Construction Accident & Commercial Premises Liability Cases
September 24, ,2024

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INDIANA CONTINUING LEGAL EDUCATION FORUM

CONSTRUCTION ACCIDENT AND COMMERCIAL PREMISES LIABILITY CASES

September 24, 2024

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The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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CONSTRUCTION ACCIDENT AND COMMERCIAL PREMISES LIABILITY CASES

ICLEF
INDIANA CONTINUING LEGAL EDUCATION FORUM

Agenda

8:30 A.M.	Registration & Coffee
8:55 A.M.	Welcome & Introduction *Otto J. Shragal*, Program Chair
9:00 A.M.	First Steps in Building and Defending a Construction Negligence / Commercial Premises Liability Case (Plaintiff and Defense Perspectives) *Otto J. Shragal and Brandon J. Kroft*
10:00 A.M.	Coverage and Indemnification *Jerry E. Huelat*
10:30 A.M.	Coffee Break
10:45 A.M.	Primer on Litigating a Construction Negligence Case *Lonnie D. Johnson*
11:30 A.M.	Primer on Litigating the Premises Liability Case *Paul O. Mullin*
12:15 P.M.	Lunch Break (on your own)
1:15 P.M.	Ethical Issues that Arise in Construction Negligence Litigation *Margaret M. Christensen*
2:00 P.M.	OSHA Citations and Investigations *Timothy G. Galarnyk*
2:45 P.M.	Refreshment Break
3:00 P.M.	Preparing the Corporate 30(b)6 Witness *Renee J. Mortimer*
3:45 P.M.	Trial Planning and Strategy *Daniel S. Chamberlain*
4:30 P.M.	Adjourn

September 24, 2024

CONSTRUCTION ACCIDENT AND COMMERCIAL PREMISES LIABILITY CASES

ICLEF
INDIANA CONTINUING LEGAL EDUCATION FORUM

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September 24, 2024

Otto J. Shragal, Allen Law Group, Chesterton

Otto Shragal is a principal in the law firm of Allen Law Group, LLC. The firm limits its practice to representation of plaintiffs in serious personal injury and wrongful death litigation, exclusively. Mr. Shragal' s entire practice is litigation based and his primary focus is on construction injury, premises liability and products liability cases. Mr. Shragal has tried cases in both State and Federal District Courts and has secured multiple 7 and 8 figure verdicts and settlements in both the State of Indiana and Illinois. His cases have been listed among the country's "Top 10 Verdicts" and recognized in publications throughout the country.

Daniel S. Chamberlain, Cohen & Malad, LLP, Indianapolis

Dan Chamberlain focuses his practice on serving personal injury clients, specifically advocating on behalf of traumatic brain injury victims and their families. For more than 20 years, Dan has litigated a variety of personal injury claims in state and federal courts such as:
- Traumatic Brain Injury
- Birth Injury
- Sexual Abuse
- Medical Malpractice
- Construction Accidents
- Wrongful Death
- Motor Vehicle and Trucking Accidents

Dan's work related to traumatic brain injury victims is extensive. He is a member of the Executive Committee for the Brain Injury Association of America (BIAA) in Washington, D.C. He served as the Board Chair in 2014-2015, leading the organization's efforts throughout 30 state and affiliate chapters.

Dan is a member of the Brain Injury Association of Indiana (BIAI) Executive Committee in Indianapolis, Indiana. This organization works at the local and state level to advocate for the rights of people and their families who have been impacted by traumatic brain injuries.

Margaret M. Christensen, Dentons Bingham Greenebaum LLP, Indianapolis

Meg Christensen leads Denton Bingham Greenebaum's largest office as Office Managing Partner, while also serving as Co-Chair of the Firm's Professional Responsibility Committee and Lateral Hiring Chair of the Firm's Recruiting Committee. Meg concentrates her full-time legal practice on three main areas of law: lawyer ethics, appeals and business litigation.

Her focus includes:

Ethics – Meg has represented lawyers in all stages of the disciplinary process pending before the Indiana Supreme Court. Additionally, she has represented other professionals in front of various state licensing boards, and the IRS Office of Professional Responsibility.
Appellate – Meg brings a fresh perspective to identifying and analyzing issues on appeal. Meg's experience includes representing clients in the appellate phase of complex business disputes, contract and insurance coverage disputes, and shareholder liability.
Business Litigation – Meg assists clients in litigation in both state and federal courts in claims involving multi-million dollar contract disputes, shareholder liability, enforcement of employee restrictive covenants, inter-governmental disputes, unfair competition claims, dissolutions, administrative enforcement and licensing. She is experienced in media law issues including defamation defense, reputation management, and social media harms. Meg also represents the media in pursuing access to public records and enforcing open door laws.

Meg's clients are primarily concerned about the impact their legal disputes will have on their business or personal lives. Recognizing that litigation introduces uncertainty into her client's plans, Meg prides herself in clearly communicating with clients about the practical effect of various strategies. Meg's goal is to help busy clients focus on what they do best while she works to present their strongest arguments in pursuit of the best possible result.

Between the Indiana State Bar Association (ISBA), the Indianapolis Bar Association (IBA), the Indiana Continuing Legal Education Forum (ICLEF) and Association of Professional Responsibility Lawyers (APRL), Meg presents on ethics at over a dozen continuing legal education seminars each year. As part of ISBA's Ethics Committee, she considers and issues advisory opinions, recommends rule changes and facilitates lawyer education events. Meg is an active member of the APRL and devotes her time to researching trends in disciplinary enforcement and lawyer ethics.

In her free time, Meg enjoys cooking, hosting dinner parties, and attending yoga or barre class. She's an avid NPR listener, loves old homes and house rehabs and attending camp with her two children. She has a vested interest in voting advocacy and once served as a member of the United Nations Election Protection Delegation, monitoring the polls in El Salvador's National Election.

Timothy G. Galarnyk, Construction Risk Management, Inc., Bandera, TX

Timothy Galarnyk is a Construction safety expert. International and national expert in construction means and methods. Injury and fatality forensic investigations and accident analysis. Expert in the field of construction work zone traffic control measures. Construction contracts, construction defects, workmanship and contractor performance evaluations. Construction insurance policy expert. Residential, industrial, transportation, high-rise, commercial and heavy construction. Construction equipment use, maintenance and accidents. Railroad infrastructure expertise. Bridge evaluation expert. Bridge collapses, defects, scour, means and methods, inspections, designonsultation for efficient constructability.

Jerry E. Huelat, Huelat & Mack P.C., LaPorte

Jerry E. Huelat has over 41 years of litigation experience in all areas of insurance defense. Having tried more than 130 cases in front of a jury, he has substantial trial experience in the areas of arson, fraud, products liability, construction, wrongful death, premises liability, municipal liability, Title VII claims, bad faith, insurance coverage, contractual indemnity, and complex litigation. Mr. Huelat was born in Chicago, Illinois, on March 7, 1953, and graduated from Pennsylvania State University in 1977. He obtained his Juris Doctor degree from Northern Illinois University in 1981 and was admitted to the Indiana bar that same year. He is also admitted to practice before the United States Supreme Court, the United States Court of Appeals, the Seventh Circuit, and the United States District Courts for the Northern and Southern Districts of Indiana. Mr. Huelat is a member of the La Porte County and Indiana State Bar Associations, where he formerly served on the Legal Ethics Committee. He is also a member of the Defense Trial Counsel of Indiana, and is a Past President. Mr. Huelat is also the author of many articles and a regular lecturer at insurance defense seminars. He received the 2016 Diplomat Award from the Defense Trial Counsel of Indiana, and has been selected as an Indiana Super Lawyer for the last eleven years.

Lonnie D. Johnson, Clendening Johnson & Bohrer, P.C., Bloomington

Lonnie Johnson is a Senior Partner at Clendening Johnson & Bohrer, P.C. with over 30 years of experience practicing law and is also a member of The Mediation Group.

PRACTICE AREAS

Lonnie practices in the areas of commercial and business litigation, construction law, personal injury and insurance defense. Throughout his career Lonnie has handled cases in all Federal and Bankruptcy Courts in Indiana and most County Courts. He has accumulated forty-eight (48) reported decisions and argued before the Indiana Court of Appeals, the Indiana Supreme Court, and the United States Seventh Circuit Court of Appeals. Lonnie has authored over thirty (30) articles on civil litigation and is a frequent speaker at seminars, and has served as faculty for the North Central Region Trial Academy. He is frequently called upon to handle complex cases in Federal and State Courts outside of Indiana on a Pro Hac basis. Lonnie is an expert at trying multi-week and multi-million dollar trials; his expertise in handling of complex litigation matters has provided Lonnie and his trial team with great proficiency in conducting and managing electronic discovery as well as the administration and presentation of voluminous documentary evidence in both class-action and complex cases.

Lonnie is a member of The Mediation Group at 888 Keystone Crossing, Indianapolis, IN and has mediated over 100 cases in the areas of personal injury, property disputes, breach of contract, intellectual property, cyber fraud, breach of fiduciary duty, fraud, construction defect, probate, and securities fraud. Lonnie is a member of the Indiana Association of Mediators and The American Association of Mediators.

Brandon Kroft, Cassiday Schade LLP, Merrillville

Brandon J. Kroft is Co-Managing Partner of the firm's offices and serves as a member of the Executive Committee. He is also a former member of the firm's Hiring and Associate Evaluation Committees. Brandon focuses his practice on complex construction, product liability, professional liability and general liability matters.

Brandon is often called upon by his clients to engage in and coordinate immediate response teams for catastrophic accidents, including transportation and construction matters. This includes working with clients and consultants to ensure preservation of evidence and developing defense strategy from the earliest possible moment.

Prior to law school, Brandon was a member of Army Reserve and National Guard. He is also involved in several professional organizations including Themis Advocates Group, Lake County Indiana Bar Association and Defense Research Institute (DRI).

Renee J. Mortimer, Lewis Brisbois Bisgaard & Smith, LLP, Highland

Renee Mortimer is the managing partner of the Highland, Indiana office of Lewis Brisbois and is a member of the General Liability and Transportation Practices. She defends clients against large and excess personal injury and property damage claims in state and federal courts in Indiana and Illinois. As a member of our 24/7 Rapid Response Team, she handles matters concerning major trucking accidents, including managing incidents on-scene. Ms. Mortimer has tried these types of cases to verdict in both Illinois and Indiana.

Prior to joining Lewis Brisbois, Ms. Mortimer served as the partner in charge of Indiana operations for another national law firm. She was also chair of that firm’s Personal Injury and Property Damage practice, as well as its Specialty Transportation Practice. She also served on its clients’ 24/7 Rapid Response Team.

An Indiana native, Ms. Mortimer began her legal career in Chicago but returned to the Hoosier State in 1998, and has practiced law there ever since.

Paul O. Mullin, Lewis and Wilkins LLP, Indianapolis

Paul Mullin's primary practice area is civil litigation. Paul has conducted jury trials on such claims as construction design defect, wrongful death, defamation, battery, automotive negligence, traumatic brain injury and medical malpractice. He currently represents individuals, businesses, insureds, injured people, and governments in civil litigation. Paul has maintained a statewide practice since 2005.

Paul was selected to defend the Indiana State Fair Commission, the Indiana Department of Homeland Security, and the Indiana State Police in the mass litigation ensuing from the August 13, 2011 stage roof collapse at the Indiana State Fair. The lawsuits, which received significant national media coverage, involved now-resolved claims by more than sixty plaintiffs.

Upon graduation from law school, he was awarded the Dean's Distinguished Service Award for service to the law school. In 2007, Paul served as Assistant Majority Counsel to the Indiana State Senate. In 2009, Paul was named as an "Up and Coming Lawyer" by the publication Indiana Lawyer. From 2009 to 2012, Paul was appointed by the Indianapolis & Marion County City-County Council to serve on the Board of Public Safety, which performs certain public safety oversight functions. He was one of five members on the board and served alongside the Director of Public Safety. In 2020, 2021 and 2022, Paul was named a "Super Lawyer" by Thomson Reuters, a distinction given to only 5% of lawyers in a state. In 2021, Paul was appointed to serve as the Indianapolis & Marion County City-County Council minority caucus attorney.

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Ami T. Anderson, Co-Author

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Section One

First Steps to Take in Construction or Premises Case

Otto J. Shragal
Allen Law Group
Chesterton, Indiana

Brandon J. Kroft
Cassiday Schade LLP
Merrillville, Indiana

Section One

FIRST STEPS TO TAKE IN CONSTRUCTION OR PREMISES CASE

OTTO J. SHRAGAL, ALLEN LAW GROUP, LLC

BRANDON J. KROFT, CASSIDAY SCHADE, LLP

HOW TO PRESERVE KEY EVIDENCE

TRO

224 PETITION

INVESTIGATOR

PHONE CALL INTERVIEW AND RECORD IT

PRESERVATION LETTERS THAT ARE SPECIFIC

INSPECTION

SOCIAL MEDIA

SURVEILLANCE CAMERAS (BUSINESSES…NEIGHBORS ETC.)

911 CALL

PRESERVE THE EVIDENCE IMMEDIATELY

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Facsimile: 219.477.5181
Toll Free: **800.465.6292**

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Executive Director
Julie A. Piatek*
Case Administration Director
Donald G. Asher*
G.M. Emeritus
Tricia Hauber*
Senior Paralegal

A Limited Liability Company
* Admitted in Indiana and Illinois
* Admitted in Indiana
* Admitted in Illinois
† Of Counsel
* Not admitted to practice

October 25, 2017

Attn: Risk Management
Niagara LaSalle Steel
1412 E. 150th Street
Hammond, IN 46327

Via Facsimile (219) 853-6095
& Certified Mail
Return Receipt Requested
No. 9489009000276007184794

Re: Accident involving: Robert Coppage
Our Client: Robert Coppage
Date of Loss: January 12, 2017

Dear Sir or Madam:

As you know, Robert Coppage was injured in the course and within the scope of employment with Niagara LaSalle Steel while working on January 12, 2017. Please allow this letter to confirm our legal representation of Robert Coppage regarding his potential third-party claim for damages arising out of this occurrence.

The circumstances surrounding this accident indicate that a third-party may have caused or contributed to cause this injury. We therefore intend to pursue a civil action if third-party liability is corroborated after our factual investigation is concluded. We will, of course, protect your subrogation interests as provided by the Worker's Compensation Act. Meanwhile, ***please preserve all evidence*** in your possession, custody or control–including all photographs, *including negatives and digital images*, videotapes and all other evidence relating to this occurrence so that the third-party action is not compromised by spoliation of this critical evidence.

Also, please assist us in protecting your subrogation interests by *immediately* forwarding copies of the following documents to the undersigned at our Valparaiso office:

(1) Any and all contracts, purchase orders or receipts between you and each vendor, company or other individual performing inspection, maintenance, repairs, certifications or service on the crane or remote control box for the past five (5) years that may be in your possession or control;
(2) Any and all documentation relating to this and any prior incidents regarding the crane or remote control box being utilized at the time in question;

(3) All medical records pertaining to the claimant;
(4) All documents pertaining to your investigation of this occurrence including all witness statements, names of employees on site, statements of employees present at the site, all photographs, video and all investigative reports;
(5) Our client's employment file;
(6) A copy of the Employer's First Report of Accident filed with the Workers' Compensation Board and any similar report(s) filed by the employer with your company;
(7) A copy of all training received for the operation of cranes;
(8) Training manuals, operation manuals and other related documentation relating to the crane and remote control box being operated by Robert Coppage at the time of his incident and any such manuals and related documentation pertaining to the remote control relating to said crane;
(9) Purchase documentation for subject crane and remote control box and any relating component parts of the same;
(10) Any and all work orders, service records, purchase documentation, documents pertaining to refurbishment, certification documentation pertaining to the subject remote control box and crane and their component parts;
(11) A copy of any statement given by the claimant or any other individual relating in any way to the incident in question.

In addition to requesting the above documents and materials, we are also asking that you preserve these documents as we anticipate litigation in this matter. Please contact our office at your earliest convenience as we would like to inspect the subject crane and remote control as soon as possible. We look forward to your professional cooperation in this matter. Please contact us with any questions immediately upon receipt. If we do not hear from you we will be left with no other choice than to seek court assistance to acquire said information and documentation as set forth above. We look forward to hearing from you upon receipt.

Yours respectfully,

KENNETH J. ALLEN LAW GROUP

Otto J. Shragal

OS/kem

March 29, 2021

Attn: Risk Manager
John Brett, Chief Executive Officer
Keith Howell, Chief Operating Officer
Cleveland-Cliffs Burns Harbor, LLC
250 West U.S. Highway 12
Burns Harbor, IN 46304

Via Certified Mail
Return Receipt Requested
No.: 9414811899560315897455

Re: Accident on March 26, 2021 involving Jose Anguiano

Dear Messrs.:

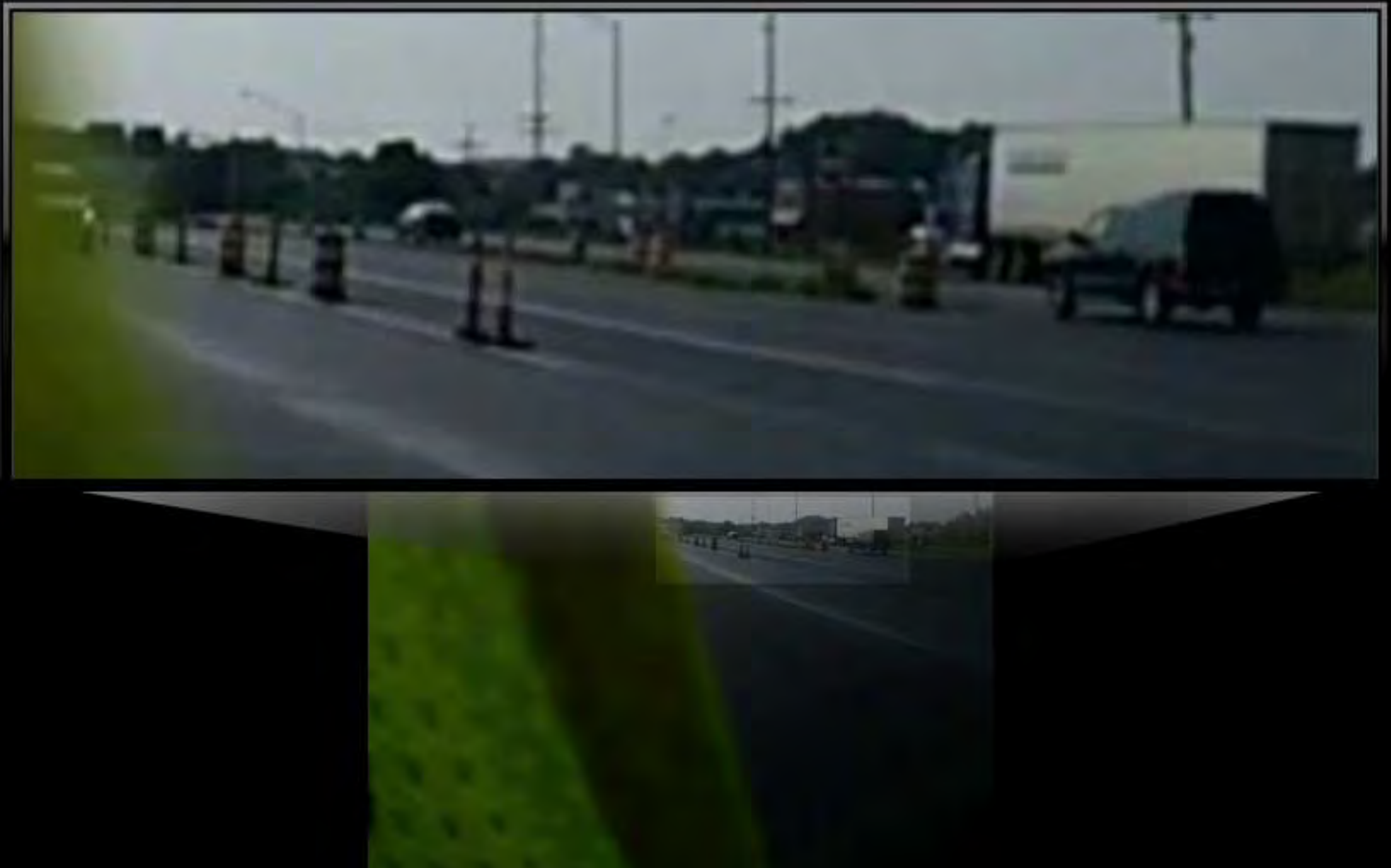
Please be advised that Jose Anguiano has retained the services of this law firm to represent him in a claim for damages and personal injuries arising out of an incident that occurred at your facility, Cleveland-Cliffs Burns Harbor, LLC located at 250 West U.S. Highway 12, Burns Harbor, Indiana 46304, on or around March 26, 2021 while he was working there at your facility.

Please preserve all documents, reports and physical evidence including the equipment, video footage, photographs, lift, crane, remotes/controls, schematics, work orders, maintenance orders, modifications performed and the like in your custody or control as well as anything relating to this occurrence, including the area of the worksite involved, equipment involved until counsel and its consultants have been allowed to enter and visually inspect and memorialize the area and equipment. Please preserve all incident and root cause analysis. Please note that it is imperative that preservation of this evidence occur or significant prejudice will occur and *spoliation* of evidence will result. Additionally, *please preserve all surveillance or security videotapes and/or other photos* which show or might show either the event itself or the circumstances leading up to the event which caused our client's injury. We also request an inspection of the area, crane and its component parts.

DO NOT SPOLIATE THIS EVIDENCE AS IT IS CRUCIAL TO THE POTENTIAL LITIGATION AND IS KEY EVIDENCE IN THIS MATTER.

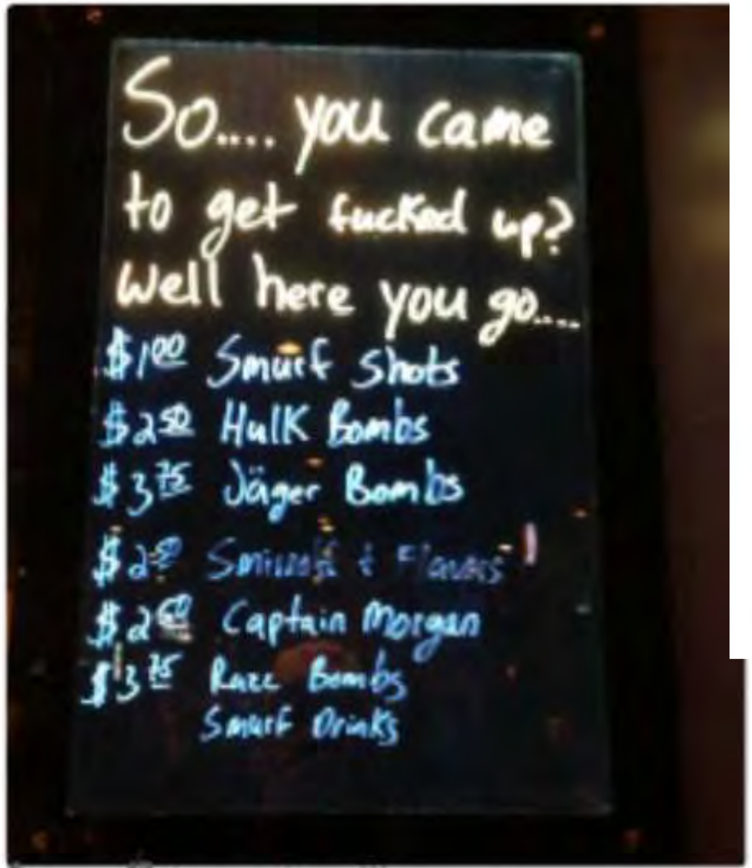
Should we fail to hear from either your Risk Manager or your insurance carrier within a reasonable period of time, then we will have no recourse but to file suit and obtain service of summons and complaint. We therefore suggest that you give this matter your most prompt attention if you have any interest in avoiding litigation. Please contact the undersigned immediately upon receipt to discuss a date and time to allow counsel and its consultants the opportunity to view/inspect the area, crane and equipment in question in the VERY near future to avoid prejudice and spoliation.

Respectfully yours,
KENNETH J. ALLEN LAW GROUP



The New Where Else @WhereElseBar · 22 Mar 2013

I'd say this is put very elegantly, but very accurately...

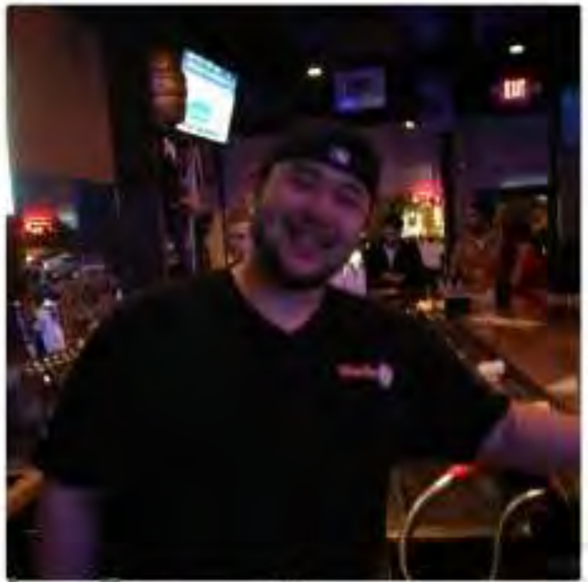


The New Where Else @WhereElseBar · 4 Feb 2013

Congrats to @MMMMMMMichalak for being named Shit Show of the Week this week. It was well deserved!

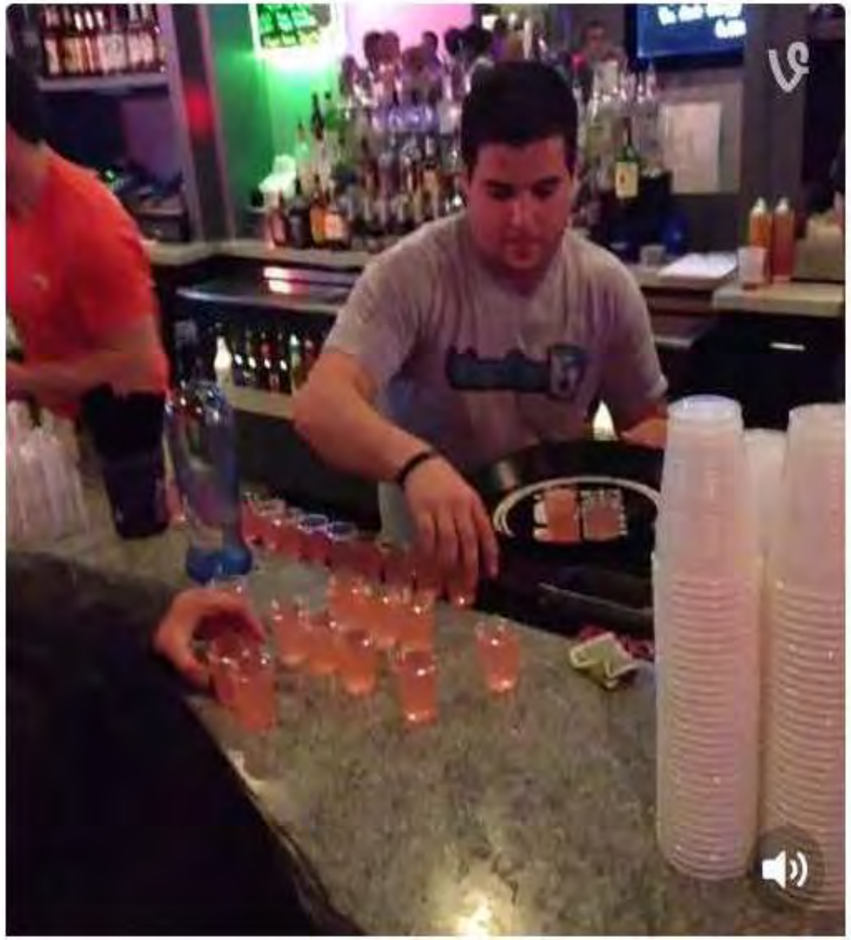
The New Where Else @WhereElseBar · 22 Mar 2013

We're buying shots for the first 10 people to give this lovely man a high-five!



The New Where Else @WhereElseBar · 25 Apr 2013

And the winner is...




PORTAGE01 02/20/09
White River
Send a T
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Dona
at
Feb
1 MainEnt
19:18:18.61


CH4
07: 15: 20 (2015/06/19)
720x480
[DeInterlace]

WHAT ARE RESERVES?

“AN AMOUNT OF MONEY EARMARKED FOR A SPECIFIC PURPOSE. INSURERS ESTABLISH UNEARNED PREMIUM RESERVES AND LOSS RESERVES INDICATED ON THEIR BALANCE SHEETS. UNEARNED PREMIUM RESERVES SHOW THE AGGREGATE AMOUNT OF PREMIUMS THAT WOULD BE RETURNED TO POLICYHOLDERS IF ALL POLICIES WERE CANCELED ON THE DATE THE BALANCE SHEET WAS PREPARED. LOSS RESERVES ARE ESTIMATES OF OUTSTANDING LOSSES, LOSS ADJUSTMENT EXPENSES (LAES), AND OTHER RELATED ITEMS. SELF-INSURED ORGANIZATIONS ALSO MAINTAIN LOSS RESERVES.” **INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC.**

WHY DO I CARE?

- RESERVES INCLUDE THE AMOUNT OF MONEY AN INSURANCE COMPANY HAS SET ASIDE TO SETTLE A CLAIM.
- RESERVES, HOWEVER, ALSO INCLUDE CLAIM EXPENSES INCLUDING ATTORNEY FEES AND EXPERT COSTS.
- RESERVES FORESHADOW SETTLEMENT NEGOTIATIONS.

SETTING RESERVES

- RESERVES ARE SET BY AN INSURANCE ADJUSTER BASED UPON THE INFORMATION PRESENTED ON LIABILITY AND DAMAGES.
- THE LARGER THE RESERVE REQUIRED, THE MORE LAYERS OF APPROVAL WITHIN AN INSURANCE COMPANY.
- THE LARGER RESERVE SET ALL EFFECT WHICH LAYER OF INSURANCE IS INVOLVED.

YOUR ROLE IN SETTING RESERVES

- FOR PLAINTIFF'S COUNSEL:
  - EARLY DISCLOSURE OF TREATING PHYSICIANS OR BILLS.
  - DON'T DELAY SIGNING MEDICAL AUTHORIZATIONS.
  - EARLY DISCLOSURE OF OTHER RELEVANT FINANCIAL LOSS INFORMATION.
  - DON'T DISCLOSE A DAMAGE EXPERT THE WEEK BEFORE MEDIATION.
- FOR DEFENSE COUNSEL:
  - ASK FOR DAMAGE INFORMATION IN THE FIRST PHONE CALL.
  - ASK PLAINTIFF'S COUNSEL TO SIGH AUTHORIZATIONS AT THE OUTSET.
  - BE PERSISTENT.
  - BAD NEWS IS NOT A FINE WINE.

CHANGING RESERVES

DIFFERENT TYPES OF DEMAND LETTERS

- SB = SETTLEMENT BROCHURES

- QSO – 1/3 LESS/MORE OR EQUAL (NOT ONLY PLAINTIFF)

  1 YEAR OF FILING CLAIM

  INDIANA CODE SECT. 34-50-1-1

  INDIANA CODE SECT. 34-51-4-1

- SINK THE ANCHOR TYPE LETTERS

  GREAT FOR MEDIATION DEMANDS

  EXCESS INSURER

  EXCESS VERDICTS

SETTLEMENT BROCHURE

- ASK YOURSELF WHAT IS THE PURPOSE?
  - WHO SHOULD I SEND TO (*FARM BUREAU EXAMPLE*)
- DON'T RUSH TO SEND UNTIL YOU HAVE ADEQUATE EVIDENCE (MEDICAL AND LIABILITY)
- WHAT TO INCLUDE
  - MEDICAL BILLS
  - MEDICAL RECORDS
  - POLICE REPORT OR INCIDENT REPORT
  - STATEMENTS
  - RECORDINGS/AFFIDAVITS
  - PHOTOGRAPHS
  - DEMAND LETTER SETTING FORTH YOUR POSITION ON THE CASE AND DAMAGES
  - DEADLINE FOR RESPONSE
  - PROPOSED PLEADING

EVALUATION PITFALLS

- GAPS IN TREATMENT
- PRE-EXISTING CONDITION, TREATMENT OR INJURY
- PHOTOGRAPHS (AUTO CASE)
- CHIROPRACTIC TREATMENT
- MEDICAL RECORDS
- PLAINTIFF ISSUES
- SURVEILLANCE
- SIZE AND AGE
- VENUE

INITIAL COURT PLEADINGS

- TRO OR INJUNCTIVE RELIEF
- ILLINOIS 224 PETITION
- TORT CLAIM NOTICE
- COMPLAINT
  - NOTICE PLEADING OR FACT PLEADING?
  - IPLA SUBSUMES ALL CAUSES OF ACTION AS TO PRODUCT DEFECT
  - MOTION TO EXPEDITE NAMING OF NON-PARTIES
- DISPOSITIVE MOTIONS ON THE PLEADINGS

TORT CLAIM NOTICE

- STATE - 270 DAYS
- MUNICIPALITY OR LOCAL GOVT. - 180 DAYS

EXPEDITE NON-PARTY

IC 34-51-2-16NONPARTY DEFENSE; PLEADINGS

SEC. 16. A NONPARTY DEFENSE THAT IS KNOWN BY THE DEFENDANT WHEN THE DEFENDANT FILES THE DEFENDANT'S FIRST ANSWER SHALL BE PLEADED AS A PART OF THE FIRST ANSWER. A DEFENDANT WHO GAINS ACTUAL KNOWLEDGE OF A NONPARTY DEFENSE AFTER THE FILING OF AN ANSWER MAY PLEAD THE DEFENSE WITH REASONABLE PROMPTNESS. HOWEVER, IF THE DEFENDANT WAS SERVED WITH A COMPLAINT AND SUMMONS MORE THAN ONE HUNDRED FIFTY (150) DAYS BEFORE THE EXPIRATION OF THE LIMITATION OF ACTION APPLICABLE TO THE CLAIMANT'S CLAIM AGAINST THE NONPARTY, THE DEFENDANT SHALL PLEAD ANY NONPARTY DEFENSE NOT LATER THAN FORTY-FIVE (45) DAYS BEFORE THE EXPIRATION OF THAT LIMITATION OF ACTION. *THE TRIAL COURT MAY ALTER THESE TIME LIMITATIONS OR MAKE OTHER SUITABLE TIME LIMITATIONS IN ANY MANNER THAT IS CONSISTENT WITH:*

(2) GIVING THE CLAIMANT A REASONABLE OPPORTUNITY TO ADD THE NONPARTY AS AN ADDITIONAL DEFENDANT TO THE ACTION BEFORE THE EXPIRATION OF THE PERIOD OF LIMITATION APPLICABLE TO THE CLAIM.

QSO

- SITE CLEARLY TO BOTH CODE SECTIONS
- DEMAND REASONABLE FIGURE (1/3)
- INTEREST TO ACCRUE (UP TO 10%)
- TIME FRAME TO SEND A QSO OR FILE A MOTION FOR EXTENSION OF TIME SERVE A QSO
- DISCUSS STRENGTH OF CASE KNOWN AT THAT TIME
- SIGNATURE LINE FOR THE CLIENT ACCEPTING OR DECLINING THE SAME?

SEE SAMPLE ATTACHED

FOIA REQUESTS

- SIMILAR TO THE GENERAL FREEDOM OF INFORMATION ACT (FOIA) ENACTED IN 1966, THE INDIANA ACCESS TO PUBLIC RECORDS ACT (APRA) KEEPS CITIZENS INFORMED ABOUT GOVERNMENT ACTIVITIES. ITS GOAL IS TO LET PEOPLE ACCESS ANY DISCLOSABLE PUBLIC RECORDS FOR VARIOUS PURPOSES.
- ACCORDING TO THE APRA, ANYONE CAN SUBMIT A REQUEST AND ACCESS PUBLIC INFORMATION IN INDIANA, INCLUDING CITIZENS OF OTHER STATES.
- THE INDIANA FOIA LAW MENTIONS SEVERAL EXEMPTIONS—THE RECORDS THAT REMAIN INACCESSIBLE TO THE PUBLIC. THEY INCLUDE:

- TRADE SECRETS
- MEDICAL RECORDS
- ACADEMIC RESEARCH
- SOCIAL SECURITY NUMBERS
- AUTOPSY PHOTOS, VIDEOS, OR AUDIO RECORDINGS
- CONFIDENTIAL OR FINANCIAL RECORDS UPON REQUEST
- STATE STATUTE AND FEDERAL LAW CONFIDENTIAL RECORDS
- GRADE TRANSCRIPTS AND LICENSE EXAMINATION SCORES
- CONFIDENTIAL RECORDS PROTECTED BY THE SUPREME COURT

EXPERTS

RULE OF EVIDENCE 702, EXPERT WITNESSES MUST HAVE "KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, OR EDUCATION" WHICH WILL "HELP THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE.

WHEN TO RETAIN THEM = IMMEDIATELY

PARTIES CAN BE QUALIFIED AS EXPERTS

- NOTHING IN RULE 702 STATES THAT A PARTY CANNOT TESTIFY AS AN EXPERT WITNESS ON HIS OWN CASE.
    - PRODUCT LIABILITY CASES – ENGINEERS FROM THE DESIGN TEAM INVOLVED IN THE TESTING
    - FELA CASES- EMPLOYEES OF THE RAILROAD INVOLVED IN OPERATIONS AND/OR TRACK MOVEMENT ETC.
    - MEDICAL MALPRACTICE CASES- STANDARD OF CARE (NURSES AND PHYSICIANS)
    - CONSTRUCTION- SAFETY MGR. ETC.

PITFALLS IN USING YOUR CLIENT OR EMPLOYEE AS EXPERT

PITFALLS

- BETTER LOOK INTO THEIR BACKGROUND, EDUCATION AND TRAINING AS THE DOOR WILL BE WIDE OPEN. I.E. EDUCATIONAL RECORD OF AN EXPERT CAN SHOW A D AVERAGE IN COLLEGE AND/OR OPEN THE DOOR TO WHY THEY WERE LET GO FROM PAST EMPLOYERS.

- BIAS

- IF UTILIZING AS AN EXPERT, THIS WILL REQUIRE DISCLOSURE OF THIS PURPOSE AND OPINIONS IN ACCORD WITH TR 26 WELL IN ADVANCE OF DEPOSITION. FAILURE TO DISCLOSE OPINION TESTIMONY CAN RESULT IN SANCTIONS.

- GIVES A ROADMAP TO PLAINTIFF'S EXPERTS EARLY ON IN THE CASE IF THE PROPER DISCOVERY IS ISSUED.

DAUBERT VS. FRYE

- THE TWO MAJOR GOVERNING STANDARDS CAN BE FOUND IN TWO SEMINAL CASES – A D.C. CIRCUIT CASE, *FRYE V. UNITED STATES*, 293 F. 1013 (D.C. CIR. 1923), AND A U.S. SUPREME COURT DECISION, *DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.*, 509 U.S. 579 (1993). THE FEDERAL COURT SYSTEM EXCLUSIVELY FOLLOWS *DAUBERT* WHILE STATE COURTS ARE DIVIDED BETWEEN THE TWO.

- INDIANA = DAUBERT (MODIFIED)

- ILLINOIS = FRYE

THE FRYE STANDARD

- ***THE FRYE STANDARD:* "GENERAL ACCEPTANCE" IN THE SCIENTIFIC COMMUNITY**

- EXPERT OPINIONS BASED ON A "SCIENTIFIC" TECHNIQUE OR PRINCIPAL

- *FRYE V. UNITED STATES*, 293 F. 1013 (D.C. CIR. 1923) - AN EXPERT OPINION IS ADMISSIBLE IF THE SCIENTIFIC TECHNIQUE ON WHICH THE OPINION IS BASED IS "GENERALLY ACCEPTED" AS RELIABLE IN THE RELEVANT SCIENTIFIC COMMUNITY. IN *FRYE*, THE CIRCUIT AFFIRMED THE TRIAL COURT'S DECISION TO BAR EXPERT TESTIMONY CONCERNING A LIE DETECTOR TEST. THE TEST, WHICH WAS BASED ON CHANGES IN SYSTOLIC BLOOD PRESSURE, WAS CONSIDERED TO HAVE "NOT YET GAINED SUCH STANDING AND SCIENTIFIC RECOGNITION AMONG PHYSIOLOGICAL AND PSYCHOLOGICAL AUTHORITIES."

THE DAUBERT STANDARD

- *DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579 (1993)*, THE SUPREME COURT EFFECTIVELY OVERRULED *FRYE* IN FEDERAL COURTS, HOLDING THAT THE CASE LAW WAS INCONSISTENT WITH THE APPLICABLE EVIDENTIARY RULES, NAMELY, RULE 702 OF THE FEDERAL RULES OF EVIDENCE. IN *DAUBERT,* THE COURT HELD THAT THE TWIN STANDARDS OF RULE 702 – RELEVANCE AND RELIABILITY – ARE INCOMPATIBLE WITH THE STRICTER "GENERAL ACCEPTANCE" TEST.

- *DAUBERT* ENCOURAGED A MORE LIBERAL APPROACH TO ADMITTING EXPERT TESTIMONY, STRESSING THE IMPORTANCE OF SUBJECTING WITNESSES TO CROSS EXAMINATION INSTEAD. THE DECISION IN *DAUBERT* TO RELAX THE ADMISSIBILITY STANDARDS OF EXPERT TESTIMONY WAS FURTHER EXPOUNDED BY ITS PROGENY. *GENERAL ELECTRIC CO. V. JOINER, 522 U.S.* 136 (1997)

THE DAUBERT 5

1. WHETHER A THEORY OR TECHNIQUE CAN BE AND HAS BEEN TESTED;

2. WHETHER THE THEORY OR TECHNIQUE HAS BEEN SUBJECT TO BOTH PEER REVIEW AND PUBLICATION;

3. THE KNOWN OR POTENTIAL ERROR RATE OF THE METHOD;

4. THE EXISTENCE AND MAINTENANCE OF STANDARDS CONTROLLING ITS OPERATION; AND

5. WHETHER IT HAS ATTRACTED WIDESPREAD ACCEPTANCE WITHIN THE RELEVANT SCIENTIFIC COMMUNITY.

- SOME STATES APPLY *DAUBERT*. OTHER STATES APPLY *FRYE*. OTHER STATES APPLY A MODIFIED *DAUBERT* OR *FRYE* STANDARD. STILL OTHER STATES HAVE THEIR OWN STANDARD OF ADMISSIBILITY. FINALLY, SOME STATES APPLY *DAUBERT* IN SOME CIRCUMSTANCES, AND *FRYE* IN OTHERS.

- INDIANA = MODIFIED DAUBERT

- *AKEY V. PARKVIEW HOSPITAL, INC.*, 941 N.E.2D 540 (IND. CT. APP. 2011) - INDIANA'S COURTS DO NOT FOLLOW *DAUBERT* WHEN RULING ON THE ADMISSIBILITY OF SCIENTIFIC EXPERT OPINION UNDER EVID. R. 702(B). A SCIENTIFIC EXPERT'S OPINION WILL BE ADMITTED IF THE EXPERT 1) ADEQUATELY DESCRIBES THE REASONING AND METHODOLOGIES UPON WHICH THE SCIENTIFIC EVIDENCE IS BASED AND 2) A REASONABLE AMOUNT OF CONFIDENCE CAN BE PLACED ON THE RELIABILITY OF THE PRINCIPLES UPON WHICH THE OPINION IS BASED.

DEMONSTRATIVE EVIDENCE

A PICTURE IS WORTH A THOUSAND WORDS IS AN OLD CLICHÉ. VISUAL AIDES TO EXPLAIN TO, OR EDUCATE, THE JURY ARE NECESSARY TOOLS TO PROVIDE LASTING IMPRESSIONS ON THE JURY DURING ITS DELIBERATIONS. DEMONSTRATIVE EVIDENCE IS EVIDENCE THAT APPEALS TO THE SENSES OF SIGHT, SOUND, OR TOUCH OF THE JURORS. DEMONSTRATIVE EVIDENCE IS EVIDENCE THAT IS NOT THE ACTUAL OR REAL PIECE OF EVIDENCE, BUT IS A REPRESENTATION OR DEPICTION OF THE ACTUAL OR REAL PIECE OF EVIDENCE.

FOUNDATION DEMONSTRATIVE EVIDENCE

A PROPER FOUNDATION MUST BE LAID BEFORE A PIECE OF DEMONSTRATIVE EVIDENCE CAN BE ADMITTED INTO EVIDENCE FOR DEMONSTRATIVE PURPOSES AND THEN PUBLISHED TO THE JURY. THE FOUNDATIONAL REQUIREMENTS FOR ADMISSION OF DEMONSTRATIVE EXHIBITS ARE:

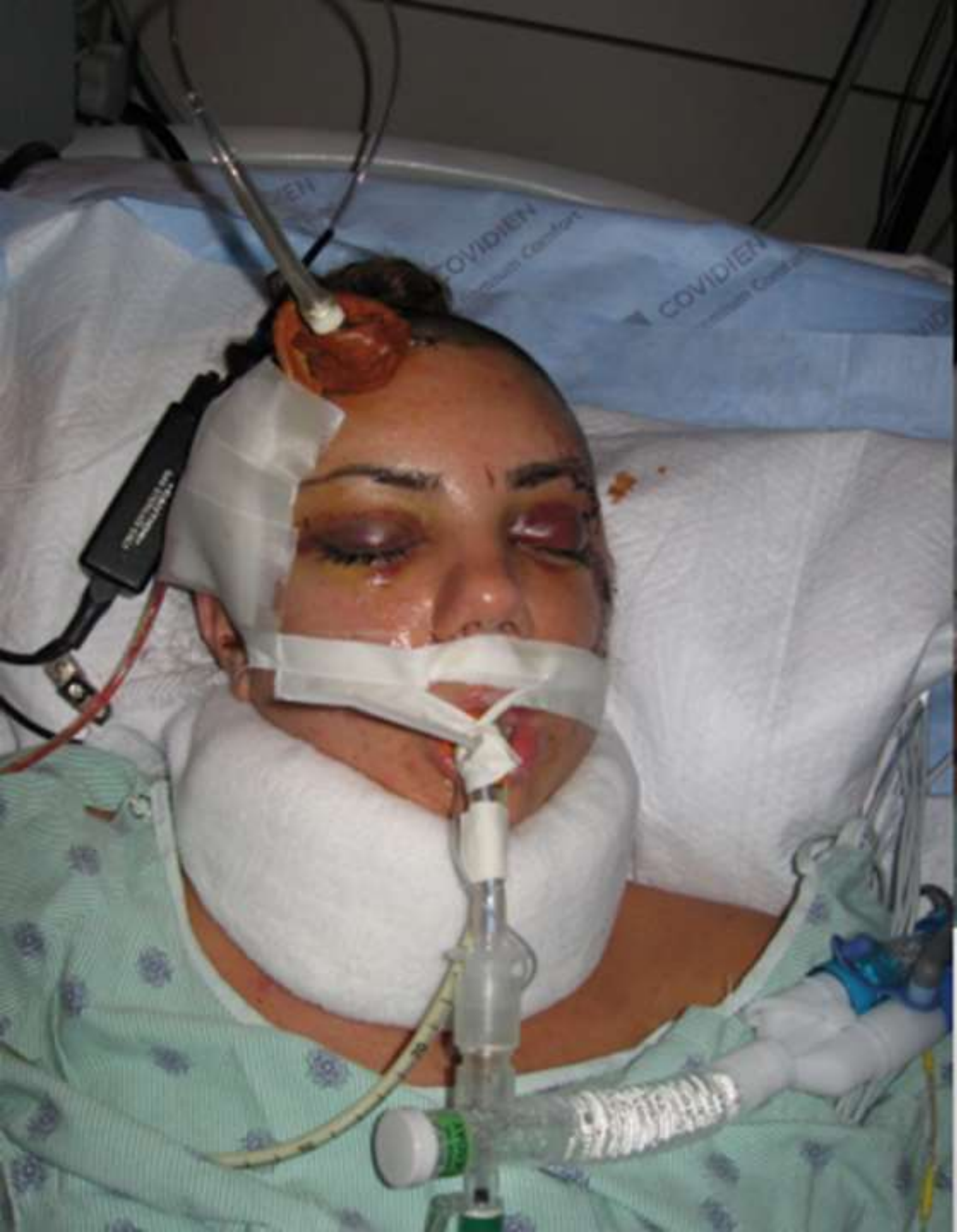
1. COMPETENT WITNESS—SOMEONE HAVING PERSONAL KNOWLEDGE OF THE DEMONSTRATIVE EXHIBIT;

2. FAIR AND ACCURATE REPRESENTATION —THE DEMONSTRATIVE EXHIBIT RELATES TO A PIECE OF ADMISSIBLE SUBSTANTIVE EVIDENCE AND FAIRLY AND ACCURATELY REFLECTS OR DEPICTS THAT ADMISSIBLE SUBSTANTIVE EVIDENCE; AND

3. ASSIST THE JURY'S UNDERSTANDING OF THE ISSUES—THE DEMONSTRATIVE EXHIBIT WILL ASSIST THE JURY TO UNDERSTAND THE TESTIMONY OF THE WITNESS (OR UNDERSTAND THE ISSUES RAISED AT TRIAL).


