that the USTs have been properly removed from the Property and any applicable soil, soil gas or groundwater contamination has been appropriately addressed with regards to the environment in accordance with applicable law (the "**Documentation**").

b. Backfill and Certification. The following ("**Backfill and Certification**"):

(1) Backfill. Backfill in accordance with the Geotechnical Engineering Report prepared by Terracon ("**Backfill**").

(2) Certification. Delivery to Sellers certification from a geotechnical engineer that the Backfill has been completed in accordance with the terms of this USTs Removal Agreement.

c. Facilitative Work. Buyer is to commence the Tank Removal promptly after the closing date, diligently complete the Tank Removal process, and deliver to Sellers a tank closure report certified by Terracon. Thereafter, Buyer is to diligently pursue the applicable Documentation (for example,

but not by way of limitation, whether contamination was discovered) and are to promptly deliver to Sellers copies of any additional reports or communications received from Buyer's environmental consultant or from TCEQ (the "**Facilitative Work**").

2. Contractors. Sellers are to be provided the opportunity to approve the contractors to be employed to undertake the Work and the contracts with the contractors, which approval shall not be unreasonably withheld.

3. Costs of the Work. Buyer is to provide Sellers with detailed estimates ("**Estimates**") of the specific costs for the Tank Removal and Corrective Actions, the Backfill and Certification and the Facilitative Work for Sellers' review and approval at least 14 days before the commencement of each aspect of the Work. Buyer is to deposit with the Escrow Agent 125% of the Estimates within five business days of its receipt and approval of the amount of the Estimates. Upon Sellers' and Escrow Agent's receipt of the Documentation for the actual work performed, together with written documentation (*e.g.*, invoices) evidencing the cost of the Work ("**Supporting Invoices**"), provided that Sellers do not object to any of the costs or information contained therein, within five business days after delivery of same, Escrow Agent shall release such portion of the Escrow Funds to Buyer or Buyer's environmental consultants and contractors as is necessary to pay the Supporting Invoices or reimburse Buyer therefor ("**Costs**"), and return any remaining Escrow Funds to Buyer. In the event that the Costs exceed the amount previously deposited with the Escrow Agent, Buyer shall replenish the Escrow Funds with an amount reasonably estimated by the parties to be required to complete the Work.

4. Bonds and Insurance. Buyer agrees to maintain or cause to be maintained the following bonds and insurance until completion of the Decommissioning of the Service Station (the "**Bonds and Insurance**"):

a. Bonds. The financial assurance required by Environmental Law for the ownership or operation of USTs, in the form of insurance and risk retention group coverage, letter of credit, or surety bond meeting, in each case, regulatory requirements under 30 Texas Administrative Code Chapter 37, Subchapter I, Financial Assurance for Petroleum Underground Storage Tank Systems, with Seller Parties to be additional insureds on the insurance policies, until issuance by TCEQ of its agreement that Decommissioning the Service Station has been completed, including obtaining and delivering to USTs Seller an unqualified Clean Closure Letter issued by TCEQ if Contamination is discovered on the Property pursuant to the tests or during the performance of the Work; and

b. Insurance. Liability insurance complying with the Insurance Specifications set out in **Exhibit A**, with Seller Parties to be additional insureds.

5. RELEASE and INDEMNITY.

a. RELEASE. BUYER, AND ANYONE CLAIMING BY, THROUGH OR UNDER IT, INCLUDING BUT NOT LIMITED TO IT AS OWNER OF THE PROPERTY OR ANY OTHER PROPERTIES, HEREBY WAIVES ITS RIGHT TO RECOVER FROM AND FULLY AND IRREVOCABLY RELEASES SELLER PARTIES FROM (1) ANY AND ALL CLAIMS, RESPONSIBILITY AND LIABILITY THAT ANY OF THEM MAY NOW HAVE OR HEREAFTER ACQUIRE AGAINST ANY OF THE SELLER PARTIES FOR ANY CLAIMS, COSTS, EXPENSES, DAMAGES, LOSSES, OR LIABILITY ARISING FROM OR RELATED TO THE CONTAMINATION (INCLUDING WITHOUT LIMITATION THE PRESENCE IN THE SOIL, SOIL GAS, AIR, STRUCTURES, OR SURFACE OR SUBSURFACE WATERS OF MATERIALS OR SUBSTANCES THAT HAVE BEEN OR MAY IN THE FUTURE BE DETERMINED TO BE TOXIC, HAZARDOUS, OR SUBJECT TO REGULATION AND THAT MAY NEED TO BE SPECIALLY TREATED, HANDLED OR REMOVED FROM THE PROPERTY UNDER CURRENT OR FUTURE FEDERAL, STATE AND LOCAL LAWS REGULATIONS OR GUIDELINES), INCLUDING HAZARDOUS MATERIALS AND (2) FOR CONTRIBUTION OR INDEMNITY WITH RESPECT TO THE CONDITION OF THE PROPERTY WHETHER ARISING UNDER ENVIRONMENTAL LAW, COMMON LAW OR OTHERWISE. THIS RELEASE INCLUDES PROPERTY SELLER AND USTS SELLER'S NEGLIGENCE AND CLAIMS OF WHICH BUYER IS PRESENTLY UNAWARE OR WHICH BUYER DOES NOT PRESENTLY SUSPECT TO EXIST WHICH, IF KNOWN BY BUYER, WOULD MATERIALLY AFFECT BUYER'S RELEASE OF SELLER PARTIES.

b. INDEMNITY. BUYER, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE SELLER PARTIES FROM AND AGAINST ALL CLAIMS ARISING OUT OF THE CONTAMINATION OR CONDITION OF THE PROPERTY OR DECOMMISSIONING THE SERVICE STATION, ANY OR ALL OF THE FOREGOING, INCLUDING WITHOUT LIMITATION (A) THE FAILURE, IN WHOLE OR IN PART, DIRECTLY OR INDIRECTLY, OF A BUYER-RELATED PERSON TO COMPLY WITH ENVIRONMENTAL LAW; OR (B) THE RELEASE OR DISTURBANCE OF HAZARDOUS MATERIALS; OR (C) ANY ALLEGATION OF IMPROPER MANAGEMENT, REMEDIATION OR DISPOSAL OF HAZARDOUS MATERIALS IN CONNECTION WITH THIS USTS REMOVAL AGREEMENT. THIS INDEMNITY IS INTENDED TO INDEMNIFY SELLER PARTIES FROM LIABILITY EVEN TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE SOLE, CONTRIBUTORY OR CONCURRENT **NEGLIGENCE** OF A SELLER PARTY OR A BUYER-RELATED PERSON OR **STRICT LIABILITY**.

c. Definitions.

(1) Claims. "**Claims**" means any and all costs, expenses, damages, losses, liability, demand, action or cause of action, including court costs, attorneys' fees and consultants' fees.

(2) Environmental Law. "**Environmental Law**" means any federal, state or local law, statute, ordinance, rule, regulation or legal requirement in effect at the Effective Date pertaining to (a) the protection of health, safety, or the environment; (b) the conservation, management, protection, or use of natural resources and wildlife; (c) the protection or use of source water and groundwater; (d) the management, manufacture, possession, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation, or handling of, or exposure to, any Hazardous Materials; or (e) pollution (including any release to air, land, surface water and groundwater), and includes without limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 *et seq.*, the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.*, the Clean Air Act of 1966, as amended, 42 U.S.C. 7401 *et seq.*, Toxic Substances Control Act of 1976, 15 USC 2601 *et seq.*, the Hazardous Materials Transportation Act, 49 U.S.C. 5101, the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. 651 *et seq.*, the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. 11001 *et seq.*, the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300(f) *et seq.*, together with state counterparts, including without limitation the Texas Water Code including the Texas Water Code Subchapter I, Underground and Aboveground Storage Tanks, §§ 26.341 *et seq.*; the Texas Solid Waste Disposal Act, the Texas Health & Safety Code §§ 361.001 *et seq.*, and any comparable, implementing or successor law, and any amendment, rule, regulation, order or directive, issued thereunder.

(3) Hazardous Materials. "**Hazardous Materials**" means (a) any hazardous waste, hazardous substance, toxic pollutant, hazardous air pollutant or hazardous chemical (as any such terms may be defined under, or for the purpose of, any Environmental Law), (b) asbestos, (c) polychlorinated biphenyls, (d) petroleum or petroleum products, including without limitation Contamination, fuel-related waste and materials from exploration and production of petroleum hydrocarbons and natural gas, (e) any substance the presence of which on the Property is prohibited under any Environmental Law or which requires or may require special handling or notification of or reporting under Environmental Law as to its generation use, handling, collection, treatment, storage, recycling, transportation, corrective action, remediation, removal, discharge or disposal.

(4) Seller Parties. "**Seller Parties**" means Broaddus Properties, Ltd., Broaddus Enterprises, Inc., and Bill Broadus, their heirs, successors and assigns.

6. MISCELLANEOUS.

a. Notices. All notices, demands and requests which may be given or which are required to be given by either party to the other, and any exercise of a right of termination provided by this USTs Removal Agreement, shall be in writing and shall be deemed effective when personally delivered to the address of the party to receive such notice set forth below or, whether actually received or not, upon actual delivery confirmation of facsimile transmission to a party's facsimile number listed below, or when

deposited in any post office or mail receptacle regularly maintained by the United States government, certified or registered mail, return receipt requested, postage prepaid, addressed as set forth on the Signature Pages attached hereto and made a part hereof for all purposes, or such other place as Property Seller, UST Seller, or Buyer, respectively, may from time to time designate by written notice to the other. The attorney for a party has the authority to send and receive notices on behalf of such party.

b. Entire Agreement. This USTs Removal Agreement embodies the entire agreement between the parties relative to the subject matter hereof, and there are no oral or written agreements between the parties, nor any representations made by either party relative to the subject matter hereof, which are not expressly set forth herein.

c. Amendment. This USTs Removal Agreement may be amended only by a written instrument executed by the party or parties to be bound thereby.

d. Captions. The captions and headings used in this Agreement are for convenience only and do not in any way limit, amplify or otherwise modify the provisions of this Agreement.

e. Time of Essence. Time is of the essence of this USTs Removal Agreement. However, if the final date of any period which is set out in any provision of this USTs Removal Agreement falls on a Saturday, Sunday or legal holiday under the law of the United States or the State of Texas, in such event, the time of such period shall be extended to the next day which is not a Saturday, Sunday or legal holiday.

f. Successors and Assigns. This USTs Removal Agreement shall bind and inure to the benefit of Seller Parties and Buyer and their respective heirs, successors and assigns.

g. Assignment. This USTs Removal Agreement may not be assigned, transferred, pledged, or hypothecated by Buyer without the prior written consent of Sellers.

h. Invalid Provision. If any provision of this USTs Removal Agreement is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable; this USTs Removal Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this USTs Removal Agreement; and, the remaining provisions of this USTs Removal Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from this USTs Removal Agreement.

i. Attorneys' Fees. In the event it becomes necessary for either party hereto to file suit to enforce this USTs Removal Agreement or any provision contained herein, the party prevailing in such suit shall be entitled to recover, in addition to all other remedies or damages as herein provided, reasonable attorneys' fees incurred in such suit.

j. Confidentiality. Property Seller, USTs Seller, and Buyer agree to keep all information relating to the negotiations of this USTs Removal Agreement, the Work and each other, or any assignee of Buyer, whether such information is in any way proprietary, strategic or otherwise in strict confidence, and Property Seller, USTs Seller, Buyer shall guard its accessibility to others within its control, or subject to its direction, except to the extent required to complete the Work and Decommissioning the Service Station. Property Seller, USTs Seller, and Buyer agree not to divulge to persons other than governmental authorities, attorney, accountant, or involved officers, directors, employees, agents, representatives, consultants, and if appropriate, family members, on a need to know only basis, any of the terms and conditions or any matters related to the negotiations, this USTs Removal Agreement, the Work and each other.

k. Cooperation. The parties shall cooperate with one another, execute such additional documents as are necessary and reasonable to consummate the transaction set forth herein.

l. Multiple Counterparts. This USTs Removal Agreement may be executed in a number of identical counterparts, each of which for all purposes is deemed an original, and all of which constitute collectively one agreement; but in making proof of this USTs Removal Agreement, it shall not be necessary to produce or account for more than one such counterpart. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page.

m. Damages. Notwithstanding anything set forth in this USTs Removal Agreement to the contrary, neither party is liable to the other for any special, indirect, punitive, or consequential damages, except to the extent insured by insurance maintained by a party.

n. Merger. This USTs Removal Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this USTs Removal Agreement are expressly merged into and superseded by this agreement. The provisions of this USTs Removal Agreement may not be explained, supplemented, or qualified through evidence of trade usage or a prior course of dealings. In entering into this agreement, the parties have not relied upon any statement, representation, or agreement of the other party except for those expressly contained in this agreement. There is no condition precedent to the effectiveness of this agreement other than those expressly stated in this USTs Removal Agreement.

o. Waiver of Jury Trial. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS USTS REMOVAL AGREEMENT AND THE TRANSACTIONS IT CONTEMPLATES. THIS WAIVER APPLIES TO ANY ACTION OR OTHER LEGAL PROCEEDING, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE ("**PROCEEDING**"). EACH PARTY ACKNOWLEDGES THAT IT HAS RECEIVED THE ADVICE OF COMPETENT COUNSEL. ANY PROCEEDING ARISING OUT OF OR BASED ON THIS USTS REMOVAL AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY MAY BE INSTITUTED ONLY IN THE FEDERAL OR STATE COURTS WITHIN TRAVIS COUNTY, TEXAS. EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS AND WAIVES ANY OBJECTION IT MAY HAVE NOW OR HEREAFTER TO THE LAYING OF VENUE IN SUCH COURTS FOR ANY PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY'S ADDRESS SET FORTH HEREIN SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY PROCEEDING BROUGHT IN ANY SUCH COURT.

p. No Third Party Beneficiaries. Nothing in this USTs Removal Agreement, express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it, nor is anything in this USTs Removal Agreement intended to relieve or discharge the obligation or liability of any third person to any party to this USTs Removal Agreement.

SIGNATURE PAGE

EXHIBIT A TO USTS REMOVAL AGREEMENT

INSURANCE SPECIFICATIONS

These "**Insurance Specifications**" are incorporated into the USTs Removal Agreement executed by _____ ("**Property Seller**") and _____ ("**USTs Seller**") (which entities together with _____ are referred to as the "**Seller Parties**") and _____ ("**Buyer**"). In the event of conflict between any of the following Insurance Specifications with any provision in the USTs Removal Agreement, these Insurance Specifications control, amend and supplement the conflicting provision. The USTs Removal Agreement provides for the removal of underground storage tanks and underground storage tank systems, including without limitation fuel dispensers, lines and piping, and all other related systems and equipment (collectively, the "**USTs**") from the service station located at _____, Austin, Texas (the "**Property**").

1. Specifications, Coverages, Limits & Other Requirements.

No.	Specifications	Coverages, Limits & Other Requirements

<table>
<tr><th>No.</th><th>Specifications</th><th>Coverages, Limits & Other Requirements</th></tr>
<tr><td colspan="3">LIABILITY INSURANCE</td></tr>
<tr><td>1.</td><td colspan="2"><u>Commercial General Liability</u>. _____ (Buyer) is to maintain commercial general liability insurance ("CGL") and, if necessary, a commercial umbrella/excess insurance policy (see Spec. 2 below), issued on an Occurrence Basis meeting at least the following specifications, but only to the extent permitted by law. Orange Development, LLC may allocate the minimum limits between primary and umbrella/excess policies.</td></tr>
<tr><td>1.1</td><td>Minimum Limits</td><td>The minimum limits of coverage are not to be less than the following amounts (which amounts may be satisfied by primary and umbrella or excess policies – see Spec. 2 below):<table><tr><td>$1,000,000</td><td>Per Occurrence</td></tr><tr><td>$2,000,000</td><td>General Aggregate.</td></tr><tr><td>$2,000,000</td><td>Products/Completed Operations Aggregate</td></tr><tr><td>$1,000,000</td><td>Personal and Advertising Injury Limit.</td></tr></table></td></tr>
<tr><td>1.2</td><td>Form</td><td>This insurance is to be issued on an ISO CG 00 01, or other commercially reasonable form, and shall cover liability arising from premises, ongoing and completed operations, hire of contractors (independent contractors coverage).</td></tr>
<tr><td>1.3</td><td>Additional Insureds</td><td>This insurance is to be endorsed to insure Broaddus Properties, Ltd., Broaddus Enterprises, Inc. and Scott William Broaddus, Jr. as additional insureds.</td></tr>
<tr><td>1.4</td><td>Primary</td><td>This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to the USTs Removal Agreement that all insurance required herein shall be primary to and shall seek no contribution from any other insurance (primary, umbrella, contingent or excess) maintained by _____ (Seller Parties) with Buyer's insurance being excess, secondary and non-contributing.</td></tr>
<tr><td>1.5</td><td>Waiver of Subrogation</td><td>This insurance is to include a waiver of subrogation by insurer as to _____ (Seller Parties).</td></tr>
<tr><td>1.6</td><td>Notice</td><td>This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to Buyer required for cancellation or material change.</td></tr>
<tr><td>1.7</td><td>Certificate of Insurance</td><td>A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Buyer to Sellers as Certificate Holders at the following address: _____.</td></tr>
<tr><td>2.</td><td colspan="2"><u>Umbrella or Excess Policy</u>. If any of the required coverages are to be maintained by and through an umbrella or excess policy, they are to be by a policy issued on an Occurrence Basis meeting at least the following specifications.</td></tr>
<tr><td>2.1</td><td>Scope</td><td>This insurance shall be excess over and be no less broad than all coverages described above. The policy limits for the primary and excess policy may be allocated between the primary and excess/umbrella as selected by the named insured. It shall be excess over and be no less broad than all coverages and conditions described herein, including but not limited to the required additional insured status, designated construction project(s) and/or location(s) general aggregate, wavier of subrogation, notice of cancellation, and prohibited exclusions or limitations, and will be primary to and not seek contribution from any other insurance (primary, umbrella, contingent or excess) maintained by _____. The specification above of minimum limits does not limit the limits of coverage to be available to the additional insureds. If the insurance has limits greater than the above limits, the amount of coverage available to the insured is increased to the limits of insured’s insurance, including limits under any excess policies.</td></tr>
</table>

No.	Specifications	Coverages, Limits & Other Requirements
2.2	**Limit of Liability**	The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein.
2.3	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.
2.4	**Primary**	This insurance shall be primary and non-contributing liability coverage. It is the specific intent of the parties to the USTs Removal Agreement that all insurance held by _____ (Seller Parties) shall be excess, secondary and non-contributory.
2.5	**Drop-Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits
2.6	**Defense Costs**	This insurance is to include a duty to defend any insured.
2.7	**Additional Insureds**	This insurance is to cover _____ (Seller Parties) as additional insureds.
2.8	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to _____ (Seller Parties) required for cancellation or material change.
2.9	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to _____ (Seller Parties).
3.	**Contractor's Insurance.** Contractors employed to perform Work pursuant to the USTs Removal Agreement are to purchase and maintain insurance meeting or exceeding the following specifications:	
3.1	**CGL**	Buyer shall use its good faith efforts to require each contractor employed to perform Work to purchase and maintain CGL insurance meeting the specifications as set in **Specs. 1** and **2** above.
3.1.1	**Additional Insureds**	The CGL insurance is to be endorsed with an additional insured endorsement listing _____ (Seller Parties) as additional insureds.
3.1.2	**Waiver of Subrogation**	The CGL insurance is to be endorsed to include a waiver of subrogation by insurer as to _____ (Seller Parties).
3.2	**Contractor's Pollution Liability/Professional Errors and Omissions Insurance**	Contractor shall obtain Contractor's Pollution Liability/Professional Errors and Omissions Liability Insurance coverage, with limits of not less than $2,000,000 per occurrence/aggregate, naming Buyer, _____ (Seller Parties) as additional insureds.
3.3	**Evidence of Insurance**	Buyer shall provide to Sellers certificates of insurance as to each contractor performing work pursuant to the USTs Removal Agreement prior to the contractor's entry on the Property certified to Sellers as Certificate Holders at the following address: _____.

2. General Insurance Requirements.

All policies must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* A-, or better, and admitted to engage in the business of insurance in the State in which the Work is performed. If the forms of policies, endorsements, certificates, or evidence of insurance required by these Insurance Specifications are superseded or discontinued, Seller Parties will have the right to require other equivalent forms. Any policy or endorsement form other than a form specified in this Exhibit must be approved in advance by Seller Parties. "**Limits**" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Buyer maintains greater limits, then these specifications shall not limit the amount of recovery available to Seller Parties and the limits specified above as the minimum limits are increased to the greater limits.

EXHIBIT B TO USTS REMOVAL AGREEMENT

TESTING REPORTS

(*Attach testing reports generated pursuant to the Purchase and Sale Agreement.*)

6. Crane Swing License

CRANE SWING LICENSE

This Crane Swing License (this "**License**") is entered into by and among _____, a _____ ("**Owner**") and _____, a _____ ("**Third Party**"), in consideration of the covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each party. Owner and Third Party are sometimes individually referred to as a "**Party**" and collectively as the "**Parties**."

RECITALS

A. Owner is the owner of the land described in Exhibit A attached hereto (the "**Project Site**"), and Third Party is the owner of the land described in Exhibit B attached hereto (the "**Third Party's Property**"). The Project Site and the Third Party's Property are sometimes collectively referred to as the "**Property**").

B. Owner and Third Party anticipate that all or portions of the Property will at some future date be developed with new buildings and improvements. Owner has finalized conceptual plans for development on a portion of the Project Site, as shown in the site plan attached hereto as Exhibit C (the "**Construction Concept Plan**"), approved by Site Development Permit No. _____.

C. During the course of development of the Project Site and/or the Third Party's Property, it is contemplated that such development will involve and necessitate certain rights and licenses on and with respect to each such Property.

D. Owner and Third Party each has agreed to grant to the other the rights and licenses set forth herein, subject to the terms and conditions of this License.

AGREEMENT

1. Crane Swing License.

1.1. Grant of License by Third Party. Third Party hereby grants to Owner a nonexclusive license (the "**Owner's Swing License**") to use, on a nonexclusive basis and upon the conditions hereinafter provided, the portions of the air space over the Third Party's Property and improvements located thereon from time to time within the grey radius depicted on **Exhibit B-1** attached hereto (the "**Owner's Swing Licensed Premises**"). The rights established by the Owner's Swing License allow only the tail (the non-load-bearing end) of a crane to enter the airspace over the Owner's Swing Licensed Premises, except in cases where applicable law requires the crane to operate in "weather-vaning" mode, in which case the arm of the crane, without a load, will be permitted to cross the Owner's Swing Licensed Premises.

1.2. Commencement Date; Use of Owner's Swing Licensed Premises. Owner shall notify Third Party at least 30 days prior to installing a crane that will utilize the Owner's Swing Licensed Premises; such notice shall specify the date on which the use will commence. Owner may exercise its rights under the Owner's Swing License multiple times during the term of the Owner's Swing License, and Owner shall deliver the commencement notice specified in this Section above prior to each exercise of its rights. Owner's use of the Owner's Swing License shall be in accordance with the crane safety and use requirements set forth in Exhibit D attached hereto, as well as all applicable law. In no event shall Owner be entitled to utilize the Owner's Swing License for transporting construction loads, other than the counterweights associated with any aerial crane equipment, over any portion of the Owner's Swing Licensed Premises. Owner shall dismantle and remove its crane within a commercially reasonable time after the completion of each of its construction projects.

1.3. Termination Date. The Owner's Swing License shall terminate on the date that is 30 years after the Effective Date, unless sooner terminated pursuant to the terms of this License.

1.4. Costs and Liabilities. All costs and liabilities associated with the use of the Owner's Swing License shall be borne by Owner and its contractors.

1.5. Obligations After Transfer. The covenants and obligations of Third Party shall be binding upon each owner of any portion of the Owner's Swing Licensed Premises for the duration of such owner's ownership and until the expiration of the Owner's Swing License. Upon the transfer of all or any portion of the Third Party's Property by its owner, the new owner of the transferred property shall be deemed to have assumed and agreed to perform and be bound by all obligations pertaining to the owner of such property arising under this License during the new owner's period of ownership and until the expiration of the Owner's Swing License. The preceding owner of the transferred property shall be released from all obligations arising under this License on and after the date of the transfer (but not from obligations accrued during its period of ownership).

