Strafford

Presenting a live 90-minute webinar with interactive Q&A

Construction Contract Insurance and Indemnification Clauses

Crafting Provisions to Allocate Risk and Minimize Liability

TUESDAY, JUNE 14, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

James P. Bobotek, Senior Associate, **Pillsbury Winthrop Shaw Pittman**, Washington, D.C.

Tamara L. Boeck, Of Counsel, **Stoel Rives**, Boise, Idaho

Scott D. Cahalan, Partner, **Smith Gambrell & Russell**, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10**.

Sample Comprehensive Construction Contract Indemnity Provision

To the fullest extent permitted by law, the Contractor shall defend, indemnify and hold harmless the Owner, Lender, Lender's construction consultant, Architect, consulting engineers, Owner's Representative, and their respective agents and employees (the "**Indemnified Parties**" and each an "**Indemnified Party**") from and against any and all claims, damages, fines, penalties, losses and expenses, including reasonable attorney's fees and expert witness fees ("**Indemnified Claims**" and each an "**Indemnified Claim**"), arising, directly or indirectly, from the performance of the Work, breach of this Contract, or a Contractor Party's negligence or willful misconduct with respect to the Project, provided that such Indemnified Claim is attributable to bodily injury, sickness, disease, or death or to injury to or destruction of tangible property (other than the Work itself to the extent amounts are recovered pursuant to builder's risk insurance), regardless of whether or not such Indemnified Claim is caused in part by an Indemnified Party. The Contractor shall also indemnify, defend, and hold harmless the Indemnified Parties from and against Indemnified Claims for economic loss (that is, Indemnified Claims not attributable to bodily injury, sickness, disease, or death or to injury to or destruction of tangible property), but only to the extent such economic loss was caused by a breach of this Contract or a Contractor Party's negligence or willful misconduct with respect to the Project, regardless of whether such Claim is caused in part by an Indemnified Party. Such obligations shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any Indemnified Party. Nothing herein shall be construed to require the Contractor to indemnify an Indemnified Party for an Indemnified Claim caused by or resulting solely from that Indemnified Party's own negligence. It is agreed that with respect to any legal limitations now or hereafter in effect and affecting the validity and enforceability of the indemnification obligation under this Section _____, such legal limitations are made a part of the indemnification obligation to the minimum extent necessary to bring Section _____ into conformity with the requirements of such limitations, and as so modified, the indemnification obligation shall continue in full force and effect.

The Owner shall promptly notify the Contractor of any action, administrative or legal proceeding or investigation as to which this indemnification may apply, and the Contractor, at the Contractor's expense, shall assume on behalf of the Indemnified Parties and conduct with due diligence and in good faith the defense thereof with counsel satisfactory to the Owner or other Indemnified Party, provided that (i) the Owner or other Indemnified Party shall have the right to be represented therein by advisory counsel of its own selection and at its own expense, and (ii) if the defendants in any such action include the Contractor and the Owner or other Indemnified Party, and the Owner or other Indemnified Party reasonably conclude that there may be legal defenses available to any of them which are different from or additional to, or inconsistent with, those available to the Contractor, or if the Owner or other Indemnified Party reasonably concludes the Contractor has a conflict of interest and cannot adequately represent the Owner or such Indemnified Party, then the Owner or such Indemnified Party shall have the right to select separate counsel to participate in the defense of such action on their own behalf for which _____ percent (___%) of the cost shall be at the Contractor's expense. In the event of failure by the Contractor to fully perform in accordance with this indemnification section, the Owner or other Indemnified Party, at the option of any of them, and without relieving the Contractor of its

James P. Bobotek james.bobotek@pillsburylaw.com

obligations hereunder, may so perform, but all costs and expenses including attorneys' fees and expert fees so incurred by the Owner or such Indemnified Party in that event shall be reimbursed by the Contractor to the Owner or such Indemnified Party, together with interest on the same from the date that any such expense was paid by the Owner or such Indemnified Party until reimbursed by the Contractor, at the rate of interest provided in Section _____ of the Agreement. The obligations of the Contractor under this Section _____ shall survive the completion of the Work and the expiration or termination of the Contract.

In claims against an Indemnified Party by an employee of the Contractor Parties, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section _____ shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor Party under workers' compensation acts, disability benefit acts or other employee benefit acts.

INSURANCE REQUIREMENTS

I. THE CONTRACTOR'S INSURANCE

A. **Types of Insurance and Limits.** Prior to the commencement of any Work under this Contract, the Contractor shall at its sole expense secure and maintain the insurance as listed in this Section I.A as will protect the Contractor, the Owner, the Owner's Representative, the Lender, and the Architect from claims which may arise in whole or in part from operations by the Contractor or any Subcontractor or anyone directly or indirectly employed by either of them, or anyone for whose acts either of them may be liable:

1. **Commercial General Liability.** Commercial general liability ("**CGL**") insurance, written on an occurrence (not claims-made) basis, on Insurance Services Office, Inc. ("**ISO**") form CG 00 01 10 01 (or another occurrence-based form with coverage at least as broad and approved by the Owner in writing), covering liability for all operations of the Contractor, including operations under all Subcontracts, and covering claims for bodily injury, including without limitation sickness, disease or death of any persons, injury to or destruction of property, including loss of use resulting therefrom, personal and advertising injury, and including coverage for liability arising out of:

(1) Blanket Contractual Liability the Contractor has assumed under the Contract (including, without limitation, indemnification obligations).
(2) Completed Operations/Products Liability.
(3) Broad Form Property Damage and Loss of Use.
(4) Explosion, Collapse and Underground ("XC&U" Perils), where applicable.
(5) Terrorism.
(6) Premises.
(7) Operations.
(8) Work performed by Subcontractors.

