

# **RISK ALLOCATION IN THE AIA GENERAL CONDITIONS**

Examination of the A201 in Light of Texas Law

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**TABLE OF CONTENTS****ARTICLE****Page**

CHAPTER 1. INTRODUCTION .....	1
CHAPTER 2. SITE SAFETY .....	2
3.3.1 SITE SAFETY .....	2
CHAPTER 3. DIFFERING SITE CONDITIONS .....	4
4.3.4 CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS .....	4
4.3.5 CLAIMS FOR ADDITIONAL COST .....	4
CHAPTER 4. DESIGN RESPONSIBILITIES .....	5
3.2.1 CONTRACTOR'S REVIEW OF DESIGN DOCUMENTS .....	5
CHAPTER 5. WAIVER OF CONSEQUENTIAL DAMAGES .....	7
4.3.10 CLAIMS FOR CONSEQUENTIAL DAMAGES .....	7
CHAPTER 6. EXTRAORDINARY RISK SHIFTS .....	9
1. Contractual Extraordinary Risk Allocation Provisions .....	9
1.1 Indemnity .....	9
3.18 INDEMNIFICATION .....	10
10.3 HAZARDOUS MATERIALS .....	13
1.2 Insurance .....	15
11.1 CONTRACTOR'S LIABILITY INSURANCE .....	15
11.2 OWNERS'S LIABILITY INSURANCE .....	16
11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE .....	16
11.4 PROPERTY INSURANCE .....	17
1.3 Waivers of Subrogation .....	18
11.4.7 Waivers of Subrogation .....	18
2. Standard Industry Additional Insured Forms .....	20
2.1 ISO Additional Insured Endorsements .....	20
2.2 ISO's CG 20 10 10 01 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization .....	24
2.3 ISO's CG 20 11 10 96 Additional Insured – Managers and Lessors of Premises .....	26
2.4 ISO's CG 20 26 (2004) Additional Insured – Designated Person or Organization .....	27
2.5 ISO's CG 20 37 (2004) Additional Insured – Owners, Lessees or Contractors - Completed Operations .....	29
2.6 AIG - AI Endorsement –Construction and Lease – Exclusion for AI's Negligence .....	31
2.7. Bituminous - Blanket AI Endorsement - Construction – Exclusion for AI's Negligence .....	32
3. "Fair Forms" and Commentary .....	35
Coverage if AI Not More Negligent Than NI .....	35
CHAPTER 7. EXTRAORDINARY RISK SHIFTS - TEXAS LAW .....	36
1. Indemnity .....	36
1.1 Terminology .....	36
1.2 Requirements for Enforceability .....	36
1.2.1 Fair Notice .....	36

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1.2.2	Express Negligence	37
1.2.3	Overcoming the Worker's Compensation Bar	37
1.2.4	Comparative Indemnity	37
1.2.5	Releases, Waivers, Exculpations and Disclaimers	38
1.2.6	Strict Liability	38
2.	Insurance	38
2.1	Contractually Assumed Liability Insurance: Coverage for the Protecting Party	38
2.1.1	Exception to an Exclusion	38
2.1.2	Coverage for Named Insured as Indemnifying Party	39
2.1.3	Named Insured Not Insured for all Contractually Assumed Liabilities	39
2.2	Additional Insurance: Coverage for the Protected Party	40
2.2.1	Purpose	40
2.2.2	Automatic Coverage or by Endorsement	41
2.2.3	Endorsements: ISO or Manuscripted Forms	41
2.2.4	Covered Liabilities	41
3.	Additional Insured's Covered Liabilities	44
3.1	Negligence	44
3.1.1	Its Vicarious Liability for Named Insured's Negligence	44
3.1.2	Its Own Negligence	44
3.2	Interpretation of Additional Insurance Covenants	45
3.2.1	Express Negligence Test Not Applicable to Insurance Covenant	45
3.2.2	Rules for Interpretation	45
3.2.3	Interpretation of Additional Insured Endorsements	47
3.3	Express Exclusion of Additional Insured's Negligence	50
3.3.1	Must Examine the Endorsement	50
3.3.2	2004 Revision to ISO Forms	51
3.3.3	Manuscript AI Endorsement to Limit Coverage to Indemnified Liabilities	51
3.4	Liability for Failure to List Other Party as Additional Insured	52
4.	Protected Party's "Other Insurance"	52
4.1	All Policies Are "Primary" and "Contributing" Unless Amended	52
4.2	Endorsing Named Insured's Policy to be Primary Not the Solution	53
4.2.1	Primary vs. Sole Contributing	53
4.2.2	Endorsing the AI's Policy to Be Excess Coverage	53
4.2.3	Providing both Indemnity Insurance and Additional Insured Insurance	53
5.	Conclusion	54

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## **Risk Allocation in the AIA A201 General Conditions**

An examination of the A201 in light of Texas law

By William H. Locke, Jr.

### **CHAPTER 1. INTRODUCTION.**

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the “deal.” The most common methods by which risk is allocated in a contract are by the use of representations and warranties

This article examines the following risk allocation provisions in the AIA A201: Chapter 2 - ¶ 3.31 Site Safety Responsibility; Chapter 3 - ¶¶ Claims for Concealed or Unknown Conditions, Chapter 4 - ¶¶ 3.2.1 - 3.2.3 Contractor’s Review of Design Documents, Chapter 5 - ¶ 4.3.10 Waivers of Consequential Damages, and Chapters 6 and 7 covering Extraordinary Risks and Risk Shifting Provisions ¶3.18 Indemnity and ¶11.4 Insurance. Chapter 6 includes an extensive explanation of the AIA bodily injury and property damage risk allocation system, the forms developed by Insurance Services Office, Inc. (“**ISO**”) for use by its members to address these risks, including commercial general liability (“**CGL**”) insurance, workers compensation insurance, and business auto insurance, additional insured endorsements, and builders risk insurance. Chapter 7 explains the special aspects of Texas law that make certain aspects of the AIA risk allocation by indemnity and waiver provisions unenforceable in Texas.

**CHAPTER 2. SITE SAFETY.**

The following provisions are from the current edition of the AIA General Conditions (1997 Edition) for use with the AIA A101-1997 Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM and the AIA A111-1997 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the COST OF THE WORK PLUS A FEE with a negotiate Guaranteed Maximum Price. On the left hand side are the AIA contract risk allocation provisions. On the right hand side is the Commentary explaining the risk allocation.

**AIA A201 - General Conditions of the Contract for Construction**

<b>SITE SAFETY</b>	<b>COMMENTARY</b>
<p><b>3.3.1 SITE SAFETY.</b></p> <p><b>3.3.1</b> The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. <i>The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.</i> If the Contract Documents give specific instructions concerning means ... the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means....If the Contractor determines that such means ... may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means ... without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage. [Emphasis added.]</p>	<p><b>3.3.1</b> places control over all construction “means, methods, techniques, sequences and procedures” on the contractor and, accordingly, sole responsibility for job site safety. In addition to making sure all Work is performed safely, the contractor is allocated the responsibility for coordinating all portions of the Work in such a way as to allow the Work to be safely performed.</p> <p>However, the 1997 revised A201 to permit the owner or architect to give instructions to the contractor on how the Work is to be performed. The 1997 revision to the AIA A201, while expressly <u>shifting to the owner</u> liability for contractually-required instructions, it</p> <ul style="list-style-type: none"> <li style="margin-bottom: 10px;">(1) <u>Places an affirmative obligation on the contractor to</u> <ul style="list-style-type: none"> <li style="margin-bottom: 10px;">(1) evaluate the owner/architect directives for safety concerns;</li> <li style="margin-bottom: 10px;">(2) notify the owner and architect of any unsafe means, methods, and techniques so mandated; and</li> <li style="margin-bottom: 10px;">(3) develop safe methods, means, and techniques, or suggest changes to the specified instructions to make them safe.</li> </ul> </li> <li>(2) Allocates to the contractor liability for the safe performance of the mandated work, if the contractor proceeds according to the contractual instructions without proper objection.</li> </ul>

If the contractor is instructed to proceed with the required means, methods, techniques, sequences, or procedures “without acceptance of changes proposed by the contractor, the contractor must do so, but the liability for any resulting loss or damage becomes the sole responsibility of the owner.