2. Construction Crane License.

2.1. Grant of License by Owner. Owner hereby grants individually and separately to each of the parties comprising Third Party a nonexclusive license (the "**Third Party's Crane Swing License**") to use, on a nonexclusive basis and upon the conditions hereinafter provided, the air space over the Project Site and improvements located thereon from time to time (the "**Third Party's Crane Swing Licensed Premises**"). The rights established by the Third Party's Crane Swing License allow only the tail (the non-load-bearing end) of a crane to enter the airspace over the Third Party's Crane Swing Licensed Premises, except in cases where applicable law requires the crane to operate in "weather-vaning" mode, in which case the arm of the crane, without a load, will be permitted to cross the Owner's Swing Licensed Premises.

2.2. Commencement Date; Use of Construction Licensed Premises. Third Party shall notify Owner at least 30 days prior to installing a crane that will utilize the Third Party's Crane Swing Licensed Premises; such notice shall specify the date on which the use will commence. The Third Party's Crane Swing License may be exercised by one or more of the parties comprising Third Party, either acting individually or collectively. Third Party may exercise its rights under the Third Party's Crane Swing License multiple times during the term of the Third Party's Crane Swing License, and Third Party shall deliver the commencement notice specified in this Section above prior to each exercise of its rights. Third Party's use of the Third Party's Crane Swing License shall be in accordance with the crane safety and use requirements set forth in **Exhibit D** attached hereto, as well as all applicable law. In no event shall Third Party be entitled to utilize the Third Party's Crane Swing License for transporting construction loads, other than the counterweights associated with any aerial crane equipment, over the portion of the Third Party's Crane Swing Licensed Premises. Third Party shall dismantle and remove its crane within a commercial reasonable time after the completion of each of its construction projects.

2.3. Termination Date. The Third Party's Crane Swing License shall terminate on the date that is 30 years after the Effective Date, unless sooner terminated pursuant to the terms of this License.

2.4. Costs and Liabilities. All costs and liabilities associated with the use of the Third Party's Crane Swing License shall be borne by Third Party and its contractors.

2.5. Obligations After Transfer. The covenants and obligations of Owner shall be binding upon each owner of any portion of the Third Party's Crane Swing Licensed Premises for the duration of such owner's ownership and until the expiration of the Third Party's Crane Swing License. Upon the transfer of all or any portion of the Project Site by Owner, the new owner of the transferred property shall be deemed to have assumed and agreed to perform and be bound by all obligations pertaining to the owner of such property arising under this License during the new owner's period of ownership and until the expiration of the Third Party's Crane Swing License. The preceding owner of the transferred property shall be released from all obligations arising under this License on and after the date of the transfer (but not from obligations accrued during its period of ownership).

3. Cooperation for Use of Multiple Cranes. If at any time during the terms of the Owner's Swing License and the Third Party's Crane Swing License, both Owner and Third Party are using a crane simultaneously, then each party agrees that it will use commercially reasonable efforts to (i) coordinate the swing radii of the cranes so that they may safely operate in proximity to each other and in accordance with all applicable rules, ordinances, and laws; (ii) cause its crane to be installed, operated, and dismantled in a manner that does not unreasonably interfere with the construction activities of the other party; and (iii) otherwise cooperate with the other party so that both parties may reasonably pursue their separate construction projects without delay or interference.

4. Limits on License Rights.

4.1. Owner's Swing License. The license granted to Owner in Section 1 above is nonexclusive and is expressly subordinate to the right of Third Party and its successors and assigns to maintain, use, and operate the buildings and other facilities presently or hereafter situated on the Third Party's Property. Third Party reserves for itself and its heirs, successors, and assigns the right to continue to use and enjoy the surface of the Third Party's Property in accordance with applicable laws, ordinances, and rules, and Owner's use of the Owner's Swing License shall not unreasonably interfere with such enjoyment.

4.2. Third Party's Crane Swing License. The license granted to Third Party in Section 2 above is nonexclusive and is expressly subordinate to the right of Owner and its successors and assign to maintain, use, and operate the buildings and other facilities presently or hereafter situated on the Project Site. Owner reserves for itself and its successors and assigns the right to continue to use and enjoy the surface of the Project Site in accordance with applicable laws, ordinances, and rules, and Third Party's use of the Third Party's Crane Swing License shall not unreasonably interfere with such enjoyment.

5. Insurance.

5.1. Construction Insurance. Upon notice by Owner to Third Party of commencement of the Owner's Swing License, Owner at its expense throughout the term of such license shall obtain and maintain insurance in conformity with the requirements set forth in **Exhibit E** attached hereto. The coverage may be provided in the form of a rider and/or endorsement to a previously existing insurance policy. The insurance must cover all perils arising from the activities of Owner, its agents, contractors, and invitees, related to such license. In the event of any insurance claim, Owner agrees to pay all deductibles stated in the policy. The insurance specifically shall name each of the parties comprising Third Party as an additional insured, and a certificate of insurance evidencing coverage shall be provided by the insurance company to all additional insureds by not later than the date of commencement of the license. To the extent obtainable based on reasonable efforts, all required insurance is to include a clause stating that in the event of cancellation or material change that reduces or restricts the insurance afforded by the insurance policy, the insurer agrees to mail prior written notice of cancellation or material change that reduces or restricts the insurance afforded to Third Party as additional insureds at least 30 days in advance to Third Party.

5.2. Insurance. In this Section, "Third Party" refers to only the Third Party parties that are utilizing the Third Party's Crane Swing License at any moment in time under this License. Upon notice by Third Party to Owner of commencement of the Construction License, Third Party at its expense throughout the term of such License shall obtain and maintain insurance in conformity with the requirements set forth in **Exhibit E** attached hereto. The coverage may be provided in the form of a rider and/or endorsement to a previously existing insurance policy. The insurance must cover all perils arising from the activities of Third Party, its agents, contractors, and invitees, related to the license. In the event of any insurance claim, Third Party agrees to pay all deductibles stated in the policy. The insurance specifically shall name Owner as an additional insured, and a certificate of insurance evidencing coverage shall be provided by the insurance company to Owner by not later than the date of commencement of the license. To the extent obtainable based on reasonable efforts, all required insurance is to include a clause stating that in the event of cancellation or material change that reduces or restricts the insurance afforded by the insurance policy, the insurer agrees to mail prior written notice of

cancellation or material change that reduces or restricts the insurance afforded to Owner as additional insureds at least 30 days in advance to Owner.

6. Indemnification and Repair of Damage.

6.1. Indemnity of Third Party. To the extent permitted by law, Owner hereby agrees fully to indemnify, defend, save, and hold harmless Third Party, its heirs, executors, administrators employees, owners, officers, directors, managers, agents, lessees, licensees, lenders, and invitees (collectively called "**Third Party Indemnitees**") against any and all liability, damage, loss, claims, demands, and actions of any nature whatsoever, including reasonable attorneys' fees, on account of personal injury (including without limitation, workers' compensation and death claims) or property loss or damage of any kind whatsoever, which arises, or is claimed to arise, out of or is, or is claimed to be, in any manner connected with: (i) Owner's use of the Owner's Swing License; (ii) any act, omission, or negligence of Owner or its agents, contractors, or invitees; (iii) any activities of Owner or its agents, contractors, or invitees conducted on or about the Third Party's Property; or (iv) any breach or default of the terms of this License by Owner or its agents, contractors, and invitees. **TO THE EXTENT PERMITTED BY LAW, THE INDEMNITY IN THIS PARAGRAPH SHALL APPLY REGARDLESS OF WHETHER THE LOSS IN QUESTION ARISES OR IS ALLEGED TO ARISE IN PART FROM ANY NEGLIGENT ACT OR OMISSION OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES, FROM STRICT LIABILITY OF ANY SUCH PERSONS OR OTHERWISE; PROVIDED, HOWEVER, THAT SUCH INDEMNITY SHALL NOT INCLUDE ANY CLAIMS THAT ARISE FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES**. Owner must, at its own expense, investigate all such claims and demands, attend to their settlement or other disposition, defend all actions based thereon, and pay all attorneys' fees and all other cost and expenses of any kind arising from any aforesaid liability, damage, loss, claims, demands or actions. This indemnification provision shall not permit Third Party to recover from Owner any damages, costs, losses, expenses or other amounts for which the Third Party Indemnitees have been compensated by insurance provided by Owner under Section 5.1 above. The foregoing indemnity shall survive after the later of the expiration or termination of the Owner's Swing License for the duration of all applicable statutes of limitation.

6.2. Indemnity of Third Party. In this Section, "Third Party" refers to only the persons that are utilizing the Third Party's Crane Swing License at any moment in time under this License. To the extent permitted by law, Third Party hereby agrees fully to indemnify, defend, save, and hold harmless Owner, its employees, owners, officers, directors, managers, agents, lessees, licensees, lenders, and invitees (collectively called "**Owner Indemnitees**") against any and all liability, damage, loss, claims, demands, and actions of any nature whatsoever, including reasonable attorneys' fees, on account of personal injury (including without limitation, workers' compensation and death claims) or property loss or damage of any kind whatsoever, which arises, or is claimed to arise, out of or is, or is claimed to be, in any manner connected with: (i) Third Party's use of the Third Party's Crane Swing License; (ii) any act, omission, or negligence of Third Party or its agents, contractors, or invitees; (iii) any activities of Third Party or its agents, contractors, or invitees conducted on or about the Project Site; or (iv) any breach or default of the terms of this License by Third Party or its agents, contractors, and invitees. **TO THE EXTENT PERMITTED BY LAW, THE INDEMNITY IN THIS PARAGRAPH SHALL APPLY REGARDLESS OF WHETHER THE LOSS IN QUESTION ARISES OR IS ALLEGED TO ARISE IN PART FROM ANY NEGLIGENT ACT OR OMISSION OF OWNER OR ITS AGENTS OR EMPLOYEES, FROM STRICT LIABILITY OF ANY SUCH PERSONS OR OTHERWISE; PROVIDED, HOWEVER, THAT SUCH INDEMNITY SHALL NOT INCLUDE ANY CLAIMS THAT ARISE FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF OWNER OR ITS AGENTS OR EMPLOYEES**. Third Party must, at its own expense, investigate all such claims and demands, attend to their settlement or other disposition, defend all actions based thereon, and pay all attorneys' fees and all other cost and expenses of any kind arising from any aforesaid liability, damage, loss, claims, demands or actions. This indemnification provision shall not permit Owner to recover from Third Party any damages, costs, losses, expenses or other amounts for which the Owner Indemnitees have been compensated by insurance provided by Third Party under Section 5.2 above. The foregoing indemnity shall survive after the

expiration or termination of the Third Party's Crane Swing License for the duration of all applicable statutes of limitation.

6.3. Repair of Damage. Owner, at its sole cost, shall repair or replace any damage to the Third Party's Property and any surrounding areas caused by the activities of Owner in the exercise of its rights under this License. The Third Party utilizing the Third Party's Crane Swing License at any moment in time under this License, at its sole cost, shall repair or replace any damage to the Project Site and any surrounding areas caused by the activities of Third Party in the exercise of its rights under this License. If either Owner or Third Party fails to repair any damage for which such party is responsible within fifteen days after receipt of written notice from the other party (or, if such repair reasonably requires more than fifteen days to complete, fails to commence repair within such fifteen-day period and diligently pursue such repair to completion), then the notifying party may elect to repair such damage at the cost of the other party. If a notifying party makes repairs as provided in this Section 6.3, the other party shall reimburse the notifying party for the reasonable cost of such repairs within thirty days after receipt of an invoice for same. Notwithstanding the foregoing, if a party, in the exercise of its rights under this License, becomes aware of a condition which that party reasonably believes (a) constitutes an imminent threat to the health, safety or welfare of any persons or property, and (b) resulted from a breach by the other party of its obligations under this License, the non-breaching party shall use reasonable efforts to notify the other party of such condition by telephone, electronic mail or other immediate means of communication. If the other party is not available or does not immediately begin to remedy such emergent and hazardous condition, then the non-breaching party may remedy such condition and receive reimbursement from the other party as provided above.

7. Termination. The licenses granted herein shall terminate on the scheduled termination dates specified in Section 1.3 and Section 2.3 above.

8. Default. If either Owner or Third Party fails to comply with any of the terms and conditions herein, then the other party may give the defaulting party written notice of such default. The defaulting party will have fifteen days from the date of such notice to take action to remedy the default. If the defaulting party does not satisfactorily remedy such default within such fifteen-day period the non-defaulting party may seek specific performance of this agreement, including by restraining orders or injunctions (temporary or permanent) prohibiting interference and commanding compliance. In addition to obtaining restraining orders and injunctions and the remedy of specific performance, the non-defaulting party shall be entitled to recover from the defaulting party all reasonable costs and expenses incurred in remedying the default or pursuing its remedies under this License. **EXCEPT FOR THE EXPENSE REIMBURSEMENT IN THE PREVIOUS SENTENCE, NO PARTY UNDER THIS LICENSE MAY PURSUE AN ACTION FOR ANY FORM OF MONETARY DAMAGES, INCLUDING ACTUAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES.**

9. General Matters.

9.1. Compliance with Laws. Owner and Third Party each agrees and covenants that all activities related to its use of the license granted to it herein shall be done in compliance with all applicable city, county, state and/or federal laws, ordinances, regulations and policies now existing or later adopted.

9.2. Venue. Venue for all lawsuits concerning this License shall be in the state district courts of _____, _____ County, _____.

9.3. Waiver of Default. Either party may waive any default of the other party at any time, without affecting or impairing any right arising from any subsequent or other default. The failure at any time of either party to enforce any provision hereof, whether a violation is known or not, shall not constitute a waiver or estoppel of the right to do so.

9.4. Notice. Notice may be given by fax, hand delivery, or certified mail, postage prepaid, and is deemed received on the day faxed or hand delivered or when deposited in the Post Office

or other depository under the care or custody of the United States Postal Service, enclosed in a wrapper with proper postage affixed and addressed, if sent certified mail. Either party may change the addressee or address for notices, by notice to the other party as provided herein. Notice must be sent as follows:

If to Owner:

_____
_____
_____
_____
Facsimile Number: _____
E-Mail Address: _____

With copy to:

_____
_____
_____
_____
Facsimile Number: _____
E-Mail Address: _____

If to Third Party:

_____
_____
_____
_____
Facsimile Number: _____
E-Mail Address: _____

With copy to:

_____
_____
_____
_____
Facsimile Number: _____
E-Mail Address: _____

9.5. Interpretation. This License, in the event of any dispute over its meaning or application, shall be interpreted fairly and reasonably, and neither more strongly for nor against any party.

9.6. Application of Law. This License is governed by the laws of the State of _____. If the final judgment of a court of competent jurisdiction invalidates any part of this License, then the remaining parts must be enforced, to the extent possible, consistent with the intent of the parties as evidenced by this License.

9.7. Cooperation and Consents. Owner and Third Party each agrees to cooperate fully with and assist each other and execute such documents as may be necessary to further the express purposes of this License, which cooperation and assistance shall not be unreasonably withheld, conditioned or delayed.

9.8. Severability. If any provision of this License shall for any reason be held to be invalid, illegal or unenforceable by any court of competent jurisdiction, the validity of the other provisions of this License shall in no way be affected thereby. **To the extent that _____ Code applies, then the indemnity and additional insured coverage is to be limited by the statute's limitations and the indemnity and additional insured coverage are to be enforced to the extent permitted.**

9.9. Counterparts; Signatures. This License may be executed in any number of identical counterparts by the handwritten signature of each party, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. This License may be executed by the handwritten signature of the parties and transmitted by facsimile or e-mail.

9.10. Attorneys' Fees. If any action shall be commenced to enforce the terms of this License or to declare the rights of the parties hereunder, the prevailing party shall be entitled to recover all of its costs and expenses (including, but not limited to, reasonable attorneys' fees) from the non-prevailing party. In addition to the foregoing award of attorneys' fees and other litigation costs to the prevailing party, the prevailing party in any lawsuit on this License shall be entitled to its reasonable attorneys' fees and other litigation costs incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of this License into any judgment on this License, and shall survive the termination of this License.

9.11. No Third Party Rights. Nothing in this License shall be construed to confer any rights, benefits or remedies upon any person or entity other than the parties hereto and their respective successors and assigns as owners of their respective Property.

9.12. Entire Agreement. This License and all documents referred to herein: (i) constitute and are intended as a final expression and a complete and exclusive statement of the understanding and the agreement between the parties hereto with respect to the subject matter hereof; (ii) supersede all prior or simultaneous understandings, correspondence, letters of intent, negotiations, or agreements, whether oral or in writing between the parties respecting the subject matter of this License; and (iii) may not be modified, amended or otherwise changed in any manner except by a writing specifically setting forth such modification, amendment or change and executed by the handwritten signature of each of the parties hereto. The parties further agree that neither shall claim that the other waived any rights under this License, whether by inconsistent actions or otherwise, unless a written amendment is executed in accordance with this paragraph.

9.13. Liability of Third Party Parties Not Joint and Several. In the event that one or more of the parties comprising Third Party under this License breaches or defaults an obligation under this License with respect to only the portion of the Third Party's Property owned by such defaulting party, any liability of such defaulting party to Owner shall be personal to such defaulting party and shall not be joint and several with the other parties comprising Third Party. In such event, Owner's cause of action for breach or default shall be commenced against only such defaulting party and not all of the parties comprising Third Party.

9.14. Recordation. Either party may record this License in the Official Public Records of _____ County, _____. After recordation, the recording Party shall deliver a copy of the recorded document to the other Party or Parties.

9.15. Third Party Beneficiary. For so long as _____ is a tenant of _____, _____ shall be a third-party beneficiary of this License for purposes of the obligation of Owner to _____ pursuant to Sections 5.1 and 6.1, and but for such consideration, _____ would not consent to this License.

9.16. List of Exhibits. The exhibits identified below and attached hereto are incorporated herein by this reference.

Exhibit A - Project Site
Exhibit B - Third Party's Property
Exhibit C - Construction Concept Plan
Exhibit D - Crane Safety and Use and Requirements
Exhibit E - Insurance Requirements

Executed to be effective _____ (the "**Effective Date**").

[Signature pages follow.]

Tenant Consent to Owner's Swing License

Reference is made herein to that certain Lease Agreement dated _____, by and between _____, as "**Landlord**," and _____, as "**Tenant**," pertaining to the premises located at _____, described as _____ (the "**Lease Premises**"). The Lease Premises is the same real property described as "_____" in the Owner's Swing License which this Consent is attached (the "**License**").

Tenant, as the holder of a leasehold interest in the Lease Premises, consents to the grant of the rights set out in the License, including all of the terms and conditions of such grant, for all purposes, in exchange for being named as an additional insured under Owner's insurance as set forth in the License. Tenant further waives any right that it may have in its License to object to or interfere with the exercise of the rights granted in the License for so long as Owner is in compliance with the same. Tenant acknowledges and agrees that the rights granted in the License include the right for Owner to install a construction crane that will use a portion of the air space over the Lease Premises and the improvements thereon.

TENANT

By: _____
Print Name: _____
Print Title: _____

Exhibit A

Project Site

[legal description], and identified as the cross-hatched area in Exhibit A-1 attached hereto.

Exhibit A-1

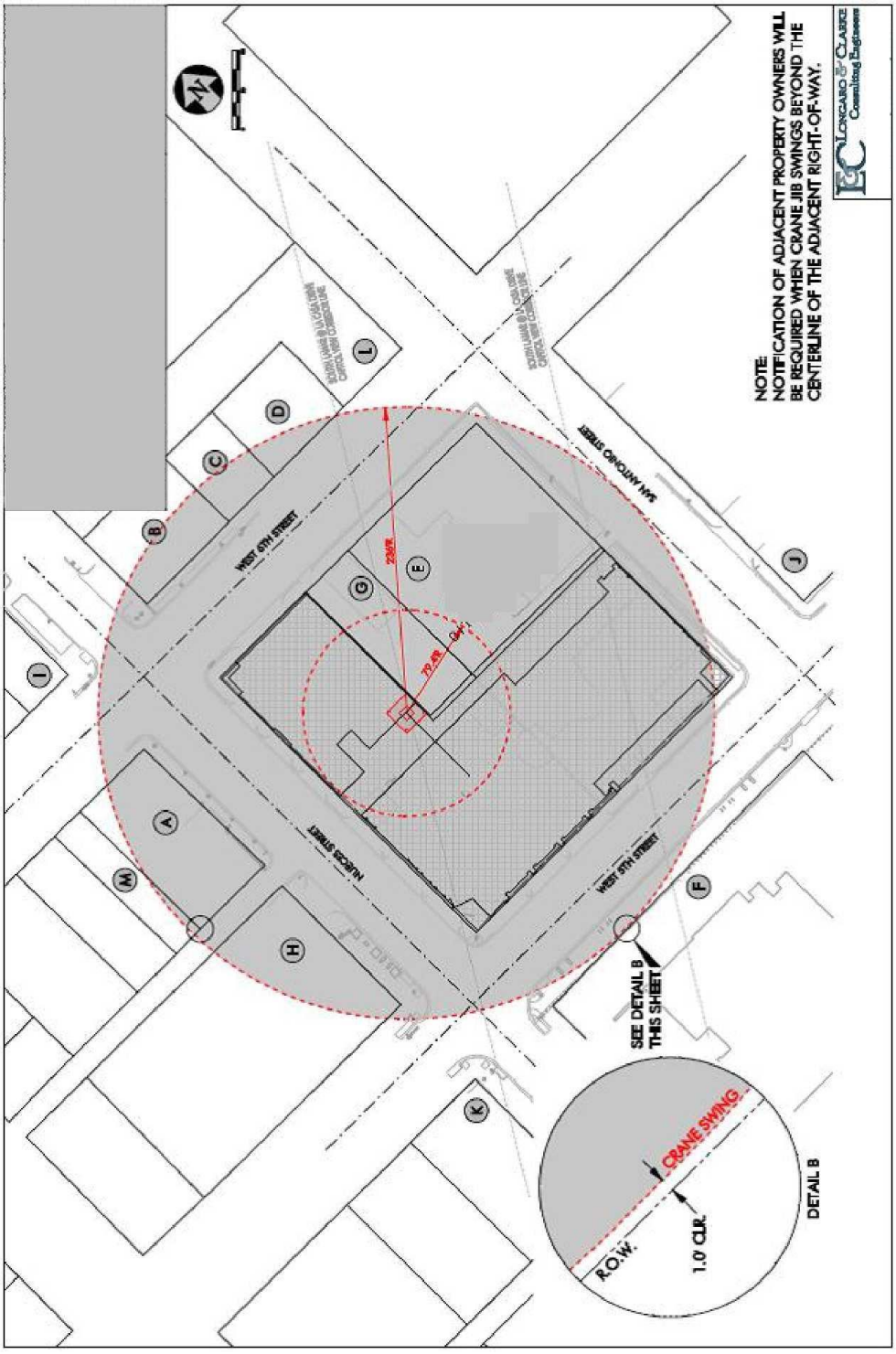


Exhibit B

Third Party's Property

[legal description], and identified as the cross-hatched area in Exhibit B-1 attached hereto.

