

2001 DRAFTING REQUEST

Bill

Received: 09/10/2001

Received By: nelsorp1

Wanted: As time permits

Identical to LRB:

For: John Gard (608) 266-2343

By/Representing:

This file may be shown to any legislator: NO

Drafter: nelsorp1

May Contact: Michael Bright, 257-6544

Addl. Drafters:

Subject: Courts - immunity liability

Extra Copies:

Submit via email: YES

Requester's email: Rep.Gard@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Indemnification agreements in construction contracts

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	nelsorp1 09/25/2001	jdye 09/25/2001					
/1			kfollet 09/26/2001		lrb_docadmin 09/26/2001	lrb_docadmin 10/29/2001	

FE Sent For:

└ none needed <END>

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1/?	nelsorp1	1/25 jld	10/1/01 eff	10/1/01 eff			

FE Sent For:

<END>

Kunkel, Mark

From: Schoenfeldt, Jeff
Sent: Monday, September 10, 2001 12:57 PM
To: Kunkel, Mark
Subject: Construction contract language



revisions83001.rtf

Attached is a copy of suggested statutory language that I spoke of in my message. It is straight-forward drafting and (apparently) we need the language ASAP.

Again, we are simply looking for drafting - I don't want to put my boss's name for any kind of support on it yet.

Thanks,

Jeff Schoenfeldt
Director of Communications, Legislative Assistant
Office of Representative John Gard
Assembly Chairman, Joint Committee on Finance
Room 308 East, State Capitol Building
Madison, Wisconsin 53708
Phone: 608/266-2343
jeff.schoenfeldt@legis.state.wi.us

Lobby
Michael Bright
257-6544

See 01-1770

Negotiating the troubled waters of risk transfer (Part II)

by Brian Cabbage, ASA Construction Law and Contracts Counsel

[Editor's note: This article is continued from the June/July 2001 issue of *The Subcontractor*.]

Next, don't forget to replace the "additional insured" requirements with an agreement to provide Owners and Contractors Protective (OCP) coverage instead. Otherwise, you have not gained a thing with a comparative negligence indemnity. As an additional insured for absolutely everything "arising out of" your work, the general can call up your carrier, on your dime, and make claims on your policy for accidents that it causes. Recall *Chevron v. Bragg*, where the owner, Chevron, gassed two Bragg employees with toxic hydrogen sulfide fumes, causing severe injuries. Chevron admitted that it was solely at fault, but the accident still "arose out of" Bragg's work: the reasoning was that the employees would not have been there if Bragg had not been on the job. So Bragg had to defend and hold Chevron harmless from the personal injury lawsuits, notwithstanding the fact that the indemnity clause did not cover it, because the "additional insured" requirement did cover it. Bragg even had to cover the deductibles.

What happens when the general hits the limits on your general liability policy? For one thing, no coverage is left for you. The policy is all used up. If the claims exceed the policy, you pay for those, too. Then your experience rating hits the ceiling, along with your premiums, whether or not you had any responsibility for the accident. Maybe your carrier just drops you like a ton of bricks. How high are your limits, and how many insureds can make claims on your policy? OCP, on the other hand, is a separate policy with separate limits. That is better coverage for the general. Think about it: If you make numerous claims on your own general liability policy, and then the general has a claim, there might not be much coverage left. But OCP is always there. It is primary coverage, which means that it gets all used up before the general has to call its own

carrier. It provides immediate defense, which is just what the general wants. It is limited to coverage for the general's vicarious, pass-through liability for your acts, and for the "general supervision" decisions that the general makes (those "failure to supervise" claims), so in a case like *Chevron* where the owner's own, active operations caused the accident, there may not be any coverage, forcing a Chevron to rely on its own general liability policy. But what could possibly be wrong with that? The policy can be endorsed to add the architect, the owner, and whomever else they want named as "additional insureds." The only real difference is that the general might have to be responsible for its own mistakes when it self-performs. Does the general really want to force you to pay for that?