EXIT




COVIDIEN


PHILIPS
Put in x-ray order PRIOR to patient checkout,
Talk About Falls
What You Can Do
What Staff Will Do
UChicagoMedicine

INJURY DEMAND LETTERS AND PRE-SUIT NEGOTIATIONS PLAINTIFF'S PERSPECTIVE

Otto Shragal
Christopher Hansen
Allen Law Group LLC

When negotiating an insurance claim begins with an insurance representative, it is vital to remember that such discussions should be regarded as more of an end to a process, not the beginning – think the review of movie that has been watched, and not a meeting of story writers deciding what will be presented. To that end, and to maximize the outcome of negotiations, the work and preparation prior to negotiation are as important, if not more so than the actual negotiation itself. A proper approach will make the negotiation more of a *fete accompli*, and less of debate.

Your audience is not just the assigned insurance representative

While any contact with claims representatives have a certain one-on-one flavor, it must be remembered that the front line adjuster is, in all probably, an individual with limited individual settlement authority, who must seek additional authority from superiors (who may well rely solely on the report of the adjuster, as opposed to personally reviewing actual claim materials). Furthermore, your claims representative is probably responsible for far more files than one adjuster can fully, reasonably and responsibility evaluate. This means every communication about the claim must be expressed clearly and compellingly, as well as concisely and effectively evidenced. This approach will lend itself to the "inevitability" of your sought-after result, while simultaneously potentially providing useful evidence against the insurer concerning bad faith should the provided information be baselessly disregarded.

Command the language

The language used to describe both the underlying event and the resulting damages at issue in a claim drive how the carrier will set its reserves, and also provide context for all future interaction on the claim.

Accordingly, for example, calling the incident at issue an "accident" suggests an unhelpful absolution for those at fault, particularly where grossly negligent or willful misconduct is to blame. Instead, whenever possible, describe the incident for what it actually was: the crash, the explosion, etc. Language regarding damages is, perhaps, even more vital to control. Don't refer to a mere "neck injury", when what is at issue is known to be a spine injury. Don't water down a Grade I mild traumatic brain injury by superficially characterizing it as just a concussion.

Throughout the process of collecting the evidence on the claim, and in subsequent periodic discussions with the claims representative, when requests for detailed updates regarding injuries, treatment and damages are received, unless there is a substantial change in the situation (i.e. subsequent hospital stay, surgery, death), it is easiest to simply explain that claimant is still treating and that when all relevant information is ready, it will be supplied.

Collect the less common evidence early that will pay off later

It goes without saying that basic claim information, medical records and bills need to be supplied. However, supplying *only* this will not set your claim apart from the hundreds of other claims cluttering the desk of the representative who is considering hundreds of other claims at the same time as yours. In addition to the obvious minimum information, one should also seek to provide information that will not only set the claim apart from the ordinary, but will emblazon it in the mind of the insurer as a claim that needs to immediately go away.

For instance, pictures of involved people, places and things are commonly provided to a carrier, but video of the underlying incident is not. An attempt should be made to not only look to where the underlying event occurred, but even nearby businesses (e.g. the gas station security camera that happens to capture the intersection in question, and therefore, the underlying event). While obviously not a sure thing, such a video can take the typical and predictable liability back and forth debate with the insurance representative off that table, simplifying negotiations from the start.

In addition to medical records and bills, more documentation regarding consequential economic harm, and readily anticipated future harm can be helpfully persuasive. For example, merely reciting in a letter the amount of time a claimant has missed from work will likely only result in the insurer requesting more information regarding this un-evidenced assertion. Spend time to head off this predictable inefficiency by obtaining and supplying a sworn statement of wage loss by employer. Similarly, there are a myriad of instances of where the medical records themselves provide useful facts, but no effectively no analysis on important subjects bearing on the nature, extent and duration of the claim, such as the relevance of pre-existing conditions, any permanence, or reasonably anticipated future care. Like the wage loss affidavit, obtaining and providing your insurance representative a narrative report by a key medical care provider can set your claim apart from the ordinary, and evidence more elements of harm for which indemnification is owed, thus motivating the insurance representative to resolve the claim based on the extensively documented and overwhelming scope of the claim.

Do not ignore any non-physically insured spouse

If your injured client is married, be sure to identify both the injured and non-injured spouse as clients and claimants. While a consortium claim is derivative in nature, and accordingly does not tap into a second per person exposure to the insurer under the applicable policy, it does share the injured client's per person limit. That sharing of the one per person liability limit can be helpful if yours is a claim where the insurance representative disagrees on whether the physical injury of the injured spouse merits payment of the full policy liability limit. Consortium claims can easily be demonstrated as resulting in at least 10% of the value of the companion injury claim raised by the injured spouse, and often more if the injured spouse provided vital service to the spouse prior to being injured (e.g. the now injured husband formerly cared for chronically ill wife, but no longer able to do so post-injury). Taking the time to explain, and where possible, to document this can make the difference during negotiations with a claims representative between a claim that settles at the negotiation stage and one that does not.

Do not reference any multiple of the documented specials

Proposing that a reasonable settlement as being "3 times specials" or any specific multiple is intellectually weak, and drags your claim into the sort of *cookie cutter claims analysis* that is to be avoided at all costs. Your client's claim is unique and should be treated that way. Debates over how many times specials your claim should be valued at ignores a host of factors that can heavily impact exposure, the first of which is the nature of injury itself. For example, a wrongful death may well have a low amount of medical damages. Does anybody think *3 x specials* has any application in the context of value?

Such analysis also ignores claimant's counsel's record of trial results. As the late Jay Hanna "Dizzy" Dean, famed Major League Baseball pitcher once said, "If ya done it, it ain't braggin'." Instead of talking about how the insurance industry regards the typical results of claims like your client's, focus attention on your track record and your firm's track record of such claims. Be not typical. Emphasize the unique aspects of the claim. A responsible insurer will find it hard to ignore copies of published verdicts demonstrating that your assessment of value on your clients claim is the fruit of years of similar actual results by you and your office.

Beware of the <u>Stanley v. Walker</u> quagmire

Stanley v. Walker, 898 N.E.2d 1226 (Ind. 2008) resulted in every trial having an included mini-trial on the value of medical care. But *Stanley* nevertheless held that the charges for medical care remain competent proof of damages which only give rise to a *rebuttable* presumption of reasonableness under IRE 413, to which <u>the defense</u> is free to challenge in any number of ways, including, for example, by expert testimony.

Understand that when any claims representative asks that you supply a *Stanley* number, the request is conceptually no different than the adjuster asking claimant's counsel to propose a viable argument of contributory fault against his own client. Such a request would obviously be roundly and immediately refused. The same response should occur if the insurance representative demands that you supply a *Stanley* number. The carrier is free to work with in-house counsel, or even retained counsel, to explore a defense to claimed damages if they wish, but no claimant can justly be required to supply it. If threatened that there will be no offer without provision of a *Stanley* number, then so be it. Start drafting your complaint.

What about an inadequate offer

On receipt of a disappointing offer, emotion is needless and unproductive. Your first concern should be whether you failed to supply some available but overlooked piece of information that will tip the claim into the rim, so to speak, and allow it to be resolved. Ask questions of the adjuster, and make note of and confirm the answers you receive. You will have to confer with your client, and the answers to the questions will guide you in determining whether countering the offer is warranted or a waste of time. An offer cannot be assessed, let alone the topic of an informed discussion with your client, unless you fully understand as best as possible what factors the insurer is taking into account when making an offer in the first place.

Your inquiry should include (a) determining whether the offer is a "take it or leave it" or just an opening bid. Feel free to suggest that you do not care what the answer is, but it will always be the client's first question, so you need to know the answer; (b) the insurer's take on liability, including any agreement on your client's conduct, their insured's conduct, and anybody else (for example, the insurer's view of the alleged comparative fault of claimants or non-parties will impact the insurer's valuation of *their* ultimate exposure, but unless you ask, you might not appreciate, for example, that the insurer is imposing a 40% discount on the value of the claim owing to what *the company* perceives, rightly or wrongly, to be the fault of claimant's employer); (c) the adjuster's take on damages might demonstrate, for example, how all that stands between you and a settlement is some piece of information that you though unimportant, but the carrier has included on a check list of items to review prior to an offer but did not receive. Once you know where the insurer is coming from, you can assess whether continued negotiation might or would be a productive use of time, or not.

Get as many foreseeable issues out of the way on the front end

Regardless of whether you successfully negotiate a case prior to litigation with a claims adjuster, or later during litigation with the assistance of a skilled mediator, there are a few vital points to bear in mind that will make the final steps from a case that seems resolved, to be one that is genuinely concluded.

Payment – when & to whom

Make sure to get out ahead of any issue that could impair the prompt and correct payment of the expected amount from the carrier, and if a settlement is reached at mediation, it is important to consider addressing these issues in the mediation agreement itself. Unless there is a good reason for it, every settlement should be capable of being properly paid within 30 days. Be on the lookout for necessary steps that may have to precede payment, such as probate court approval, for settlements concerning a minor, or a wrongful death claim.

Prompt payment will likely involve the exchange of release. Therefore, make sure to address head-on any issues that could likely be a problem, such as commonly found overly generalized form language in releases purportedly releasing all claims, when something less than all claims is being resolved. Releases often will include hold harmless / indemnification agreements. Such provisions are fine, if the insurer will agree that upon receipt of such an executed agreement that a "clean" check will be provided (i.e. payable solely to the settling party and counsel). If the carrier refuses, it only demonstrates how the carrier is disregarding part of the very bargain it is claiming to have struck. Perhaps the easiest way to unearth prompt payment issues is to preemptively request a clean check, and note the reaction. Often it will result in new issues pertaining to asserted liens, subrogation interests and claimed rights of repayment. Arguably, if the carrier insists on a hold harmless / indemnification agreement, lien issues should not be an impediment to prompt payment. If they remain so, even with an executed hold harmless agreement, the only options are to address the liens and request separate checks from the carrier, or seeking assistance from the court to enforce the settlement.

A note regarding confidentiality

This issue often emerges during mediation, and it should be recalled that confidentiality, while often of great concern to the settling defendant, it is invariably something different than what is actually at issue in the claim. The Tax Code, 26 U.S.C.A. Section 104(a)(2), provides that gross income does not include the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sum or as periodic payments) on account of personal physical injuries or physical sickness. In other words, personal injury settlement proceeds are not subject to income taxes.

However, in *Amos v. Commissioner*, 2003 Tax Ct. Memo, LEXIS 330 (2003), a new law was created allowing the IRS to tax personal injury settlements which include confidentiality provisions. The U.S. Tax Court found that the settlement Amos had with Chicago's own Dennis Rodman, who allegedly hurt Amos, and he then settled with Amos was in consideration of several requirements above and beyond monies for physical injuries–mainly a confidentiality clause in the settlement agreement. The court found that the parties did not intend all of the settlement proceeds to be allocated to the component for payment on account of personal physical injuries, and Amos therefore was found to have assumed a tax liability for the part of his settlement. The easiest way to avoid the same result is to avoid the issue entirely by not including it. If it must be, then it should be a separate agreement with demonstrably separate consideration, entered into after the original settlement is quantified. Any other approach is perilous from a tax liability stand-point.

Do not fail to remind the insurer of their duty of good faith and fair dealing

In *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (1993), Indiana's high court recognized and affirmed the duty of an insurer to deal in good faith with its insured and recognized a cause of action in tort for the breach of that duty. In a related vein, Indiana's Insurance Code, at § 27-4-1-4.5, sets forth a variety of unfair claim settlement practices which you should not be shy about citing in the course of negotiations if the insurance representative is refusing to deal fairly with a claim where liability is clear, and damages unquestionably exceed available policy limits. Do not feel restricted to confine your own self as the only means by which that that reminder can be conveyed. Where appropriate, such as where information has been conveyed and subsequently ignored by an insurer, a brief letter of complaint to the Indiana Department of Insurance detailing the insurer's violation of its duties under *Erie* and the Indiana Insurance Code can swiftly thereafter provide you with the full attention of, not only the insurance representative, but necessarily involved supervisors and even insurance company management, depending on the nature of the claim. Do not hesitate to be the very squeaky wheel on this front.

Sample demand letters

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Farm Bureau Insurance
P.O. box 6497
Indianapolis, IN 46206-6497

Re:	**Claim No.:**	**2900021753**
	My Client:	**Jane Doe**
	D/Loss:	**4-20-13**

Dear Ms. Adjuster:

I submit this correspondence and materials in an effort to resolve my client's underinsured claim with Farmers. It is my understanding that there is $100,000 of underinsured coverage. As you know, the at-fault party tendered its $25,000 liability limits, which were accepted by Ms. Doe on May 21, 2014 with the permission of Farm Bureau Insurance. Thus, there is $75,000 of underinsured coverage available.

On April 20, 2013, your insured, Tim Cross (18 years old), collided with the rear of a car driven by Jim Croce. Mr. Croce was completely stopped at an intersection red light at the time. The impact pushed Mr. Croce' car about 20 feet into the intersection. The investigating police officer found Mr.Cross was driving at an unsafe speed and was following too closely. Jane Doe was a front seat passenger in Mr. Cross' car at the time.

Jane reported immediate head and neck pain to the police officer. Three days later, Jane sought medical care with her primary care physician, Dr. Jones. Jane was diagnosed with a concussion and a cervical injury. Jane's symptoms included concentration/confusion issues, poor balance, neck/left arm pain and headaches. A cervical MRI on June 28, 2013 showed reversal of cervical curvature (suggesting muscle spasm) and neural foramen encroachment at C4-5 and C5-6.

In late July 2013, Jane was referred to and saw neurosurgeon, Dr. Nord at NWI Bone & Joint Specialists. Dr. Nord diagnosed Jane with a cervical radiculopathy and recommended cervical epidural steroid injections, which were done on August 22, 2013 by Dr. Ann Stroink. Unfortunately, the injections provided only temporary relief.

By mid-October, 2013, Jane was still having problems with balance due to post-concussive issues. Jane's radicular pain continued and she reported sleep disruption due to pain. Jane continues physical therapy through NWI Bone and Joint Specialists. Neurologist, Dr. Shawn Patel has recommended balance therapy. Jane continues to treat with Dr. Patel for her injuries from the crash.

The medical expenses presently total just under $46,611. This amount will continue to increase as Jane's medical care is ongoing. Jane continues to treat with Dr. Stroink, Dr. Nord, and Dr. Patel.

I am enclosing a CD-ROM with the following documentation in support of this claim:

- Crash Report (DOE000001-5)
- Dr. Stroink Records (DOE000027-63)
- NWI Bone & Joint Specialists Records (DOE000064-128 & 593-730)
- St. Anthony Records (DOE000129-173)
- Porter Regional Hospital Records (DOE000175-530)
- Porter County Chiropractic Records (DOE000533-535 & 731-732)
- Dr. Shawn Patel Records (DOE000550-592)
- Medical Bill Summary & Bills (DOE000915-1010)

Based upon the foregoing, please allow this correspondence to serve as our formal demand that the available underinsured policy limits, which we understand to be $75,000, be tendered at this time.

Very truly yours,

****

November 8, 20____

Ms. Susan Johnson	*Via Certified Mail*
Western Reserve Group	*Return Receipt Requested*
P.O. Box 36	*No. XXXXX*
Wooster, OH 44691	

Re: Braastad, Brook
Claim No.: 13B274134

Dear Ms. Johnson;

As you already know, Brook was seriously injured on November 18, 2016 when your insured disregarded the stop sign facing his path of travel on County Road 1200 S in Kouts, Indiana and violently crashed into Brook who was traveling on CR 500 E. Indeed, the impact was so significant Brook's vehicle was thrown into the air, rolled multiple times and came to rest in a nearby field. Responding officers properly concluded that your insured's failure to yield was the sole cause of the crash.

EMS personnel extricated Brook from her vehicle, noting that she had suffered a loss of consciousness and a large hematoma to the front of her head. Brook was rushed her to Porter Regional Hospital where she was admitted for 10 days and diagnosed with a head injury, multiple fractures of her pelvis and multiple rib fractures. Brook also underwent surgical intervention to remove glass from the vehicle which had been embedded into her forearm.

The pain and discomfort experienced by Brook from her fractures was significant, as reflected in her medical records. Brook was unable to walk on her own for months after this crash, requiring the use of a walker and subsequently a cane. Brook required assistance in preparing meals, bathing, getting dressed, cleaning, using the restroom and was unable to drive or return to her job as a cashier for more than 6 months after the crash.

The medical bills incurred for this treatment as a result of your insured's gross negligence alone total in excess of $75,000.00 thus far, and continue as we obtain additional records. Frankly, at this point there can be no serious doubt that Brook's injuries and damages vastly exceed your insured's available liability coverage, which we understand to be only $50,000.00 per person, per occurrence. Accordingly, you may accept this letter as our formal demand that an offer for the liability limit of your insured's policy be tendered immediately. Of course, our acceptance of this tender is contingent upon permission from Brook's underinsured motorist carrier to accept the same, as well as our receipt of a certified copy of the declarations page from your insured's policy. However, if the liability limit is not tendered by 5:00 p.m. on November 7, 2017, we will recommend that suit be immediately filed against your insured and will seek the full value of the damages and harms suffered by the Braastad family as a result of your insured's reckless and inexcusable conduct—a figure which will dwarf his available coverage limit. We respectfully request that a copy of this letter be provided to your insured so that he is aware of the excess exposure he undoubtedly faces and his right to independent counsel regarding the conflict that will exist between Western Reserve and himself if this matter is not resolved now.

Very truly yours,

****

December 1, 20___

Judy Gray
First Acceptance Insurance, Inc.
P.O. Box 150769
Nashville, TN 37215

Our client:	Jacob Herzog
Your insured:	Brian Clarke
Claim #:	1252425J

Dear Ms. Gray

Thank you for your letter of November 2, 2015. As you know, 20 year old Jacob Herzog was riding his bicycle on June 6, 2015 with a friend westbound on 33rd Avenue at its intersection with Emerald avenue in Chicago, Illinois. Although the vehicle traveling next to your insured stopped and yielded to Jacob, your insured, Brian Clarke did not. Mr. Clarke proceeded through the intersection and violently drove into Jacob with such force that Jacob was thrown in the air and died as a result of this impact. Jacob was pronounced dead at the scene and therefore, there are no medical or wage loss records to provide, as you requested. However, I have attached the death certificate for your review.

Jacob, who was an upbeat, young college student, and avid piano, guitar and tuba player, that loved music, and left behind his mother, father and sister. The joy and happiness that Jacob brought to the lives of those around him is now gone and the void felt by the loss of their first born child will remain with Jacob's parents forever.

Based upon past Cook County verdicts, as well as our firm's extensive trial experience, we are confident that a jury would award a healthy seven figure verdict for this loss–a figure that is 10 times larger than your insured's inadequate insurance coverage, the limits of which we understand to be only $100,000.00. Even after taking into consideration the potential comparative fault of Jacob, it becomes unequivocally clear that your insured does not possess enough insurance coverage for this loss. Accordingly, please consider this letter our formal demand your insured's available policy limits be tendered in satisfaction of this claim. Understand that this demand will remain open until 5:00 p.m. (CST) on December 31, 2016. Thereafter, this demand will be withdrawn, we will file suit against your insured and will seek the full value of the harms and losses suffered by the Herzog family. We respectfully request that you forward a copy of this letter to your insured so that he is aware of the personal financial exposure he faces, as well as his right to independent counsel regarding the conflict of interest that will surely exist between him and First Acceptance Insurance if this matter is not resolved now. We are hopeful that First Acceptance Insurance will not place its own financial interests above those of its insured and look forward to resolving this obvious excess claim.

Sincerely

Section Two

Coverage and Indemnification

Jerry E. Huelat
Huelat & Mack P.C.
LaPorte, Indiana

Section Two

Jerry E. Huelat has over 43 years of litigation experience in all areas of insurance defense. Having tried more than 130 cases in front of a jury, he has substantial trial experience in the areas of arson, fraud, products liability, construction, wrongful death, premises liability, municipal liability, Title VII claims, bad faith, insurance coverage, contractual indemnity, and complex litigation. Mr. Huelat was born in Chicago, Illinois, on March 7, 1953, and graduated from Pennsylvania State University in 1977. He obtained his Juris Doctor degree from Northern Illinois University in 1981 and was admitted to the Indiana bar that same year. He is also admitted to practice before the United States Supreme Court, the United States Court of Appeals, the Seventh Circuit, and the United States District Courts for the Northern and Southern Districts of Indiana. Mr. Huelat is a member of the La Porte County and Indiana State Bar Associations, where he formerly served on the Legal Ethics Committee. He is also a member of the Defense Trial Counsel of Indiana, and is a Past President. Mr. Huelat is also the author of many articles and a regular lecturer at insurance defense seminars. He received the 2016 Diplomat Award from the Defense Trial Counsel of Indiana, and has been selected as an Indiana Super Lawyer for the last eleven years. Lastly, Mr. Huelat was awarded the honor of Defense Lawyer of the Year by The Defense Trial Counsel of Indiana for 2023.

David A. Mack has been practicing law for 33 years. In the early years of his career, he maintained a general practice, which encompassed several areas of the law. For the last 13 years, he has focused his practice on litigation primarily in insurance defense cases. Mr. Mack is a native Hoosier. He obtained his B.S. in Business Economics and Public Policy from the Indiana University School of Business in 1988. He obtained his J.D. from the Indiana University School of Law in Bloomington, Indiana, in 1991. He is licensed to practice in both Indiana and Illinois. He is also admitted to practice in the United States District Courts for the Northern and Southern Districts of Indiana. He is a member of the Indiana State Bar Association and the La Porte Bar Association.

Robert J. Penney - Mr. Penney has over 23 years of litigation experience. He was admitted to the Indiana bar in 2001, the Ohio bar in 2003 (inactive), and the Illinois bar in 2012. He was also admitted to practice in the United States District Courts for the Northern and Southern Districts of Indiana. A Phi Beta Kappa graduate of the University of Illinois, he obtained his M.A. from UCLA in Political Science in 1997 and his J.D. from Indiana University-Bloomington in 2001.

I. <u>Insurance Coverage and Indemnification requirements in the American Institute of Architects, (AIA), construction contract.</u>

> Perhaps more than any other industry, the construction industry is vitally enmeshed in our economy and dependent on settled expectations. The Parties involved in a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required - owner, architect, engineer, general contractor, subcontractor, materials supplier - and to allocate among them the risk of problems, delays, extra costs, unforseen site conditions and defects...

Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 737 (Ind. 2010), (quoting Sindney R. Barrett, Jr., Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C.L. Rev. 891, 941 (1989)(citations and internal quotation omitted)).

Construction contracts frequently include agreements to insure, where the contracting parties agree to place the risk of loss related to construction defects on insurance. Construction contracts often use forms prepared by the American Institute of Architects (AIA). The AIA contract contains a provision that requires the contractor to obtain a Commercial General Liability (CGL) policy covering the contractor's work and any resulting damage or injury that may arise **after the work has been completed**. The AIA contract imposes reciprocal obligations on the owner to purchase "builder's risk" insurance, which covers any work performed on the property by the general contractor, subcontractors or sub-subcontractors on the project while the work is ongoing. Therefore, if the contractor or his subcontractors make a mistake before the completion of the project that causes damage to their work, the builders' risk insurance would cover the loss.

The AIA 201-2007 General Conditions of the Contract for Construction[1], a form frequently used in the construction industry, includes an agreement to insure, which provides as follows:

> ARTICLE 11 INSURANCE AND BONDS
>
> § 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 and completed 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:
>
> § 11.3 Property Insurance
>
> **§** 11.3.1 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 property 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

[1] The most recent version of the AIA General Conditions, AIA 201-2017, retains essentially the same language as AIA 201-2007, but moves most of the provisions of Article 11, regarding insurance requirements, to a separate form, "AIA 101-2017 Exhibit A," which is "intended to be used in conjunction with AIA 202-2017, General conditions of the Contract under Construction." It is unclear why this change was made. (The Forms AIA 201-2017 and AIA 101-2017 Exhibit A are attached hereto as Appendix B1 and B2.)

> such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include the interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

AIA 201-2017, (Appendix A).

The AIA 201-2007 General Conditions also includes a provision to prevent the owner from setting an unreasonably large deductible by making the owner responsible for "all loss not covered because of such deductibles.

> § 11.3.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

Construction contracts also frequently include waivers of subrogation, where the owner, contractor and general contractor waive rights against each other and each of their subcontractors. "Subrogation allows the subrogee (e.g., the insurer) to step into the shoes of the subrogor (e.g., the insured) to recover from the party that is primarily liable (e.g., the third-party tortfeasor) any amounts previously paid by the subrogee to the subrogor." 168 Am. Jur. *Trials* § 91 (2021). When a contract between the owner of a project and the general (or prime) contractor contains a waiver of subrogation rights against each other and other contractors to the project (including both subcontractors and sub-subcontractors), the parties have evinced an intention to remedy construction losses through claims, not lawsuits. *Bd. of Comm'rs v. Teton Corp.*, 30 N.E.3d 711, 715. (Ind. 2015). The AIA 201-2007 waiver of subrogation provides as follows:

> § 11.3.7 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 described in Article 6, if any and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 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 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.

In addition, A201-2007 contains a provision that requires the Contractor to indemnify and hold harmless the owner and architect from claims arising out of or resulting from the Contractor's negligent performance of the Work, provided that the damage is to property other than the work itself. As we will discuss in greater depth below, courts have held that such a provision requires the contractor to indemnify the owner for damages that would not be covered by property insurance. However, the Contractor's indemnity requirement does not relieve the Owner of its contractual obligation to obtain builder's risk coverage for the Work.

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

> construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.1.8.

Moreover, a construction contract typically requires the subcontractors on a project to purchase insurance and name the general contractor and owner as insureds. The AIA Document A101-2007 Standard Form Agreement between Contractor and Subcontractor provides as follows:

> 9.2.11.2 ADDITIONAL INSURED. Contractor and all other parties required to be insured by the Contractor by the Subcontract Documents shall be named as an additional insured on Subcontractor's Commercial General Liability and umbrella/excess liability insurance specified, for operations and completed operations, and shall provide primary coverage (including Completed Operations) for all claims and losses, including but not limited to, those claims that arise out of injuries to the employees of the Subcontractor, employees of the Subcontractor's subcontractors or injuries to third parties, from your work under this agreement, or as a result of the Subcontractor's performance.

A. Indiana cases addressing the requirement of the Owner to provide builder's risk coverage and the waiver of subrogation.[2]

Construction contracts often contain agreements which require the owner to provide insurance covering the contractor's work, thereby shifting the risk of loss from the contractor to the owner's insurance company. "An agreement to insure differs from an agreement to indemnify in that, with an agreement to insure, the risk of loss is not intended to be shifted to one of the parties, but is instead intended to be shifted to an insurance company. Neither party

[2] In the summary and analysis of case law addressing provisions of the AIA contract forms, we were greatly assisted by Steven G.M. Stein, The American Institute of Architects Legal Citator (ed. 2022), and Steven G.M. Stein, The American Institute of Architects Cases Supplement, 1886-2000 (ed 2022).

intends to assume a potential liability because both are demonstrating appropriate business foresight in avoiding liability by allocating it to an insurer."

West Bend Mut. Ins. Co. v. MacDougall Pierce Const., Inc., 11 N.E.3d 531, 544 (Ind. Ct. App. 2014).

Builder's Risk Insurance "is a unique form of property insurance that typically covers only projects under construction, renovation or repair and insures against accidental losses, damages or destruction of property for which the insured had an insurable interest...The purpose of builder's risk insurance is to compensate for loss due to physical damage or destruction caused to the construction project itself." *One Place Condo, LLC v. Travelers Prop. Cas. Co. Of Am.*, 2015 WL 2226202 (N.D. Ill., Apr. 22, 2015),*3, citing *Fireman's Fund. v. Structural Sys. Tech., Inc*., 426 F. Supp.2d 1009, 1025 (D. Neb. 2006); *Ajax Bldg. Corp. v. Hartford Fire Ins. Co.*, 358 F.3d 795, 799 (11th Cir. 2004). As with any other property insurance, coverage is "triggered" by some threshold concept of injury to the insured property, which in the case of all-risk policies is frequently physical loss or damage. *Id.*, citing 10A COUCH ON INS. 3D § 148.46. "A builders risk policy may be denominated as a property loss insurance contract by which a builder, whether the owner of or general contractor on a building, seeks to insulate himself from the loss which he might suffer because of damage to or loss of a building in the process of construction, alteration, or repair." Jay M. Zitter, J.D., Annotation, *Insurance: Subrogation of Insurer Compensating Owner for Loss under "Builder's Risk" Policy Against Allegedly Negligent Contractor or Subcontractor*, 22 A.L.R. 4th 701 (1983), § 2.

> Practitioners too often perceive that builders risk insurance may be treated like commercial general liability policies. This is a misconception. Builder's risk insurance is a type of property insurance coverage, not liability insurance or warranty coverage. However, while builder's risk insurance is similar in nature to

> a standard property damage policy, there are important reasons that a standard property policy does not work in a construction setting. Standard property insurance policies do not provide coverage for structures under construction because the risks to property are significantly different in scope when property is under construction than when it is not.
>
> 168 Am. Jur. *Trials* § 91, (2021).

"Builders Risk Insurance is a form of property insurance. A builder's risk insurance policy is a first-party contract and does not indemnify a third party, as "liability" insurance protects the insured against liability to third parties who claim to have suffered a loss as a result of conduct by the insured or for which the insured is responsible." *Id*.

In *South Tippecanoe School Building Corporation v. Shambaugh & Son, Inc.*, 395 N.E.2d 320, 322 (Ind. Ct. App. 1979), the court addressed a situation where a gas explosion and fire damaged a high school that was under construction. After the school corporation's insurer paid for damages under a builder's risk policy it had issued, it pursued a subrogation action against the contractors. *Id.* On appeal, the insurer claimed that the contract's waiver of subrogation provision did not bar recovery of amounts covered by the builder's risk policy. *Id.* at 324. The court however held, "an agreement to provide insurance constitutes an agreement to limit recourse of the party acquiring the policy solely to its proceeds even though the loss may be caused by the negligence of the other party to the agreement." *Id.*, pp. 326-27 (quoting *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284, 285 (Ind. Ct. App. 1979)). The court held that the insurance provisions of the contract revealed a "studied attempt" by the parties to require construction project risks to be covered by insurance and to allocate among the parties the burden of acquiring such insurance. *Id.* at 326. **The court further noted that if a construction project owner failed to take out sufficient insurance "to cover the cost of the undertaking"**

the owner, not the contractor, was required to bear the loss caused by such a miscalculation. *South Tippecanoe School Building Corporation*, 395 N.E.2d 329, 334 (Ind. Ct. App. 1979). The court also addressed an indemnification provision in the contract's General Conditions that provided in pertinent part as follows:

> The contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys fees arising out of or resulting from the performance of the Work...

Id. at 326.

The court noted that "conspicuous by its exclusion from the indemnification and hold harmless clause" was injury to or destruction of the Work. *Id.* Therefore, any recourse by the parties for damage to the Work was limited to the property insurance that the owner was contractually required to obtain, which "included the interests of all parties in the Work." *Id.* The waiver of subrogation provisions added "further strength to these points." *Id.* The court noted that under the contract, the Contractor was to require similar waivers by Subcontractors and Sub-subcontractors. *Id.* Therefore, the requirement of waivers was "consistent with an intent to place the risk of loss on insurance." *Id.*

Similarly, in *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284, 285 (Ind. Ct. App. 1979), relied on by the Court in *Shambaugh & Son*, a property owner, Probst, brought an action against Morsches for negligent construction of a pole barn. The landlord's insurance only covered 75% of the loss. *Id.* The trial court found that Morsches had been negligent in the manner in which it built the barn, and that its negligence was the proximate cause of the barn's construction. *Id.* On appeal, Morsches argued that the construction agreement called for Probst to carry fire and windstorm insurance and for Morsches to carry compensation and liability insurance, however

Probst failed to take out a policy with sufficient coverage. *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284, 285 (Ind. Ct. App. 1979). Therefore, neither Probst nor his insurer could bring an action for a loss which was agreed by the parties to be allocated to an insurer. *Id.* The Court held that in agreements to insure, the risk of loss is intended to be shifted to an insurance company in return for a premium payment. *Id.* at 287. Neither party intends to assume a potential liability; rather both are demonstrating normal business foresight in avoiding liability and allocating it to an insurer. *Id.* Therefore, Probst was limited in his recovery to the proceeds of the insurance policy required to be carried under the contract. *Id.* **The fact that he failed to take out a policy sufficient to cover the cost of the undertaking was a cost he would have to bear**. *Id.* *See also, Youell v. Cincinnati Ins. Co.*, 117 N.E.3d 639 (Ind. Ct. App. 2018) (Trial court erred in denying tenant's motion for judgment on the pleadings in action brought by landlord's insurer seeking to recover for damages due to fire, where commercial lease agreement unambiguously provided that landlord would insure building, and therefore, landlord's insurer had no subrogation rights against tenant). *See also, Walker v. Vanderpool*, 302 S.E.2d 669 (Va. 1983), (Where the Virginia Supreme Court held that by breaching agreement to provide insurance, property owners themselves became insurers who could not recover against an HVAC company, their constructive insured.)

Similarly, in *Allen County Pub. Library v. Shambaugh & Son, L.P.*, 997 N.E.2d 48, 49 (Ind. Ct. App. 2013), *abrogated by Bd. Of Comm'rs v. Teton Corp*., 30 N.E.3d 711, 717 (Ind. 2015), the Library brought an action against contractors for a renovation project after the library discovered that a hole in copper piping connecting to the generator caused approximately 3,000 gallons of diesel fuel to leak into the ground underneath the library. The Defendants moved for partial summary judgment on the ground that the Library had waived its ability to seek cleanup-related expenses under waiver of subrogation provisions in the contracts. *Allen County Pub. Library v. Shambaugh & Son, L.P.*, 997 N.E.2d 48, 51 (Ind. Ct. App. 2013). The trial court granted the Defendants' motions. *Id.*

On appeal, the court noted that the library's contracts with the Defendants required the library as the Owner to purchase and maintain "all-risk" property insurance for the entire Work at the site. *Id.* at 50. The contract further provided, "[if] the contractor is damaged by the failure of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor, then the Owner shall bear all reasonable costs properly attributable thereto." *Id.* Before work on the project began, the Library obtained a "Builder's Risk Plus" insurance policy from Great American to specifically cover the library renovation and job site. *Id.* The property covered by the policy included: "building materials and supplies, equipment, machinery and fixtures...fences, foundations, excavations, underground pipes, drains, paving, and/or pilings at any construction job site covered by this Coverage Form...which is, or intended to become, a permanent part of the structure(s) at the job-site(s) described in the Declarations." *Id.* The contracts contained waiver of subrogation provisions, where the owner and contractors waived rights against each other and against the construction manager. *Id.*

The court held that under the AIA contract, the library was only required to cover the cost of "the entire Work at the site on a replacement cost basis." *Id.* at 54. The library was under no obligation to procure insurance for damage to property surrounding the jobsite or to property outside of the building project itself. *Id.* at 54. Such damages could well exceed and be completely unrelated to the total replacement cost of "the Work." *Id.* Therefore, the waiver of subrogation provision did not apply to damaged, contaminated land outside of "the Work" - i.e., the library building addition and renovation. *Allen County Pub. Library v. Shambaugh & Son,* *L.P.*, 997 N.E.2d 48, 54 (Ind. Ct. App. 2013). The Court noted that the AIA standard contract generally divided responsibility for providing insurance as follows: the project owner was required to provide insurance covering any mishaps that caused harm to "the Work" itself, while contractors were required to provide insurance covering mishaps that caused harm outside of "the Work." *Id.* at 55.

> Moreover, a project owner cannot seek reimbursement from a contractor for any mishaps resulting in harm to the project itself, because it was obligated to purchase insurance for such mishaps. However, a project owner can seek recovery from a contractor (or its insurer) for construction mishaps resulting in harm to non-construction work property, consistent with the contractor's obligation to purchase liability insurance to cover those kind of mishaps.

Id.

The Court therefore held that the Library was not precluded from seeking recovery for pollution cleanup costs for property contaminated by the Defendants' allegedly faulty construction that was outside the scope of "the Work" for which the Defendants were contracted to perform. *Id.* Therefore, the Defendants could be required to reimburse the Library for cleanup costs of the land outside of the library building itself. *Id.*

Similarly, in *Midwestern Indem. Co. v. Systems Builders, Inc.*, 801 N.E.2d 661 (Ind. Ct. App. 2004), *abrogated by Bd. Of Comm'rs v. Teton Corp.*, 30 N.E.3d 711, 717 (Ind. 2015) due to the court's finding that the waiver of subrogation in the prime contract did not apply to damages to the contents of a building, which were non-work property, the court also held any recovery in contract was barred by a valid waiver of subrogation in the prime contract. *Midwestern Indem. Co. v. Systems Builders, Inc.*, 801 N.E.2d 661, 672 (Ind. Ct. App. 2004). The construction contract indicated that the owner intended to benefit the subcontractor, where the contract provided for the acquisition of property insurance after project completion and indicated that the insurance would include the interest of subcontractors, and that the owner would waive all rights in accordance with the terms of the agreement. *Id.* at 671. Therefore, the subcontractor, as a third party beneficiary, could enforce the waiver of subrogation clause contained within the contract. *Id. See also, S.C. Nestel, Inc., Inc. v. Future Constr., Inc.*, 836 N.E.2d 445 (Ind. Ct. App. 2005), holding that a waiver of subrogation clause in the prime contract was valid and enforceable in an action by an owner and contractor against a sub-subcontractor, and therefore summary judgment in favor of the subcontractor was appropriate. Although the prime contractor argued that the sub-subcontractor was not a party to the subcontract, there was an explicit reference to subcontractors and sub-subcontractors in the agreement to provide builder's risk insurance coverage for the owner, contractor, subcontractors, and sub-subcontractors.

However, in *Bd. Of Comm'rs v. Teton Corp.*, 30 N.E.3d 711, 717 (Ind. 2015), the Indiana Supreme Court adopted the "any insurance" approach to the waiver of subrogation, because it "reflects the plain and unambiguous meaning of the contract-that as long as a property owner's damages are covered by any property insurance policy used to insure construction related damages (i.e., the work), the waiver applies to all damages." In *Teton*, Jefferson County brought a subrogation action against contractors in connection with a fire that began when a roofing subcontractor was soldering copper downspouts near the wood frame of the courthouse as part of a remodeling and renovation of the entire building. *Id.* at 713. The damages far exceeded the remodeling costs, but were fully covered by Jefferson County's property insurer, which paid Jefferson County under its policy after the fire. *Bd. Of Comm'rs v. Teton Corp.*, 30 N.E.3d 711, 713 (Ind. 2015). The trial court granted summary judgment for Defendants. *Id.* On appeal, the Court noted that the contract between Jefferson County and Teton contained a waiver of subrogation, and it also required Jefferson County to obtain property insurance that triggered the waiver. *Id.* The Court noted that to satisfy its property insurance requirements, Jefferson County could either (1) procure a separate policy to cover only the renovations - commonly referred to as builder's risk insurance - or (2) rely on its existing "all-risk" property insurance policy to cover the entire courthouse, including the renovations. *Id.* at 716. The Court adopted the "any insurance" approach to waiver, holding that Jefferson County waived its subrogation claim because it relied on its pre-existing "all risk" property insurance policy to insure both the work and all other damages to the courthouse. *Id.* at 717.

In *Performance Servs. v. Hanover Ins. Co.*, 85 N.E.3d 655 (Ind. Ct. App. 2017), an owner, Southwest, entered into an agreement with the construction manager, Skillman, for the purchase and installation of a new HVAC system for a school. The contractor in charge of the work, PSI, subcontracted with Huntingberg to complete the piping and sheet metal work for the HVAC system. *Id.* at 658. After water escaped from a pipe and damaged the school's communication equipment, the insurer, Hanover, as the owner's subrogee, brought a negligence action against PSI and subcontractor, Huntingberg, for reimbursement of the insurance claim. *Id.* The trial court denied PSI and Huntingberg's summary judgment motions. *Id.*

On appeal, Hanover maintained that the PSI Contract was a "separate and distinct contract," executed over 15 months after the Construction Manager Contract, and that the PSI contract along with the Huntingberg subcontract were the "controlling agreements." *Performance Servs. v. Hanover Ins. Co.*, 85 N.E.3d 655, 659 (Ind. Ct. App. 2017). Hanover argued that the PSI contract did not incorporate any of the terms of any prior contracts, including the waiver of subrogation in the Construction Manager Contract, therefore, the waiver of subrogation did not apply to Hanover's claims. *Id.* However, the owner-construction manager agreement incorporated the American Institute of Architects (AIA) Standard Form of Agreement between Owner and Construction Manager, A201/CMa, 1992, and under Section 10.4, the owner and Skillman agreed to waive all subrogation rights against each other and all contractors for any damages that might occur during the project that was covered by property insurance. *Id*. at 660. The Huntingburg subcontract contained a subrogation waiver clause that provided that Huntingberg's insurance carriers had no right of subrogation against PSI or Southwest with respect to losses arising out of work in connection with the project under the subcontract. *Id*. at 662. The court held that "**where a written contract refers to another instrument and makes the terms and conditions of such other instrument a part of it, the two will be construed together as the agreement of the parties,**" *Id.* at 660, emphasis supplied. The Court noted that Southwest and the Construction Manager, Skillman, entered into the Construction Manager Contract, pursuant to which they waived subrogation rights "against each other and against the Contractors." *Id.* at 664. The Construction Manager Contract further required Southwest and the Construction Manager to obtain similar waivers from contractors. *Id.* Therefore, the Court concluded that the intent of the parties was to waive all subrogation claims against contractors and subcontractors. *Id.* The requirement of waivers in the Construction Manager Contract was consistent with an intent to place the risk of loss on insurance, "a common practice in the construction industry." *Performance Servs. v. Hanover Ins. Co.*, 85 N.E.3d 655, 664 (Ind. Ct. App. 2017). The Court therefore held that the waiver of subrogation clause in the Construction Manager Contract waived any rights of Hanover to seek compensation from PSI and Huntingburg. *Id.* Therefore, PSI and Huntingberg were entitled to summary judgment. *Id.*

See also, S.C. Nestel, Inc., Inc. v. Future Constr., Inc., 836 N.E.2d 445 (Ind. Ct. App. 2005), holding that a waiver of subrogation clause in the prime contract was valid and enforceable in an action by an owner and contractor against a sub-subcontractor, and therefore summary judgment in favor of the subcontractor was appropriate. Although the prime contractor argued that the sub-subcontractor was not a party to the subcontract, the court found that there was a clear agreement to provide builder's risk insurance coverage for the owner, contractor, subcontractors, and sub-subcontractors. *Id.* at 451.

Likewise, in *U.S. Automatic Sprinkler Corporation v Erie Insurance Exchange*, 204 N.E.3d 215, 219 (Ind. 2023), a commercial tenant, Surgery Center, contracted with Automatic Sprinkler to both install a sprinkler system and conduct periodic inspections and testing. The "Inspection Agreement" contained specific terms regarding the scope of Automatic Sprinkler's work and the conditions under which it would be held liable for any damage. *Id.* As to damages, the agreement provided in relevant part that "[n]o insurer or other third party will have any subrogation rights against" Automatic Sprinkler and that Surgery Center "will be responsible for maintaining all liability and property insurance." *Id.* After water in the sprinkler system froze and ruptured the pipes, Surgery Center's insurer, Travelers filed a subrogation action against Automatic Sprinkler, contending that its losses were the result of Automatic Sprinkler's allegedly negligent work. *Id.* Other "non contract tenants" in the same building and their insurers also sued Automatic Sprinkler to recover for their property damages. *Automatic Sprinkler Corporation v Erie Insurance Exchange*, 204 N.E.3d 215, 219 (Ind. 2023). The trial court denied Automatic Sprinkler's motions for summary judgment. *Id.*

On appeal, the court noted in general, as to Traveler's subrogation claims, that when parties enter into a service contract, the risk of loss is of paramount concern. *Id.* at 222. To contain their risk, parties are generally free to craft contractual provisions that delineate the nature and extent to which certain damages are recoverable. *Id.* An agreement to insure is intended "to provide both parties with the benefits of insurance regardless of the cause of the loss (excepting wanton and willful acts)." *Id.* As a result, "where one party agrees to purchase insurance for the benefit of both parties, this party has no cause of action against the other regardless of their fault in contributing to or inducing the loss." *Id.* The court therefore held that because the rights of a subrogated insurer could rise no higher than the rights of its insured, the agreement to insure foreclosed Travelers from pursuing its subrogation action. *Id.* The contract also included a subrogation waiver which stated, "No insurer or third party will have subrogation rights against [Automatic Sprinkler.]" *Id.* at 219. The court found that the waiver of subrogation unambiguously foreclosed the availability of a subrogation action against Automatic Sprinkler irrespective of the circumstances giving rise to the loss. *Id.*

Therefore, where the owner is an intended beneficiary of the owner's agreement to obtain builders risk coverage for the project, the waiver of subrogation in the prime contract applies to bar the owner's claims against the general contractor and subcontractors.

B. Cases in Indiana and in other states regarding payment of the cost of deductibles where claimed damages do not exceed the deductible.

We next examine whether an owner may simply purchase "all risk" insurance containing an arbitrarily high deductible, and thereby require the general contractor to pay for damages that do not exceed the deductible.[3] In *South Tippecanoe*, previously discussed, the Indiana Court of

[3] In the summary and analysis of case law addressing provisions of the AIA contract forms, we were greatly assisted by Steven G.M. Stein, The American Institute of Architects Legal Citator

Appeals addressed this issue. There, the property insurance purchased by the owner had a one thousand dollar deductible. The owner argued that it was entitled to recoup the deductible notwithstanding the agreement to insure and the subrogation waiver clause. The appellate court disagreed, stating:

> The trial court's judgment is also affirmed with respect to the $1000 deductible which South Tippecanoe had under the builder's risk policy. **Inasmuch as 11.3.1 required the Owner to secure insurance on the Work to the "full insurable value thereof," South Tippecanoe became the insurer of the other contracting parties to the extent of the deductible**. See *Midwest Lumber*, supra at 379. Similarly in *Morsches* the court said, after noting that the plaintiff Probst was limited in recovery to the proceeds of the policy (which covered 75 percent of his loss), "**The fact that he failed to take out a policy sufficient to cover the cost of the undertaking is a cost he will have to bear**.

S. Tippecanoe Sch. Bldg. Corp. v. Shambaugh & Son, Inc., 395 N.E.2d 320, 334 (Ind. Ct. App. 1979)(emphasis supplied).

Therefore, under Indiana law, if the owner chooses to rely on a policy containing an unreasonably high deductible, the owner will become the insurer of the work of the contractor to the extent of that deductible. Courts in other states have similarly held that an owner may not avoid responsibility for damages through simply opting for an insurance policy with a high deductible.

In *Hearst v. Argyle Properties*, 778 N.W.2d 465 (Neb. 2010), an owner, Hearst, entered into an agreement with contractors to remove and replace an antenna. In the process of replacing the antenna, the tower collapsed causing damage to the owner's property. *Id.* at 469. Hearst brought an action against the contractors alleging that their negligence caused the tower to

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(ed. 2022), and Steven G.M. Stein, <u>The American Institute of Architects Cases Supplement, 1886-2000</u> (ed 2022).

collapse. *Id.* Although subparagraph 11.4.1 of the parties' contract required Hearst to purchase and maintain builder's "all risk" insurance "without optional deductibles," Hearst obtained insurance with a $250,000 deductible. *Id.* at 472. The trial court granted the contractors' motion for summary judgment. *Id.* at 468.