**Contractor Objections.**

This provision in the A201 shifts some of the owner’s and architect’s liability for third-party claims to the contractor. This provision may subject the contractor’s employees to increase risk of injury. Delays may arise as the contractor is forced to wait for clarifying instructions. Contractors may as a result argue for the return of the provision to the pre-1997 state, where liability is allocated to a party to the extent that the party is responsible for the construction methods, means, and techniques.

### CHAPTER 3. DIFFERING SITE CONDITIONS.

“**Differing site conditions**” are any on-site subsurface or concealed physical condition that is substantially different from what the contractor reasonably expected and that increases the time and/or money, required to complete the Work.

#### AIA A201 - General Conditions of the Contract for Construction

##### DIFFERING SITE CONDITIONS

**4.3.4 CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor’s cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

**4.3.5 CLAIMS FOR ADDITIONAL COST.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for claims relating to an emergency endangering life or property arising under Paragraph 10.6.

##### COMMENTARY

The A201 provides that the party detecting a differing site condition must promptly notify the other party of this finding before the conditions are disturbed, and no later than 21 days after first observing the condition. The architect is responsible for investigating the situation and determining whether the contractor is entitled to an equitable adjustment of time or money. Such conditions are referred to as “**Type I conditions**” (site conditions are “materially different” from what is indicated in the contract) and “**Type II conditions**” (site conditions are materially different from conditions ordinarily recognized as inherent to the Work called for by the contract).

The 21-day period is to allow the owner the opportunity to investigate the situation before the changed condition is disturbed and before additional work is performed.

If contractor intends to make a claim for price or time adjustment due to differing site conditions, it is required to give a claims notice *before proceeding to execute the work*, except in the case of an emergency affecting the safety of persons or property. If either the owner or contractor is dissatisfied with the architect’s determination of the differing site conditions claim, the A201 provides that the dissatisfied party is required to file its opposition within 21 days of the architect’s findings.

In the absence of an **4.3.4** type provision, Texas common law would permit a contractor to adjust the price or time only if it could prove owner misrepresentation, deceit, or breach of warranty with respect to site conditions. A **4.3.4** type provision allows the contractor to price the project based on normal conditions without an allowance (a “risk premium”) for differing site conditions.

## CHAPTER 4. DESIGN RESPONSIBILITIES.

### AIA A201 - General Conditions of the Contract for Construction

#### DESIGN RESPONSIBILITIES

##### **3.2.1 CONTRACTOR'S REVIEW OF DESIGN DOCUMENTS.**

**3.2.1** Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. *These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents;* however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

**3.2.2** Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that *the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional* unless otherwise provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with the applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.

**3.2.3** (...) *The Contractor shall not be liable* to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents *unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.*

**3.12.10** The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such

#### COMMENTARY

##### **3.12.10's Circumstances Where Design Responsibility Allocated to Contractor**

**3.12.10** provides for design responsibility, and consequent potential design liability, arising out of professional services that are (1) specifically required by the Contract Documents or (2) necessary to carry out the contractor's responsibility for construction means, methods, and techniques.

Whereas **3.12.10** of the A201 stipulate that the architect must specify all design and performance criteria, and that the contractor is not responsible for the adequacy of performance or design criteria that are required by the contract documents, **3.2.1-3.2.3** provide that the contractor is required to study and compare the various design components of the contract documents and other owner-furnished information, take field measurements of existing conditions, and to generally plan its work.

##### **Reporting Requirements**

The A201 places on the contractor the duty to report errors, omissions, or inconsistencies in the architect's design and to notify the architect of any noncompliances with laws, building codes or other regulations. A contractor who knowingly fails to inform the architect of the nonconformity may be forced to pay to correct the errors, inconsistencies, or omissions.

##### **Contractor Objection**

Contractors may object to the inclusion of this provision on grounds that it relieves the architect of its responsibility to review submittals independently of review by the contractor. In any event, the potential risk of design liability arising under **3.2** allocated to a contractor should be considered by owner and contractor in the project's insurance specifications.

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services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will renew, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

## CHAPTER 5. WAIVER OF CONSEQUENTIAL DAMAGES.

“**Damages**” broadly defined encompasses all injury or loss suffered by a person as a result of an act or omission of another person. In construction claims, damages fall into two categories: “**direct damages**” and “**consequential damages**.” “**Direct damages**” are typically immediate and arise naturally from the breach of the contract. Direct damages are the most common form of damages incurred by an injured party, either owner, architect, contractor, or subcontractor. Direct damages are incurred when specific project costs increase as a result of a certain event. For example, a project delay may produce direct damages in the form of increased material, rental, and labor costs. Unless waived or prohibited by contract, contracting parties are usually able to recover direct damages. “**Consequential damages**” are more remote than direct damages and may not naturally flow, or be reasonably foreseeable as a result of breach. They have an indirect link to a damage-producing event. Examples of consequential damages are lost profits and harm to a business’s reputation. Because consequential damages do not directly flow from the event giving rise to the claim, they are harder to prove and recover. There may not be a bright line between what are direct damages and what are consequential damages.

This provision was not included in earlier editions of the A201. This provision of the 1997 AIA A201 is a mutual waiver by Owner and Contractor of a claim for consequential damages, including consequential damages arising out of or relating to the termination of the contract. This waiver includes the contractor’s lost profits and extended home office overhead and the owner’s loss of use claim.

This provision states certain types of consequential damages as being “**included**.” Without clarification by adding “**but not limited to**” some commentators have argued that the listed consequential damages may be the exclusive damages waived.

### AIA A201 - General Conditions of the Contract for Construction

<u>WAIVER OF CONSEQUENTIAL DAMAGES</u>	<u>COMMENTARY</u>
<p><b>4.3.10 CLAIMS FOR CONSEQUENTIAL DAMAGES.</b> The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:</p> <ul style="list-style-type: none"> <li>.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and</li> <li>.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.</li> </ul> <p>This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in the Subparagraph 4.3.10 shall be deemed to preclude</p>	<p><b>Deletion of the Waiver from the Contractor’s Perspective.</b></p> <p>Striking this provision, removes from the contractor the AIA form’s protection against liability for consequential damages suffered by the owner if the contractor’s work proves faulty. This waiver likely covers practically all liabilities suffered by the owner except the cost to repair or replace defective work. For example without this waiver, the contractor is still exposed to a loss of use claim by the owner arising out a contractor’s defective work. Such claim can easily exceed the cost of repair. Retention of the waiver reduces the contractor’s uncertainty as to the magnitude of an owner’s claim.</p> <p><b>Contractor’s Revision.</b></p> <p>Contractor may seek to delete from the waiver “home office overhead, including salaries of home office employees.” In support of this modification, if the contract contains a liquidated damage provision as to claims by the owner against the contractor for failure to complete on time, such liquidated damages include an element of consequential damages incurred by the owner, namely loss of use. A contractor could achieve much the same result by negotiating a per diem</p>

an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

rate to recover its home office expenses as part of its recoverable and compensable delay damages.

**Ambiguity in the Provision.**

This provision excludes “liquidated **direct** damages.” While “liquidated damages” are a common industry term. There is no definition of “liquidated direct damages.” Does this somehow mean that “liquidated **consequential** damages” are not waived?

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**CHAPTER 6. EXTRAORDINARY RISK SHIFTS.****1. Contractual Extraordinary Risk Allocation Provisions.****1.1 Indemnity.**

Chapter 7 discusses the concept of Indemnity and the special requirements imposed by Texas to make indemnities covering an Indemnified Person's liability for its own negligence, whether the liabilities are caused in whole by the Indemnified Person's fault due to its negligent acts or omissions or in part by the Indemnified Person's negligent acts or omissions, or if the Indemnified Person's liability arises without fault due to its strict liability.

Indemnity agreements are comprised of the following elements:

- (1) the person giving the indemnity (the "**Indemnifying Person**"), the person or persons protected by the indemnity (called herein "**Indemnified Persons**"),
- (2) the matters triggering the indemnity (such as a relationship or an event; for example, the Work or Operations of the Indemnifying Person, or the acts or omissions of the Indemnifying Person, the occurrence of an injury or an environmental contamination, or the providing of products and services, or a location such as the Job Site, called herein "**Indemnified Matters**"), and
- (3) the liabilities covered by the indemnity (for example, a claim, loss, liability, damage, attorney's fees, court costs, expert witness fees, called herein "**Liabilities**" and to the extent indemnified called "**Indemnified Liabilities**" and to the extent not indemnified "**Excluded Liabilities**").