Exhibit B-1

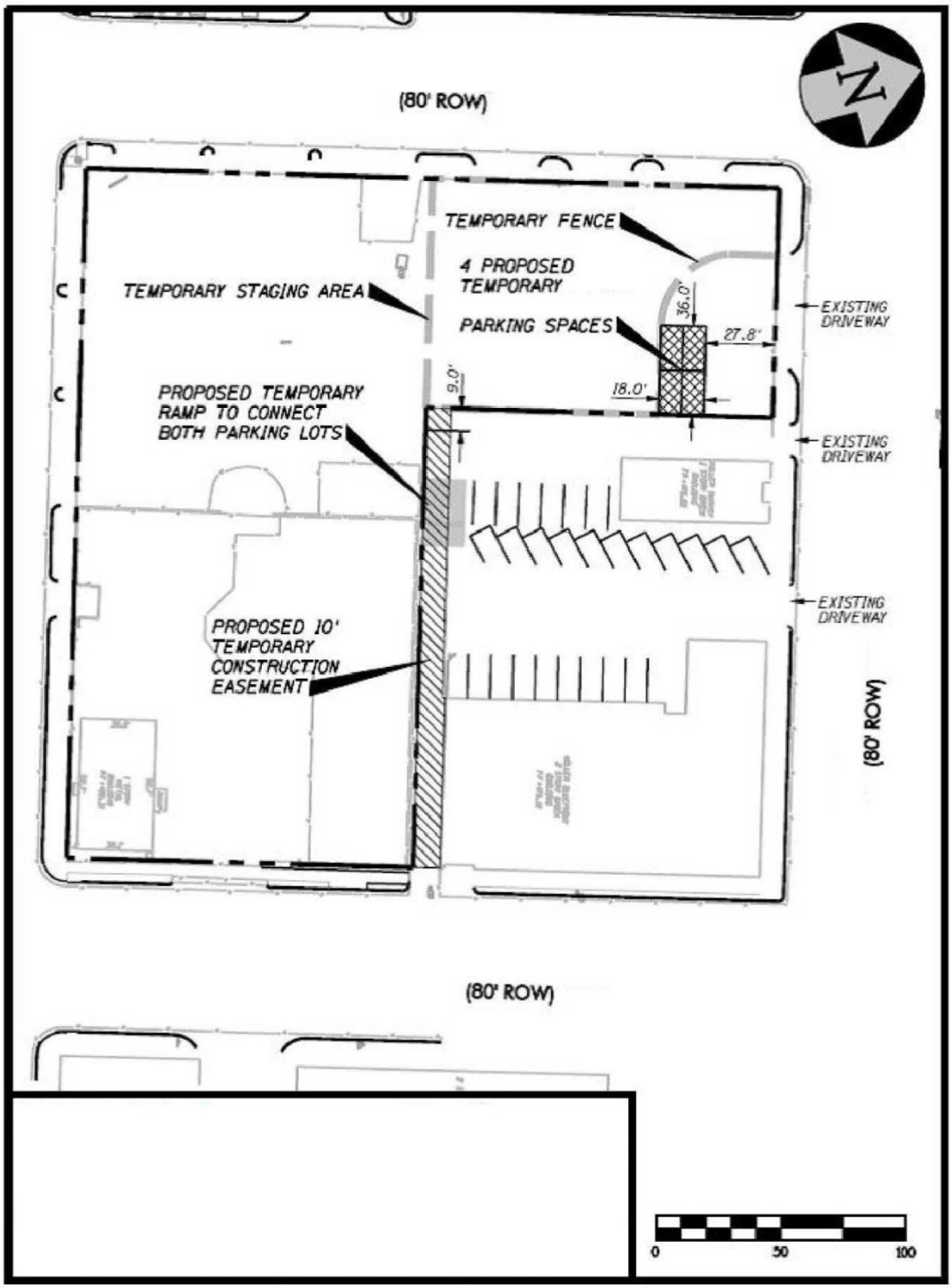
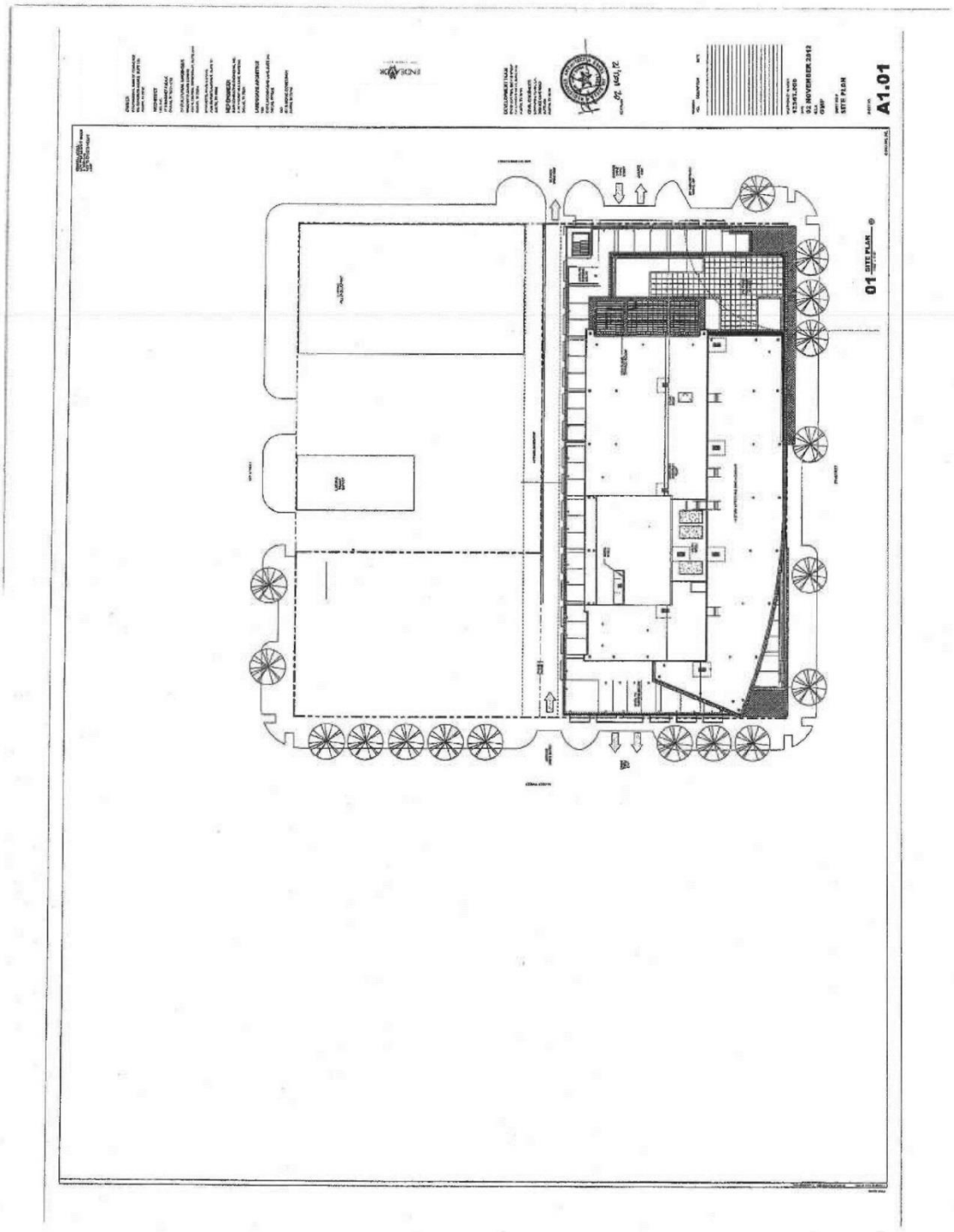


Exhibit C

Construction Concept Plan



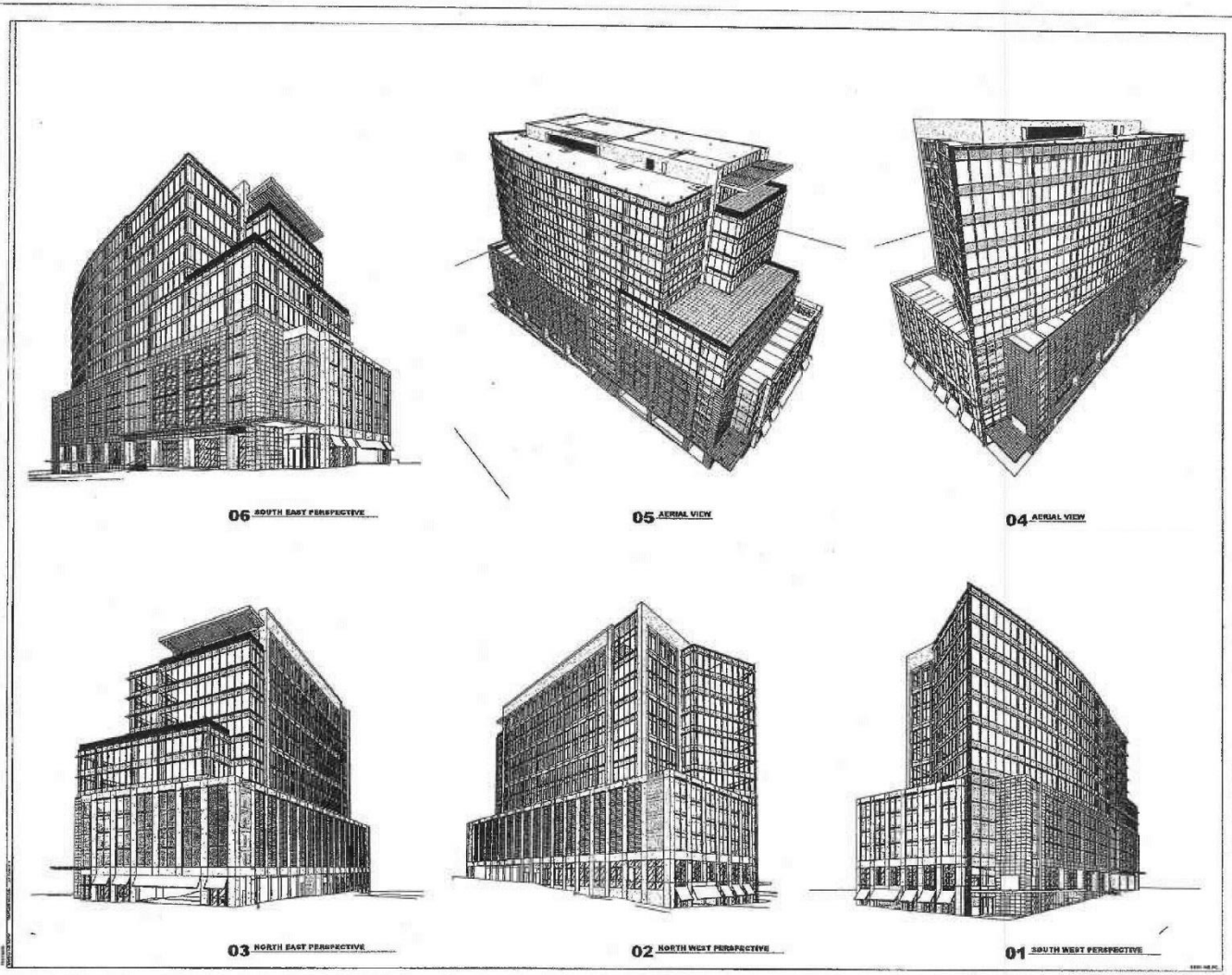

06 SOUTH EAST PERSPECTIVE
05 AERIAL VIEW
04 AERIAL VIEW
03 NORTH EAST PERSPECTIVE
02 NORTH WEST PERSPECTIVE
01 SOUTH WEST PERSPECTIVE
08 AUGUST 2019
DD / GMP
BUILDING PERSPECTIVES
A5.0

Exhibit D

Crane Safety and Use Requirements

1. **Tower Crane Operations.** Each overhead tower crane utilized by or on behalf of a Party shall be erected on the land owned by such Party. There shall be no more than two horizontal, overhead tower cranes in use at any one time by any Party in connection with the construction of improvements on the portions of the Property owned by such Party. Each Party shall cooperate with the other Parties to agree upon the operational height of each horizontal beam for a crane to provide proper safety and to allow, during concurrent mutual terms of the Owner's Swing License and the Construction Crane License, the use of cranes to construct improvements located on the Project Site and the Third Party's Property simultaneously.

2. **Height of Horizontal Beam.** In no event shall the operational height of a horizontal beam for a crane be lower than thirty-two feet above the highest level of improvements located on the portions of the Construction Crane Licensed Property or Owner's Swing Licensed Property utilized by such crane, except in connection with the erection or removal of such crane. The Parties understand and agree that each crane may be erected in parts prior to operation of each crane, and that each subsequent addition of a section of a crane does not constitute "erection" of the entire crane.

3. **No Construction Loads May Moved Over Limited Use Premises.** At no time may any crane operated by Owner carry construction materials and/or supplies or any other load over the Third Party's Property. At no time may any crane operated by Third Party carry construction materials and/or supplies or any other load over the Project Site.

4. **Hours of Operation of Cranes.** The cranes shall be operated during the hours permitted by applicable laws, rules, regulations, ordinances or authorizations of the City of _____.

5. **Safety.** The cranes shall at all times be erected and operated in accordance with all applicable safety laws, rules, regulations and ordinances. Only trained and qualified personnel (in accordance with applicable law) shall be permitted to operate cranes governed by this License.

6. **Maintenance and Repair.** The parties shall require that the crane contractors, crane owners, and crane operators adequately maintain and repair the cranes at all times.

Exhibit E to Owner's Swing License

Insurance Specifications

Below are specifications for insurance to be maintained pursuant to the Owner's Swing License (the "**License**") by Owner under § 5.1 or by Third Party under § 5.2, as the insuring party (the "**Insuring Party**") as to the premises (the "**Licensed Premises**") owned by the persons designated below as the "**Property Owner**" and licensed to the Insuring Party for its use for the limited purposes set out in the License. Both the Insuring Party and contractors ("**Contractor**") hired by the Insuring Party that are performing work or operations on or above the Licensed Premises are to obtain and maintain insurance meeting these Insurance Specifications. In the event of any conflict between these Insurance Specifications and other provisions of the License, the other provisions of the License controls. The term "**Additional Insured**" as used below refers to the persons listed below as additional insureds on the insurance to be maintained or caused to be obtained and maintained pursuant to the License by the person listed below as Insuring Party:

Insuring Party:	Additional Insured or Property Owner:
Owner under § 5.1 of the License	_____ ("**Third Party**") Attn: _____ _____ _____ Facsimile Number: _____ E-Mail Address: _____ Tenant
Third Party under § 5.2 of the License	_____ ("**Owner**") Attn.: _____ _____ _____ Facsimile Number: _____ E-Mail Address: _____

The following are specifications for insurance to be maintained by the Insuring Party or its Contractor, except that in the case of Third Party being the Insuring Party, the Workers' Compensation, Employer's Liability and Business Auto Liability insurance specifications apply to insurance to be maintained by Third Party's Contractor (*specifications of "minimum limits" or "no less than" means that the insurance is to have limits of no less than the limit specified, but that if the Insuring Party or Contractor, as the case may be, has greater limits, then the greater limits are specified and apply hereunder):

#	Specification	Additional Details
1.	**Commercial General Liability Insurance ("CGL")**	
1.1	Occurrence Basis	The CGL is to be issued on an occurrence basis.
1.2	Minimum limits*	
		$ 5,000,000 per occurrence.*
		$ 5,000,000 products/completed operations.*
		$ 5,000,000 personal and advertising injury.*
1.3	General Aggregate	If the CGL insurance contains a general aggregate limit, it shall apply separately to this project, and shall be no less than $5,000,000.*
1.4	Form	CGL is to be on an ISO form CG 00 01, or a substitute providing equivalent coverage, and shall cover liability arising from premises, operations, and contractor's liability arising out of the hire of contractors (independent contractors coverage). If available at no extra cost, CGL shall cover sudden and accidental pollution.
1.5	Term	The policy's effective date/expiration date shall cover the entire term of construction operations at the project's location, and for a period of no less than 2 years after completion of construction operations.
1.6	Insured Contracts	Coverage shall include but not be limited to insurable assumed contract liability to the Additional Insureds, and their officers, directors and employees.
1.7	Primary	The CGL shall be endorsed to provide that it is primary and non-contributing coverage (other insurance of the Additional Insured is not required to contribute or share with the CGL's limits).
1.8	Waiver of Subrogation	CGL shall be endorsed with an ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others

		Endorsement to include a waiver of subrogation by the insurer as to claims against the persons designated herein to be Additional Insureds, and their officers, directors and employees.
1.9	Prohibited Endorsements	The following exclusions/limitations (or their equivalents) are not permitted without the prior consent of the Additional Insured; if the Insuring Party's insurer refuses to delete any of the endorsements below, the Additional Insured agrees to consult with and cooperate with Insuring Party to reach a commercially reasonable resolution:
		a. Contractual Liability Limitation, CG 21 39.
		b. Amendment Of Insured Contract Definition, CG 24 26 or 33 90.
		c. Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		d. Any "Insured vs. Insured" exclusion.
		e. Any type of punitive, exemplary or multiplied damages exclusion.
		f. An exclusion for the type of operations contemplated by the License to be undertaken by the Insuring Party's Contractor.
1.10	Additional Insured	
	(1) Insuring Party's CGL:	Additional insured coverage is to be provided to the Additional Insured for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising out of the ownership, maintenance or use of that part of the licensed premises licensed to the Insuring Party and shown in the Schedule on an ISO CG 20 11 modified to change the reference "premises leased to you" to "premises licensed to you" listing the Additional Insured as additional insureds.
		b. as to "ongoing operations" on an ISO CG 20 26 Additional Insured – Designated Person or Organization modified to change the reference "premises rented to you" to "premises licensed to you" and listing the Additional Insured as additional insureds.
		c. as to "completed operations" coverage of hazards within the "products-completed operations hazard" for work performed by or for the Insuring Party at or around the licensed premises under the License, listing the Additional Insured as additional insureds.
1.10	(2) Insuring Party Contractor's CGL:	Additional insured coverage is to be provided for the term of the Contractor's obligations under the construction contract with the Insuring Party and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising in whole or in part out of the Contractor's acts or omissions on an ISO CG 20 10 04 13 listing the Additional Insured as additional insureds.
		b. as to "completed operations" on an ISO CG 20 37 04 13 listing the Additional Insured as additional insureds.
1.11	Notice	The policy shall provide for 30 days' prior written notice by the insurer to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
1.12	Excess or Umbrella	CGL limits may be covered under a combination of primary and excess/umbrella policies. Excess/umbrella policy is to be written on an occurrence basis. Such insurance shall be excess over and be no less broad than all coverages described above for the base policy. The policy limits for the primary and excess/umbrella policy may be allocated between the primary and excess/umbrella as selected by the named insured. The policy shall list the Additional Insured as additional insureds. This insurance shall be endorsed to provide primary and non-contributing liability coverage as to any other insurance of the Additional Insured. It is the specific intent of the parties to this License that all insurance held by the Additional Insured shall be excess, secondary and not contribute to the insurance provided by the Insuring Party. Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits of the base policy. This policy shall include a duty to defend any insured. The policy shall include a waiver of subrogation by

		insurer against the additional insureds. The policy shall contain a provision for 30 days' prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
2.	**Workers' Compensation ("WC") and Employer's Liability ("EL")**	
2.1	Limits	WC – statutory limits. EL – $1,000,000 each accident and disease.
2.2	Territory	State where work is to be performed must be listed under Item 3.A. on the Information Page.
2.3	Scope	Such insurance shall cover liability arising out of the Insuring Party's employment of workers and anyone for whom the Party may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance shall be permitted.
2.4	Leased Employees	Where a Professional Employer Organization or "leased employees" are utilized, Named Insured shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement.
2.5	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Property Owner required for cancellation or substantial modification.
2.6	Waiver of Subrogation	Include a waiver of subrogation by insurer as to the Property Owner, its officers, directors and employees.
3.	**Business Auto Liability ("BAL")**	
3.1	Minimum Limit*	$5,000,000 per accident*
3.2	Form	The BAL is to be written on a Current ISO edition of CA 00 01, or equivalent.
3.3	Scope	The BAL is to cover liability arising out of any auto (including owned, hired and nonowned).
3.4	Additional Insured	The Additional Insured is to be designated as an additional insured on the BAL. Additional insured coverage is to be provided by the Insuring Party for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter; and by the Contractor for the entire term of construction operations at the project's location, and for a period of no less than 2 years after completion of construction operations.
3.5	Primary	This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this License that all other insurance held by an Additional Insured shall be excess and secondary to the coverage provided by the BAL to the Additional Insured.
3.6	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
3.7	Waiver of Subrogation.	Include a waiver of subrogation by insurer as to the Additional Insured, and its officers, directors and employees.
4.	**Certificate of Insurance ("COI")**	
4.1	Form	The Insuring Party is to provide the Additional Insured with evidence of insurance by a completed ACORD™ Form 25 (2010/05) *Certificates of Liability Insurance* prior to the Insuring Party's, or its contractors, commencing operations on the Additional Insured's property, and shall refresh the COI by delivering an updated COI prior to the expiration date of the respective insurance policy set out in the previously provided COI.
4.2	Certificate holder	The COI is to be addressed to the Additional Insured at its above address as Certificate Holder.
4.3	Information	The COI shall be fully completed and shall state that the

		Additional Insured is an additional insured on the named insured's policy; the named insured's coverage, including the additional insured coverage, is primary and does not provide for contribution by the additional insured's other insurance.
4.4	Endorsements	Accompanying the COI shall be a copy of the following endorsements: the additional insured endorsements, the waiver of subrogation endorsements, and the endorsements to give the Additional Insured advance notice of cancellation or material modification of the policy.
4.5	Declaration Page	Accompanying the COI shall be a copy of the policy's Declaration Page and any supplemental page listing endorsements to the policies.
5.	**General Specifications**	
5.1	Policies	The Additional Insured shall be entitled to communicate directly with the insurance agents of the Insuring Party, its contractors and subcontractors to verify amounts, coverages, deductibles, and other terms of insurance carried by the Insuring Party, its contractors, and their subcontractors. Failure of the Additional Insured to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Additional Insured to identify a deficiency from evidence that is provided shall not be construed as a waiver of the Insuring Party's obligation to maintain such insurance. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein. The Limits set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If the Insuring Party or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to the Additional Insured. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, the Additional Insured will have the right to require other equivalent forms. Any policy or endorsement forms other than a form specified in this exhibit must be approved in advance by the Additional Insured. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to this License, shall be reformed to provide the maximum amount of protection to the Additional Insured as allowed under the law. **To the extent that** _____ _____ **Code applies, then the additional insured coverage is to be limited by the statute's limitations.**
5.2	Insurer Qualifications	All insurance required to be maintained by the Insuring Party must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in Texas.
5.3	ISO	These insurance specifications are stated in terms of coverage provided by the specified Insurance Service Office ("**ISO**") forms. Terms used herein have the meaning specified at the following webpage for the International Risk Management Institute, Inc.: http://www.irmi.com/forms/online/insurance-glossary/terms.aspx

7. Crane Swing License

CRANE SWING LICENSE

This Staging License (this "**License**") is entered into by and among _____, a _____ ("**Owner**"), and _____, a _____ ("**Third Party**"), in consideration of the covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each party. Owner and Third Party are sometimes individually referred to as a "**Party**" and collectively as the "**Parties**."

RECITALS

A. Owner is the owner of the land described in **Exhibit A** attached hereto (the "**Project Site**") and Third Party is the owner of the land described in **Exhibit B** attached hereto (the "**Third Party's Property**"). The Project Site and the Third Party's Property are sometimes collectively referred to as the "**Property**").

B. Owner has finalized conceptual plans for development on a portion of the Project Site, as shown in the site plan attached hereto as **Exhibit C** (the "**Construction Concept Plan**"), approved by Site Development Permit No. _____.

C. During the course of development of the Project Site, it is contemplated that such development will involve and necessitate certain rights and licenses on and with respect to the Third Party's Property.

D. Third Party has agreed to grant to Owner the rights and licenses set forth herein, subject to the terms and conditions of this License.

AGREEMENT

1. Staging License.

1.1. Grant of License by Third Party. Third Party hereby grants to Owner a nonexclusive license (the "**Staging License**"), to use, on a nonexclusive basis and upon the conditions hereinafter provided, the portion of the Third Party's Property depicted on **Exhibit C-1** attached hereto (the "**Staging Licensed Premises**"). The Staging License shall be appurtenant to the Project Site and for the sole purpose of providing access and Staging over, on and under the Staging Licensed Premises in connection with the development of the Project Site.

1.2. Commencement Date; Use of Licensed Premises. Owner shall notify Third Party at least 30 days prior to commencing its use of the Staging Licensed Premises; such notice shall specify the date on which the use will commence. If Owner has not delivered the commencement notice to Third Party on or before the day that is 180 days after the Effective Date, then the Staging License granted in this License shall automatically terminate without need for any written notice to be delivered by Third Party. Owner's use of the Staging License shall be in accordance with **Exhibit D** attached hereto.

1.3. Termination Date. The Staging License shall terminate on the earlier of (i) the date specified by Owner in a notice to Third Party or (ii) the date that is 18 months after the commencement date specified in the commencement notice from Owner to Third Party delivered pursuant to Section 1.2 above, unless sooner terminated pursuant to the terms of this License.

1.4. Cost and Liabilities. All costs and liabilities associated with the use of the Staging License shall be borne by Owner and its contractors.