On appeal, Hearst argued that the agreement did not preclude it from seeking indemnification for the deductible. *Id.* at 473. Hearst argued that the waiver of subrogation provision contained in subparagraph 11.4.7 operated as a waiver of liability only for amounts covered by property insurance, that the deductible was not covered by insurance, and therefore, it was not waived. *Id.* The court agreed that subparagraph 11.4.7 did not preclude Hearst from recovering the deductible amount. *Id.* However, the analysis did not end there, since subparagraph 11.4.1.3 required Hearst to pay the costs not covered because of the deductible. *Id*. Hearst's construction of subparagraph 11.4.1.3 made "little sense when read in the context of the entire contract." *Id.* The Court noted that subparagraph 11.4.1 required Hearst to obtain property insurance "without optional deductibles," and that if Hearst chose not to do so, it would bear any resulting costs. *Id.* Therefore, the only construction of subparagraph 11.4.1.3 consistent with those provisions was that if Hearst neither obtained the required no-deductible insurance nor informed the contractor, Entrex, of that fact, Hearst would bear any resulting costs. *Hearst v. Argyle Properties*, 778 N.W.2d 465, 474 (Neb. 2010). The Court further noted that subparagraph 11.4.1.3 plainly stated that "if the property insurance requires deductibles, [Hearst] shall pay costs not recovered because of such deductibles." *Id.* Therefore, the trial court correctly read the parties' contract to require Hearst to bear the risk associated with its insurance deductible. *Id.* The court found that the reason Hearst's damages were uninsured was because Hearst did not obtain the nondeductible insurance that the contract required. Refusing to enforce subparagraph 11.4.1.3 "would leave Hearst in the peculiar position of benefitting from the degree of the defendant's alleged gross negligence," because Hearst would be able to recover damages that should have been covered by Hearst's insurance. *Id.* The Court noted that the parties were sophisticated business entities, and "had the terms of the contract been followed to the letter, none of the alleged damages would be uninsured." *Id.* at 478. The court therefore held that the contract required Hearst to bear the costs of its insurance deductible. *Id.*

Similarly, in *Starr Surplus Lines Ins. Co. v. Bernhard MCC, L.L.C.*, 308 So.3d 372 (La. Ct. App. 2020), the owners of a hotel, Jung, retained TMG as general contractor, and TMG entered into a subcontract with BMCC to provide plumbing and HVAC work on the project. Then when BMCC was conducting a test of the water supply line, water escaped and caused damage to the property. *Id.* at 374. The contract between Jung and TMG required TMG to procure property insurance for the duration of the project. *Id.* TMG purchased builders risk policies from Starr Surplus and Lexington, which insured against all risk of direct physical loss to the building during the project. *Id.* The subcontract with BMCC also required BMCC to purchase commercial general liability insurance. *Id.* BMCC purchased a CGL policy from Travelers. *Id.* TMG assigned Star Surplus and Lexington its rights to recover payment of its $50,000.00 deductible from BMCC, which purportedly arose from the subcontract between TMG and BMCC. *Starr Surplus Lines Ins. Co. v. Bernhard MCC, L.L.C.*, 308 So.3d 372, 375 (La. Ct. App. 2020). Starr Surplus and Lexington then filed suit against BMCC. *Id.* They alleged that BMCC was negligent in the manner in which it conducted the water test. *Id.* They also alleged a claim of "insurance coverage" against Travelers, wherein they alleged that the Travelers policy was primary and should have covered the damages sustained by the accident prior to any insurance coverage by Starr Surplus and Lexington. *Id.* In addition to the

$4,000,000 paid to TMG, Star Surplus and Lexington sought to recover the $50,000.00 deductible. *Id.*

On appeal, the court noted that the prime contract between Jung and TMG was AIA document, A102-2007, a widely used standard form construction contract. *Id.* at 376. The court noted that Article 11 set forth the insurance requirements and waivers of subrogation. *Id.* at 377. Specifically, Article 11.3 required the purchase of "all risk" property insurance (commonly referred to as builder's risk insurance), and provided that the property insurance "shall" include the interests of the owner, the contractor, subcontractors, and sub-subcontractors in the project. *Id.* Notably, Article 11.3.1.3 stated, "if the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles." *Id.* at 377. Article 11.3.7, further provided that the Owner and contractor waived all rights against (1) each other and any of their subcontractors, agents and employees, each of the other, and further provided that "[a] waiver of subrogation shall be effective as to a person or entity even though that person would otherwise have a duty of indemnification, contractual or otherwise, or 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." *Starr Surplus Lines Ins. Co. v. Bernhard MCC, L.L.C.*, 308 So.3d 372, 377-78 (La. Ct. App. 2020).

The court noted that the above language was a "mutual waiver of subrogation." *Id.* at 378. The purpose behind such a waiver was to assure that, in the instances of losses covered by the policy, the insurer bore the risk of loss regardless of any fault on the part of the identified parties, as well as to prevent a potential windfall for the insurer. *Id.* The court therefore held that the mutual waiver of subrogation provisions in the prime contract signed by TMG precluded Star Surplus and Lexington from bringing claims against the subcontractor, BMCC. *Id.* at 380.

The court also found that BMCC was an additional insured under the builder's risk policy. *Id.* at 382. Therefore, since the accident was a risk covered by the builder's risk policy, and because BMCC was an additional insured under the policy, Star Surplus and Lexington could not bring suit against BMCC to recover amounts paid under the policy or the deductible, because to do so would allow Starr Surplus and Lexington to pass the incidence of the loss, which the policy was designed to cover, to the insured. *Id*. The court held that Starr Surplus and Lexington's argument that BMCC was not an additional insured under the builder's risk policy was contrary to the purpose behind the standard provisions of the AIA contract, which was to shift the risk of loss for damages to the property during the course of construction to the insurer. *Id.* Therefore, Starr Surplus and Lexington could not recover the $50,000 deductible from the subcontractor, BMCC. *Id.*

Similarly, in *Olinkraft, Inc. v. Anco Insulation, Inc*., 376 So.2d 1301 (La. Ct. App. 1979), discussed in *Starr Surplus Lines*, supra, an insurer brought an action against contractors for negligence in causing a fire at a construction site, and the insured property owner, Olinkraft, sought to recover the $25,000 deductible. The trial court granted the contractors' motions for summary judgment on the grounds that the contractors were co-insureds with Olinkraft under the policy. *Olinkraft, Inc. v. Anco Insulation, Inc*., 376 So.2d 1301, 1302 (La. Ct. App. 1979). The trial court held that under Article 16 of the construction contracts, Olinkraft obligated itself to insure against the type of loss it incurred. *Id.* Therefore, Olinkraft, by contracting with its insurer for a $25,000 deductible, could not avoid its obligation to the contractors and sue them for the amount of the deductible. *Id.* On appeal, the court found that the contractors', Kraft and Anco's interests were protected under the builders' risk policy to the extent that Olinkraft had contractually agreed to do so. *Id.* at 1303. Therefore, the trial court properly granted summary judgment in favor of the defendants. *Id.*

But see, Stop & Shop Supermarket Co. v. Abco Refrigeration Supply Corp., 842 A.2d 1194 (Conn. Sup. 2003), petition dismissed, 853 A,2d 523 (Although parties intended to allocate risk of loss to owner where owner was required to maintain property insurance for the entire work site, including the interest of contractors and subcontractors, where the owner's deductible was not covered under the policy, the owner was entitled to recover that amount of the deductible from the contractor); *Empress Casino Joliet Corp. v. W.E. O'Neil Constr. Co.*, 68 N.E.3d 856 (Ill. Ct. App. 2016) (Waiver of subrogation in Owner's contract with general contractor did not apply to cleaning company who caused fire during renovation project that damaged casino, but had pre-existing agreement with Owner for non-construction related services, and therefore owner could recover amount of deductible from cleaning company).

C. Cases regarding agreements by the subcontractor to indemnify the general contractor.

Confusion often arises when contractors consider the interplay between the prime contract's waiver of subrogation clause and a subcontract's indemnity clause in favor of the owner and general contractor. In other words, when does the waiver of subrogation clause prevail over indemnity clause and vice versa? Although we have not found relevant cases in Indiana, courts in other states have addressed this issue.

In *Summit Contrs. Inc. v. Gen. Heating & Air Conditioning, Inc*., 595 S.E.2d 472 (S.C. 2004), the subcontractor had submitted a standard form contract developed by the American Institute of Architects that contained a waiver of subrogation provision. *Id.* at 474. In response, the general contractor submitted Schedules A and B as additional contract terms. *Id.* The AIA form and Schedules A and B together became the agreement between the parties. *Id.* After a subcontractor's employee allegedly caused a fire by negligent soldering, the General contractor brought an action against the subcontractor. *Id*., 473-74. The trial judge granted the subcontractor a directed verdict based on the waiver of subrogation clause and the court of appeals affirmed. *Id.* at 474.

On appeal, the general contractor contended that the subcontractor's agreement in Schedules A and B to be "held responsible" for damages and to carry liability insurance conflicted with the waiver of subrogation clause in the AIA standard form contract. *Id*. at 475. The court noted that the waiver of subrogation clause provided that subrogation was waived to the extent that damages were covered by property insurance. *Id*. Under the provisions of schedules A and B, the subcontractor remained liable for any excess damages not covered by property insurance. *Summit Contrs. Inc. v. Gen. Heating & Air Conditioning, Inc*., 595 S.E.2d 472, 475 (S.C. 2004). The court held that the requirement that the subcontractor carry liability insurance applied to excess damages and other damages not covered by property insurance. *Id.* Therefore, under the terms of the AIA form, even though the subcontractor had to fully indemnify the contractor for damage to the property of others, the contractor waived subrogation for damage to the construction site to the extent it was covered by property insurance. *Id.* at 476. Therefore, the trial court properly directed a verdict for the subcontractor. *Id.*

See also, Nodaway Valley Bank v. E.L. Crawford Constr., Inc., 126 S.W.3d 820 (Mo. Ct. App. 2004), where the owner argued that the waiver of subrogation clause in the owner-contractor agreement did not bar its claims because an indemnification clause in one of the contract documents superseded the waiver of subrogation clause. The Court found that the owner's interpretation conflicted with both the insurance procurement requirement and the waiver of subrogation clause and essentially rendered the two meaningless. *Id.* at 829. The Court held that it would have been pointless for the contractor to require the owner to purchase an all-risk property insurance policy covering the total value for the entire project and including the owner's, the contractor's and subcontractors interests if the contractor intended, through the indemnification clause, to be personally responsible to the owner for any and all losses to property, even those covered by the required property insurance policy. *Id*. The Court therefore held the indemnification clause referred to compensation and liability for losses not covered by the property insurance policy, such as compensation and liability to third parties. *Id*. The Court held that the parties' intent was to shift the risk of each other's loss to the insurer to the extent the loss was covered by property insurance. *Id.* at 830. Therefore, the owner's claims against the contractor were barred. *Nodaway Valley Bank v. E.L. Crawford Constr., Inc*., 126 S.W.3d 820, 830 (Mo. Ct. App. 2004). *See also, American Zurich Ins. Co. v. Barker Roofing,* L.P., 387 S.W.3d 54 (Tex. Ct. App. 2012)(Indemnification provision in subcontract where subcontractor agreed to indemnify owner did not conflict with or void waiver of subrogation in general contract, and business interruption losses paid by insurer were subject to the waiver provision).

D. Cases addressing the issue of whether the subcontract incorporated the terms of the general contract.

Courts have addressed cases where the waiver of subrogation was only included in the general contract, but the subcontract did not include such a waiver. Courts have generally found that the subcontractor was an intended beneficiary of the waiver of subrogation in the general contract, and therefore, the waiver was enforceable in an action by the owner or general contractor against the subcontractor.

In *RLI Ins. Co. v. Southern Union Co.*, 341 S.W.3d 821, 824 (Mo. Ct. App. 2011), an Owner, Triumph entered into an agreement with a construction manager, Epstein, to construct a hog processing plant. A natural gas explosion destroyed a portion of the owner's plant while the plant was under construction. *Id*. Triumph's builder's risk insurer, RLI paid the Triumph $7,990,000 to reconstruct the plant. *Id.* Triumph brought an action against a contractor, MGE and several other defendants. *Id.* In the construction manager contract with Epstein, Triumph used a standard AIA A101/cMa 1992 edition form of contract that incorporated the General Conditions of the contract, which contained a waiver of subrogation provision that provided:

> The owner and Contractor waive all rights against each other and against the Construction Manager, Architect, Owner's other Contractors and own forces described in Article 6, if any, and the subcontractors, sub-subcontractors, consultants, agents and employees of any of them, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this paragraph 11.3 or other property insurance applicable to the Work...

RLI Ins. Co. v. Southern Union Co., 341 S.W.3d 821, 825 (Mo. Ct. App. 2011)

Triumph separately contracted with MGE to transport natural gas to the Plant. *Id.* The MGE contract did not incorporate the AIA contract or the General Conditions in the Construction Manager contract. *Id.* at 826. The MGE contract did not contain a waiver of subrogation provision, and was silent on the subject of subrogation. *Id.* MGE filed a motion for summary judgment, alleging that it was a third party beneficiary to the waiver of subrogation provision in the General Conditions. *Id.* The trial court granted partial summary judgment in favor of MGE. *Id*. On appeal, Triumph's business risk insurer, RLI, argued that the MGE contract did not include a waiver of subrogation provision. *Id.* at 827. Therefore, RLI argued that MGE was barred from claiming third party beneficiary status under the Construction Manager contract. *Id.* However, the court noted that the Missouri Supreme Court in *Butler v.*

Mitchell-Hugeback, Inc., 895 S.W.2d 15, 21 (Mo. 1995) rejected the contention that a third party could not enforce a waiver of subrogation provision unless that clause was part of the party's own contract. *Id.* at 830. RLI's contract was silent on the subject of subrogation, thus there was no evidence that MGE and Triumph had an agreement that conflicted with affording MGE third party beneficiary status. *Id.* RLI further argued that MGE was not an intended third party beneficiary to the waiver of subrogation provision in the General Conditions of the AIA contract. *Id.* The waiver provided that the Owner (Triumph) and the Contractor each agreed to "waive all rights against each other and against the Construction Manager, Architect, **Owner's other Contractors and own forces**...for damages caused by fire and other perils to the extent covered by property insurance..." *RLI Ins. Co. v. Southern Union Co.*, 341 S.W.3d 821, 831 (Mo. Ct. App. 2011), emphasis supplied. The Court found that MGE was one of Triumph's "own forces," and that MGE's activities fell within the contractual definition of "construction or operations related to" the project. *Id.* at 832. Therefore MGE was an intended beneficiary to the waiver of subrogation provision. *Id.* The Court therefore affirmed the trial court's order of summary judgment in favor of MGE. *Id. at 833.*

But See, Haren & Laughlin Constr. Co. v. Jayhawk Fire Sprinkler Co., 330 S.W.3d 596 (Mo. Ct. App. 2011), where an owner entered into an agreement with the general contractor for the construction of a senior living facility. The general contractor entered into an agreement with a subcontractor for the installation of the sprinkler system for the project. *Id.* at 598. Then after the sprinkler system was installed, it leaked and damaged the building. *Id.* The contractor paid for the damages through its insurer and brought suit against the subcontractor. *Id.* The trial court granted the subcontractor's motion for summary judgment. *Id.* On appeal, the court noted that the subcontract contained a provision which required the subcontractor to indemnify the contractor against all liability that arose out of its defective work. *Id.* at 599. The court found the subcontract clearly gave the contractor the same rights against the subcontractor as the owner had against the contractor, and that the waiver of subrogation provision was applicable. *Id.* at 600. However, that did not end the court's inquiry, because to obtain summary judgment, the subcontractor had to show that the contractor's obligation to maintain insurance was effective at the time of the leak. *Id.* Under the contract, the general contractor had to maintain insurance until the later date of when the contractor received final payment or the last day any contractor related person was physically on the project. *Id.* at 601. The court held, "[a] policy still effective after a project has been completed does not extend the waiver of subrogation beyond the life of the contract." *Haren & Laughlin Constr. Co. v. Jayhawk Fire Sprinkler Co.*, 330 S.W.3d 596, 601 (Mo. Ct. App. 2011). Although the parties stipulated that the owner accepted the work, there was no mention that the acceptance included the general contractor's final payment, which would support an inference that the general contractor's obligation to maintain insurance had terminated. *Id.* Nor did the fact that the general contractor's insurer paid for the damages prove that the contractor was still obligated to maintain insurance. *Id.* Rather, it simply indicated that the policy was still effective. *Id.* There therefore was an issue of material fact as to whether the waiver of subrogation was still in effect at the time of the leak. *Id.* at 600. Therefore, summary judgment in favor of the subcontractor was improper. *Id.* at 601.

See also, *Gibbons-Grabble Co. v. Gilbane Bldg. Co.*, 517 N.E.2d 559 (Oh. Ct. App. 1986), where a subcontractor brought an action against a general contractor for extras and the costs and expenses incurred in accelerating its performance under the contract. The general contractor moved to stay or dismiss the action pending arbitration. *Id.* at 561. The trial court dismissed the action and referred the subcontractor's claims to arbitration. *Id.* On appeal, the court found that the arbitration clause was expressly incorporated into the subcontract by the provision which stated that "the contract documents consist of this agreement and any exhibits attached hereto, the agreement between the Owner and the Contractor, the conditions of the agreement between the Owner and contractor, general conditions, supplementary, special and other conditions," and by a provision where the subcontractor "[agreed] to be bound to and assume toward the Contractor all of the obligations and responsibilities that the Contractor by those documents [assumed] toward the Owner." *Id.* at 563. The Court therefore held that the subcontractor's claims were subject to arbitration. *Gibbons-Grabble Co. v. Gilbane Bldg. Co.*, 517 N.E.2d 559, 564 (Oh. Ct. App. 1986).

See also, *Key Bank Nat'l Ass'n v. Columbus Campus*, LLC 988 N.E.2d 32 (Oh. Ct. App. 2013)(Subcontractors were bound by mortgage subordination provisions of General Conditions, where subcontracts provided, "subcontractor shall be bound by the terms of the prime contract and all documents incorporated therein, including without limitation, the General and Supplementary Conditions, and assumes toward the Contractor, with respect to Subcontractor's Work, all of the obligations and responsibilities that the Contractor by the Prime Contract, has assumed toward the Owner.")

Likewise, in *Davlar Corp. v. Superior Court*, 62 Cal. Rptr. 2d 199 (1997), a general contractor's insurer brought a subrogation action against a subcontractor and its insurer for fire damage to the contractor's property. The subcontract incorporated the owner-contractor agreement by reference and provided that any conflicts between the two would be controlled by the subcontract. *Id.* at 201. The subcontract was silent on the subject of subrogation, but it obligated the subcontractor to indemnify the contractor and owner for any damage caused by the subcontractor's negligence. *Id.* On appeal, the court held that the waiver of subrogation defeated all of the insurer's claims against the subcontractor. *Id.* The court rejected the insurer's argument that it was not bound by the subrogation waiver because the subcontractor was not a party to the owner-contractor agreement. *Id*. Instead, the subcontractor was a party to the subcontract which incorporated the owner-contractor agreement by reference. *Id.* The court also rejected the insurer's contention that there was an inconsistency between the subrogation waiver and the subcontract's indemnity provision. *Id.* The court held that the subrogation waiver applied to claims covered by insurance, while the indemnity provision applied to claims that were not covered by insurance. *Davlar Corp. v. Superior Court*, 62 Cal. Rptr. 2d 199, 201 (1997). Therefore, summary judgment in favor of the subcontractor should have been granted. *Id.* at 202.

See also, Behr v. Hook, 787 A.2d 499 (Vt. 2001) (General contract provided that a waiver of subrogation shall be effective even against persons or entities that would otherwise have a duty of indemnification or did not pay the insurance premium directly or indirectly. Therefore, the plain intent of the parties was to make the owner's insurer bear the risk of property damage resulting from fire or other perils); *Walker Eng'g v. Bracebridge Corp.,* 102 S.W.3d 837 (Tex. Ct. App. 2003), petition for review denied, 2003 Tex. LEXIS 285 (Tex. Aug. 28, 2003)(Waiver of subrogation provision in general contract precluded owner's suit against subcontractor); *Gray Ins. Co. v. Old Tyme Builder, Inc*., 878 So.2d 603 (La. Ct. App. 2004), writ denied, 876 So.2d 814 (La. 2004)(Waiver of subrogation in owner-contractor agreement applied to bar claims by the contractor against his own subcontractors where property was damaged by rainfall); *Acuity v. Interstate Constr., Inc*., 2008 WL 625097 (Oh. Ct. App. 2008)(Waiver of subrogation provision applied to damages covered by property insurance purchased after construction was completed); *Hartford Fire Ins. Co. v. E.M. Duggan, Inc*., 2013 WL 714803 (Mass. Super. 2013)(Owner's claims for negligent failure to warn and consumer protection were alleged "rights" of the owner against subcontractor and were therefore barred by the waver of subrogation in construction manager agreement).

See also, Ace Am. Ins. Co. v. Med. Plumbing, Inc., 206 A.3d 437 (N.J. Super. Ct. App. Div., 2019), where the owner entered into an agreement with a contractor for the construction of the core and shell of a health club, and the contractor entered into an agreement with a subcontractor to provide the plumbing. After the work was completed, a water main failed and flooded the health club. *Ace Am. Ins. Co. v. Med. Plumbing, Inc.*, 206 A.3d 437, 439 (N.J. Super. Ct. App. Div., 2019). The owner's insurer brought an action against the subcontractor seeking recovery of its payments to the owner. *Id*. The trial court granted the subcontractor's motion for summary judgment. *Id.* On appeal, the court was "unpersuaded" by the insurer's argument that the waiver was limited to damages incurred during construction. *Id.* at 443. Paragraph 11.3.7 of the Owner-contractor agreement, A201-2007 provided:

> 11.3.7 WAIVERS OF SUBROGATION
>
> The Owner and Contractor waive all rights against...each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other...for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 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. (emphasis added).

Id. at 442.

The contract also included a provision that stated as follows:

> Paragraph 11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment, property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the owner shall waive all rights in accordances with the terms of Section 11.3.7 for damages caused by fire or other causes

> of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise." (emphasis added).

Id.

The court found that the evident purpose of section 11.3.5 was to preserve the subrogation waiver for post-completion damages, even if the owner happened to shift policies or insurers after construction was complete. *Ace Am. Ins. Co. v. Med. Plumbing, Inc.*, 206 A.3d 437, 446 (N.J. Super. Ct. App. Div., 2019). The provision was also intended to "extend the provisions for waiver of subrogation to other property insurance the owner may purchase." *Id.* "Such policies may cover property at or adjacent to the project, or they may replace the property insurance that was in effect on the work during construction." *Id.* The court held that together, the two provisions enured a "seamless waiver' that shielded the contracting parties from suit by subrogees. *Id*.

The court also rejected the insurer's argument that application of the subrogation waiver was inconsistent with the subcontractor's contractual obligation to obtain liability insurance, since Section 11.37 of the contract clearly stated that the **"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**..." *Id*. at 446, emphasis supplied. The court therefore found that notwithstanding that most of the damage affected non-Work property and occurred after construction was completed, the subrogation waiver barred the owner's action against the subcontractor, since its blanket all-risk insurance satisfied A201's requirements and covered the work. *Id.* at 447.

But see, Donald B. Murphy Contractors, Inc. v. King County, 49 P.3d 912 (Wash Ct. App. 2002)(Subcontractor was not third party beneficiary to owner's agreement to purchase and maintain builder's risk insurance, where owner-contractor agreement clearly stated, "Subcontractors to the Contractor will not be recognized as having a direct relationship with (owner), nor are subcontractors intentional or incidental beneficiaries to this Contract.")

CONCLUSION TO PART I

In conclusion, the parties involved in a construction, owner, architect, engineer, general contractor, and subcontractor, rely on intricate, highly sophisticated contracts to define their rights and responsibilities. Such contracts typically include an agreement to insure, where the parties agree to place the risk of loss of construction defects and consequential damages related thereto on insurance. In a typical AIA construction contract, the contractor agrees to take out a CGL policy covering the work after completion, and the owner agrees to provide builder's risk coverage. Therefore, if the contractor or his subcontractors make a mistake before the completion of the project that causes damage to their work, the builders' risk insurance would cover the loss. Moreover, when a contract between the owner of a project and the general (or prime) contractor contains a waiver of subrogation rights against each other and other contractors to the project (including both subcontractors and sub-subcontractors), the parties have evinced an intention to remedy "construction losses through insurance claims, not lawsuits." Therefore, when a general contract between the owner of a project and the general contractor contains a requirement that the owner procure property insurance for the benefit of itself, the general contractor, subcontractors and sub-subcontractors, the subcontractors and sub-subcontractors are considered third party beneficiaries of the general contract and are entitled to enforce the subrogation waiver clause contained in the general contract.

If a construction project owner fails to take out sufficient insurance "to cover the cost of the undertaking," as required by the Contract, the owner, not the contractor, must bear the loss caused by such failure. Likewise, if the owner chooses to rely on "all risk" insurance with an unreasonably high deductible, instead of taking out a builder's risk policy to cover the Work, courts have held the owner responsible for all losses not covered because of such deductible. Moreover, even though the prime contract may require a contractor to indemnify the owner, courts have found such indemnification clauses to refer to compensation and liability for losses not covered by the owner's property insurance, such as compensation and liability to third parties. Therefore, such indemnification requirements in the prime contract or subcontract do not relieve the owner of his responsibility to obtain sufficient property insurance to cover the contractor's work.

II. Provisions regarding coverage for a subcontractor's faulty workmanship under a CGL policy.

Commercial general liability (CGL) Insurance policies are designed to protect an insured against certain losses arising out of business operations. *Sheehan Const. Co., Inc. v. Continental Cas. Co.*, 935 N.E.2d 160, 162 (Ind. 2010). Most CGL policies are written on standardized forms developed by an association of domestic property insurers known as the Insurance Services Office ("ISO"). *Id.*

> [These] policies begin with a broad grant of coverage, which is then limited in scope by exclusions. Exceptions to exclusions narrow the scope of the exclusion and, as a consequence, add back coverage. However, it is the initial broad grant of coverage, not the exception to the exclusion, that ultimately creates (or does not create) the coverage sought.

Sheehan Const. Co., Inc. v. Continental Cas. Co., 935 N.E.2d 160, 162 (Ind. 2010), citing David Decker, Douglas Green & Stephen Palley, The Expansion of Insurance Coverage for Defective Construction, 28 Constr. Law, Fall 2008, at 19, 20.

"CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage." *Sheehan Const. Co., Inc. v. Continental Cas. Co.*, 935 N.E.2d 160, 167 (Ind. 2010), (quoting *Am. Family Mut. Ins. Co. v. Am. Girl, Inc*., 268 Wis.2d 673 N.W.2d 65, 76 (2004)). However, since more and more projects were being completed with subcontractors, liability coverage was eventually extended to the insured's work when the damage arose out of work performed by a subcontractor. *Id*. at 163. In 1986, as part of a major revision, the subcontractor exception was added directly to the body of the ISO's CGL policy in the form of an express exception to the "Your Work" exclusion. *Id.* Thus, the "Your Work" exclusion specifically provides that it "does not apply if the damaged work or the work out of which the damage arises was performed on [the insured contractor's] behalf by a subcontractor." *Id.*

The CGL policy typically provides coverage for "sums that the insured becomes legally obligated to pay as damages" because of "bodily injury" or "property damage" ... caused by an "occurrence" that takes place in the coverage territory during the policy period.

COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

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

(1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
(2) The "bodily injury or "property damage" occurs during the policy period; and...

ISO Commercial General Liability Coverage Form, CG 00 01 04 13, (Appendix C).

A typical CGL policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and "property damage" includes "[p]hysical injury to tangible property, including all resulting use of that property...."

Definitions:

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

"Property Damage" means:
a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
b. Loss of use of tangible property that is not physically injured...

ISO Commercial General Liability Coverage Form, CG 00 01 04 13, (Appendix C).

The coverage provisions of a typical CGL policy are limited by numerous exclusions, including the exclusion for expected or intended injury, and the exclusion for "damage to your work," with its exception for work performed by a subcontractor.

2. Exclusions
This insurance does not apply to:
a. Expected Or Intended Injury
"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
.....
k. Damage to Your Product
"Property damage" to "your product" arising out of it or any part of it.

l. Damage to Your Work
"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if

> the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

ISO Commercial General Liability Coverage Form, CG 00 01 04 13, (Appendix C).

A. Indiana Cases regarding whether a subcontractor's faulty workmanship constitutes an "occurrence" under a CGL policy.

In 2010, the Indiana Supreme Court issued an opinion in *Sheehan Construction Co., Inc. v. Continental Casualty Co.,* 935 N.E.2d 160 (Ind. 2010) which clarified the common law regarding coverage for faulty workmanship by a subcontractor under a commercial general liability policy.

Previously, in *Indiana Insurance Co. v. DeZutti*, 408 N.E.2d 1275, 1276 (Ind. 1980), an insurance company filed a declaratory judgment action to determine whether there was coverage under the terms of a commercial general liability policy to defend its insured (a general contractor) against claims for damages caused by faulty construction. The trial court ruled that the policy provided coverage for the claim and that the insurer was required to defend the claim. *Id.* The Indiana Supreme Court reversed, holding that the policy did not provide coverage to correct, repair or replace the contractor's own poor workmanship. *Id.* at 1279. The court held that the insurance policy at issue did not cover faulty workmanship but rather faulty workmanship which causes an accident." *Id.* Therefore, the insurer did not intend to, nor did it provide coverage to include reimbursement to a builder for expenditures required to correct, repair or replace his own workmanship." *Id.*

However, in *Sheehan Construction Co., Inc. v. Continental Casualty Co.,* 935 N.E.2d 160 (Ind. 2010), an insurer, Continental, filed a declaratory judgment action to determine its obligation to an insured contractor, Sheehan, in connection with suits by homeowners for costs to repair water damage caused by the faulty workmanship of Sheehan's subcontractors.

Continental also agreed to represent Sheehan under a reservation of rights. *Sheehan Construction Co., Inc. v. Continental Casualty Co.*, 935 N.E.2d 160, 164 (Ind. 2010). The trial court found there was no property damage other than to the structural components of the homes themselves, and entered summary judgment in favor of the insurer. *Id.* On appeal, our Supreme Court noted that the insurers' CGL policies at issue insured against liability for property damage caused by an "occurrence." *Id.* at 167. The CGL policies included an exclusion for damage to "your work" which expressly did not apply "if the damaged work or the work out of which the damage arose was performed on you behalf by a subcontractor." *Id*. at 171.

On appeal, the Indiana Supreme Court found that the trial court erred in entering summary judgment in favor of insurers on grounds that there was no damage to property "other than the structural components of the homes themselves," and thus no "occurrence" or "property damage." *Id.* The court therefore held that improper or faulty workmanship does constitute an accident, "so long as the resulting damage is an event that occurs without expectation or foresight." *Id.* at 169. **"**More specifically, if the defective work of the subcontractors were done intentionally instead of without intention or design, then it is not an accident." *Id.* at 172. The court did not address the question of whether the faulty workmanship in question was the product of intentional or un-accidental conduct, noting "faulty workmanship may constitute an accident and thus an occurrence depending on the facts." *Id.*

In *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 864 F. Supp.2d 744, 751 (S.D. Ind. 2012), an insurer sued by an insured contractor to recover for the cost of repairing water damage to homes caused by a subcontractor's faulty work argued as a defense that the Indiana Supreme Court in *Sheehan* never addressed the "moral hazard" considerations where a general contractor might purposefully hire subcontractors who are known to perform cheap but shoddy work. The

Southern District, however, noted that according to *Sheehan*, “if the defective work of the subcontractors were done intentionally instead of ‘without intention or design’ it is not an accident.” *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 864 F. Supp.2d 744, 751 (S.D. Ind. 2012), (quoting *Sheehan*, 935 N.E.2d at 172). *Sheehan* addressed the moral hazard problem, since “the insurer must be able to satisfy itself, with respect to CGL policies, that there was a lack of intent on the part of the insured or those acting under his direction and control before coverage exists for claims based on any accidental faulty workmanship.” *Id*. , pp. 751-752. Therefore, the claims at issue in the underlying lawsuit were property damage claims resulting in an “occurrence” and were covered under the insurance policy. *Id.* at 760.

See also, American Ins. Co. v. Crown Packaging Intern., 813 F. Supp.2d 1027 (N.D. Ind., 2011) (Issue of material fact as to whether plastic soap container manufacturer intended to manufacture containers on which date codes and labels would flake off precluded summary judgment for both manufacturer’s insurer and manufacturer in insurer’s declaratory judgment action); *Indiana Ins. Co. v. Kopetsky*, 11N.E.3d 508 (Ind. Ct. App., 2014) (Coverage existed under a housing developer’s insurance policies, where lots containing contaminants purchased by developer were found to have suffered “property damage,” and migration of toxic or hazardous waste from adjacent property to lots constituted an “occurrence” under the policies).

Likewise, in *Jim Barna Log Systems Midwest, Inc. v. General Cas. Ins. Co. of Wisconsin*, 791 N.E.2d 816, 820 (Ind. Ct. App. 2003), a case that was decided before *Sheehan*, but is still followed, the court found that a Complaint by homeowners, the Grotts, in the underlying action failed to allege an “occurrence” as defined by a general contractor, Barna Log’s CGL policy, and that several exclusions in the policy applied. In the Grotts’ underlying action, it was alleged, among other things, that the Barna Log breached their contract to construct a log home for the

Grotts by failing to provide the materials set forth in the purchase agreement, substituting inferior and defective materials for the materials bargained for by the homeowners, failing to provide all of the components of the log home package bargained for, and providing specifications for a structurally unsound log home. *Jim Barna Log Systems Midwest, Inc. v. General Cas. Ins. Co. of Wisconsin*, 791 N.E.2d 816, 820 (Ind. Ct. App. 2003). The Grotts further alleged that the defendants converted to their own use materials, components and products purchased by the homeowners pursuant to the purchase agreement, and that the defendants intentionally, fraudulently, and recklessly misrepresented that Myers, the builder hired by Barna Log, was a qualified and competent log home builder and contractor. *Id.*, 820-21. The trial court granted summary judgment to Barna Log's insurers in Barna Log's declaratory judgment action. *Id.* at 821. On appeal, the court first considered whether the Grotts' complaint in the underlying action alleged facts that constituted an "occurrence" under the CGL policy. The CGL policy provided, in pertinent part:

> b. This insurance applies to "bodily injury" and "property damage" only if:
> (1) The "bodily injury" or "property damage" is caused by an occurrence that takes place in the "coverage territory."

Id. at 824.

On appeal, Barna Log argued that the Grotts' Complaint included several allegations of "negligent, non-intentional conduct in which resultant damage would not be expected or intended by the insured." *Jim Barna Log Systems Midwest, Inc. v. General Cas. Ins. Co. of Wisconsin*, 791 N.E.2d 816, 825 (Ind. Ct. App. 2003). However, the court noted that contrary to the insureds' contention, "an allegation of negligence is not necessarily an allegation of accidental conduct as defined in the context of a commercial general liability insurance policy."

Id. The court also noted that in Count I of the Grotts' Complaint, they argued that Barna Log breached its duty to the Grotts by negligently, carelessly, and intentionally recommending, providing and hiring an incompetent and unqualified builder with no experience building log homes. *Id*. at 826. The policy at issue defined an occurrence as "an accident, including continuous or repeated exposure to the same general, harmful conditions." *Id.* The court noted that in the context of insurance coverage, an accident meant "an unexpected happening without intention or design." *Id.* Therefore, even if Barna Log acted negligently and carelessly by selecting and hiring Myers to be the builder of the home, the act itself was intentional, not accidental. *Id.* As such, the allegations regarding negligent hiring did not arise from an "accident" and thus were not the result of an "occurrence" as defined by the CGL Policy. *Id.* The court held that the trial court did not err by granting the insurers' motion for summary judgment and denying Barna Log's motion for summary judgment. *Id.* at 832.

Similarly, in *Westfield Ins. Co. v. Barick*, No. 2:06-CV 288-PRC 2008 U.S. Dist. LEXIS 28299; 2008 WL 938330, at *1 (N.D. Ind., Apr. 3, 2008), an insurer, Westfield, filed a declaratory judgment action, where it requested the court to find that it had no duty to defend or indemnify insured builders, Barick and BBI, against state court lawsuits filed by homeowners, the Conaways, involving the construction of two homes in Lake County, Indiana. In their state court complaints, the Conaways asserted claims for (1) fraud, alleging that Barick and BBI misrepresented their abilities to complete the homes as required by the drawings, industry standards, state building codes and local ordinances; (2) breach of contract, alleging that Barick and BBI failed to complete the homes in a workmanlike manner and in compliance with the drawings, industry standards, state building codes and local ordinances; and (3) personal injury due to exposure to mold that formed as a result of Barrick's and BBI's substandard construction. *Westfield Ins. Co. v. Barick*, No. 2:06-CV 288-PRC 2008 U.S. Dist. LEXIS 28299; 2008 WL 938330, at *5 (N.D. Ind., Apr. 3, 2008).

The District Court found that the Conaways' fraud claims in the state court actions did not allege an occurrence, since their claims for fraudulent inducement contained no suggestion that they were based on an accident. *Id.* at *22. Their fraud claims sought in large part, if not entirely, remedies for shortcomings in the construction of their homes. *Id.* The policies defined "property damage" as "[physical] injury to tangible property, including all resulting loss of use of that property," and "[loss] of use of tangible property that is not physically injured." *Id.* at *23. The policies also excluded from coverage, "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations," and "that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it." *Id.* These exclusions precluded Westfield from a duty to defend to the extent that the Conaways' claims for fraud concerned any work done by or on behalf of Barick or BBI, and any restoration that had to be done as a result of Barick's or BBI's work. *Id.* at *23. Further, the policies contained an exclusion for "damage to your work," defined as "work or operations performed by you or on your behalf;...and materials, parts or equipment furnished in connection with such work or operations." *Westfield Ins. Co. v. Barick*, No. 2:06-CV 288-PRC 2008 U.S. Dist. LEXIS 28299; 2008 WL 938330, at *23 (N.D. Ind., Apr. 3, 2008). "Your work" included "warranties or representations made at any time with respect to fitness, quality, durability, performance or use of 'your work'; and ..the providing of or failure to provide warnings or instructions." *Id.* at *24.

The Policies also excluded "property damage" to "your work" arising out of it or any part of it, and included in the "products-completed operations hazard." *Id.* The exclusion for "your work" provided that Westfield was under no duty to defend any claims by the Conaways for damage to work completed by Barick or BBI. *Id*. The court therefore held that Westfield was entitled to summary judgment on the Conaways' fraud claims. *Id*. Finally, the court found that the "Fungi Or Bacteria" exclusion applied, therefore Westfield was entitled to summary judgment on the Conaways' mold claims as well. *Id.* at *34. *See also, Salomon v. Cincinnati Ins. Co.*, 954 F. Supp.2d 828, 839-840 (N.D. Ind. 2013) ("Your Work" exclusion in insurance policy excluded coverage to property owners for damages resulting from contract to build retaining wall, where Contractor intentionally deviated from designs given to him and applied a different system for anchoring the wall. There was sufficient evidence that the contractor's design for building the wall caused it to fail.)

CONCLUSION TO PART II

In conclusion, commercial general liability (CGL) insurance policies are designed to protect an insured against certain losses arising out of business operations. The contractor's CGL policy is intended to provide coverage where the Plaintiff's complaint alleges an "occurrence" under the policy. The CGL policy generally excludes coverage for the insured's own work, with the exception of damage that arises from work performed by a subcontractor. Indiana courts have examined whether and to what extent damage caused by a subcontractor's faulty workmanship is covered under a CGL policy. In *Sheehan*, the Indiana Supreme Court held that a subcontractor's faulty workmanship constitutes an "occurrence" under a CGL policy where it is done “without intention or design.” However, if the defective work of the subcontractors was done intentionally, then it is not an accident, and would not be covered.

TABLE OF CASES

Cases:

AIA® Document A201® – 2007

General Conditions of the Contract for Construction

for the following PROJECT:
(Name and location or address)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

THE OWNER:
(Name, legal status and address)

THE ARCHITECT:
(Name, legal status and address)

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Basic Definitions

§ 1.1.1 The Contract Documents

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding requirements.

§ 1.1.2 The Contract

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

§ 1.1.3 The Work

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

§ 1.1.4 The Project

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by separate contractors.

§ 1.1.5 The Drawings

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

§ 1.1.6 The Specifications

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

§ 1.1.7 Instruments of Service

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

§ 1.1.8 Initial Decision Maker

The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2.

§ 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

§ 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

§ 1.3 Capitalization
Terms capitalized in these General Conditions include those that are (1) specifically defined, (2) the titles of numbered articles or (3) the titles of other documents published by the American Institute of Architects.

§ 1.4 Interpretation
In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§ 1.5 Ownership and Use of Drawings, Specifications and Other Instruments of Service
§ 1.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and will retain all common law, statutory and other reserved rights, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce the Instruments of Service provided to them solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants.

§ 1.6 Transmission of Data in Digital Form
If the parties intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions, unless otherwise already provided in the Agreement or the Contract Documents.

ARTICLE 2 OWNER
§ 2.1 General
§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 2.1.2 The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

§ 2.2 Information and Services Required of the Owner
§ 2.2.1 Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.2 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 2.2.4 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

§ 2.2.5 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

§ 2.3 Owner's Right to Stop the Work

If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or repeatedly fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

§ 2.4 Owner's Right to Carry Out the Work

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

ARTICLE 3 CONTRACTOR

§ 3.1 General

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

§ 3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

§ 3.2 Review of Contract Documents and Field Conditions by Contractor

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 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 coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. 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 specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

§ 3.3 Supervision and Construction Procedures

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. 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. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, 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, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures 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, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 3.4 Labor and Materials

§ 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 3.4.2 Except in the case of minor changes in the Work authorized by the Architect in accordance with Sections 3.12.8 or 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

§ 3.5 Warranty
The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.6 Taxes
The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

§ 3.7 Permits, Fees, Notices and Compliance with Laws
§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

§ 3.7.3 If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§ 3.7.4 Concealed or Unknown Conditions
If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that 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, the Contractor shall promptly provide notice to the Owner and the Architect 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 the Architect determines that 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 promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

§ 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

§ 3.8 Allowances
§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

.1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

.2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and

.3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.

§ 3.9 Superintendent

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to the proposed superintendent or (2) that the Architect requires additional time to review. Failure of the Architect to reply within the 14 day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

§ 3.10 Contractor's Construction Schedules

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

§ 3.10.2 The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

§ 3.11 Documents and Samples at the Site

The Contractor shall maintain at the site for the Owner one copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

§ 3.12 Shop Drawings, Product Data and Samples

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice, the Architect's approval of a resubmission shall not apply to such revisions.

§ 3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such 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 and approvals performed or provided 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 Section 3.12.10, the Architect will review, 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 and design criteria specified in the Contract Documents.

§ 3.13 Use of Site
The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

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§ 3.14 Cutting and Patching
§ 3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

§ 3.15 Cleaning Up
§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.

§ 3.16 Access to Work
The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

§ 3.17 Royalties, Patents and Copyrights
The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

§ 3.18 Indemnification
§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

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

ARTICLE 4 ARCHITECT
§ 4.1 General
§ 4.1.1 The Owner shall retain an architect lawfully licensed to practice architecture or an entity lawfully practicing architecture in the jurisdiction where the Project is located. That person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

§ 4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

§ 4.1.3 If the employment of the Architect is terminated, the Owner shall employ a successor architect as to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

§ 4.2 Administration of the Contract

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

§ 4.2.4 Communications Facilitating Contract Administration

Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

§ 4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions rendered in good faith.

§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

ARTICLE 5 SUBCONTRACTORS

§ 5.1 Definitions

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

§ 5.2 Award of Subcontracts and Other Contracts for Portions of the Work

§ 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to any such proposed person or entity or (2) that the Architect requires additional time for review. Failure of the Owner or Architect to reply within the 14-day period shall constitute notice of no reasonable objection.

§ 5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

§ 5.2.4 The Contractor shall not substitute a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitution.

§ 5.3 Subcontractual Relations

By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

§ 5.4 Contingent Assignment of Subcontracts

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

§ 5.4.3 Upon such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§ 6.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Article 15.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights that apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

§ 6.2 Mutual Responsibility

§ 6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a separate contractor's delays, improperly timed activities, damage to the Work or defective construction.

§ 6.2.4 The Contractor shall promptly remedy damage the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

§ 6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

§ 6.3 Owner's Right to Clean Up

If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

§ 7.1 General

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

§ 7.2 Change Orders

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

.1 The change in the Work;
.2 The amount of the adjustment, if any, in the Contract Sum; and
.3 The extent of the adjustment, if any, in the Contract Time.

§ 7.3 Construction Change Directives

§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in

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the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

.2 Unit prices stated in the Contract Documents or subsequently agreed upon;

.3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

.4 As provided in Section 7.3.7.

§ 7.3.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 7.3.5 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.6 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.7 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.7 shall be limited to the following:

.1 Costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;

.2 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;

.3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;

.4 Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and

.5 Additional costs of supervision and field office personnel directly attributable to the change.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect will prepare a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

§ 7.4 Minor Changes in the Work

The Architect has authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order signed by the Architect and shall be binding on the Owner and Contractor.

ARTICLE 8 TIME

§ 8.1 Definitions

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

§ 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.1 Contract Sum

The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.2 Schedule of Values

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit to the Architect, before the first Application for Payment, a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 9.3 Applications for Payment

§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.1 As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

§ 9.4 Certificates for Payment

§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1.

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 9.5 Decisions to Withhold Certification

§ 9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

.1 defective Work not remedied;
.2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
.3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
.5 damage to the Owner or a separate contractor;
.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
.7 repeated failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.3 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.

§ 9.6 Progress Payments

§ 9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

§ 9.6.2 The Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

§ 9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

§ 9.6.5 Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

§ 9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

§ 9.7 Failure of Payment

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

§ 9.9 Partial Occupancy or Use

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

§ 9.10 Final Completion and Final Payment

§ 9.10.1 Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

- **.1** liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- **.2** failure of the Work to comply with the requirements of the Contract Documents; or
- **.3** terms of special warranties required by the Contract Documents.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

§ 10.2 Safety of Persons and Property

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to

- **.1** employees on the Work and other persons who may be affected thereby;
- **.2** the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- **.3** other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

§ 10.2.7 The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

§ 10.2.8 Injury or Damage to Person or Property

If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§ 10.3 Hazardous Materials

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and 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.

§ 10.3.2 Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up.

§ 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 Section 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), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.5 The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency 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.

§ 10.4 Emergencies
In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

ARTICLE 11 INSURANCE AND BONDS
§ 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 and completed 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 that 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 usual 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 Section 3.18.

§ 11.1.2 The insurance required by Section 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 the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.

§ 11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. 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.

§ 11.1.4 The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

§ 11.2 Owner's Liability Insurance
The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

§ 11.3 Property Insurance
§ 11.3.1 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 property 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 Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

§ 11.3.1.1 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.

§ 11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

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

§ 11.3.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

§ 11.3.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

§ 11.3.2 Boiler and Machinery Insurance
The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

§ 11.3.3 Loss of Use Insurance
The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

§ 11.3.4 If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

§ 11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

§ 11.3.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Section 11.3. 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 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.

§ 11.3.7 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 described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 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.

§ 11.3.8 A loss insured under the Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

§ 11.3.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Owner and Contractor. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

§ 11.3.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor as the method of binding dispute resolution in the Agreement. If the Owner and Contractor have selected arbitration as the method of binding dispute resolution, the Owner as fiduciary shall make settlement with insurers or, in the case of a dispute over distribution of insurance proceeds, in accordance with the directions of the arbitrators.

§ 11.4 Performance Bond and Payment Bond
§ 11.4.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

§ 11.4.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

§ 12.1 Uncovering of Work
§ 12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

§ 12.1.2 If a portion of the Work has been covered that the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, such costs and the cost of correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

§ 12.2 Correction of Work
§ 12.2.1 Before or After Substantial Completion
The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

§ 12.2.2 After Substantial Completion
§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4.