There are three types of indemnity agreements.

**Broad Form Indemnity:** Under what is known as "broad form indemnity" the Indemnifying Person agrees to be responsible for any and all Liability arising out of an Indemnified Matter, including Liability that is the result of the sole negligence of the Indemnified Person. Most states, not Texas, prohibit, or severely limit the use of broad form indemnity provision in construction contracts.

**Intermediate-Form Indemnity:** Under an "intermediate-form indemnity" the Indemnifying Person agrees to be responsible for Liability arising out of Indemnified Matters that is caused by the Indemnifying Person's sole fault or negligence, as well as Liability for which the Indemnifying Person and the Indemnified Person are jointly at fault. Under this form of indemnity the Indemnifying Person is not responsible for liability incurred as a result of the sole fault or negligence of the Indemnified Person.

**Comparative (or Limited) Form Indemnity:** Under a "comparative-form indemnity" the Indemnifying Person agrees to be responsible for Liability to the extent that the Liability is caused by the Indemnifying Person, but not to the extent that the Liability is caused by the Indemnified Person.

## AIA A201 - General Conditions of the Contract for Construction

### INDEMNIFICATION

#### 3.18 INDEMNIFICATION.

**3.18.1** To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, 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) including loss of use resulting therefrom, but only to the extent caused in whole or in part by 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 which would otherwise exist as to a party or person described in this Paragraph **3.18**.

**3.18.2** In claims against any person or entity indemnified under this Paragraph **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 Paragraph **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' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

**3.18.3** The obligations of the Contractor under this Paragraph **3.18** shall **not** extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instruction by the Architect, the Architect's

### COMMENTARY

#### **[1] AIA's Attempted Broad Form Shift of Risk from Owner to Contractor for Owner's Contributory Negligence is Unenforceable in Texas as Drafted.**

The AIA risk management system reflected in the AIA A201 seeks to shift the risk of liabilities [3.18.1] "arising out of the Contractor's performance of the Work, if such liabilities are caused in whole or in part by the negligent acts or omissions of the Contractor or by its 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."

#### **Scope of Indemnity**

**3.18.1** is unclear as to whether the owner's negligence is an Indemnified Liability. Contractor's indemnity is worded both as being limited by "**only** to the extent caused by the negligent acts or omissions of the Contractor" but is also clarified by "**regardless** of whether or not such claim ... is caused in part by a party indemnified hereunder." The issue is whether the contractor's indemnity covers **all** Liability arising out of resulting from Contractor's performance of the Work, even if the Liability is in part caused by the negligence of the Owner or Architect.

This indemnity language does not meet either the express negligence test or the fair notice test. As a result it does **not** indemnify the "Owner, Architect, Architect's consultants, and agents and employees of any of them" (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The "regardless of whether ... caused in part by a party indemnified hereunder" does not expressly refer to the negligence, in whole or in part of the Indemnified Persons. *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987); *Fisk Electric Co. v. Daniel Construction Co.*, 888 S.W.2d 813 (Tex. 1994). Thus the exclusion from the Contractor's indemnity to the extent the claims are covered by Project Management Protective Liability insurance purchased by the Contractor for the Owner's protection, is irrelevant as the Contractor's indemnity never comes into play.

consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage. . . .

The failure of the indemnity to be enforceable as an indemnification of the Indemnified Person's negligence also results in the indemnity not being enforceable as to the Indemnifying Person's own concurrent negligence. *Ethyl Corp. V. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987); *Monsanto Co. v. Owens-Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1988, no writ).

As such, the indemnity does not overcome the Workers' Comp bar. *Varela v. American Petrofina Co., of Texas*, 658 S.W.2d 561 (Tex. 1983).

**[2] AIA's Language Does Not Cover Cost of Defense.**

The AIA language does not expressly recite that the Indemnifying Person is to defend the Indemnified Persons and as a result the cost of defense is not covered even though attorney's fees are recited as an Indemnified Liability. Additionally, due to the failure to meet the express negligence test the cost of defense are not covered even if the Indemnified Person is negligent. *Fisk Electric Co. v. Daniel Construction Co.*, 888 S.W.2d 813 (Tex. 1994); *Glendale Construction Services, Inc. V. Accurate Air Systems, Inc.* 902 S.W.2d 536 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1995, writ denied).

**[3] Unnamed Persons are Not Implied to be Indemnified Persons.**

Care should be taken in listing all persons who are to be indemnified. For example, the failure to list partners, shareholders, officers, principals and consultants of an Indemnified Person results in their not being indemnified. *Melvin Green, Inc. V. Questor Drilling Corp.*, 946 S.W.2d 907 (Tex. App.–Amarillo 1997, no writ).

**[4] AIA Form Does not Expressly List Punitive Damages or Fines as an Indemnified Liability.**

**[5] AIA Form Does Not Expressly Cover Legal Costs Beyond Attorney's Fees Incurred to Enforce Indemnity.**

The failure of the AIA form to cover the Indemnified Persons' legal costs (copying, filing fees, courier fees) in enforcing the indemnity may result in such costs not being an Indemnified Liability. *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.–Dallas 1999, no writ).

**[6] AIA Form Fails to Address Settlement Rights.**

The AIA form fails to address settlement. This may result in the loss of indemnity upon settlement of the liability. *MAN GHH Logistics GMBH v. Emscor, Inc.*, 858 S.W.2d 41 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1993, no writ); *Liberty Steel Co. V. Guardian Title Co. Of Houston, Inc.* 713 S.W.3d 358 (Tex. App.–Dallas 1986, no writ). This may result in the loss of an Indemnified Person's attorney's fees upon settlement. *Humana Hospital Corp. V. American Medical Systems, Inc.*, 785 S.W.2d 144 (Tex. 1990).

**[7] The AIA Form Fails to Include as an Indemnified Matter Strict Liability of an Indemnified Person.**

The failure expressly to indemnify the Indemnified Person for liability imposed on it due to strict liability in tort, statutory environmental liability, or strict products liability results in these types of liabilities not being indemnified. *Houston Lighting & Power Co. V. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994); *Fina, Inc. V. ARCO*, 200 F.3d 266 (5<sup>th</sup> Cir. 2000); *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App.–Houston [1<sup>st</sup> Dist.] 1974), *aff'd*, 530 S.W.2d 794 (Tex. 1975); *Dorchester Gas corp. v. American Petrofina, Inc.* 710 S.W.2d 541 (Tex. 1986); *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.–Dallas 1999, no writ).

**[8] The AIA Form Does Not Contain a Mutual Indemnity by Owner of Contractor for Owner's Comparative Share of Negligence.**

The AIA form does not contain a mutual indemnity by Owner of Contractor. The AIA risk management system seeks to pass to the Contractor through the Contractor's indemnity liability for injuries caused by the joint negligence of Contractor and the Indemnified Persons (*i.e.*, the Owner, Architect, Architect's consultants, and agents and employees of any of them). Also, the failure of the AIA form to have a mutual indemnity by the Owner of the Contractor results in the Worker's Comp. Bar preventing recovery by Contractor against Owner for Owner's share of negligence for injuries to Owner's employees. *Varela v. American Petrofina Co. Of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983).

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**HAZARDOUS MATERIALS**


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**10.3 HAZARDOUS MATERIALS.**

**10.3.1** If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop work in the affected area and report the condition to the Owner and Architect in writing.

**10.3.3** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, 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 in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph **10.3.1** and has not been rendered harmless, 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) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

....

**10.5** If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

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**COMMENTARY**


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"**Hazardous substances**" are broadly defined in **10.3.1** as a material or substance encountered on the site that presents the "risk of bodily injury or death." If a contractor identifies a hazardous substance on site "for which reasonable precautions" would be inadequate to prevent foreseeable injury, the contractor is required to suspend operations in the affected area and report the condition to the owner and architect in writing. Work can resume in that area only after the hazardous substance is rendered harmless. If a material delay results, the contractor is entitled to a time and price adjustment.

**Indemnity**

A201 ostensibly requires the owner to indemnify contractor, architect and subcontractors for claims or damages arising out of or related to the presence of hazardous substances on site, including costs of removal, containment, and injury, except for such liabilities that arise for hazardous substances brought to the site by the contractor.