This is another chance to use the A201-1997 as a model of fairness. ¶ 11.3.3 of this document prohibits the owner from requiring the contractor to name additional insureds, period. ¶ 11.3.1, moreover, permits the owner to require the contractor to purchase Project Management Protective Liability (PMPL) insurance, which is very similar to the coverage that OCP provides, but PMPL, unlike OCP, covers *both the owner and the contractor for the entire project*. The insuring clauses in PMPL and OCP are the same; separate coverage for "general supervision" liability is the modern, fair, and generally accepted way to handle "vicarious liability" issues, *not* "additional insured."

When dealing with adamant general contractors, improvise. The contract may say "additional insured," but not specify this or that particular form endorsement, or it may not specify what has to be covered. So ask your agent to re-write the policy endorsement! A lot of them are already doing it. Why should the endorsement say it covers the "additional insured" for everything "arising out of your work," or "arising out of your ongoing operations," as in *Chevron*, when it could limit the coverage with the happier phrase, "but only to the extent of bodily injury and

property damage *caused by* the acts or omissions of the subcontractor or its agents and subcontractors.”

Your agent should be stepping up to the plate for you on these issues, and should discuss options with you, down to the finest details. Make sure you understand what a subcontract would require you to do before you sign it. If your agent will not take the time to sell your customer on OCP, or, as a last ditch ploy, to re-write the “additional insured” endorsement, then your agent should not take your premiums, either.

Last, there is the contract clause that says you waive all of your claims against the general contractor when they are covered by your workers’ compensation policy, or by your general liability policy. That means that when your insurance pays, neither you nor your carrier can recover part of the loss from the general contractor, even if the general caused the accident.

When the waiver covers only claims covered by Builder’s Risk (e.g., A201-1997 ¶ 11.4.7), a waiver is fine. We don’t want the Builder’s Risk carrier suing the subcontractors if the building burns down. And a waiver for OCP is also a fine thing to have. A201-1997 ¶ 11.3.2 requires such a waiver for the PMPL policy. Furthermore, your own carrier could not sue you if you provided an additional insured endorsement, so the waiver for OCP just puts things the way that they ought to be. But when *your* insurer cannot recover from their insurer for the losses that they caused, that means your experience modifier and your premiums are at stake.

Are the waivers okay with your insurance agent? If your insurance company does not agree to the waivers of subrogation in advance, they will completely void your insurance. That will mean that you will not have any insurance at all (this is another important reason to read your contracts!).

So the first line of defense could be to tell the general contractor that it is “out of your hands”; your insurance carrier simply will not accept waivers of subrogation for workers’ comp or general liability. The treatment of the waivers in the A201-1997 is also worth pointing out to the more vehement general contractors. As noted, §§ 11.3.2 and 11.4.7 only contain waivers for claims covered by general supervision insurance (PMPL or OCP) and Builder’s Risk, not for workers’ compensation. Article 13 of the A401-1997 similarly contains no waiver of subrogation among its insurance requirements. § 13.8.1 of the A401-1997 contains a waiver for claims covered by Builder’s Risk. That is where it ends. The “industry standard,” then, is to allow the subcontractor’s workers’ comp insurer to pursue a subrogation claim against a general contractor that causes a workplace injury.

Ultimately, of course, your last line of defense is to call the general contractor’s bluff, and see whether it really will just move on to the next highest bidder. It’s a gamble, but it’s a gamble that you could probably stand to take more often than you do now. Ask yourself how many times you have lost money on a job and how much that particular job is really worth to you before you choose.

For more information, contact Brian Cubbage by e-mail: bcubbage@asa-hq.com, or call (703) 684-3450, ext. 311.

(insert Specialty Contractor Press icon)

Related resources are available from Specialty Contractor Press. *Mastering Subcontracts Reference Guide*, Item #4166, \$49 for members and \$65 for nonmembers. *Risk Transfer Management Kit*, Item #4700, \$99 for members and \$129 for nonmembers.

To order, see page XX.

Nelson, Robert P.

From: Michael P. Bright [mbright@bright-consulting.com]
Sent: Monday, September 10, 2001 7:21 PM
To: Nelson, Robert P.
Subject: FW: Article for Bob Nelson



Contractual risk
transfer part...