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

§ 12.3 Acceptance of Nonconforming Work
If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

ARTICLE 13 MISCELLANEOUS PROVISIONS
§ 13.1 Governing Law
The Contract shall be governed by the law of the place where the Project is located except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.

§ 13.2 Successors and Assigns
§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

§ 13.3 Written Notice
Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.

§ 13.4 Rights and Remedies
§ 13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

§ 13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing.

§ 13.5 Tests and Inspections
§ 13.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Contractor.

§ 13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.5.3, shall be at the Owner's expense.

§ 13.5.3 If such procedures for testing, inspection or approval under Sections 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

§ 13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

§ 13.5.5 If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

§ 13.6 Interest

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

§ 13.7 Time Limits on Claims

The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

- **.1** Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- **.2** An act of government, such as a declaration of national emergency that requires all Work to be stopped;
- **.3** Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- **.4** The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

§ 14.2 Termination by the Owner for Cause

§ 14.2.1 The Owner may terminate the Contract if the Contractor

.1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

.3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or

.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

.1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

.2 Accept assignment of subcontracts pursuant to Section 5.4; and

.3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.

§ 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.

§ 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall

.1 cease operations as directed by the Owner in the notice;

.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

ARTICLE 15 CLAIMS AND DISPUTES

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

§ 15.1.2 Notice of Claims

Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3 Continuing Contract Performance

Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents. The Architect will prepare Change Orders and issue Certificates for Payment in accordance with the decisions of the Initial Decision Maker.

§ 15.1.4 Claims for Additional Cost

If the Contractor wishes to make a 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 Section 10.4.

§ 15.1.5 Claims for Additional Time

§ 15.1.5.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.5.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

§ 15.1.6 Claims for Consequential Damages

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

- **.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
- **.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.

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 this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

§ 15.2 Initial Decision

§ 15.2.1 Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 15.2.7 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 15.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 15.3 Mediation

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 15.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 15.3.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 15.4 Arbitration

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 15.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 15.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 15.4.4 Consolidation or Joinder

§ 15.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Contractor under this Agreement.

AIA® Document A201® – 2017

General Conditions of the Contract for Construction

for the following PROJECT:
(Name and location or address)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.

THE OWNER:
(Name, legal status and address)

THE ARCHITECT:
(Name, legal status and address)

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Basic Definitions

§ 1.1.1 The Contract Documents

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement, and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding or proposal requirements.

§ 1.1.2 The Contract

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants, or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

§ 1.1.3 The Work

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

§ 1.1.4 The Project

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by Separate Contractors.

§ 1.1.5 The Drawings

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules, and diagrams.

§ 1.1.6 The Specifications

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

§ 1.1.7 Instruments of Service

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

§ 1.1.8 Initial Decision Maker

The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2. The Initial Decision Maker shall not show partiality to the Owner or Contractor and shall not be liable for results of interpretations or decisions rendered in good faith.

§ 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

§ 1.2.1.1 The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

§ 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

§ 1.3 Capitalization

Terms capitalized in these General Conditions include those that are (1) specifically defined, (2) the titles of numbered articles, or (3) the titles of other documents published by the American Institute of Architects.

§ 1.4 Interpretation

In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§ 1.5 Ownership and Use of Drawings, Specifications, and Other Instruments of Service

§ 1.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and retain all common law, statutory, and other reserved rights in their Instruments of Service, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors, and suppliers are authorized to use and reproduce the Instruments of Service provided to them, subject to any protocols established pursuant to Sections 1.7 and 1.8, solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to the Project outside the scope of the Work without the specific written consent of the Owner, Architect, and the Architect's consultants.

§ 1.6 Notice

§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.

§ 1.7 Digital Data Use and Transmission

The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties will use AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

§ 1.8 Building Information Models Use and Reliance

Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees.

ARTICLE 2 OWNER

§ 2.1 General

§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 2.1.2 The Owner shall furnish to the Contractor, within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of, or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

§ 2.2 Evidence of the Owner's Financial Arrangements

§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

§ 2.2.3 After the Owner furnishes evidence of financial arrangements under this Section 2.2, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.4 Where the Owner has designated information furnished under this Section 2.2 as "confidential," the Contractor shall keep the information confidential and shall not disclose it to any other person. However, the Contractor may disclose "confidential" information, after seven (7) days' notice to the Owner, where disclosure is required by law, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or by court or arbitrator(s) order. The Contractor may also disclose "confidential" information to its employees, consultants, sureties, Subcontractors and their employees, Sub-subcontractors, and others who need to know the content of such information solely and exclusively for the Project and who agree to maintain the confidentiality of such information.

§ 2.3 Information and Services Required of the Owner

§ 2.3.1 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.3.2 The Owner shall retain an architect lawfully licensed to practice architecture, or an entity lawfully practicing architecture, in the jurisdiction where the Project is located. That person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

§ 2.3.3 If the employment of the Architect terminates, the Owner shall employ a successor to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

§ 2.3.4 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 2.3.5 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

§ 2.3.6 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

§ 2.4 Owner's Right to Stop the Work
If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or repeatedly fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

§ 2.5 Owner's Right to Carry Out the Work
If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such default or neglect. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect and the Architect may, pursuant to Section 9.5.1, withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect, or failure. If current and future payments are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. If the Contractor disagrees with the actions of the Owner or the Architect, or the amounts claimed as costs to the Owner, the Contractor may file a Claim pursuant to Article 15.

ARTICLE 3 CONTRACTOR
§ 3.1 General
§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

§ 3.1.3 The Contractor shall not be relieved of its obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

§ 3.2 Review of Contract Documents and Field Conditions by Contractor
§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, 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 coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. 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 specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner, subject to Section 15.1.7, as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

§ 3.3 Supervision and Construction Procedures

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. 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. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and shall be solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely notice to the Owner and Architect, and shall propose alternative means, methods, techniques, sequences, or procedures. The Architect shall evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the Contractor shall perform the Work using its alternative means, methods, techniques, sequences, or procedures.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 3.4 Labor and Materials

§ 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 3.4.2 Except in the case of minor changes in the Work approved by the Architect in accordance with Section 3.12.8 or ordered by the Architect in accordance with Section 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

§ 3.5 Warranty

§ 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.5.2 All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4.

§ 3.6 Taxes
The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

§ 3.7 Permits, Fees, Notices and Compliance with Laws
§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

§ 3.7.3 If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§ 3.7.4 Concealed or Unknown Conditions
If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that 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, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 14 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that 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 that an equitable adjustment be made 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 promptly notify the Owner and Contractor, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15.

§ 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

§ 3.8 Allowances
§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

- .1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and

.3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.

§ 3.9 Superintendent

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the name and qualifications of a proposed superintendent. Within 14 days of receipt of the information, the Architect may notify the Contractor, stating whether the Owner or the Architect (1) has reasonable objection to the proposed superintendent or (2) requires additional time for review. Failure of the Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

§ 3.10 Contractor's Construction and Submittal Schedules

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall contain detail appropriate for the Project, including (1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work. The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents. The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project.

§ 3.10.2 The Contractor, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, shall submit a submittal schedule for the Architect's approval. The Architect's approval shall not be unreasonably delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, or fails to provide submittals in accordance with the approved submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

§ 3.11 Documents and Samples at the Site

The Contractor shall make available, at the Project site, the Contract Documents, including Change Orders, Construction Change Directives, and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and the approved Shop Drawings, Product Data, Samples, and similar required submittals. These shall be in electronic form or paper copy, available to the Architect and Owner, and delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

§ 3.12 Shop Drawings, Product Data and Samples

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules, and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment, or workmanship, and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. Their purpose is to demonstrate how the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve, and submit to the Architect, Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents, in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of Separate Contractors.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples, and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples, or similar submittals, until the respective submittal has been approved by the Architect.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from the requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples, or similar submittals, unless the Contractor has specifically notified the Architect of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals, by the Architect's approval thereof.

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples, or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such notice, the Architect's approval of a resubmission shall not apply to such revisions.

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

§ 3.12.10.1 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 be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by an appropriately 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 and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and 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.

§ 3.12.10.2 If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the time and in the form specified by the Architect.

§ 3.13 Use of Site
The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

§ 3.14 Cutting and Patching
§ 3.14.1 The Contractor shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting, or patching shall be restored to the condition existing prior to the cutting, fitting, or patching, unless otherwise required by the Contract Documents.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or Separate Contractors by cutting, patching, or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter construction by the Owner or a Separate Contractor except with written consent of the Owner and of the Separate Contractor. Consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold, from the Owner or a Separate Contractor, its consent to cutting or otherwise altering the Work.

§ 3.15 Cleaning Up
§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials and rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery, and surplus materials from and about the Project.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the Owner shall be entitled to reimbursement from the Contractor.

§ 3.16 Access to Work
The Contractor shall provide the Owner and Architect with access to the Work in preparation and progress wherever located.

§ 3.17 Royalties, Patents and Copyrights
The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for defense or loss when a particular design, process, or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications, or other documents prepared by the Owner or Architect. However, if an infringement of a copyright or patent is discovered by, or made known to, the Contractor, the Contractor shall be responsible for the loss unless the information is promptly furnished to the Architect.

§ 3.18 Indemnification
§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

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

ARTICLE 4 ARCHITECT

§ 4.1 General

§ 4.1.1 The Architect is the person or entity retained by the Owner pursuant to Section 2.3.2 and identified as such in the Agreement.

§ 4.1.2 Duties, responsibilities, and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of the Owner, Contractor, and Architect. Consent shall not be unreasonably withheld.

§ 4.2 Administration of the Contract

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of, and will not be responsible for acts or omissions of, the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

§ 4.2.4 Communications

The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.4.2 and 13.4.3, whether or not the Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data, and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under

Sections 3.3, 3.5, and 3.12. The Architect's review shall not constitute approval of safety precautions or of any construction means, methods, techniques, sequences, or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may order minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more Project representatives to assist in carrying out the Architect's responsibilities at the site. The Owner shall notify the Contractor of any change in the duties, responsibilities and limitations of authority of the Project representatives.

§ 4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either, and will not be liable for results of interpretations or decisions rendered in good faith.

§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

ARTICLE 5 SUBCONTRACTORS

§ 5.1 Definitions

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a Separate Contractor or the subcontractors of a Separate Contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

§ 5.2 Award of Subcontracts and Other Contracts for Portions of the Work

§ 5.2.1 Unless otherwise stated in the Contract Documents, the Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the persons or entities proposed for each principal portion of the Work, including those who are to furnish materials or equipment fabricated to a special design. Within 14 days of receipt of the information, the Architect may notify the Contractor whether the Owner or the Architect (1) has reasonable objection to any such proposed person or entity or (2) requires additional time for review. Failure of the Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the

Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

§ 5.2.4 The Contractor shall not substitute a Subcontractor, person, or entity for one previously selected if the Owner or Architect makes reasonable objection to such substitution.

§ 5.3 Subcontractual Relations

By appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work that the Contractor, by these Contract Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies, and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

§ 5.4 Contingent Assignment of Subcontracts

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

§ 5.4.3 Upon assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§ 6.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 6.1.1 The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each Separate

Contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with any Separate Contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to its construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, Separate Contractors, and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces or with Separate Contractors, the Owner or its Separate Contractors shall have the same obligations and rights that the Contractor has under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6, and Articles 10, 11, and 12.

§ 6.2 Mutual Responsibility

§ 6.2.1 The Contractor shall afford the Owner and Separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly notify the Architect of apparent discrepancies or defects in the construction or operations by the Owner or Separate Contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to notify the Architect of apparent discrepancies or defects prior to proceeding with the Work shall constitute an acknowledgment that the Owner's or Separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not apparent.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a Separate Contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a Separate Contractor's delays, improperly timed activities, damage to the Work or defective construction.

§ 6.2.4 The Contractor shall promptly remedy damage that the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or Separate Contractor as provided in Section 10.2.5.

§ 6.2.5 The Owner and each Separate Contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

§ 6.3 Owner's Right to Clean Up

If a dispute arises among the Contractor, Separate Contractors, and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

§ 7.1 General

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor, and Architect. A Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor. An order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work.

§ 7.2 Change Orders

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor, and Architect stating their agreement upon all of the following:

.1 The change in the Work;
.2 The amount of the adjustment, if any, in the Contract Sum; and
.3 The extent of the adjustment, if any, in the Contract Time.

§ 7.3 Construction Change Directives
§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
.2 Unit prices stated in the Contract Documents or subsequently agreed upon;
.3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
.4 As provided in Section 7.3.4.

§ 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.4 shall be limited to the following:

.1 Costs of labor, including applicable payroll taxes, fringe benefits required by agreement or custom, workers' compensation insurance, and other employee costs approved by the Architect;
.2 Costs of materials, supplies, and equipment, including cost of transportation, whether incorporated or consumed;
.3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
.4 Costs of premiums for all bonds and insurance, permit fees, and sales, use, or similar taxes, directly related to the change; and
.5 Costs of supervision and field office personnel directly attributable to the change.

§ 7.3.5 If the Contractor disagrees with the adjustment in the Contract Time, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

§ 7.3.6 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.7 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The

Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect will prepare a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

§ 7.4 Minor Changes in the Work

The Architect may order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the Work will affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and shall not proceed to implement the change in the Work. If the Contractor performs the Work set forth in the Architect's order for a minor change without prior notice to the Architect that such change will affect the Contract Sum or Contract Time, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.

ARTICLE 8 TIME

§ 8.1 Definitions

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

§ 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, commence the Work prior to the effective date of insurance required to be furnished by the Contractor and Owner.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.1 Contract Sum

§ 9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.1.2 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 9.2 Schedule of Values
Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit a schedule of values to the Architect before the first Application for Payment, allocating the entire Contract Sum to the various portions of the Work. The schedule of values shall be prepared in the form, and supported by the data to substantiate its accuracy, required by the Architect. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Architect and supported by such data to substantiate its accuracy as the Architect may require, and unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's subsequent Applications for Payment.

§ 9.3 Applications for Payment
§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. The application shall be notarized, if required, and supported by all data substantiating the Contractor's right to payment that the Owner or Architect require, such as copies of requisitions, and releases and waivers of liens from Subcontractors and suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.1 As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or supplier, unless such Work has been performed by others whom the Contractor intends to pay.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage, and transportation to the site, for such materials and equipment stored off the site.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information, and belief, be free and clear of liens, claims, security interests, or encumbrances, in favor of the Contractor, Subcontractors, suppliers, or other persons or entities that provided labor, materials, and equipment relating to the Work.

§ 9.4 Certificates for Payment
§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; or (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner of the Architect's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole as provided in Section 9.5.1.

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data in the Application for Payment, that, to the best of the Architect's knowledge, information, and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion, and to specific qualifications expressed by the Architect. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences, or procedures; (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment; or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 9.5 Decisions to Withhold Certification

§ 9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims, unless security acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or suppliers for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a Separate Contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 repeated failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 When either party disputes the Architect's decision regarding a Certificate for Payment under Section 9.5.1, in whole or in part, that party may submit a Claim in accordance with Article 15.

§ 9.5.3 When the reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.4 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or supplier to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Contractor shall reflect such payment on its next Application for Payment.

§ 9.6 Progress Payments

§ 9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

§ 9.6.2 The Contractor shall pay each Subcontractor, no later than seven days after receipt of payment from the Owner, the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

§ 9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and suppliers to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay, or to see to the payment of money to, a Subcontractor or supplier, except as may otherwise be required by law.

§ 9.6.5 The Contractor's payments to suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

§ 9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors or provided by suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, create any fiduciary liability or tort liability on the part of the Contractor for breach of trust, or entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

§ 9.6.8 Provided the Owner has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

§ 9.7 Failure of Payment

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion; establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in the Certificate. Upon such acceptance, and consent of surety if any, the Owner shall make payment of retainage applying to the Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

§ 9.9 Partial Occupancy or Use
§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor, and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

§ 9.10 Final Completion and Final Payment
§ 9.10.1 Upon receipt of the Contractor's notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection. When the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, (3) a written statement that the Contractor knows of no reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment, (5) documentation of any special warranties, such as manufacturers' warranties or specific Subcontractor warranties, and (6) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts and releases and waivers of liens, claims, security interests, or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien, claim, security interest, or encumbrance. If a lien, claim, security interest, or encumbrance remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging the lien, claim, security interest, or encumbrance, including all costs and reasonable attorneys' fees.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed, corrected, and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of the surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

- **.1** liens, Claims, security interests, or encumbrances arising out of the Contract and unsettled;
- **.2** failure of the Work to comply with the requirements of the Contract Documents;
- **.3** terms of special warranties required by the Contract Documents; or
- **.4** audits performed by the Owner, if permitted by the Contract Documents, after final payment.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor, or a supplier, shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract.

§ 10.2 Safety of Persons and Property

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to

- **.1** employees on the Work and other persons who may be affected thereby;
- **.2** the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody, or control of the Contractor, a Subcontractor, or a Sub-subcontractor; and
- **.3** other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with, and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, bearing on safety of persons or property or their protection from damage, injury, or loss.

§ 10.2.3 The Contractor shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards; promulgating safety regulations; and notifying the owners and users of adjacent sites and utilities of the safeguards.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment, or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3. The Contractor may make a Claim for the cost to remedy the damage or loss to the extent such damage or loss is attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

§ 10.2.7 The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

§ 10.2.8 Injury or Damage to Person or Property
If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§ 10.3 Hazardous Materials and Substances
§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and 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 notify the Owner and Architect of the condition.

§ 10.3.2 Upon receipt of the Contractor's notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of the material or substance or who are to perform the task of removal or safe containment of the material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable additional costs of shutdown, delay, and start-up.

§ 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 Section 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), except to the extent that such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for hazardous materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for hazardous materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.5 The Contractor shall reimburse the Owner for the cost and expense the Owner incurs (1) for remediation of hazardous materials or substances the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency 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 reimburse the Contractor for all cost and expense thereby incurred.

§ 10.4 Emergencies
In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

ARTICLE 11 INSURANCE AND BONDS
§ 11.1 Contractor's Insurance and Bonds
§ 11.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the

endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Owner, Architect, and Architect's consultants shall be named as additional insureds under the Contractor's commercial general liability policy or as otherwise described in the Contract Documents.

§ 11.1.2 The Contractor shall provide surety bonds of the types, for such penal sums, and subject to such terms and conditions as required by the Contract Documents. The Contractor shall purchase and maintain the required bonds from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located.

§ 11.1.3 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

§ 11.1.4 Notice of Cancellation or Expiration of Contractor's Required Insurance. Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by the Contract Documents, the Contractor shall provide notice to the Owner of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner shall, unless the lapse in coverage arises from an act or omission of the Owner, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

§ 11.2 Owner's Insurance

§ 11.2.1 The Owner shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Owner shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located.

§ 11.2.2 Failure to Purchase Required Property Insurance. If the Owner fails to purchase and maintain the required property insurance, with all of the coverages and in the amounts described in the Agreement or elsewhere in the Contract Documents, the Owner shall inform the Contractor in writing prior to commencement of the Work. Upon receipt of notice from the Owner, the Contractor may delay commencement of the Work and may obtain insurance that will protect the interests of the Contractor, Subcontractors, and Sub-Subcontractors in the Work. When the failure to provide coverage has been cured or resolved, the Contract Sum and Contract Time shall be equitably adjusted. In the event the Owner fails to procure coverage, the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent the loss to the Owner would have been covered by the insurance to have been procured by the Owner. The cost of the insurance shall be charged to the Owner by a Change Order. If the Owner does not provide written notice, and the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain the required insurance, the Owner shall reimburse the Contractor for all reasonable costs and damages attributable thereto.

§ 11.2.3 Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the Contract Documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the Contract Time and Contract Sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate Change Order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

§ 11.3 Waivers of Subrogation

§ 11.3.1 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; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The

Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

§ 11.4 Loss of Use, Business Interruption, and Delay in Completion Insurance
The Owner, at the Owner's option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other causes of loss. The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner's property, due to fire or other hazards however caused.

§11.5 Adjustment and Settlement of Insured Loss
§ 11.5.1 A loss insured under the property insurance required by the Agreement shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.5.2. The Owner shall pay the Architect and Contractor their just shares of insurance proceeds received by the Owner, and by appropriate agreements the Architect and Contractor shall make payments to their consultants and Subcontractors in similar manner.

§ 11.5.2 Prior to settlement of an insured loss, the Owner shall notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds. The Contractor shall have 14 days from receipt of notice to object to the proposed settlement or allocation of the proceeds. If the Contractor does not object, the Owner shall settle the loss and the Contractor shall be bound by the settlement and allocation. Upon receipt, the Owner shall deposit the insurance proceeds in a separate account and make the appropriate distributions. Thereafter, if no other agreement is made or the Owner does not terminate the Contract for convenience, the Owner and Contractor shall execute a Change Order for reconstruction of the damaged or destroyed Work in the amount allocated for that purpose. If the Contractor timely objects to either the terms of the proposed settlement or the allocation of the proceeds, the Owner may proceed to settle the insured loss, and any dispute between the Owner and Contractor arising out of the settlement or allocation of the proceeds shall be resolved pursuant to Article 15. Pending resolution of any dispute, the Owner may issue a Construction Change Directive for the reconstruction of the damaged or destroyed Work.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK
§ 12.1 Uncovering of Work
§ 12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

§ 12.1.2 If a portion of the Work has been covered that the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, the Contractor shall be entitled to an equitable adjustment to the Contract Sum and Contract Time as may be appropriate. If such Work is not in accordance with the Contract Documents, the costs of uncovering the Work, and the cost of correction, shall be at the Contractor's expense.

§ 12.2 Correction of Work
§ 12.2.1 Before Substantial Completion
The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, discovered before Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the

Contractor's expense.

§ 12.2.2 After Substantial Completion
§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5.

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction of the Owner or Separate Contractors, whether completed or partially completed, caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

§ 12.3 Acceptance of Nonconforming Work
If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

ARTICLE 13 MISCELLANEOUS PROVISIONS
§ 13.1 Governing Law
The Contract shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules. If the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.

§ 13.2 Successors and Assigns
§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate the assignment.

§ 13.3 Rights and Remedies

§ 13.3.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.

§ 13.3.2 No action or failure to act by the Owner, Architect, or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed upon in writing.

§ 13.4 Tests and Inspections

§ 13.4.1 Tests, inspections, and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules, and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections, or approvals that do not become requirements until after bids are received or negotiations concluded. The Owner shall directly arrange and pay for tests, inspections, or approvals where building codes or applicable laws or regulations so require.

§ 13.4.2 If the Architect, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection, or approval, by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.4.3, shall be at the Owner's expense.

§ 13.4.3 If procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for the Architect's services and expenses, shall be at the Contractor's expense.

§ 13.4.4 Required certificates of testing, inspection, or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

§ 13.4.5 If the Architect is to observe tests, inspections, or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.4.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

§ 13.5 Interest

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate the parties agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

§ 14.2 Termination by the Owner for Cause

§ 14.2.1 The Owner may terminate the Contract if the Contractor

- **.1** repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- **.2** fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or suppliers;
- **.3** repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- **.4** otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the reasons described in Section 14.2.1 exist, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may, without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- **.1** Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- **.2** Accept assignment of subcontracts pursuant to Section 5.4; and
- **.3** Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.

§ 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

- **.1** that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or
- **.2** that an equitable adjustment is made or denied under another provision of the Contract.

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§ 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

.1 cease operations as directed by the Owner in the notice;

.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

ARTICLE 15 CLAIMS AND DISPUTES

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

§ 15.1.2 Time Limits on Claims

The Owner and Contractor shall commence all Claims and causes of action against the other and arising out of or related to the Contract, whether in contract, tort, breach of warranty or otherwise, in accordance with the requirements of the binding dispute resolution method selected in the Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all Claims and causes of action not commenced in accordance with this Section 15.1.2.

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.

§ 15.1.4 Continuing Contract Performance

§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

§ 15.1.4.2 The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker's decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section

15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

§ 15.1.7 Waiver of Claims for Consequential Damages
The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.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

.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.

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 this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

§ 15.2 Initial Decision
§ 15.2.1 Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and 11.5, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim. If an initial decision has not been rendered within 30 days after the Claim has been referred to the Initial Decision Maker, the party asserting the Claim may demand mediation and binding dispute resolution without a decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of the request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished, or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation. If such a demand is made and the party receiving the demand fails to file for mediation within 30 days after receipt thereof, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 15.2.7 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 15.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 15.3 Mediation

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 15.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 15.3.3 Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.

§ 15.3.4 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 15.4 Arbitration

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. The Arbitration shall be conducted in the place where the Project is located, unless another location is mutually agreed upon. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 15.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 15.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 15.4.4 Consolidation or Joinder

§ 15.4.4.1 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as those of the Owner and Contractor under this Agreement.

AIA Document A101® – 2017 Exhibit A

Insurance and Bonds

This Insurance and Bonds Exhibit is part of the Agreement, between the Owner and the Contractor, dated the ________ day of ________ in the year ________
(In words, indicate day, month and year.)

for the following **PROJECT**:
(Name and location or address)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document is intended to be used in conjunction with AIA Document A201®–2017, General Conditions of the Contract for Construction. Article 11 of A201®–2017 contains additional insurance provisions.

THE OWNER:
(Name, legal status and address)

THE CONTRACTOR:
(Name, legal status and address)

TABLE OF ARTICLES

ARTICLE A.1 GENERAL

The Owner and Contractor shall purchase and maintain insurance, and provide bonds, as set forth in this Exhibit. As used in this Exhibit, the term General Conditions refers to AIA Document A201™–2017, General Conditions of the Contract for Construction.

ARTICLE A.2 OWNER'S INSURANCE

§ A.2.1 General
Prior to commencement of the Work, the Owner shall secure the insurance, and provide evidence of the coverage, required under this Article A.2 and, upon the Contractor's request, provide a copy of the property insurance policy or policies required by Section A.2.3. The copy of the policy or policies provided shall contain all applicable conditions, definitions, exclusions, and endorsements.

§ A.2.2 Liability Insurance
The Owner shall be responsible for purchasing and maintaining the Owner's usual general liability insurance.

§ A.2.3 Required Property Insurance
§ A.2.3.1 Unless this obligation is placed on the Contractor pursuant to Section A.3.3.2.1, the Owner shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Owner's

property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section A.2.3.1.3, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. This insurance shall include the interests of mortgagees as loss payees.

§ A.2.3.1.1 Causes of Loss. The insurance required by this Section A.2.3.1 shall provide coverage for direct physical loss or damage, and shall not exclude the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials. Sub-limits, if any, are as follows:
(Indicate below the cause of loss and any applicable sub-limit.)

Cause of Loss	Sub-Limit

§ A.2.3.1.2 Specific Required Coverages. The insurance required by this Section A.2.3.1 shall provide coverage for loss or damage to falsework and other temporary structures, and to building systems from testing and startup. The insurance shall also cover debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and reasonable compensation for the Architect's and Contractor's services and expenses required as a result of such insured loss, including claim preparation expenses. Sub-limits, if any, are as follows:
(Indicate below type of coverage and any applicable sub-limit for specific required coverages.)

Coverage	Sub-Limit

§ A.2.3.1.3 Unless the parties agree otherwise, upon Substantial Completion, the Owner shall continue the insurance required by Section A.2.3.1 or, if necessary, replace the insurance policy required under Section A.2.3.1 with property insurance written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in Section 12.2.2 of the General Conditions.

§ A.2.3.1.4 Deductibles and Self-Insured Retentions. If the insurance required by this Section A.2.3 is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or retentions.

§ A.2.3.2 Occupancy or Use Prior to Substantial Completion. The Owner's occupancy or use of any completed or partially completed portion of the Work prior to Substantial Completion shall not commence until the insurance company or companies providing the insurance under Section A.2.3.1 have consented in writing to the continuance of coverage. The Owner and the Contractor shall take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance, unless they agree otherwise in writing.

§ A.2.3.3 Insurance for Existing Structures
If the Work involves remodeling an existing structure or constructing an addition to an existing structure, the Owner shall purchase and maintain, until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, "all-risks" property insurance, on a replacement cost basis, protecting the existing structure against direct physical loss or damage from the causes of loss identified in Section A.2.3.1, notwithstanding the undertaking of the Work. The Owner shall be responsible for all co-insurance penalties.

§ A.2.4 Optional Extended Property Insurance.
The Owner shall purchase and maintain the insurance selected and described below.
(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. For each type of insurance selected, indicate applicable limits of coverage or other conditions in the fill point below the selected item.)

☐ **§ A.2.4.1 Loss of Use, Business Interruption, and Delay in Completion Insurance,** to reimburse the Owner for loss of use of the Owner's property, or the inability to conduct normal operations due to a covered cause of loss.

☐ **§ A.2.4.2 Ordinance or Law Insurance,** for the reasonable and necessary costs to satisfy the minimum requirements of the enforcement of any law or ordinance regulating the demolition, construction, repair, replacement or use of the Project.

☐ **§ A.2.4.3 Expediting Cost Insurance**, for the reasonable and necessary costs for the temporary repair of damage to insured property, and to expedite the permanent repair or replacement of the damaged property.

☐ **§ A.2.4.4 Extra Expense Insurance,** to provide reimbursement of the reasonable and necessary excess costs incurred during the period of restoration or repair of the damaged property that are over and above the total costs that would normally have been incurred during the same period of time had no loss or damage occurred.

☐ **§ A.2.4.5 Civil Authority Insurance,** for losses or costs arising from an order of a civil authority prohibiting access to the Project, provided such order is the direct result of physical damage covered under the required property insurance.

☐ **§ A.2.4.6 Ingress/Egress Insurance,** for loss due to the necessary interruption of the insured's business due to physical prevention of ingress to, or egress from, the Project as a direct result of physical damage.

☐ **§ A.2.4.7 Soft Costs Insurance,** to reimburse the Owner for costs due to the delay of completion of the Work, arising out of physical loss or damage covered by the required property insurance: including construction loan fees; leasing and marketing expenses; additional fees, including those of architects, engineers, consultants, attorneys and accountants, needed for the completion of the construction, repairs, or reconstruction; and carrying costs such as property taxes, building permits, additional interest on loans, realty taxes, and insurance premiums over and above normal expenses.

§ A.2.5 Other Optional Insurance.
The Owner shall purchase and maintain the insurance selected below.
(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance.)

☐ **§ A.2.5.1 Cyber Security Insurance** for loss to the Owner due to data security and privacy breach, including costs of investigating a potential or actual breach of confidential or private information. *(Indicate applicable limits of coverage or other conditions in the fill point below.)*

☐ **§ A.2.5.2 Other Insurance**
(List below any other insurance coverage to be provided by the Owner and any applicable limits.)

Coverage	**Limits**

ARTICLE A.3 CONTRACTOR'S INSURANCE AND BONDS

§ A.3.1 General

§ A.3.1.1 Certificates of Insurance. The Contractor shall provide certificates of insurance acceptable to the Owner evidencing compliance with the requirements in this Article A.3 at the following times: (1) prior to commencement of the Work; (2) upon renewal or replacement of each required policy of insurance; and (3) upon the Owner's written request. An additional certificate evidencing continuation of commercial liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment and thereafter upon renewal or replacement of such coverage until the expiration of the periods required by Section A.3.2.1 and Section A.3.3.1. The certificates will show the Owner as an additional insured on the Contractor's Commercial General Liability and excess or umbrella liability policy or policies.

§ A.3.1.2 Deductibles and Self-Insured Retentions. The Contractor shall disclose to the Owner any deductible or self-insured retentions applicable to any insurance required to be provided by the Contractor.

§ A.3.1.3 Additional Insured Obligations. To the fullest extent permitted by law, the Contractor shall cause the commercial general liability coverage to include (1) the Owner, the Architect, and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions for which loss occurs during completed operations. The additional insured coverage shall be primary and non-contributory to any of the Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04.

§ A.3.2 Contractor's Required Insurance Coverage

§ A.3.2.1 The Contractor shall purchase and maintain the following types and limits of insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:
(If the Contractor is required to maintain insurance for a duration other than the expiration of the period for correction of Work, state the duration.)

§ A.3.2.2 Commercial General Liability

§ A.3.2.2.1 Commercial General Liability insurance for the Project written on an occurrence form with policy limits of not less than ________ ($__) each occurrence, ________ ($__) general aggregate, and ________ ($__) aggregate for products-completed operations hazard, providing coverage for claims including

.1 damages because of bodily injury, sickness or disease, including occupational sickness or disease, and death of any person;
.2 personal injury and advertising injury;
.3 damages because of physical damage to, or destruction of, tangible property, including the loss of use of such property;
.4 bodily injury or property damage arising out of completed operations; and
.5 the Contractor's indemnity obligations under Section 3.18 of the General Conditions.

§ A.3.2.2.2 The Contractor's Commercial General Liability policy under this Section A.3.2.2 shall not contain an exclusion or restriction of coverage for the following:

- **.1** Claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim.
- **.2** Claims for property damage to the Contractor's Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a Subcontractor.
- **.3** Claims for bodily injury other than to employees of the insured.
- **.4** Claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employees of the insured
- **.5** Claims or loss excluded under a prior work endorsement or other similar exclusionary language.
- **.6** Claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language.
- **.7** Claims related to residential, multi-family, or other habitational projects, if the Work is to be performed on such a project.
- **.8** Claims related to roofing, if the Work involves roofing.
- **.9** Claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces, if the Work involves such coatings or surfaces.
- **.10** Claims related to earth subsidence or movement, where the work involves such hazards.
- **.11** Claims related to explosion, collapse, and underground hazards, where the Work involves such hazards.

§ A.3.2.3 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Contractor, with policy limits of not less than ________ ($__) per accident, for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles along with any other statutorily required automobile coverage.

§ A.3.2.4 The Contractor may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella insurance policies result in the same or greater coverage as the coverages required under Section A.3.2.2 and A.3.2.3, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

§ A.3.2.5 Workers' Compensation at statutory limits.

§ A.3.2.6 Employers' Liability with policy limits not less than ________ ($__) each accident, ________ ($__) each employee, and ________ ($__) policy limit.

§ A.3.2.7 Jones Act, and the Longshore & Harbor Workers' Compensation Act, as required, if the Work involves hazards arising from work on or near navigable waterways, including vessels and docks

§ A.3.2.8 If the Contractor is required to furnish professional services as part of the Work, the Contractor shall procure Professional Liability insurance covering performance of the professional services, with policy limits of not less than ________ ($__) per claim and ________ ($__) in the aggregate.

§ A.3.2.9 If the Work involves the transport, dissemination, use, or release of pollutants, the Contractor shall procure Pollution Liability insurance, with policy limits of not less than ________ ($__) per claim and ________ ($__) in the aggregate.

§ A.3.2.10 Coverage under Sections A.3.2.8 and A.3.2.9 may be procured through a Combined Professional Liability and Pollution Liability insurance policy, with combined policy limits of not less than ________ ($__) per claim and ________ ($__) in the aggregate.

§ A.3.2.11 Insurance for maritime liability risks associated with the operation of a vessel, if the Work requires such activities, with policy limits of not less than________ ($__) per claim and________ ($__) in the aggregate.

§ A.3.2.12 Insurance for the use or operation of manned or unmanned aircraft, if the Work requires such activities, with policy limits of not less than________ ($__) per claim and________ ($__) in the aggregate.

§ A.3.3 Contractor's Other Insurance Coverage

§ A.3.3.1 Insurance selected and described in this Section A.3.3 shall be purchased from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:

(If the Contractor is required to maintain any of the types of insurance selected below for a duration other than the expiration of the period for correction of Work, state the duration.)

§ A.3.3.2 The Contractor shall purchase and maintain the following types and limits of insurance in accordance with Section A.3.3.1.

(Select the types of insurance the Contractor is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. Where policy limits are provided, include the policy limit in the appropriate fill point.)

☐ **§ A.3.3.2.1** Property insurance of the same type and scope satisfying the requirements identified in Section A.2.3, which, if selected in this section A.3.3.2.1, relieves the Owner of the responsibility to purchase and maintain such insurance except insurance required by Section A.2.3.1.3 and Section A.2.3.3. The Contractor shall comply with all obligations of the Owner under Section A.2.3 except to the extent provided below. The Contractor shall disclose to the Owner the amount of any deductible, and the Owner shall be responsible for losses within the deductible. Upon request, the Contractor shall provide the Owner with a copy of the property insurance policy or policies required. The Owner shall adjust and settle the loss with the insurer and be the trustee of the proceeds of the property insurance in accordance with Article 11 of the General Conditions unless otherwise set forth below.

(Where the Contractor's obligation to provide property insurance differs from the Owner's obligations as described under Section A.2.3, indicate such differences in the space below. Additionally, if a party other than the Owner will be responsible for adjusting and settling a loss with the insurer and acting as the trustee of the proceeds of property insurance in accordance with Article 11 of the General Conditions, indicate the responsible party below.)

☐ **§ A.3.3.2.2 Railroad Protective Liability Insurance,** with policy limits of not less than ________ ($__) per claim and ________ ($__) in the aggregate, for Work within fifty (50) feet of railroad property.

☐ **§ A.3.3.2.3 Asbestos Abatement Liability Insurance,** with policy limits of not less than ________ ($__) per claim and ________ ($__) in the aggregate, for liability arising from the encapsulation, removal, handling, storage, transportation, and disposal of asbestos-containing materials.

☐ **§ A.3.3.2.4** Insurance for physical damage to property while it is in storage and in transit to the construction site on an "all-risks" completed value form.

☐ **§ A.3.3.2.5** Property insurance on an "all-risks" completed value form, covering property owned by the Contractor and used on the Project, including scaffolding and other equipment.

☐ **§ A.3.3.2.6 Other Insurance**

(List below any other insurance coverage to be provided by the Contractor and any applicable limits.)

Coverage	Limits

§ A.3.4 Performance Bond and Payment Bond
The Contractor shall provide surety bonds, from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located, as follows:
(Specify type and penal sum of bonds.)

Type	Penal Sum ($0.00)
Payment Bond	
Performance Bond	

Payment and Performance Bonds shall be AIA Document A312™, Payment Bond and Performance Bond, or contain provisions identical to AIA Document A312™, current as of the date of this Agreement.

ARTICLE A.4 SPECIAL TERMS AND CONDITIONS
Special terms and conditions that modify this Insurance and Bonds Exhibit, if any, are as follows:

NOTE: For the General Liability line of insurance only, Miller's offers annotations for two ISO form revisions: 2013 and 1973. Although currently reported cases usually quote the General Liability provisions included in ISO's 2013 forms, some cases, such as those involving pollution claims, continue to interpret 1973 provisions. For this reason, annotations to 1973 forms, which appear on pages GL – 133 to GL – 160, have not been converted to similar provisions in later ISO forms. In addition, forms in other insurance lines (e.g. Businessowners) contain provisions similar or identical to those found in the General Liability forms. Please consult Miller's Index for additional form and section references.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

0a Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

0b Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.
0b1 The words "we", "us" and "our" refer to the company providing this insurance.

0c The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

0d Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

1 **SECTION I – COVERAGES**

1A **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

1A1 **1. Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as
1A1a damages because of "bodily injury" or 1A1b
1A1c "property damage" to which this insurance applies.
1A1d We will have the right and duty to defend the insured against any "suit" seeking 1A1e
1A1e1 those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.
1A1f We may, at our discretion, investigate any "occurrence" and
1A1g settle any claim or "suit" that may result. But:

1A1h **(1)** The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

1A1i **(2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.** 1A1j

Coverage for punitive damages awarded against insured. 1A1k

b. This insurance applies to "bodily injury" and "property damage" only if: 1A1l

(1) The "bodily injury" or "property damage" is caused by an "occurrence" 1A1m
that takes place in the "coverage territory"; 1A1n

(2) The "bodily injury" or "property damage" occurs during the policy period; and 1A1o

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. 1A1p
If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period. 1A1p1

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period. 1A1q

14a

1A1r **d.** "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

1A1s **(1)** Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

1A1t **(2)** Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

1A1u **(3)** Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

1A1v **e.** Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

1A1w Insurer's duty to disclaim coverage in a timely manner.

1A2 **2. Exclusions** (Burden of Proof)

This insurance does not apply to:

1A2a **a. Expected Or Intended Injury**

"Bodily injury" or "property damage" expected or intended from the standpoint of

1A2a1 the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

1A2b **b. Contractual Liability**

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

1A2b1 **(1)** That the insured would have in the absence of the contract or agreement; or

1A2b2 **(2)** Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of

1A2b3 the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and 1A2b4

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. 1A2b5

c. Liquor Liability 1A2c

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

(1) Causing or contributing to the intoxication of any person; 1A2c1

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or 1A2c2

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages. 1A2c3

(4) Any act or omission by any insured, any employee of any insured, patrons, members, associates, volunteers or any other persons as respects providing or failing to provide transportation, detaining or failing to detain any person, or any act of assuming or not assuming responsibility for the well being, supervision or care of any person allegedly under or suspected to be under the influence of alcohol. 1A2c4

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in: 1A2c5

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or 1A2c5a

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol; 1A2c5b

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph **(1)**, **(2)** or **(3)** above. 1A2c5c

1A2c6 However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing
1A2c6a alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

1A2d **d. Workers' Compensation And Similar Laws**

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

1A2e **e. Employer's Liability**

"Bodily injury" to:

1A2e1 **(1)** An "employee" of the insured arising out of and in the course of:

1A2e1a **(a)** Employment by the insured; or

1A2e1b **(b)** Performing duties related to the conduct of the insured's business; or

1A2e2 **(2)** The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

1A2e3 This exclusion applies whether the insured may be liable as an employer or in any other
1A2e4 capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

1A2e5 This exclusion does not apply to liability assumed by the insured under an "insured contract".

1A2f **f. Pollution**

1A2f1 **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

1A2f1a **(a)** At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests; 1A2f1a1

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or 1A2f1a2

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire"; 1A2f1a3

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste; 1A2f1b

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for: 1A2f1c

(i) Any insured; or 1A2f1c1

(ii) Any person or organization for whom you may be legally responsible; or 1A2f1c2

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to: 1A2f1d

1A2f1d1 (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

1A2f1d2 (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

1A2f1d3 (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

1A2f1e **(e)** At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(f) At or from any tank, piping, pumps or dispensers at premises, sites or locations in addition to those described in subparagraphs (a), (b), (d) or (e), which are or were at any time owned, leased, installed, removed, tested, repaired or filled by or on behalf of any insured, wherever located (except at residences primarily used for dwelling purposes) which contain, transport, or dispense or are designed to contain, transport or dispense: 1A2f1f

(i) motor fuels; 1A2f1f1

"Motor fuels" means petroleum or petroleum-based substances that are typically used in the operation of a motor or engine, including but not limited to gasoline, aviation fuel, number one or two diesel fuel, or any grade of gasohol.

(g) Which arises out of "your work" or 1A2f1g

(h) Which arises out of "your product." 1A2f1h

(2) Any loss, cost or expense arising out of any: 1A2f2

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or 1A2f2a

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants". 1A2f2b

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority. 1A2f2c

1A2f4 However, this [pollution] exclusion does not apply to the "products completed operations hazard," provided that:

1A2f4a (1) The emission, discharge, dispersal, seepage, release or escape of "pollutants"; (a) does not occur at or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of "waste"; or (b) does not arise out of the transportation, handling, storage, treatment, disposal or processing of "waste", at any time, by or for you or any person or organization for whom you may be legally responsible.

1A2f4b (2) "Your work" does not or did not involve any "clean-up" of "pollutants".

1A2f4c (3) The "Pollutants" were not brought on or to any site or location in connection with operations performed by you or any contractors or subcontractors working directly or indirectly on your behalf.

1A2f4d (4) Any loss, cost or expense incurred as a result of any "clean-up" of "pollutants" is not the result of a governmental directive or request, and would otherwise be covered by this insurance.

1A2f5 This exclusion does not apply to property damage caused by accidental drift of vapors, fumes, or toxic chemicals as a result of spraying operations.

1A2g **g. Aircraft, Auto Or Watercraft**

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

1A2g0 This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent; 1A2g1

(2) A watercraft you do not own that is: 1A2g2

(a) Less than 26 feet long; and

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

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured; 1A2g3

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or 1A2g4

(5) "Bodily injury" or "property damage" arising out of: 1A2g5

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or 1A2g5a

(b) The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment". 1A2g5b

(c) The maintenance, service or repair of an "auto" by the "named insured" or their employees on the property of the "insured" or on the premises of others. 1A2g5c

(6) Bodily injury or property damage arising out of the use of any "non-owned auto" in your business by any person other than you; 1A2g6

(a) "Non-owned auto" means any auto that the named insured does not own, lease, hire or borrow which is used in connection with the named insured's business. 1A2g6a

(7) Watercraft owned by the named insured and leased to others. Coverage applies subject to the following provisions: 1A2g7

A. At the time of the occurrence, the insurance required by the lease agreement is not collectible, and 1A2g7a

B. The insurance provided is excess over any collectible insurance, whether primary, excess or contingent. 1A2g7b

1A2h **h. Mobile Equipment**

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

1A2h1 **(1)** The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

1A2h2 **(2)** The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

1A2i **i. War**

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

1A2i1 **(1)** War, including undeclared or civil war;

1A2i2 **(2)** Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

1A2i3 **(3)** Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

1A2j **j. Damage To Property**

"Property damage" to:

1A2j1 **(1)** Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

1A2j2 **(2)** Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

1A2j3 **(3)** Property loaned to you;

1A2j4 **(4)** Personal property in the care, custody or control of the insured;

1A2j5 **(5)** That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

1A2j6 **(6)** That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance. 1A2j6a

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you. 1A2j7

Paragraphs **(3)**, **(4)**, **(5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement. 1A2j8

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard". 1A2j9

k. Damage To Your Product 1A2k

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

l. Damage To Your Work 1A2l

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

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor. 1A2l1

m. Damage To Impaired Property Or Property Not Physically Injured 1A2m

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

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or 1A2m1

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms. 1A2m2

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use. 1A2m3

n. Recall Of Products, Work Or Impaired Property 1A2n

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

1A2n1 (1) "Your product";

1A2n2 (2) "Your work"; or

1A2n3 (3) "Impaired property";

1A2n4 if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

1A2o **o. Personal And Advertising Injury**

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

1A2p **p. Electronic Data**

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

1A2p1 However, this exclusion does not apply to liability for damages because of "bodily injury".

1A2p2 As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

1A2q **q. Recording And Distribution Of Material Or Information In Violation Of Law**

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

1A2q1 **(1)** The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

1A2q2 **(2)** The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

1A2q3 **(3)** The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

1A2q4 **(4)** Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** – Limits Of Insurance. 1A2r

COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY 1B

1. Insuring Agreement 1B1

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. 1B10

Or, 1993 provision:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 1B1a

"personal injury" or 1B1b

"advertising injury" 1B1c

to which this insurance applies.

We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But: 1B1d 1B1e 1B1e1 1B1f 1B1g

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and 1B1h

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**. 1B1i

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**. 1B1j

Coverage for punitive damages awarded against insured. 1B1k

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period. 1B11 1B1l0 1B1m

1B1n <u>1993 Provision</u>

This insurance applies to "advertising injury" caused by an offense committed in the course of advertising your goods, products or services.

1B2 **2. Exclusions** (Burden of Proof)

This insurance does not apply to:

1B2a **a. Knowing Violation Of Rights Of Another**

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

1B2b **b. Material Published With Knowledge Of Falsity**

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

1B2c **c. Material Published Prior To Policy Period**

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

1B2d **d. Criminal Acts**

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

1B2e **e. Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement.