1.5. Obligations After Transfer. The covenants and obligations of Third Party shall be binding upon each owner of any portion of the Staging Licensed Premises for the duration of such owner's ownership and until the expiration of the Staging License. Upon the transfer of all or any portion of the Third Party's Property by its owner, the new owner of the transferred property shall be deemed to

have assumed and agreed to perform and be bound by all obligations pertaining to the owner of such property arising under this License during the new owner's period of ownership and until the expiration of the Staging License. The preceding owner of the transferred property shall be released from all obligations arising under this License on and after the date of the transfer (but not from obligations accrued during its period of ownership).

2. Limits on License Rights. The license granted to Owner in Section 1 above is nonexclusive and is expressly subordinate to the right of Third Party and its successors and assigns (i) to have at all times egress and ingress to and from the Third Party's Property and (ii) to develop, construct, maintain, use, and operate the buildings and other facilities presently or hereafter situated on the Third Party's Property. Third Party reserves for itself and its heirs, successors, and assigns the right to continue to use and enjoy the surface of the Third Party's Property other than the Staging Licensed Premises in accordance with applicable laws, ordinances, and rules, and Owner's use of the Staging License shall not interfere unreasonably with such enjoyment.

3. Insurance. Upon notice by Owner to Third Party of commencement of the Staging License, Owner at its expense throughout the term of such license shall obtain and maintain insurance in conformity with the requirements set forth in **Exhibit E** attached hereto. The coverage may be provided in the form of a rider and/or endorsement to a previously existing insurance policy. The insurance must cover all perils arising from the activities of Owner, its agents, contractors, and invitees, related to such license. In the event of any insurance claim, Owner agrees to pay all deductibles stated in the policy. The insurance specifically shall name each of the parties comprising Third Party as an additional insured, and a certificate of insurance evidencing coverage shall be provided by the insurance company to Third Party by not later than the date of commencement of the license. To the extent obtainable based on reasonable efforts, all insurance is to include a clause stating that in the event of cancellation or material change that reduces or restricts the insurance afforded by the insurance policy, the insurer agrees to mail prior written notice of cancellation or material change that reduces or restricts the insurance afforded to Third Party as additional insured at least 30 days in advance to Third Party.

4. Indemnification and Repair of Damage.

4.1. Indemnity. To the extent permitted by law, Owner hereby agrees fully to indemnify, save, and hold harmless Third Party, its heirs, executors, administrators employees, owners, officers, directors, managers, agents, lessees, licensees, lenders, and invitees (collectively called "**Third Party Indemnitees**") against any and all liability, damage, loss, claims, demands, and actions of any nature whatsoever, including reasonable attorneys' fees, on account of personal injury (including without limitation, workers' compensation and death claims) or property loss or damage of any kind whatsoever, which arises, or is claimed to arise, out of or is, or is claimed to be, in any manner connected with: (i) Owner's use of the Staging License; (ii) any act, omission, or negligence of Owner or its agents, contractors, or invitees; (iii) any activities of Owner or its agents, contractors, or invitees conducted on or about the Third Party's Property; or (iv) any breach or default of the terms of this License by Owner or its agents, contractors, and invitees. **TO THE EXTENT PERMITTED BY LAW, THE INDEMNITY IN THIS PARAGRAPH SHALL APPLY REGARDLESS OF WHETHER THE LOSS IN QUESTION ARISES OR IS ALLEGED TO ARISE IN PART FROM ANY NEGLIGENT ACT OR OMISSION OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES, FROM STRICT LIABILITY OF ANY SUCH PERSONS OR OTHERWISE; PROVIDED, HOWEVER, THAT SUCH INDEMNITY SHALL NOT INCLUDE ANY CLAIMS THAT ARISE FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES**. Owner must, at its own expense, investigate all such claims and demands, attend to their settlement or other disposition, defend all actions based thereon, and pay all attorneys' fees and all other cost and expenses of any kind arising from any aforesaid liability, damage, loss, claims, demands or actions. This indemnification provision shall not permit Third Party to recover from Owner any damages, costs, losses, expenses or other amounts for which the Third Party Indemnitees have been compensated by insurance provided by Owner under Section 3 above. The foregoing indemnity shall survive after the later of the expiration or termination of the Staging License for the duration of all applicable statutes of limitation.

4.2. Repair of Damage. Owner, at its sole cost, shall repair or replace any damage to the Third Party's Property and any surrounding areas caused by the activities of Owner in the exercise of its rights under this License. If Owner fails to repair any damage for which it is responsible within fifteen days after receipt of written notice from Third Party (or, if such repair reasonably requires more than fifteen days to complete, fails to commence repair within such fifteen-day period and diligently pursue such repair to completion), then Third Party may elect to repair such damage. If Third Party makes repairs as provided in this Section 4.2, then Owner shall reimburse Third Party for the reasonable cost of such repairs within thirty days after receipt of an invoice for same. Notwithstanding the foregoing, if Third Party, in the exercise of its rights under this License, becomes aware of a condition which it reasonably believes (a) constitutes an imminent threat to the health, safety or welfare of any persons or property, and (b) resulted from the activities of Owner, Third Party shall use reasonable efforts to notify the other party of such condition by telephone, electronic mail or other immediate means of communication. If Owner is not available or does not immediately begin to remedy such emergent and hazardous condition, then Third Party may remedy such condition and receive reimbursement from Owner as provided above.

5. Termination. The license granted herein shall terminate on the scheduled termination dates specified in Section 1.3 above.

6. Default. If either Owner or Third Party fails to comply with any of the terms and conditions herein, then the other party may give the defaulting party written notice of such default. The defaulting party will have 15 days from the date of such notice to take action to remedy the default. If the defaulting party does not satisfactorily remedy such default within such 15-day period the non-defaulting party may seek specific performance of this agreement by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. In addition to obtaining restraining orders and injunctions and the remedy of specific performance, the non-defaulting party shall be entitled to recover from the defaulting party all reasonable costs and expenses incurred in remedying the default or pursuing its remedies under this License. **EXCEPT FOR THE EXPENSE REIMBURSEMENT IN THE PREVIOUS SENTENCE, NO PARTY UNDER THIS LICENSE MAY PURSUE AN ACTION FOR ANY FORM OF MONETARY, DAMAGES, INCLUDING ACTUAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES.**

7. General Matters.

7.1. Compliance with Laws. Owner agrees and covenants that all activities related to its use of the license granted to it herein shall be done in compliance with all applicable city, county, state and/or federal laws, ordinances, regulations and policies now existing or later adopted.

7.2. Venue. Venue for all lawsuits concerning this License shall be in the state district courts of _____, _____ County, _____.

7.3. Waiver of Default. Either party may waive any default of the other party at any time, without affecting or impairing any right arising from any subsequent or other default. The failure at any time of either party to enforce any provision hereof, whether a violation is known or not, shall not constitute a waiver or estoppel of the right to do so.

7.4. Notice. Notice may be given by fax, hand delivery, or certified mail, postage prepaid, and is deemed received on the day faxed or hand delivered or on the third day after deposit if sent certified mail. Either party may change the addressee or address for notices, by notice to the other party as provided herein. Notice must be sent as follows:

If to Owner: _____

_____

_____

Facsimile Number: _____

E-Mail Address: _____

With copy to: _____
_____
_____
Facsimile Number: _____
E-Mail Address: _____

If to Third Party: _____
_____
_____
Facsimile Number: _____
E-Mail Address: _____

With copy to: _____
_____
_____
Facsimile Number: _____
E-Mail Address: _____

7.5. Interpretation. This License, in the event of any dispute over its meaning or application, shall be interpreted fairly and reasonably, and neither more strongly for nor against any party.

7.6. Application of Law. This License is governed by the laws of the State of _____. If the final judgment of a court of competent jurisdiction invalidates any part of this License, then the remaining parts must be enforced, to the extent possible, consistent with the intent of the parties as evidenced by this License.

7.7. Cooperation and Consents. Owner and Third Party each agrees to cooperate fully with and assist each other and execute such documents as may be necessary to further the express purposes of this License, which cooperation and assistance shall not be unreasonably withheld, conditioned or delayed.

7.8. Severability. If any provision of this License shall for any reason be held to be invalid, illegal or unenforceable by any court of competent jurisdiction, the validity of the other provisions of this License shall in no way be affected thereby. **To the extent that _____ Code applies, then the indemnity and additional insured coverage is to be limited by the statute's limitations and the indemnity and additional insured coverage are to be enforced to the extent permitted.**

7.9. Counterparts; Signatures. This License may be executed in any number of identical counterparts by the handwritten signature of each party, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. This License may be executed by the handwritten signature of the parties and transmitted by facsimile or e-mail.

7.10. Attorneys' Fees. If any action shall be commenced to enforce the terms of this License or to declare the rights of the parties hereunder, the prevailing party shall be entitled to recover all of its costs and expenses (including, but not limited to, reasonable attorneys' fees) from the non-prevailing party. In addition to the foregoing award of attorneys' fees and other litigation costs to the prevailing party, the prevailing party in any lawsuit on this License shall be entitled to its reasonable attorneys' fees and other litigation costs incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of this License into any judgment on this License, and shall survive the termination of this License.

7.11. No Third Party Rights. Nothing in this License shall be construed to confer any rights, benefits or remedies upon any person or entity other than the parties hereto and their respective successors and assigns as owners of their respective Property.

7.12. Entire Agreement. This License and all documents referred to herein: (i) constitute and are intended as a final expression and a complete and exclusive statement of the understanding and the agreement between the parties hereto with respect to the subject matter hereof; (ii) supersede all prior or simultaneous understandings, correspondence, letters of intent, negotiations, or agreements, whether oral or in writing between the parties respecting the subject matter of this License; and (iii) may not be modified, amended or otherwise changed in any manner except by a writing specifically setting forth such modification, amendment or change and executed by the handwritten signature of each of the parties hereto. The parties further agree that neither shall claim that the other waived any rights under this License, whether by inconsistent actions or otherwise, unless a written amendment is executed in accordance with this paragraph.

7.13. Liability of Third Party Parties Not Joint and Several. In the event that one or more of the parties comprising Third Party under this License breaches or defaults an obligation under this License with respect to only the portion of the Third Party's Property owned by such defaulting party, any liability of such defaulting party to Owner shall be personal to such defaulting party and shall not be joint and several with the other parties comprising Third Party. In such event, Owner's cause of action for breach or default shall be commenced against only such defaulting party and not all of the parties comprising Third Party.

7.14. No Recordation. Neither party may record this License in the Official Public Records of Travis County, Texas, or any other county in Texas or any other state.

7.15. List of Exhibits. The exhibits identified below and attached hereto are incorporated herein by this reference.

Exhibit A - Project Site
Exhibit B - Third Party's Property
Exhibit C - Construction Concept Plan
Exhibit D - Terms and Conditions
Exhibit E - Insurance Requirements

Executed to be effective _____ (the "**Effective Date**").

[Signature page follows.]

Exhibit A

Project Site

[legal description], and identified as the cross-hatched area in Exhibit A-1 attached hereto.

Exhibit A-1

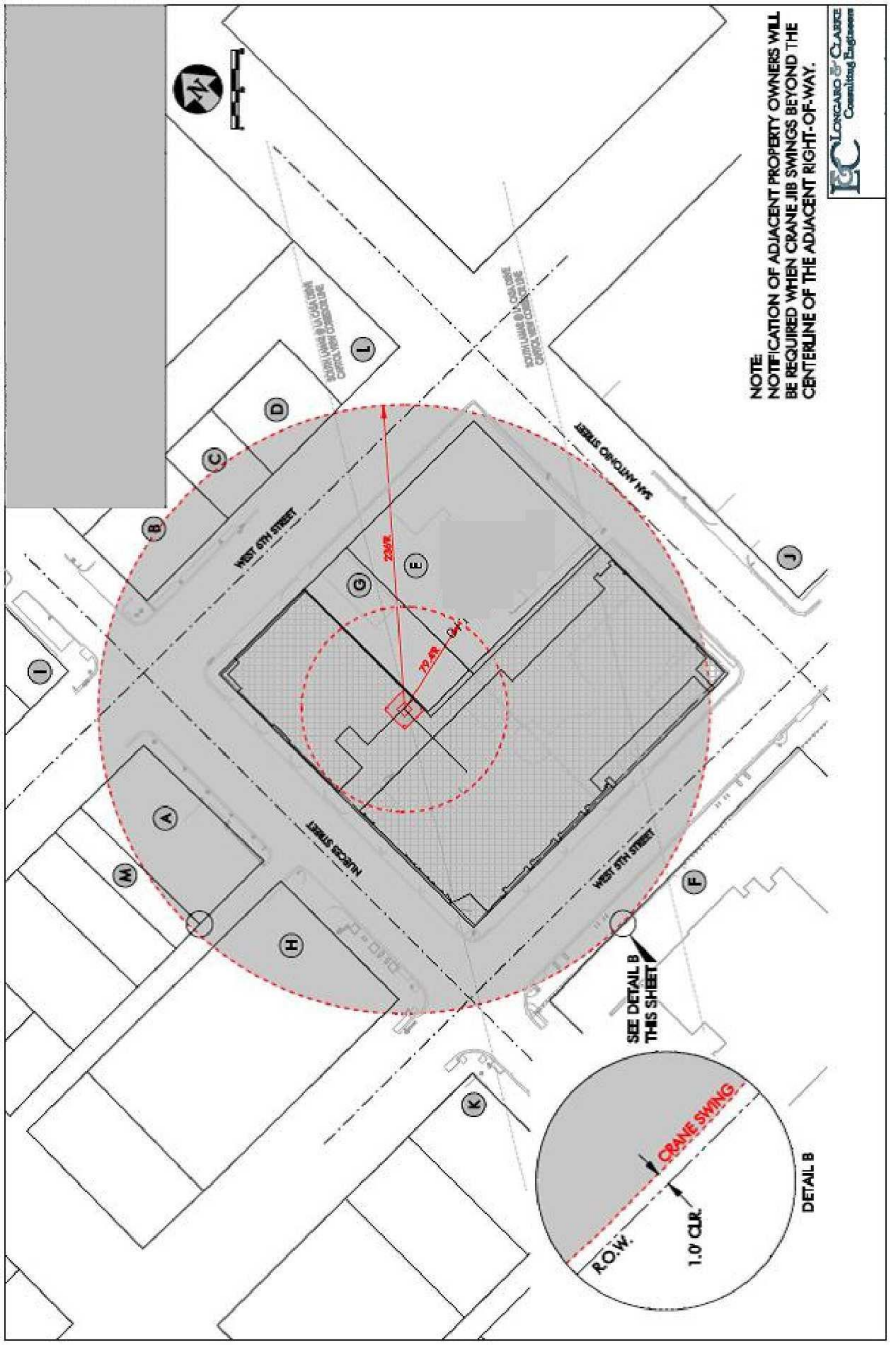


Exhibit B

Third Party's Property

[legal description], and identified as the cross-hatched area in Exhibit B-1 attached hereto.

Exhibit B-1

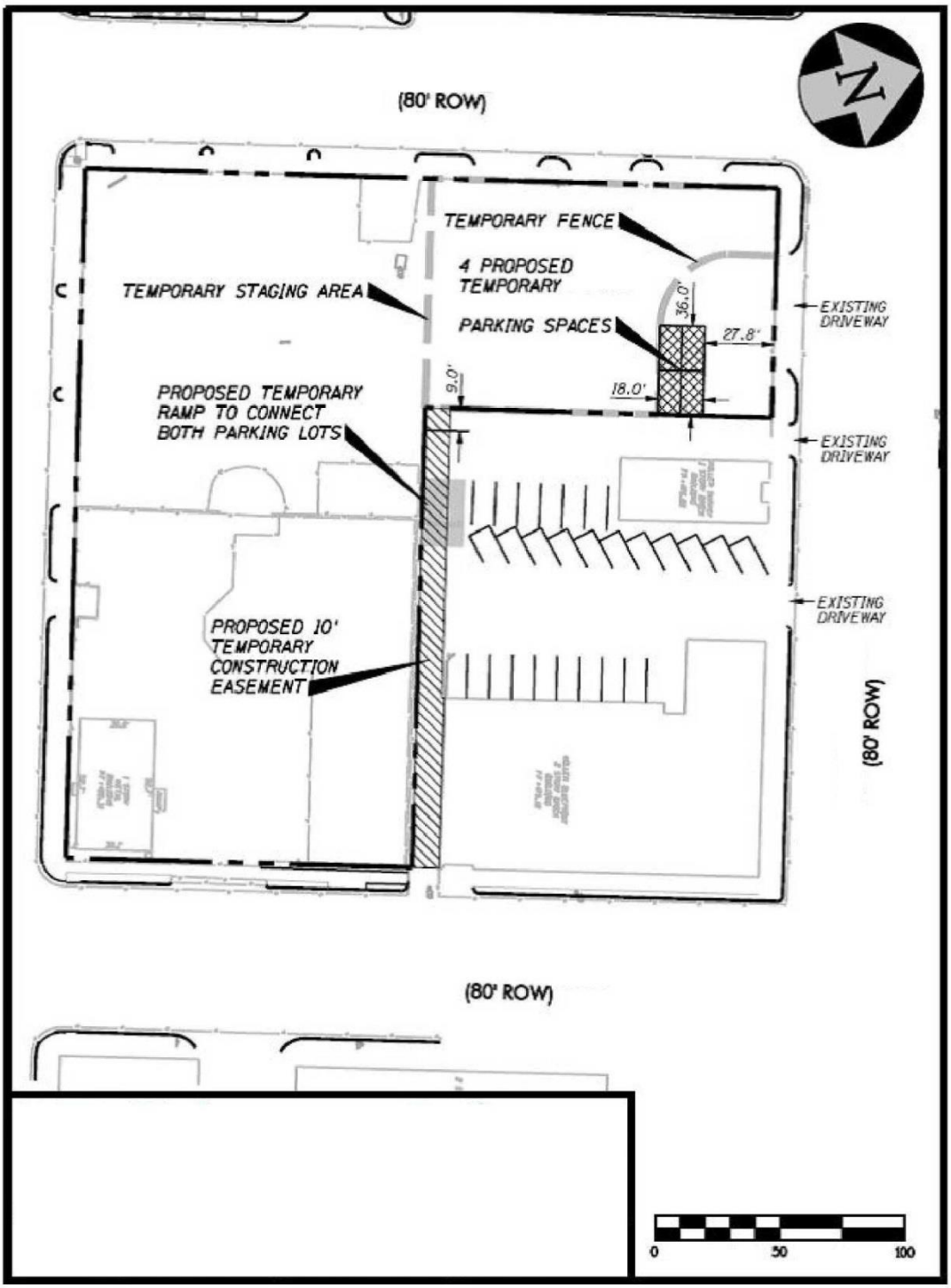


Exhibit C

Construction Concept Plan

Exhibit D

Use of License

Owner's use of the Staging License shall be subject to the following terms and conditions:

1. Owner may only use the Staging Licensed Premises during the following periods: (i) 21 days beginning on the date identified in Owner's notice delivered under Section 1.2 of this License as Owner's commencement date and (ii) 21 days beginning on a date to be identified by Owner at least 30 days prior to the commencement of this second 21-day period at the end of which the Staging License shall terminate. In any event, the Staging License shall terminate on the date identified in Section 1.3 of this License, and the second 21-day period described in this paragraph shall automatically commence 21 days prior to the termination of the Staging License even if no notice is delivered by Owner.

2. During the two 21-day periods that Owner will use the Staging License, Owner must provide alternative access for Third Party to any blocked public roadway in the manner depicted on the sketch attached to this License as Exhibit C-1 (or in such other mutually agreeable manner). The alternate access route must allow for unobstructed, continuous use by Third Party and all third parties desiring to access the Third Party's Property during the two 21-day periods described in paragraph 1 above. Notwithstanding anything in this License, Owner shall at all times provide a means of egress and ingress to and from the Third Party's Property.

3. The Staging License shall terminate on the last day of the second 21-day period described in paragraph 1 above. Owner shall restore the Staging Licensed Premises to its prior condition (or better), at its sole cost and expense, before the end of such second 21-day period. If Owner fails to restore the Staging Licensed Premises in the manner required by this paragraph, Third Party, without need for written notice to Owner, may complete such restoration. If Third Party incurs restoration expenses under this paragraph, then Owner shall reimburse Third Party for such expenses within thirty days after receipt of an invoice for same. If such amount remains unpaid thirty days after delivery of an invoice, it will accrue interest at the maximum rate allowed by law on a daily basis.

Exhibit E to Staging License

Insurance Specifications

Below are specifications for the insurance to be maintained pursuant to the Staging License (the "**License**") by Owner under § 3, as the insuring party ("**Insuring Party**") as to the premises (the "**Licensed Premises**") owned by the persons designated below as the "**Property Owner**" and licensed to the Insuring Party for its use for the limited purposes set out in the License. Both the Insuring Party and contractors ("**Contractor**") hired by the Insuring Party that are performing work or operations on or above the Licensed Premises are to obtain and maintain insurance meeting these Insurance Specifications. In the event of any conflict between these Insurance Specifications and other provisions of this License, the other provisions of the License controls. The term "**Additional Insured**" as used below refers to the persons designated below as additional insureds on the insurance to be maintained or caused to be obtained and maintained pursuant to the License by the person designated below as Insuring Party:

Insuring Party:	Additional Insured or Property Owner:
_____ ("**Owner**")	_____ ("**Third Party**") c/o _____ _____ _____ Facsimile Number: _____ E-Mail Address: _____

The following are specifications for insurance to be maintained both by the Insuring Party and its Contractor (*specifications of "minimum limits" or "no less than" means that the insurance is to have limits of no less than the limit specified, but that if the Insuring Party or Contractor, as the case may be, has greater limits, then the greater limits are specified and apply hereunder):

#	Specification	Additional Details
1.	**Commercial General Liability Insurance ("CGL")**	
1.1	Occurrence Basis	The CGL is to be issued on an occurrence basis.
1.2	Minimum Limits*	
		$ 5,000,000 per occurrence*
		$ 5,000,000 products/completed operations*
		$ 5,000,000 personal and advertising injury*
1.3	General Aggregate	If the CGL insurance contains a general aggregate limit, it shall apply separately to this project, and shall be no less than $5,000,000.*
1.4	Form	CGL is to be on an ISO form CG 00 01, or a substitute providing equivalent coverage, and shall cover liability arising from premises, operations, and contractor's liability arising out of the hire of contractors (independent contractors coverage). If available at no extra cost, CGL shall cover sudden and accidental pollution.
1.5	Term	The policy effective date/expiration date shall cover the entire term of construction contractor's operations at the project's location, and for a period of no less than 2 years after completion of contractor's operations.
1.6	Insured Contracts	Coverage shall include but not be limited to insurable assumed contract liability to the Additional Insureds, and their officers, directors and employees.
1.7	Primary	This insurance shall be endorsed to provide primary and non-contributing coverage (other insurance of the Additional Insured is not required to contribute or share with CGL's limits).
1.8	Waiver of Subrogation	CGL shall be endorsed with an ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by the insurer as to claims against the persons designated herein to be Additional Insureds, and their officers, directors and employees.
1.9	Prohibited Endorsements	The following exclusions/limitations (or their equivalents) are not permitted without the prior consent of the Additional Insured; if the Insuring Party's insurer refuses to delete any of the endorsements below, the Additional Insured agrees to consult with and cooperate with Insuring Party to reach a commercially reasonable resolution:
		a. Contractual Liability Limitation, CG 21 39.
		b. Amendment Of Insured Contract Definition, CG 24 26.
		c. Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		d. Any "Insured vs. Insured" exclusion.
		e. Any type of punitive, exemplary or multiplied damages exclusion.

		f. An exclusion for the type of operations contemplated by the License to be undertaken by the Insuring Party's contractor.
1.10	Additional Insured	
	(1) Insuring Party's CGL:	Additional insured coverage is to be provided to the Additional Insured for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising out of the ownership, maintenance or use of that part of the licensed premises licensed to the Insuring Party and shown in the Schedule on an ISO CG 20 11 modified to change the reference "premises leased to you" to "premises licensed to you" listing the Additional Insured as additional insureds.
		b. as to "ongoing operations" on an ISO CG 20 26 Additional Insured – Designated Person or Organization modified to change the reference "premises rented to you" to "premises licensed to you" listing the Additional Insured as additional insureds.
		c. as to "completed operations" coverage of hazards within the "products-completed operations hazard" for work performed by or for the Insuring Party at or around the licensed premises under the License, listing the Additional Insured as additional insureds listing the Additional Insured as additional insureds.
1.10	(2) Insuring Party Contractor's CGL:	Additional insured coverage is to be provided for the term of the Contractor's obligations under the construction contract with the Insuring Party and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising in whole or in part out of the Contractor's acts or omissions on an ISO CG 20 10 04 13 listing the Additional Insured as additional insureds.
		b. as to "completed operations" on an ISO CG 20 37 04 13 listing the Additional Insured as additional insureds.
1.11	Notice	The policy and additional insured endorsement shall provide for 30 days' prior written notice by the insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
1.12	Excess/Umbrella	CGL limits may be covered under a combination of primary and excess/umbrella policies. Excess/umbrella policy is to be written on an occurrence basis. Such insurance shall be excess over and be no less broad than all coverages described above for the base policy. The policy limits for the primary and excess/umbrella policy may be allocated between the primary and excess/umbrella as selected by the named insured. The policy shall list the Additional Insured as additional insureds. This insurance shall be endorsed to provide primary and non-contributing liability coverage as to any other insurance of the Additional Insured. It is the specific intent of the parties to this License that all insurance held by the Insuring Party shall be excess, secondary and not contribute to the insurance provided by the Insuring Party. Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits of the base policy. This policy shall include a duty to defend any insured. The policy shall include a waiver of subrogation by insurer against the additional insureds. The policy shall contain a provision for 30 days' prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
2.	**Workers' Compensation ("WL") and Employer's Liability ("EL")**	
2.1	Limits	WC – statutory limits. EL – $1,000,000 each accident and disease.
2.2	Territory	State where work is to be performed must be listed under Item 3.A. on the Information Page.
2.3	Scope	Such insurance shall cover liability arising out of the Insuring Party's employment of workers and anyone for whom the Party may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance shall be permitted.
2.4	Leased Employees	Where a Professional Employer Organization or "leased employees" are utilized, Named Insured shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement.