-----Original Message-----

From: Donald Croysdale [mailto:croysdal@execpc.com]
Sent: Monday, September 10, 2001 1:17 PM
To: Michael Bright
Subject: Article for Bob Nelson

Michael,

Just checked your e-mail to me. Somehow I sent you the incorrect article (still good reading, but not on OCP and PMPL's). Here is the correct one for Bob.

don

Nelson, Robert P.

To: Schoenfeldt, Jeff
Subject: RE: indemnification draft

I have about a half-dozen drafts ahead of it, so it will be a couple of weeks at least, barring any major changes in my plans.

-----Original Message-----

From: Schoenfeldt, Jeff
Sent: Thursday, September 20, 2001 4:34 PM
To: Nelson, Robert P.
Subject: indemnification draft

Bob,

Sorry to bother you, but I have been contacted by Michael Bright of Bright Consulting regarding an update on the indemnification draft. At your convenience, if you can let me know so I can call back Michael with the status report, I'd appreciate.

Additionally, if you have any questions or wish to contact Michael yourself, his number is 257-6544.

Thanks,

Jeff Schoenfeldt
Office of State Representative John Gard
Room 308 East, State Capitol Building
Madison, Wisconsin 53708
Telephone: 608-266-2343

Nelson, Robert P.

From: Michael P. Bright [mbright@bright-consulting.com]
Sent: Monday, September 10, 2001 7:17 PM
To: Nelson, Robert P.
Subject: FW: Indemnification Draft



legalcounselso.
rtf

-----Original Message-----

From: Michael P. Bright [mailto:mbright@bright-consulting.com]
Sent: Monday, September 10, 2001 6:06 PM
To: Bob.Nelson@legis.state.wi.us
Cc: Donald J. Croysdale
Subject: FW: Indemnification Draft

Bob-

Pursuant to our conversation today, I received the following from Don Croysdale, Executive Director, Subcontractors Assoc.

Note that he welcomes a direct call from you, and I shall encourage such as the technical architecture of this language is very important to the stakeholders.

Please note the attachment below.

Thanks for your swift attention to this matter.

Michael

Attached is an article by ASA national's Construction Law and Contracts Counsel Brian Cubbage, which addresses Owners and Contractors Protective insurance (OCP), Project Management Protective Liability (PMPL) and builder's

risk insurance. Section (4) is the same as what Bob drafted for last session, excepting the specific references to these insurance coverages, beginning on page 3 line 11 "including Owners ... to builder's risk insurance" on line 12. The reason for adding these specific words is to provide assurance to general contractors, owners, etc. that this bill is not intended to interfere with these coverages. Section 4 already said this, in our opinion, but the added phrases are to explicitly make it unambiguous.

Incidentally, [.....] neither OCP nor PMPL is used with any frequency in Wisconsin. The added language of section (3) on page 3, lines 6 to 9 extend additional insured endorsements to cover safe place statute liability, which is the main thing that OCP or PMPL would be providing.

Let me know if Bob needs anything else. He is welcome to call me direct
at
414 276-1743.

Don

"

State of Wisconsin
2001-2002 Legislature

Revisions 8/30/01

2001 Bill

- 1 AN ACT to create 895.491 of the statutes; relating to indemnification and hold
- 2 harmless provisions and additional insured endorsements in construction contracts.

Analysis by Legislative Reference Bureau

Under current law, any provision in an agreement relating to the construction maintenance or alteration of a structure that limits or eliminates tort liability is void. In *Gerdmann v. United States Fire Ins. Co.*, 119 Wis. 2d 367 (Ct. App. 1984), the court held that an indemnity clause in a construction contract was not affected by this law. The current law does not apply to an insurance contract or to a workers' compensation plan.

Under this bill, any provision in or collateral to a construction contract that requires one person (the indemnitor) to indemnify (secure against loss or damage) or hold harmless another person (the indemnitee) for damages, injury or death is void to the extent that the provision applies to acts or omissions of the indemnitee or a person other than the indemnitor's agents or employees. For example, under the bill, if, as part of a construction agreement, the contractor agreed to pay any amount that the owner was required to pay to an injured party as the result of the owner's negligence that occurred during the construction of the building, that part of the agreement would be void. The bill also provides that any additional insured endorsement furnished as part of a construction agreement cannot extend coverage so as to result in one person indemnifying another person for the acts or omissions of that second person.

2001-2002 Legislature

-2-

Revisions 8/30/01

The people of Wisconsin, represented in senate and assembly,
do enact as follows:

1 SECTION 1. 895.491 of the statutes is created to read:

2 **895.491 Certain indemnity provisions in construction contracts void.**

3 **1) In this section:**

4 (a) "Construction contract" means an agreement for architectural services,
5 alterations, construction, demolition, design services, development, engineering
6 services, excavation, maintenance, repair or other improvement to real property,
7 including any agreement to supply labor, materials or equipment for an 8

improvement to real property.

9 (b) "Indemnification or hold harmless clause" means any provision in an 10
agreement that requires an indemnitor to indemnify or hold harmless an indemnitee

11 from or insure or defend an indemnitee against any claim, damage, loss or expense
12 attributable to bodily injury, sickness, disease or death, or to injury to or destruction of 13 tangible
property (other than the Work itself).

14 (c) "Indemnitee" means the person whom the indemnitor is required to
15 indemnify, insure, hold harmless, or defend under an indemnification and hold
16 harmless clause.

17 (d) "Indemnitor" means the person who agrees and is required to indemnify or
18 hold harmless an indemnitee from, or insure, or defend an indemnity against, any
19 claim, damage, loss or expense attributable to bodily injury, sickness, disease or 20 death, or to
injury to or destruction of tangible property (other than the Work itself).

21 (2) Any indemnification or hold harmless clause in or collateral to a construction 22 contract
is against public policy and void to the extent that the clause
23 requires the indemnitor to indemnify or hold harmless an indemnitee from,

1 or insure, or defend an indemnity against, any claim, damage, loss or expense 2
attributable to bodily injury, sickness, disease or death, or to injury to or destruction 3 of tangible

property (other than the Work itself) caused by or arising out of the acts, 4 or omissions of the indemnitee or any other person, except the indemnitor or the 5 indemnitor's agents or employees.

6 (3) Notwithstanding the above, the indemnification and hold harmless clause and 7 the additional insured endorsement may provide that the indemnitor indemnify an 8 indemnitee for losses that the indemnitee incurs because of indemnitee's negligent 9 failure to discover or remedy a dangerous condition created by the indemnitor.

10 (4) This section does not apply to an indemnity agreement executed by an 11 indemnitor in favor of a surety company, or to an insurance contract, including 12 Owners and Contractors Protective (OCP) insurance, Project Management 13 Protective Liability (PMPL) insurance, builder's risk insurance, surety bond or workers' 14 compensation plan. However, any additional insured endorsement furnished in 15 accordance with an agreement in or collateral to a construction contract may not 16 extend coverage to the person covered by that additional insurance if that would 17 result in a violation of sub. (2).

18 **SECTION 2. Initial applicability.**

19 (1) This act first applies to construction contracts entered into on the effective 20 date of this subsection.

21 **SECTION 3. Effective date.**

22 (1) This act takes effect on the first day of the 3rd month beginning after 23 publication.

24 (End)

Wed am

2001 - 2002 LEGISLATURE

3760/1
LRB-17701
RPN:ldjif

DN

2001 BILL

Regen

✓ and hold harmless

1 AN ACT to create 895.491 of the statutes; relating to: indemnification provisions
2 and additional endorsements in construction contracts.

Analysis by the Legislative Reference Bureau

3760/1

Under current law, any provision in an agreement relating to the construction maintenance or alteration of a structure that limits or eliminates tort liability is void. The current law does not apply to an insurance contract or to a worker's compensation plan. In *Gerdman v. United States Fire Ins. Co.*, 119 Wis. 2d 367 (Ct. App. 1984), the court held that an indemnity clause in a construction contract was not void under this law. affected by

Under this bill, any provision in or collateral to a construction contract that requires one person (the indemnitor) to indemnify (secure against loss or damage) or hold harmless another person (the indemnitee) for damages, injury, or death is void to the extent that the provision applies to acts or omissions of the indemnitee or a person other than the indemnitor's agents or employees. For example, under the bill, if, as part of a construction agreement, the contractor agreed to pay any amount that the owner was required to pay to an injured party as the result of the owner's negligence that occurred during the construction of the building, that part of the agreement would be void. The bill also provides that any additional insured endorsement furnished as part of a construction agreement cannot extend coverage

BILL

so as to result in one person indemnifying another person for the acts or omissions of that second person.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

X

1 SECTION 1. 895.491 of the statutes is created to read:

2 **895.491 Certain indemnity provisions in construction contracts void.**

3 (1) In this section:

4 (a) "Construction contract" means an agreement for architectural services,
5 alterations, construction, demolition, design services, development, engineering
6 services, excavation, maintenance, repair, or other improvement to real property,
7 including any agreement to supply labor, materials, or equipment for an
8 improvement to real property.

9 (b) "Indemnification or hold harmless clause" means any provision in an
10 agreement that requires an indemnitor to indemnify or hold harmless an indemnitee

use twice

11 from, or insure or defend an indemnitee against, any claim ~~actions, or causes of~~
12 ~~action for damages, costs, injuries, or death~~ *damage, loss, or expense attributable to bodily injury, sickness, disease,*
or death, or to injury to or destruction of property other than the property improvement

13 (c) "Indemnitee" means the person whom the indemnitor is required to *that is the*
14 indemnify, hold harmless, insure, or defend under an indemnification and hold ~~the construction~~
15 harmless clause. *contract*

16 (d) "Indemnitor" means the person who agrees and is required to indemnify or
17 hold harmless an indemnitee from, or insure or defend an indemnitee against, any
18 ~~actions or claims for damages, costs, injuries, or death.~~

19 (2) Any indemnification or hold harmless clause in or collateral to a
20 construction contract is against public policy and void to the extent that the clause
21 requires the indemnitor to indemnify or hold harmless an indemnitee from, or insure

BILL

SECTION 1

1 damage, loss, or expense attributable to bodily injury,
 sickness, disease, or death, or to injury to or destruction of property,
 other than the property improvement that is the subject of the construction
 or defend an indemnitee against, any claim, actions, or causes of action for damages,
 2 costs, injuries, or death caused by or arising out of the acts or omissions of the
 3 indemnitee or any other person, except the indemnitor or the indemnitor's agents or
 4 employees.

*management protective liability insurance,
 builder's risk insurance,*

5 (2) This section does not apply to an indemnity agreement executed by an
 6 including owners and contractors protective insurance, project, or
 7 indemnitee in favor of a surety company, or to an insurance contract, surety bond, or
 8 or worker's compensation plan. However, any additional insured endorsement
 9 furnished in accordance with an agreement in or collateral to a construction contract
 10 may not extend coverage to the person covered by that additional insured
 endorsement if that would result in a violation of sub. (2).

SECTION 2. Initial applicability.

11 (1) This act first applies to construction contracts entered into on the effective
 12 date of this subsection.

SECTION 3. Effective date.

13 (1) This act takes effect on the first day of the 3rd month beginning after
 14 publication.

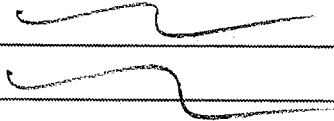
(END)

15 (3) Notwithstanding the above, the indemnification and hold harmless clause and an
 16 additional insured endorsement may provide that the indemnitor indemnify an
 17 indemnitee for losses that the indemnitee incurs because of the indemnitee's negligent
 failure to discover or remedy a dangerous condition created by the indemnitor.

D - Note

I do not see why
these specific insurance
contracts that are listed
in sub. (4) need to be
listed.

RPN



DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3760/1dn
RPN:jld:kjf

September 26, 2001

I do not see why the specific insurance contracts that are listed in sub. (4) need to be listed.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

Emery, Lynn

From: Skoldberg, Alyson
Sent: Monday, October 29, 2001 11:44 AM
To: LRB.Legal
Subject: Draft review: LRB-3760/1 Topic: Indemnification agreements in construction contracts

It has been requested by <Skoldberg, Alyson> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB-3760/1 Topic: Indemnification agreements in construction contracts