1B2e1 This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

1B2f **f. Breach Of Contract**

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

1B2g **g. Quality Or Performance Of Goods – Failure To Conform To Statements**

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

1B2h **h. Wrong Description Of Prices**

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

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret 1B2i

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement". 1B2i1

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan. 1B2i2

This insurance does not apply to any claim or "suit" arising out of any actual ~~or alleged~~ false advertising, false designation of origin, product disparagement, trade libel, or other claims arising out of unfair competition, whether or not in your "advertisement." 1B2i3

j. Insureds In Media And Internet Type Businesses 1B2j

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

(1) Advertising, broadcasting, publishing or telecasting; 1B2j1

(2) Designing or determining content of web sites for others; or 1B2j2

(3) An Internet search, access, content or service provider. 1B2j3

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions section. 1B2j4

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting. 1B2j5

k. Electronic Chatrooms Or Bulletin Boards 1B2k

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

l. Unauthorized Use Of Another's Name Or Product 1B2l

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

1B2m **m. Pollution**

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

1B2n **n. Pollution-related**

Any loss, cost or expense arising out of any:

1B2n1 **(1)** Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

1B2n2 **(2)** Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

1B2o **o. War**

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

1B2o1 **(1)** War, including undeclared or civil war;

1B2o2 **(2)** Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

1B2o3 **(3)** Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

1B2p **p. Recording And Distribution Of Material Or Information In Violation Of Law**

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

1B2p1 **(1)** The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

1B2p2 **(2)** The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

1B2p3 **(3)** The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information. 1B2p4

q. Claims made by any present, former or, prospective employee, partner, joint venturer, co-venturer, officer or director of the insured or any independent contractor supplying matter, material or services to the insured. 1B2q

COVERAGE C – MEDICAL PAYMENTS 1C

1. Insuring Agreement 1C1

a. We will pay medical expenses as described below for "bodily injury" caused by an accident: 1C1a

(1) On premises you own or rent; 1C1a1

(2) On ways next to premises you own or rent; or 1C1a2

(3) Because of your operations; 1C1a3

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period; 1C1a4

(b) The expenses are incurred and reported to us within one year of the date of the accident; and 1C1a5

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require. 1C1a6

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for: 1C1b

(1) First aid administered at the time of an accident; 1C1b1

(2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and 1C1b2

(3) Necessary ambulance, hospital, professional nursing and funeral services. 1C1b3

2. Exclusions (Burden of Proof) 1C2

We will not pay expenses for "bodily injury":

a. Any Insured 1C2a

To any insured, except "volunteer workers".

1C2b **b. Hired Person**

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

1C2c **c. Injury On Normally Occupied Premises**

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

1C2d **d. Workers' Compensation And Similar Laws**

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

1C2e **e. Athletics Activities**

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

1C2f **f. Products-Completed Operations Hazard**

Included within the "products-completed operations hazard".

1C2g **g. Coverage A Exclusions**

Excluded under Coverage **A.**

1C2h **h.** Due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

1D **SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**

1D1 **1.** We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1D1a **a.** All expenses we incur.

1D1b **b.** Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

1D1c **c.** The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

1D1d **d.** All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

1D1e **e.** All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer. 1D1f

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance. 1D1g

These payments will not reduce the limits of insurance. 1D1h

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met: 1D2

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract"; 1D2a

b. This insurance applies to such liability assumed by the insured; 1D2b

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract"; 1D2c

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee; 1D2d

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and 1D2e

f. The indemnitee: 1D2f

(1) Agrees in writing to: 1D2f1

(a) Cooperate with us in the investigation, settlement or defense of the "suit"; 1D2f1a

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit"; 1D2f1b

(c) Notify any other insurer whose coverage is available to the indemnitee; and 1D2f1c

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and 1D2f1d

1D2f2 (2) Provides us with written authorization to:

1D2f2a (a) Obtain records and other information related to the "suit"; and

1D2f2b (b) Conduct and control the defense of the indemnitee in such "suit".

1D2g So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments.
1D2h Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

1D2i Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

2 **SECTION II – WHO IS AN INSURED**

21 **1.** If you are designated in the Declarations as:

21a **a.** An individual, you and your spouse are
21a1 insureds, but only with respect to the conduct of a business of which you are the sole owner.

21b **b.** A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

21c **c.** A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

21d **d.** An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

21e **e.** A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

22 **2** Each of the following is also an insured:

a. Your "volunteer workers" only while 22a
performing duties related to the conduct of
your business, or your "employees", other 22b
than either your "executive officers" (if you 22c
are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability
company), but only for acts within the scope 22d
of their employment by you or while performing duties related to the conduct of
your business. However, none of these 22e
"employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury": 22e1

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business; 22e1a

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above; 22e1b

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(1)(a)** or **(b)** above; or 22e1c

(d) Arising out of his or her providing or failing to provide professional health care services. 22e1d

(2) "Property damage" to property: 22e2

(a) Owned, occupied or used by; 22e2a

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by; 22e2b

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company). 22e2c

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager. 22f

22g **c.** Any person or organization having proper temporary custody of your property if you die, but only:

22g1 **(1)** With respect to liability arising out of the maintenance or use of that property; and

22g2 **(2)** Until your legal representative has been appointed.

22h **d.** Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

22i **e.** Each other unit-owner of the described condominium, but only with respect to liability arising out of ownership, maintenance or repair of that portion of the premises which is not owned solely by the unit-owner.

22i1 However, the insurance afforded with respect to the developer in the developer's capacity as a unit owner does not apply to liability for acts or omissions as a developer.

22j **f.** Any legally incorporated entity of which you own at least 51% of the voting stock on the inception dates of this Coverage Form and on the date of any covered "occurrence," claim or "suit."

22j1 This insurance shall not apply to any entity that is already an insured under any other insurance provided by any company or that would be an insured but for the exhaustion of its limits of insurance.

22k **g.** With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for his liability. However, no person or organization is an insured with respect to:

22k1 **(1)** "Bodily injury" to a co-"employee" of the person driving the equipment; or

22k2 **(2)** "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However: 23

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier; 23a

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and 23b

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization. 23c

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations. 24

SECTION III – LIMITS OF INSURANCE 3

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of: 31

a. Insureds; 31a

b. Claims made or "suits" brought; or 31b

c. Persons or organizations making claims or bringing "suits". 31c

2. The General Aggregate Limit is the most we will pay for the sum of: 32

a. Medical expenses under Coverage **C;** 32a

b. Damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and 32b

c. Damages under Coverage **B.** 32c

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard". 33

4. Subject to Paragraph **2.** above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization. 34

35 5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

35a a. Damages under Coverage A; and

35b b. Medical expenses under Coverage C

35b1 Supplementary payments

35c because of all "bodily injury" and "property damage" arising out of any one "occurrence".

36 6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

37 7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

38 The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations,
39 unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

4 **SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS**

401 **1. Bankruptcy**

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

402 **2. Duties In The Event Of Occurrence, Offense, Claim Or Suit**

402a a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

402a1 (1) How, when and where the "occurrence" or offense took place;

402a2 (2) The names and addresses of any injured persons and witnesses; and

402a3 (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

402a4 It is understood and agreed that knowledge of an occurrence by the agent, servant or employee of the insured shall not in itself constitute knowledge by the insured unless an executive officer or the insurance department of the insured corporation shall have received written notice of such claim from the agent, servant or employee.

b. If a claim is made or "suit" is brought against any insured, you must: 402b

(1) Immediately record the specifics of the claim or "suit" and the date received; and 402b1

(2) Notify us as soon as practicable. 402b2

You must see to it that we receive written notice of the claim or "suit" as soon as practicable. 402b3

c. You and any other involved insured must: 402c

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit"; 402c1

(2) Authorize us to obtain records and other information; 402c2

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and 402c3

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply. 402c4

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent. 402d

3. Legal Action Against Us 403

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or 403a

b. To sue us on this Coverage Part unless all of its terms have been fully complied with. 403b

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. 403c
An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative. 403d

Statute of limitations defense. 403e

Duty to notify third party claimant of statute of limitations. 403f

404 **4. Other Insurance**

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

404a **a. Primary Insurance**

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

404b **b. Excess Insurance**

404b1 **(1)** This insurance is excess over:

404b1a **(a)** Any of the other insurance, whether primary, excess, contingent or on any other basis:

404b1b **(i)** That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

404b1c **(ii)** That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

404b1d **(iii)** That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner;

404b1e **(iv)** If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability;

404b1f **(v)** That is valid and collectible insurance including but not limited to coverage as an additional insured under another policy against such losses as may be covered by this policy;

404b1f1 **(vi)** For which you have been added as an additional insured by attachment of an endorsement;

404b1g **(vii)** That was bought specifically for an insured; or

404b1h **(viii)** If the loss is caused by the sole negligence of any additional insured owner, lessee, or contractor.

(ix) That is available to the insured when the insured . . . is any other insured that is not a named insured under such insurance. 404b1i

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured. 404b1k

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers. 404b2

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of: 404b3

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and 404b3a

(b) The total of all deductible and self-insured amounts under all that other insurance. 404b3b

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part. 404b4

c. Method Of Sharing 404c

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. 404c1

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers. 404c2

5. Premium Audit 405

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates. 405a

405b b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

405c c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

406 **6. Representations**

By accepting this policy, you agree:

406a a. The statements in the Declarations are accurate and complete;

406b b. Those statements are based upon representations you made to us; and

406c c. We have issued this policy in reliance upon your representations.

407 **7. Separation Of Insureds**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

407a a. As if each Named Insured were the only Named Insured; and

407b b. Separately to each insured against whom claim is made or "suit" is brought.

408 **8. Transfer Of Rights Of Recovery Against Others To Us**

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

408a Contribution Actions

408b Anti-Subrogation Rule/Restitution

409 **9. When We Do Not Renew**

409a If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

409b If notice is mailed, proof of mailing will be sufficient proof of notice.

Other Common Policy Conditions

A. Cancellation 411

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation. 411a

2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least: 411b

   a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or 411b1

   b. 30 days before the effective date of cancellation if we cancel for any other reason. 411b2

3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us. 411c

4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date. 411d

5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund. 411e

6. If notice is mailed, proof of mailing will be sufficient proof of notice. 411f

7. Notice to administrative agency. 411g

B. Changes 412

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy. 412a 412b

C. Examination Of Your Books And Records 413

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys 414

1. We have the right to: 414a

   a. Make inspections and surveys at any time; 414a1

414a2 **b.** Give you reports on the conditions we find; and

414a3 **c.** Recommend changes.

414b **2.** We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

414b1 **a.** Are safe or healthful; or

414b2 **b.** Comply with laws, regulations, codes or standards.

414c **3.** Paragraphs **1.** and **2.** of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

414d **4.** Paragraph **2.** of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

415 **E. Premiums**

The first Named Insured shown in the Declarations:

415a **1.** Is responsible for the payment of all premiums; and

415b **2.** Will be the payee for any return premiums we pay.

416 **F. Transfer Of Your Rights And Duties Under This Policy**

416a Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

416b If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

417 **G.** Conflicts of Law and Territorial Issues in Policy Interpretation

SECTION V – DEFINITIONS 5

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition: 501

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and 501a

b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement. 501b

<u>1993 Definition</u>

"Advertising injury" means injury arising out of one or more of the following offenses: 501m

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organizations' goods, products or services: 501n

b. Oral or written publication of material that violates a person's right of privacy; 501o

c. Misappropriation of advertising ideas or style of doing business; or 501p

d. Infringement of copyright, title or slogan. 501q

e. Infringement of trademark. 501r

2. "Auto" means: 502

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or 502a

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. 502b

However, "auto" does not include "mobile equipment". 502c

"Aviation operations" means all operations arising from the ownership, maintenance or use of locations for aviation activities including that portion of roads or other accesses that adjoin these locations. Aviation operations include all operations necessary or incidental to aviation activities. 502m

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. 503

504 **4.** "Coverage territory" means:

504a **a.** The United States of America (including its territories and possessions), Puerto Rico and Canada;

504b **b.** International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or

504c **c.** All other parts of the world if the injury or damage arises out of:

504c1 **(1)** Goods or products made or sold by you in the territory described in Paragraph **a.** above;

504c2 **(2)** The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or

504c3 **(3)** "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication;

504d provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

505 **5.** "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

506 **6.** "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.

507 **7.** "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

508 **8.** "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

508a **a.** It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

508b **b.** You have failed to fulfill the terms of a contract or agreement;

508c if such property can be restored to use by the repair, replacement, adjustment or removal of

508d "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means: 509

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract"; 509a

b. A sidetrack agreement; 509b

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad; 509c

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality; 509d

e. An elevator maintenance agreement; 509e

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. 509f

Paragraph **f.** does not include that part of any contract or agreement: 509g

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing; 509h

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of: 509i

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or 509i1

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or 509i2

509j (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

510 **10.** "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

511 **11.** "Loading or unloading" means the handling of property:

511a **a.** After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

511b **b.** While it is in or on an aircraft, watercraft or "auto"; or

511c **c.** While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

511d but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

512 **12.** "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

512a **a.** Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

512b **b.** Vehicles maintained for use solely on or next to premises you own or rent;

512c **c.** Vehicles that travel on crawler treads;

512d **d.** Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

512d1 **(1)** Power cranes, shovels, loaders, diggers or drills; or

512d2 **(2)** Road construction or resurfacing equipment such as graders, scrapers or rollers;

512e **e.** Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

512e1 **(1)** Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers; 512e2

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo. 512f

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos": 512f0

(1) Equipment designed primarily for: 512f1

(a) Snow removal; 512f1a

(b) Road maintenance, but not construction or resurfacing; or 512f1b

(c) Street cleaning; 512f1c

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and 512f2

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment. 512f3

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos". 512f4

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. 513

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses: 514

a. False arrest, detention or imprisonment; 514a

b. Malicious prosecution; 514b

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; 514c

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; 514d

e. Oral or written publication, in any manner, of material that violates a person's right of privacy; 514e

f. The use of another's advertising idea in your "advertisement"; or 514f

514g g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

514m 1993 Definition

"Personal injury" means injury, other than "bodily injury" arising out of one or more of the following offenses:

514n a. False arrest, detention or imprisonment;

514o b. Malicious prosecution;

514p c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;

514q d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

514r e. Oral or written publication of material that violates a person's right of privacy.

514s f. Discrimination, racial or religious discrimination and/or violation of civil rights, humiliation, sexual discrimination, alienation of affection; however damages based on the above offenses are only covered where insurance against same is not prohibited by law.

514t g. Discrimination because of race, religion, age, sex or physical disability, but only if such discrimination is not directly or indirectly related to the employment, prospective employment or termination of employment of any person or persons by any insured.

515 **15.** "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

516 **16.** "Products-completed operations hazard":

516a **a.** Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

516a1 **(1)** Products that are still in your physical possession; or

516a2 **(2)** Work that has not yet been completed or

516a3 abandoned. However, "your work" will be deemed completed at the earliest of the following times:

516a4 **(a)** When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site. 516a5

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. 516a6

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed. 516a7

b. Does not include "bodily injury" or "property damage" arising out of: 516b

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured; 516b1

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or 516b2

(3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit. 516b3

17. "Property damage" means: 517

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or 517a

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it. 517b

For the purposes of this insurance, electronic data is not tangible property. 517c

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment. 517d

"Publication" means any method of announcing or disseminating any material to any third party. 517p

518 **18.** "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

518a **a.** An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

518b **b.** Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

518c **c.** An appeal of a civil proceeding.

519 **19.** "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

520 **20.** "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

521 **21.** "Your product":

521a **a.** Means:

521a1 **(1)** Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

521a1a **(a)** You;

521a1b **(b)** Others trading under your name; or

521a1c **(c)** A person or organization whose business or assets you have acquired; and

521a2 **(2)** Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

521b **b.** Includes:

521b1 **(1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

521b2 **(2)** The providing of or failure to provide warnings or instructions.

521c **c.** Does not include vending machines or other property rented to or located for the use of others but not sold.

522 **22.** "Your work":

522a **a.** Means:

522a1 **(1)** Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations. 522a2

b. Includes: 522b

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and 522b1

(2) The providing of or failure to provide warnings or instructions. 522b2

Section Three

Issues in Construction Negligence Cases: Assumption of Duty; the Role of OSHA Regulations; and the Role of Expert Testimony

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Section Three

**Issues in Construction Negligence Cases:
Assumption of Duty; the Role of OSHA
Regulations; and the Role of Expert Testimony…………..... Lonnie D. Johnson
Samantha A. Mitchell, Co-Author**

I.

COMPARATIVE FAULT AND VICAROUS LIABILITY BY ASSUMPTION OF DUTY

Under Indiana law, all tort actions for personal injury, including construction actions, are subject to Indiana's Comparative Fault Act. I.C. § 34-20-8-1. Under Indiana's Comparative Fault Act "Comparative Fault Act", I.C. § 34-51-1, *et. seq.*, the jury apportions fault for Plaintiff's damages to Plaintiff, each defendant and each non-party identified in the pleadings. If Plaintiff's fault exceeds 50%, then a defense verdict is entered. Otherwise, each defendant is responsible for—and only for—that portion of the damages awarded in relation to its fault, and Plaintiff's award of damages is reduced by all fault assessed to Plaintiff as well as any identified non-parties.

An injured construction worker cannot bring an action directly against his employer to recover for personal injuries. *I.C. §22-3-2-6*. However, pursuant to Indiana's Comparative Fault Act, an employer can be named by the named defendants as a "non-party" whose fault caused or contributed to plaintiff's injuries. *I.C. §34-6-2-88*. The Comparative Fault Act does not restrict an injured employee from pursuing a claim against any "other person than the employer." *Ind.Code § 22–3–2–13 (2007)*. *Hunt Const. Grp., Inc. v. Garrett*, 964 N.E.2d 222, 224 (Ind. 2012). As a general rule, "a general contractor [...] will ordinarily owe no outright duty of care to a subcontractor's employees, much less so to employees of a sub-subcontractor. This means that when a subcontractor fails to provide a reasonably safe workspace, the general contractor will not incur liability for employee injury, even when such injury is proximately caused by the subcontractor negligence." *Ryan v. TCI Architects/Engineers/Contractors, Inc.*, 72 N.E.3d 908, 913 (Ind. 2017).

Duty

To maintain a negligence action under Indiana law, a plaintiff must establish a duty on the part of defendants to conform their conduct to a standard of care arising from their relationship with the plaintiff. *Helton v. Harbrecht*, 701 N.E.2d 1265, 1267 (Ind. Ct. App. 1998). The existence of a legal duty is a question of law to be resolved by the court. *Miller v. Griesel*, 308 N.E.2d 701, 706 (Ind. 1974). Absent a duty, there can be no breach, and therefore, no negligence. *Ebbinghouse v. First Fleet, Inc.*, 693 N.E.2d 644, 647 (Ind. Ct. App. 1998). A worker injured on a construction site may maintain a negligence action against a construction manager which does not physically occupy the Project premises on the site only by proving a general duty to ensure workplace safety.

"Under Indiana common law, it is well established that an employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence of the independent contractor." *Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007) *citing Armstrong v. Cerestar*, 775 N.E.2d 360, 369 (Ind. Ct. App. 2002); *Ramon v. Glenroy Constr. Co., Inc.*, 609 N.E.2d 1123, 1128 (Ind. Ct. App. 1993), *trans. denied.* "However, our court has recognized five exceptions to this general rule: (1) where the contract requires the performance of intrinsically dangerous work; (2) where one party is by law or contract charged with performing the specific duty; (3) where the performance of the contracted act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal. *Id.*, (citing *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1267).

When a general contractor has assumed a duty to ensure the safety of a worksite, the general contractor becomes vicariously liable for breaches of that duty by its subcontractors. "In general, vicarious liability is 'indirect legal responsibility.' This doctrine applies where a party is legally responsible for the negligence of another, not because the party did anything wrong but rather because of the party's relationship to the wrongdoer. Courts employ various legal doctrines to hold people vicariously liable, including respondeat superior, apparent or ostensible agency, agency by estoppel, and the non delegable duty doctrine. Some doctrines are based in tort law, and some are based in agency law." *Hunt Const. Grp. v. Garrett*, 938 N.E.2d 798 (Ind. Ct. App. 2010), (citing *Sword v. NKC Hospitals, Inc.,* 714 N.E.2d 142, 147 (Ind.1999)).

1. Duty Imposed by Law (Conduct) or Contract

There are numerous cases in which Indiana courts have found that the second exception, where a duty is imposed by law or contract, applies to the contractor- subcontractor relationship. A contractor may be charged with performing a duty to ensure workplace safety through contract or, in the absence of a contractual duty, through the contractor's conduct. *Hunt*, 964 N.E.2d at 224 (Ind. 2012) (citing *Plan–Tec, Inc. v. Wiggins*, 443 N.E.2d 1212 (Ind. Ct. App. 1983)).

Plan-Tec was a case of an employee of a subcontractor who was injured on the job. *Plan–Tec, Inc. v. Wiggins*, 443 N.E.2d 1216 (Ind. Ct. App. 1983). The plaintiff was employed as a carpenter by a subcontractor on a hospital work site. *Id.* Plan-Tec acted as a construction manager and negotiated contracts between the owners of the hospital and various subcontractors. *Id.* Plan-Tec needed the expansion joints on the exterior skin of the building to be changed in order to suit the architect's modifications. *Id.* Plan-Tec informed the Blakley Corporation of the need to change the expansion joints, who discussed it with two subcontractors including Wiggin's employer. *Id.* Both said this was not work within the contemplation of their contracts. *Id.* Plan-Tec then assumed the responsibility for the work order and had it performed by Wiggin's employer. *Id.* at 1217. Wiggins fell through the scaffolding while performing the work. *Id.*

Wiggins sued Plan-Tec, amongst others, for failing to ensure proper safety on the job and was awarded damages. *Id.* On appeal, the court of appeals upheld the trial court. The court found that a construction manager may owe a legal duty of care for jobsite employee safety in two circumstances: (1) when such a duty is imposed upon the construction manager by a contract to which it is a party; or (2) when the construction manager assumes such a duty through conduct. *Id.* at 1218-1219.

The standard set out in Plan-Tec remains the standard used by Indiana courts in determining whether a duty is owed to employees of contractors or subcontractors. In *Hunt*, the Supreme Court of Indiana noted that "The first reported case in Indiana of this nature was decided by the Court of Appeals almost three decades ago. *Plan–Tec* has proved to provide a durable template for resolving the issues in cases like this and we will use it for that purpose here." *Hunt*, 964 N.E.2d 225 (Ind. 2012). *Hunt* applied the same two-part test set out in *Plan-Tec* to the facts in that case. *Id.* In *Lee v. GDH, LLC*, the court of appeals declared that "[t]he key issue is whether GDH, as the construction manager, owed a duty of care to Daniel, the employee of an independent contractor. *Hunt* is the leading case on this issue" 25 N.E.3d 761, 767 (Ind. Ct. App. 2015). As in *Hunt*, the court of appeals used the same two-prong test for whether a duty had been imposed by contract or conduct. *Id.* at 767-769.

(A) Assumption of Duties Through Contract

Whether a contractor assumed a duty to ensure worksite safety may be interpreted from the language of its contract with the project manager or property owner. *Stumpf*, 863 N.E.2d 876 (Ind. Ct. App. 2007). "If a contract affirmatively evinces intent to assume a duty of care, actionable negligence may be predicated upon the contractual duty. Furthermore, this duty is considered non-delegable, and a principal will be liable for the negligence of the contractor because the responsibilities are deemed 'so important to the community' that the principal should not be permitted to transfer these duties to another.'" *Id.*, (citing *Ryobi Die Casting v. Montgomery,* 705 N.E.2d 227, 229 (Ind.Ct.App.1999), *trans. denied*).

In *Stumpf*, the court found that the contractor had assumed a duty and thus become vicariously liable for the actions of its subcontractors to ensure the safety of the worksite based on the following contract language: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed.... Contractor shall designate a responsible member of its organization on the work, whose duty shall be the prevention of accidents." *Stumpf*, 863 N.E.2d at 877. The contract further required the contractor to "*administer* and comply with all the rules, standards, and regulations of the Construction Safety Act, and the Williams–Steigher Occupational Safety and Health Act of 1970." *Id.*

The court noted that the contract required the contractor to designate a responsible member of its organization whose duty would be the prevention of accidents, a fact which indicated a duty to ensure worksite safety. *Id.* at 878. The court also emphasized that the contractor had agreed to administer OSHA regulations, rather than oversee them, as a fact which indicated that there was a duty. *Id.*

Another such case is *Harris v. Kettelhut Construction, Inc.,* 468 N.E.2d 1069 (Ind.Ct.App.1984). In *Harris*, a steelworker sued his employer (subcontractor) and the contractor for damages relating to injuries he sustained when he fell through a roof. *Id.* at 1072. The steelworker argued that the following contract language gave the contractor a duty to ensure worksite safety: "The Contractor shall take all necessary precautions for the safety of all employees on the Project, and all other persons who may be affected thereby, and shall comply with all applicable provisions of the Contract Documents and Federal, state and municipal safety laws, building, mechanical and electrical codes and rules, regulations and restrictions to prevent accidents or injury to persons on, about or adjacent to the Project or elsewhere." *Id.* at 1072–73. Additionally, the "non-assignability clause" provided: "The Contractor shall neither delegate his duty of performance nor assign, in whole or part, his rights or obligations under the Contract without the prior written consent of the Owner, and any attempted delegation or assignment without such consent shall be of no force and effect. Subject to the restrictions contained in the preceding sentence, the Contract shall be binding upon the Contractor and the Owner, their Successors, Executors, Administrators and Assigns." *Id.* at 1073.

The court concluded that the contract created a duty on the part of the contractor. *Id.* The contractual language "all employees on the Project" was so broad as to create a duty of care to all persons on the worksite, including employees of the subcontractor. *Id.* at 1074. Further, the contract made that duty a non-delegable duty, which necessarily meant that the contractor could not pass onto subcontractors the duty to ensure the safety of their employees. *Id.* at 1076.

Alternatively, in *Hunt*, the contract expressly stated that Hunt's construction-management services were to be "rendered solely for the benefit of the [Stadium Authority] and not for the benefit of the Contractors, the Architect, or other parties performing Work or services with respect to the Project." *Hunt*, 964 N.E.2d at 227 The Court found that, due to that provision, Hunt owed a duty only to the property owner, rather than to everyone on the worksite. *Id.* at 227-228.

In sum, contracts which impose upon a contractor, or construction manager, the responsibility to ensure safety throughout the worksite or to administer applicable safety regulations without reservation as to whom that duty is owed, will likely impose a duty upon the contractor to ensure safety of the worksite. The inclusion of provisions which specify that the contractor's safety-related duties are not rendered for the benefit of subcontractors and that the duty to ensure safety of subcontractor employees is the responsibility of the subcontractor will likely prevent the contractor from becoming liable.

(B) <u>Gratuitous Assumption of Duties Through Conduct</u>

As to whether a contractor or construction manager assumed a duty through their conduct, a contractor will generally not be found to have assumed a duty through conduct if that conduct does not exceed the duties imposed upon them by their contract, assuming that the contract does not impose a duty. *Plan-Tec* was one such case where "the general conditions of the contract unequivocally state that the contractors [rather than the construction manager] are to have the responsibility for project safety and the safety of their employees." *Plan-Tec,* 443 N.E.2d at 1218. However, the fact that the construction manager appointed a safety manager, held weekly safety meetings and directed that certain safety precautions be taken by contractors, none of which appeared to be required by the construction manager's contract, was a sufficient showing of conduct to submit the question of assumption of a duty to the jury. *Id.*, 1220.

In *Hunt*, the contract was also held not to impose a duty upon the construction manager because the contract explicitly stated that the construction manager was not "assuming safety responsibilities of individual contractors" nor taking "control over or charge of or be responsible for ... safety precautions and programs in connection with the Work of each of the Contractors, since these are the Contractor's responsibilities". *Hunt*, 964 N.E.2d at 227. The Court found that the contract did not create a duty of care because the contract specifically provided that it was the contractor's responsibility to provide for the safety of their employees, even if the construction manager had obligations related to safety. *Id.* at 228. "In short, Hunt did not undertake in its contracts a duty to act as the insurer of safety for everyone on the project. Rather, Hunt's responsibilities were owed only to Stadium Authority, not to workers like Garrett." *Id.*

The construction manager in *Hunt*, like in *Plan-Tec*, held weekly safety meetings and inspected the site daily for safety violations. *Id.* at 230. The Court acknowledged that the actions of the construction manager in *Hunt* were similar to those in *Plan-Tec*, but held that Hunt's actions were insufficient to create a duty of care through conduct because none of Hunt's actions went beyond that which was required by the contract. *Id.* Since the Court had already determined that the contract did not create a duty of care, Hunt's actions which adhered to the contract also could not create a duty of care. *Id.*

Although *Plan-Tec* and *Hunt* both deal with vicarious liability of construction managers, the Indiana Court of Appeals has applied the same legal principles in determining the vicarious liability of contractors over subcontractors. *See Dixon v. Shiel Sexton Co., Inc.,* 196 N.E.3d 717, 721 (Ind. Ct. App. 2022). In *Dixon*, the contractor required all subcontractor employees to watch a safety briefer before starting work; hired a safety manager to oversee the worksite; and held weekly meetings with subcontractors which discussed safety, in part. *Id.* at 722. The court in *Dixon* held that the contractor's actions regarding safety "fell within the scope of its contractual obligations to the Owner, and it did not assume a duty of care". *Id.* at 722–23.

Hunt illustrates a case in which a construction manager was able to avoid assuming a duty through contract or conduct, while still taking action to ensure safety on the worksite, by specifying in their contract that all duty to ensure safety for employees remained the duties of subcontractors and that any actions the construction manager undertook to ensure worksite safety were to be rendered solely for the benefit of the landowner. *Id.* at 227. Contractors who wish to avoid liability should take care to ensure that any planned safety measures are included as a duty of that contractor in their contract.

2. <u>Duty Imposed by Peculiar Risk</u>

Under the fourth exception, a contractee may be held liable for the negligence of an independent contractor where the work to be performed will probably cause injury to others unless due precaution is taken. *McDaniel v. Bus. Inv. Grp., Ltd.*, 709 N.E.2d 17, 22 (Ind. Ct. App. 1999). "The essence of this exception is the foreseeability of the peculiar risk involved in the work and of the need for special precautions." *Id.*, (quoting *Bagley v. Insight Communications Co.,* 658 N.E.2d 584, 586 (Ind.1995). To establish the "due precaution necessary to prevent injury" exception, a plaintiff must show that a particular risk exists, that that risk is foreseeable to the principal, and that the plaintiff's injury is consistent with that particular risk. *McDaniel*, 709 N.E.2d at 22. "Application of this fourth exception . . . requires an examination of whether, at the time [a party] was employed as an independent contractor, there existed a peculiar risk [that] was reasonably foreseeable and [that] recognizably called for precautionary measures." *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 856 (Ind. 1999) (quoting *Bagley*, 658 N.E.2d at 588). This exception also requires review of several elements, including a peculiar risk; the principal's foreseeability of that risk; and an injury consistent with the peculiar risk. *Myers v. Bremen Casting, Inc.*, 61 N.E.3d 1205, 1215 (Ind. Ct. App. 2016).

(A) Peculiar risk

A "peculiar risk" is "the risk of a particularized harm specific to the work being performed or the conditions under which it is performed," and only applies "when the risk involved is something more than the routine and predictable hazards generally associated with a given occupation: it must be a risk unique to the circumstances of a given job." *Myers*, 61 N.E.3d at 1215 (citing *McDaniel*, 709 N.E.2d at 22). This exception expects independent contractors to be "responsible for anticipating and guarding against routine or predictable dangers"; otherwise the exception would abrogate both the general rule of nonliability and the contractee/independent contractor relationship. *Id*.

In *McDaniel*, the Court found that a cave-in did not represent a peculiar risk. *McDaniel,* 709 N.E.2d at 22. The plaintiff argued in their brief that cave-ins were a peculiar risk of trenching, and pointed to statistics which show a "dismaying number of injuries and deaths connected with trenching and cave-ins" in support of that argument. *Id.* at 22. The Court, however, held that those statistics demonstrated exactly why cave-ins were not a peculiar risk: the risk must be peculiar to the particular job, not peculiar to the kind of work that is being performed. *Id.* "The relevant statistics demonstrate that cave-ins are a routine and predictable hazard of trenching, and even the construction industry has acknowledged that reality by devising and promoting safety measures to prevent such accidents." *Id*. Therefore, the risk of a cave-in was not a peculiar risk but rather a risk associated with trenching in general. *Id.*

(B) Foreseeability of that risk

The principal will only be liable under this exception if it should have foreseen at the time of contracting that injury to others was likely; the plaintiff must show the probability of the harm, not merely the possibility. *Walker v. Martin*, 887 N.E.2d 125, 136 (Ind. Ct. App. 2008); *McDaniel*, 709 N.E.2d at 23.

In *Red Roof Inns, Inc. v. Purvis*, the court found that the probability element was not met where the property owner could have foreseen the possibility of harm but not the probability 691 N.E.2d 1341, 1346 (Ind. Ct. App. 1998) *trans. denied*, 706 N.E.2d 166 (Ind.). The court determined that Red Roof did not owe the employee of a roofing contractor a non-delegable duty because the contractor had completed twenty-two roofing jobs for Red Roof during that year without injury. *Id.* at 1346-1347.[1]

McDaniel also addressed the probability prong, and noted that the plaintiff must show not just that injury was probable, but that the contractor or landowner knew of that probability. *McDaniel*, 709 N.E.2d at 23. "[N]othing in the designated evidence before us supports the conclusion that Acme should have foreseen the probability that Wilson's employees would not use recommended procedures and a cave-in and McDaniel's death would result." *Id.*

[1] In *Ryobi Die Casting v. Montgomery*, 705 N.E.2d 227, 229 (Ind.Ct.App.1999), *trans. denied*), the plaintiff attempted to distinguish their case from *Red Roof Inn* by pointing out that the contractor knew that the roofer in their case was inexperienced, which made injury more foreseeable. "[W]e do not consider the level of skill or experience of the independent contractor, only the risk involved in the performance of the work itself.") *Id.* at 230.

(C) Injury consistent with the peculiar risk

In order to fit within this exception, the danger that the principal must foresee "must be substantially similar to the accident that produced the complained-of injury." *Carie*, 715 N.E.2d at 857; *Walker*, 887 N.E.2d at 136.

In *Bagley*, the plaintiff suffered severe brain injuries when he was hammering a rod into the ground and another employee slipped off of a ladder and fell onto the plaintiff, driving his head into that rod. *Bagley*, 658 N.E.2d at 588. The Court did not discuss whether any risk of harm was peculiar and probable because the type of harm suffered was not consistent with the kind of risk that could have been foreseen. *Id.* "At the time the contracts were made, the delegated work did not present the peculiar probability that an injury such as Bagley's would result unless precautionary measures were taken, and the employers could not have been expected to foresee the sort of injury which actually occurred." *Id.*

In sum, contractors who wish to avoid becoming liable for injuries of subcontractor employees should ensure that their contract with the property owner specifies all of the safety provisions which the contractor may expect to undertake, and that those duties are undertaken for the benefit of the property owner. Contractors should avoid undertaking additional safety provisions as the job goes on. The foreseeable and peculiar risk provision is unlikely to apply unless a contractor is engaging in a particularly high-risk task and either the contractor or subcontractor fails to undertake reasonable precautionary measures. Where a contractor believes that they are engaging in job involving a peculiar risk, that contractor should ensure that their contract imposes upon them adequate safety measures so that they can ensure reasonable precautionary measures are taken.

II.

A. ROLE OF OSHA REGULATIONS

An OSHA violation does not in itself render a property owner or contractor liable in tort for the negligence of an independent contractor. *Vaughn v. Daniels Co. (West Virginia) Inc.,* 841 N.E.2d 1133 (Ind. 2006). However, a contractor who adopts a duty to ensure that applicable OSHA regulations are followed may be held liable for any failures to adhere to those regulations. *See Perryman v. Huber, Hunt & Nichols, Inc.*, 628 N.E.2d 1240, 1244-1245 (Ind. Ct. App. 1994) (finding that a contractor who agreed, by contract, to ensure that all subcontractors comply with federal safety regulations (including OSHA) assumed a duty to subcontractors' employees to do so, even if the subcontractors also owed the same duty to their employees).

1. Admissibility

In Indiana, a violation of Occupational Safety and Health Act regulations is not admissible as evidence of negligence per se in order to impose strict or absolute liability. *Hebel v. Conrail, Inc.*, 475 N.E.2d 652 (Ind. 1985); *Blocher v. DeBartolo Properties Mgmt., Inc.*, 760 N.E.2d 229, 239 (Ind. Ct. App. 2001). Nor can OSHA regulations be used to "expand or otherwise affect [a defendant's] common law duties or liabilities under a negligence per se theory, or as evidence of an expanded standard of care." *Jeffords v. BP Prod. N. Am. Inc.*, 963 F.3d 658, 664 (7th Cir. 2020) (quoting *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 608 (7th Cir. 1989)). Without any power to create or expand duties in tort, the defendants' contractual duties to comply with OSHA regulations must remain just that: contractual promises that cannot be enforced by anyone not a party to them, in privity with a party to them, or an intended beneficiary of them. *Id.*

However, a contractor who agrees, via contract, to ensure that applicable OSHA or other safety regulations are followed on a worksite may adopt a duty to ensure OSHA compliance. In *Capitol Const. Servs., Inc. v. Gray*, the contract stated that the contractor would "comply with all laws, ordinances, rules and regulations bearing on the project" and "*maintain* physical conditions and employee performance on the jobsite during the course of construction to conform with all local and federal laws, rules and regulations including those covered by the Occupational Safety and Health Act of 1970" 959 N.E.2d 294, 304 (Ind. Ct. App. 2011). The court held that, although a contractor does not ordinarily owe a duty to employees of subcontractors to ensure OSHA compliance, that contract created such a duty. *Id.* at 305.

Although IOSHA regulations cannot be used to establish a duty, violations of those regulations can be introduced as evidence of a breach of a duty which has been established. "Violation of an administrative regulation can be considered evidence of negligence, though it is not evidence per se." *Beta Steel v. Rust*, 830 N.E.2d 62, 74 (Ind. Ct. App. 2005).[2]

In *Huffman v. Dexter Axle Co.*, the court considered the admissibility of evidence that the defendant had breached OSHA regulations where it had been established that the defendant owed a duty to the plaintiff as a matter of law, 990 N.E.2d 947 (Ind. Ct. App. 2013). Much of the discussion of admissibility pertains to whether the applicable OSHA regulations had been preempted by similar DOT regulations. *Id.* at 954-957. After establishing that "DOT regulations in this case do not preempt the regulatory authority of OSHA," the court found that "Linda has designated evidence that could establish Dexter violated OSHA regulations, and thus, breached its duty to Huffman." *Id*.at 957. This indicates that a plaintiff who has established that a duty was owed can prove a breach of that duty by showing that the defendant violated applicable OSHA regulations.

However, in every state except Alabama, evidence of OSHA citations themselves are inadmissible. *§ 21:13. Admissibility of OSHA violations and standards, Occ. Safety & Health L. § 21:13 (2024 ed.).* IOSHA worksheets which report on a specific jobsite or incident are also inadmissible. *Hagerman Const., Inc. v. Copeland*, 697 N.E.2d 948, 955 (Ind. Ct. App. 1998), *opinion amended on reh'g* (Oct. 6, 1998) ("The IOSHA worksheets and safety orders include detailed evaluations of project conditions relative to various safety regulations, and even attempt to reconstruct how the accident occurred. We conclude that the IOSHA worksheets and safety orders are not admissible pursuant to Evid.R. 803(8)(d), and that the trial court did not abuse its discretion in so deciding.")

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[2] Note that *Beta Steel* was a case in which it was established that the defendant owed a duty to the plaintiff to maintain a reasonably safe worksite, not to ensure that the applicable safety code regulations were followed, yet evidence of a breach of safety code regulations was still admissible on the issue of whether the defendant had breached their duty to the plaintiff. *Beta Steel*, 930 N.E.2d 74 (Ind. Ct. App. 2005). "Evidence of violations of such rules, however, is relevant to the question of whether Beta breached any such duty and may be considered by a jury in that regard." *Id.*

Therefore, a plaintiff who seeks to introduce evidence that a defendant breached a duty to the plaintiff by violating OSHA regulations must do so through testimony.

2. Jury Instructions

Ordinarily, it is proper for a court to instruct a jury that OSHA or other safety regulations do not create a duty. In *England v. Fairfield Contracting, Inc.*, the court of appeals upheld the following jury instruction: "Where a general contractor requires a subcontractor, in writing and/or in any other form, to comply with safety requirements, IOSHA, or otherwise, by that act alone, does not assume safety obligations by the general contractor to the employees of the subcontractor. This is a question for the jury," 908 N.E.2d 238, 243 (Ind. Ct. App. 2008). "The instruction properly informed the jury that the mere fact that a contractor requires a subcontractor to comply with safety requirements does not, itself, mean that the contractor has assumed a duty of care to the subcontractor's employees. This is not an incorrect statement of the law, and to the extent that the instruction implies that a duty of care is delegable, we note that the jury was explicitly instructed that if Fairfield retained control over the safety practices of its subcontractor or evinced an affirmative intent in a contract to do so, then Fairfield may be solely liable for a failure to adequately perform that duty." *Id.*

However, if a contractor assumes a duty to ensure OSHA compliance on a worksite, the court may instruct the jury as such. In *Jones v. City of Logansport*, the applicable contract stated, in relevant part, "The Contractor shall comply in every respect with the Williams-Steiger Occupational Safety and Health Act of 1970 (OSHA) and all rules and regulations now or hereafter in effect under this Act. He shall also comply in every respect with all state and local laws and regulations pertaining to job safety and health," 436 N.E.2d 1138 (Ind. Ct. App. 1982). The defendant argued that the trial court erred in instructing the jury that the defendant was "responsible under the law for compliance with the regulations found in the Indiana Industry Safety Code, Burns Indiana Administrative Regulations (22-1-1-10) L 95", because OSHA regulations cannot create a private right of action. *Id.* at 1146. The court of appeals found that the contract in dispute incorporated those regulations by reference into the contract, thus making the regulations admissible in jury instructions. "These OSHA regulations are relevant not as federally promulgated safety regulations but rather, as contract terms setting forward an agreed upon standard of safety. The violation of these contract terms is therefore not negligence per se; rather, the violation of these terms may be considered by the trier of fact as evidence of negligence." *Id.* at 1148.

In short, OSHA or other safety regulations can never be used as evidence of a duty of care, but they can be used once a duty is established as evidence of a breach of the duty to take reasonable care. Evidence of OSHA citations or infractions by other regulatory safety departments cannot be introduced as evidence in a negligence action. In the rare instance that a contract is found to incorporate safety regulations by reference, those safety regulations will be entirely admissible as evidence of the applicable standard of care.

B. EXPERT TESTIMONY

"Indiana Evidence Rule 702 states that a witness may be qualified as an expert by virtue of 'knowledge, skill, experience, training, or education.' Only one of these characteristics is necessary for an individual to qualify as an expert." *Troutwine Ests. Dev. Co., LLC v. Comsub Design & Eng'g, Inc.*, 854 N.E.2d 890, 901 (Ind. Ct. App. 2006). Evidence Rule 702 acknowledges that one may acquire the requisite knowledge through means other than formal education. *Messer v. Cerestar USA, Inc.*, 803 N.E.2d 1240, 1248 (Ind. Ct. App. 2004). In *Meeser*, the court concluded that an expert who spent fourteen years as a construction safety supervisor for the Illinois Toll Authority, worked four years as a consulting safety engineer, owned his own construction safety consulting business, and investigated jobsite accidents was qualified as an expert in worksite safety issues and accident investigation, despite his lack of formal education in construction safety. *Id.* at 1248.

In general, when OSHA experts or safety experts provide testimony, they cannot state whether a legal duty existed because it is a legal conclusion based upon contract law, not OSHA standards. Rule 704(b) prohibits witnesses from testifying to opinions concerning legal conclusions. Rule 704(a) allows opinions on an ultimate fact that are "otherwise admissible." *§ 704.206 Legal conclusions, 13 Ind. Prac., Indiana Evidence § 704.206 (4th ed.) See also Armstrong v. Cerestar USA, Inc.*, 775 N.E.2d 360, 368 (Ind. Ct. App. 2002) ("any determination made under OSHA regulations ... is irrelevant as to the issue of whether [the defendant] owed [the plaintiff] a duty because an OSHA standard cannot be used to expand an existing common law or statutory duty, or be used as evidence of an expanded duty of care.")

In *Stumpf*, the trial court struck the deposition of Frank Burg, "certified safety professional" who testified as to his expert knowledge of OSHA standards, on grounds that it was "irrelevant to the claims at issue, that it contained impermissible legal conclusions, and that his testimony was not based on any personal knowledge of the worksite at the time of Nathan's fall." *Stumpf,* 863 N.E.2d at 879. The court of appeals upheld the trial court's finding. *Id.* "[I]n the case at hand, Burg asserts that Hagerman and Dodd were the 'primary responsible party for the safety and health program, and implementation of policies and procedures' and were therefore required under OSHA to designate a competent person trained on ladder inspection." *Id.* at 880. "Such statements constitute legal conclusions of the duty Hagerman and Dodd owed to the Stumpfs. Therefore, as in *Merrill,* we conclude that 'Burg's determination regarding duty is a legal conclusion that invades the province of the court.'" *Id.* The court continued that "interpreting OSHA standards' is not relevant to the issue of whether Hagerman or Dodd used reasonable care or whether failure to use reasonable care proximately caused Nathan's injury. Rather, Burg's affidavit attempts to elucidate what *duty* is required under OSHA's provisions." *Id.*

In *Merrill v. Knauf Fiber Glass GmbH*, the court of appeals considered testimony of the same expert and again found portions of his testimony, submitted to the court in the form of an affidavit, to be inadmissible, 771 N.E.2d 1258 (Ind. Ct. App. 2002). "In his affidavit, Burg concludes that Knauf owed Merrill an affirmative duty to cover or guard the skylights. Burg's determination regarding duty is a legal conclusion that invades the province of the court. Given that Paragraph 5 relies upon inadmissible evidence, the trial court did not abuse its discretion when it struck that portion of Burg's affidavit." *Id.* at 1263-1264.

Safety experts can never testify to whether a duty was owed, or how a particular party should have acted on a worksite to ensure safety. Safety experts can testify to what the applicable safety regulations would have called for in a particular case or what industry standards are.

Section Four

Primer on Litigating the Premises Liability Case

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Section Four

Primer on Litigating the
Premises Liability Case…………………………..…………….. Paul O. Mullin

Possession and control of the premises is the basis for liability

The Indiana Court of Appeals has stated that:

> In premises liability cases, we must determine who controlled the property upon which the injury occurred, because "the thread through the law imposing liability upon occupancy [sic] of premises is control." *Great Atlantic & Pacific Tea Co. v. Wilson,* 408 N.E.2d 144, 150 (lnd.Ct.App.1980). The [reason] the law imposes liability on the person who controls the property is self-evident: only the party who controls the land can remedy the hazardous conditions which exist upon it and only the party who controls the land has the right to prevent others from coming onto it. Thus, the party in control of the land has the exclusive ability to prevent injury from occurring. *Crist*, 653 N.E.2d at 145 (quoting *City of Bloomington v. Kuruzovich,* 517 N.E.2d 408, 411 (lnd.Ct.App.1987), *trans. denied*).

Thayer v. James Whitcomb Riley Festival Association, Inc., 802 N.E.2d 7, 11 (lnd.Ct.App.2003). See also *Perdue v. Greater Lafayette Heath Svs*, 951 N.E.2d 235 (lnd.Ct.App.2011).

Liability for harm resulting from negligence generally rests upon the person who has possession and control of the place or instrumentality that causes an injury - through ownership, lease or otherwise.

> *Mishler v. State*, 730 N.E.2d 229 (lnd.Ct.App.2000); *Sizemore v. Templeton Oil Co., Inc*., 724 N.E.2d 647 (lnd.Ct.App.2000); *Carroll by Carroll v. Jagoe Homes, Inc*., 677 N.E.2d 612(lnd.Ct.App.1997), *trans. denied*; *Great Atlantic & Pacific Tea Co., Inc. v. Wilson,* 408 N.E.2d 144 (lnd.Ct.App.1980).

Premises liability law is premised on the notion that liability will be imposed upon a person who should have known of any dangers on the land and could have acted to prevent foreseeable harm.

> *Daisy v. Roach*, 811 N.E.2d 862 (lnd.Ct.App.2004). See also *Branscomb v. Wal-Mart Stores E., L.P.*, 165 N.E.3d 982, 986 (Ind. 2021).

The key to the imposition of liability upon an occupant of premises is control. This is because only the party who controls the premises can remedy a hazardous condition on the premises and can control who enters the premises. As a result, the party in control of the premises is the one who can prevent injury from occurring.

> *St. Casimir Church v. Frankiewicz*, 563 N.E.2d 1331 (lnd.Ct.App.1990).

Whether a defendant owes a duty to a plaintiff who is injured in a slip-and-fall incident on the defendant's premises depends primarily upon whether the defendant was in control of the premises at the time of the injury.

Olds v. Noel, 857 N.E.2d 1041 (lnd.Ct.App.2006).

Control over premises is used to determine who is liable for injuries sustained on the premises.

Pelak v. Indiana Industrial Services, Inc., 831 N.E.2d 765 (lnd.Ct.App.2005).

For purposes of the duty to keep premises reasonably safe, "a possessor or occupier of land" is the person who is in occupation of the land with the intent to control it; the person who has been in occupation of the land with the intent to control it; or, the person who is entitled to the immediate occupation of the land if no other person has subsequently occupied the land with the intent to control it.

Thayer v. James Whitcomb Riley Festival Association, Inc., 802 N.E.2d 7, 11 (lnd.Ct.App.2003); *Risk v. Schilling*, 569 N.E.2d 646 (lnd.1991); *Martin v. American National Can Co.*, 975 F.Supp. 1153 (N.D.lnd.1997).

When a new owner assumes possession or control over premises, he becomes responsible for the safety of structures erected by the previous owner or possessor absent misrepresentation by the predecessor.

Mishler v. State, 730 N.E.2d 229 (Ind.Ct. App.2000).

When the defendant in a premises liability case is a non-owner, liability turns upon the degree of control that individual or entity exercised over the premises.

Johnson v. Steffen, 685 N.E.2d 1117 (lnd.Ct.App.1997), *trans. denied.*

A person who lacks or has relinquished possession and control of the property will generally not be liable for injuries arising therefrom because he is no longer in a position to prevent those injuries.

Ramon v. Glenroy Construction Co., 609 N.E.2d 1123 (lnd.Ct.App.1993), *trans. denied*; *Rogers v. Grunden*, 589 N.E.2d 248 (lnd.Ct.App.1992), *reh'g denied, trans. denied*; *Zimmerman v. Moore*, 441 N.E.2d 690 (lnd.Ct.App.1982).

However, actual physical possession of property at the precise moment an accident happens is not always dispositive on the question of "control" for premises purposes, if there is evidence that another party was in a better position to prevent the harm that occurred.

Yates v. Johnson County Board of Commissioners, 888 N.E.2d 842 (lnd.Ct.App.2008); *Beta Steel v. Rust*, 830 N.E.2d 62 (lnd.Ct.App.2005); *Rhodes v. Wright*, 805 N.E.2d 382 (lnd.2004).

The duty owed to an entrant on land depends upon the person's status on the land

A landowner's liability for injuries sustained by third persons while on the land depends upon why the third person is on the land (the purpose for the third party being on the land) and the purposes for which the land is held open.

> *J.C. Penney Co., Inc. v. Wesolek*, 461 N.E.2d 1149 (Ind.Ct. App.1984).

A person's status when they are injured on premises owned by anomer determines the duty the landowner owes to the injured person.

> *Reed v. Beachy Const. Corp.*, 781 N.E.2d 1145 (lnd.Ct.App.2002); *Sizemore v. Templeton Oil Co., Inc*., 724 N.E.2d 647 (lnd.Ct.App.2000); *Taylor v. Duke*, 713 N.E.2d 877 (lnd.Ct.App.1999); *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044 (lnd.Ct.App.1993), *reh'g denied*, trans denied; *Markle v. Hacienda Mexican Restaurant*, 570 N.E.2d 969 (lnd.Ct.App.1991).

A person enters upon the land of another either as a trespasser, a licensee or an invitee. The status of the person who enters upon the land of another determines the duty the landowner owes to the third person.

> *Henderson v. Reid Hosp. & Healthcare Servs***,** 17 N.E.3d 311 (lnd.Ct.App.2014); *Rhoades v. Heritage Investments,* LLC, 839 N.E.2d 788 (lnd.Ct.App.2005); *Gaboury v. Ireland Road Grace Brethren*, 446 N.E.2d 1310 (lnd.1983).

The first step in analyzing a premises liability case is to determine the status of the injured party on the property. The visitor's status will define the duty of care owed by the landowner to the visitor.

> *Gilpin v. Ivy Tech State College*, 864 N.E.2d 399 (lnd.Ct.App.2007); *Masick v. McColly Realtors, Inc*., 858 N.E.2d 682 (lnd.Ct.App.2006).

When applying the negligence standard to accidents that are caused by a condition on someone's premises, the duty owed by a landowner to an entrant on land is determined by the entrant's status as an invitee, licensee or trespasser.

> *Kopczynski v. Barger*, 870 N.E.2d 1 (lnd.Ct.App.2007).

Trespassers

A trespasser is one who enters or remains on another's land without the landowner's permission or consent. A trespasser enters the land for his own convenience, and does so at his own risk.

> *Taylor v. Duke*, 713 N.E.2d 877 (lnd.Ct.App.1999); *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991), *reh'g denied.*

A trespasser "takes the property as he finds it". The duty owed by a landowner to a trespasser is the duty to refrain from willfully or wantonly injuring him or acting in a way that increases the trespasser's peril.

> *Taylor v. Duke*, 713 N.E.2d 877 (lnd.Ct.App.1999); *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991), *reh'g denied.*

The duty owed to a trespasser is merely to refrain from willfully or wantonly (intentionally) injuring him after discovering his presence.

> *McCormick v. State*, *Dept. of Natural Resources*, 673 N.E.2d 829 (lnd.Ct.App.1996); *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991), *reh'g denied.*

Licensees

A licensee is a person who legally enters the land or premises of another for his own convenience, curiosity or entertainment.

> *Pickering v. Ceasers Riverboat Casino, LLC, 988 N.E.2d 385* (lnd.Ct.App.2013), *Taylor v. Duke*, 713 N.E.2d 877 (lnd.Ct.App.1999).

Like a trespasser, a licensee is one who enters the property of another for his own convenience, curiosity or entertainment. However, unlike a trespasser, a licensee has a privilege to enter or remain on the land by virtue of the landowner's permission or sufferance.

> *Rhoades v. Heritage Investments, LLC*, 839 N.E.2d 788 (lnd.Ct.App.2005); *Burrell v. Meads*, 569 N.E.2d 637 (lnd.1991), *reh'g denied*.

Like a trespasser, a licensee enters the land at his own risk and takes the premises as he finds them.

> *Koeneman v. City of New Haven*, 506 N.E.2d 1135 (lnd.Ct.App.1987).

A landowner owes both trespassers and licensees a duty to refrain from willfully or wantonly injuring them or acting in a manner that increases their peril.

> *Burrell v. Meads*, 569 N.E.2d 637 (lnd.1991), *reh'g denied*.

A landowner has an additional duty to a licensee - which is to warn a licensee of any concealed (i.e., latent) dangers on the property that are known to the landowner. However, a landowner has no duty to keep his land free from danger for the benefit of a licensee. The duty a landowner owes to a licensee is the duty to refrain from willfully, wantonly or intentionally injuring the licensee or acting in a manner which increases the licensee's peril.

> *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991), *reh'g denied*; *Koeneman v. City of New Haven*, 506 N.E.2d 1135 (Ind.Ct.App.1987).

The duty owed to a licensee is to refrain from willfully or wantonly injuring him or acting in a manner that, increases his peril. It also includes the duty to warn a licensee of any latent danger on the premises that is known to the landowner or occupier.

McCormick v. State, Dept. of Natural Resources, 673 N.E.2d 829 (lnd.Ct.App.1996).

Invitees

Invitees are persons who are invited or permitted to enter or remain on a landowner's premises or who enter on land which is open to the public.

Indiana has adopted the "invitation test" (vs. the "economic benefit test", which Indiana courts used in the past) as the analytical basis for determining whether someone is an invitee. Under the "invitation test", when an owner or occupier of land, by "enticement, allurement or inducement", whether express or implied, causes another to come upon his land, he then assumes the obligation of providing for the safety and protection of that person. The "enticement, allurement or inducement" must be the equivalent of an express or implied invitation. The "mere acquiescence in the use of one's land by another is insufficient to constitute an invitation". However, an implied invitation may be inferred from a landowner's acts or conduct.

Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991), *reh'g denied.*

In *Burrell v. Meads*, 569 N.E.2d 637, 642 (Ind. 1991), *reh'g denied*, the Indiana Supreme Court stated that:

> Adoption of the invitation test leads us to declare that at least those persons described in the Restatement (Second) of Torts §332 qualify as invitees:
>
> 1) An invitee is either a public invitee or a business visitor.
> 2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
> 3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

There are three categories of invitees under Indiana law: (1) business visitors; (2) social guests; and, (3) public invitees.

> *Frye v. Trustees of Rumbletown Free Methodist Church*, 657 N.E.2d 745 (lnd.Ct.App.1995), *reh'g denied*; *Dunifon v. Iovino*, 665 N.E.2d 51 (lnd.Ct.App.1996), *reh'g denied*; *Schloot v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273 (lnd.Ct.App.1998); *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991), *reh'g denied*.

Business visitors, social guests and public invitees are all invitees to whom a landowner owes a duty of reasonable care.

> *Burrell v. Meads*, 569 N.E.2d 637 (lnd.1991). [In *Burrell v. Meads,* the Indiana Supreme Court held for the first time that social guests are a third type of invitee.]

Social guests, business visitors and public invitees are entitled to invitee status when they enter a landowner's property.

> *Rhoades v. Heritage Investments, LLC*, 839 N.E.2d 788 (lnd.Ct.App.2005).

A **business visitor** is one who is invited to enter or remain on premises for a purpose directly or indirectly connected with business dealings with the owner or possessor of the land.

> *Burrell v. Meads*, 569 N.E.2d 637 (lnd.1991), *reh'g denied*; *McCormick v. State, Dept. of Natural Resources*, 673 N.E.2d 829 (Ind.Ct. App.1996).

A **social guest** is one who enters upon another's property pursuant to an express or reasonably implied invitation.

> *Schrum v. Moskaluk*, 655 N,E.2d 561 (lnd.Ct.App.1995), *trans. denied*.

In determining whether an individual is a licensee or an invitee, the distinction between an "invitation" and "permission" becomes crucial.

> *Kopczynski v. Barger*, 870 N.E.2d 1 (lnd.Ct.App.2007).

A public invitee is a person who is invited to enter or remain on another's land for a purpose for which the land is held open to the public but a licensee is privileged to enter or remain on the land by virtue of *permission* or sufferance. *Frye*, 657 N.E.2d at 748 (referring to Restatement (Second) of Torts §§330 and 332) (emphasis added). Thus, in the determination of whether an individual is a public invitee or a licensee, the distinction between the terms "invitation" and "permission" becomes critical. The comments to Restatement (Second) of Torts §330 provide that:

> *Consent and toleration.* The word "consent," or "permission," indicates that the possessor is in fact willing that the other shall enter or remain on the land, or that his conduct is such as to give the other reason to believe that he is willing that he shall enter, if he desires to do so.

The comments to Restatement (Second) of Torts §332 clarify the distinction between invitation and permission:

> *Invitation and permission.* Although an invitation does not in itself establish the status of an invitee, it is essential to it. An invitation differs from mere permission in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so.

******

Mere permission, as distinguished from invitation, is sufficient to make the visitor a licensee, as stated in §330; but it does not make him an invitee....

******

The comments to the same section of the Restatement clarify what is meant by land held open to the public for purposes of the public invitee:

> *Land held open to the public.* Where land is held open to the public, there is an invitation to the public to enter for the purpose for which it is held open. Any member of the public who enters for that purpose is an invitee ...

It is not enough, to hold land open to the public, that the public at large, or any considerable number of persons, are permitted to enter at will upon the land for their own purposes. *As in other instances of invitation, there must be some inducement or encouragement to enter, some conduct indicating that the premises are provided and intended for public entry and use, and that the public will not be merely tolerated, but is expected and desired to come.* When a landowner tacitly permits the boys to play ball on his vacant lot they are licensees only; but if he installs playground equipment and posts a sign saying that the lot is open free to all children, there is then a public invitation, and those who enter in response to it are invitees.

Restatement (Second) of Torts §332 (emphasis added). The decisive factor with regard to whether the possessor has extended an "invitation" or "permission" is the interpretation which a reasonable man would put upon the possessor's words and actions given all of the surrounding circumstances. *See* Restatement (Second) of Torts §330, cmt. e; Restatement (Second) of Torts §332, cmt. c.

> *McCormick v. State, Dept. of Natural Resources,* 673 N.E.2d 829, 836-837 (lnd.Ct.App.1996).

An invitation may be either express or implied.

> *Yates v. Johnson County Board of Commissioners*, 888 N.E.2d 842 (lnd.Ct.App.2008); *Smith v. Syd's, Inc*., 598 N.E.2d 1065 (lnd.1992).

An invitation does not have to come directly from the landowner. Rather, the issue is whether the landowner's conduct gave the third party reason to believe that the landowner was willing to allow the third party to enter the land.

> *Yates v. Johnson County Board of Commissioners*, 888 N.E.2d 842 (lnd.Ct.App.2008); *Kopczynski v. Barger*, 870 N.E.2d 1 (lnd.Ct.App.2007).

An invitation to come onto a landowner or occupier's premises for one purpose does not invite entry for all purposes. An owner or occupier of premises must anticipate what is "usually and customarily" done by an invitee "within the scope of or to carry out the purpose of the invitation". An invitee's status may change to licensee if the use to which he puts the property is not within the scope of the invitation.

> *Markle v. Hacienda Mexican Restaurant*, 570 N.E.2d 969 (lnd.Ct.App.1991).

A landowner's duty of reasonable care exists only as long as a visitor is on the part of the premises to which the invitation extends.

> *Markle v. Hacienda Mexican Restaurant*, 570 N.E.2d 969 (lnd.Ct.App.1991).

A landowner has a duty to exercise reasonable care to make his premises safe for an invitee.

> *Taylor v. Duke*, 713 N.E.2d 877 (lnd.Ct.App.1999); *Fleischer v. Hebrew Orthodox Congregation*, 504 N.E.2d 320 (lnd.Ct.App.1987).

The owner or occupier of the land owes an active duty to invitees/business visitors to maintain his property in a reasonably safe condition.

> *Orville Milk Co. v. Beller*, 486 N.E.2d 555 (lnd.Ct.App.1985).

A landowner owes an invitee the highest duty, which is the duty to exercise reasonable care for the protection of the invitee while he is on the landowner's premises. Indiana has adopted §343 of the Restatement (Second) of Torts, which provides that:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees; and, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger.

Rennick v. Norfolk and Western R.R., 721 N.E.2d 1287 (lnd.Ct.App.2000); *Watson v. Ziegert*, 616 N.E.2d 785 (lnd.Ct.App.1993); *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991), *reh'g denied*.

A landowner owes the highest duty of care to an invitee. That is the duty to exercise reasonable care for the protection of the invitee while he is on the landowner's premises.

Certa v. Steak'n Shake Operations Inc., 102 N.E.3d 336 (lnd.Ct.App.2018), *Gilpin v. Ivy Tech State College*, 864 N.E.2d 399 (lnd.Ct.App.2007); *Rector v. Oliver*, 809 N.E.2d 887 (lnd.Ct.App.2004); *Taylor v. Duke*, 713 N.E.2d 877 (lnd.Ct.App.1999); *Ross v. Lowe*, 619 N.E.2d 911 (lnd.Ct.App.1993), *Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310 (lnd.1983).

This duty extends not only to harm caused by a condition on the land, but also to activities being conducted on the land.

> *Estate of Pflanz v. Davis*, 678 N.E.2d 1148 (lnd.Ct.App.1997); *Ross v. Lowe*, 619 N.E.2d 911 (lnd.Ct.App.1993); *McCormick v. State, Dept. of Natural Resources*, 673 N.E.2d 829 (lnd.Ct.App.1996).

A person is an invitee if the landowner or possessor encourages the person to enter the land to further the purposes of the landowner or possessor and there is an implicit assertion that the landowner or possessor has exercised reasonable care to make the place safe for the invitee.

> *St. Mary's Medical Center of Evansville, Inc. v. Loomis*, 783 N,E.2d 274 (lnd.Ct.App.2002).

However, a landowner is not an insurer of an invitee's safety and will not be liable for injuries caused by conditions from which no unreasonable risk was to be anticipated, or from conditions of which the landowner was unaware or, in the exercise of reasonable care, could not have discovered.

> *Northern Indiana Public Service Co. v. Stokes*, 493 N.E.2d 175 (Ind.Ct.App.1986).

In order to make a recovery for injuries sustained while on another's property, an invitee must prove that: (1) the premises were in a defective condition; (2) the defective condition was created by the owner or existed for a sufficient period of time to permit the landowner to know about it or correct it; and, (3) the defective condition was the proximate cause of the invitee's injury.

The owner or possessor of land will be subject to liability for an injury suffered by an invitee if the landowner or possessor: (1) knew or should have known of a danger and should have realized that it involved an unreasonable risk of harm; (2) should have expected that invitees would not realize the danger or would not protect themselves against the danger; and, (3) failed to exercise reasonable care to protect the invitee from the danger.

> *Steel v. Rust*, 830 N.E.2d 62 (lnd.Ct.App.2005).

A landowner or possessor is not liable for an injury to an invitee caused by a condition or activity on the land if the danger is known or obvious to the invitee, unless the landowner should have anticipated the harm despite the invitee's knowledge of the danger or the obviousness of the danger.

> *Rhodes v. Wright*, 805 N.E.2d 382 (lnd.2004); *Johnson v. Pettigrew*, 595 N.E.2d 747 (lnd.Ct.App.1992).

The law does not require a landowner to protect an invitee who is aware of a danger, yet consciously disregards it.

> *Johnson v. Pettigrew*, 595 N.E.2d 747 (lnd.Ct.App.1992).

The comparative knowledge of a landowner and an invitee is not a factor in determining whether a duty exists. However, it is properly taken into consideration in determining whether there was a breach of duty.

> *Ooms v. USX Corp.*, 661 N.E.2d 1250 (lnd.Ct.App.1996), *trans. denied.*

In determining whether a landowner breached the duty of care owed to an invitee, a court will consider the purpose and intent of the invitation to enter the land and the comparative knowledge of the parties.

Messer v. Cerestar USA, Inc., 803 N.E.2d 1240 (lnd.Ct.App.2004).

The comparative knowledge of the landowner or possessor and the invitee relative to known or obvious dangers is properly taken into consideration in determining whether the landowner or possessor breached the duty of reasonable care owed to the invitee.

Smith v. Baxter, 796 N.E.2d 242 (lnd.2003).

If an invitee proves that a landowner knew of a condition that involved a risk of harm to the invitee, of which the invitee was unaware, but the evidence shows that the landowner could reasonably expect an invitee to discover, realize, and avoid such risk, such evidence may be insufficient to establish that the landowner breached the duty of care he owed to the invitee.

Ooms v. USX Corp., 661 N.E.2d 1250 (lnd.Ct.App.1996), *trans. denied.*

Public invitees

A public invitee is one who is invited to enter or remain on another's land for the purpose for which the land is held open to the public.

Winfrey v. NLMP, Inc, 963 N.E.2d 609 (lnd.Ct.App.2012); *Frye v. Trustees of Rumbletown Free Methodist Church*, 657 N.E.2d 745 (lnd.Ct.App.1995), *reh'g denied*; Dunifon v. Iovino, 665 N.E.2d 51 (lnd.Ct.App.1996), *reh'g denied*; Schloot v. Guinevere Real Estate Corp., 697 N.E.2d 1273 (lnd.Ct.App.1998).

A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

St. Casimir Church v. Frankiewicz, 563 N.E.2d 1331 (lnd.Ct.App.1990).

In order for a person to be considered a public invitee, the premises on which he is injured must be open to the public or some broad segment of the public. However, broad access does not confer public invitee status on everyone who enters the premises. In order to qualify as a public invitee, one must enter the premises "for the particular purpose for which the occupant has encouraged the public to do."

French v. Sunburst Properties, Inc., 521 N.E.2d 1355 (lnd.Ct.App.1988).

An inviter owes a public invitee a duty to exercise reasonable care to keep the premises safe for the invitee.

St. Casimir Church v. Frankiewicz, 563 N.E.2d 1331 (lnd.Ct.App.1990).

The privilege to enter another's land implied by custom

In *Frye v. Trustees of Rumbletown Free Methodist Church*, 657 N.E2d 745, (lnd.Ct.App.1995), *reh'g denied*, the Indiana Court of Appeals addressed the issue of "privilege to enter another's land implied by custom" as an issue of first impression. The Court noted that the concept of "licenses implied by custom", is explained in Comment E to §330 of the Restatement (Second) of Torts as follows:

> The well established usages of a civilized and Christian community entitle everyone to assume that a possessor of land is willing to permit him to enter for certain purposes until a particular possessor expresses unwillingness to admit him. Thus a traveler who is overtaken by a violent storm or who has lost his way, is entitled to assume that there is no objection to his going to a neighboring house for shelter or direction.

657 N.E.2d 745, 750.

The Court of Appeals in *Frye* stated that it was persuaded by the common sense reasoning of §330, Comment E, and therefore held that Indiana recognizes the privilege to enter another's land implied by custom. The Court also went on to state that:

> In our society, it is a generally accepted custom for a motorist to approach a nearby residence and if lost to ask for directions, or if stranded to ask for the courtesy to use the telephone. This custom entitles one to assume that a landowner or occupier will allow a traveler to enter on land for certain limited purposes arising from an unanticipated need, such as to ask for directions or to use the telephone, unless the landowner or occupier indicates otherwise.

Id.

Therefore, in *Frye*, the Court of Appeals held that a stranded motorist seeking assistance was "a licensee with a privilege implied by custom" to enter onto the premises of a parsonage, where he had gone to use a telephone or borrow a gasoline can after his car stopped running. Therefore, the Court also held that the Trustees of the parsonage owed the motorist a duty to warn him of any latent or hidden dangers on the premises.

Children

The Indiana Court of Appeals has recognized that:

> [An] invitee's peculiar status as a child may alter the degree of "reasonable care and diligence" required on the part of the occupier of land. Indeed the court recognized this possibility in *City of Birmingham v. Whitfield,* 29 Ala.App. 454, 197 So. 666 (1940):
>
> [T]he degree of caution which is necessary to reach the required standard of reasonable

> care to be exercised may vary according to the capacity of the person with respect to whom such duty exists ... those upon whom the duty rests of exercising reasonable care toward children must calculate jupon the fact that children are expected to act according to their known characteristics and childish impulses."
>
> 29 Ala.App. at 458, 197 So., at 670.
>
> The child's ignorance of the danger in such a case would trigger the duty to warn on the occupier of the land, even though there might be no duty to warn an adult in the same position., 595 N.E.2d 747, 750 (lnd.Ct.App.1992) (quoting Second Restatement of Torts §343B).

Kopczynski v. Barger, 870 N.E.2d 1, 6-7 (lnd.Ct.App.2007), quoting *Johnson v. Pettigrew*, 595 N.E.2d 747, 750 (lnd.Ct.App.1992), *trans. denied.*

> Thus, the general rule is that "where an owner can reasonably anticipate that a child is or will be in a dangerous position but will be unable to appreciate the danger, the owner is required to take reasonable precautions to protect the endangered child from injury." *Swanson v. Shroat*, 169 Ind.App. 80, 345 N.E.2d 872, 877 (Ind.Ct.App.1976) (emphasis added). Two caveats to this general rule are that the owner must have actual or constructive knowledge of the existence of the dangerous condition and the owner must also know or have reason to know that an *"unwitting licensee is likely to come into contact with the dangerous condition." Id.* (emphasis added).

Kopczynski v. Barger, 870 N.E.2d 1, 7 (lnd.Ct.App.2007).

The duty owed to child invitees is that set out in §343 of the Restatement (Second) of Torts, taking into account the age, abilities, experience and maturity of the child.

> *Johnson v. Pettigrew*, 595 N.E.2d 747 (lnd.Ct.App.1992), *trans. denied*; *Keane v. Schroeder*, 264 N.E.2d 95 (lnd.Ct.App.1970).

The duty owed by a landowner to a child invitee is the duty to exercise reasonable care for his or her protection, in light of the child's abilities, age, experience, and maturity.

Johnson v. Pettigrew, 595 N.E.2d 747 (lnd.Ct.App.1992), *trans. denied*. See also *Harradon v. Schlamadinger* 913 N.E.2d 297 (lnd.Ct.App.2009).

When it is anticipated that children will be among those utilizing an invitation to business invitees, a host is bound to consider their age, propensities, and experience in the exercise of care to make the premises safe.

> *Hobby Shops, Inc. v. Drudy,* 317 N.E.2d 473 (lnd.Ct.App.1974).

When determining the liability of a premises owner for an injury to a child, courts must consider the ability of a child to perceive and avoid danger, in light of the child's youth and lack of experience, with the understanding that dangers that may be obvious to adults are often hidden to a child.

> *Kopczynski v. Barger*, 870 N.E.2d 1 (lnd.Ct.App.2007).

However, a landowner is not obligated to protect a child invitee from a danger on the premises if the child is fully aware of the danger, but consciously disregards it.

> *Johnson v. Pettigrew*, 595 N.E.2d 747 (lnd.Ct.App.1992), *trans. denied*.

The general rule is that no different or higher duty is owed to a child trespasser or licensee than is owed to an adult trespasser or licensee. Therefore, ordinarily, the only duty owed to a child trespasser or licensee is the duty to refrain from willfully or wantonly injuring him.

> *Neal v. Home Builders, Inc*., 111 N.E.2d 280 (lnd.1953), *reh’g denied*.

However, a landowner may sometimes owe a child a higher duty of care, even if the child is a trespasser.

> *Kelly v Ladywood Apartments*, 622 N.E.2d 1044 (imd.Ct.App.1993), *reh’g denied, trans. denied*.

A duty to use reasonable care is imposed upon one who maintains something that is dangerous to children and so exposed that there is a likelihood of their coming into contact with it and being injured by it, despite the fact that they are trespassers.

> *Wright v. International Harvester Co., Inc*., 528 N.E.2d 837 (lnd.Ct.App.1988), *reh’g denied, trans. denied*.

If a landowner can anticipate that a child will not perceive a danger that is obvious to adults, he is required, in the exercise of reasonable care, to take additional precautions to protect a child licensee.

> *Johnson v. Pettigrew*, 595 N.E.2d 747 (lnd.Ct.App.1992), *trans. denied*.

The general rule is that when a landowner can reasonably anticipate that a child will be in a dangerous position but will be unable to appreciate the danger, the landowner is required to take reasonable precautions to protect the endangered child from injury. However, there are two caveats to this rule: (1) the owner must have actual or constructive knowledge of the existence of the dangerous condition; and, (2) the landowner must also know or have reason to know that an unwitting licensee is likely to come into contact with the dangerous condition.

> *Kopczynski v. Barger*, 870 N.E.2d 1 (Ind.Ct.App.2007).

Attractive Nuisance Doctrine

Indiana recognizes the "attractive nuisance doctrine" relative to child trespassers. Under this rule, a landowner will be held liable for injuries to child trespassers based upon a failure to exercise reasonable care when: (1) the structure or condition that caused the injury is unusually attractive to children; (2) the injured child was, in fact, attracted to the land by such structure or condition; (3) the landowner or occupier knew or should have known of the presence of children; and, (4) the danger is not apparent to immature minds.

Neal v. Home Builders, Inc., 111 N.E.2d 280 (lnd.1953).

The attractive nuisance doctrine applies when the problem complained of is: (1) maintained or permitted upon property by the owner of the property; (2) particularly dangerous to children, and of such a nature that they will not comprehend the danger; and (3) particularly attractive to chil_dren. In addition, the owner must have actual or constructive knowledge of the condition and that children do or are likely to trespass and to be injured; and, the injury must be a foreseeable result of the wrong. Finally, the application of the attractive nuisance doctrine is limited to situations in which the danger is latent.

Morningstar v. Maynard, 798 N.E.2d 920 (lnd.Ct.App.2003).

A "dangerous condition or structure" is an artificial and unnatural condition inherently dangerous and unreasonably risky to children.

Neal v. Home Builders, Inc., 111 N.E.2d 280 (lnd.1953).

Liability arises out of the negligent act of maintaining such a condition in a dangerous manner.

Neal v. Home Builders, Inc., 111 N.E.2d 280 (lnd.1953).

When a landowner could reasonably anticipate that children might come into contact with a dangerous structure or condition on his property and that such contact might inflict serious injury, the landowner must take reasonable steps to protect against injury.

Neal v. Home Builders, Inc., 111 N.E.2d 280 (lnd.1953).

The policy underlying the attractive nuisance doctrine is based upon the recognition that young children may not be able to understand the dangers associated with the attractive nuisance, where a more mature person would. Therefore, in a situation where a child is supervised by an adult, the attractive nuisance doctrine will not apply.

Morningstar v. Maynard, 798 N.E.2d 920 (lnd.Ct.App.2003).

The attractive nuisance doctrine is limited in its application to situations where the danger is latent and does not apply to conditions that are common to nature.

City of Indianapolis v. Johnson, 736 N.E.2d 295 (lnd.Ct.App.2000).

Recreational Use Statute

Indiana's Recreational Use Statute [I.C. 14-22-10-2.5] provides that a person who goes upon or through the premises, including caves, of another, with or without permission and either (1) without the payment of monetary consideration or (2) with the payment of monetary consideration directly or indirectly on the person's behalf by an agency of the state or federal government, for the purpose of hunting, fishing, trapping, or preparing to hunt, fish, or trap, "does not have an assurance that the premises are safe for that purpose". In addition, the statute states that the owner of the premises does not "assume responsibility or incur liability for an injury to a person or property caused by an act or failure to act of other persons using the premises. However, the statute also specifically states that it "does not affect Indiana case law on the liability of owners or possessors with respect to the following: (1) business invitees in commercial establishments. (2) The attractive nuisance doctrine." The statute also states that it does not excuse the owner or occupant of premises for liability for injury to a person or property caused by the malicious or illegal act of the owner or occupant.

Therefore, limited liability under the Recreational Use Statute applies in situations involving injuries to licensees or trespassers - not to situations involving injuries to business invitees or invited guests.

> *Civils v. Stucker,* 705 N.E.2d 524 (lnd.Ct.App.1999).

"As a general rule, the recreational use statute applies if a landowner in lawful possession and control of lands allows the public to use them for recreational purposes without charging a fee."

> *McCormick v. State, Department of Natural Resources*, 673 N.E.2d 829, 833 (lnd.Ct.App.1996).

The purpose of the Recreational Use Statute is to encourage landowners to open their property to the public for recreational purposes free of charge.

> *Brothers v. Lake Holiday Enters***.,** 2015 Ind. App. Unpub. LEXIS 456 (lnd.Ct.App.2015); *Cunningham v. Bakker Produce, Inc*., 712 N.E.2d 1002 (lnd.Ct.App.1999), *trans. denied*; *McCormick v. State, Dept. of Natural Resources*, 673 N.E.2d 829 (lnd.Ct.App.1996); *Kelly v. Ladywood Apartments,* 622 N.E.2d 1044 (lnd.Ct.App.1993), *reh'g denied, trans. denied*.

However, because the statute denies certain persons legal recourse for personal injury or property damage, the statute is in derogation of the common law, and it must be strictly construed against limiting a claimant's right to bring suit.

> *Civils v. Stucker*, 705 N.E.2d 524 (lnd.Ct.App.1999); *Cunningham v. Bakker Produce, Inc*., 712 N.E.2d 1002 (lnd.Ct.App.1999), *trans. denied*; *Drake by Drake v. Mitchell Community Schools,* 649 N.E.2d 1027 (lnd.1995).

In determining whether an invitation has been extended to the public to enter private property, thus rendering the Recreational Use Statute inapplicable, the proper inquiry is not limited to merely whether the property is held open to the public - but, rather, whether the landowner desired1 induced, encouraged, or expected others to enter onto the land so as to make them invitees.

Civils v. Stucker, 705 N.E.2d 524 (lnd.Ct.App.1999).

The Recreational Use Statute applies where an injury is caused by a condition of the land or by another recreational user. It does not create immunity from liability for a premises owner for his own actions.

Cunningham v. Bakker Produce, Inc., 712 N.E.2d 1002 (lnd.Ct.App.1999), *trans. denied*; *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044 (lnd.Ct.App.1993), *reh'g denied*, *trans. denied*.

The phrase "for any other purpose" in the Recreational Use Statute includes only those activities consistent with the general class of behavior typified by hunting, fishing, swimming, trapping, camping, hiking and sightseeing.

Drake by Drake v. Mitchell Community Schools, 649 N.E.2d 1027 (lnd.1995).

However, the Recreational Use Statute has been held to be applicable in cases involving injuries that were sustained in the course of the following activities:

sledding - *Civils v. Stucker*, 705 N.E.2d 524 (lnd.Ct.App.1999); *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044 (lnd.Ct.App.1993), *reh'g denied*, *trans. denied*.

baseball - *Cunningham v. Bakker Produce, Inc*., 712 N.E.2d 1002 (lnd.Ct.App.1999), *trans. denied*.

a child riding in an inner tube, being pulled behind an automobile - *Civils v. Stucker*, 705 N.E.2d 524 (lnd.Ct.App.1999).

Landlord/Tenant

Under many circumstances, a landlord has no liability to tenants or others for injuries sustained on the property when the tenant has full control of the leased premises.

Dutchmen Mfg., Inc. v. Reynolds, 849 N.E.2d 516 (lnd.2006).

Generally, absent fraud, concealment, a covenant, or an applicable statute, a landlord who gives a tenant full possession and control of leased premises will not be held liable for personal injuries stemming from the defect which are sustained by the tenant or other persons lawfully on the leased property (unless the landlord has expressly agreed to repair the premises/the defect and is negligent in doing so).

Houin v. Burger by Burger, 590 N.E.2d 593 (Ind. Ct.App.1992), *trans. denied*; *Pitcock v.*

Worldwide Recycling, Inc., 582 N.E.2d 412 (lnd.Ct.App.1991).

However, there are two exceptions to this general rule: (1) if a latent defect is known to the landlord, but not known to the tenant, and the landlord fails to disclose the defect, the landlord will be held liable for any injuries related to the defect; and, (2) if the premises are leased for a public or semi-public purpose, and at the time of the lease the landlord knows or should know that the premises are unsafe for the intended purposes, the landlord will be held liable for any resulting personal injuries.

Pitcock v. Worldwide Recycling, Inc., 582 N.E.2d 412 (lnd.Ct.App.1991).

A landlord has a duty to warn a tenant of hidden defects that are known to the landlord, but which are unknown to the tenant.

Dickison v. Hargitt, 611 N.E.2d 691 (lnd.Ct.App.1993); *Houin v. Burger by Burger*, 590 N.E.2d 593 (Ind. Ct.App.1992), *trans. denied*.

A landlord who retains any degree of control over the premises may be subject to liability for negligence.

Houin v. Burger by Burger, 590 N.E.2d 593 (Ind. Ct.App.1992), *trans. denied*.

A landlord owes the same duty to a tenant's social guests as he owes to the tenant.

Campbell v. Criterion Group, 613 N.E.2d 423 (lnd.Ct.App.1993).

Generally, a landlord has no duty to undertake repairs of leased premises which are in the exclusive possession of the tenant unless the landlord agrees to do so by contract or otherwise.

Dickison v. Hargitt, 611 N.E.2d 691 (lnd.Ct.App.1993).

If a landlord expressly agrees to repair the leased premises or undertakes the duty of providing security and then is negligent in the performance of what was undertaken, the landlord may be held liable for a tenant's injury that results from the defect or failure to protect.

Nalls v. Blank, 571 N.E.2d 1321 (lnd.Ct.App.1991); Vertucci v. NHP Management Co., 701 N.E.2d 604 (lnd.Ct.App.1998).

A landlord has a duty to maintain in safe condition the parts of a building used in common by the tenants and over which the landlord retains control.

Zubrenic v. Dunes Valley Mobile Home Park, Inc., 797 N.E.2d 802 (lnd.Ct.App.2003).

A portion of any leased premises may only be considered a common area for purposes of a premises liability action against a landlord when the landlord retains control and responsibility over that portion of the premises.

Olds v. Noel, 857 N.E.2d 1041 (lnd.Ct.App.2006).

A landlord owes a duty to exercise reasonable care to make the premises reasonably fit as to common passageways and approaches retained under the landlord's express or constructive control.

LaPlante v. LaZear, 68 N.E.2d 312 (lnd.Ct.App.1903); *Tippecanoe Loan & Trust Co. v. Jester*, 101 N.E. 915 (lnd.1913); *Rossow v. Jones*, 404 N.E.2d 12 (lnd.Ct.App.1980).

That duty applies whether the premises are leased to a single tenant or are a multi-unit property.

Coleman v. DeMoss, 246 N.E.2d 483 (lnd.Ct.App.1969).

The seminal case in Indiana relative to a landlord's duty to remove ice and snow from rented property is Rossow v. Jones, 404 N.E.2d 12 (lnd.Ct.App.1980). The case is significant both for its holding and for its survey of the case law history and public policy supporting the decision. The case itself involved a claim for personal injuries brought by a tenant against a landlord arising out of a slip and fall incident. In Rossow, the Court held that "a landlord has a duty of reasonable care that common ways and areas, or areas over which he has reserved control, are reasonably fit, and hazards created through natural accumulation of ice and snow are not beyond the purview of that duty." 404 N.E.2d 12, 14.

A landlord may not enforce a lease provision which purports to relieve the landlord of his common law duty to maintain common areas.

Ransburg v. Richards, 770 N.E.2d 393 (lnd.Ct.App.2002).

Premises that are leased for a public or semi-public purpose

When premises are leased for public or semi-public purposes, and at the time the lease is executed, unsafe conditions exist on the property, and the lessor knows or by the exercise of reasonable care should know of those conditions, and such conditions cause injury to a third party, the landlord is liable on the theory that the third person is on the premises at the invitation of the landlord as well as the tenant.

Yates v. Johnson County Board of Commissioners, 888 N.E.2d 842 (lnd.Ct.App.2008); Walker v. Ellis, 129 N.E.2d 65 (lnd.Ct.App.1955).

Duty owed to independent contractors and their employees

The owner of property has no general duty to provide an independent contractor with a safe place to work. However, a property owner has a duty to maintain the property in a reasonably safe condition for business invitees, which includes employees of an independent contractor.

Pelak v. Indiana Industrial Services, Inc., 831 N.E.2d 765 (lnd.Ct.App.2005); *Daisy v.*

Roach, 811 N.E.2d 862 (lnd.Ct.App.2004), *Messer v. Cerestar, USA, Inc*., 803 N.E.2d 1240 (lnd.Ct.App.2004).

A owner of property on which business invitees, including employees of independent contractors, are present has an affirmative duty to exercise ordinary care to keep the property in a reasonably safe condition, co-extensive with the purpose and extent of the invitation.

Steel v. Rust, 830 N.E.2d 62 (lnd.Ct.App.2005)[1]

A landowner has a duty to warn an independent contractor of hazardous instrumentalities maintained by the landowner as well as any latent or concealed perils located on the premises.

Ozinga Transportation Systems v. Michigan Ash Sales, 676 N.E.2d 379 (lnd.Ct.App.1997)

A property owner generally owes no duty to provide a safe work place to the employees of an independent contractor working on the landowner's property. However, a landowner may be liable for the safety of an independent contractor, or that independent contractor's employees, if the landowner retains control over any part of the work performed by the independent contractor on his land. In order for this exception to apply, the property owner must exercise control over the job site or over the manner or means by which the contractor performs his work.

Pelak v. Indiana Industrial Services, Inc., 831 N.E.2d 765 (Ind.Ct.App.2005)[2]

Unless a landowner has unique knowledge not imparted to the independent contractor, a landowner should not be held liable to employees of an independent contractor based upon a claim that a project was unusually risky or dangerous. In assessing the comparative knowledge of the parties involved, the focus of the inquiry is on whether the landowner had superior knowledge with regard to any danger on the premises.

PSI Energy, Inc. v. Roberts, 829 N.E.2d 943 (lnd.2005)[3]

[T]he owner is under a duty to keep the property in a reasonably safe condition for business invitees, including employees of independent contractors.

Merrill v. Knauf Fiber Glass, GmbH, 771 N.E.2d 1258 (Ind.Ct.App.2002), *Zawacki v. U.S.X.*, 750 N.E.2d 410, 414 (Ind.Ct.App.2001)[4]**,** *reh'g denied, trans. denied.*

The "best definition" of that duty comes from the Restatement (Second) of Torts § 343 **(**1965), which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it

[1] still good, but negative treatment via distinguishment by by *Baker v. Fall Creek Housing Partners, LLC* (Ind.Ct.App.2017)
2 still good, but negative treatment via distinguishment by *Nagel v. Northern Indiana Public Service Co*. (Ind.Ct.App.2015)
3 abrogated in part by *Helms v. Carmel High School Vocational Building Trades Corp*., (Ind. 2006)
[4] still good, but negative treatment by *Houin v. Burger by Burger*, (lnd.Ct.App.1992)

involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Burrell v. Meads, 569 N.E.2d 637, 639-40 (Ind. 1991)[5], *reh'g denied*. Under § 343, "An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein." Restatement (Second) of Torts § 343, cmt. d.

Sidewalks

When a sidewalk is not a public sidewalk, but is privately owned, the owner owes a pedestrian a duty to keep the sidewalk in a reasonably safe condition.

Frampton v. Hutcherson, 784 N.E.2d 995 (lnd.Ct.App.2003)[6]

Necessity of proving why a plaintiff fell

In *Ogden v. Decatur County Hospital***,** 509 N.E.2d 901 (lnd.Ct.App.1987), *reh’g denied*, Charles Ogden was at the Decatur County Hospital visiting his mother, who was a patient in the hospital. Charles went into a public restroom located in the hallway of the hospital and a custodian later found him lying on the floor in the restroom. He died several days later due to the head injury he sustained when he fell.

When the custodian discovered Charles lying on the floor in the restroom, he summoned the unit coordinator, a doctor and a nurse. Another custodian also came to the restroom to assist in getting Charles into a wheelchair. All five of those people testified in depositions that the floor in the restroom was no slippery or wet and that there were no foreign objects or debris on the floor.

Ogden's wife, as the personal representative of his estate, filed a wrongful death case against the hospital, alleging that it negligently caused his death because the restroom floor was slick. However, the hospital filed a motion for summary judgment, which the trial court granted; and, the estate appealed.

The estate claimed that the hospital had negligently caused Ogden's death because the restroom floor was allegedly slick. However, the Court of Appeals stated that the following "speculative allegations· were the only contentions of negligence made by the estate: "[a]ccording to Ogden's speculation, the hospital employees allegedly failed to properly mop the restroom floor. Negligent mopping allegedly made the floor slick and caused Charles to slip and fall." 509 N.E.2d 901, 903. In contrast, the Court of Appeals noted that the hospital presented evidence from the depositions of five individuals who were in the restroom before and after Charles was found lying on the floor,

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[5] still good, but negative treatment by *Houin v. Burger by Burger*, (lnd.Ct.App.1992)
[6] still good, but negative treatment via distinguished by *McKibben Const., Inc. v. Longshore*, (lnd.Ct.App.2003)

who all testified that they did not notice any foreign object or defect that would have made the floor slick. In addition, another witness testified that she had not mopped the restroom floor, which was in accordance with hospital policy not to mop on weekends and holidays. According to the Court of Appeals, this evidence established that the floor was not slick; and, therefore, the estate was required to come forward with "specific evidence to place the Hospital's negligence back in issue". 509 N.E.2d 901, 903.

However, the Court concluded that the estate failed to place the slickness of the floor and the hospital's negligence into issue, noting that it:

> attempted to rely solely upon the fact that Charles was found lying on the floor to prove slickness and in tum negligence. From this Ogden speculates that a janitor mopped negligently. This Ogden cannot do. Negligence cannot be established by inferential speculation alone. In the present case, one could speculate and infer that Charles was laying on the floor because he fainted and not because he slipped. However, such speculation is improper. Absent factual evidence, negligence cannot be supported by the inferred chain of events. Here, no evidence exists to establish that the floor was slick or slippery. Ogden failed to present any factual evidence which would place in issue the Hospital's evidence that established a lack of slickness. Since the doctrine of res ipsa loquitur is inapplicable to this case, and to most slip and fall cases, (citations omitted), Ogden has failed to sustain the burden in opposition to summary judgment. No material issue of fact existed and the Hospital was entitled to judgment as a matter of law. Therefore, the trial court properly granted summary judgment.

509 N.E.2d 901, 903-904.

In *Barsz v. Max Shapiro, Inc***.,** 600 N.E.2d 151 (lnd.Ct.App.1992)[7], Marjorie Barsz ate breakfast at Shapiro's restaurant. After breakfast, she slipped and fell while walking to the restroom. Barsz filed suit against Shaprio's to recover for the injuries she sustained when she fell, alleging that the restaurant had negligently failed to maintain its floor in a safe condition. In her deposition, when asked how her injury occurred, Barsz stated:

> A. I was walking to the bathroom ... and I slipped on something that was like I was outside on ice or maybe it was grease, and my right foot went out from under me, leaving all of my weight on my left knee when I went down.
>
> Q. Let me ask you this question: you say you slipped on something; is that correct?
>
> A. (Affirmative nod).

600 N.E.2d 151, 152.

The trial court entered summary judgment in favor of Shapiro's, finding that based upon the evidence revealed during the discovery process, Barsz was unable to recover on her negligence claim because she could not establish that the restaurant caused her injury. Barsz appealed, arguing

[7] still good but negative treatment by *Adkins v. Meijer Stores Limited Partnership*, S.D.Ind., October 10, 2006.

that there were genuine issues of material fact which should have been resolved by the trier of fact

The Court of Appeals began its analysis in this case by noting that because Barsz was a customer, she was unquestionably an invitee; and, therefore, Shapiro's clearly owed Barsz a duty to exercise reasonable care for her protection while she was on its premises. However, the Court next stated that in order to avoid summary judgment, Barsz had to establish specific facts which supported an inference that Shapiro's was negligent. In that regard, the Court stated that Barsz, therefore, had to demonstrate that (1) there was an object or defect in Shapiro's floor which caused her to slip and fall; and, (2) Shapiro's unreasonably failed to discover and remedy the hazardous condition.

With regard to whether Barsz could demonstrate that there was a genuine issue of material fact concerning the presence of an object on or defect in Shaprio's floor, the Court of Appeals noted that although Barsz did not specifically identify the object or defect that caused her to fall, she did testify that she slipped on "something" because in her deposition, Barsz stated that she "slipped on something that was like I was outside on ice or maybe it was grease ...". Therefore, the Court stated that (unlike the situation in *Ogden v. Decatur County Hospital*) "a finding of negligence [against Shapiro's] would not require 'inferential speculation,' because Mrs. Barsz testimony, if believed, establishes the presence of a foreign object on the floor". 600 N.E.2d 151, 153. In addition, the Court noted that a water glass had been found in the area where Barsz fell. [The restaurant manager testified that Barsz was carrying a water glass at the time of her fall, but he could not recall whether it broke when she fell.] Therefore, the Court stated that although Barsz did not specifically allege that she slipped on a water glass (and in fact, denied that she was carrying a water glass at the time of her fall), Shapiro's had presented testimony "demonstrating this potentially hazardous object was on the floor"; and, "[s]ince all reasonable inferences are drawn in favor of the opponents to a motion for summary judgment, (citation omitted), a court could reasonably infer that Mrs. Barsz slipped on the glass itself, pieces of the broken glass, or liquid that spilled from the glass." Id. Therefore, the Court held that, drawing all inferences in the light most favorable to Barsz, "the conclusion that Mrs. Barsz has raised a genuine issue of material fact concerning the existence of an object on or defect in Shapiro's floor is inescapable". Id.

The Court of Appeals in Barsz also noted that it was not enough that Barsz had established the existence of a genuine issue of material fact concerning the presence of a foreign substance on the floor. It was also necessary for her to demonstrate a genuine issue of material iact concerning the question of whether Shapiro's acted unreasonably in allowing the foreign substance to remain on the floor - because Shapiro's was not an absolute guarantor of its patrons' safety and Indiana law would not hold Shapiro's strictly liable for a all occurring before it even had a chance to remove the foreign substance from the floor. In that regard, the Court noted that Shaprio's manager had testified that many of its customers are accident-prone and that spills occurred frequently. In addition, Shapiro's general manager also testified that customers periodically spill food and drink on the way from the serving line to their tables, and that it is the responsibility of cafeteria bus personnel to clean up the spills. Noting that the evidence established that Shapiros' served between 1000-1800 customers daily, and that the general manager testified that spills were commonplace, the Court of Appeals concluded that under these circumstances, the question of whether Shapiro's had been diligent enough in ensuring a reasonably safe floor was a factual issue to be resolved by the trier of fact.

In *Golba v. Kohl's Dept. Store, Inc.,* 585 N.E.2d 14 (lnd.Ct.App.1992), *reh'g denied*, while shopping at Kohl's Department Store, Stella Golba's heel came into contact with a rounded object on the floor, which, in combination with the high gloss finish on the floor, caused her to fall. She filed suit against Kohl's to recover for the injuries that she sustained in the fall, but the trial court entered summary judgment in favor of Kohl's, finding that based upon the evidence revealed during discovery, Golba could not recover on her claim. On appeal, Golba asserted that there were genuine issues of material fact that should be resolved by the trier of fact.

Clearly, Golba was a business invitee; and therefore, Kohl's owed her a duty to exercise reasonable care for her protection while she was on its premises. However, Kohl's argued, and the trial court found, that there was no evidence that Kohl's had actual or constructive notice of the dangerous condition which allegedly caused Golba to fall. The Court of Appeals noted that:

> [w]hile not yet specifically addressed in Indiana, numerous cases from other jurisdictions have found that summary judgment is not proper in a slip-and-fall case where the question whether the store had actual or constructive notice is unresolved. (citations omitted). These cases have generally found the plaintiffs testimony that she slipped on something sufficient to withstand summary judgment of the issue of the existence of a hazard. In the absence of undisputed evidence to the contrary, the issues of whether the store had actual or constructive notice of the dangerous condition or whether reasonable precautions were taken to remedy the condition have likewise been held to be jury questions. (citations omitted).

In this case, the Court of Appeals noted that Golba indicated in her answers to interrogatories and responses to requests for admissions that "she slipped when her heel landed on a rounded object such as a small stone or 'B-8' on the high gloss finish to the floor". 585 N.E.2d 14, 17. In its answers to interrogatories, Kohl's indicated that it had swept the floor "earlier that morning" and that the floor would have been visually inspected at that time. However, the Court noted that there was no evidence that the floor had been swept immediately before Golba fell; and that her fall occurred at 10:50 in the morning. In addition, Kohl's did not deny that there was some kind of wax or polish on the floor.

Based on these facts, the Court of Appeals concluded that "[e]xamining the evidence in the light most favorable to Golba and drawing all inferences in her favor, we must conclude that there was an object on the floor upon which she slipped". Id. The Court noted that the facts in this case were different than those in *Ogden v. Decatur County Hospital* and stated that this case did not require "inferential speculation" because Golba's testimony constituted evidence of a defect in or on the floor. Id.

The Court in *Golba* also concluded that

> [w]e must also infer that the object was on the floor for a sufficient amount of time that morning such that we cannot say as a matter of law there could not have been constructive notice of the object. As a department store, Kohl's is charge with the knowledge that its method of operation may result in customers dropping objects onto the ground as they

> browse through the merchandise. Further, Kohl's has a corresponding duty to protect its customers from such risks. The only evidence of preventative measures taken by Kohl's was that its employees swept the floors of the store in the morning. We cannot say as a matter of law that sweeping the floor once a day constitutes the exercise of reasonable care to prevent injury to customers from objects on the floor. Accordingly, we hold that issues of fact remained which should have been reserved for the jury, and the trial court erred in granting Kohl's motion for summary judgment.

Id.

In *State Street Duffy's, Inc.*, 623 N.E.2d 1099 (lnd.Ct.App.1993), *trans. denied*, Maxine O'Brien and her grandson, Allen Loyd, went to lunch at a Tumbleweed restaurant operated by State Street Duffy's, Inc. They were seated in a booth that was raised approximately 6-8 inches off of the floor. After they were finished eating, Allen turned in the booth and reached for his wallet to pay the bill. While he was turned away, Maxine attempted to get out of the booth, fell and fractured her hip. There were no witnesses to her fall. She later died from unrelated causes before her testimony had been preserved. However, Maxine's son, Raymond Loyd, as the executor of Maxine's estate, filed a negligence action against Duffy's, alleging that the raised booth constituted a dangerous condition.

Duffy's field a motion for summary judgment, which the trial court denied. Therefore, Duff's initiated an interlocutory appeal.

Duffy's acknowledged that Maxine was an invitee in the restaurant; and that therefore, it owed her a duty to exercise reasonable care while she was on its premises. Duffy's also conceded that the configuration of the raised booth from which Maxine fell "could be considered a potentially dangerous condition" and ·a potential tripping hazard". 623 N.E.2d 1099, 1101. However, Duffy's asserted that there was insufficient evidence for a jury to decide whether the raised booth caused Maxine's injuries without resorting to speculation; and, that, therefore, it was entitled to summary judgment.

The Court of Appeals noted that the issue of causation or proximate cause is generally a question for the jury. However, the Court also noted that absent factual evidence, negligence cannot be inferred from the mere fact that an accident occurred. Nor can causation be inferred merely from the existence of an allegedly negligent condition. Therefore, the Court stated that it had to determine whether Raymond had shown that a genuine issue of material fact existed concerning whether the raised booth caused Maxine's fall and injury.

The Court noted that the designated evidence included depositions of Allen and Raymond, as well as the affidavit of a safety expert. In his deposition, Raymond testified that after the incident, Maxine had told him that she had fallen and the Duffy's manager had told her that people fell there all the time. Raymond also testified that his mother did not tell him what had caused her to fall. However, Allen gave the following testimony in his deposition:

> Q. What happened?

A. She fell. I didn't personally see the falt I was paying or I was - it seemed like I was getting the check and I had my back to her, and I heard her hit the ground and she turned around and she was lying there and I thought she had broken her back.

…

Q. Without having seen your grandmother fall, do you have any personal knowledge as to what caused her to fall?

A. I asked her what happened and she told me that she tripped getting up and tripped over the step.

…

Q. And what did your grandmother point out to you, can you show me on any of these photographs?

A. Well she pointed and said that she tripped over the step, so I am assuming it's the step, the elevation of the booth.

Q. Did your grandmother say anything to you about why she fell, other than I missed the step, or tripped on the step?

A. No, she didn't.

623 N.E.2d 109, 1102.

The Court of Appeals summarized this testimony as indicating that Maxine told her grandson immediately after she fell that she had tripped over the step of the raised booth, and the Court noted that Maxine had specifically identified the object which she thought had caused her to fall. Therefore, the Court concluded that Allen's testimony concerning his grandmother's statement, in addition to Raymond's deposition and the affidavit of the expert, if believed, would not require "inferential speculation" to find Duffy's negligent.

[The Court of Appeals also addressed the issue of whether Allen's testimony about statements his grandmother had made immediately after her fall were admissible. The Court held that Maxine's statement to her grandson that she "tripped over the step" was admissible as an exception to the hearsay rule because it qualified as an excited utterance/was part of the res gestae relative to her injury.]

In *Hayden v. Paragon Steakhouse***,** 731 N.E.2d 456 (Ind.Ct.App.2000)[8], James Hayden fell and broke his wrist in the parking lot at Paragon Steakhouse on his way to retrieve his car after he and his wife finished eating dinner in the restaurant. He filed suit against the restaurant, alleging that he had fallen on snow and ice that had not been properly cleared or salted by the restaurant. The restaurant filed a motion for summary judgment, asserting that Hayden could not provide any

[8] still good, but negative treatment via distinguishment by *Chappey v. Storey*, (Ind.Ct.App.2023)

evidence as to the cause of his fall. The trial court granted the motion and Hayden appealed.

Hayden argued that he had presented sufficient evidence from which a jury could determine the cause of his fall and that the restaurant knew or should have known of the allegedly icy conditions in its parking lot. However, the Court of Appeals stated that the designated evidence clearly revealed that Hayden did not know what caused his fall and he was "[inviting] [the Court] to speculate as to the cause of [his] fall". 731 N.E.2d 456, 458. Specifically, the Court noted that although Hayden alleged in his complaint that he slipped and fell on snow and ice on Paragon's property, during his deposition, Hayden testified that he did not see any snow on the pavement where he fell and that he did not know whether there was any ice in the area. In addition, he testified that it was his "belier that he slipped on ice and that he "suspects" that he slipped on "something". Id. The Court of Appeals also noted that no one witnessed Hayden's fall and although his wife testified that he had shown her where he fell and the area was covered with ice, Hayden testified that he did not recall showing anyone where he fell. In addition, Hayden testified that when he exited the restaurant, he did not recall the pavement being slippery before he fell. Finally, the Court pointed to the following testimony that Hayden gave during his deposition as being "the most telling":

> Q. Do you have any other facts that support your belief that this was what you call black ice?
>
> A. None other than the fact that my feet went out from underneath me and I went up in the air and fell down.
>
> Q. Do you have any idea what - strike that. Do you have have [sic] any idea what your feet slipped in that caused you to fall?
>
> A. Are you calling for speculation on my part?
>
> Q. I'm just asking if you know. And I'm not asking you to speculate.
>
> A. I don't know for sure.

731 N.E.2d 456,458.

After setting out this excerpt from Hayden's deposition, the Court of Appeals noted that "absent some factual evidence, negligence cannot be inferred from the mere fact of an accident, and causation may not be inferred merely from the existence of an allegedly negligent condition. (citation omitted). The Court then stated that "[w]ithout any evidence on how or why James fell, the Haydens are relying on speculation and conjecture to explain the proximate cause of his injuries. Instead, the Court stated that "[they] were required to come forward with specific facts that demonstrate the existence of a negligent condition that caused James' fall and, therefore, his injuries". 731 N.E.2d 456, 459. Because they failed to do so, the Court of Appeals held that the restaurant was entitled to judgment as a matter of law and affirmed the trial court's entry of summary judgment in favor of the restaurant.

Landowner's liability for off-premises injuries

The occupier of land abutting on or adjacent to, or in close proximity to, a public highway owes the traveling public a duty to exercise reasonable care to prevent injury to travelers upon the highway from any unreasonable risks created by the occupier of the land, which he permits to continue after he knows or should have known of their existence. The traveling public is entitled to the free use of highways and streets and an occupier of land which is adjacent to or in close proximity to a public street or highway has no right to use the property occupied by him so as to interrupt or interfere with the exercise of such right by creating or maintaining a condition that is unreasonably dangerous.

Pitcairn v. Whiteside, 34 N.E.2d 943 (lnd.Ct.App.1941)[9]

One may not always conduct a lawful business on his own premises as he pleases. The law requires that everyone, in the use and enjoyment of their property, have regard for the rights of others; and does not allow him to set up or prosecute a business on his own land in a way that is calculated to, or, in fact does, materially or injuriously affect the rights of adjoining owners, or that substantially or harmfully interferes with or injures people rightfully travelling on an adjoining highway.

Fr. Wayne Cooperage Co. v. Page, 84 N.E.145 (lnd.1908)

One is entitled to the reasonable use of his property even if such use incidentally injures the property of a neighbor; but liability for an injury arises when it is caused by such unreasonable use of one's property as might reasonably have been anticipated to result in damage to the person or property of others in the vicinity.

Rock Oil Company et al v. Brumbaugh, 108 N.E. 260 (lnd.Ct.App.1915)

The Distraction Doctrine

In analyzing premises liability claims, Indiana follows the Restatement (Second) of Torts § 343. *Kaufman v. J&M Enter. Corp. of N. Ind.*, No. 43D04-1910-CT-000071, 2021 Ind. Cir. LEXIS 1522 (Kosciusko County Circuit Court May 27, 2021).[10] Section 343 is to be read alongside Section 343A, which states "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* (quoting Restatement (Second) of Torts, § 343A); see also *Lin v. Sheraton License Operating Co.*, No. 1:18-cv-02158-JPH-DML, 2020 U.S. Dist. LEXIS 198440 at *12-13 (S.D. Ind. Oct. 26, 2020). The exception to open and obvious dangers applies in two situations, with one being when the possessor "has reason to expect that the invitee's attention may be distracted so that she will not discover or will forget the obvious danger." *Lin v. Sheraton License Operating Co.*, at *12 (citing Restatement § 343A cmt. f). In order to succeed under the distraction doctrine, Indiana courts, as well as the Seventh Circuit, have held that the distraction exception will only apply when the invitee designates factual evidence that the invitee was distracted which would compel the court to apply the distraction doctrine or allow the court to infer that the invitee was distracted. See *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1267 (Ind. Ct. App. 2002); see also *Lin v. Sheraton License Operating Co.*, at *13 (citing Illinois law to apply Restatement § 343A).

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[9] still good, but negative treatment via distinguishment by *Swingley v. City of Muncie*, (lnd.Ct.App.2021)
[10] unpublished, negative treatment

- *Lin v. Sheraton License Operating Co.*, 2020 U.S. Dist. LEXIS 198440
    - Unpublished, but the doctrine is explained
- *Merrill v. Knauf Fiber Glass, GmbH*, 771 N.E.2d 1258 (Ind. Ct. App. 2002)
    - Asked the court to adopt and apply the "distraction theory"
    - Plaintiff argues that Defendant should have expected that Plaintiff would become distracted and fall through skylight
    - "[s]uch reason to expect harm to the visitor from known or obvious danger may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it…"
        - "in such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk….it is not however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances"
    - Distraction doctrine is not a separate theory of liability
    - "rather, the doctrine states that, in the proper case, a landowner may anticipate that a known or obvious danger will cause harm to the invitee when, for example, there is reason to except that the invitee's attention may be distracted.
    - In this case, P was distracted by someone not at the control of D, so not liable
- *Kaufman v. J&M Enter. Corp. of N. Ind.*, 2021 Ind. Cir. LEXIS 1522 (2021)[11]
    - Kosciusko County Circuit Court
    - Cited Restatement of Torts 343A comment (f)
        - "such reason to expect harm to the visitor from known or obvious danger may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted"
    - "however, the court notes that a reason to expect harm may arise if the possessor has reason to expect that an invitee's attention would be diverted from known and obvious danger."
    - In analyzing premises liability in Indiana, the state follows Restatement of Torts 343

Also see:

Holiday Rambler Corp. v. Gessinger, 541 N.E.2d 559 (lnd.Ct.App.1989), *trans. denied* - liability for dangers created by exits from a landowner's premises onto an adjacent public highway.

Blake v. Dunn Farms, Inc., 413 N.E.2d 560 (lnd.1980) *Justice v. CSX Transportation*, Inc., 908 F.2d 119 (7th Cir.1989) liability for creating conditions wholly contained within a landowner's property which impair the view of motorists on an adjoining highway. Also see *Snyder Elevators*,

[11] unpublished, negative treatment

Inc. v. Baker, 529 N.E.2d 857 (lnd.Ct.App.1988), *trans. Denied*

Spears v. Blackwell, 666 N.E.2d 974 (lnd.Ct.App.1996), *trans. denied* - landowner's liability to users of adjacent roads based upon "artificial" vs. "natural" conditions of land.[12]

Statutes and ordinances relative to trimming vegetation to prevent obstructing the view at intersections - *French v. Bristol Myers Company*, 574 N.E.2d 940 (lnd.Ct.App.1991), *trans. denied*; I.C. 32-26--5-1; I.C. 32- 26-4-2; I.C. 32-26-4-2;
Wilcox v. Urschel, 200 N.E. 465 (lnd.Ct.App.1936).

"One in possession of premises does owe a duty to passersby to keep adjoining areas reasonably clear of risks." [L]iability does not necessarily stop at the property line."

Tibbs v. Huber, Hunt I Nichols, Inc., 668 N.E.2d 248, 250 (Ind. 1996).

[12] still good, but very negative treatment in part by *Reece v. Tyson Fresh Meats, Inc.* (Ind. 2021)

Section Five

Ethics for Construction Lawyers

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Section Five

Ethics
for Construction Lawyers
September 24, 2024

Grow | Protect | Operate | Finance

Ethical Considerations for Construction Lawyers

2024 Trends

- **Candor**

-Signatures

- **Confidentiality**

-Negative Reviews

- **Fairness**

-Bypassing

-Threats

-Extrajudicial Statements

Candor

Rules Implicated by Affixing a False Signature

Rule 3.3(a)(1):
Knowingly making a false statement of fact to a tribunal.

Rule 8.4(c):
Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Rule 8.4(d):
Engaging in conduct prejudicial to the administration of justice.

In the Matter of Irk, January 19, 2024

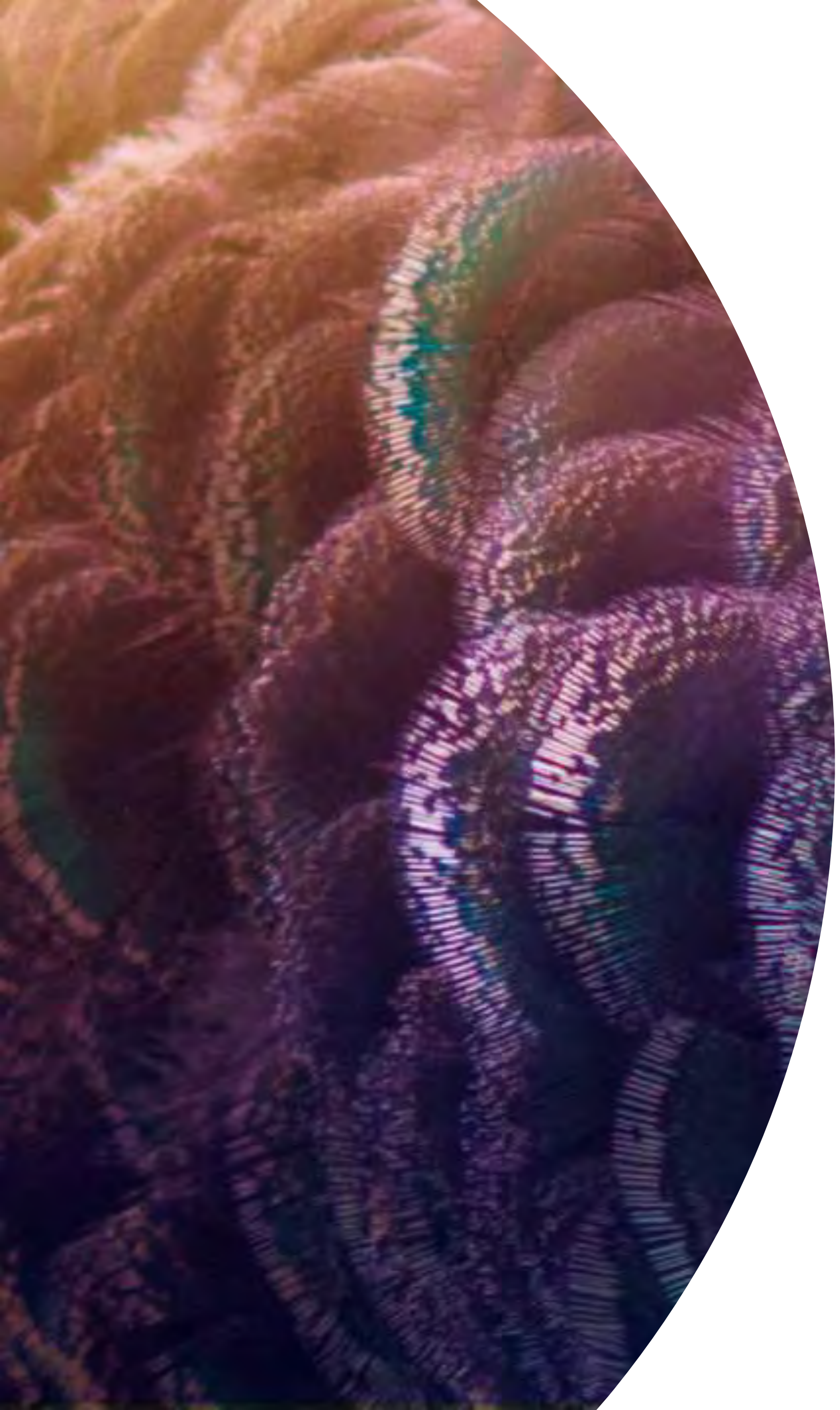
Affixing false signature without authorization and falsely notarizing documents

- Respondent represented Adoptive Parents in an uncontested adoption proceeding.
- Respondent cut and pasted the signature of the adoption agency director on two documents
- Respondent notarized the documents affirming that the director had signed these forms in his presence.
- Respondent filed the documents in Court
- 30-day suspension
- Chief Justice Rush and Justice Goff dissented from the 30-day suspension, believing the sanction to be inadequate.

In the Matter of R. M., August 30, 2024

Affixing false signatures

- **DCS staff attorney affixed case worker signatures to CHINS petitions without their knowledge or authorization**
  - Petitions were otherwise accurate
  - the case workers appeared at the hearings
- **120-day suspension**
  - Rule 3.3(a)(1): knowingly making a false statement of fact to a tribunal
  - Rule 8.4(c): engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation
  - Rule 8.4(d): engaging in conduct prejudicial to the administration of justice



Matter of Robison,
985 N.E.2d 336 (Ind. 2013)

"Much of our legal system is predicated on the authenticity and reliability of signatures. For a lawyer to affix a false signature is a deception that gravely undermines public trust, respect, and confidence in the legal profession. Such inexcusable misconduct is not justified or excused by considerations of client convenience, expediency, or lack of personal gain. Affixing a false signature is manifestly dishonest and an absolute ethical transgression. For this offense, I favor a substantial period of suspension."

(Dickson, C.J., and Rush, J., dissenting)

Practical Guidance

- Obtain **specific written authorization** to sign on behalf of another person
- “Wet ink” signature should disclose that the attorney signed with permission
- Notaries may perform remote notarial acts pursuant to I.C.33-42-17-1, *et seq.*

Confidentiality

Rule 1.6

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Rule 1.6

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Rule 1.6, Comment 3

“The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. **The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.** The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”

Confidentiality

- ***In re Anonymous* (Ind. 2010)**
  - Friend contacted lawyer for referral.
  - Friend became prospective client and revealed confidential information regarding an altercation with her husband.
  - Lawyer referred her to another lawyer.
  - Lawyer encouraged another friend to reach out to prospective client because she was going through a hard time.
  - Violation for revealing confidential information.

Confidentiality: Scope

Confidentiality: LAWYER must stay quiet

- Ethical obligation in all contexts
- Applies to **information** learned from client in scope of representation
- Client may authorize disclosure

Privilege: LAWYER AND CLIENT can stay quiet

- Prevents compelled disclosure to tribunal
- Applies to **communications** with client for purpose of seeking legal advice
- Client may waive privilege

In the Matter of Wruble, July 18, 2024

Divulging client confidences in response to negative online review and engaging in offensive personality

Attorney responded to negative online review

- Profane threats to remove the post
- Public response disparaging client and revealing confidential damaging information
- Filed defamation lawsuit revealing confidential information

30 day suspension, stayed subject to probation with JLAP monitoring

- Revealing confidential information about a former client
- Violating the Oath of Attorneys by acting in an offensive manner.

Wruble includes a dissent from Justice Slaughter on the basis that “offensive personality” is too subjective to be a standard for attorney discipline. Justice Molter, Justice Massa, and Chief Justice Rush wrote a concurring opinion approving the agreed discipline but leaving open the question of whether it is appropriate to sanction attorneys for violations of the Oath of Attorneys.

Fairness: Bypassing

Rule 4.2

Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

In the Matter of Trapp, December 11, 2023

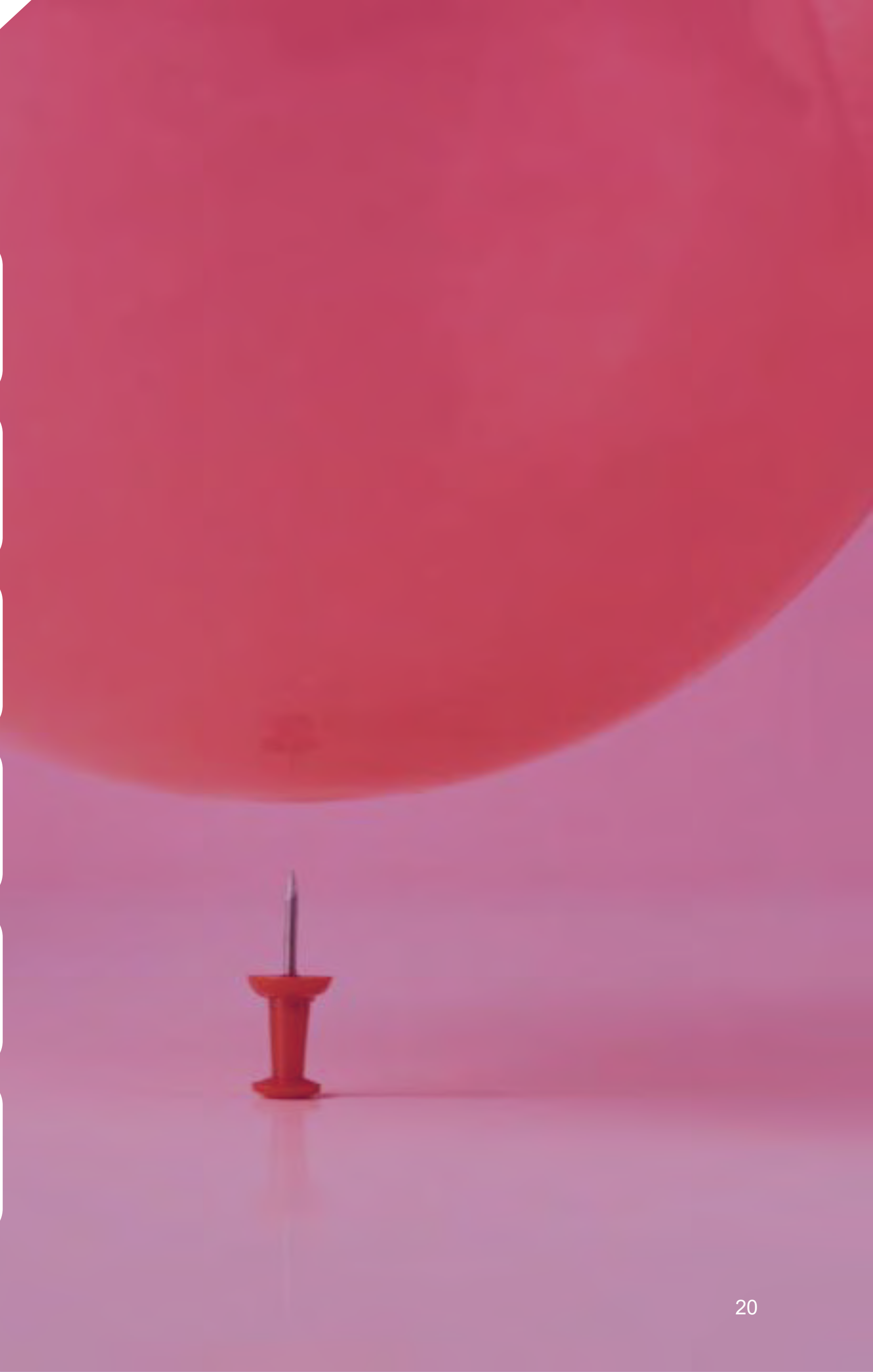
Communicating with represented party; misrepresentation to tribunal

- Respondent represented Husband in a consolidated divorce and protective order proceeding arising from a domestic dispute AND related criminal proceeding.
- Without notifying Wife's counsel in the civil matter, Respondent subpoenaed Wife in the Criminal Case and took a taped statement from her regarding the domestic dispute.
- Respondent asked several questions about marital property during the taped statement (despite objection of the deputy prosecutor who referenced Wife's right to counsel related to the civil matter.
- Respondent refused to provide the taped statement to Wife's counsel, arguing that she had not asked any questions of Wife about the civil matter.
- Wife also represented to the trial court that Wife's counsel had received notice of the taped statement and that it was not relevant to the civil matter. Respondent provided the taped statement to Wife's counsel only when ordered to do so by the trial court.
- Violations of Rule 3.3 (making a false statement to a tribunal), Rule 4.2 (improperly communicating with a represented party); and 8.4(d) (engaging in conduct prejudicial to the administration of justice).
- 30 day suspension with automatic reinstatement.

Fairness: Improper Threats

Impermissible Threats and Leverage

- Rule 3.1 (Meritorious Claims and Contentions);
- Rule 3.4 (Fairness to Opposing Party and Counsel);
- Rule 4.1 (Truthfulness in Statements to Others);
- Rule 4.4 (Respect for Rights of Third Persons); and
- Rule 8.4(b) (Criminal Acts)
- Rule 8.4(d) (Conduct Prejudicial to the Administration of Justice



ABA Formal Opinion 92-363

A lawyer can threaten the opposing side with criminal prosecution if the lawyer has a well-founded **belief** that:

(1) both the civil claim and the **criminal charges are warranted** by the law and the facts; and

(2) the subject matter of **the criminal conduct is related to the underlying civil suit.**

In Re Campanella

- Represented ex-wife in dispute over trade-in of vehicle, alleging ex-husband traded car in using a forged power of attorney.
  - o Included “Chrysler” as a defendant
  - o Chrysler won summary judgment
  - o Campanella Filed Notice of Appeal
- **Campanella sent settlement demand to Chrysler’s counsel demanding $200,000,000 and threatening to file disciplinary grievance against Chrysler’s counsel if the demand was rejected.**
- 30 day suspension, without automatic reinstatement.

In Re Hoffman

- Client asked for invoice and respondent charged client twice.
- Respondent attempted to threaten criminal prosecution to resolve the invoice dispute.
  - Respondent’s email to client indicated client was subject to criminal prosecution and a $500 penalty for writing a bad check.
  - Respondent closed the email by stating, “I don't expect to hear from you about this again, but reserve all my rights in the event I do.”
- Respondent charged with threatening criminal prosecution solely to obtain an advantage in a civil matter.

In Re Christoff

- Fountain County Prosecutor (Holmes) didn’t want another lawyer to run against him
- Holmes and his Chief Deputy (Christoff) threatened to renew a dormant criminal investigation against a potential candidate unless the lawyer opted not to become a candidate
- Christoff filed Disciplinary Grievance against the potential candidate and assisted the Prosecutor in making his threats – “improperly used his prosecutorial discretion to discourage the lawyer from seeking office.”
- IT WORKED—the lawyer did not file as a candidate.
- Public Reprimand

In Re Ruffin

54 So. 3d 645, 648 (La. 2011)

- Respondent used her position as an assistant district attorney to threaten criminal prosecution and gain an advantage in an informal civil matter.
  - Respondent was attempting to resolve the matter on behalf of a long-time friend. (Painter who had received a bad check from a customer)
  - Showed up to “discuss” the matter wearing her DA badge and wrote her mobile on her business card.
  - Returned to the customer’s house a second time and threatened to arrest and prosecute him if he refused to pay the balance.

- 6- month suspension, 30 days served, remainder stayed

Matter of Flatt-Moore

959 N.E.2d 241 (Ind. 2012)

- Respondent prosecuting a check fraud case included restitution, plus 18% interest, as a condition for plea agreement
- Respondent the entirety of restitution decisions to the victim, allowing the victim to use the criminal case as leverage in its civil collection efforts.
- The Court explained that prosecutors "may allow crime victims to have substantial and meaningful input into plea agreements offered to the offenders at whose hands they suffered. . .But . . ."

Matter of Flatt-Moore

959 N.E.2d 241 (Ind. 2012)

- “[B]y giving [victim] unfettered veto power in the plea negotiations. . . Respondent entirely gave up her prosecutorial discretion to enter into what would otherwise be a fair and just resolution of the charges. If a prosecutor puts the conditions for resolving similar crimes entirely in the hands of the victims, defendants whose victims are unreasonable or vindictive cannot receive the same consideration as defendants whose victims are reasonable in their demands. At very least, such a practice gives the appearance that resolution of criminal charges could turn on the whims of victims rather than the equities of each case.”
- Violated Rule 8.4(d) (conduct prejudicial to the administration of justice); public reprimand

Matter of Blickman

164 N.E.3d 708 (Ind. 2021)

- Respondent represented private high school with respect to a report that a teacher at the school had engaged in inappropriate conduct with a student and had received sexually graphic images from the student.
- Respondent attempted to prevent the student and her family from cooperating with law enforcement and the Department of Child Services.
  - This improper demand for silence in connection with the school's settlement payment was "contrary to public policy and sought to subvert justice." *Id.* at 714.
  - The Court reasoned: "After all, had the efforts to silence those involved been successful, the result would have been to shield [the teacher] from answering for his crimes and to turn loose a child predator to teach and coach at another unsuspecting school." *Id.*

Matter of Blickman

164 N.E.3d 708 (Ind. 2021)

- Rule 1.1 (incompetence) and 1.2(d) (counseling or assisting a criminal act) charges were **rejected** by the Court
  - He failed to immediately advise the school to report the suspected child abuse as required by statute.
  - The Court concluded it was reasonable for Respondent to require a few hours to research his client's obligations and Respondent did not encourage or participate in his client's scheme to avoid reporting.

Matter of Blickman

164 N.E.3d 708 (Ind. 2021)

- Rule 8.4(b) (criminal conduct reflecting adversely on the lawyer’s honest, trustworthiness, or fitness in other respects) charge was **rejected**.
  - This charge was based on Respondent’s own failure to directly report the suspected child abuse and his possession of the sexually explicit images of the minor student in connection with his representation.
  - The law with respect to attorney reporting of child abuse is unsettled, and “guessing incorrectly about an unsettled legal matter, upon which reasonable minds can differ and indeed have differed, does not reflect adversely on Respondent's honesty, trustworthiness, or fitness as a lawyer.” *Id.* at 718.
  - Possession of the images was for the purpose of preserving evidence, not for any purpose that would reflect on his fitness as a lawyer. *Id.* at 718-19.

Fairness: Extrajudicial Statements

Matter of Rokita

November 2, 2023

Attorney General publicly alleged that a physician had a history of failing to report abortions as required by law and stated that his office was looking at the physician's licensure.

- Rule 3.6(a) (making an extrajudicial statement substantially likely to prejudice an adjudicative proceeding in the matter)
- Rule 4.4(a) (using means in representing a client with no substantial purpose other than to embarrass, delay, or burden a third person).

Public Reprimand

- Chief Justice Rush and Justice Slaughter dissented, believing the public reprimand was too lenient based on Respondent's position as the Attorney General and the scope and breadth of the admitted conduct.

Thank you!

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DENTONS BINGHAM GREENEBAUM

Recent Indiana Ethics Opinions

(November, 2023 - August, 2024)

Grow | Protect | Operate | Finance

In the Matter of R. M., August 30, 2024 – Affixing false signatures

Respondent was a staff attorney for the Indiana Department of Child Services (DCS). Respondent prepared CHINS petitions using information in documents prepared by DCS case workers and then signed the names of the DCS case workers to the CHINS petitions. Respondent affixed these signatures without the knowledge or permission of the case workers. The Court noted two important facts: 1) there was no evidence that the information in the CHINS petitions was falsified (other than the signatures); and 2) the case workers attended initial hearings on the CHINS petitions with Respondent.

Respondent entered into agreed discipline for violations of 3.3(a)(1) (Knowingly making a false statement of fact to a tribunal); 8.4(c) (Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 8.4(d) (Engaging in conduct prejudicial to the administration of justice). The Court explained that considerations of convenience and efficiency do not excuse a lawyer for affixing a false signature:

> Much of our legal system is predicated on the authenticity and reliability of signatures. For a lawyer to affix a false signature is a deception that gravely undermines public trust, respect, and confidence in the legal profession. Such inexcusable misconduct is not justified or excused by considerations of client convenience, expediency, or lack of personal gain. Affixing a false signature is manifestly dishonest and an absolute ethical transgression. For this offense, I favor a substantial period of suspension.

Matter of Robison, 985 N.E.2d 336, 336-37 (Ind. 2013) (Dickson, C.J., and Rush, J., dissenting). In mitigation, the Court found that Respondent had no prior discipline and a lengthy career of public service.

In the Matter of Taylor, July 18, 2024 – Lack of diligence and client communication in bankruptcy matter and tax appeal

Respondent was hired to file a Chapter 13 Bankruptcy on behalf of Clients. During the bankruptcy proceedings, the clients paid their believed debt to the IRS. Later, the IRS audited Clients and assessed additional unpaid taxes and interest. Respondent agreed to represent clients against the IRS to initiate an adversary proceeding against the IRS to enforce the bankruptcy discharge. However, Respondent did not file the petition and ignored Clients attempts to contact him.

Respondent entered into agreed discipline for violations of Rules 1.3 (diligence) and 1.4(a)(4) (failing to comply with a client's reasonable requests for information). Respondent and the Commission agreed the additional taxes owed by Clients to the IRS were likely nondischargeable and they would have been unlikely to prevail in any adversary petition against the IRS. Respondent received a public reprimand.

In the Matter of Wruble, July 18, 2024 – Divulging client confidences in response to negative online review and engaging in offensive personality

Respondent received a negative online review from a client. Respondent made multiple demands, using derogatory and profane language, that the client remove the post. When the client did not remove the post, Respondent posted a public response to the review which revealed damaging information about the client relating to the subject of the representation. Respondent also revealed this information in a defamation lawsuit he filed against the client. Respondent entered into agreed discipline for revealing confidential information about a former client and for violating the Oath of Attorneys by acting in an offensive manner. Respondent was suspended for 30 days, stayed subject to probation with JLAP monitoring.

Wruble includes a dissent from Justice Slaughter on the basis that "offensive personality" is too subjective to be a standard for attorney discipline. Justice Molter, Justice Massa, and Chief Justice Rush wrote a concurring opinion approving the agreed discipline but leaving open the question of whether it is appropriate to sanction attorneys for violations of the Oath of Attorneys.

In the Matter of Jones, May 6, 2024 – Failing to return unearned fees in a sentence modification matter

Respondent agreed to represent Client in seeking a sentence modification. Respondent filed two motions for progress reports and did not file the modification petition. Client terminated Respondent and asked for a refund of roughly half the flat fee he had paid. Respondent refused to refund any portion of the fee despite never having filed the petition. Respondent ultimately issued a refund during the pendency of the disciplinary proceedings. Respondent entered into agreed discipline for his violation of Rule 1.16 and was suspected for 90 days, with 30 days actively served and the remainder stayed subject to probation requiring additional CLE credits and pro bono service.

In the Matter of Mattingly, April 26, 2024 – OWI while serving as deputy prosecutor

Respondent, then a deputy prosecutor, was drinking alcohol in his car during before and during his lunch hour. He drove his vehicle and then returned to the parking lot and continued to drink. Respondent was discovered in his car and law enforcement was summoned. Respondent pled guilty to an OWI and was subject to interim suspension upon his conviction for a level 6 felony. Respondent entered into agreed discipline for his violations of Rules 8.4(b) and (d) (committing a criminal act reflecting adversely on fitness to practice and conduct prejudicial to the administration of justice). Respondent was suspended for 120 days with 30 days actively served and rest stayed subject to probation with JLAP monitoring.

In the Matter of Nash, April 5, 2024 – Criminal conduct while serving elected prosecutor

Respondent pled guilty to disorderly conduct and harassment (both B misdemeanors) arising from a dispute with his neighbor regarding their pets. Respondent was serving as the elected county prosecutor at the time and taunted his neighbor to call the police and stated "last time I checked I am still the chief law enforcement officer. . . go ahead and call the cops!" Respondent entered into agreed discipline and was suspended for 30 days for violating Rule 8.4(b) (criminal conduct reflecting adversely on honesty, trustworthiness, or fitness as a lawyer) and Rule 8.4(d) (conduct prejudicial to the administration of justice).

In the Matter of Lane, March 15, 2024 – Lack of competence, diligence, and client communication; trust account mismanagement; failure to withdraw from representation

Respondent filed a complaint on behalf of "Clients A" but failed to participate in discovery, mediation, and other pretrial orders. Respondent failed to timely designate evidence in opposition to the defendant's motion for summary judgment and summary judgment was granted for the defendants. Respondent represented "Client B" in a post-conviction proceeding but delayed filing a petition for nearly a year after she first told Client B filing would be "imminent." Respondent failed to appear for a meeting with Client B and failed to respond to multiple inquiries. Respondent attempted to have Client B withdraw his grievance. Finally, Respondent overdrafted her trust account when she failed to deposit client funds before relying on those funds to issue a payment from her trust account.

Respondent attributed her delays to mental health issues and an illness and entered into agreed discipline for violations of Rules 1.1 (competence), 1.3 (diligence), 1.4 (client communication, 1.15 (trust account mismanagement), 1.16(a)(2) (failure to withdraw when materially impaired in the representation), and 8.4(d) (conduct prejudicial to the administration of justice). Respondent was suspended for 60 days, stayed subject to completion of two years of probation with JLAP monitoring.

In the Matter of LeBlanc, February 29, 2024 – Lack of diligence, lack of communication, charging unreasonable fee, and failing to respond to Commission's demand for information

Respondent did not participate in the disciplinary proceedings against her and on the Commission's Motion for Judgment on the Complaint, it was determined that Respondent collected fees for work she did not perform, and clients could not reach her regarding her representation. Respondent was suspended for 60 days, without automatic reinstatement for her violations of Rules 1.3 (diligence), 1.4 (client communication), 1.5(a) (unreasonable fee), and 8.1 (failing to timely respond to Commission's demand for information).

In the Matter of Monterrosa, February 23, 2024 – Lack of diligence and lack of communication in immigration matter.

Respondent represented Client in an immigration matter and failed to confirm that a form and money orders were received by the US Citizenship and Immigration Services ("USCIS") office. The mailing was returned as undeliverable and Respondent re-sent the form and money orders without advising the client. USCIS rejected the form as outdated and because the money orders had expired. Respondent waited three months and sent a letter asking Client to contact her. Four months later, Respondent contacted client seeking to collect an outstanding fee balance. Respondent entered into agreed discipline for violations of Rules 1.3 (failure to act with reasonable diligence and promptness) and 1.4(a)(3) (failure to keep a client reasonably informed about the status of a matter) and was issued a public reprimand.

In the Matter of Dogan, February 23, 2024 – Conflict of interest arising from usurping client's settlement authority, failure to withdraw when terminated by client, and attempting to collect fee from contingency fee client before underlying claim was resolved

Respondent was engaged to represent Clients in a personal injury and worker's compensation claim arising from an injury husband suffered at work. Respondent's contingency fee agreement included a power of attorney provision giving Respondent authority to settle the matter in his discretion and a fee provision requiring Clients to pay Respondent all expenses and fees due in the event they discharged Respondent. Clients hired successor counsel who appeared in the pending litigation. Despite multiple requests from successor counsel and the Clients, Respondent did not withdraw his appearance or provide his file. After the trial court ordered Respondent to withdraw and provide his file, he accused successor counsel of having obtained an ex parte order and asserted that the clients owed him $386,743.67 in legal fees. The next day, Respondent moved to set aside the trial court's order, filed a retaining lien, and—despite still having an appearance on file for Clients—sought to have the lien reduced to a judgment against the Clients. A month later Respondent filed a motion to correct a "scriveners error" indicating that he wanted a retaining lien, not a personal judgment. He then sent successor counsel a letter proposing that if Clients agreed to a judgment against them, Respondent would withhold execution of the judgment until the underlying personal injury claims were resolved. Successor counsel and Clients abandoned their efforts to obtain Respondent's case file and the trial court largely denied Respondent's pending motions as moot.

The following year, although Client's personal injury claims were still pending, Respondent sent a letter to successor counsel asserting that, with interest, he was now owed $552,850.80. Respondent filed a collections lawsuit against Clients and successor counsel seeking these fees and award or attorney fees associated with the collections suit. Respondent moved to intervene in Client's personal injury claim and have that case consolidated with Respondent's collections lawsuit. Shortly thereafter, Respondent filed a notice of charging lien based on quantum meruit recovery, withdrew his motions to intervene and consolidate, and the parties filed a joint motion to dismiss the collections case.

Respondent entered into agreed discipline for violation of the following Rules:

- 1.2(a) and 8.4(a): Attempting to not abide by a client's decision whether to settle a matter.
- 1.7(a)(2): Representing a client when the representation may be materially limited by the attorney's own self-interest.
- 1.16(a)(3): Failing to withdraw from representation after being discharged.
- 8.4(d) and 8.4(a): Attempting to engage in conduct prejudicial to the administration of justice.

Respondent was suspended for 45 days.

In the Matter of Irk, January 19, 2024 — affixing false signature without authorization and falsely notarizing documents in an uncontested adoption matter

In Matter of Irk, Respondent represented Adoptive Parents in an uncontested adoption proceeding. Respondent filed two documents in court to begin the adoption that purported to have the signature of the adoption agency's director. Respondent had notarized both of these documents affirming that the director had signed these forms in his presence. In reality Respondent had cut and paste the director's signature from another document, without her permission. Respondent entered into agreed discipline and was suspended for 30 days for violations of Rule 3.3(a)(1) (knowingly making a false statement of fact to a tribunal), Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Notably, Chief Justice Rush and Justice Goff dissented from the 30-day suspension, believing the sanction to be inadequate. They quoted Matter of Robison, 985 N.E.2d 336 (Ind. 2013):

Much of our legal system is predicated on the authenticity and reliability of signatures. For a lawyer to affix a false signature is a deception that gravely undermines public trust, respect, and confidence in the legal profession. Such inexcusable misconduct is not justified or excused by considerations of client convenience, expediency, or lack of personal gain. Affixing a false signature is manifestly dishonest and an absolute ethical transgression. For this offense, I favor a substantial period of suspension.

Id. at 336-37 (Dickson, C.J., and Rush, J., dissenting)

In the Matter of Devis, January 12, 2024 — OWI and related criminal conduct

In July, 2021, Respondent was convicted of an OWI and leaving the scene of an accident, both misdemeanors. In September, 2022, Respondent pled guilty to two separate misdemeanor counts of trespass. Shortly thereafter, Respondent was charged with a series of probation violations, including consumption of alcohol and failure to schedule a required substance abuse evaluation. Respondent was found to have violated Rule 8.4(b) (committing a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice). Respondent entered into agreed discipline whereby she was suspended for 90 days, with 30 days actively served and the remainder stayed subject to successful completion of two years of JLAP monitoring.

In the Matter of Moreno, December 19, 2023 – Neglect, deceit and abandoning immigration practice

Respondent was disbarred after a pattern of neglecting clients, charging unreasonable fees, engaging in deceitful behavior, failing to cooperate with disciplinary investigations, and ultimately abandoning his immigration law practice.

In the Matter of Trapp, December 11, 2023 — Communicating with represented party and misrepresenting related facts to opposing counsel and tribunal

Respondent represented Husband in a consolidated divorce and protective order proceeding arising from a domestic dispute. Respondent also represented Husband in criminal proceedings arising from the same domestic dispute. Without notifying Wife's counsel in the civil matter, Respondent subpoenaed Wife in the Criminal Case and took a taped statement from her regarding the domestic dispute. Respondent asked several questions about marital property during the taped statement (despite objection of the deputy prosecutor who referenced Wife's right to counsel related to the civil matter. Respondent refused to provide the taped statement to Wife's counsel, arguing that she had not asked any questions of Wife about the civil matter. Wife also represented to the trial court that Wife's counsel had received notice of the taped statement and that it was not relevant to the civil matter. Respondent provided the taped statement to Wife's counsel only when ordered to do so by the trial court.

Respondent was found to have violated Rule 3.3 (making a false statement to a tribunal), Rule 4.2 (improperly communicating with a represented party); and 8.4(d) (engaging in conduct prejudicial to the administration of justice). Respondent was suspended for 30 days with automatic reinstatement.

In the Matter of McGiffen, December 7, 2023 – Attempting to impersonate public servant during traffic stop

Respondent was stopped for speeding and a suspected OWI. Respondent displayed a gold badge during the traffic stop, which was confiscated and identifited as a County Prosecutor's Office badge. Respondent had previously worked at the Prosecutor's Office but was no longer employed there at the time of the traffic stop. Respondent plead guilty to impersonation of a public servant (a level 6 felony) and reckless driving (a class C misdemeanor). Respondent was subject to interim suspension beginning on October 12, 2022, as a result of his conviction and was suspended for 60 days for violations of 8.4(b) (criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer) and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

In the Matter of Dechert, November 8, 2023 – OWI resulting in serious bodily injury

Respondent pled guilty to operating a vehicle while intoxicated causing serious bodily injury, a level 5 felony. Respondent engaged in JLAP programming and substance abuse evaluation and treatment in connection with his criminal probation. Respondent agreed to a 365-day suspension, with 60 days actively served and the remainder stayed subject to completion of two years of probation with JLAP monitoring.

In the Matter of Rokita, November 2, 2023 – Prejudicial extrajudicial statements and engaging improper litigation tactics.