2.5	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Property Owner of cancellation or material change that reduces or restricts the insurance.
2.6	Waiver of Subrogation	Include a waiver of subrogation by insurer as to the Property Owner, its officers, directors and employees.
3.	**Business Auto Liability ("BAL")**	
3.1	Minimum Limit*	$5,000,000 per accident.*
3.2	Form	The BAL is to be written on a Current ISO edition of CA 00 01, or equivalent.
3.3	Scope	The BAL is to cover liability arising out of any auto (including owned, hired and nonowned).
3.4	Additional Insured	The Additional Insured is to be designated as an additional insured on the BAL. Additional insured coverage is to be provided by the Insuring Party for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter; and by the Contractor for the entire term of construction operations at the project's location, and for a period of no less than 2 years after completion of construction operations.
3.5	Primary	This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this License that all other insurance held by an Additional Insured shall be excess and secondary to the coverage provided by the BAL to the Additional Insured.
3.6	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
3.7	Waiver of Subrogation.	Include a waiver of subrogation by insurer as to the Additional Insured, and its officers, directors and employees.
4.	**Certificate of Insurance ("COI")**	
2.1	Form	The Insuring Party is to provide the Additional Insured with evidence of insurance by a completed ACORD™ Form 25 (2010/05) *Certificates of Liability Insurance* prior to the Insuring Party's, or its contractors, commencing operations on the Insuring Party's property, and shall refresh the COI by delivering an updated COI prior to the expiration date of the CGL set out in the previously provided COI.
2.2	Certificate holder	The COI is to be addressed to the Additional Insured at its above address as Certificate Holder.
2.3	Information	The COI shall be fully completed and shall state that the Additional Insured is an additional insured on the named insured's policy; the named insured's coverage, including the additional insured coverage, is primary and does not provide for contribution by the additional insured's other insurance.
2.4	Endorsements	Accompanying the COI shall be a copy of the following endorsements: the additional insured endorsement, the waiver of subrogation endorsement, and the endorsement to give the Additional Insured advance notice of cancellation or material modification of the policy.
2.5	Declaration Page	Accompanying the COI shall be a copy of the policy's Declaration Page and any supplemental page listing endorsements to the policy.
5.	**General Specifications**	
5.1	Policies	The Additional Insured shall be entitled to communicate directly with the insurance agents of the Insuring Party, its contractors and subcontractors to verify amounts, coverages, deductibles, and other terms of insurance carried by the Insuring Party, its contractors, and their subcontractors. Failure of the Additional Insured to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Additional Insured to identify a deficiency from evidence that is provided shall not be construed as a waiver of the Insuring Party's obligation to maintain such insurance. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein. The Limits set out in these specifications are the minimum dollar amount of insured coverage for

		the risk or peril specified. If the Insuring Party or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to the Additional Insured. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, the Additional Insured will have the right to require other equivalent forms. Any policy or endorsement forms other than a form specified in this exhibit must be approved in advance by the Additional Insured. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to this License, shall be reformed to provide the maximum amount of protection to the Additional Insured as allowed under the law. **To the extent that _____ Code applies, then the additional insured coverage is to be limited by the statute's limitations.**
5.2	Insurer Qualifications	All insurance required to be maintained by the Insuring Party must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in Texas.
5.3	ISO	These insurance specifications are stated in terms of coverage provided by the specified Insurance Service Office ("**ISO**") forms. Terms used herein have the meaning specified at the following webpage for the International Risk Management Institute, Inc.: http://www.irmi.com/forms/online/insurance-glossary/terms.aspx

V. ENDNOTES

[1] **Insurance and Insurance Provisions**. "**Insurance**" is a form of contractual indemnity. However, Texas courts on public policy grounds construe the same "**arising out of**" indemnity triggering language in indemnity provisions in leases, construction contracts and other contracts strictly against coverage of an indemnified party's negligence and broadly in favor of coverage of an additional insured's negligence in additional insured endorsements issued pursuant to the same contract. As discussed in the articles drafted by the author cited in the author's bibliography, drafting by insurance companies of coverage for additional insureds has evolved considerably since 1986 to address various courts' finding coverage for an additional insured's sole negligence or independent negligence contributing to the insurer's named insured's liability. Also, see articles written by the author and cited in the author's bibliography and the writings of others cited in the Helpful Materials addressing the crafting of insurance specifications for inclusion in contracts to specify insurance to be obtained by the Protecting Party. An indemnification may be executed in connection with another contract, as in the case of a subcontractor's indemnity protecting a contractor in connection with contractor's construction contract with the property owner. See 14 TEX. JUR. 3d Contribution and Indemnification § 2 Distinctions 477.

[2] **Indemnity Provision.** An "**Indemnity**" is, "*I agree to be liable for your wrongs*." Indemnity is a shifting of the risk of a loss from a liable person to another. The risk of loss may be contractual or tortious. Many times scriveners use an indemnity provision when they do not know whether the Protected Party is a potentially liable person. Sometimes, an indemnity provision is no more than a restatement of existing duties, "*I will indemnify you for my wrongs*;" "*You will indemnify me for your wrongs*." Indemnity agreements are strictly construed in favor of the Protecting Party. However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing. 14 TEX. JUR. 3d Contribution and Indemnification § 14 Form; 26 TEX. JUR. 2d Statute of Frauds § 29.

[3] **Exculpation Provision**. "**Exculpation**" is, "*I am not liable to you for my wrongs*." An exculpatory provision is designed to exclude, as between the parties to a contract, certain designated duties, liabilities or costs due to the occurrence or nonoccurrence of events.

[4] **Release Provision.** A **"Release**" is, "*You are not liable to me for your wrongs*." A release is an agreement in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved.

[5] **ISO.** "**ISO**" refers to Insurance Service Office, Inc., a public company that acts as a source of information about property/casualty insurance risk. ISO provides statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies. ISO's forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the "**standard form**". Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1986 *endorsement* forms for use in connection with its commercial general liability policy. **Endorsement** is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction. Each ISO designation is composed of four elements. The following is an example for the additional insured endorsement form appearing in the Appendix as **ISO Form CG 20 26 04 13** Additional Insured–Designated Person or Organization:

CG	20	26	04 13
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its *comprehensive* general liability forms.	The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number "20" refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group–in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled "Additional Insured–Designated Person or Organization."	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "04 13" or April 2013. November 1985 is the initial date of all ISO forms for the "CG" system. The *coverage* forms have been revised a number of times since then and currently bear an edition date of 04 13. Many of the *endorsement* forms were revised at the same time as the coverage forms and also bear a 04 13 edition date.

[6] **1917 Statute.** TEX. CIV. PRAC. & REM. CODE ANN. §§ 32.001 to 32.003.

[7] **1973 Statute and Amendments.** TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001 et seq.

[8] **Abolition of Common-Law Indemnity**. *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179 (Tex. 1988); *Cypress Creek Utility Service Co., Inc. v. Muller*, 640 S.W.2d 860 (Tex. 1982); *B & B Auto Supply, Sand Pit., and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980); *Federal Petroleum Co. v. Gas Equipment Co.,* 105 S.W.3d 281 (Tex. App. – Corpus Christi 2003).

[9] **Common-Law Indemnity Available for Liability of a Purely Vicarious Nature.** *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179 (Tex. 1988); *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.,* 127 S.W.3d 134 (Tex. App. – Hou. [1st Dist.] 2003); *St. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174 (Tex. App. – Amarillo 1997, *writ den'd*).

[10] **"Gross Negligence".** Gross negligence is more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5). The test for gross negligence contains both an objective and a subjective component. *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 21, 22 (Tex. 1994). Objectively, the defendant's conduct must involve an extreme degree of risk, which is a function of both the magnitude and the probability of the anticipated injury to the plaintiff. *Also see Wal-Mart Stores, Inc. v. Alexander,* 878 S.W.2d 322, 325-26 (Tex. 1993). Subjectively, there must be evidence that the defendant had actual, subject awareness of the risk involved, but nevertheless was consciously indifferent to the extreme risk. The defendant knew about the peril, but its acts or omissions demonstrated that it did not care. *Moriel*, at 21; *Alexander* at 326; *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998). *Also see Universal Services Co., Inc. v. UNG,* 904 S.W.2d 638 (Tex. 1995) for a case arising under the common law definition of "gross negligence." The fact that a defendant exercises "some care" does not insulate the defendant from gross negligence liability. *See Moriel,* 879 S.W.2d at 20 (discussing cases before *Burk Royalty Co. v. Walls,* 616 S.W.2d 911, 921-22 (Tex. 1981) that erroneously focused on "entire want of care" part of the gross negligence definition in reasoning that "some care" defeated a gross negligence finding. In 1995 the Legislature substituted "malice" for gross negligence as the prerequisite for punitive damages. However, the Legislature also defined "malice" with a definition mirroring the definition of "gross negligence" in *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 23 (Tex. 1994). TEX. CIV. PRAC. & REM. CODE § 41.001(7).

[11] **Indemnity for Intentional Acts and Gross Negligence.** See Comment by Meagan McKeown, *Indemnification Agreements for Intentional Misconduct: Balancing Public Policy and Freedom to Contract in Texas*, 46 ST. MARY'S L. J. 345, 355 (2015) at FN. 53 citing following cases and discussion at pp. 376 – 376: *Hamblin v. Lamont*, 433 S.W.3d 51, 55 (Tex. App. - San Antonio 2013, *pet. denied*) (applying fair notice requirements to case involving indemnification against a party's intentional acts, but questioning whether a party can prospectively exculpate itself from the results of intentional conduct under Texas public policy); *Oxy USA, Inc. v. Sw. Energy Prod. Co.*, 161 S.W.3d 277, 283 (Tex. App. - Corpus Christi 2005, *pet. denied*) (declining to apply fair notice requirements to an agreement shifting liability arising from the indemnitee's intentional torts to the indemnitor where the conduct occurred before the agreement was executed); *Solis v. Evins*, 951 S.W.2d 44, 50 (Tex. App. - Corpus Christi 1997, *no writ*) (stating contractual exculpation with respect to intentional torts is contrary to public policy); *Webb v. Lawson-Avila Constr., Inc.*, 911 S.W.2d 457, 462 (Tex. App. - San Antonio 1995, *writ dism'd*) (declining to hold that an agreement for indemnity against gross negligence violated public policy); *Valero Energy Corp. v. M. W. Kellogg Constr. Co.*, 866 S.W.2d 252, 254 (Tex. App. - Corpus Christi 1993, *writ denied*) ("The waiver and indemnity provision absolving Kellogg of all liability sounding in products liability and gross negligence does not offend public policy."); see also *Budner v. Wellness Int'l Network, Ltd.*, No. 3:06-CV-0329-K, 2007 WL 806642, at *8 (N.D. Tex. Mar. 15, 2007) (refusing to dismiss a complaint on the grounds that the defendant could not prospectively limit liability for intentional torts); *Ott v. Sonic Land Corp. & Sonic Rests., Inc.*, No. 09-94-209CV, 1996 WL 185347, at *7 (Tex. App. - Beaumont Apr. 18, 1996, *writ denied*) (not designated for publication) ("If a release must expressly state it will release future negligence, then surely it must expressly state it will release future intentional tortious conduct."); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App. - Beaumont 1986, *no writ*) ("A term in a release attempting to exempt one from liability or damages occasioned by gross negligence is against public policy.").

[12] **Oil and Gas Service Contracts.** The following commentary is from an 2003 article by the Author. It is included herein for context, and has not been updated. Indemnity contracts in oil and gas service contracts are void as against public policy unless certain statutory requirements are met. TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001-.007 (Vernon 1997). This statute is known as the Texas Oilfield Anti-Indemnity Statute; this statute, formerly TEX. REV. CIV. STAT. ANN. Art. 2212b, was originally enacted in 1973, and amended in 1979. Article 2212b was recodified as Chapter 127 of the Civil Practice and Remedies Code in 1985, and amended again in 1989. *See* White, *Winding Your Way Through the Texas Oilfield Anti-Indemnity Statute, the Fair Notice Requirements and Other Indemnity Related Issues*, 37 S. TEX. L. REV. 161 (1996); Powell, *Indemnity and Insurance Provisions in Oil and Gas Agreements,* Advanced Oil, Gas and Mineral Course (State Bar of Texas 1996); Tade, *Indemnification - Who Wins, Who Loses Under Texas, Louisiana and Maritime Law*, 20TH ANNUAL OIL, GAS & MINERAL LAW INSTITUTE 12-21 (UNIV. TEX. 1994); Tade, *Texas Anti-Indemnity Law Update*, 53 TEX. B. J. 107 (1990). *Also see Transworld Drilling Co. v. Levingston Shipbuilding*, 693 S.W.2d 19, 23 (Tex. App.--Beaumont 1985, *no writ*) for a review of the types of contracts governed by this statute. The Texas Oilfield Anti-Indemnity Statute provides that an agreement pertaining to an oil and gas well is void if it purports to indemnify a party from loss or liability for damage arising out of its own negligence.

Prior to the enactment of Article 2212b in 1973, many oil companies and oil well operators had imposed "hold harmless" agreements on oil well drilling and service contractors to indemnify the oil companies and operators for losses caused by the negligence of the drilling contractor, and often for the negligence of the oil company, operator and third parties as well. Many

believed that such agreements placed an undue financial burden on what were perceived to be small contractors with less bargaining power than the oil companies and operators with whom they were negotiating contracts. *See* HOUSE INTERIM STUDY COMMITTEE ON HOLD HARMLESS AGREEMENTS, REPORT, 63rd Leg., at 3-8 (1973). The legislature enacted the Oilfield Anti-Indemnity Statute in 1973 to cure this perceived inequity by prohibiting agreements pertaining to oil and gas wells that indemnify a party for its own negligence.

(1) Void Agreements. Section 127.003 TEX. CIV. PRAC. & REM. CODE ANN. provides

> (a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a **well for oil, gas, or water or to a mine for a mineral** is void if it purports to indemnify a person against loss or liability for damage that:
>
> (1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and
>
> (2) arises from:
>
> (A) personal injury or death;
>
> (B) property damage; or
>
> (C) any other loss, damage, or expenses that arises from personal injury, death, or property injury.

(2) Excluded Activities.

(a) Joint Operating Agreements. Following the ruling in *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex. App.--San Antonio 1989, *no writ*), oil operators were successful in having joint operating agreements excluded from the Oilfield Anti- Indemnity Statute and in creating a legislative exception to the court-created express negligence test. Section 127.002(c) adopted in 1991 (Vernon 1997) provides:

> (c) The legislature finds that joint operating agreement provisions for the sharing of costs or losses arising from joint activities, including costs or losses attributable to the negligent acts or omissions of any party conducting the joint activity:
>
> (1) are commonly understood, accepted, and desired by the parties to joint operating agreements;
>
> (2) encourage mineral development;
>
> (3) are not against the public policy of this state; and
>
> (4) are enforceable unless those costs or losses are expressly excluded by written agreement.

Prior to the adoption of this amendment, great concern was expressed among oil operators that the standard provisions exculpating and indemnifying the operator by the non-operators, contained in the model form joint operating agreement published by the American Association of Petroleum Landmen ("**A.A.P.L.**"), would fail the express negligence test. The A.A.P.L. form provides that the operator, in its capacity as operator, is to have no liability to the other parties for losses or liabilities, unless such losses or liabilities result from the gross negligence or willful misconduct of the operator. The A.A.P.L. model form provides that costs attributable to the negligence of the operator are to be borne and paid by each party according to its interest. Even though the A.A.P.L. form was revised in 1989, these provisions dealing with release and indemnification of the operator were not revised to bring the form into compliance with the Texas express negligence rule. A. Derman, The New and Improved 1989 Joint Operating Agreement: A Working Manual, NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW SECTION, MONOGRAPH SERIES No. 15. A.A.P.L. Form 610 1989 Model Form Operating Agreement; A.A.P.L. Form 610 1982 Model Form Operating Agreement; A.A.P.L. Form 610 1977 Model Form Operating Agreement; and A.A.P.L. Form 610 1956 Model Form Operating Agreement. Darden, In Support of the Operator Liability Provision of the AAPL Model Form Joint Operating Agreement: A Pre-Emptive Strike Against Possible Claims Made Under Page Petroleum, Inc. v. Dresser Industries, Inc., 18 TEX. ST. B. SEC. REP. OIL GAS & MIN. L. 20 (1994). However, there still may exist an issue as to whether these exculpatory and indemnity provisions of the Joint Operating Agreement must still meet the fair notice requirements, and if they do not, then whether they are enforceable. White, Winding Your Way Through the Texas Oilfield Anti Indemnity Statute, the Fair Notice Requirements and Other Indemnity Related Issues, 37 S. TEX. L. REV. 161, 176 77 (1996).

(b) Gas Pipelines. "Well or mine service" is defined in § 127.001(4) (Vernon 1997). Gas pipelines and "fixed associated facilities" are expressly excluded from the prohibitions of the statute by being excluded from the definition of "well or mine service." Section 127.001(4)(B).

(3) Permitted Indemnity: "Indemnity Supported by Insurance". Section 127.005 TEX. CIV. PRAC. & REM. CODE ANN. permits specified forms of indemnity if supported by specifically permitted levels of insurance. Section 127.005 as amended in 1995 provides

> (a) This Chapter does not apply to 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 indemnitor subject to the limitations specified in Subsection (b) or (c).
>
> (b) With respect to a *mutual indemnity obligation* (defined below), the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit as to the other party as indemnitee.

(c) With respect to a *unilateral indemnity obligation* (defined below), the amount of insurance required may not exceed $500,000.

Section 127.001 contains the following definitions of "mutual indemnity obligation" and "unilateral indemnity obligation":

(3) "Mutual indemnity obligation" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral 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. ….

(6) "Unilateral indemnity obligation" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee with respect to claims for personal injury or death to the indemnitor's employees or agents or to the employees or agents of the indemnitor's contractors but in which the indemnitee does not make a reciprocal indemnity to the indemnitor.

The Fifth Circuit in *Campbell v. Sonat Offshore Drilling, Inc.,* 979 F.2d 1115 (5th Cir. 1992) held that under the Texas Oilfield Anti-Indemnity Act, an indemnitee may collect indemnity up to the amount of insurance *actually obtained* by the indemnitor (in this case the indemnitor had $10,000,000 insurance coverage even though the Texas Oilfield Anti-Indemnity Act prohibited *requiring* the indemnitor to carry in excess of $300,000 in insurance). In this case, Union Texas Petroleum Corporation ("*UTP*") hired a drilling vessel from Sonat Offshore Drilling ("*Sonat*") to drill a well on the outer continental shelf off the coast of Louisiana. UTP also entered into an agreement with Frank's Casing Crew and Rental Tools, Inc. ("*Frank's*") to perform casing and other services on board the drilling vessel. Campbell, an employee of Frank's, was injured while transferring to Sonat's drilling vessel from a supply boat hired by UTP. After Campbell sued UTP and Sonat, UTP filed a third-party complaint against Frank's and Frank's insurers seeking indemnity pursuant to the indemnity provision contained in the purchase order between UTP and Frank's.

The "indemnity supported by insurance" exception to the prohibition against indemnities does not apply to agreements with respect to the purchase, gathering, storage, or transportation of oil, gas, brine water, fresh water, produced water, petroleum products, or other liquid commodities. In other words, no indemnity against one's own negligence is allowed in these instances. Section 127.005(a) (Vernon Supp. 2002). Only Texas, Louisiana, New Mexico and Wyoming have anti-indemnity statutes directed particularly at oil and gas operations. *See generally* Battiato & Gilbertson, *The Changing Insurance Market-- Who Will Bear the Risks?*, 32 ROCKY MTN. MIN. L. INST. § 17.04 at 17- 16 (1986); Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract*, 25 TULSA L. J. 359, 421-31 (1990).

[13] **Fair Notice – Conspicuous – Appearance and Placement.**

Provisions Held Conspicuous: *Rourke v. Garza*, 511 S.W.2d 331, 334 (Tex. Civ. App.—Houston [1st Dist.] 1974), ***aff'd*** 530 S.W.2d 794 (Tex. 1975); *Safeway Scaffold Co. of Houston, Inc. v. Safeway Steel Products, Inc.*, 570 S.W.2d 225, 228 (Tex. Civ. App.—Houston [1st Dist.] 1978, *writ ref'd n.r.e.*). *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978) upheld a provision on reverse side of purchase order where front side contained reference in large red print, partly in bold, incorporating provisions on reverse side. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990) upheld an indemnity provision contained on front of one page contract in separate paragraph. *Banzhaf v. ADT Sec. Sys.*, 28 S.W.3d 180 (Tex. App.– Eastland [11th Dist.] 2000, *writ ref'd*) held an indemnity to be conspicuous that was set forth in enlarged, all capital lettering. "The lettering is dark, boldface type so that it contrasts with the lighter, smaller type of the remaining contractual paragraphs ... The indemnity provision ... is directly above the signature line. A reasonable person's attention is attracted to the indemnity provision when looking at the contract... The indemnity provision is on the back page (of a 1 page document), but the contract itself specifically directs the reader's attention to the paragraph in which is it contained. On the front of the contract, just above the signature line for Herman is the directive: "**ATTENTION IS DIRECTED TO THE WARRANTY, LIMIT OF LIABILITY AND OTHER CONDITIONS ON REVERSE SIDE.**"

Provisions Held Not Conspicuous: *K & S Oil Well Service, Inc. v. Cabot Corp., Inc.*, 491 S.W.2d 733, 737-38 (Tex. Civ. App.– Corpus Christi 1973, *writ ref'd n.r.e.*) struck down indemnity hidden on reverse of contract in paragraph headed "warranty." Indemnity provision was held not to meet the conspicuousness requirement in *U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789 (Tex. App.—Houston [14th Dist.] 1995, *writ denied*) when it was buried on the back of a rental contract with all provisions printed in the same respective type and sizes, and the heading did not alert the reader that it created an indemnity obligation ("LIABILITY FOR DAMAGE TO EQUIPMENT, PERSONS AND PROPERTY"). The Texas Supreme Court in *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex. 1997) found that a release was not conspicuous when it was set in a type font too small to read even though the heading was in larger font (heading was 4 point font and the terms of the release were in smaller font); the release was outlined in a box; the heading was all caps, in bold type and read "**RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT**"; and above the signature line appeared the caption in all caps, bold-faced centered and underlined type the following statement "**I UNDERSTAND MOTORCYCLE RACING IS DANGEROUS. YES, I HAVE READ THIS RELEASE.**" The court did not accept the argument that the release was conspicuous because of its small contrasting type. The court of appeals in *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex. App.–Texarkana 1999, *writ denied*) held that the indemnity provision was not conspicuous as it was in the same size and type and without a separate heading identifying the paragraph as an indemnity in a 22 paragraph, 13 page document. The court was not persuaded that the conspicuousness requirement applied only to "**forms**." The court of appeals in *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. App.– Houston [14th Dist.] 2000, *writ ref'd*) determined that an indemnity was not conspicuous if it was printed in same the size and type as the balance of a 1 page document.