The additional insured status under the CGL insurance, as described below in the "General Requirements" section, shall be effected using the ISO Additional Insured Endorsement form CG 20 10 11 85 (or CG 20 10 10 93 **and** CG 20 37 10 01) or such other endorsement or combination of endorsements providing coverage at least as broad and approved by the Owner in writing. The per occurrence and aggregate coverage limits of at least the amounts set forth below shall be specific to this Project and apply separately to the Contractor's Work under the Contract.

a. Minimum Limits:

$_____	each occurrence (bodily injury/ property damage)
$_____	damage to rented premises (each occurrence)
$_____	medical expense (any one person)
$_____	products – completed operations (each occurrence)
$_____	products – completed operations aggregate
$_____	personal and advertising injury (any one person)
$_____	general aggregate per project (other than products-completed operations)

2. **Workers' Compensation; Employers' Liability.** Workers' compensation insurance in the form prescribed by statutory law and with limits of at least the amounts set forth below, and employers' liability insurance with limits of at least the amounts set forth below. If the United States Longshoremen's and Harbor Workers' Compensation Act, Jones Act or any similar laws, regulations or statutes apply to the Contractor or its employees, coverage shall be included for the injuries or claims thereunder of such employees. The policy(ies) shall include "other states" coverage. All insurance required by this Section 2 shall include a waiver of subrogation for the benefit of the Owner, Owner's Representative, Lender, Architect, and other Indemnified Parties.

a. Minimum Limits:

Workers' compensation:

as required by applicable statute(s)

Employers' liability:

$_____	bodily injury each accident
$_____	bodily injury each employee by disease
$_____	bodily injury each disease aggregate

3. **Commercial (Business) Automobile Liability.** Commercial (business) automobile liability insurance written on ISO form CA 00 01 07 97 (or another form with coverage at least as broad and approved by the Owner in writing) including coverage for all owned, hired, borrowed and non-owned vehicles and equipment used by the Contractor, with combined single minimum limits of at least the amounts set forth below, exclusive of

defense costs. This insurance will also be endorsed to include coverage for claims under the Motor Carrier Act of 1980 (e.g., MCS-90 endorsement) resulting from the transportation of materials identified as hazardous during the performance of the Work. In the event that the Contractor's insurance required under this Section 3 excludes any drivers from coverage, such drivers shall not be permitted to drive in connection with this Project.

a. Minimum Limits:

$_____ each accident (bodily injury, death or property damage)

4. **Commercial Umbrella/Excess Liability.** The Contractor shall procure a commercial excess or umbrella liability insurance policy with limits of at least the amounts set forth below, following the form and in excess of the underlying employers' liability, commercial general liability, and commercial automobile liability policies, with an effective date that is concurrent with such liability policies. The annual general aggregate limit shall be written in a form that annually reinstates all required limits.

a. Minimum Limits:

$_____ per occurrence
$_____ annual aggregate

5. **Personal Property Insurance on Owned or Rented Equipment.** The Contractor shall secure, pay for, and maintain whatever all risk insurance the Contractor may deem necessary to protect itself against loss of owned or rented capital equipment and tools, and any tools, equipment, scaffoldings, stagings, towers and forms owned or rented by the Contractor. The requirements to secure and maintain such insurance is solely for the benefit of the Contractor. Failure of the Contractor to secure such insurance or to maintain adequate levels of coverage shall not obligate the Owner or anyone else for any losses of owned or rented equipment. The Contractor waives any claims and right of recovery against the Owner, Owner's Representative, Lender, Architect, and other Indemnified Parties for losses of owned or rented capital equipment and tools, and of any other tools, equipment, scaffoldings, stagings, towers and forms owned or rented by the Contractor. The Contractor's personal property insurance shall be endorsed accordingly to include a waiver of subrogation in favor of the Owner, Owner's Representative, Lender, Architect, and other Indemnified Parties.

6. **Contractor's Pollution Legal Liability.** The Contractor shall maintain in force for the full period of this Contract pollution legal liability insurance covering losses caused by pollution conditions that arise from the operations of the Contractor under this Contract and completed operations. Completed operations coverage shall remain in effect for at least five (5) years after Final Completion of the Work. Such insurance shall apply to bodily injury, property damage (including loss of use of damaged property or of property that has been physically injured), cleanup costs, liability and cleanup costs while in transit, and defense (including costs and expenses incurred in the investigation, defense and settlement of claims). The policy of insurance affording these required coverages shall be written with limits of at least the amounts set forth below. If such coverage is written on a claims-made basis, the Contractor warrants that any retroactive date applicable to coverages under the policy precedes the Contractor's performance of any Work under the Contract and that continuous coverage will be maintained or an extended reporting period will be exercised for at least five (5) years after Final Completion. The Contractor also must furnish to the Owner certificates of insurance evidencing pollution legal liability insurance maintained by the transportation and disposal site operators(s) used by the Contractor for losses arising from facility(ies) accepting, storing or disposing hazardous materials or other waste as a result of the Contractor's operations under the Contract. Such coverages must be maintained with limits of at least the amounts set forth below.

a. Minimum Limits:

$_____ each loss
$_____ annual aggregate

7. **Professional Liability.** For all Work performed by the Contractor on a design/build basis, the Contractor shall provide and maintain professional liability insurance covering errors and omissions in the performance of such Work with limits of at least the amounts set forth below and with a deductible, if any, acceptable to the Owner. The Contractor warrants that any applicable retroactive date precedes the date the Contractor first performed any such design/build Work for the Project and that continuous coverage will be maintained or an extended reporting period will be exercised for a period of five years after the Final Completion of the Work.

a. Minimum Limits:

$_____ each claim
$_____ annual aggregate

8. **Subcontractor Insurance.** The Contractor shall require Subcontractors of all tiers to carry CGL insurance with limits appropriate to the hazard associated with their respective work, but in no event less than the minimum limits as set forth below. The CGL insurance shall comply with the other terms and conditions set forth in Section I.A.1 above. The Contractor shall further require Subcontractors to carry, in at least the amounts set forth below, (i) commercial (business) automobile liability insurance covering owned, non-owned, or hired vehicles, (ii) workers' compensation insurance, (iii) employers' liability insurance, and (iv) to the extent that any Subcontractor performs Work on a design/build basis, professional liability insurance covering errors and omissions in the performance of such Work, with a deductible, if any, acceptable to the Owner. The Contractor shall include in each Subcontract a statement that the Subcontractor waives all rights of recovery against the Owner, Owner's Representative, Architect, Lender, and other Indemnified Parties to the extent any claim against such parties is covered by the insurance required of Subcontractors under this Contract, and all such insurance shall include a waiver of subrogation in favor of the Owner, Owner's Representative, Architect, Lender, and other Indemnified Parties. The Contractor shall require all Subcontractors to provide evidence of such insurance in the form of a certificate of insurance on ACORD Form 25 (or such other form approved by the Owner) accompanied by any applicable additional insured endorsements (and, upon the Owner's request, certified copies of the Subcontractors' policies) to the Contractor and Owner prior to commencing any Work on the Project.