Respondent served as Indiana's Attorney General. In connection with his role as the Attorney General, Respondent publicly alleged that a physician had a history of failing to report abortions as required by law and stated that his office was looking at the physician's licensure. Respondent admitted violations of Rule 3.6(a) (making an extrajudicial statement substantially likely to prejudice an adjudicative proceeding in the matter) and Rule 4.4(a) (using means in representing a client with no substantial purpose other than to embarrass, delay, or burden a third person). Respondent agreed to a public reprimand. Three members of the Court of Appeals approved this sanction. Chief Justice Rush and Justice Slaughter dissented, believing the public reprimand was too lenient based on Respondent's position as the Attorney General and the scope and breadth of the admitted conduct.

In the Matter of Coomes, November 1, 2023 – False information in connection with bar application

Respondent was licensed to practice law in Ohio and sought reciprocal admission in Indiana. Respondent's Indiana application was inaccurate and he was found to have violated Rule 8.1(a) (knowingly making false statement of material fact in connection with a bar admission application) and Rule 8.1(b) (failing to disclose a fact necessary to correct a misapprehension arising in an admissions matter). Respondent agreed to a 45-day suspension with automatic reinstatement.

Meg Christensen
Partner
317 968 5493
margaret.christensen@dentons.com

Section Six

OSHA Citations & Investigations

Timothy G. Galarnyk
Construction Forensic Investigator
Construction Risk Management, Inc.
Bandera, Texas

Section Six

ICLEF (INDIANA CONTINUING EDUCATION FORUM CONSTRUCTION ACCIDENTS LIABILITY CASES

TIMOTHY G. GALARNYK, CONSTRUCTION FORENSIC INVESTIGATOR

CRM

CONSTRUCTION RISK MANAGEMENT INC.

WHAT IS A CONSTRUCTION SAFETY EXPERT?

AN INDIVIDUAL WHO HAS ACQUIRED COMPREHENSIVE SPECIFIC EDUCATION, ADVANCED AND CONTINUING TRAINING, AND EXTENSIVE SPECIFIC EXPERIENCE TO GAIN THE KNOWLEDGE AND AUTHORITATIVE ABILITIES REPRESENTING THE MASTERY OF THE SPECIFIC FIELD AND OF THE SUBJECT UPON WHICH THEY INTEND TO OPINE.

THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 – PUBLIC LAW 91-596

SECTION 5.Duties

(a)

Each employer -

(1)

shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2)

shall comply with occupational safety and health standards promulgated under this Act.

(b)

Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

OSHA INSPECTIONS - INVESTIGATIONS

OSHA COMPLAINCE OFFICERS
1976 to 2024

- Lack of construction experience
- Lack of training
- Progressively got worse
- Focused on diveristy

OSHA INSPECTIONS - INVESTIGATIONS

- Focused on the employer
- Does not consider employee conduct
- Incomplete
- Lacking details
- Only interested in citations

OSHA INSPECTIONS - INVESTIGATIONS

- Are the results of the inspection admissible in court?
- Could these results be admissible?
- How?

OSHA INSPECTIONS - INVESTIGATIONS

- Cited employer does not contest citation(s)
- Contests and then settles

  No exculpatory language
- Does not respond to the citations.

OSHA – MULTI-EMPLOYER CITATION POLICY

- INTERNAL POLICY FOR COMPLIANCE OFFICERS
  - Is not a regulation
  - Has no standing in theory
  - Can only allege a violation
  - Has been improperly allowed for years

Section Seven

Preparing the Corporate 30(b)6 Witness

Renee J. Mortimer
Lewis Brisbois Bisgaard & Smith LLP
Highland, Indiana

Ami T. Anderson, Co-Author
Lewis Brisbois Bisgaard & Smith LLP
Highland, Indiana

Section Seven

Preparing the Corporate 30(b)6 Witness…………………..... Renee J. Mortimer
Ami T. Anderson, Co-Author

Preparing the Corporate 30(b)6 Witness

Ami T. Anderson and Renee J. Mortimer

Lewis, Brisbois, Bisgaard & Smith LLP

I. What Does Trial Rule 30(b)(6) Actually Say?

Rule 30(b)(6) of the Indiana Rules of Trial Procedure states as follows:

> A party may in his notice name as the deponent an organization, including without limitation a governmental organization, or a partnership and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. This subdivision (B)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 30(b)(6) of the Federal Rules of Civil Procedure is very similar and states as follows:

> *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Indiana caselaw provides very little interpretation of the duties and responsibilities of counsel and the corporate entity under the Rule. However, because of the similarities between the Indiana and Federal Rules, Indiana courts have relied on federal precedent when interpreting the Indiana rule. *Everage v. N. Ind. P.S.C.*, 825 N.E.2d 941 (Ind. Ct. App. 2005).

II. What is a Trial Rule 30(b)(6) Deposition?

A deposition requested and taken pursuant to Rule 30(b)(6) allows a party to "seek the corporation's testimony without regard to who actually provides the testimony on behalf of the organization." *Rosenruist-Gestao E Servicos LDA v. Virgin Enters*., 511 F.3d 437, 445 (4th Cir. 2007). "[T]he purpose of the rule was to afford the party deposing the corporation the ability to obtain information on certain matters in the form of testimony on behalf of the corporation without having to name the individual in the corporation to be deposed. *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 729 (D. Mass. 1985). "Rule 30(b)(6) is designed 'to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself.'" *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006)(*quoting* 8A CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2103, at 33 (2d ed. 1994)). "[A]nother purpose of the rule was to allow the corporation to designate a person who was prepared to answer questions on certain matters on behalf of the corporation." *Paparelli v. Prudential Ins. Co.,* 108 F.R.D. 727, 730 (D. Mass. 1985).

For purposes of the deposition, there is "no distinction between the corporate representative and the corporation." *Id.* (*quoting Sprint Commc'ns. Co. v. Theglobe.com, Inc.,* 236 F.R.D. 524, 527 (D. Kan. 2006)). "[A] rule 30(b)(6) designee does not give his personal opinions, but presents the corporation's 'position'" on the topic." *Brazos River Auth. v. GE Ionics, Inc.,* 469 F.3d 416 (5th Cir. 2006).

III. What Do You Do When You Receive a Trial Rule 30(b)(6) Deposition Notice?

A. Determine Whether the Notice is Proper

Pursuant to Rule 30(B)(1) of the Indiana Rules of Trial Procedure, a notice relevant to the deposition of a fact witness only requires the name and address of the deponent and the time and place of the deposition. However, a notice for a deposition of a corporate representative requires significantly more information.

Both the Indiana Rule and the Federal Rule require the deposition notice to describe the topics to be addressed during the deposition with "reasonable particularity." "The purpose of the reasonable particularity requirement is to allow the business to identify a witness or witnesses who possesses knowledge responsive to the subjects identified in the Rule 30(b)(6) notice." *Catt v. Affirmative Ins. Co.*, No. 2:08-CV-243-JVB-PRC, 2009 U.S. Dist. LEXIS 37443, at 20 (N.D. Ind. Apr. 30, 2009)(*citing Hooker v. Norfolk S. Ry. Co.,* 204 F.R.D. 124, 126 (S.D. Ind. 2001)). It is not sufficient to include general statements such as "any matters relevant to this case." *Kalis v. Colgate-Palmolive Co.,* 231 F.3d 1049 (7th Cir. 2000)(*citing Alexander v. Federal Bureau of Investigation,* 188 F.R.D. 111 (D.D.C. 1998)). Instead, "[t]he requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute." *Id.* (*quoting Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633 (D. Minn. 2000)).

Potential "red flags" of improper notices include the following:

- Notices that include vague or overly inclusive potential topics, i.e., any and all information related to this claim

- Specific topics are overly broad. *Richardson v. Rock City Mech. Co., LLC,* No. 3-09-0092, 2010 U.S. Dist. LEXIS 16647, at 18 (M.D. Tenn. Feb. 24, 2010)("any specific topic can be challenged on the basis of overbreadth and that such a challenge may have particular significance in light of the defendant's obligation to properly prepare a Rule 30(b)(6) witness.)

- Notices requiring the witness to have "personal knowledge" of the identified topics. *Reed v. Nellcor Puritan Bennett & Mallinckrodt,* 193 F.R.D. 689, 692 (D. Kan. 2000)

- Notices indicating that the topics "include, but are not limited to" the areas identified in the notice. *Reed v. Nellcor Puritan Bennett & Mallinckrodt,* 193 F.R.D. 689, 692 (D. Kan. 2000)

Additionally, the topics that can be addressed during a Trial Rule 30(b)(6) deposition are limited by Rule 26 of the Indiana Rules of Trial Procedure or the Federal Rules of Civil Procedure. Pursuant to Rule 26(B)(1) of the Indiana Rules of Trial Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party."

The relevancy standard for discovery is much broader than the admissibility standard for trial. For purposes of discovery, any information that is reasonably calculated to lead to the discovery of admissible evidence is within the scope of permissible inquiry. However, that scope is not unlimited, and Trial Rule 30(b)(6) deposition topics have the potential to seek information regarding a corporation that is well beyond what is relevant to the case at issue. Some potential overreaching topics may include:

- Topics seeking information unlimited in time or otherwise temporally unrelated to the claim or any defense;

- Topics seeking information pertaining to other, unrelated claims; and

- Topics seeking personal information regarding current or former representatives or employees that are unrelated to the litigation.

Similarly, deposition topics may seek to address confidential business information. Rule 26(C)(7) provides protection for trade secrets or "other confidential research, development, or commercial information." "Indiana Code § 24-2-3-2 defines a "trade secret" as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Trade secrets are protected from discovery through Indiana

Code § 24-2-3-6, which states as follows: "[A] court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."

Examples of information that Indiana state and federal courts have found to qualify as protected trade secrets in certain factual circumstances include:

- Research and data regarding consumer purchasing habits and sales techniques. *Star Sci., Inc. v. Carter,* 204 F.R.D. 410 (S.D. Ind. 2011)

- Customer lists, supplier lists and pricing data. *Ackerman v. Kimball Int'l,* 634 N.E.2d 778, 783 (Ind. Ct. App. 1994)

- Compiled data that was accumulated through the "substantial investment of time, expense or effort" may qualify for protection as a trade secret. *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993)

Similarly, depending on the corporation at issue, the deposition topics may focus on information that may be protected by another specific statutory privilege. These privileges included, but are not limited to, Peer Review Statutes (Indiana Code §§ 34-30-15-1 (healthcare) and 25-2.1-5-8 (accounting)) and Accountant-Client Privilege (Indiana Code § 25-2.1-14-1).

Additionally, Rule 26(C) of the Indiana Rules of Trial Procedure provides a mechanism to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." From a corporate perspective, the potential for undue burden or expense may provide another basis for objection depending on the volume of information upon which a representative may be requested to testify.

Once potentially problematic topics are identified, the first step is to contact opposing counsel. Rule 26(F) of the Indiana Rules of Trial Procedure (as well as various local rules) require the parties to "make a reasonable effort to reach agreement with the opposing party." However, in the event that an agreement or compromise cannot be reached, a protective order can be sought pursuant to Rule 26(C) of the Indiana Rules of Trial Procedure, which allows the Court to preclude or limit requested discovery.

Trial Rule 30(b)(6) deposition topics may also seek information that is covered by a recognized privilege. Most commonly, the privileges at issue will be the attorney-client privilege and the work-product privilege. However, it may be difficult to assert claims of privilege prior to the deposition itself because blanket claims of privilege are disfavored. *Hayworth v. Schilli Leasing*, 669 N.E.2d 165, 169 (Ind. 1996). Instead, "[t]he party seeking to assert a privilege has the burden to allege and prove the applicability of the privilege 'as to each question asked or document sought.'" *Id.* (*quouting Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995) (*citing In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980)). As such, these privileges are discussed in more detail below.

B. Selection and Preparation of an Appropriate Corporate Trial Rule 30(b)(6) Representative

Once appropriate areas of inquiry are identified, the next step is the selection of an appropriate deponent. Pursuant to Rule 30(B)(6) of the Indiana Rules of Trial Procedure, as well as the corresponding federal rule, the company is required to "designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf." As such, multiple representatives could be designated to testify regarding specific topics identified in the notice. However, any and all representatives must be properly prepared to testify on behalf of the corporation as they "'must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions,' as well as the organization's 'interpretation of documents and events.'" *Avenatti v. Gree USA, Inc.*, No. 2:20-cv-00354-JPH-MJD, 2022 U.S. Dist. LEXIS 141988, at 5-6 (S.D. Ind. Aug. 5, 2022) (*quoting United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)). "Rule 30(b)(6) places the burden upon the deponent to "make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought … and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed … as to the relevant subject matters." *Harris v. New Jersey*, 259 F.R.D. 89 (D.N.J. 2007)(*quoting Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 67 (D.P.R. 1981));

An organization is responsible for preparing the designated individual(s) to testify regarding "information known or reasonably available to the organization." *Ball Corp. v. Air Tech of Mich., Inc.*, 329 F.R.D. 599 (N.D. Ind. 2019). "Importantly, the organization has a duty to gather the information and prepare the designee(s) so that they can give complete, knowledgeable, and binding testimony." *Avenatti v. Gree USA, Inc.*, No. 2:20-cv-00354-JPH-MJD, 2022 U.S. Dist. LEXIS 141988 (S.D. Ind. Aug. 5, 2022)(*citing Alliance for Global Justice v. District of Columbia*, 437 F. Supp. 2d 32, 37 (D.D.C. 2006) ("By its very nature, a Rule 30(b)(6) deposition notice requires the responding party to prepare a designated representative so that he or she can testify on matters not only within his or her personal knowledge, but also on matters reasonably known to the responding entity.").

"The duty of preparation goes beyond matters personally known to the designee or to matters in which the designee was personally involved, and if necessary the deponent must use documents, past employees or other resources to obtain responsive information." *Harris v. New Jersey*, 259 F.R.D. 89 (D.N.J. 2007)(*quoting United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)). "If need be, the responding party 'must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits.'" *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633 (D. Minn. 2000)(*quoting United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996)).

IV. Objections During the Deposition

As with any deposition, a witness may be asked questions that seek information protected by privilege. The attorney-client privilege "protects against judicially compelled disclosure of confidential information regardless of whether the information is to be disclosed by way of testimony or by court-ordered compliance with a discovery request which a party has attempted to resist." *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721 (Ind. Ct. App. 1995)(*quoting Canfield* *v. Sandock*, 563 N.E.2d 526, 529 (Ind. 1990)). "The rule is that 'when an attorney is consulted on business within the scope of his profession, the communication on the subject between him and his client should be treated as strictly confidential.'" *Id.* (*quoting Colman v. Heidenreich*, 381 N.E.2d 866, 869 (Ind. 1978))(internal quotations omitted). "The privilege applies to all communications between the client and his attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities." *Id.* (*citing Hueck v. State*, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992)).

When defending a Trial Rule 30(B)(6) deposition, it is important to keep in mind that the business may have sought legal advice on matters from other counsel throughout the course of the business. Those issues may be tangentially related to the litigation at issue, making them potentially relevant for purposes of discovery. However, the attorney-client privilege still applies to those prior communications.

The work-product doctrine protects materials prepared in anticipation of litigation. However, it also precludes disclosure of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation." *Richey v. Chappell*, 594 N.E.2d 443, 445 (Ind. 1992). "Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses." *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 355 (Ind. Ct. App. 1992)(*quoting Spork v. Peil* (1985), C.A.3, 759 F.2d 312, 316).

The documents selected by counsel for purposes of reviewing the same with the deponent in preparation for the deposition are considered work product as "identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions." *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 355 (Ind. Ct. App. 1992)(*quoting Spork v. Peil* (1985), C.A.3, 759 F.2d 312, 316).

V. Consequences for Not Following the Rules

As with all discovery violations, failure to comply with Rule 30(b)(6) could lead to consequences pursuant to Rule 37 of the Indiana Rules of Trial Procedure or the corresponding federal rule. "[W]hen the discovery process breaks down, Indiana Trial Rule 37 provides the court with tools to enforce compliance." *Nwannunu v. Weichman & Assocs., P.C.*, 770 N.E.2d 871, 876 (Ind. Ct. App. 2002)(*citing Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 399 (Ind. Ct. App. 1997)). "The court may impose various sanctions, including an award of costs and attorney's fees, exclusion of evidence, dismissing the action, or rendering a judgment by default." *Id.* (*citing* T.R. 37(B)(2)). Some examples of consequences that have been ordered for failure to comply with Rule 30(b)(6) are as follows:

- In *Hummer Transp., Inc. v. Spoa-Harty*, No. 64A04-1002-CT-72, 2010 Ind. App. Unpub. LEXIS 1749 (Ct. App. Dec. 15, 2010), one defendant failed to produce a Trial Rule 30(b)(6) deponent and one defendant produced an unprepared Trial Rule 30(b)(6) deponent. The trial court entered default judgment against both relevant to liability, and the decision was affirmed by the Indiana Court of Appeals.

- In *Avenatti v. Gree USA, Inc.*, No. 2:20-cv-00354-JPH-MJD, 2022 U.S. Dist. LEXIS 141988 (S.D. Ind. Aug. 5, 2022), the Trial Rule 30(b)(6) witness was not prepared to testify. In addition to being ordered to produce a new, properly prepared witness, the defendant was ordered to pay monetary sanctions and costs relevant to the deposition.

- In *Buckley v. S.W.O.R.N. Prot., LLC*, No. 1:20-cv-00357-HAB-SLC, 2022 U.S. Dist. LEXIS 19597 (N.D. Ind. Feb. 3, 2022), a designated Trial Rule 30(b)(6) witness failed to appear for her deposition. As a result, the court imposed sanctions including attorney fees and expenses.

Preparing the Corporate 30(b)(6) Witness

Renee J. Mortimer
Lewis, Brisbois, Bisgaard & Smith LLP

What does Trial Rule 30(b)(6) Actually Say?

Rule 30(b)(6) of the Indiana Rules of Trial Procedure states as follows:

A party may in his notice name as the deponent an organization, including without limitation a governmental organization, or a partnership and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. This subdivision (B)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

LEWIS BRISBOIS

Rule 30(b)(6) of the Federal Rules of Civil Procedure is very similar and states as follows:

Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Indiana caselaw provides very little interpretation of the duties and responsibilities of counsel and the corporate entity under the Rule. However, because of the similarities between the Indiana and Federal Rules, Indiana courts have relied on federal precedent when interpreting the Indiana rule. *Everage v. N. Ind. P.S.C.*, 825 N.E.2d 941 (Ind. Ct. App. 2005).

What is a Trial Rule 30(b)(6) Deposition?

- Allows a party to “seek the corporation’s testimony without regard to who actually provides the testimony on behalf of the organization.”
- Affords the party deposing the corporation the ability to obtain information on certain matters in the form of testimony on behalf of the corporation without having to name the individual in the corporation to be deposed
- Avoids the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself.
- Allows the corporation to designate a person who was prepared to answer questions on certain matters on behalf of the corporation.
- There is “no distinction between the corporate representative and the corporation.”
- “[A] rule 30(b)(6) designee does not give his personal opinions, but presents the corporation's ‘position’” on the topic.”

What Do You Do When You Receive a Trial Rule 30(b)(6) Deposition Notice?

LEWIS BRISBOIS

Get Corporation's General Counsel Involved!

Determine Whether the Notice is Proper:

- Both the Indiana Rule and the Federal Rule require the deposition notice to describe the topics to be addressed during the deposition with "reasonable particularity."
- "The purpose of the reasonable particularity requirement is to allow the business to identify a witness or witnesses who possesses knowledge responsive to the subjects identified in the Rule 30(b)(6) notice."
- It is not sufficient to include general statements such as "any matters relevant to this case."
- "[T]he requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."

Potential “red flags” of improper notices include the following:

- Notices that include vague or overly inclusive potential topics, i.e., any and all information related to this claim
- Notices requiring the witness to have “personal knowledge” of the identified topics.
- Notices indicating that the topics “include, but are not limited to” the areas identified in the notice.
- Topics seeking information unlimited in time or otherwise temporally unrelated to the claim or any defense;
- Topics seeking information pertaining to other, unrelated claims; and
- Topics seeking personal information regarding current or former representatives or employees that are unrelated to the litigation.
- Topics seeking confidential business information.
    - Rule 26(C)(7) provides protection for trade secrets or “other confidential research, development, or commercial information.”
    - “Indiana Code § 24-2-3-2 defines a “trade secret.”
    - Trade secrets are protected from discovery through Indiana Code § 24-2-3-6.

Examples of protected trade secrets in certain factual circumstances include:

- Research and data regarding consumer purchasing habits and sales techniques. *Star Sci., Inc. v. Carter*, 204 F.R.D. 410 (S.D. Ind. 2011)
- Customer lists, supplier lists and pricing data. *Ackerman v. Kimball Int'l,* 634 N.E.2d 778, 783 (Ind. Ct. App. 1994)
- Compiled data that was accumulated through the "substantial investment of time, expense or effort" may qualify for protection as a trade secret. *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993)

Other Privileges:

Peer Review Statutes (Indiana Code §§ 34-30-15-1 (healthcare) and 25-2.1-5-8 (accounting)) and Accountant-Client Privilege (Indiana Code § 25-2.1-14-1).

Additionally, Rule 26(C) of the Indiana Rules of Trial Procedure provides a mechanism to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." From a corporate perspective, the potential for undue burden or expense may provide another basis for objection depending on the volume of information upon which a representative may be requested to testify.

If Objections to 30(b)(6) Notice:

- Contact opposing counsel
- Seek protective order
- Make record during deposition

Selection and Preparation of an Appropriate Corporate Trial Rule 30(b)(6) Representative:

- Consult client or general or corporate counsel
- Multiple witnesses can be designated
- Witness preparation key (meetings meetings meetings)

Preparation:

- An organization is responsible for preparing the designated individual(s) to testify regarding "information known or reasonably available to the organization."
- The organization has a duty to gather the information and prepare the designee(s) so that they can give complete, knowledgeable, and binding testimony.
- The responding party must prepare a designated representative so that he or she can testify on matters not only within his or her personal knowledge, but also on matters reasonably known to the responding entity.
- The duty of preparation goes beyond matters personally known to the designee or to matters in which the designee was personally involved, and if necessary the deponent must use documents, past employees or other resources to obtain responsive information.
- If need be, the responding party 'must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits.'

During the Deposition

- Corporate/General counsel present
- All objections fair game
- Broader issues of privilege and trade secret
- Keep witness on task
- Keep lawyers on task

The work-product doctrine protects materials prepared in anticipation of litigation. However, it also precludes disclosure of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.” *Richey v. Chappell*, 594 N.E.2d 443, 445 (Ind. 1992). “Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses.” *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 355 (Ind. Ct. App. 1992)(*quoting Spork v. Peil* (1985), C.A.3, 759 F.2d 312, 316).

The documents selected by counsel for purposes of reviewing the same with the deponent in preparation for the deposition are considered work product as “identification of the documents as a group will reveal defense counsel’s selection process, and thus his mental impressions.” *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 355 (Ind. Ct. App. 1992)(*quoting Spork v. Peil* (1985), C.A.3, 759 F.2d 312, 316).

Consequences for Not Following the Rules

- In *Hummer Transp., Inc. v. Spoa-Harty*, No. 64A04-1002-CT-72, 2010 Ind. App. Unpub. LEXIS 1749 (Ct. App. Dec. 15, 2010), one defendant failed to produce a Trial Rule 30(b)(6) deponent and one defendant produced an unprepared Trial Rule 30(b)(6) deponent. The trial court entered default judgment against both relevant to liability, and the decision was affirmed by the Indiana Court of Appeals.
- In *Avenatti v. Gree USA, Inc.*, No. 2:20-cv-00354-JPH-MJD, 2022 U.S. Dist. LEXIS 141988 (S.D. Ind. Aug. 5, 2022), the Trial Rule 30(b)(6) witness was not prepared to testify. In addition to being ordered to produce a new, properly prepared witness, the defendant was ordered to pay monetary sanctions and costs relevant to the deposition.
- In *Buckley v. S.W.O.R.N. Prot., LLC*, No. 1:20-cv-00357-HAB-SLC, 2022 U.S. Dist. LEXIS 19597 (N.D. Ind. Feb. 3, 2022), a designated Trial Rule 30(b)(6) witness failed to appear for her deposition. As a result, the court imposed sanctions including attorney fees and expenses.

Thanks for listening!

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Section Eight

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ICLEF: Construction Accident and Commercial Premises Liability Cases

Trial Planning and Strategy

I. Introduction

The construction industry in the United States constitutes a sizeable portion of the economy. The industry employs over 8 million employes and is estimated to be a $2 trillion industry annually.[1] The construction industry is also dangerous. In 2021, over 1,000 employees in the construction industry died on the job, representing nearly 20% of all workplace deaths in the United States.[2]

This article examines the legal consequences when a person who is not an employee sustains an injury on a construction site, as there may be a viable claim against a tortfeasor, including the contractor on the site. As explained in Smith, Currie & Hancock's guide on Construction Law, there may be liability for "negligence that results in personal injury or property damage to persons rightfully on the premises, occupants of adjacent premises and persons lawfully using a street or highway abutting the construction site."[3]

To prevail on a negligence claim in Indiana, the plaintiff must show (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by the breach of duty. However, litigation concerning injuries suffered on a construction site brings about various other considerations. These considerations are discussed in the article.

II. Assigning Liability

There are several actors involved in a construction site, such as the architect, contractor, subcontractor, and the workers themselves. As such, an injured person may inquire who may be assigned liability. Generally, liability is assigned based on the terms of the construction contract. As the Indiana Supreme Court has explained:

> Perhaps more than any other industry, the construction industry is vitally enmeshed in our economy and dependent on settled expectations. The parties involved in a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required—owner, architect, engineer, general contractor, subcontractor, materials supplier—and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and

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[1] Ken Simonson & Macrina Wilkins, *Construction Data*, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, https://www.agc.org/learn/construction-data#:~:text=Construction%20is%20a%20major%20contributor,worth%20of%20structures%20each%20year (last visited April 12, 2024).

[2] *Construction deaths due to falls, slips, and trips increased 5.9 percent in 2021*, UNITED STATES BUREAU OF LABOR STATISTICS (May 1, 2023), https://www.bls.gov/opub/ted/2023/construction-deaths-due-to-falls-slips-and-trips-increased-5-9-percent-in-2021.htm.

[3] SMITH CURRIE & HANCOCK'S COMMON SENSE CONSTRUCTION LAW, 6 (Thomas J. Kelleher, Jr. ed., 3rd ed. 2005).

> defects. Imposition of tort duties that cut across those contractual lines disrupts and frustrates the parties' contractual allocation of risk and permits the circumvention of a carefully negotiated contractual balance among owner, builder, and design professional. Indeed, the right of the parties to make their own bargain as to economic risk is impaired.[4]

Oftentimes, the AIA (American Institute of Architects) controls the terms of the construction contract. The terms generally assign a duty on the contractors to provide a safe construction site. As such, liability generally falls upon the contractor. However, an architect or engineer may be found to be liable if their actions fail to meet their assigned responsibilities in the contract.[5] Moreover an architect or engineer has a duty to provide competent skill and learning to contractors, or anyone else "who could *foreseeably* be injured by the design professional's negligence."[6] Therefore, it is imperative that an injured person's attorney have familiarity with these types of contracts to determine where liability should be assigned.

Moreover, a contractor may not escape liability if the duty is assigned via the contract. For example, suppose the construction contract requires the contractor to "ensure the construction site follows all applicable safety laws and to maintain a safe environment to employees and the general public." Then, suppose a subcontractor failed to adhere to OSHA safety standards, thus creating a dangerous environment that led to a significant injury. Can the general contractor be held liable? The answer is yes. Though the longstanding rule in Indiana is "that a principal is not liable for the negligence of an independent contractor," there are five exceptions to the rule.[7] The exceptions are: "(1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal."[8] If one of these five factors exist, the duty is considered to be nondelegable. In the hypothetical scenario, and in most construction matters, the contractor cannot absolve itself of the duty imposed by the contract, which falls within the second exception to Indiana's general rule on liability and creates a nondelegable duty.[9]

III. Duty: Premises Liability – Control Requirement

In general, injuries sustained on a construction site are litigated through a premises liability framework. In order to prevail on a premises liability claim for injuries sustained on a

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[4] Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 738 (Ind. 2010) (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L.REV. 891, 941 (1989)).
[5] *Id.*; *See also* WILLIAM ALLENSWORTH ET AL., CONSTRUCTION LAW 490 (William Allensworth et al. eds., 2009).
[6] SMITH CURRIE & HANCOCK'S COMMON SENSE CONSTRUCTION LAW, 6 (Thomas J. Kelleher, Jr. ed., 3rd ed. 2005) (emphasis in original).
[7] Bagley v. Insight Comm. Co., L.P., 658 N.E.2d 584, 586 (Ind. 1995).
[8] *Id*.
[9] *See* Capitol Const. Serv., Inc. v. Gray, 959 N.E.2d 294 (Ind. Ct. App. 2011); Stumpf v. Hagerman Const. Corp., 863 N.E. 2d 871 (Ind. Ct. App. 2007); Harris v. Kettelhut Const., Inc., 468 N.E.2d 1069 (Ind. Ct. App. 1984).

construction site, the plaintiff must first prove the defendant possessed control over the site. As explained by the Indiana Court of Appeals in *Carroll by Carroll v. Jagoe Homes, Inc.*, "Only a party who exerts control over the premises owes a duty to persons coming onto the premises."[10] Importantly, control need not be possessed exclusively. As explained in the Indiana Model Civil Jury Instructions, "Several persons or entities may each have sufficient control as an owner or as an occupant even though [pronoun] control is only partial or joint."[11] A person can exercise control over the land in three ways:

(a) a person who is in occupation of the land with intent to control it, or
(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).[12]

Consider the Court's opinion in *Helton v. Harbrecht* found the contractor did not control the premises and could not be held liable under a premises liability theory.[13] In *Helton*, a contractor was building a new home. The mother of the future owner of the home visited the construction site and was injured climbing down a ladder. She sued the construction company. However, the Court ruled that no duty existed because the contractor did not control the property. The most important considerations were that no employees were present at the time of the accident and no employees had been on the construction site for a month. In fact, the only work completed on the site on the day of the accident was electrical work by the future owner. Because the contractor was not actively working at the location, they did not possess the necessary control to owe a duty to the mother.

Contrast *Helton* with the Court's decision *Rider v. McCamment*. In *Rider*, the construction crew left the construction site for only a couple of hours after it began to rain.[14] The contractor was subsequently sued when a person was injured on a deck while the workers were away. The Court noted that the contractor was in control of the deck, as he was present on the construction site earlier that day and had been working on the deck shortly before and after the accident. The facts of *Helton* and *Rider* provide meaningful context as to when a potential tortfeasor is in control of the construction site, which is a requirement for cases of premises liability.

IV. Duty: Premises Liability

Generally, defining a duty is somewhat difficult. As the Indiana Supreme Court has written, "'[D]uty is not sacrosanct in itself, but is only an expression of the sum total of those consideration of policy which lead the law to say that the plaintiff is entitled to protection."[15] However, duty is much more clear in construction site cases. To begin, an injured person will be

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[10] Carroll by Carroll v. Jagoe Homes, Inc., 677 N.E.2d 612, 616 (Ind. Ct. App. 1997).
[11] INDIANA JUDGES ASSOCIATION, INDIANA MODEL CIVIL JURY INSTRUCTION: § 1912 POSSESSOR OF LAND (2023 ed.).
[12] *Id.*
[13] Helton v. Harbrecht, 701 N.E.2d 1265 (Ind. Ct. App. 1998).
[14] Rider v. McCamment, 938 N.E.2d 262 (Ind. Ct. App. 2010).
[15] Garip Const. Co. v. Foster, 519 N.E.2d 1224, 1227 (Ind. 1988) (quoting W. PAGE KEETON ET. AL, PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed.1984)).

assigned one or three designations for purposes of premises liability law: a trespasser, a licensee, or an invitee. A person's designation is paramount to a premises liability case, as each designation carries a different level of duty placed upon the property owner. A trespasser is owed the least duty, an invitee is owed the highest duty, and the duty owed to a licensee falls in the middle. After a level of legal duty is assigned, the plaintiff must argue the defendant did not meet the duty. *Burrell v. Meads* is the most authoritative case in Indiana discussing each designation.[16] Each designation is discussed below:

1. Trespasser

i. Who is a trespasser?

A trespasser is one who enters onto the land of another for "their own convenience, curiosity, or entertainment" without permission or sufferance.[17] In *Kopczynski v. Barger* (2008), the Indiana Supreme Court noted that permission need not be explicit:

> In the absence of actual authority to invite third parties to the house, the issue is whether the landowner's conduct gave the third party reason to believe that the landowner was willing to allow the third party to enter the land. *See* 62 Am.Jur.2d *Premises Liability* § 112 (2005) ("The word 'consent' or 'permission' indicates that the possessor of the land is in fact willing that the visitor, or entrant, enter and remain thereon, or that the possessor's conduct gives the entrant reason to believe that the possessor is willing to allow him or her to enter if he or she desires to do so.").

ii. What duty is owed to a trespasser?

A trespasser receives the lowest duty owed to them by a landowner. Under Indiana law, a "landowner owes a trespasser the duty to refrain from willfully or wantonly (intentionally) injuring him after discovering his presence."[18] This is the most widely accepted standard in the Indiana courts. However, the Restatement (Second) of Torts § 336 (1965), provides that "A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety."[19] The Indiana Court of Appeals adopted this position 1974 in the case of *Surratt v. Petrol, Inc.*, but it has been infrequently applied since, with most courts, including the Indiana Supreme Court, continuing with the bright line willful or wanton test.[20]

To provide an example, suppose a major retail store is renovating a portion of the store. After the store has closed, burglars break into the store at 2:00 AM to steal valuable merchandise. One

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[16] Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991).
[17] *Id.* at 640.
[18] *Id.* at 639.
[19] RESTATEMENT (SECOND) OF TORTS § 336 (1965).
[20] Surratt v. Petrol, Inc., 312 N.E.2d 487, 492 (Ind. Ct. App. 1974).

of the burglars is injured on the site of the construction renovations and sustains serious injury. Because the burglars are trespassers, the store only owes a duty to refrain from willfully injuring the burglars. As long as the store or construction contractor did not intend for the construction site to endanger the burglars, it owes no duty to the burglars and cannot be held liable for injuries sustained on the construction site.

2. Licensee

i. Who is a licensee?

A licensee generally includes three types of persons:

> 1. One whose presence upon the land is solely for his own purposes, in which the possessor has no interest, and to whom the privilege of entering is extended as a mere personal favor to the individual, whether by express or tacit consent or as a matter of general or local custom.
> 2. The members of the possessor's household, except boarders or paying guests and servants, who, as stated in § 332, Comments *i* and *j*, are invitees.
> 3. Social guests. Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an "invitee," within the legal meaning of that term, as stated in § 332. He does not come as a member of the public upon premises held open to the public for that purpose, and he does not enter for a purpose directly or indirectly connected with business dealings with the possessor. The use of the premises is extended to him merely as a personal favor to him.[21]

ii. What duty is owed to a licensee?

A licensee is owed a higher duty than a trespasser. In Indiana a "landowner owes a licensee the duty to refrain from willfully or wantonly injuring him or acting in a manner to increase his peril. The landowner also has a duty to warn a licensee of any latent danger on the premises of which the landowner has knowledge."[22]

3. Invitee

i. Who is an invitee?

"(1) An invitee is either a public invitee or a business visitor; (2) a public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for

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[21] RESTATEMENT (SECOND) OF TORTS § 330 (1965).
[22] Burrell v. Meads, 569 N.E.2d 637, 639 (Ind. 1991).

which the land is held open to the public; (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with the business dealings with the possessor of the land."[23]

ii. What duty is owed to an invitee?

The highest duty is owed to an invitee.[24] The Restatement (Second) of Torts provides that, "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger."[25]

Consider the store and burglar hypothetical. Instead of burglars breaking into the store at 2:00 AM, a shopper is injured on the construction site at 2:00 PM during store hours. The shopper is now an invitee and owed a much higher duty of care. Instead of a nearly impossible burden to overcome, the injured person has a much higher chance of success in the construction site litigation.

V. Breach of the Duty: Premises Liability

A breach of duty "is determined by the reasonableness under the circumstances of the actions of the alleged tortfeasor. Breach of duty usually involves an evaluation of reasonableness and thus is usually a question to be determined by the finder of fact in negligence cases."[26]

The standard for a breach regarding an "obvious" danger is clearer. Since large construction sites are likely to be "obvious" to the defendant, litigants should consider the three factors as to whether a breach has occurred for an obvious risk: "(1) whether the landowner knew or by the exercise of reasonable care would have discovered the dangerous condition and should have realized that it involved an unreasonable risk of harm to invitees; (2) whether the landowner should have expected that an invitee would fail to protect him—or herself from the danger; and (3) whether the landowner failed to exercise reasonable care to protect the invitee."[27]

VI. Injury: Proximate Cause and Damages

1. Injury

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[23] RESTATEMENT (SECOND) OF TORTS § 332 (1965).
[24] Burrell v. Meads, 569 N.E.2d 637, 639 (Ind. 1991).
[25] RESTATEMENT (SECOND) OF TORTS § 343 (1965).
[26] Pfenning v. Lineman, 947 N.E.2d 392, 403 (Ind. 2011).
[27] Nagel v. N. Indiana Public Service Co., 26 N.E.3d 30, 46 (Ind. Ct. App. 2015).

When considering what constitutes an injury in a construction site negligence case, it is important to acknowledge the economic loss rule. The economic loss rules applies in many jurisdictions, including Indiana. The doctrine is best explained as, "Recovery of purely economic losses is properly the realm of contract law and not tort law. . . As such, under the economic loss rule, damages for purely economic losses are not recoverable in tort."[28] However, the economic loss rule is not all encompassing. As the Indiana Supreme Court has written, "But we emphasize before going further that the economic loss rule has limits, that while it operates as a *general* rule to preclude recovery in tort for economic loss, it does so only for *purely* economic loss—pecuniary loss unaccompanied by any property damage or personal injury (other than damage to the product or service provided by the defendant)—and even when there is purely economic loss, there are exceptions to the general rule."[29] As such, the economic loss rule does not apply to any property damage, which is important in a construction site case. For example, suppose the contractor performing construction work on a home is negligent and the negligence results in property damage to the neighbor's home or property. Though there is no physical injury to his person, the neighbor is likely not precluded from recovery due to the economic loss rule.

2. Proximate Cause

To satisfy the third element of a negligence claim, plaintiff must prove an injury that was proximately caused by the defendant. As the Indiana Supreme Court explained in *Havert v. Caldwell*, "[T]he authorities are clear that where the negligent actor's act or omission has the effect of setting in motion the chain of events leading to the injury, the key to holding that act or omission to be the proximate cause of the injury is that the ultimate injury be one that was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the act or omission." Accordingly, the injury sustained on a construction site must be foreseeable.

The Indiana Court of Appeals considered foreseeability in *Rider v. McCamment*.[30] In *Rider*, the contractor left the scene of a new construction home due to rain. The contractor was working on the deck, which became slippery and was missing rails. The future owner's mother visited the scene, and sustained injuries when she fell off the deck. The Court considered the foreseeability of the mother visiting the construction site. Even though the contract between the contractor and future owner stipulated that the owner must get permission from the contractor for any visits to the site, her visit could have been foreseeable, given that she frequently visited the property without obtaining permission while the contractors were present. Therefore, the mother could meet the proximate cause burden and the motion to dismiss was denied. In construction site cases, the court will consider the foreseeable of the injured person to be on, or near, the construction site and if the risk of injury was foreseeable.

3. Damages

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[28] LYNN R. AXELROTH ET AL, FUNDAMENTALS OF CONSTRUCTION LAW 275 (Carina Y. Enhada, Cheri Turnage Gatlin, Fred D. Wilshusen eds., 2001).
[29] Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 738 (Ind. 2010).
[30] Rider v. McCamment, 938 N.E.2d 262 (Ind. Ct. App. 2010).

The damages for injuries sustained on a construction site are the same as typical tort damages, such as medical bills, lost wages and the cost to rebuild physical damage to property, as well as non-economic damages, such as pain and suffering.[31] Though rare, punitive damages can be recovered.[32] A plaintiff can recover both direct and consequential damages in tort law.[33]

VII. Negligence Per Se & Strict Liability

1. Negligence Per Se

Oftentimes, there are laws are enacted to ensure the safety of construction sites. Therefore, it is relevant to consider the effects that violations of these laws can have on construction site litigation. Negligence per se is defined as "An unexcused or unjustified violation of a duty dictated by a statute."[34] Therefore, it seems apparent that the failure to comply with a construction site safety law — negligence per se — automatically imputes liability on a defendant. However, the courts have differentiated negligence per se from liability. As explained by the Indiana Court of Appeals, "negligence per se does not mean that there is liability per se."[35]

i. OSHA Violations

As the Occupational Safety and Health Administration ("OSHA") is charged with developing rules for safe workplaces, OSHA laws are pivotal to the safety of construction sites. There is no universal consensus on the effects of an OSHA violation on construction negligence claims, as the courts are split. Three federal appellate courts and nine states' high courts have held violations of OSHA regulations constitute negligence per se.[36] However, many of the courts have limited their holding and "held that a defendant's violation of OSHA is negligence per se when the defendant is the plaintiff's employer, but that such violation is merely 'some evidence' of negligence when the parties lack a genuine employment relationship."[37] Those jurisdictions have considered who OSHA was intended to benefit and concluded that it was intended to benefit employees.[38]

However, many courts, such as the First Circuit Court of Appeals, have ruled that evidence of an OSHA violation can only be used as evidence supporting a standard negligence claim, not negligence per se.[39] That is the status of the law in Indiana. In *Jones v. City of Logansport*, the Indiana Court of Appeals noted that evidence of OSHA regulations can be admitted for

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[31] LYNN R. AXELROTH ET AL, FUNDAMENTALS OF CONSTRUCTION LAW 275 (Carina Y. Enhada, Cheri Turnage Gatlin, Fred D. Wilshusen eds., 2001).
[32] *Id.* at 276.
[33] WILLIAM ALLENSWORTH ET AL., CONSTRUCTION LAW 619 (William Allensworth et al. eds., 2009).
[34] Town of Montezuma v. Downs, 685 N.E.2d 108, 112 (Ind. Ct. App. 1997).
[35] Lindsey v. DeGroot, 898 N.E.2d 1251, 1260 (Ind. Ct. App. 2009).
[36] Rory Thomas Skowron, *Treating OSHA Violations as Negligence Per Se*, 61 B.C. L. REV. 3043, 3060 (2020).
[37] *Id*. at 3061; *See also* Melerine v. Avondale Shipyards, Inc., 659 F.2d, 706 710-712 (5th Cir. 1981); Donald A. Loose & C. Kyle Brown, *The Use of OSHA Regulations in Negligence Cases*, ARIZONA ATTORNEY (July 2000).

[38] Skowron at 3061.
[39] Elliot v. S.D. Warren Co., 134 F.3d 1, 5 (1st Cir. 1998).

interpreting the contract terms of the construction contract is evidence of negligence, not negligence per se.[40] The principle was re-affirmed by the Indiana Supreme Court in *Hebel v. Conrail, Inc*, explain that in an ordinary negligence claim, evidence of OSHA violations *may* be admissible as evidence, but not as evidence of negligence per se.[41] As recently explained by the Seventh Circuit, "OSHA regulations cannot 'be used to expand or otherwise affect a defendant's common law duties or liabilities under a negligence per se theory, or as evidence of an expanded standard of care."[42] Accordingly, it is important for a plaintiff to identify and include into the evidence any OSHA violations, but it will merely be used as evidence to support the general claim of negligence.

ii. Other State Safety Statutes

Indiana has enacted many workplace safety statutes, and Indiana courts have determined that violations of other state safety statutes have the same effect as an OSHA violation. Similar to OSHA violations, Indiana courts have said, "In determining whether violation of a safety statute establishes negligence per se, some consideration must be given to whether [plaintiff] is within the class of persons intended to be protected by the statute."[43] In addition to the intended persons to benefit requirement, a plaintiff must prove that the statutory violation is the proximate cause of the injury.[44] "A jury is free to find that a violation of a statutory duty is not necessarily the direct cause of the injury."[45] The Indiana Court of Appeals explained in *Inland Steel v. Pequignot*:

> The violation of statutory duty is not actionable negligence unless it is also the proximate cause of the injury. The violation of a statute raises no liability for injury to another unless the injury was in some manner the result of such violation. In order to find that an injury was the proximate result of a statutory violation, the injury must have been a foreseeable consequence of the violation and would not have occurred if the requirements of the statute had been observed.[46]

2. Strict Liability for Construction Site Negligence

In Smith, Currie & Hancock's *Common Sense Construction Law*, they contend that a contractor may be strictly liable for some dangerous actions. A contractor can be strictly liable "if a party is aware of the abnormally dangerous condition or activity, and has voluntarily engaged in or permitted it, that party accepts the fact that it will be liable for resulting damage even

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[40] Jones v. City of Logansport, 436 N.E.2d 1138, 1148 (Ind. Ct. App. 1982).
[41] Hebel v. Conrail, Inc., 475 N.E.2 652, 658 (Ind. 1985).
[42] Jeffords v. BP Products N. America Inc., 963 F.3d 658, 664 (7th Cir. 2020) (quoting Merritt v. Bethlehem Steel Corp., 875 F.2d 603, 608 (7th Cir. 1989).

[43] Petroski v. N. Indiana, 354 N.E.2d 736, 743 (Ind. Ct. App. 1976).
[44] Lewis v. Lockard, 498 N.E.2d 1024, 1028 (Ind. Ct. App. 1986).
[45] *Id*.
[46] Inland Steel v. Pequignot, 608 N.E.2d 1378, 1383 (Ind. Ct. App. 1993).

though it has taken every possible precaution, was not negligent, or was not at fault in any moral sense."[47] Some examples of abnormally dangerous activities include blasting or demolition.[48]

VIII. Relevant Jury Instruction

1. Negligence: Indiana Model Civil Jury Instructions 909 (2023 ed.)

Negligence is the failure to use reasonable care.

A person may be negligent by acting or by failing to act. A person is negligent if he or she does something a reasonably careful person would not do in the same situation, or fails to do something a reasonably careful person would do in the same situation.

2. Reasonable Care for Premises Liability: Indiana Model Civil Jury Instructions 1907 (2023 ed.)

Reasonable care means being careful and using good judgment and common sense.

3. Premises Liability: Duty

i. Duty to Trespasser: Indiana Model Civil Jury Instructions 1915 (2023 ed.)

[(*Name*) was a trespasser on the property of the (owner)(occupant), (*name*)].

Trespassers enter another [person][entity]'s property at their own risk of injury from conditions on the property.

An [owner][occupant] of property has no responsibility for a trespasser's safety until the [owner][occupant] knows that the trespasser is present.

An [owner][occupant] who knows that a trespasser is present must not willfully or intentionally injure the trespasser.

ii. Duty to Licensee: Indiana Model Civil Jury Instructions 1921 (2023 ed.)

[(*Name*) was a licensee on the property of the (owner)(occupant), (*name*).]
Licensees enter another [person][entity]'s property at their own risk of injury from conditions on the property.

However, an [owner][occupant] must not willfully or intentionally injure the licensee, or act in a manner to increase the licensee's risk of injury.

In addition, an [owner][occupant] who knows of a hidden danger on the property must warn the licensee of that danger.

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[47] SMITH CURRIE & HANCOCK'S COMMON SENSE CONSTRUCTION LAW, 6 (Thomas J. Kelleher, Jr. ed., 3rd ed. 2005).
[48] *Id*.

iii. Duty to Invitee: Indiana Model Civil Jury Instructions 1928 (2023 ed.)

An invitee must use [*pronoun*] senses in an ordinary manner to discover a dangerous condition on the property.

An invitee is not required to anticipate or search for hidden or unusual dangers.

iv. Duty to Invitee (Conditions on the Land): Indiana Model Civil Jury Instructions 1929 (2023 ed.)

[(*Nam*e) was an invitee on the property of the (owner)(occupant), (*name*).]

An [owner][occupant] of property is liable for injury caused to an invitee by the property's condition only if the [owner][occupant]:

(1) knew that the condition existed and realized that it created an unreasonable danger to an invitee, or should have discovered the condition and its danger;

(2) should have expected that the invitee would not discover or realize the danger of the condition, or would fail to protect himself or herself against it; and
(3) failed to use reasonable care to protect the invitee against the danger.