[14] **Actual Notice.** *Dresser Industries, Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1993), *citing generally Cate v. Dover Corp.,* 790 S.W.2d 550, 561 (Tex. 1990). *See McGehee v. Certainteed Corp.,* 101 F.3d 1078 (5th Cir. (Tex.) 1996) remanding case for trial on actual knowledge of inclusion of an inconspicuous indemnity; *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119 (Tex. App .- Houston [14th Dist.] 2000, *writ den'd*) finding that an admission that signing party read the agreement sufficient to establish actual notice; *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.,* 565 S.W.2d 916, 919 (Tex. 1978), *overruled on other grounds by Dresser Indus., Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 509 (Tex. 1993); *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex. App. – Texarkana 1999, *no writ*). *Ayers Welding Co., Inc. v. Conoco, Inc.*, 243 S.W.3d 177, 181 n. 3 (Tex. App. Hou. [14th Dist.] 2007, *pet. ref'd*) "The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement."; and In United States for the *Use and Benefit of E. J. Smith Construction, Co., LLC v. Travelers Casualty & Surety Co.* 2016 WL 1030154, 1 (W .D. Tex. 2016), the district court found that the fair notice requirements imposed by the common law were inapplicable because the indemnitor had actual knowledge of the indemnity agreement. The court also found, however, that even if the indemnitor had not possessed actual knowledge of the indemnification clause that the clause satisfied the express negligence doctrine.

[15] **Failure to Read Not an Excuse.** *Gulf Oil Corp. v. Spence & Howe Constr. Co.*, 356 S.W.2d 382 (Tex. Civ. App.--Houston 1962, *writ ref'd n.r.e.*), *aff'd* 365 S.W.2d 631 (Tex. 1963).

[16] **The "Clear and Unequivocal" Test.** Before Texas adopted the express negligence doctrine in *Ethyl*, it followed the "clear and unequivocal" test, which says that an intent to indemnify a party against its own negligence must be stated in clear and unequivocal language. *Joe Adams and Son v. McCann Constr. Co.,* 475 S.W.2d 721, 723 (Tex. 1971); *Eastman Kodak Co. v. Exxon Corp,* 603 S.W.2d 208, 211 (Tex. 1980). Some states continue to follow this test. *See, e.g., Gulf Oil Corp. v. Atlantic C.L. R. Co.,* 196 So.2d 456 (Fla. App.2d 1967); *Washington Elem. School Dist. No. 6 v. Baglino Corp.,* 817 P.2d 3 (Ariz. 1991); *Arkansas Craft Corp v. Boyed Sanders Constr.*, 764 S.W.2d 452 (Ark. 1989); *Royal Ins. Co. v. Whitaker Constr. Corp.*, 824 So.2d 747 (Ala. 2002). Because these doctrines exist in so many jurisdictions and have the potential to render indemnity provisions unenforceable, it is prudent both to be aware of and to draft in accordance with the doctrines to best convey the intention of the parties.

[17] **Prior Common Law Approach.** Prior to 1971: Generally-Worded and Broad Statements of Indemnity. Prior to 1971, a broad general statement regarding indemnity for any injury or death of any persons or damage to property resulting from the use of equipment was effective against the Protecting Party. *James Stewart & Co. v. Mobley*, 282 S.W.2d 290 (Tex. Civ. App. - Dallas 1955, *writ ref'd*). Under this rule, an indemnity contract was sufficiently worded to pass liability to the Protecting Party when it was sufficiently broad as to cover the negligence of the indemnified person and it was clear that the intent was to do so. *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963); *Alamo Lumber Co. v. Warren Petroleum Corp.*, 316 F.2d 287, 290-91 (5th Cir. 1963).

1971 – 1987 Broad Statements No Longer Sufficient Unless Obligation Expressed in Clear and Unequivocal Terms. In 1971, the Texas Supreme Court made a significant change in indemnity contract law. Broad, general indemnity provisions would no longer suffice to protect a Protected Party against the consequences of its own negligence. In *Joe Adams & Son v. McCann Const. Co.*, 475 S.W.2d 721 (Tex. 1971), the Texas Supreme Court held that an indemnity agreement will not protect the Protected Party against the consequences of his own negligence unless the obligation was expressed in unequivocal terms. In holding that the indemnity agreement in question did not protect the indemnified person, the court stated:

> It is not necessary for the parties to say, in so many words, that they intend to save the indemnitee harmless from liability for his own wrongs, but it is necessary for that intention to clearly appear when all the provisions of the contract are considered in light of the circumstances surrounding its execution.

The indemnity provision construed by the court is as follows:

Insured Contract Provision:

The Contractor (Adams) shall effectually secure and protect its work and shall bear and be liable for all loss or damages of any kind which may happen to the work or any materials to be incorporated therein at any time prior to the final completion and acceptance thereof. McCann Construction ... shall not be responsible for any damage done to the work or property of the Contractor, unless such damage shall be caused by the direct negligence of McCann Construction. ...

The Contractor shall protect, indemnify and save McCann Construction ... and Owner harmless from any and all claims, suits, and actions of any kind or description, for damage or injuries to persons or property received or sustained by any party or parties through or on account of any act or in connection with the work of the Contractor or its agents or servants or subcontractors, or any default or omission of the Contractor, or its agents or servants or subcontractors in the performance of this contract, or through the use of improper or defective materials or tools or on account of injury of damage to adjacent buildings or property occasioned by work under this contract, or through failure to give the usual requisite and suitable notices to all parties, whose persons, estates or premises may be, in any way, interested in or affected by the performance of this work, and at its own cost shall defend any and all suits or actions that may be brought against McCann Construction... or Owner by reason thereof, and in the event of the failure of the Contractor to defend such suits McCann Construction... shall have the right and power to defend same and charge all costs of such defense to the Contractor or its Surety.

(Emphasis added by author.)

While the "clear and unequivocal" rule appeared to be simple and straight forward, it was not easy in its application and only a small number of indemnity provisions were judicially enforced to protect the Protected Party against its own conduct. See Scheer, *The Contractual Indemnity Provision Effective to Protect an Indemnitee Against His Own Negligence or Other Fault*, 17 TEX. TECH L. REV. 845, 856 874 (1986).

In *Fireman's Fund Insurance Co. v. Commercial Standard Indemnity Co.*, 490 S.W.2d 818 (Tex. 1972), the Texas Supreme Court established the "clear and unequivocal" standard. The majority of the court attempted to define this stricter standard:

> (w)e have, in fact, progressed toward the so-called "express negligence" rule as near as is judicially possible without adopting it. *Id*. at 822.

The court, however, failed to define the stricter standard. The indemnity provision construed by the court read as follows:

Insured Contract Provision:

All Contractors shall be responsible each for his work and every part thereof, and for all materials, tools, appliances and property of every description used in connection therewith, (in case of general contract, General Contractor assumes entire responsibility). They shall specifically and distinctly assume and do so assume all risks of damage or injury from any cause except negligence of Owner, its officers, agents and employees, to property or persons used or employed on or in connection with the work, and of all damage or injury to any persons or property wherever located, resulting from any action or operation under the contract or in connection with the work, and undertake and promise to protect and defend the Owner and Architect Engineer against all claims on account of any such damage or injury.

Id. At 821.

The court found that this broad language of "protecting ... the Owner ... against all claims" did not clearly and unequivocally indicate an intent to indemnify the owner (General Motors) from its own negligence.

[18] **Express Negligence.** The following is a discussion of various Texas court decisions determining whether the indemnity provision in an Insured Contract passed the express negligence test.

Texas Supreme Court Cases

In *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987), the Texas Supreme Court found that the following provision **failed** the express negligence standard since the provision stated what was not to be indemnified--claims resulting from the sole negligence of the premises owner--rather than expressly stating that the premises owner was to be indemnified from its own negligence.

Insured Contract Provision:

Contractor agrees to ... indemnify ... owner from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... excepting only claims arising out of accidents resulting from the sole negligence of owner.

(Emphasis added by author.)

In *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987 *per curiam*) in a *per curiam* opinion, and without hearing oral argument, the Texas Supreme Court upheld the trial court's granting summary judgment to the Indemnifying Person (the contractor) on the basis that the **indemnity provision was unenforceable as a matter of law**. The court found the following provision **failed** expressly to indemnify the plant owner for injuries to employees of the contractor due to either party's negligence.

Insured Contract Provision:

Contractor (Gulf Coast) agrees to indemnify and save owner (Owens-Illinois) harmless from any and all loss sustained by owner ... from any liability or expense on account of property damage or personal injury ... sustained by any person or persons, including but not limited to employees of ... contractor ... arising out of ... the performance or non-performance of work hereunder by contractor ... or by any act or omission of contractor, its subcontractor(s), and their respective employees and agents while on owner's premises ....

(Emphasis added by author.)

Although the agreement specifies the contractor's duty to indemnify the owner for claims resulting from the contractor's acts, it fails to state, with equal specificity, the obligation to indemnify for claims resulting from acts of other parties (*i.e.*, owner) and does not expressly refer to the negligence of either the owner or the contractor as an Indemnified Liability.

In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), the Texas Supreme Court held the indemnity provision set out below **met the express negligence test** and required Christie, Inc. to indemnify Enserch for Enserch's negligent supervision of Christie, Inc.'s work as an independent contractor hired to service Enserch's pipeline. Parker, an employee of Christie, Inc., was asphyxiated when a gasket blew out causing a valve to leak natural gas into the concrete manhole vault where Parker was working. Parker's estate brought a wrongful death action against Enserch. The court first held that Enserch owed a duty of care to the employees of Christie, Inc., even though Christie, Inc. was an independent contractor, since Enserch had retained control of the manner that Christie, Inc. was to carry out its servicing contract. Enserch had furnished a procedures book for Christie's employees which outlined the procedures to be followed while working on the pipeline, and Enserch representatives frequently visited the job site and supervised Christie's employees. The supreme court followed the exception announced in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) to the general rule of *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976). The general rule adopted in *Abalos* is that an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. However, the court in *Redinger* created an exception by holding that "one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id*. at 418 [citing RESTATEMENT (SECOND) OF TORTS § 414 (1977)]. The court upheld the following provision as requiring Christie, Inc. to indemnify Enserch for Enserch's negligent supervision:

Insured Contract Provision:

> (Christie) assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by (Christie), its agents and employees, and its subcontractors, their agents and employees, regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of (Enserch), (Enserch's) representative, or the employees, agents, invitees, or licensees thereof. (Christie) further agrees to indemnify and hold harmless (Enserch) and its representatives, and the employees, agents, invitees and licensee thereof in **respect of any such matters** and agrees to defend any claim or suit or action brought against (Enserch), (Enserch's) representative, and employees, agents, invitees, and licensees thereof ... .
>
> (Court's underling emphasis. This author's bolding.)

The court found that it was clear that "**respect of any such matters**" in the second sentence referred to the claims or actions described in the first sentence and the contract as a whole was sufficient to define the parties' intent that Christie indemnify Enserch for the consequences of Enserch's own negligence. Therefore, the indemnity language and the reference to Enserch's negligence did not need to be in the same sentence.

Atlantic Richfield Co. v. Petroleum Personnel, Inc., 758 S.W.2d 843, 844 (Tex. App. - Corpus Christi 1988), *rev'd*, 768 S.W.2d 724 (Tex. 1989). In this case, the employee of the contractor (PPI) sued the owner (ARCO) for injuries sustained while working on the owner's drilling platform. ARCO impleaded the contractor seeking indemnification from the contractor under the indemnification provision in the contract between ARCO and the contractor. The Texas Supreme Court found the following provision **met** the express negligence standard:

Insured Contract Provision:

> Contractor (PPI) agrees to hold harmless and unconditionally indemnify company (ARCO) against and for all liability, costs, expenses, claims and damages which (ARCO) may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons, or property or both of (PPI), or of the workmen of either party, or of any other parties, or to the property of (ARCO) in any matter arising from the work performed hereunder, including but not limited to **any negligent act or omission of (ARCO),** its officers, agents or employees. ...
>
> (Emphasis added by author.)

The court held the language "**any negligent act of ARCO**" was sufficient to define the parties' intent.

In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), the Texas Supreme Court held the indemnity provision set out below **met** the express negligence test and required Christie, Inc. to indemnify Enserch for Enserch's negligent supervision of Christie, Inc.'s work as an independent contractor hired to service Enserch's pipeline. Parker, an employee of Christie, Inc., was asphyxiated when a gasket blew out causing a valve to leak natural gas into the concrete manhole vault where Parker was working. Parker's estate brought a wrongful death action against Enserch. The court first held that Enserch owed a duty of care to the employees of Christie, Inc., even though Christie, Inc. was an independent contractor, since Enserch had retained control of the manner that Christie, Inc. was to carry out its servicing contract. Enserch had furnished a procedures book for Christie's employees which outlined the

procedures to be followed while working on the pipeline, and Enserch representatives frequently visited the job site and supervised Christie's employees. The supreme court followed the exception announced in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) to the general rule of *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976). The general rule adopted in *Abalos* is that an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. However, the court in *Redinger* created an exception by holding that "one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id*. at 418 [citing RESTATEMENT (SECOND) OF TORTS § 414 (1977)].

The court **upheld** the following provision as requiring Christie, Inc. to indemnify Enserch for Enserch's negligent supervision:

Insured Contract Provision:

> (Christie) assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by (Christie), its agents and employees, and its subcontractors, their agents and employees, regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of (Enserch), (Enserch's) representative, or the employees, agents, invitees, or licensees thereof. (Christie) further agrees to indemnify and hold harmless (Enserch) and its representatives, and the employees, agents, invitees and licensee thereof in respect of any such matters and agrees to defend any claim or suit or action brought against (Enserch), (Enserch's) representative, and employees, agents, invitees, and licensees thereof ... .
>
> (Court's emphasis.)

The Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App. - Dallas 1989), *aff'd* 817 S.W.2d 50, 56 (Tex. 1991) **approved** the following language as meeting the express negligence test:

Insured Contract Provision:

> **14.9 Operator's Indemnification of Contractor:** Operator (Diamond Shamrock n/k/a Maxus) agrees to ... indemnify ... Contractor (Moran Bros.) ... from and against all claims ... of every kind ... without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees... on account of bodily injury, death or damage to property. ...
>
> **14.13 Indemnity Obligation:** Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under the terms of this Contract, including without limitation, paragraphs 14.1 ... be without limit and without regard to the cause or causes thereof ... strict liability, or the negligence of any party, whether such negligence be sole, joint or concurrent, active or passive.
>
> (Underlining added.)

The *Maxus* case is discussed below concerning the advisability of having a choice of laws provision in an indemnity agreement. The oil well drilling contract in *Maxus* failed to contain a choice of laws provision. Diamond Shamrock (n/k/a Maxus), the operator, defended Moran Bros., the contractor, against a claim filed in a Kansas court by Boydstun, an employee of a contractor of Diamond Shamrock, against Moran. The Kansas jury found that Moran Bros. was 90% liable and awarded a $3,000,000 verdict, which was thereupon reduced to $2,700,000. Diamond Shamrock then sued in Texas for a declaratory judgment to declare the indemnity invalid. In applying the balancing test set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971), the Texas Supreme Court held that Kansas law applied and under the "clear and unequivocal language " applicable to indemnities in Kansas, the indemnity was enforceable. However, the court additionally found that the indemnity provisions conformed to the public policy of Texas contained in the express negligence test. The indemnity provisions in *Maxus* are from the standard form Daywork Drilling Contract published by the International Association of Drilling Contractors.

The Texas Supreme Court in *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813 (Tex. 1994) found that the following language **did not** meet the express negligence test:

Insured Contract Provision:

> ...[t]o the fullest extent permitted by law, [Fisk] shall indemnify, hold harmless and defend [Constructors] ... from and against all claims, damages, losses, and expenses, including but not limited to attorney’s fees [arising out of or resulting from the performance of Fisk’s work].

Constructors brought a third party cause of action against Fisk seeking indemnification against the claim of Fisk's employee against Constructors. The court held that Fisk had no duty to indemnify Constructors, since the indemnity did not expressly cover Fisk indemnifying Constructors for Constructors' negligence. The court then found that since Fisk had no duty to indemnify Constructors, Fisk had no liability for Constructors' attorney's fees in defending against Fisk's employee's suit. *Id.* at 815.

Court of Appeals Applications of *Ethyl*:

Beaumont Court of Appeals

The Beaumont Court of Appeals, in *Faulk Management Services v. Lufkin Industries, Inc.,* 905 S.W.2d 476 (Tex. App. - Beaumont 1995, *writ denied*), upheld the following provision as covering injuries to an employer's employees caused by the sole negligence of the Indemnified Person (premises owner) even though injuries to the contractor/employer's employees was not specifically mentioned, and the indemnity provision was worded in terms of injuries "caused by the (contractor/employer)" and did not expressly mention that it covered injuries "caused by" the Indemnified Person

Insured Contract Provision:

> By signing the below statement, the seller (meaning Faulk Management as the "seller" of janitorial services) agrees to ... indemnify ... Lufkin Industries, Inc. against loss ... caused by the seller, its employees, agents or any subcontractor arising out of or in consequence of the performance of this contract.
>
> It is the intention of the Seller and/or Contractor to indemnify Lufkin Industries, Inc. even in the event that any such claims, demands, actions or liability arises *in whole* or in part from warranties, express or implied, defects in materials, workmanship or design, condition of property or its premises and/or *negligence* of Lufkin Industries, Inc. or any other fault claims as a basis of liability for Lufkin Industries, Inc.

Corpus Christi Court of Appeals

Atlantic Richfield Oil & Gas Co. v. McGuffin, 773 S.W.2d 711 (Tex. App. - Corpus Christi 1989, *writ dism'd*). *McGuffin* is an earlier court of appeals' decision upholding the language from the Daywork Drilling Contract later approved by the Texas Supreme Court in *Maxus*. In *McGuffin*, ARCO sought indemnity for the $300,000 portion of a $1,000,000 agreed judgment in the wrongful death action brought by the estate of the contractor's deceased employee as was covered by the insurance requirement imposed by the contract on the contractor. The contract required the contractor to maintain the following insurance:

Insured Contract Provision:

> 8.1 Without limiting the indemnity obligations or liabilities of Contractor or its insurers, at any and all times during the term of this agreement, Contractor agrees to carry insurance of the types and in minimum amounts as follows:
> ...
> c. Comprehensive General Liability Insurance; including contractual liability insuring the indemnity agreement as set down in the agreement with minimum limits of $300,000 applicable to bodily injury, sickness or death in any one occurrence. ...

Id. at 714. The court **upheld** the contractor's agreement to indemnify the owner and found that the indemnity language expressly covered the owner's negligence. The court found that the insurance requirement did not exceed the limits imposed on indemnity insurance contained in TEX. CIV. PRAC. & REM. CODE ANN. § 127.005 in what is known as the Texas Oilfield Anti-Indemnity Statute. The insurance did not exceed the limit so-imposed of 12 times the State's basic limits for personal injury as approved by the State Board of Insurance (12 x $25,000). [Higher limits are now permitted; *see* § 127.005.] Therefore, the contractor's indemnity was within the exception permitted by the Oilfield Anti-Indemnity Statute prohibiting indemnities in oil and gas contracts except when the indemnity is supported by liability insurance up to the permitted amount. The court found that the indemnity was enforceable up to the permitted level of insurance.

The Corpus Christi Court of Appeals in *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App. - Corpus Christi 1986, *writ ref'd n.r.e.*) held the following provision meant what it said, that the indemnified person was **not** being indemnified for its own negligence, in a case where the jury found the indemnified person (Getty) was 100% negligent.

Insured Contract Provision:

> Seller (NL Industries-the chemical supplier) shall indemnify ... Purchaser (Getty) ... from any and all losses .... Seller shall not be held responsible for any losses ... caused by the negligence of Purchaser.
>
> (Emphasis added by author.)

This provision is not quoted in the 1986 opinion (Round 1) but is set forth in the 1991 opinion (Round 2) discussed below in the portion of this Article concerning Coordinating Insurance With Indemnity Provisions.

Dallas Court of Appeals

Adams v. Spring Valley Const. Co., 728 S.W.2d 412 (Tex. App. - Dallas 1987, *writ ref'd n.r.e.*). This case involved construction of an indemnity provision in a subcontract between the general contractor and the subcontractor and in a certificate of insurance. The court held that the contract provisions, even when taken together with the insurance certificate, **did not meet** the express negligence standard. Both documents contained a provision whereby the subcontractor would indemnify the contractor for all liability arising from or out of the contractor's work on the project. The insurance certificate contained an indemnity as to liabilities "caused in whole or in part by a negligent act of the Subcontractor ... regardless of whether it is caused in part by a party, indemnified hereunder." The court found that the indemnity provision did not cover liabilities in the event that the contractor was 100% negligent.

The Dallas court in *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App. - Dallas 1999, *no writ*)[an alarm security products liability case where the tenant indemnified the alarm company from claims by third parties, which included the claim of the landlord] found that the following provision clearly and specifically **covered** the Protected Party's negligence, breach of warranty, and strict product liability:

> When purchaser (Arthur's Garage), in the ordinary court of business, has the property of others in his custody, or the alarm system extends to protect the property of others, purchaser agrees to and shall indemnify, defend, and hold harmless seller, its employees and agents for and against all claims brought by parties other than the parties to this agreement. This provision shall apply to all claims, regardless of cause, including seller's performance or failure to perform, and including defects in products, design, installation, maintenance, operation or non-operation of the system, whether based upon negligence, active or passive, warranty, or strict product liability on the part of seller, its employees or agents, but this provision shall not apply to claims for loss or damage solely and directly caused by an employee of seller while on purchaser's premises.
>
> (Emphasis added by author.)

This case is also discussed in this Article in connection with the enforceability of contractual limitations of liability.

Eastland Court of Appeals

In *Banzhaf v. ADT Sec. Sys.*, 28 S.W.3d 180 (Tex. App. - Eastland [11th Dist.] 2000, *writ denied*) the court of appeals **upheld** the following indemnity provision in an alarm security services contract. The court rejected Herman's argument that the identification of claims arising out of ADT's negligence as being covered by the indemnity had to be in the same sentence with the word "*indemnify*." ADT obtained indemnity against its customer, Herman Sporting Goods, Inc., for claims made by the estate of a Herman's employee who was killed in a robbery. The alarm service purchased by Herman's was fire alarm and after-hours unauthorized entry detection services and not robbery or hostage detection services. The alarm service purchased by Herman's was designed to go on only when no employees were in the store. Herman's had declined to add the "duress code" feature to the alarm. The decedent employee's estate argued that ADT's project was defective in not having this feature as a mandatory service.

Insured Contract Provision:

> In the event any person, not a party to this agreement, shall make any claim or file any lawsuit against ADT for failure of its equipment or service in any respect, customer [Herman's] agrees to indemnify, defend, and hold ADT harmless from any and all such claims, and hold ADT harmless from any and all such claims and lawsuits including the payment of all damages, expenses, costs, and attorney's fees. The customer [Herman's] ... agrees that ADT shall be exempt from liability for loss, damage or injury due directly or indirectly to occurrences, or consequences therefrom, which the service or system is designed to detect or avert; that if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% of the annual service charge or $10,000, whichever is less ... as the exclusive remedy; and that the provisions of this paragraph shall apply if loss, damage, or injury, irrespective of cause or origin, results directly or indirectly to person or property from performance or nonperformance of obligations imposed by this contract or from ***negligence***, active or otherwise, of ADT, its agents or employees.
>
> (Emphasis added by author.)

El Paso Court of Appeals

In *Permian Corp. v. Union Texas Petroleum Corp.*, 770 S.W.2d 928 (Tex. App. — El Paso 1989, *no writ*) an employee of a subsidiary of Permian, the contractor, sued Union Texas for negligently causing the employee injuries while the employee was performing services for Union Texas. The El Paso Court of Appeals found the following indemnity by Permian **expressly indemnified** Union Texas against liabilities arising out of its negligence:

Insured Contract Provision:

> Contractor (Permian) hereby indemnifies and agrees to protect, hold and save Union Texas ... harmless from and against all claims ... including but not limited to injuries to employees of Contractor ... on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by Contractor ... and whether the same is caused or contributed to by the negligence of Union Texas, its agents or employees.
>
> (Emphasis added by the court.)