**AIA's Attempted Broad Form Shift of Risk from Contractor to Owner of Contractor's Contributory Negligence Due to Hazardous Materials at Owner's Premises is Unenforceable in Texas as Drafted.**

A similar malady exists as to the indemnity contained in **10.3.3**, which is an indemnity by the Owner of the Contractor as to claims against the "Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them ... provided that such damage, ... is not due to the sole negligence of a party seeking indemnity." This indemnity language does **not** meet either the express negligence test or the fair notice test.

As a result it does not indemnify the "Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them" (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The phrase "provided that such damage, ... is not due to the sole negligence of a party seeking indemnity" does not expressly indemnify the Indemnified Persons for hazardous materials liability arising out of either the concurrent negligence of the Indemnified Persons or their non-negligent strict liability.

The reiteration in Paragraph **10.5** of the **10.3.3** indemnity by the Owner is also subject to the same maladies; it is neither conspicuous and does not expressly state that the Contractor is being indemnified for its strict liability.

#### **Contractor Objections**

**10.5** places the following limits on the owner's indemnity: (1) it excludes liabilities occurring if the contractor is negligent thereby excluding from the indemnity cases where the owner and contractor are "**concurrently negligent**" and (2) it excludes liabilities from owner's indemnity where they are not "**solely**" the result of Contractor's performance of the Work (leading to disputes as to what is meant by "solely.>").

## 1.2 Insurance.

### LIABILITY INSURANCE

#### 11.1 CONTRACTOR'S LIABILITY INSURANCE

**11.1.1** The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

.1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;

.2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;

.4 claims for damages insured by personal injury liability coverage;

.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

.6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;

.7 claims for bodily injury or property damage arising out of completed operations; and

.8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

**11.1.2** The insurance required by Subparagraph **11.1.1** shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

### COMMENTARY

**No Requirement Imposed on Contractor to Purchase CGL Insurance to Protect Owner or to List Owner as AI on Contractor's CGL.**

The liability insurance coverage being provided by Contractor pursuant to Paragraph **11.1** protects the Contractor against liability for liabilities "which may arise out of or result from the Contractor's operations...."

**Since AIA's 3.18.1 is Unenforceable in Texas to Indemnify Owner for its Negligence, AIA's 11.1.1.8 is Requirement for Contractor to Provide Contractual Liability Insurance Protection is Irrelevant and Ineffective.**

This provision does not directly protect the Owner, except to the extent of the protection afforded by Clause **11.1.1.8** which protects the Contractor for "claims involving contractual liability insurance applicable to the Contractor' obligations under Paragraph **3.18.**" Clause **11.1.1.8** is not direct insurance in favor of the Indemnified Persons. It is indirect protection to the extent that the **3.18** indemnity is effective. Since **3.18** is not enforceable in Texas, an issue exists as to whether the "assumed liability on an insured contract" coverage under the Contractor's CGL policy will provide the Indemnified Persons any protection.

**AIA Form Does Not Impose Requirement on Owner to Maintain Liability Insurance or Require Owner to Have its Other Contractors Maintain Insurance.**

#### **Need Copy of AI Endorsement**

This provision should be modified to provide that a copy of the AI endorsements are to be furnished to the AI prior to commencement of Work.

**11.1.3** Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph **11.1** shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire initial at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph **9.10.2**. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

## **11.2 OWNERS'S LIABILITY INSURANCE**

**11.2.1** The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

## **11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE**

**11.3.1** Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's **vicarious liability** for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses **11.1.1.2** through **11.1.1.5**.

**11.3.2** To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

### **AIA Insurance Provisions Place upon Owner the Obligation to Carry Liability Insurance to Protect Owner Against Injuries Arising out of Contractor's Work or Operations Caused by Owner's Contributory Negligence.**

Paragraph **11.3** provides the Owner with an option at the Owner's expense to require the Contractor to purchase Project Management Liability insurance for the "Owner's, Contractor's and Architect's **vicarious liability** for construction operations under the Contract."

### **AIA Provisions Prohibit Owner from Requiring Contractor to Name Owner as an AI on Contractor's CGL Policy.**

Subparagraph **11.3.1** provides that "Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner." Subparagraph **11.3.3** provides that the "Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as **additional insureds**."

Thus, the AIA system contemplates that the most common form of risk shifting device will **not** be employed to protect the Indemnified Persons for the very risk that were attempted to be shifted to the Contractor under the indemnity in Paragraph **3.18**, the risk of liability for concurrently negligently caused liabilities.

A common method of protecting the Owner from the risk of liability arising out of its concurrent negligence is to require the Contractor to have its insurance company list the Owner and the other Indemnified Persons as additional insureds under an ISO Additional Insured Endorsement, such as an ISO CG 20 10 Additional Insured - Owners, Lessees or Contractors – Scheduled Person or Organization (See **Chapter 6 Form 2.2**) or an ISO CG 20 26 Additional Insured - Designated Person or Organization (See **Chapter 6 Form 2.4**).

**11.3.3** The Owner shall **not** require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Paragraph 11.1.

#### **11.4 PROPERTY INSURANCE**

**11.4.1** Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project.

.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

.2 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

**11.4.6** Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverage required by this Paragraph 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or

#### **Completed Operations Risk Coverage**

Additional insured status as to liabilities arising after final completion of a contractor's work may be endorsed on to the contractor's CGL policy by ISO CG 20 37. Additional Insured - Owners, Lessees or Contractors – Completed Operations (See **Chapter 6 Form 2.5**). See the Commentary following each of these forms.

allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

### 1.3 Waivers of Subrogation.

#### WAIVERS

**11.4.7 Waivers of Subrogation.** The Owner and Contractor **waive** all rights against (1) **each other** and any of their **subcontractors**, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors, agents and employees described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils or other causes of loss to the extent **covered by property insurance** obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary.

The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

#### COMMENTARY

**Both a Covenant to Obtain a Waiver of Subrogation from Insurance Carriers and a Release of Claims by Owner and Contractor for Losses Covered by Property Insurance.**

The "waiver of subrogation" provision contained in Subparagraph 11.4.7 is both a covenant requiring the Owner and the Contractor to cause their insurance companies to endorse their property insurance policies to **waive** subrogation against the Owner and Contractor and a **release** of claims for "damages caused by fire or other perils or other causes of loss to the extent covered by property insurance obtained pursuant to Paragraph 11.4 or other property insurance applicable to the Work."

**Unfortunately the Release of Claims is Unenforceable in Texas as Drafted.**

This provision is neither conspicuous nor express as to the negligence of the parties and as such an issue exists as to its enforceability as a release and waiver.

**Unfortunately for Contractor the Release of Claims Does Not Extend to Insured Losses Beyond the Scope of the Work - Collateral Damage.**

The waiver of recovery and subrogation is "*to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work.*" These waivers are not broad enough to cover property losses to property other than the Work, for example where the "owner" under the construction contract is a tenant doing tenant improvements, the waiver does not extend to losses to the tenant's FF&E or property beyond the Work site, such as other portions of the Leased Premises; and, for example, where the Work being done for the owner is only as to a portion of an owner's facility, the waiver of recovery does not extend to property losses outside the Work covered by insurance.

**Unfortunately for Contractor the AIA Provision is Limited to Property Losses Occurring Prior to Project Completion.**

The waiver as drafted in the AIA form is also limited by the time period of construction and will not cover the Releasing Party's property losses arising after Work completion but attributable to the "Released Party's" work.

**Post Project Completion Losses.**

Care should be taken by the parties in coordinating the indemnity, the insurance and the waiver of subrogation provisions to avoid the failure to address a timing of loss issue (e.g., broad indemnity covering post Work liabilities, but failure to insure the loss under a completed operations endorsement, or by failure of the waiver of subrogation provision to extend to post-Work completion losses paid by the owner's insurance.