a. Minimum Limits:

Commercial general liability:

$_____	each occurrence (bodily injury/ property damage)
$_____	damage to rented premises (each occurrence)
$_____	medical expense (any one person)
$_____	products – completed operations (each occurrence)
$_____	products – completed operations aggregate
$_____	personal and advertising injury (any one person)
$_____	general annual aggregate (other than products-completed operations)

Commercial automobile liability:

$_____ each occurrence (bodily injury, death or property damage)

Workers' compensation:

as required by applicable statute(s)

Employers' liability:

$_____ bodily injury each accident
$_____ bodily injury each employee by disease
$_____ bodily injury each disease

Professional liability:

$_____ each claim
$_____ annual aggregate

B. **General Requirements.** The Contractor's and Subcontractors' insurance also shall be subject to the following requirements:

1. **Deductibles and Retentions.** Prior to commencing the Work, the Contractor shall disclose to the Owner the amount of any deductible or self-insured retention applicable to any of its insurance policies required in connection with this Project and whether any such deductible or self-insured retention applies to either or both of defense costs and indemnity. The Contractor shall also obtain the Owner's advance written approval (which approval shall not be unreasonably withheld) if the Contractor's deductible or self-insured retention under any such policy is greater than $_____.

2. **Certificates of Insurance, Endorsements, and Policies.** All Contractor's and Subcontractors' insurance required in connection with this Project shall be written by insurance companies licensed in the jurisdiction in which the Project is located with a minimum rating of A-/VII by A.M. Best. Before commencing any Work, the Contractor shall furnish to the Owner (i) certificates of insurance on ACORD form 25 (or such other form approved by the Owner) evidencing the coverage required to be carried by the Contractor as set forth in this Contract. Upon the Owner's request made at any time prior to five (5) years following Final Completion of the Work, the Contractor shall promptly deliver updated certificates of insurance, endorsements indicating the required coverages, and/or certified copies of the insurance policies. Certificates, endorsements and/or policies which, in the Owner's opinion, are

incomplete or do not reflect the required coverage, limits or terms will be returned by the Owner for resubmission by the Contractor. If the insurance initially obtained by the Contractor expires prior to Final Completion of the Work, renewal certificates and additional insured and other endorsements (conforming with the requirements set forth in this Exhibit) shall be furnished to the Owner prior to the date of expiration of all such initial insurance. For all coverage required to be maintained after Final Completion, an additional certificate evidencing such coverage and the Additional Insureds' status as additional insureds shall be submitted to the Owner on an annual basis as the coverage is renewed (or replaced).

3. **Failure to Obtain Insurance.** The Contractor's failure to procure and/or maintain insurance required under this Contract shall constitute a material breach of the Contract for which the Owner may, in its sole discretion, stop the Work, suspend, or terminate the Contract. In response to such failure the Owner also may, at its sole discretion, procure or renew such insurance necessary to protect the Owner's interests, pay any premiums in connection therewith and recover (or deduct) all amounts so paid, as well as all other costs and fees incurred as a result of such breach, from the Contractor. The foregoing rights and remedies of the Owner are in addition to the Owner's other rights and remedies. The Contractor understands and agrees that (a) the Owner's receipt of proper certificates of insurance (and endorsements and certified copies of policies if requested by Owner) from the Contractor shall be a condition precedent to Owner's obligation to make any progress payment under the Contract, and (b) it shall not be the basis for an extension of the Contract Time if the Work is stopped or delayed due to the Contractor's failure to provide proper certificates of insurance, endorsements, and policies.

4. **Additional Insureds.** The Owner, the Architect, the Lender, the Owner's Representative, other Indemnified Parties, and other persons or entities designated by the Owner in writing (together, the "**Additional Insureds**" and each an "**Additional Insured**") shall each be included in all policies required hereunder to be maintained by the Contractor and Subcontractors (except for workers' compensation and professional liability insurance) as additional insureds for claims against them relating to this Project, with the understanding that any affirmative obligation imposed upon the insured Contractor and Subcontractor (including without limitation the liability to pay premiums) shall be the sole obligation of the Contractor and Subcontractor, and not of the Additional Insureds. All of the Contractor's and Subcontractors' liability policies shall be endorsed so as to indicate that such policies provide primary coverage (without any right of contribution by any other insurance or self-insurance, including any deductible or retention, maintained by an Additional Insured) for all claims against the Additional Insureds arising out of the performance of this Contract by the Contractor or Subcontractors, or anyone for whom the

Contractor or a Subcontractor may be liable. These policies shall include a separation of insureds/severability of interests clause for claims against the Additional Insureds due to the negligence, act, omission or other conduct of the Contractor or its Subcontractors, or anyone for whom the Contractor or a Subcontractor may be liable.

5. **Renewal or Cancellation of Policies.** All policies shall be endorsed to state that such insurance shall be non-renewed, canceled or modified to reduce the limits only after written notice to the Owner from such insurance company or companies, mailed to the Owner in the same method as would be required under the law of the jurisdiction in which the Project is located for mailing such notice to the first named insured, no less than thirty (30) days in advance. Upon the Contractor's acquisition of a new, renewed, or modified policy, the Contractor shall file with Owner a copy, or a certificate evidencing the procurement, of such policy.

6. **Liability Not Limited.** Neither the insurance requirements set forth in this Exhibit nor the Owner's review and approval of any insurer or insurance policy shall be deemed to limit the Contractor's obligations under the Contract Documents or the Contractor's underlying liability in any manner. The insurance requirements herein merely prescribe the minimum amounts and forms of insurance coverage that the Contractor and all Subcontractors are required to maintain. Any failure by the Owner to enforce in a timely manner any of the provisions of this Exhibit shall not act as a waiver to enforcement of any of such provisions at a later date.

7. **Duration of Coverage.** The Contractor shall maintain all required insurance coverage in full force and effect until Final Completion of the Work, except that the products and completed operations coverage under the CGL and pollution legal liability insurance, and coverage under the professional liability insurance, required under this Exhibit shall be maintained (or if applicable, an extended reporting period will be exercised) for the period of any applicable statute of limitations or five years following Final Completion of the Work, whichever is longer.

II. THE OWNER'S INSURANCE

A. **Builder's Risk Insurance.** The Owner shall procure and maintain in effect at all times during construction a standard all-risk builder's risk insurance policy providing coverage for fire, theft, explosion, vandalism, malicious mischief and collapse, to the maximum extent available at a cost that is not demonstrably unreasonable. Earthquake and flood insurance may (but need not) be included in the Owner's sole discretion (provided that, if the Owner elects not to carry earthquake insurance, the Contractor will not be required to re-build the Project at Contractor's cost in the event of damage by earthquake).

1. The builder's risk insurance shall be in an amount equal to the replacement cost of the completed Work (without deduction for depreciation), including the cost of excavation, grading and filling. This insurance, which may be subject to deductibles in the Owner's sole discretion, shall cover building materials to be incorporated into the Work that are stored on-Site, and shall cover building materials that are off-Site or in transit up to a limit of $_____, but shall not cover loss or damage to the tools, equipment, scaffolding, personal property or other items belonging to or rented by Contractor or any Subcontractor which are not to be incorporated into the Work. The amount of the deductible, if any, shall not exceed $_____ for any one loss. Losses not reimbursed by builder's risk insurance by reason of the deductible will be paid by the Contractor as a Cost of the Work subject to the Guaranteed Maximum Price (if the Contract is based upon the Cost of the Work).

2. The builder's risk policy shall name the Owner, Lender, Contractor and Subcontractors of any tier as insureds. All proceeds of the builder's risk policy shall be payable to the Owner. The Owner shall collect, adjust and distribute such proceeds, resolve any and all claims thereunder and apply the proceeds of such insurance to the repair, reconstruction or replacement of the Project. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate written agreements shall require Subcontractors to make payments to their sub-subcontractors in similar manner.

3. The Contractor shall be responsible for the Work until Final Completion by the Contractor pursuant to the Contract terms. The fact that the Owner is furnishing builder's risk insurance as described herein shall not be interpreted to relieve the Contractor of its obligation to complete the Work in accordance with the requirements of the Contract Documents and without additional cost to the Owner beyond the Contract Sum/Guaranteed Maximum Price.

4. The Owner and Contractor waive all rights against (1) each other and any of their Subcontractors, sub-subcontractors, agents, consultants and employees, each of the other, and (2) the Architect, Architect's consultants, Lender, Owner's Representative, Owner's separate contractors, if any, and any of their subcontractors, sub-subcontractors, agents, consultants and employees, for damages caused by fire or other causes of loss to the extent of actual recovery of any insurance proceeds under the builder's risk insurance obtained pursuant to this Contract (but not including any deductible amount), except such rights as they have to proceeds of such insurance held by the Owner or Contractor for the benefit of others. The builder's risk policy shall provide such waivers of subrogation by endorsement or otherwise. The Owner or the Contractor, as appropriate, shall require of the Architect, Architect's consultants,

separate contractors (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 in favor of each of the parties enumerated herein. Notwithstanding anything to the contrary set forth in the Contract Documents, in the event that the actual recovery from the builder's risk insurer is less than the amount claimed by the Contractor, a Subcontractor or any other person or entity seeking recovery from such insurance, then (a) the Contractor shall not be entitled to an increase in the Guaranteed Maximum Price (or Contract Sum, in a stipulated sum contract) on account of any amounts not actually recovered by the Contractor, and (b) any amounts not actually recovered by the Contractor shall not constitute a Cost of the Work if such loss was caused in whole or in part by the negligence or breach of contract of the Contractor, Subcontractor, Sub-subcontractor, supplier, or anyone for whom they may be responsible. A waiver of rights of recovery, including subrogation, as set forth in this Section II.A.4 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.

Construction Risk Management: Ten Issues in Construction Contracts

This article first appeared in Insurance Law Blog, May 13, 2010.

by James P. Bobotek

James P. Bobotek
Senior Associate
Insurance Recovery & Advisory
+1.202.663.8930 DC
+1.703.770.7930 VA
james.bobotek@pillsburylaw.com

Mr. Bobotek concentrates his practice on a variety of insurance coverage, risk management and risk allocation issues, with an emphasis on those arising in the construction industry. Mr. Bobotek counsels clients in formulating risk management strategies, obtaining insurance cover, developing contractual insurance requirements, analysis and resolution of insurance coverage claims and disputes, and all phases of development and construction of commercial properties, including preparation, review and negotiation of development, design, construction, design-build, and related agreements.

In the world of construction, whether you are a lender, owner, contractor, or subcontractor, your success hinges largely on risk management. While there is no substitute for sound business and construction practices (such as proper preconstruction planning, proven construction means and methods, use of experienced personnel, and stringent safety programs), among the most important project risk allocation tools are the contracts governing the various parties' rights and obligations. Within those contracts, risk is primarily allocated through indemnity and insurance requirement provisions. Proper risk management practices, however, are not limited to risk allocation. Equally important is careful contract preparation and review. Set forth below is a brief overview of some of the most important risk management concepts to consider when preparing or entering into your next construction contract.

1. Risks Should Be Transferred to Those In the Best Position to Control Them

Owners and contractors should anticipate potential project risks and determine whether it is more advantageous to retain or transfer them. From a risk management perspective, it is crucial to spread the project risks to the parties most able to manage them. Owners, especially those not well-versed in the nuances of the construction industry, should strive to limit the number of parties with whom they contract. The owner should engage a project architect, and then place responsibility for engagement and oversight of all other design professionals on the architect, who is in a much better position to oversee these consultants' services than the owner. The same is true for the project's construction activities; the owner should enter into a contract with the contractor, who will engage all subcontractors. Subcontractors should, in turn, engage sub-subcontractors, materialmen, and suppliers. In this fashion, the overall project risks may be spread to those with the greatest ability to control them.

2. Don't Include Overly Onerous Contractual Requirements

The best way to achieve successful completion of the project on time and within budget is to foster a collaborative project environment. This begins with the contracting process. While is it advisable to clearly address all anticipated risks in the contract, it serves no useful purpose to force an onerous, one-sided contract on contractors and subcontractors. Draconian

indemnity, warranty, and payment provisions will not only drive project costs up, but may also engender a more adversarial relationship between the contracting parties. In addition, courts may not uphold them.

3. Back Up Indemnity Provisions With Insurance

Contractual indemnity provisions included in contracts are only as good as the indemnitor's ability to honor them. Because it is often difficult to adequately vet a contractual partner's finances and work/safety history, requiring the proper amount and type of insurance is a crucial risk management component. When transferring risk through indemnity, it is important to ensure that the transferee has, or is able to procure in a cost-effective manner, insurance coverage sufficient to handle the assumed risk. One caveat at is that some risks included in an indemnity agreement, such as liability arising out of an indemnitor's intentional misconduct, are not insurable. Do not let lack of insurability for such conduct serve as a valid argument for negotiating responsibility for it out of an indemnity agreement.

4. Tailor Insurance Requirements to the Discipline

When preparing insurance requirements for construction-related contracts, make sure that the indemnity and risk obligations associated with each project discipline are identified and addressed.

a. Design Professionals (architects, engineers, etc.). Design professional contract requirements should include auto and commercial general liability, workers compensation/ employers liability and, most importantly, professional liability. Pay particular attention to the limits of the professional liability coverage; requiring excess limits for the professional liability coverage may be appropriate depending on the project's size. Consider requiring that the coverage be "project specific" either through a separate project policy or sub-limits applicable only to the project. For large projects, an owner may wish to consider obtaining owners protective professional insurance coverage, which indemnifies the owner directly for losses arising out of professional negligence of architects/engineers exceeding the limits available under architects'/engineers' own professional liability policies.

b. Contractors and Subcontractors. Those entities performing construction work on the project should be required to carry auto and commercial general liability insurance, workers compensation/employers liability, and an excess liability policy providing coverage over the auto and CGL policies' limits. Many owners also insist on payment and performance bonds from contractors and/or subcontractors. For those contractors and subcontractors performing any design-build functions, professional liability coverage should also be required. To prevent coverage gaps, contractors and subcontractors' insurance requirements should include pollution liability coverage. If the owner will procure the property or builders risk coverage, contractors and subcontractors should consider the need for an "installation floater" or similar coverage to protect their equipment and supplies on-site, offsite, and in transit.

c. Property/Builders Risk Coverage. While the liability coverage referenced above covers most project accidents resulting in (i) bodily injury, and (ii) damage to property other than what is being constructed, in most cases it does not cover damage to the structure being built. While it is possible to cover damage to construction projects under an owner's existing property policy, there are coverage limitations in standard property insurance forms that make procurement of a builders risk policy desirable in most cases. If a builders risk policy is procured, consideration should be given to whether the owner or the contractor obtains it. This determination is best made on a project-by-project basis, taking into consideration such factors as the type of project (i.e., new construction or renovation of an existing structure), type of contract (cost plus or stipulated sum), financing/lender's requirements (owner may want to "bundle" soft cost and loss of income coverage with the builders risk policy to avoid claim delays and argument among insurers over coverage), the presence of a master property program (owner or contractor), location of project, the parties' relative economic leverage to negotiate the most favorable premium and coverage, the contractor's level of sophistication, and

the owner's desire to participate in project-specific risk management.

5. Address Potential Coverage Gaps

Numerous risk management products, including insurance policies and bonds, are required to cover the risks presented by a construction project. To the greatest extent possible, the coverage provided by these policies should fit together. Policy provisions are drafted to create in one policy the exact coverage that was excluded by another policy. Have your broker and/or attorney review the entire insurance program to prevent gaps in coverage. You may need to amend one or more of your policies through endorsements, or purchase additional coverage, to close these gaps.

6. Add Protection By Including Additional Insured Requirements

Make sure that you require all downstream contractors and/or subcontractors to add you as an additional insured under their liability policies. Additional insured status adds a layer of protection to an owner's or contractor's indemnity requirements. A key advantage is that an insurer has an up-front duty to defend claims made against additional insureds, whereas most indemnity provisions require only that the indemnitee provide reimbursement of any defense costs. Include a requirement in your contract that the additional insured endorsement be broad enough to cover both ongoing and completed operations, as well as your liability arising out of the work, on a primary and non-contributory basis. Be sure, however, not to ask to be named as an "additional named insured," as this may include undesirable obligations such as paying a deductible, self-insured retention, or premium if the first named insured fails to do so.

7. Ensure That Waivers of Subrogation Are in Place.

Proper transfer of many project risks from the contracting parties to their insurers is achieved through inclusion of waivers of subrogation. These waivers prevent insurers from passing risk back to downstream project parties by precluding insurers from seeking reimbursement from other project participants for amounts paid on claims. Because an insurer "stands in the shoes" of its insured when bringing a subrogation claim, it cannot bring such a claim if its insured has waived this right in its contract with the allegedly culpable party. For this reason, waivers of subrogation ensure that transferred project risk stays with the insurers.

8. Don't Rely on Certificates of Insurance

Many parties to a construction project fail to adequately confirm that insurance requirements have been satisfied, either upon execution of the contract or throughout the duration of the project. Required coverage limits, additional insured status, and waivers of subrogation provide no benefit if they were not obtained, or are permitted to lapse. It is common for owners and contractors to rely on a cursory review of certificates of insurance to "confirm" compliance with insurance requirements. This practice is extremely risky, as many insurance certificates include incorrect and/or incomplete information, such as omitting mention of risk-changing exclusions or endorsements. In addition, most certificates of insurance are prepared using an industry-standard form. Courts have found that these forms are so replete with express disclaimers that they are not legally binding on the party providing them. As such, it is advisable to require in the contract not only a certificate of insurance and endorsements evidencing the proper insurance coverage, additional insured status and waiver of subrogation, but also delivery of a copy of the applicable insurance policies. Performing a diligent review of the information provided will greatly diminish, if not remove, the anguish, costs and lost time suffered upon discovery, after a claim is made, that the putative coverage identified in the certificate of insurance is not what the actual policies provide, and is not what was required under the relevant contract.

9. Have Contracts Reviewed by a Knowledgeable Attorney to Ensure that all Contracts Are Consistent and Current

All too often, owners and contractors fail to ensure that the various contracts into which they have entered are consistent with both the market and one another. Dispute resolution provisions should be harmonized to avoid inconsistent results caused by an inability to include all parties in the same proceeding. Project lenders' and owners' requirements regarding payment timing and limitations must be properly flowed down. To steer

clear of surprises when claims arise, as well as unnecessary project delays, subcontractor, sub-subcontractor, supplier and materialmen contracts must include the proper flow-downs required by upper tier contracts. Many lenders, owners, and contractors use form contracts with insurance and indemnity requirements that are outdated, unenforceable, or otherwise unobtainable. Forcing a design professional, contractor, or subcontractor to obtain insurance in a form that is no longer offered, or offered only at a cost-prohibitive premium, is not in the project's best interest. To avoid these problems, it is crucial to have an experienced attorney scrutinize your contracts.

10. Read the Contract Before Executing It

Lastly, there is no substitute for reading each contract very carefully before signing it. Beyond the obvious problems of errors and inaccurate information that creep into negotiated contracts, careful review may reveal additional risks, improperly allocated risks, and other issues. No agreement is perfect, but vigilant contract review is one of the most crucial steps in the risk management process.

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 1.877.323.4171

EXHIBITS

I. Senate Bill 971, ratified in 2010 – Contracts for design professional services

II. Senate Bill 474, 2011-2012 Regular Session – Commercial Construction Contracts: Indemnification

III. *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033 (Fla. App. 2010)

IV. *Pennsylvania General Insurance Co. v. American Safety Indemnity Co.*, 111 Cal. Rpt. 3d (Cal. App. 2010), rev. denied

V. *Scottsdale Insurance Co. v. Century Surety Co.,* 105 Cal. Rptr. 3d 896 (Cal. App. 2010)

EXHIBIT I

Senate Bill 972

Senate Bill 972 clarifies the requirement under California law that indemnity agreements, including the duty to defend, must be related to the work of the design professional. SB 972 was adopted, and the amended language is effective as of January 1, 2011.

Section 2782.8 of the Civil Code is amended to read:
2782.8. (a) For all contracts, and amendments thereto, entered into[,] on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost *and duty* to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that *are caused by* the negligence, recklessness, or willful misconduct of the design professional. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.

EXHIBIT II

Senate Bill 474

Existing law provides that provisions in construction contracts that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss arising from the sole negligence or willful misconduct of the promisee or the promisee's agents who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable. Existing law excepts from these provisions agreements to indemnify with professional engineers and geologists, among others. Existing law prescribes different requirements and prohibitions for residential construction contracts entered on and after January 1, 2009.

This bill would provide, for construction contracts executed on and after January 1, 2012, that are not for residential construction, that any provision in a contract purporting to indemnify, hold harmless, or defend another person against actual or claimed liability, damage, or expense arising, in whole or in part, from the negligence, willful misconduct, defective design, violation of law, or other fault of that person or that person's agents, employees, independent contractors, subcontractors, or representatives is against public policy and is void and unenforceable. The bill would require that California law be applied to these contracts regardless of any choice-of-law rules that might otherwise apply. The bill would except certain contractual provisions and types of insurance from its provisions. The bill would provide that waiver of these provisions is contrary to public policy, void, and unenforceable.

~~Existing law, applicable to residential construction contracts entered into after January 1, 2009, makes unenforceable provisions that purport to require a subcontractor to insure or indemnify a builder, or a general contractor or contractor not affiliated with the builder, against liability for claims of construction defects if the claims relate to the negligence of the builder or contractor or the builder's or contractor's other agents, as specified.~~

~~This bill would extend these provisions to commercial construction contracts entered into on and after January 1, 2012.~~

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) It is in the best interests of this state and its citizens and consumers to ensure that every construction business in the state is financially responsible under the tort liability system for losses that it, as a business, may cause.

(b) The duty of a business to be responsible for its own negligence should be nondelegable, except through contracts for insurance.

(c) Developers and construction businesses in recent years have begun to use contract provisions to shift the financial responsibility for their negligence to others, thereby circumventing one of the fundamental foundations of tort law.

(d) If all businesses, large and small, are responsible for their own actions, then construction companies will be able to obtain adequate insurance, the quality of construction will be improved, and workplace safety will be enhanced.

(e) Construction businesses must be able to obtain liability insurance in order to meet their responsibilities.

(f) The provisions of this act will promote competition and safety in the construction industry, thereby benefiting California consumers.

(g) The intent of this act is to create an economic climate that will promote safety in construction and ensure fairness among businesses.

~~SECTION 1.~~ *SEC. 2.* Section 2782 of the Civil Code is amended to read:

2782. (a) *(1)* Except as provided in Sections 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable; provided, however, that this section shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer as defined by the Insurance Code.

(2) This subdivision shall apply only to contracts executed before January 1, 2012. On and after January 1, 2012, Section 2782.05 shall apply to all construction contracts executed on and after January 1,

2012, that are not for residential construction or otherwise excepted by the provisions of that section.

(b) Except as provided in Sections 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable.

(c) For all construction contracts, and amendments thereto, entered into after January 1, 2009, for residential construction, as used in Title 7 (commencing with Section 895) of Part 2 of Division 2, ~~and for commercial construction as provided in subdivision (i),~~ all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract, and amendments thereto, that purport to insure or indemnify, including the cost to defend, the builder, as defined in Section 911, or the general contractor or contractor not affiliated with the builder, as described in subdivision (b) of Section 911, by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, other servants, or other independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties. Nothing in this subdivision shall prevent any party from exercising its rights under subdivision (a) of Section 910. This subdivision shall not affect the obligations of an insurance carrier under the holding of Presley Homes, Inc. v. American States Insurance Company (2001) 90 Cal.App.4th 571. Nor shall this subdivision affect the obligations of a builder or subcontractor pursuant to Title 7 (commencing with Section 895) of Part 2 of Division 2.

(d) Subdivision (c) does not prohibit a subcontractor and builder or general contractor from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement does not waive or modify the provisions of subdivision (c) subject, however, to paragraphs (1) and (2). A subcontractor shall owe no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless and until the builder or general contractor provides a written tender of the claim, or portion thereof, to the

subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants, including, but not limited to, information provided pursuant to subdivision (a) of Section 910, relating to claims caused by that subcontractor's scope of work. This written tender shall have the same force and effect as a notice of commencement of a legal proceeding. If a builder or general contractor tenders a claim for construction defects, or a portion thereof, to a subcontractor in the manner specified by this provision, the subcontractor shall elect to perform either of the following, the performance of which shall be deemed to satisfy the subcontractor's defense obligation to the builder or general contractor:

(1) Defend the claim with counsel of its choice, and the subcontractor shall maintain control of the defense for any claim or portion of claim to which the defense obligation applies. If a subcontractor elects to defend under this paragraph, the subcontractor shall provide written notice of the election to the builder or general contractor within a reasonable time period following receipt of the written tender, and in no event later than 90 days following that receipt. Consistent with subdivision (c), the defense by the subcontractor shall be a complete defense of the builder or general contractor of all claims or portions thereof to the extent alleged to be caused by the subcontractor, including any vicarious liability claims against the builder or general contractor resulting from the subcontractor's scope of work, but not including claims resulting from the scope of work, actions, or omissions of the builder, general contractor, or any other party. Any vicarious liability imposed upon a builder or general contractor for claims caused by the subcontractor electing to defend under this paragraph shall be directly enforceable against the subcontractor by the builder, general contractor, or claimant.

(2) Pay, within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees and costs, on an ongoing basis during the pendency of the claim, subject to reallocation consistent with subdivision (c), and including any amounts reallocated upon final resolution of the claim, either by settlement or judgment. The builder or general contractor shall allocate a share to itself to the extent a claim or claims are alleged to be caused by its work, actions, or omissions, and a share to each subcontractor to the extent a claim or claims are alleged to be caused by the subcontractor's work, actions, or omissions, regardless of whether the builder or general contractor actually tenders the claim to any particular subcontractor, and regardless of whether that subcontractor is participating in the defense. Any amounts not collected from any particular subcontractor may not be

collected from any other subcontractor.

(e) Notwithstanding any other provision of law, if a subcontractor fails to timely and adequately perform its obligations under paragraph (1) of subdivision (d), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory damages, consequential damages, and reasonable attorney's fees. If a subcontractor fails to timely perform its obligations under paragraph (2) of subdivision (d), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory and consequential damages, as well as for interest on defense and indemnity costs, from the date incurred, at the rate set forth in subdivision (g) of Section 3260, and for the builder's or general contractor's reasonable attorney's fees incurred to recover these amounts. The builder or general contractor shall bear the burden of proof to establish both the subcontractor's failure to perform under either paragraph (1) or (2) of subdivision (d) and any resulting damages. If, upon request by a subcontractor, a builder or general contractor does not reallocate defense fees to subcontractors within 30 days following final resolution of the claim as described above, the subcontractor shall have the right to pursue a claim against the builder or general contractor for any resulting compensatory and consequential damages, as well as for interest on the fees, from the date of final resolution of the claim, at the rate set forth in subdivision (g) of Section 3260, and the subcontractor's reasonable attorney's fees incurred in connection therewith. The subcontractor shall bear the burden of proof to establish both the failure to reallocate the fees and any resulting damages. Nothing in this section shall prohibit the parties from mutually agreeing to reasonable contractual provisions for damages if any party fails to elect for or perform its obligations as stated in this section.

(f) A builder, general contractor, or subcontractor shall have the right to seek equitable indemnity for any claim governed by this section.

(g) Nothing in this section limits, restricts, or prohibits the right of a builder, general contractor, or subcontractor to seek equitable indemnity against any supplier, design professional, or product manufacturer.

(h) As used in this section, "construction defect" means a violation of the standards set forth in Sections 896 and 897.

~~(i) This section shall apply to commercial construction contracts entered into on and after January 1, 2012.~~

SEC. 3. Section 2782.05 is added to the Civil Code , to read:

2782.05. (a) Provisions, clauses, covenants, or agreements

contained in, collateral to, or affecting a contract or agreement, except as provided in subdivision (c), whether executed in this state or without, for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to public or private real property located in the state, including any erection, moving, lifting, demolition, or excavation that requires a promisor to indemnify, release, hold harmless, insure, or defend another person against actual or claimed liability, damage, or expense arising, in whole or in part, from the negligence, willful misconduct, defective design, violation of law, or other fault of that person or that person's agents, employees, independent contractors, subcontractors, or representatives are against public policy and are void and unenforceable.

(b) A provision in a contract described in subdivision (a) that requires the purchase of additional insured coverage, or any coverage endorsement or provision within an insurance policy providing additional insured coverage, primary or noncontributing coverage or waivers, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this section for an agreement to indemnify, hold harmless, or defend.

(c) This section does not apply to:

(1) Contracts for residential construction, as used in Title 7 (commencing with Section 895) of Part 2 of Division 2.

(2) Any wrap-up insurance policy or program, except as provided by this section.

(3) A cause of action for breach of contract or warranty that exists independently of an indemnity obligation.

(4) A provision in a construction contract that requires the promisor to purchase or maintain insurance covering the acts or omissions of the promisor.

(5) Indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and a contracting project owner's lender are parties.

(6) General agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts.

(7) The benefits and protections provided by the workers' compensation laws.

(8) The benefits or protections provided by the governmental immunity laws.

(d) This section does not apply to a construction contract provision that requires a promisor to purchase:

(1) Owners and contractors protective liability insurance.

(2) Railroad protective liability insurance.

(3) Contractors all-risk insurance.

(4) Builders all-risk or named perils property insurance.

(e) This section applies only to liability under a construction contract entered into on or after January 1, 2012.

(f) Notwithstanding any choice-of-law rules that would apply the laws of another jurisdiction, the law of California shall apply to every contract to which this section applies.

(g) Any waiver of the provisions of this section is contrary to public policy and is void and unenforceable.

EXHIBIT III

Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033 (Fla. App. 2010)

The geologist, his company, and a design-builder corporation entered into a contract with a country club for hydrogeologic consulting and design services for a reverse osmosis water treatment plant. The geology contract contained a liability limitation clause capping the geologist corporation's "total aggregate liability" to its fee for all services provided. The liability limitation clause in the contract provided:

> In recognition of the relative risks and benefits of the project to both [parties], the risks have been allocated such that [the county club] agrees, to the fullest extent permitted by law, to limit the liability of [the corporation] and its subconsultants to the total dollar amount of the approved portions of the scope for the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [the corporation] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [the corporation's] total fee for services rendered on this project, whichever is greater. Such claims and causes include, but are not limited to, negligence, professional errors or omissions, strict liability, breach of contract or warranty.

Furthermore, the liability limitation clause specifically extended to "negligence, professional errors or omissions, strict liability, breach of contract, and warranty."

Throughout the design and construction of the project, many problems arose, including issues with water quality, and the proper operability of the water treatment system. As a result of these issues, the club filed suit against the geologist, his corporation and the design-builder corporation for fraud, breach of contract and professional malpractice. The trial court concluded that the defendants were liable for professional malpractice, but that the limitation of liability provision applied only to the geologist's corporation.

The Florida Court of Appeal affirmed. In doing so, the appellate court rejected the geologist's argument that any liability he faced was capped by the limitation of liability provision. The court concluded that even assuming the liability limitation extended to him personally, it would be unenforceable as a matter of law. The court based its conclusion on Florida statute § 492.111, which provides that a licensed professional geologist who practices through a corporation shall not be relieved from personal liability for negligence, conduct or wrongful acts committed by her or him. The court further based its decision on a Florida Supreme Court decision, *Moransais v. Heathman*, 744 So. 2d 973 (1999), involving claims against an engineering firm. In that case, the Florida Supreme Court held:

> [T]he economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature and the aggrieved party has entered into a contract with the professional's employer. We also hold that Florida recognizes a common law cause of action against professionals based on their acts of negligence despite

> the lack of a direct contract between the professionals and the aggrieved party.

The appellate court observed that based on Florida statute § 492.111 and *Moransais*, "a cause of action in negligence exists [against the geologist] irrespective, and essentially independent of a professional services agreement."

In light of the court's holding, it appears that any person licensed as a Florida professional is potentially subject to unlimited liability under Florida common law for his professional actions, even if the retention agreement for him or his business contains a liability limitation clause.

EXHIBIT IV

Pennsylvania General Insurance Co. v. American Safety Indemnity Co., 111 Cal. Rpt. 3d (Cal. App. 2010), rev. denied

The California Supreme Court has held that the bodily injury and property damage liability coverage afforded by standard occurrence-based CGL policies is triggered by the occurrence of "bodily injury" or "property damage." Coverage is triggered on the date the injury or damage occurs, rather than the date of the event resulting in the injury or damage.

In *Pennsylvania General Insurance Co. v. American Safety Indemnity Co*., 185 Cal. App. 4th 1515 (2010), *rev. denied*, a framing subcontractor was insured under a CGL policy issued by Pennsylvania General Insurance Company while performing work on an apartment construction project ("Project"). At the conclusion of the policy period, and after the subcontractor's work was completed, the subcontractor was issued a new CGL policy by American Safety Indemnity Company ("ASIC").

As a result of a construction defect lawsuit involving the Project, the subcontractor tendered its defense to both Pennsylvania General and ASIC. Pennsylvania General accepted the tender of the defense and paid the subcontractor's defense and settlement costs. ASIC declined the subcontractor's tender, and did not participate in defending or indemnifying the subcontractor. After the underlying litigation was settled, Pennsylvania General sued ASIC for equitable contribution for a portion of the defense and indemnity costs. The pivotal issue was whether the trigger for coverage occurred within the ASIC policy period.

ASIC argued the term "occurrence" employed in ASIC's policy expressly and unambiguously referred to the underlying conduct that caused the resulting damage, rather than to the damage resulting from that conduct, and it was undisputed that the subcontractor's conduct was completed before the effective date of ASIC's policy.

ASIC's CGL policy provided it would indemnify the subcontractor for any amount the subcontractor became obligated to pay as "'property damage' to which this insurance applies," and specified that "[t]his insurance applies to … 'property damage' only if: (1) The … 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and (2) The … 'property damage' occurs during the policy period." ASIC's CGL policy provided a "per occurrence" limit of $1 million as well as a "products/completed operations" aggregate limit of $1 million.

ASIC's CGL policy also contained two 1999 endorsements that modified the standard policy provisions. The standard definition of "occurrence" contained in the 1997 version of the CGL policy was replaced by ASIC's 1999 endorsement that refined the definition of "occurrence" by adding the following italicized language: "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions *that happens during*

the term of this insurance. 'Property damage' ... which commenced prior to the effective date of this insurance will be deemed to have happened prior to, and not during, the term of this insurance." (Emphasis added.)

At the same time, ASIC added another 1999 endorsement, entitled "PRE-EXISTING INJURY OR DAMAGE EXCLUSION," which stated: "This insurance does not apply to: 1. Any 'occurrence', incident or 'suit' … [(a)] which first occurred prior to the inception date of this policy … ; or [(b)] which is, or is alleged to be, in the process of occurring as of the inception date of this policy … even if the 'occurrence' continues during this policy period."

Given the policy language, ASIC argued there was no potential for coverage under ASIC's policy, regardless of when the damage resulting from the subcontractor's conduct may have occurred, because all of the subcontractor's work (the causal conduct) was completed prior to ASIC's policy period. ASIC's definition of "occurrence" did not suggest that damage resulting from that conduct was germane to determining *when* there was an occurrence.

The Court of Appeal disagreed with ASIC. In reaching its decision, the Court noted that when construing insurance policies, ambiguities in coverage clauses must be resolved broadly in favor of coverage. The Court held that ASIC's policy, read as a whole, was reasonably susceptible to the interpretation that resulting damage, and not causal conduct, was a defining characteristic of the "occurrence" that must take place during the policy period to trigger coverage. Accordingly, it was error to grant summary judgment in ASIC's favor.

EXHIBIT V

***Scottsdale Insurance Co. v. Century Surety Co.*, 105 Cal. Rptr. 3d 896**

(Cal. App. 2010)

When multiple insurance companies have the duty to defend the same mutual insured against the same legal action, the costs of the defense are to be allocated among the insurers equitably. When an insurance company that has the duty to defend declines to participate in the defense of the common insured, those insurers who contributed to the defense may pursue an action for equitable contribution against the nonparticipating insurer. In this case, two insurers shared multiple construction subcontractors as mutual insureds. Frequently, Century Surety Co. would decline to participate in the defense and indemnity of the insureds. Scottsdale Insurance Co. brought suit seeking equitable contribution with respect to hundreds of underlying actions involving the mutual insureds. In allocating responsibility between the insurers, the trial court applied the following standard: "[W]here someone's wrong has made it difficult to provide exact numbers as to loss or damage, plaintiff does not bear the burden of exactitude." The trial court concluded that Scottsdale could recover one-half of the amounts it paid on approximately 80 underlying claims.

The Court of Appeal held that when multiple insurance companies have a duty to defend common insureds in a legal action and one declines to participate in the defense, an insurer seeking equitable contribution from the nonparticipating insurer must prove that it paid more than its "fair share" of the defense and indemnity costs for the common insured. The insurer seeking equitable contribution also bears the burden of producing the evidence necessary to calculate a "fair share." One insurer cannot recover equitable contribution from another insurer for any amount that would result in the first insurer paying less than its "fair share," even if the second insurer would end up paying nothing. Because the trial court applied an incorrect standard, the Court of Appeal reversed and remanded the case for an allocation determination.