Fort Worth Court of Appeals

Linden-Alimak, Inc. v. McDonald, 745 S.W.2d 82 (Tex. App. - Ft. Worth 1988, *writ denied*). The Fort Worth Court of Appeals reviewed an indemnity provision in an equipment rental agreement. An employee (McDonald) of the equipment lessee (Thomas S. Byrne, Inc.) filed suit against the equipment lessor (Linden-Alimak) to recover damages for personal injuries sustained while the leased crane was being erected. The equipment lessor filed a third party action against the lessee for indemnification. The court held that the following indemnity provision in the equipment lease agreement suffered the same defect as the provision in *Crown Central Petroleum*. The court found the indemnity language to be **inadequate** to indemnify the equipment lessor against its concurrent negligence. The indemnity, by excluding the lessor's sole negligence, did not include a case of lessor's concurrent negligence. Situations involving lessor's concurrent negligence were not mentioned (*i.e.*, "**in part**" not mentioned).

Insured Contract Provision:

> It is expressly understood and agreed that Lessor shall not be liable for damages, losses and injuries of any kind whatsoever, whether to persons or property, or for any other loss arising from the operation, handling, use of, transportation of, or in any way connected with the said equipment or any part thereof from whatsoever cause arising, except direct damages, losses or injuries caused by Lessor's sole negligence. Lessee shall indemnify and save Lessor harmless from any and all claims, demands, liabilities, judgments, actions or causes of action of any nature whatsoever (except if caused by Lessor's sole negligence) arising out of the selection, possession, leasing, operation, control, use, maintenance, repair, adjustment or return of the equipment.
>
> (Emphasis added by author.)

In *B- F-W Const. Co., Inc. v. Garza*, 748 S.W.2d 611 (Tex. App. - Ft. Worth 1988, *no writ*), the Fort Worth Court of Appeals held that the language "regardless of any cause or of any fault or negligence of Contractor" **expressly stated** the intent of the parties that the subcontractor would indemnify the contractor against the contractor's negligence. The indemnity provision stated

Insured Contract Provision:

> Subcontractor (Garza Concrete) shall fully protect, indemnify and defend contractor (B-F-W) and hold it harmless from and against any and all claims, demands, causes of action, damages and liabilities for injury to or death of Subcontractor, or any one or more of Subcontractor's employees or agents, or any subcontractor or supplier of Subcontractor, or any employee or agent of any such subcontractor or supplier, arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to any work or operations of Subcontractor or Contractor or any other contractor or subcontractor or party, or otherwise in the course and scope of their employment, and regardless of cause or of any fault or negligence of Contractor.
>
> (Emphasis added by author.)

Houston Court of Appeals

1st District. *Monsanto Co. v. Owens-Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App. – Hou. [1st Dist.] 1988, *no writ*). The employee of the subcontractor (Owens-Corning) sued the contractor (Monsanto) for personal injuries suffered on the job site. The employee had already collected workers' compensation benefits from the subcontractor. The contractor filed a third party action against its subcontractor seeking contractual indemnity. The court held the following provision in the subcontract **did not meet** the express negligence standard since it did not expressly indemnify the contractor for its own negligence:

Insured Contract Provision:

(Sub)Contractor (Owens-Corning) agrees to indemnify and save Monsanto (Contractor) and its employees harmless against any and all liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out ... as a result of bodily injuries ... to any person or damage ... to any property occurring to or caused in whole or in part by, (Subcontractor) (or any of his employees), any of his (Sub)Subcontractors (or any employee thereof) directly or indirectly employed or engaged by either (Subcontractor) or any of his (Sub- subcontractors).

(Emphasis and parenthetical designations added by author.)

The court noted that the term "**negligence**" is not found in the indemnity agreement. The indemnity did not mention indemnifying against the negligence of the contractor. Also, it did not mention indemnifying against the concurrent negligence of the subcontractor (the indemnifying party). Therefore, the court noted that the agreement **did not provide for contractual comparative negligence**. The indemnity contract neither covered the negligence of the contractor nor the subcontractor. *Id*. at 295. The indemnity also does not expressly require the employer (Indemnifying Person) to assume liability for injuries to its employees thereby overcoming the Workers' Compensation Bar.

The court in *Jobs Building Services, Inc. v. Rom, Inc.*, 846 S.W.2d 867 (Tex. App. - Houston [1st Dist.] 1992, *writ denied*) found that the following provision in a window washing subcontract with the building maintenance contractor was **not** specific enough to indemnify the contractor for its own negligence:

Insured Contract Provision:

The Subcontractor agrees to indemnify and hold harmless the Contractor ... for (i) bodily injury, illness or death of any person; ... which ... damage is caused by the Subcontractor's negligent act or omission or by the negligent act or omission of anyone employed by the Subcontractor or for whose acts the **Contractor** or the Subcontractor **may be liable** or for which the Subcontractor is liable or responsible.

(Court's italics; author's bold.)

Id. at 870.

The court in *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App. – Hou. [1st Dist.] 1995, *writ denied*), following the Texas Supreme Court's ruling in *Fisk Electric Co. v. Constructors, Inc.,* 888 S.W.2d 813 (Tex. 1994) construing a similar provision, held the following provision did **not** pass the express negligence test. A general contractor sought indemnity from a heating, ventilation, and air conditioning subcontractor for liability to a duct mechanic who was electrocuted when the duct work he was installing became electrically charged. The indemnification agreement stated that the subcontractor would indemnify the contractor for losses "arising out of or resulting from the performance of the subcontractor's work." The agreement also stated that the subcontractor owed an obligation to indemnify the general contractor to the extent that loss was "caused in whole or in part by a negligent act or omission of the subcontractor … regardless of whether it is caused in part by a party indemnified hereunder."

Insured Contract Provision:

11.11 Indemnification:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's work under this Subcontract provided that any such claim ... to the extent caused in whole or in part by a negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone whose acts he may be liable (**the Protecting Party**), regardless of whether it is caused in part by a party indemnified hereunder (**the Protected Party**).

(Underlining added by author; Identification of Protecting Party and the Protected Party added by author.)

The language referring to the Protected Party only referred to injuries "whether caused in part" by the Protecting Party, and did not expressly state that the cause was the "negligence" of the Protected Party. This type of indemnity provision is the same as is contained in the **AIA forms**. The court also noted that the next provision in the indemnity, the standard waiver of the workers' compensation bar (the "indemnification obligation ... shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under workers' or workmen's compensation acts...") was irrelevant since the indemnity was not otherwise enforceable.

14th District. The court in *Adams Resources Exploration Corp. v. Resource Drilling, Inc.*, 761 S.W.2d 63 (Tex. App.--Houston [14th

Dist.] 1988, *writ dism'd*) found the indemnity provision **passed** the express negligence test. The indemnity language in this case is identical to the language recently reviewed by the Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App.--Dallas 1989), *aff'd* 817 S.W.2d 50 (Tex. 1991) discussed above and is contained in the standard form Daywork Drilling Contract published by the International Association of Drilling Contractors.

In *DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880 (Tex. App. – Hou. [14th Dist.] 2001, *no writ*), the court of appeals found that the following provision **was not** enforceable to shift DDD's negligence to Veritas, but did not prevent DDD from recovery from Veritas on a claim that Veritas breached its contract to perform its services in a good and workmanlike manner:

Insured Contract Provision:

> Section V-Operations:
>
> Veritas shall **indemnify**, defend, ... [DDD] for all claims, damages, causes of actions, and liabilities resulting from **Veritas' failure to conduct seismic operations in an orderly and workmanlike manner**...
>
> Section X-Liability Indemnity:
>
> Veritas shall protect, **indemnify**, defend and save [DDD], ... harmless from and against all claims, ... and causes of action ... asserted by third parties on account of ... damage to property of such third parties, which ... damage is the result of the **negligent act or omission**, breach of this Basic Agreement or the Supplemental Agreement, or willful misconduct **of Veritas** ... Likewise, [DDD] shall protect, indemnify, defend and save Veritas, ... harmless from and against all claims, ... causes of action ... asserted by third parties on account of ... damage to property of such third parties, which ... damage is the result of the negligent act or omission or willful misconduct of [DDD] ...
>
> (Emphasis added by author.)

Suit was brought by Vickers, a landowner, against DDD, which was the lessee on an oil and gas lease covering Vickers' land, for property damages sustained by Vickers due to the cutting down of numerous oak and mesquite trees. DDD had hired Veritas to conduct seismic services on the Vickers' land. Veritas subcontracted with Brush Cutters to conduct brush clearing operations. DDD brought suit against Veritas seeking a declaratory judgment that Veritas is obligated to defend and indemnify DDD against claims based on damage to Vickers' land caused by Veritas' negligence. The court of appeals sustained the trial court's granting of summary judgment against enforcement of the indemnity provision. The court of appeals found that DDD's action was an attempt to have Veritas indemnify DDD for DDD's negligence. However, the court reversed the trial court and remanded the matter for further proceedings regarding Veritas' obligations under the indemnity provisions to defend and indemnify DDD against third party claims not based on DDD's negligence. Vickers had sued DDD for (1) breach of duty to manage and administer the lease, (2) breach of contract, (3) negligence, (4) malicious trespass, (5) negligent misrepresentations, (6) breach of fiduciary duty, (7) gross negligence, and (8) intentional tort.

San Antonio Court of Appeals

Haring v. Bay Rock Corp., 773 S.W.2d 676 (Tex. App.--San Antonio 1989, *no writ*). In this case involving a wrongful death action, the San Antonio Court of Appeals held the following provision **did not meet** the express negligence test since the negligence of the alleged indemnified person (oil and gas lessee) is not mentioned:

Insured Contract Provision:

> [Operator (Bay Rock Corp.)] shall have no liability to owners of interests in said wells and leases (Haring) for losses sustained, or liabilities incurred, except such as may result from gross negligence or from breach of the provisions of this agreement.
>
> (Emphasis added by author.)

The provision is worded as a disclaimer by the operator as to any liability except for gross negligence, and not as an indemnification by the operator for the operator's "disclaimed" but not expressly disclaimed negligence.

Texarkana Court of Appeals

The Texarkana Court of Appeals in *Texas Utilities Electric Co. v. Babcock & Wilcox,* 893 S.W.2d 739 (Tex. App.--Texarkana 1995, *no writ*) found that **neither** of the following indemnity provisions expressly covered the Indemnified Person's (Texas Utilities') concurrent negligence in causing injuries to an employee of Flour Daniel, a contractor employed by Texas Utilities.

Insured Contract Provisions:

[Babcock & Wilcox agree to indemnify Texas Utilities for claims against Texas Utilities for damages arising from] personal injury or death or damage to property of Company's [Babcock's] agents, servants and employees, as well as the agents, servants, and employees of Company's [Babcock's] subcontractor, whether or not arising from sole or concurrent negligence or fault of Purchaser [TU].

[Babcock & Wilcox] shall defend ... indemnify ... Purchaser [TU] and its ... agents ... from and against any and all claims ... of every kind and character whatsoever arising in favor of any person or entity (other than the agents, servants, and employees or [*sic]* [of?] Company [Babcock] or of Company's subcontractor, as provided in the paragraph immediately above), including ... claims ... on account of personal injuries or death, or damage to property arising out of or incident to the work performed hereunder .... with the only exception being that, as to claims arising in favor of persons or entities other than for injury, death, or damage to the agents, servants, and employees of Company [Babcock] or Company's subcontractor, Purchaser [TU] shall not be entitled to indemnification for claims, demands, expenses, judgments, and causes of action resulting from Purchaser's [TU] sole negligence.

(Emphasis added by author.)

The first indemnity does not cover injuries to employees of a contractor of Texas Utilities. The second indemnity does not cover Texas Utilities' concurrent negligence. The exception for Texas Utilities' sole negligence from the broad indemnity is not equivalent to an express inclusion of Texas Utilities' concurrent negligence.

Tyler Court of Appeals

In *State Department of Highways & Public Transportation v. Reynolds-Land, Inc.*, 757 S.W.2d 868, 869 (Tex. App.--Tyler 1988, *no writ*), the Tyler Court of Appeals held **unenforceable** the following indemnity provision in a highway construction contract between the State Highway Department and the contractor:

Insured Contract Provision:

The contractor (Reynolds-Land) shall save harmless the (Department) from all account of any injuries or damages sustained by any person or property in consequence of any neglect in safeguarding the work by ... (Reynolds-Land); or from any claims or amounts arising or recovered under the "Workmen's' Compensation Laws" or any other laws.

(Emphasis added by author.)

The amounts for which indemnity was sought were paid by the Department pursuant to an agreed judgment setting a negligence suit brought by the injured employee of the contractor against the Department. The contractor's workers' compensation carrier had intervened in the suit to seek subrogation against the Department for amounts it had paid to the employee. Unfortunately for the Department, the court held that the settlement amounts paid by the Department were in the nature of settlement payments on the claim against the Department for its own negligence, rather than amounts paid by it on a workers' compensation claim. The indemnity clause neither expressly covered the Department's negligence nor amounts paid by the Department to settle claims against the Department for its own negligence. Also, even though the indemnity clause expressly covers "any claims over amounts arising or recovered under the Workmen's Compensation Laws," the Department could only be liable at common law for its own negligence; and therefore, the settlement agreement could not transform the payment from a payment on account of the Department's negligence to a claim paid by it under the Workers' Compensation Act.

[19] **Express Negligence Requirement and Non-Negligence Based Indemnities.** Cases holding express negligence requirement not applicable to non-negligence based indemnity actions: *English v. BGP Int'l, Inc.*, 174 S.W.3d 366, 375 (Tex. App. – Hou. [14th Dist.] 2005, *no pet.*); *Devon SFS Operating, Inc. v. First Seismic Corp.*, 2006 WL 374257 (Tex. App. – Hou. [1st Dist.); *B. R. Brick & Masonry, Inc. v. Phillips*, 2003 WL 22724752, at 2 (Tex. App. – Hou. [14th Dist.], *no pet.*).

[20] **Indemnity for Strict Liability – Products Liability.** The Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) cited the following cases as examples in which the indemnity provision did not expressly identify strict products liability as an indemnified liability and therefore were not enforceable: *Rourke v. Garza*, 511 S.W.2d 331, 333 (Tex. Civ. App. Houston [1st Dist.] 1974), ***aff'd***, 530 S.W.2d 794 (Tex. 1975) in which the indemnity clause was held not to have been worded sufficiently so as to include strict products liability; and *Dorchester Gas Corp. v. American Petrofina, Inc.* 710 S.W.2d 541, 543 (Tex. 1986) also, which held that the indemnity clause in question did not clearly require the indemnitor to indemnify the indemnitee against strict products liability.

[21] **"Partial Success" Covered.** Two commentators offer the following good advice at Howard and Horowitz, *Negotiating and Drafting Indemnification Provisions,* 71 TEX. B. J. 648 (Sept. 2008):

> Coverage for partial success -- defined as some resolution resulting from something less than an authoritative decision on the merits of an indemnified claim -- is often neglected when defining the scope of coverage. Texas statutes mandate payments to directors and officers if a suit is defended successfully -- on the merits or otherwise. However, indemnification provisions can provide coverage for dismissals based on procedural

grounds (for example, due to the application of a statute of limitations). An indemnifying party may wish to encourage the indemnified party to seek early resolution on procedural grounds, rather than incurring additional time and expense to obtain a decision on the merits. The indemnification provision also can provide coverage regardless of whether settlement of a claim constitutes "success on the merits or otherwise." If language such as "wholly successful" is used, that may preclude partial indemnification in instances where the indemnified party achieves only partial success on the merits; whereas "to the extent successful" language may afford partial indemnification where there was partial success.

[22] **CGL Coverage "A".** Coverage A under standard form CGL policies is for loss arising out of "Bodily Injury" or "Property Damage." "**Bodily Injury**" is in such policies defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "**Property Damage**" in such policies is defined as "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured."

[23] **Getty 1.** Previously, in a 1986 case ("***Getty* 1**"), Getty had been unsuccessful in seeking indemnity against NL Industries. *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*). Getty lost *Getty* Round 1 when the court determined that the contractual indemnity provision meant what it said: "Seller shall not be responsible for any losses ... solely caused by the negligence of Purchaser." The facts giving rise to *Getty* Round 1 are as follows. Getty purchased various chemicals from NL Industries for Getty's oil production and exploration operations in the Midland, Texas area. A barrel of chemical demulsifier delivered by NL Industries to Getty exploded in the vicinity of a Getty well, killing Carl Duncan, an independent contractor working for Getty. Duncan's estate and survivors brought wrongful death and survival actions against Getty and NL Industries (*Getty* Round 1). The jury found Getty 100% negligent. The jury also found that NL Industries was not negligent and that it placed adequate warnings on its chemicals. There was, however, no finding that the accident did not arise out of or was not incident to NL Industries' performance of its purchase order.

[24] **Getty 2.** The court in the instant action ("***Getty* 2**") was being requested by Getty to reverse the holding of the trial court and the court of appeals in a subsequent suit brought by Getty against NL Industries for its failure to name Getty as an "additional insured" on NL Industries' insurance policies and against NL Industries' insurers. Getty was suing on multiple theories: as to NL Industries--breach of contract to purchase insurance on its behalf; violation of § 1.203 of TEX. BUS. & COMM. CODE (Tex. UCC) (Vernon 1994) (obligation of good faith and fair dealing); negligence; violation of the Texas Deceptive Trade Practices Act; and common law fraud; and as to the insurers--breach of contract to extend it insurance coverage; violation of TEX. INS. CODE Art. 3.62 (Vernon 1981) (repealed) (failure to pay claim); breach of the duty of good faith and fair dealing; negligence; violation of the DTPA; and common law fraud. The trial court in *Getty* Round 2 granted summary judgment against Getty on four grounds: (1) a contract provision requiring the seller to purchase liability insurance for the buyer violated the Texas Oilfield Anti-Indemnity Statute, §§ 127.001-.007, TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997); (2) the same contractual provision violated the common law express negligence rule; (3) the prior litigation of a related indemnity provision precluded the present suit under the doctrine of *res judicata* ("*Claim Bar*"); and (4) collateral estoppel prevented Getty from relitigating ultimate issues of fact and law litigated in *Getty* Round 1 ("***Issue Bar***"). Getty was barred by *res judicata*, having already cross- claimed against NL Industries in *Getty* Round 1 for contractual indemnity and having lost. In *dicta*, the court of appeals opined that the insurance provision would violate the Texas Oilfield Anti-Indemnity Statute by allowing Getty to avoid the consequences of its own negligence. The court of appeals also noted that Texas courts would "undoubtedly extend (the express negligence doctrine) to the insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the results of its sole negligence." 819 S.W.2d 908, 914. The supreme court found that Getty was not required to bring any of its cross-claims against NL Industries in the suit by Duncan. However, once Getty chose to cross-claim for indemnity, it was required under *res judicata* to bring all its actions in the same action. As to the claims against the insurers, the court held that Getty was not barred by either res judicata or collateral estoppel. Res judicata was not applicable even though as a general matter under Texas law a former judgment bars a second suit against all who were in "privity" with the parties to the first suit. Since NL Industries' insurance policies contained a "no action" provision (suit against the insurer was specifically prohibited before the insured's liability was reduced to judgment), the court found that Getty could not have joined the insurers as defendants in Getty Round 1 anyway. Collateral estoppel did not apply either since the court found that Getty Round 2 was not a relitigation of either (1) an issue of fact did Duncan's injuries arise out of NL's performance of the purchase order? (did the parties intend to limit the insurance to injuries caused by NL Industries' negligence?) or (2) an issue of law did NL Industries' breach its insurance covenant? Finally, the court held that the express negligence **doctrine would not be extended** to contractual provisions, other than indemnity agreements, and therefore was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies. The court stated

> We express no opinion regarding whether Getty is an additional insured under NL's insurance policies with INA or Youell, or the extent of such coverage, if it exists. *Id.* 806.

[25] **To the Extent Permitted by Law.** This change was brought about by the wave of anti-indemnification sweeping the country and the many different manners in which the legislation is drafted. Anti-indemnity statutes in some states are silent or unclear as to whether the statute's prohibitions apply to insurance as well as indemnification. Most of ISO's additional insured endorsements provide coverage to the additional insured for negligence shared with the named insured. In those states, like Texas, where the statute expressly prohibits additional insured coverage for another party's negligence (except in specified exceptions), this language is to make clear that despite the wording extending coverage to an additional insured for its concurrent negligence (or even sole negligence), coverage applies only to the extent permitted by law. This change permitted the use of a uniform endorsement throughout the United States in lieu of the tailored state-by-state endorsements that ISO had previously promulgated for states with varying anti-indemnity statutes.

[26] **Dollar Limit Required by Contract or Agreement, Whichever is Less.** This change was made to limit the dollar limits of coverage afforded the additional insured to the lesser of the policy limits or the limit required in the underlying contract or agreement that specified additional insured coverage. For example, if the contract requires the contractor to maintain CGL limits of $1,000,000 per occurrence, but the contractor obtains coverage for $2,000,000 per occurrence, the additional insured owner in insured only to the extent of $1,000,000.

More Questions Abound

- What constitutes "the amount of insurance … required by the contract"?

- What happens in cases where the named insured/indemnitor's indemnity is not capped by a specific dollar amount, but the insurance specification provides for a specific dollar amount of coverage, and the named insured actually has greater limits? (In such case, the dollar amount of the additional insured coverage is limited to the amount specified for the liability policy, but the additional insured/indemnitee can claim against the named insured/indemnitor for amounts greater than the contract specified CGL limit. The named insured/indemnitor can then make a claim against its CGL policy for the limits within its actual policy. But what if the named insured/indemnitor does not pursue its claim on its CGL policy as it has no assets?) A court addressing a manuscripted additional insured endorsement held the limits for the additional insured were capped at the amount specified in the contract as the dollar coverage amount. *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140 (N.Y. App. Div. [1st Dept.] 2008).

- What if the contract calls for coverage to be provided in an amount "**of at least**" or "**shall be no less than**" a stated amount? See *Mobil Oil Corp. v. Maryland Cas. Co.*, 681 N.E.2d 552 (1997) - court held that the additional insured's coverage under the CGL policy and excess layer policies was not limited by contract language that the insured was required to procure "at least $250,000" of coverage, but extended to the full face value of the policies. Other cases construing similar language are cited at footnote 8 to *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. [Tex.] 1991) in which the court found that an underlying contract's "with limits of not less than" a specified amount did not limit the additional insured's coverage to the contractually specified "not less than amount" and also held the primary insurer was not entitled to subrogate as to its insured against the excess insurer for a claim settled by the primary insurer above the "not less than amount" but below the actual limits of the primary coverage.

[27] ***In re Deepwater Horizon* - Fifth Circuit.** *In re Deepwater Horizon*, 728 F.3d 491, 500 (5th Cir. 2013) certified questions to the Texas Supreme Court, including the following question:

1. Whether *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008) compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?

2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 256 S.W.3d at 668, given the facts of this case?

This certified questions came after the Fifth Circuit withdrew its prior opinion, 710 F.3d 338 (5th Cir. 2013), where it held that BP was an additional insured covered by $750,000,000 in primary and umbrella policies.

[28] **Incorporation by Reference of Limitations into Insurance Coverage for Protected Party – "Following Form": Excess-Insurance.** The Texas Supreme Court in *In re Deepwater Horizon*, cites the discussion of following form excess-insurance policies *ATOFINA*, 256 S.W.3d 664 in support of its finding in *In re Deepwater Horizon* that insurance coverage can be limited by incorporating extrinsic documents to limit coverage. Following form excess-insurance policies incorporate as limitations on the scope of coverage afforded by the excess insurance policy the scope of coverage of scheduled underlying liability policies.

[29] **Incorporation by Reference of Limitations in an Extrinsic Document into Insurance Coverage for Protected Party – Car Rental Agreements.** The Texas Supreme Court in *In re Deepwater Horizon* identifies the rental agreement reviewed in *Urrutia v. Decker*, 992 S.W.2d 440, 441, 443 (Tex. 1999) as an example of an insurance policy which incorporates the limits of an extrinsic document to limit the scope of insurance afforded the protected party. The court *In re Deepwater Horizon* noted that the court does not require "magic" words to incorporate a restriction from another contract into an insurance policy; "rather, it is enough that the policy clearly manifests an intent to include the contract as part of the policy." The *Urrutia* court found that an auto rental agreement, which called for liability insurance to be afforded the renter by the rental agency of a specified amount, was effectively "written into" the rental agency's master insurance policy by virtue of endorsement language extending additional-insured status to the rental agency's customers "to the extent of liability agreed to under the [rental agreement]".