**Effect of AIA's Limiting Waiver of Subrogation to Property Insurance Claims is to Permit Contractor's CGL Carrier to Subrogate Against Owner for Claims Paid by Carrier Despite Contractor's Indemnity Since Contractor's Indemnity Unenforceable.**

This Subparagraph 11.4.7 does not address either a waiver of claims by the Owner and Contractor for liabilities to the extent covered by liability insurance provided by a party to protect the other or a waiver of subrogation by the liability insurance issuers. Thus, although the Contractor indemnifies the Indemnified Persons under Paragraph 3.18, its liability insurance issuer which has paid the claim has not released its right to subrogate to the Contractor's claim against the Owner *et al.*

## 2. Standard Industry Additional Insured Forms.

### 2.1 ISO Additional Insured Endorsements.

A commonly employed risk transfer technique is to require an insured (the "**named insured**") to arrange for its insurance to cover another party in a transaction (the "**party to be protected**") as an additional insured ("**AI**"). Coverage may be accomplished by two methods: by endorsement to the named insured's CGL insurance issued upon request of the insured or automatically without endorsement through the inclusion in the CGL policy at the time of its issuance of a provision naming certain classes of persons as automatic additional insureds (called a "**blanket AI provision**"). In either case the additional insured is an "**insured**" but not a "**named insured**." There is no such thing as an "**additional named insured**." Sometimes this blanket AI provision is as broad as providing coverage to any person required in a contract with the insured to be listed as an additional insured.

There are four nationwide insurance advisory organizations that develop standard insurance forms. Insurance Services Office, Inc. ("**ISO**") is the largest national insurance advisory organization. Additional insured endorsements can be divided into two categories: endorsement forms promulgated by the Insurance Services Office, Inc. and all other endorsement forms (which other types of forms are referred to in the insurance industry as "**manuscripted**" forms).

ISO forms are considered to be the industry's "standard" forms. ISO forms are identified by a two-letter prefix identifying the type of coverage, four digits identifying the form category and individual form number, and four digits identifying the edition date by month and year. For example, the CG 20 10 03 97 AI Endorsement form is made up of "CG" to indicate that this is a CGL form; "20" indicates the category of CGL endorsement that this form belongs to (an AI endorsement form); "10" is the number assigned to this particular CGL AI Endorsement; and "03 97" indicates that this form is the March 1997 edition of the CG 20 10. ISO has promulgated 33 forms of AI endorsements, each tailored to a different risk transfer.

AI endorsements furnish coverage to an AI for tort liability "arising out of" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes. An AI endorsement is equivalent to an insurance policy written for the AI. The strongest rationale for this request is the perceived fairness of making the named insured's insurance carrier responsible for the increased exposure to loss created for the AI due to the named insured's operations, work or control of the premises. Issuance of AI endorsements is routine and inexpensive (typically \$150 per AI) as compared to the premium that would be charged by the insurer to issue a separate policy to cover the exposure of the party to be protected. The risk of liabilities arising out of the work, operations or premises has been factored into the named insured's premium.

Additional insured status affords the AI protection against vicarious liability arising out of the named insured's acts or omissions and, depending on the language of the party's insurance covenant, coverage for the AI's own negligence. As such, it supplements the protection afforded by the named insured's indemnity.



**List of ISO Additional Insured Endorsements.**

The following is a listing of all of the ISO Additional Insured Endorsements-Category 20.

Additional Insured–Club Members	CG 20 02
Additional Insured–Concessionaires Trading Under Your Name	CG 20 03
Additional Insured–Condominium Unit Owners	CG 20 04
Additional Insured–Controlling Interest	CG 20 05
Additional Insured–Engineers, Architects or Surveyors	CG 20 07
Additional Insured–Users of Golfmobiles	CG 20 08
Additional Insured–Owners/Lessees/Contractors (A)	CG 20 09
Additional Insured–Owners/Lessees/Contractors (B)	CG 20 10
Additional Insured–Managers or Lessors of Premises	CG 20 11
Additional Insured–State or Political Subdivisions–Permits	CG 20 12
Additional Insured–State or Political Subdivisions–Permits Relating to Premises	CG 20 13
Additional Insured–Users of Teams, Draft or Saddle Animals	CG 20 14
Additional Insured–Vendors	CG 20 15
Additional Insured–Townhouse Associations	CG 20 17
Additional Insured–Mortgagee, Assignee or Receiver	CG 20 18
Additional Insured–Charitable Institutions	CG 20 20
Additional Insured–Volunteers	CG 20 21
Additional Insured–Church Members, Officers and Volunteer Workers	CG 20 22
Additional Insured–Executors, Administrators, Trustees/Beneficiaries	CG 20 23
Additional Insured–Owners or Other Interests from Whom Land Has Been Leased	CG 20 24
Additional Insured–Elective or Appointive Executive Officers of Public Corporations	CG 20 25
Additional Insured–Designated Person or Organization	CG 20 26
Additional Insured–Co-owner of Premises	CG 20 27
Additional Insured–Lessor of Leased Equipment	CG 20 28
Additional Insured–Grantor of Franchise	CG 20 29
Additional Insured–Oil/Gas Operations–Non-Operator, Working Interests	CG 20 30
Additional Insured–Engineers, Architects or Surveyors Not Engaged by the Named Insured	CG 20 32
Additional Insured–Owners, Lessees or Contractors–Automatic Status When Required in Construction Agreement with You	CG 20 33
Additional Insured–Lessor of Leased Equipment–Automatic Status When Required in Lease Agreement with You	CG 20 34

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Additional Insured–Grantor of Licenses–Automatic Status When Required by Licensor	CG 20 35
Additional Insured–Grantor of Licenses	CG 20 36
Additional Insured–Owners, Lessees or Contractors–Completed Operations	CG 20 37

**ISO AI Endorsements**

The following are 4 of the 33 ISO AI Endorsement forms. I have highlighted certain terms in **bold italics** and have underlined certain clauses in order to alert you to terms and clauses that have special meanings or that limit coverage. These terms and clauses are discussed in the Commentary following each form. Additionally, footnotes are inserted to provide keys to the completion and interpretation of the forms.

**2.2 ISO's CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

Name of Person or Organization: \_\_\_\_\_<sup>1</sup>

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

**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 locations designated above.

**B.** With respect to the insurance afforded to these additional insureds, the following 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<sup>2</sup> **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.

<sup>1</sup> Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – e.g., officers, directors, and employees of the persons or entities specifically designated as additional insureds.

<sup>2</sup> "Your" = named insured.

<sup>3</sup> This is the "completed operations" exclusion to AI coverage. In order to extend AI coverage to liabilities occurring after either of the events set out in Exclusions (1) or (2), an additional AI endorsement needs

to be endorsed on to the CGL policy covering "products and completed operations" liabilities. See **Chapter 6 Form 2.5** ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations for this type of endorsement.

### **Commentary on ISO's CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization**

#### **AI's Negligence, Excluding AI's Sole Negligence, Covered as to NI's Operations**

CG 20 10 as recently revised (in 2004) to eliminate coverage for the additional insured's sole negligence. Additionally, the 2004 revision requires that in order for the liability to be covered by the named insured's CGL policy, the liability must have been **caused in whole or in part** by the acts or omissions of the named insured. The pre-2004 version of the CG 20 10 extended coverage for the additional insured for all liabilities "arising out of" the named insured's operations. See discussion at Chapter 7 **3.3.1 - 3.3.2**.

It is not yet clear whether the change of the CG 20 10 to "caused by the acts or omissions of the named insured" will be interpreted by the courts differently than the prior coverage for liabilities "arising out of the named insured's operations." Liabilities can still be "caused by" the named insured's acts or omissions, yet the liability arise out of the sole negligence of the additional insured or the concurrent negligence of the additional insured and persons other than the named insured!

#### **Completed Operations Risk Excluded**

Liabilities **occurring after** completion of work are not covered.

Perhaps because CG 20 10 does not reference coverage for the "acts or omissions of the additional insured," this endorsement occasionally has been viewed as providing coverage only for the additional insured's vicarious liability in connection with the acts or omissions of the named insured.

CG 20 10 has undergone changes from coverage for liabilities "arising out of the work" of the named insured in the November 1985 version (CG 20 10 11 85), to "arising out of the operations" of the named insured in the October 1993 version (CG 20 10 10 93), the March 1997 version (CG 20 10 03 97), and the October 1997 version (CG 20 10 10 01). ISO made this change to clarify that this particular form of additional insured endorsement is intended to only cover liabilities arising out of the named insured's "ongoing operations" as opposed to liabilities arising out of operations that have been completed. The ISO CG 20 10 11 85 additional insured endorsement form was construed in *Pardee Constr. Co. v. Insurance Co. of the West*, 92 Cal. Rptr.2d 443 (Cal.App. 2000) to cover an additional insured contractor's liabilities (in this particular case its sole negligence) arising 4 years after the completion of the work of the named insured subcontractor.

While the phrases "your work" and "your ongoing operations" have important meanings in the context of determining coverage of liabilities arising out of injuries occurring after the named insured's operations have been completed, there is no significant difference between them as respects determining the scope of coverage prior to completion of operations. Coverage for liabilities arising after completion of the named insured's operations, but attributable to the named insured's or the additional insured's acts or omissions prior to completion may be added by use of ISO CG 20 37 10 01 Additional Insured endorsement covering liabilities arising out of the "products and completed operations" hazard.

**2.3 ISO's CG 20 11 10 96 Additional Insured – Managers and Lessors of Premises.**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED –  
MANAGERS OR LESSORS OF PREMISES**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

- 1. Designation of **Premises** (Part Leased to You<sup>1</sup>): \_\_\_\_\_.
- 2. Name of Person or Organization (Additional Insured): \_\_\_\_\_.<sup>1</sup>
- 3. Additional Premium: \_\_\_\_\_.

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability **arising out of** the ownership, maintenance or use of that **part** of the **premises** leased to you<sup>2</sup> 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<sup>2</sup> cease to be a tenant in that **premises**.
- 2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule<sup>2</sup>.

CG 20 11 01 94 Copyright, Insurance Services Office, Inc., 1994 Page 1 of 1 [**Emphasis added**]

<sup>1</sup> Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – e.g., officers, directors, and employees of the persons or entities specifically designated as additional insureds. <sup>2</sup> "you" = the named insured.

<sup>3</sup> "Premises" = "part leased to You." See discussion at Section **2.2.4** as to risk that "premises" may be narrowly defined in lease resulting in no coverage for AI as to Injuries occurring outside of the premises (e.g., in Common Areas, Common Facilities or in adjacent sidewalks, driveways and easements).

**Commentary on ISO's CG 20 11 01 96 Additional Insured – Managers and Lessors of Premises.**

This endorsement contains two significant carve outs. The first is for liabilities that "take place after (the tenant) ceases to be a tenant in that premises." This carve out excludes coverage for liabilities that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy. The second carve out is for alterations, new construction or demolition operations "by or on behalf of the (additional insured—e.g., the landlord). This carve out excludes protection for liabilities associated with construction activities. If the tenant will be engaged in any construction activities (e.g., tenant improvements), then another endorsement form should be used.

**2.4 ISO's CG 20 26 (2004) Additional Insured – Designated Person or Organization.**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED–DESIGNATED PERSON OR ORGANIZATION**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**SCHEDULE**

**Name of Person or Organization:** \_\_\_\_\_<sup>1</sup>

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an 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 your<sup>2</sup> acts or omissions or the acts or omissions of those acting on your behalf:

- A. In the performance of your<sup>2</sup> **ongoing** operations; or
- B. In connection with your<sup>2</sup> **premises**<sup>3</sup> **owned by** or **rented to you**.<sup>2</sup>

CG 20 26 Copyright, Insurance Services Office, Inc., 2004 Page 1 of 1 [Emphasis added]

<sup>1</sup> Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – e.g., officers, directors, and employees of the persons or entities specifically designated as additional insureds. <sup>2</sup> "You" and "your" = the named insured.

<sup>3</sup> “Premises” may limit the AI’s coverage to Injuries occurring in the boundaries of the leased premises as defined in the lease and as a result may not extend to Injuries occurring in Common Areas, Common Facilities or easements. See Section 2.2.4 of the Article.

**Commentary on ISO's CG 20 26 (2004) Additional Insured – Designated Person or Organization.**

This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability "caused in whole or in part, by your (the named insured's) **acts or omissions in the performance of your** (the named insured's) **ongoing operations**" or "**premises owned by or rented to you** (the named insured)." This endorsement form was promulgated for the purpose of adding as insureds to CGL policies persons and entities for which no other specific additional insured endorsement is published by ISO. The form however is used for many situations where an additional insured has required this form due to its broad coverage. This AI endorsement form was modified in 2004 in connection with the modifications to the CG 20 10 to change the trigger for coverage from liabilities "**arising out of**" the named insured's ongoing operations to liabilities "**caused in whole or in part by the acts or omissions of**" the named insured.

See discussion at Chapter 7 **3.3.1 - 3.3.2.**

It is not yet clear whether the change of the CG 20 26 to “caused by the acts or omissions of the named insured” will be interpreted by the courts differently than the prior coverage for liabilities “arising out of the

---

named insured's operations." Liabilities can still be "caused by" the named insured's acts or omissions, yet the liability arise out of the sole negligence of the additional insured or the concurrent negligence of the additional insured and persons other than the named insured!

### **Ongoing Operations**

It may be used in construction contexts as an endorsement to provide additional insured coverage to an owner on a contractor's CGL policy, to an owner on a tenant's CGL policy, to a tenant on an owner's CGL policy, and to a tenant on a contractor's CGL policy. If the insurer is willing, it can provide an acceptable method of including completed operations coverage for an additional insured who requires such coverage. Otherwise, completed operations coverage can be added by use of ISO CG 20 37. See ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations at **Chapter 6 Form 2.5** below.

In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy.

This endorsement form does not contain carve outs for the "**acts or omissions**" of the additional insured and is not limited to "ongoing" operations.

**2.5 ISO's CG 20 37 (2004) Additional Insured – Owners, Lessees or Contractors - Completed Operations.**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

Name of Person or Organization: \_\_\_\_\_<sup>1</sup>

Location and Description of Completed Operations: \_\_\_\_\_<sup>2</sup>

Additional Premium: \$ \_\_\_\_\_.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

**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<sup>3</sup> **work**" at the location designated and described in the schedule of this endorsement performed for that additional insured<sup>4</sup> and included in the "**products-completed operations hazard**".

<sup>1</sup> (Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – e.g., officers, directors, and employees of the persons or entities specifically designated as additional insureds.)

<sup>2</sup> (Insert general description of construction location - e.g., street address and construction project).

<sup>3</sup> "You" = the named insured.

<sup>4</sup> "that insured" = the additional insured.

**Commentary on ISO's CG 20 37 (2004) AI Endorsement.**

This endorsement makes designated persons (e.g., owners, lessees or contractors) additional insureds on an insured contractor's or insured subcontractor's CGL policy. This endorsement provides coverage to the additional insured "owner, lessee or contractor" for liabilities caused in whole or in part by the named-insured contractor's "**work**" **occurring after completion** of the insured contractor's or insured subcontractor's work. This endorsement was introduced in 2001 by ISO to provide a standard means of extending the additional insured coverage of endorsement CG 20 10 to completed operations claims. This coverage is extended to locations designated and designated operations.

## 2.6 AIG - AI Endorsement –Construction and Lease – Exclusion for AI's Negligence.

The following is an additional insured endorsement issued by American Indemnity Group (**AIG**). Coverage for the AI's negligence was litigated in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6<sup>th</sup> Cir. 2000) in which the 6<sup>th</sup> Circuit applied Texas law. The holding in this case emphasizes why it is important to obtain and read the additional insured endorsement form and not to rely either upon a statement in the certificate of insurance that a party to be protected is an AI for liabilities arising out of the work of the named insured or upon a general statement in the contract that a party to be protected is to be listed as an additional insured on the named insured's CGL policy. The court held that the AI endorsement issued by AIG meant exactly what it said, "the negligence of the additional insured is **excluded!**" The court held that the certificate of insurance listing the contractor as an AI and the construction contract provision requiring that the contractor be listed as an AI did not expressly provide that the additional insured was to be covered for its negligence.

### **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

#### **SCHEDULE**

**Name of Person or Organization:** \_\_\_\_\_.

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability **arising out of your**<sup>1</sup> **operations** or **premises owned by** or **rented to you**.<sup>1</sup>

It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities **arising out of their**<sup>2</sup> **operations** performed by or for the named insured,<sup>1</sup> but **excluding** any negligent acts committed by such additional insured.<sup>2</sup>

<sup>1</sup> "You" = the named insured.

<sup>2</sup> "Their" = additional insured.

### **Commentary on AIG's Manuscripted AI Endorsement**

The language in the ISO and the AIG endorsements are very similar, in that each specifies (1) a covered relationship: the ownership or use by or the rental to the named insured of premises (ISO form and AIG form); and (2) a covered activity: the named insured's operations (ISO form) and the additional insured's operations (AIG form). But note that the AIG endorsement limits the additional insured's protection under the named insured's CGL policy by excluding from coverage liabilities arising out of "any negligent acts committed by the additional insured." The AIG exclusion effectively eliminates from insurance coverage all liabilities for which the additional insured would wish to be listed as an additional insured on the named insured's policy!

**2.7. Bituminous - Blanket AI Endorsement - Construction – Exclusion for AI's Negligence.**

**BITUMINOUS FIRE & MARINE INSURANCE  
CONTRACTORS EXTENDED LIABILITY COVERAGE - GL-2785-TX (07/00)**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

It is agreed that the provisions listed below apply only upon the entry of an  in the box next to the caption of such provision.

- |                                                                                             |                                                                                       |
|---------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|
| A. <input checked="" type="checkbox"/> Partnership and Joint Venture Extension              | F. <input checked="" type="checkbox"/> Personal Injury - Contractual Coverage         |
| B. <input checked="" type="checkbox"/> Blanket Additional Insureds - Construction Contracts | G. <input checked="" type="checkbox"/> Nonemployment Discrimination                   |
| C. <input checked="" type="checkbox"/> Blanket Waiver of Subrogation                        | H. <input checked="" type="checkbox"/> Liquor Liability                               |
| D. <input checked="" type="checkbox"/> Unintentional Failure to Disclose Hazards            | I. <input checked="" type="checkbox"/> Broadened Conditions                           |
| E. <input checked="" type="checkbox"/> Broadened Mobile Equipment                           | J. <input checked="" type="checkbox"/> Blanket Additional Insureds - Equipment Leases |

....

**B. BLANKET ADDITIONAL INSUREDS - CONSTRUCTION CONTRACTS**

**Section II - WHO IS AN INSURED** is amended by adding the following:

7. Any person or organization for whom you<sup>1</sup> are performing operations if you and such person or organization have agreed in a written contract or written agreement executed prior to any loss that such person or organization will be added as an additional insured on your policy up to the limits of liability required by such contract or agreement with respect to liability **resulting from:**

- a. "your<sup>1</sup> **work**" for the additional insured(s), or
- b. actions or omissions of the additional insured(s) in connection with their<sup>2</sup> **general supervision** of "your<sup>1</sup> **work**."

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

- b. Additional Exclusions. This insurance does not apply to: <sup>3</sup>
- (1) "Bodily injury" or "property damage" for which the additional insured(s) are 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 that the additional insured(s) would have in the absence of the contract or agreement.
- (2) "Bodily injury" or "property damage" **occurring after**:
- (a) All work on the project(s) (other than service, maintenance, or repairs) to be performed by or on behalf of the additional insured(s) has been completed; or

- (b) That portion of “your<sup>1</sup> 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.
- (3) “Bodily injury” or “property damage” **arising out of any act or omission of the additional insured(s)** or any of their employees, **other than** the **general supervision** of work performed for the additional insured(s) by you.<sup>1</sup>
- (4) “Property damage” to:
  - (a) Property owned, used or occupied by or rented to the additional insured(s):
  - (b) Property in the care, custody, or control of the additional insured(s) or over which the additional insured(s) are for any purpose exercising physical control; or
  - (c) “Your<sup>1</sup> work” for the additional insured(s)
- (5) “Bodily injury”, “property damage” or “personal and advertising injury”:
  - (a) Arising out of the rendering or failure to render any professional services by you<sup>1</sup> or by any additional insured, but only with respect to either or both of the following operations:
    - (i) Providing engineering, architectural or surveying services to others in your<sup>1</sup> or the additional insureds capacity as an engineer, architect or surveyor, and
    - (ii) Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with work you<sup>1</sup> or an additional insured performs.
  - (b) Subject to paragraph (c) below, professional services include:
    - (i) The preparing, approving or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
    - (ii) Supervisory or inspection activities performed as part of any related architectural or engineering activities.

- (c) Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you<sup>1</sup> in connection with your operations as a construction contractor.

Any coverage provided herein will be **excess** over any other valid and collectable insurance available to the additional insured(s) whether primary, excess, contingent or on any other basis unless you<sup>1</sup> have agreed in a written contract or written agreement that this insurance will be primary.

This insurance will be **noncontributory** only if so stated in a written contract or written agreement. ....

<sup>1</sup> "You" = the named insured contractor or subcontractor. <sup>2</sup> "Their" = additional insured contractor or owner.

<sup>3</sup> **b(1)** is an exclusion for liabilities assumed (taken on by indemnity) by the named insured caused by the additional insured's negligence.

**b(2)** is an exclusion for the "**completed operations hazard**," liabilities incurred by the additional insured (the additional insured's negligence) occurring after completion of all work by or on behalf of the additional insured or after completion of the named insured's work.

**b(3)** is an exclusion for the AI's negligence other than liability of the AI due to its general supervision of the named insured's work for the AI.

**b(4)** is an exclusion for property damage to the additional insured's property even if due to the named insured's negligence. The AI is relegated to its property insurance.

### **Commentary on Bituminous's Blanket AI Endorsement**

**1. Who is the AI?** The blanket automatic additional insured provision contained in this Endorsement as **B II 7** designates as the additional insured "any person for whom you are performing operations." In cases where the named insured contractor is performing services for an AI tenant, the building owner (landlord) and the employees, officers, directors, successors and assigns of the building owner and of the tenant would not be covered. In such case additional endorsements are required to extend coverage to persons other than the tenant.

**2. Whose Negligence is Covered?** Provision **B II 7b (3)** of this form of blanket additional insured endorsement carves out of the additional insured coverage liabilities "arising out of any act or omission of the additional insured ... other than the **general supervision** of work performed for the additional insured ...." This carve-out effectively guts protection for the additional insured. In order for the additional insureds to have protection for their sole or contributory negligence, this policy must be endorsed to extend coverage to liabilities arising out of the acts or omissions of the additional insureds, whether or not caused by the negligence of the additional insured.

**3. Contribution or Non-Contribution by AI's CGL Insurance?** Note that the blanket additional insured endorsement provides that the insurance afforded thereby to the additional insured will be "**excess**" over the additional insured's "other insurance" unless the contract between the contractor and the additional insured requires this coverage to be primary. Also, note that the blanket additional insured endorsement provides that the insurance coverage afforded to the blanket additional insured endorsement will be "**noncontributory**" unless the contract between the named insured and the additional insured requires the coverage to be contributory. "Noncontributory" means that even if the contract requires the named insured's coverage of the additional insured to be primary, the named insured's carrier will not contribute to cover a loss to the extent the additional insured's policy covers the liability. The contract between the named

insured and the additional insured should be drafted to provide that the named insured's CGL policy will not be excess of the AI's CGL policy, but will be primary with the AI's CGL being excess and noncontributory.

3. **"Fair Forms" and Commentary.**

**Coverage if AI Not More Negligent Than NI.**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**Additional Insured – Exclusion if Additional Insured Not More Negligent than Insured**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

1. Name of Person or Organization (Additional Insured): \_\_\_\_\_ \*

2. Additional Premium: \$\_\_\_\_\_.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

**Section II - Who Is An Insured** is amended to include as an 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 your acts or omissions or the acts or omissions of those acting on your<sup>1</sup> behalf:

- A. In the performance of your ongoing operations for the additional insured; or
- B. In connection with your<sup>1</sup> premises owned by or rented to you<sup>1</sup>.

There is no coverage for "bodily injury", "property damage" or "personal and advertising injury" arising out of the sole negligence of an additional insured or if said injury or damage is caused by the contributory negligence of the additional insured or by those acting on behalf of those acting on behalf of the additional insured if that insured's percentage share of all insureds' negligence is 51% or greater.

This endorsement form is not a standard ISO endorsement. It has been "manuscripted" to shift insurance the risk of insured loss as between the NI and the AI to the party who is most negligent. However, in addition to this endorsement language, the AI's CGL policy must be amended to provide that its coverage is excess to the coverage afforded by the above AI endorsement and non-contributory with the NI's insurance. Otherwise, the AI could find itself in the position of being covered under the above AI endorsement in a case where the AI was less negligent than the NI, but the AI's insurance being called on to contribute pro rata with the NI's insurance to cover the Insured Injury.

## CHAPTER 7. EXTRAORDINARY RISK SHIFTS - TEXAS LAW.

Risk shifting provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity, exculpation, release and limitation of liability provisions.

This chapter examines how liability insurance can be used to protect an indemnifying party through coverage for its contractually assumed liabilities and to protect an indemnified party by being an additional insured on the indemnifying party's liability insurance. Generally, the indemnifying party is required by the indemnified party to carry commercial general liability ("CGL") insurance naming the indemnified party as an additional insured on the indemnifying party's CGL policy. In such case, the indemnifying party is the "named insured" and the indemnified party is the "additional insured." In this article the indemnifying party and the named insured are sometimes referred to in this article as the "protecting party" and the indemnified party and the additional insured are sometimes referred to as the "protected party." Insurance is also a form of indemnity. However, Texas courts on public policy grounds construe the same "arising out of" indemnity triggering language used in both types of indemnity strictly against coverage of an indemnified party's negligence by a contract and broadly in favor of coverage of an additional insured's negligence in additional insured endorsements issued pursuant to the same contract. Indemnity agreements are strictly construed in favor of the indemnifying party. *Safeco Ins. Co. of America v. Gaubert*, 829 S.W.2d 274, 281 (Tex.App.–Dallas, 1992, *writ den'd*). By contrast, insurance policies are strictly construed in favor of coverage. *See, e.g., Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987); *National Union Fire Ins. Co. of Pittsburgh, Penn. v. Kasler*, 906 F.2d 196, 198 (5<sup>th</sup> Cir. 1990).

### 1. Indemnity.

#### 1.1 Terminology.

"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. It is like insurance between the parties. *Russell v. Lemons*, 205 S.W.2d 629, 631 (Tex.Civ.App–Amarillo 1947, *writ ref'd n.r.e.*). 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." Care should be taken in crafting the scope of and exclusions from the liabilities indemnified, such as providing for the defense of the indemnified party by the indemnifying party ("indemnify, defend, and hold harmless"), settlement authority, and choice of laws applicable.

#### 1.2 Requirements for Enforceability.

The Texas Supreme Court has imposed certain contract drafting requirements in order for a negligent party to shift its liability to another person. Johnston, *Settlement and the Express Negligence Rule*, TEX. B.J. 14 (Jan. 1995); Scheer, *Model Contractual Indemnity Provisions Effective to Protect an Indemnitee Against His Own Negligence or Other Fault*, TEX. B.J. 602 (June 1987); Reynolds, *Contracts of Indemnity in Texas*, TEX. B.J. 297 (Ap. 1980); *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993); Greer and Collier, *The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas after Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SOUTH TEX. L. REV. 243 (1994); and Holcomb, *The Validity and Effectiveness of Pre-Injury Releases of Gross Negligence in Texas*, 50 BAYLOR L. REV. 233 (1998).

##### 1.2.1 Fair Notice.

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

### 1.2.2 Express 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 of *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.* *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972).

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 indemnified person 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. *Adams v. Spring Valley Const. Co.*, 728 S.W.2d 412 (Tex.App.–Dallas 1987, *writ ref'd n.r.e.*);

*Linden-Alimak, Inc. v. McDonald*, 745 S.W.2d (Tex.App.–Ft. Worth 1988, *writ denied*); *Glendale Constructors, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex.App.–Houston [1<sup>st</sup> Dist.] 1995, *writ denied*); *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex.App.–San Antonio 1989, *no writ*); *Texas Utilities Electric Co. v. Babcock & Wilcox*, 893 S.W.2d 739 (Tex.App.–Texarkana 1995, *no writ*).

### 1.2.3 Overcoming the Worker's Compensation Bar.

Unless there is an enforceable written indemnity covering an employer's negligence, a landlord, tenant, and 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. *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983). The Workers' Compensation Act bars contribution actions by third parties unless the employer has executed before the injury a written indemnity agreement for injuries to its employees arising out of the employer's negligence. Texas Workers' Compensation Act, TEX. LABOR. CODE ANN. § 417.004 (Vernon 1996). See *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990).

### 1.2.4 Comparative Indemnity.

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did not protect an "indemnified" party either for its negligence or the indemnifying party negligence for injuries caused to the indemnifying party's employee:

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, 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. 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.

**1.2.5 Releases, Waivers, Exculpations and Disclaimers.**

In 1993 the Texas Supreme Court in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) extended the fair notice principle and the express negligence doctrine to releases. This principle is likely to be extended to waivers, exculpations and disclaimers seeking to exclude liability for one's own negligence, being merely a release worded in a different format. See generally *Hart v. Traders & General Ins. Co.*, 189 S.W.2d 493, 494 (Tex. 1945).

**1.2.6 Strict 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 strict liability to expressly state that it covers such strict liability.

**2. Insurance.**

There are two insurance methods to effectuate protection: directly, (1) either by 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; and (2) indirectly, by the protecting party insuring its contractually assumed liability (its indemnity).

**2.1 Contractually Assumed Liability Insurance: Coverage for the Protecting Party.**

**2.1.1 Exception to an Exclusion.**

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" the following exceptions to the exclusion from coverage of contractually assumed liability.

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." The exception to exclusion from Coverage A reads

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

1. **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; or
2. that the insured would have in the absence of the contract or agreement. (Emphasis added)

An "**Insured Contract**" is defined in the standard ISO CGL policy form as including

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 [2004 endorsement CG 24 26: , ***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. (Emphasis added)

Note that ISO has proposed the italicized language for inclusion in CGL policies by an endorsement CG 24 26. This introduces into the “insured contract” definition a “contributory negligence” condition equivalent to the one contained in the newly filed additional insured endorsements discussed below in Section 3.3.2. Inclusion of this type language into a CGL policy effectively eliminates coverage for the NI’s indemnification of a third party for its sole negligence. Care therefore must be taken by NI’s in coordinating and negotiating the terms of its CGL policy and indemnity agreements. It is possible for a NI to be “uncovered” in such circumstances for an indemnity of another party’s sole negligence. If this is coupled with an exclusion from AI coverage for an AI’s sole negligence, the NI may find itself acting as the insurer or in breach of its covenants to protect the AI/indemnified party!

A similar exception to the exclusions from Coverage B (coverage for “Personal and Advertising Injury”) is generally not contained in standard form CGL policies. Thus, in such cases, the named insured’s liability policy will not protect it against its contractually assumed liability for Personal and Advertising Injury, unless it obtains a special endorsement to its policy adding an exception to the exclusion in Coverage B. “Personal and Advertising Injury” is defined in Coverage B to standard CGL policies as “injury, including consequential bodily injury, arising out of one or more of the following offenses:

(i) false arrest, detention or imprisonment; (ii) malicious prosecution; (iii) 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; (iv) oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s good, products or services; (v) oral or written publication of material that violates a person’s right of privacy; (vi) the use of another’s advertising idea in your “advertisement”; or (vii) infringing upon another’s copyright, trade dress or slogan in your “advertisement.”

### **2.1.2 Coverage for Named Insured as Indemnifying Party.**

#### **.1 Indemnified Party not the Insured.**

Contractually assumed liability insurance does not make the indemnified-protected party an insured under the policy. *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.*, 8 Cal. App. 4th 338, 10 Cal. Rptr.2d 165 (1992); *Jefferson v. Sinclair Ref.g Co.*, 10 N.Y.2d 422, 223 N.Y.S2d 863, 179 N.E.2d 706 (1961); *Davis Constructors & Engineers, Inc. v. Hartford Accident & Indemnity Co.*, 308 F. Supp. 792 (M.D. Ala. 1968); and *Hartford Ins. Group v. Royal-Globe Co.*, 21 Ariz. App. 224, 517 P.2d 1117 (1974). Instead it expands coverage for the named insured. See e.g., *Gibson & Associates, Inc. v. Home Ins. Co.*, 966 F.Supp. 468, 475-77 (N.D.Tex. 1997).

#### **.2 Defense Covered Only if an Indemnified Liability.**

CGL policies will place conditions precedent that must be satisfied by an indemnified person prior to providing it defense under the indemnifying person’s CGL policy. For example, the ISO CGL standard policy form provides