[30] **Texas Real Estate Forms Manual's Approach to Indemnities in Leases.** The following is a quoted portion of the commentary in chapter 71 Leases, p. 71-2 of the Texas Real Estate Forms Manual (2 ed.) § 71.1:4 Cautions: Risk Allocation:

> **Indemnities and Waivers:** The indemnity provisions of the multitenant building or project lease forms are designed to protect the respective parties from their own ordinary negligence (but not gross negligence or willful misconduct) on a geographic basis; that is, the tenant indemnifies the landlord for any damage or injury occurring within the premises, whether or not the ordinary negligence of the landlord is a cause of the damage or injury, and the landlord indemnifies the tenant for any damage or injury occurring within the common areas, whether or

not the ordinary negligence of the tenant is a cause of the damage or injury. The waiver of subrogation provision contained in the multitenant building or project lease from releases both parties from liability for property damage and loss of revenues up to the limits of the property insurance coverages required to be carried under the lease, notwithstanding the ordinary negligence of the party causing the property damage or loss of revenues. The indemnity and waiver provisions are designed to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

[31] **"Injury".** The defined term "***Injury***" is used in the indemnity provisions of the Lease, ¶¶ *B.1.q* and *C.1.f*. ¶ *B.1.q* provides that "Tenant agrees to ... indemnify ... Landlord from any Injury occurring in any portion of the Premises." ¶ *C.1.f* provides that "Landlord agrees to ... indemnify ... Tenant from any Injury occurring in any portion of the Common Areas." "**Injury**" is defined in the Manual Lease forms as meaning 3 types of occurrences and the associated liability arising out of such occurrence: property damage, injuries to persons including their death, and "personal and advertising injury." This last form of liability incorporates by reference the definition of such term as contained in Tenant's liability insurance.

[32] **Attorney's Fees**. See discussion of attorneys' fees as being an indemnified cost in Article.

[33] **Costs**. See discussion of "costs" in Article.

[34] **"Occurring".** The indemnity language does not expressly address the time of the occurrence. Injuries can occur after the end of the Term of a lease due to acts or omissions occurring during the Term of a lease. The indemnity does state that the indemnity survives the end of the Term of the Lease, but this may address the survivability of the indemnity as to Injuries occurring during the Term of the Lease. The timing issue is addressed by adding the words "either before or after the end of the Term" after "occurring in any portion of the Premises."

[35] **"Premises".** "**Premises**" is defined in the Basic Terms section of the Retail Lease. The risk allocation scheme adopted in the Texas Real Estate Forms Manual for Leases is to allocate responsibility to the Tenant for all Injuries occurring in the Premises and to allocate to the Landlord responsibility for all Injuries occurring in the Common Areas. The Retail Lease contains reciprocal indemnities with the Tenant indemnifying the Landlord for all Injuries occurring in the Premises and with the Landlord indemnifying Tenant for all Injuries occurring in the Common Areas.

[36] **Comparative Negligence Statutes.** This language is added to address those cases in which the court has sought to interpret the Indemnifying Person's indemnity in cases of ambiguity by examining the scope of a Protecting Party's insurance covenant and the risks covered thereby to determine the intended breadth of the indemnity to scope and limits of the insurance.

[37] **Workers Compensation Act.** This language notes that the indemnity is intended by the parties not to be limited by the statutory risk allocation schemes set up in the comparative negligence statutes and the Workers' Compensation Act. A contractual indemnity by the employer of the injured person is necessary to overcome the Workers' Compensation Bar so as at least to pass back to the employer the employer's percentage of responsibility (if not all of the employee's damages in excess of the statutory workers' compensation limits to the employer's liability) which might otherwise be borne by the Protected Party absent the indemnity. The contractual indemnity should also be drafted to pass back to the employer the costs of defense of the employee's claim. In *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983) the Texas Supreme Court held that an employer's negligence could not be considered in a third-party negligence action bought by an employee arising out of an accidental injury covered by workers' compensation insurance. The jury had determined that the accident was attributable as follows: plant owner's negligence (Petrofina) – 43%, employer's negligence (Hydrocarbon Construction) – 42%, and employee's negligence (Varela) – 15%. The supreme court reversed the trial court's reduction of the damage award from $606,800 to $243,924, or 43% of total damages. The supreme court held that the Workers' Compensation Act is an exception to the Comparative Negligence Statute [then Article 2212a, § 2(b)] and disallowed contribution from the employer. The enforceability of a contractual indemnity passing back to the employer a third party's negligence over the "Worker Compensation Bar" has been upheld. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990). The Texas Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold another person harmless for a judgment or settlement resulting from injury or death of an employee "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." Texas Workers' Compensation Act, TEX. LABOR CODE § 417.004, repealing TEX. REV. CIV. STAT. ANN. Art. 8308-4.04, formerly Art. 8306, § 3(d).

[38] **Survives Termination of Lease.** This provision is added to assure the Protected Party that the contractual indemnity does not terminate like the other covenants on the end of the Lease Term. Note, however, that the indemnity does not expressly state that it covers Injuries occurring after the end of the Lease Term but attributable acts or omissions of the Indemnified Party prior to the end of the Lease Term. The indemnity should be revised to address Injuries occurring in the Premises after the Term attributable to acts or omissions of Tenant during the lease term.

[39] **"Caused".** See discussion of Causation Triggers to indemnity in Article.

[40] **Indemnity for Protected Party's Sole Negligence.** Tenant's indemnity in Retail Lease ¶ *B.1.q* covers all Injuries occurring in the Premises "even if caused **in whole** or in part by the ordinary negligence of Landlord." Thus Tenant is indemnifying Landlord for its **sole negligence**, a risk not covered by the standard additional insured endorsement and likely not covered by the "insured contract" provisions of the Tenant's CGL policy. In order to effect this coverage, Tenant will have to have its carrier issue a manuscripted

endorsement to its policy. If Tenant does not obtain such manuscripted endorsement, it will find itself in the position of indemnifying Landlord for a liability not reinsured by Tenant's CGL policy.

Standard Endorsement to Additional Insured Coverage. In 2004 ISO revised several of its additional insured endorsement forms to limit coverage to injuries and damages **"caused, in whole or in part**" acts or omissions of the named insured (e.g., the Tenant).

Standard Endorsement to "Insured Contract" Definition. Additionally, ISO issued a new CGL policy amendment form, **CG 24 26 07 04** Amendment of Insured Contract Definition. This amendment form amends the definition of "insured contracts" to limit assumed tort liability to injury or damage "caused, in whole or in part" by (the named insured).

A Tenant's CGL policy must be reviewed to determine if either or both of these amendment have been added to the policy. An argument exists as to whether this amendment excludes the sole negligence of the Landlord, as it does not expressly state that the additional insured's sole negligence is excluded from the definition of "insured contract."

[41] **"In Whole or In Part": Comparative Indemnity-Indemnifying for One's Own Share of Injury Caused by the Concurrent Negligence of the Protected Party and the Indemnifying Person.** The "**in whole ... by ... Landlord**" language expressly addresses the issue as to whether the Protecting Party's indemnity covers an Injury caused "solely" by the negligence of the Protected Party. The "**in part ... by ... Landlord**" language expressly addresses the issue as to whether the Tenant's (the Indemnifying Person's) indemnity is only as to Injuries caused solely by the acts or omissions of the Landlord (the Protected Party) or also covers Injuries caused in part by other persons. However, This language may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence. The indemnity provisions do not expressly state that the Protected Party is indemnified for the liability it has due to the negligence of the Indemnifying Person. This may result in the Protected Party being indemnified by the Indemnifying Person for the portion of the liability attributable to the Protected Party's negligence but not for the portion attributable to the Indemnifying Person's negligence. For example, if an employee of the Tenant is injured in the Premises and suit results. Under the facts of the case, the employee's injuries are the result of the joint negligence of "Landlord" and "Tenant." The injured employee is barred from suing its employer (the Tenant) by the Workers' Comp Bar and thus sues the Landlord. Landlord calls on Tenant to defend Landlord from suit relying on Tenant's indemnity in Lease ¶ A.18. Tenant defends. The jury determines that Landlord was 20% negligent and Tenant was 80% negligent. Jury determines damages to the employee are $1,000,000. Landlord seeks indemnity and contribution from Tenant. Tenant pays the 20% allocable to Landlord's 20% share of the award = $200,000. Tenant does not pay the $800,000 attributable to its negligence. Tenant argues that it did not indemnify Landlord for the share of the liability attributable to Tenant's share of the negligence! The Texas Supreme Court in *Ethyl* held that, if indemnity is sought by the Indemnified Party for the concurrent negligence of the Indemnifying Party, the indemnity has to so expressly state. The court termed this claim as one for "**comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987).

[42] **"Ordinary Negligence".** In Lease ¶A.18 Tenant indemnifies Landlord against Landlord's liability for Injuries occurring in the Premises even if the Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord. This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Tenant for "all liabilities arising out of use of the Premises", "such as the liability of the Landlord due to its negligence or strict liability or for injuries to the Tenant's employees arising out of the sole or concurrent negligence of the Landlord. It thus indemnifies "Landlord" for the "Landlord's" sole and contributory negligence. In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co*., 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement. In *Ethyl*, the court observed

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that true intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine. The express negligence test replaced the "clear and unequivocal" test....

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law. *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994). The indemnity must expressly state that it indemnifies the Protected Party for liabilities caused in whole or in part by its negligence and not leave it to inference. For instance, "x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by the gross negligence or willful misconduct of y" will not be enforced to indemnify y for loss caused by its negligence.

[43] **"Strict Liability".** In order to protect a Protected Party for liability incurred by it under the doctrine of strict liability (liability without fault), the indemnity provision shifting this liability to the Indemnifying Person in order to be enforceable must expressly state that the Indemnifying Person indemnifies the Protected Party for its strict liability. In ¶A.18 Tenant covenants to indemnify Landlord all liabilities that are imposed on Landlord for Injuries occurring in the Premises, "even if (the) Injury is caused ... by the strict liability of Landlord." The fair notice doctrine has been extended to cases involving strict liability. The Texas Supreme Court held in *Houston*

Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co., 890 S.W.2d 455 (Tex. 1994) that an indemnity agreement will include indemnification for strict statutory liability only if the agreement expressly states that the Indemnifying Person is to be liable for the Protected Party's strict liability. The court found that fairness dictates that such an "extraordinary shifting of risk" must be clearly and specifically expressed as to non-negligence based statutory strict liability in order to be enforced. The court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.,* 890 S.W.2d 455 (Tex. 1994) in passing recognized that indemnity provisions shifting liability arising out of strict products liability are similarly enforceable, if fair notice has been given. *Citing Rourke v. Garza,* 511 S.W.2d 331, 333 (Tex. Civ. App.—Houston [1st Dist.] 1974), ***aff'd***, 530 S.W.2d 794 (Tex. 1975)--in which the indemnity clause was held not to have been worded sufficiently so as to include strict products liability; *Dorchester Gas Corp. v. American Petrofina, Inc.* 710 S.W.2d 541, 543 (Tex. 1986)--also, which held that the indemnity clause in question did not clearly require the indemnitor to indemnify the indemnitee against strict products liability. The Dallas court in *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.—Dallas 1999, *no writ*)[an alarm security products liability case where the tenant indemnified the alarm company from claims by third parties, which included the claim of the landlord] found that the following provision clearly and specifically covered the Protected Party's negligence, breach of warranty, and strict product liability:

> When purchaser (Arthur's Garage), in the ordinary course of business, has the property of others in his custody, or the alarm system extends to protect the property of others, purchaser agrees to and shall indemnify, defend, and hold harmless seller, its employees and agents for and against all claims brought by parties other than the parties to this agreement. This provision shall apply to all claims, regardless of cause, including seller's performance or failure to perform, and including defects in products, design, installation, maintenance, operation or non-operation of the system, whether based upon negligence, active or passive, warranty, or strict product liability on the part of seller, its employees or agents, but this provision shall not apply to claims for loss or damage solely and directly caused by an employee of seller while on purchaser's premises.

See also Helmerich & Payne Int'l Drilling Co. v. Swift Energy Co., 180 S.W.3d 635 (Tex. App.–Hou. [14th Dist.] 2005, no pet. h.).

One of the most common forms of strict liability impositions arises under the environmental laws. The Fifth Circuit has addressed indemnifications for strict liability under environmental protection laws in *Fina, Inc. v. ARCO*, 200 F.3D 266 (5th Cir. 2000). In *Fina* the court had to determine the enforceability of two indemnity provisions, the first in a 1969 sales contract between ARCO and BP Oil Company (the "**ARCO/BP Agreement**") as to a refinery located in Port Arthur, Texas being acquired by BP from ARCO, and the second in a 1973 sales contract between BP and Fina (the "**BP/Fina Agreement**") whereby Fina acquired the refinery from BP. Fina sued BP and ARCO for $14,000,000 in investigatory and remedial response costs it incurred after it discovered contamination at the refinery in 1989. Fina sought contribution from BP and ARCO under CERCLA. BP counterclaimed that the liability was covered in Fina's indemnity of BP in the BP/Fina Agreement. ARCO counterclaimed that the liability was covered by the indemnity in the ARCO/BP Agreement was assumed by Fina by the BP/Fina Agreement. The BP/Fina Agreement contained an express choice of laws provision choosing Delaware law. The ARCO/BP Agreement was silent as to applicable law. The indemnity provisions are the following:

Insured Contract Provision:

ARCO/BP Agreement. BP shall indemnify, defend, and hold harmless ARCO ... against all claims, actions, demands, losses or liabilities arising from the ownership or the operation of the Assets ... and accruing from and after Closing ... except to the extent that any such claim, action, demand, loss or liability shall arise from the gross negligence of ARCO.

BP/Fina Agreement. Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

As to the BP/Fina Agreement the court first determined that it would uphold the parties choice of Delaware law as the court could not discern a fundamental public policy of the State of Texas that would be violated by applying the "clear and unequivocal" test applicable to the enforceability of indemnity provisions covering the Protected Party's negligence. The court then held that the "all claims" language in the BP/Fina Agreement clearly covered liabilities arising under CERCLA, even though CERCLA was not enacted until 1980. The court noted that unlike Texas no Delaware case had addressed the applicability of the clear and unequivocal test to claims based on strict liability. The court found that the same policy reasons that existed in Texas' extension of the express negligence doctrine to strict liability cases also existed in Delaware to extend the clear and unequivocal test to strict liability claims in interpreting indemnities. The court rejected BP's argument that normal contract rules of interpretation should apply to interpreting the indemnity. BP argued that the clear and unequivocal test should not apply to indemnification for prior acts giving rise to potential future liability (with "past" and "future" being determined by reference to the time at which the indemnity provision was signed). The court rejected BP's argument that under Texas law the express negligence doctrine is inapplicable to indemnities for past conduct giving rise to potential future liability and therefore similarly the court should find that Delaware would not apply the clear and unequivocal test to potential future liability for past acts. The court stated,

> Even as to Texas law, it is not at all clear that BP's conclusion is correct. The language used by the Texas courts is ambiguous: "Future negligence" might refer to future negligent conduct, but it also might refer to future claims based on negligence. True, the Texas rule does clearly distinguish between (1) indemnification for past conduct for which claims have already been filed at the time the indemnity provision is signed and (2) indemnification for future conduct for which claims could not possibly have been filed at the time the indemnity provision was signed. Still, no Texas case has addressed the applicability of the rule to the rare situation in which a party attempts to

invoke the protection of an indemnity agreement against a claim filed *after* the indemnity was signed but arising from conduct that occurred *prior* to signing of the indemnity.

The court held that under Delaware law the indemnity in the BP/Fina Agreement did not clearly and unequivocally require Fina to indemnify BP for its strict liability under CERCLA that arose after the indemnity agreement (the "future claim") for conduct prior to the indemnity agreement. As to ARCO's "circuitous indemnity obligation" being enforceable against Fina, the court held that the ARCO/BP Agreement did not pass the fair notice test under Texas law and would not pick up strict liability claims for ARCO's future strict liability for its past conduct. The court noted that Fina's claims under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq*., and § 361.344 of the Texas Solid Waste Disposal Act similarly would not be barred by the indemnity.

See Dent v. Beazer Materials and Services Incorporated, 156 F.3d 523 (4th Cir. 1998). Conoco (the landlord and the Protected Party leased to Beazer (the tenant and the Indemnifying Person) a parcel of property. The indemnity provided that "[Beazer] agrees to save [Conoco] harmless from any and every claim arising out of the use by [Beazer] of the demised premises." Den (the owner of an adjoining parcel) sued Conoco to recover environmental "response" costs under CERCLA. The court concluded that Conoco was entitled to indemnity because the response cost claim arose out of Beazer's use of the leased premises.

[44] **"But Will Not Apply To"; "Except Sole Negligence of the Protected Party".** The drafter of an indemnity clause cannot use the exclusion clause as a means of impliedly including within the coverage clause by implication items not excluded. In *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987), the Texas Supreme Court found that the following provision **failed** the express negligence standard since the provision stated what was not to be indemnified claims resulting from the sole negligence of the premises owner rather than expressly stating that the premises owner was to be indemnified from its own negligence.

Insured Contract Provision:

> Contractor agrees to ... indemnify ... owner from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... ***excepting only*** claims arising out of accidents resulting from the ***sole negligence*** of owner. (Emphasis added by author.)

Linden-Alimak, Inc. v. McDonald, 745 S.W.2d 82 (Tex. App.—Ft. Worth 1988, *writ denied*). *Texas Utilities Electric Co. v. Babcock & Wilcox,* 893 S.W.2d 739 (Tex. App.—Texarkana 1995, *no writ*).

"**Whether**"; "**Including, Even If"; "Regardless Of…."**

"Whether" has been interpreted to mean "***including, even if*** ... ." in *B- F-W Const. Co., Inc. v. Garza*, 748 S.W.2d 611 (Tex. App.—Ft. Worth 1988, *no writ*). The Fort Worth Court of Appeals held that the language "***regardless of*** any cause or of any fault or negligence of Contractor" expressly stated the intent of the parties that the subcontractor would indemnify the contractor against the contractor's negligence. The indemnity provision stated

Insured Contract Provision:

> Subcontractor (Garza Concrete) shall fully protect, indemnify and defend contractor (B-F-W) and hold it harmless from and against any and all claims, demands, causes of action, damages and liabilities for injury to or death of Subcontractor, or any one or more of Subcontractor's employees or agents, or any subcontractor or supplier of Subcontractor, or any employee or agent of any such subcontractor or supplier, arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to any work or operations of Subcontractor or Contractor or any other contractor or subcontractor or party, or otherwise in the course and scope of their employment, and regardless of cause or of any fault or negligence of Contractor. (Emphasis added by author.)

[45] **"Gross Negligence".** See discussion of indemnification for gross negligence in Article.

[46] **Common Areas.** Landlord's indemnity is for all Injuries occurring in any portion of the Common Areas, even if the Injury is caused in whole or in part by the negligence of the Tenant.

[47] **ISO CG 20 10 04 13 Primary and Noncontributory – The "Other Insurance" Condition. ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition was introduced in 2013 by ISO to provide an endorsement form to be added to the Named Insured's policy (the protecting party's policy) to reiterate that it provides "primary" coverage and that its issuer "will not seek contribution from any other insurance available to an additional insured". Note, however, that Provision (2) of this endorsement requires that the written agreement of the additional insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured's insurance is primary and will not seek contribution from the additional insured's other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that an ISO CG 20 10 endorsement be added to the Named Insured's policy may not achieve the Additional Insured's objectives, if the written agreement itself does not also specify that the additional insured coverage on the Named Insured's policy is "primary and noncontributory" plus contain language defining what is meant by primary and noncontributory. Note that this new endorsement is worded to apply only where the additional insured is a Named Insured. Many of the parties that require additional insured protection are not named insureds under a CGL policy, *e.g.*, officers, directors, and employees of a primary additional insured. Also note that this new endorsement provides

that it applies only if the person or entity is named as an additional insured by an endorsement. Also, note this endorsement endorses the Named Insured's Commercial General Liability Policy and is not an endorsement to the Named Insured's umbrella or excess policy. This result might be avoided if the umbrella or excess policy provides that it is primary and does not require the additional insured's policy to contribute, and the additional insured's policy does not provide that it contributes along with other insurance above the primary contributing policies. This desired result of an additional insured is exacerbated by the standard policy's "other insurance" language that provides the policy is "Excess over: … (b) Any other primary insurance available to you covering liability … for which you have been added as an additional insured." The additional insured's policy does not state it is excess over umbrella policies of the Named Insured on which it has been added as an additional insured.

[48] **ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** The **ISO CG 20 10 04 13** Additional Insured Endorsement, is used to schedule an owner (a landlord), a lessee or a contractor on a named insured's CGL policy. It is used to schedule a landlord on the tenant's CGL policy and on a tenant's contractor's CGL policy to schedule a landlord on a tenant's CGL policy.

[49] **ISO CG 20 11 Additional Insured – Managers or Lessors of Premises.** This endorsement is used when a landlord or the property manager, or both, is to be listed as an additional insured on the tenant's liability insurance policy. A common risk transfer strategy is for a landlord to provide in its lease that its tenant indemnify and make the landlord and its property manager an additional insured on the tenant's CGL policy. These provisions recognize that the tenant's occupancy creates an additional liability exposure to the landlord for injuries and property damage resulting from a tenant's activities.

[50] **ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations.** This endorsement, **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by "your work" "at the location described in the Schedule" "performed for that additional insured" and "included in the products-completed operations hazard". Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk. It was introduced in 2001 as a companion to ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization, which in 2001 was revised to limit its coverage to "ongoing operations" of the Named Insured at the location designated in the Schedule in the face of the form and to expressly exclude at Paragraph B injury and damages occurring after work completion.

[51] **ISO CG 20 38 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status For Other Parties When Required in Written Construction Agreement.** This form was added by ISO in 2013 to its list of additional insured endorsement forms. Paragraph **.2** extends additional insured coverage to "Any other person … you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above." Make sure that, if automatic additional insured status is being afforded and there is not a direct contract between the Named Insured and the Additional Insured, **ISO CG 20 38** is the appropriate endorsement form to attach to the Named Insured's policy. Your examination of the Certificate of Insurance will not confirm which automatic additional insured endorsement form is part of the Named Insured's policy. Many times the parties' written agreement has a laundry list of Additional Insureds. In such circumstances it is not assured that the Insurer will be willing to extend additional insured status to numerous entities with which the Named Insured does not have a contract. **CG 20 38** at Paragraph **B.2** excludes coverage for liabilities arising out of the products and completed operations hazard. Also, at Paragraph **B.1** the 2013 revision to this endorsement added an exclusion for professional services, including the additional insured's hiring, training or monitoring of employees who perform professional services themselves.

[52] **ISO CG 21 39 10 93 Contractual Liability Limitation.** In addition to additional insured coverage, Contractual Liability Coverage is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. **ISO CG 21 39 10 93** Contractual Liability Limitation is one of the most egregious endorsements in the insurance industry. The provision of Contractual Liability Coverage includes a series of definitions of an "insured contract." The first five definitions are referred to as incidental provisions, but the sixth definition is the provision that provides for the contractual assumption of tort liability. The sixth type of "insured contract" is most frequently the basis of insurance of a Named Insured on its indemnity of third parties (*e.g.*, indemnity for injuries to an employer's employees; indemnity for injuries to a subcontractor's employees). The **CG 21 39** deletes this sixth definition in its entirety, deleting coverage for an indemnitor's indemnity of a third party for its negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer, unless its indemnity falls within one of the five defined "insured contracts". Anti-Indemnity Statutes in many states preclude enforcement of indemnities as to a third party's negligence, sole or even concurrent, except in statutorily limited circumstances.

[53] **ISO CG 24 26 Amendment of Insured Contract Definition.** This endorsement amends the definition of "insured contract" to limit contractual liability coverage insuring the named insured's indemnities for the Protected Party's tort liability to bodily injury and property damage *caused in whole or in part by* the named insured (the Protecting Party). This causation language was added by ISO to eliminate from the Contractual Liability Coverage of "insured contracts" the sole negligence of the indemnified party. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer.