

COMPLEXITIES IN CONSTRUCTION NEGLIGENCE LITIGATION

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Introduction

With the demise of the Structural Work Act in 1995 (repealed by P.A. 89-2), the claims of injured construction workers shifted from the arena of strict liability to the field of ordinary care and comparative fault. No longer were owners, engineers and contractors obligated to comply with specific statutory mandates because they were “one of the persons having charge of the work” on a construction project. (740 ILCS 150/9). Instead, the liability analysis became one that involved the application of standard negligence principles *after* a common law duty was found. *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 325, 211 N.E.2d 247 (1965). The nature of that duty, *inter alia*, is the subject of this article, as are the elements of its breach and the complexity of relationships between the parties who may be jointly or severally liable for that breach.

This article considers the history and theoretical underpinnings of construction negligence in the contexts of: (1) the elements of the tort and (2) its impact in cases where there are multiple parties from whom damages are sought, and between whom complex contractual and insurance coverage issues exist. In the latter respects it focuses upon the potential for fault shifting and damage apportionment both contractually and under the contribution statute. The ensuing discussion further considers the intertwined relationships between liability insurers and their insureds, as well as that which often arises between insurance carriers regarding which has coverage for the loss.

Elements of the Tort

Section 414 of the Restatement

It is well accepted that construction negligence has its conceptual roots in Section 414 of the Restatement (Second) of Torts. *Larson v. Commonwealth Edison, supra*, *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 275, 770 N.E.2d 1175 (2nd Dist. 2002), *Rangel v. Brookhaven Constructors*, 307 Ill. App. 3d 835, 838, 719 N.E.2d 174 (1st Dist. 1999), and *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 923, 627 N.E.2d 1265 (3rd Dist. 1994). Section 414 provides:

One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

It is significant to note that the language of the Restatement resembles that of the Structural Work Act in the sense that the existence of a duty depends upon the presence of a dominant relationship with respect to a relevant portion of the work. The term “control” is used in the Restatement, as opposed to having “charge of,” which appeared in the statute. (740 ILCS 150/9).

Under the Scaffold Act the duty of compliance arose alternatively if the defendant had charge of the “overall work” (*Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967), and *Emberton v. State Farm Mutual Automobile Insurance Co.*, 71 Ill. 2d 111, 373 N.E.2d 1348 (1978)), or that phase of the work that was involved in the violation. *McGovern v. Standish*, 65 Ill. 2d 54, 67, 357 N.E.2d 1134 (1976). If a party had “charge of” the work he became liable for any wilful violations, which meant those of which he knew or *could have known*. *Simmons v. Union Electric*, 104 Ill. 2d 444, 453, 473 N.E.2d 946 (1984), and *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 501-02, 336 N.E.2d 881 (1975).

Liability was strict in the sense that it was tied to the violation *per se*, and its economic consequences were not mitigated by the plaintiff’s contributory fault. *Gannon v. M., St. P. & P. Railway Co.*, 22 Ill. 2d 305, 175 N.E.2d 785 (1961), and *Prewein v. Caterpillar Tractor Co.*, 108 Ill. 2d 141, 483 N.E.2d 224 (1985). Issues involving the plaintiff’s conduct were considered only in the context of proximate cause. If that misconduct were the sole proximate cause of the damages for which recovery was sought, an injured construction worker failed to prove his case. *Schultz v. Henry Ericsson Co.*, 264 Ill. 156, 106 N.E. 236 (1914), and *Beebe v. Commonwealth Edison Co.*, 45 Ill. App. 3d 43, 48, 358 N.E.2d 1343 (3rd 1977).

While Section 9 of the Structural Work Act required a “willful violation” for liability, that term was judicially construed with increasing benignity to the point where its significance fell below that of ordinary care and ceased to require either actual or constructive knowledge. As discussed *supra*, a defendant “having charge of the work” became liable for third party violations of which it “*could have known*.” *Kennerly v. Shell Oil Co.*, 13 Ill. 2d 431, 439, 150 N.E.2d 134 (1958), and *Smith v. Georgia Pacific Corp.*, 86 Ill. App. 3d 570, 574, 408 N.E.2d 117 (3rd 1980).

Further, while the statute was adopted to protect workers at heights from falling or being struck by objects that fell from heights, it was broadly interpreted to cover most construction based injuries which had any connection with scaffolds, hoists, mechanical contrivances, etc., *e.g.*, a trench in *Navlyt v. Kalinich*, 53 Ill. 2d 137, 290 N.E.2d 219 (1972); wall shoring in *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); a roof in *Crothers v. LaSalle Institute*, 68 Ill. 2d 399, 290 N.E.2d 219 (1977); a grain bin in *Warren v. Meeker*, 55 Ill. 2d 108, 302 N.E.2d 54 (1973); support for construction materials in *McNellis v. Combustion Engineering, Inc.*, 58 Ill. 2d 146, 317 N.E.2d 573 (1974), provided that they were being used for support in connection with one of the activities enumerated in the Act. *Crafton v. Lester B. Knight & Associates*, 46 Ill. 2d 533, 536, 263 N.E.2d 817 (1970); *Meyer v. Caterpillar Tractor Co.*, 135 Ill. 2d 1, 12-17, 552 N.E.2d 719 (1990). The failure to provide a compliant “device” also constituted a violation on the premise that whatever the claimant used in its place became a “support” within the meaning of the statute. *Louis v. Barenfanger*, 39 Ill. 2d 445, 449, 236 N.E.2d 724 (1968).

Control of the Work

The phrase “having charge of the work” was viewed as a generic term of common understanding that did not require a definitional instruction (*Larsen v. Commonwealth Edison, supra*). The same approach has been taken by the Supreme Court in failing to define “control” in its pattern instructions that have recently been approved for publication and use.

Under the Structural Work Act numerous evidentiary indicia were found to support a defendant’s “having charge of the work.” *Simmons v. Union Electric Co.*, 104 Ill. 2d 444, 473 N.E.2d 946 (1984). These included: (1) supervision and control of the work; (2) retention of the right to supervise and

control the work; (3) constant participation in ongoing activities at the construction site; (4) supervision and coordination of subcontractors; (5) responsibility for taking safety precautions at the jobsite; (6) authority to issue change orders; and (7) the right to stop the work; (8) ownership of the equipment used on the jobsite; (9) defendant's familiarity with construction customs and practices; and (10) whether defendant was in a position to assure worker safety or alleviate equipment deficiencies or improper work habits. (*Chance v. City of Collinsville*, 112 Ill. App. 3d 6, 11, 445 N.E.2d 39 (5th Dist. 1983)).

These were generally summarized under the "umbrella" that the defendant could "stop the work," as evidenced by contractual language to that effect or the exercise of such authority on the job. *McGovern v. Standish*, 65 Ill. 2d 51, 357 N.E.2d 1134 (1976), *Emberton v. State Farm*, 71 Ill. 2d 111, 373 N.E.2d 1348 (1978), and *Norton v. Wilbur Waggoner*, 76 Ill. 2d 481, 394 N.E.2d 403 (1979).

The concept of "control" under the Restatement is not as expansive. The comments specifically state that the right to stop the work is not sufficient to create a duty upon which liability may be founded. In that respect comment c to Section 414 provides:

c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a generally right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

"Control" for the purposes of Section 414 implies the ability to dictate the "manner" in which the contractor performs his work, or "his methods of work," or the "operative detail" of that work. As the comment states, control must be retained to such a degree that the contractor is unable to perform his work "in his own way"

Few areas in the current evolution of tort liability law have yielded the confusion and contradictions found in the appellate interpretation of "control" in construction negligence cases. Since 1995 over 20 decisions have considered the question, often reaching conflicting results on seemingly comparable facts within the same district.

In *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 923-25, 627 N.E.2d 1265 (3rd Dist. 1994), *appeal denied* 157 Ill. 2d 499, the Third District reversed a plaintiff's verdict on grounds that the defendant had not retained control over the methods used by the plaintiff's employer in performing its work. In reaching that decision, the court expressly rejected the idea that a duty under Section 414 arose from general control over the project, even where that authority included safety, stating:

Although Personal Products retained the right to require that work be done in a safe manner, this general authority cannot be viewed as creating such a right of supervision as to have prevented Stephen from doing routine work in its own say. Personal Products' authority under the contract was not so broad. It did not control the routine and incidental aspects of Stephen's work. Personal Products did not retain control of Stephen's activities to the extent that it had a duty to Fris under these circumstances. Adoption of Fris' theory of liability would in effect result in strict liability for all injuries to employees of independent contractors.

Later in *Brooks v. Midwest Grain Products Co.*, 311 Ill. App. 3d 871, 874-85, 726 N.E.2d 153 (3rd Dist. 2000), a different panel of the same court reversed a summary judgment which had been entered

in favor of the defendant in reliance upon the *Fris* rationale. In so doing, the court seemed to reject the detail-oriented reasoning of its predecessor in favor of the general ability to stop the work.

The same type of conflict between the sufficiency of overall authority and the right to direct specific construction methods flows through the First District, as demonstrated by the results in *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 1061-63, 728 N.E.2d 726 (1st Dist. 2000), finding “control” in the “power to forbid work from being done” in a dangerous manner, and *Rangel v. Brookhaven Constructors*, 307 Ill. App. 3d 835, 838-39, 719 N.E.2d 174 (1st Dist. 1999), and *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 274-79, 770 N.E.2d 1175 (2nd Dist. 2002), which emphasize retention of a right of supervision over the “methods of work” or “operative detail.”

As the Supreme Court has not decided the issue, any attempt to reconcile or synthesize the philosophic differences between these decisions is a fool’s errand. However, some generalizations from the most recent cases are helpful: (1) control over the ends but not the means of the work probably will not give rise to a duty (*Bieruta v. Klein Creek Corp.*, *supra*); (2) the general powers to inspect, order changes in the plans and specifications, and even make sure safety precautions are observed will not suffice (*Connaghan v. Caplice*, 325 Ill. App. 3d 245, 250-51, 757 N.E.2d 971 (2nd Dist. 2001)); (3) the right of supervision is only a general right unless it carries with it the authority to direct the contractor’s work which gave rise to the injury (*Rangel v. Brookhaven Constructors*, *supra* at 839 (1999), and (4) the actual exercise of authority by persons present on the site is significant (*Brooks v. Midwest Grain Products*, 311 Ill. App. 3d 871, 874-75, 726 N.E.2d 153 (3rd Dist. 2000)).

The same type of confusion pervades the recently adopted pattern instructions, which avoid a definitional morass but lend themselves to equally equivocal results. For example, the duty instruction states:

A party who retained some control over the safety of the work has a duty to exercise that control with ordinary care.

The term “work” is neither defined nor circumscribed by its character. Therefore the question remains whether it refers to the project generally and would extend to the right to stop the work for contractual non-compliance, or is limited to the authority to direct the methods and details of the particular work that caused the injury.

After a Duty is Found Negligence Principles Apply

Perhaps, the answer lies in an understanding of the focused nature of the resultant duty once the requisite “control” is found. That duty is to exercise the “control” with ordinary care. Here the common law concept of construction negligence parts ways with the statutory scheme of the Structural Work Act. Under the latter, as discussed *supra*, a party “having charge of the work” had an affirmative duty to correct any violations of which he “could have known.” *Kennerly v. Shell Oil Co.*, 13 Ill. 2d 431, 439, 150 N.E.2d 134 (1958), and *Smith v. Georgia Pacific Corp.*, 86 Ill. App. 3d 570, 574, 408 N.E.2d 117 (3rd Dist 1980). The duty imposed by the statute was strict and presupposed the obligation to discover.

On the other hand, the duty which arises under Section 414 is to exercise the qualifying “control” with “reasonable care” Whether tied to the overall work or the specific work which caused the injury, “reasonable care” relates to what the defendant “knew or had notice of.” *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 839, 719 N.E.2d 174 (1st Dist. 1999).

As otherwise expressed, a party having control of the work has remedial responsibilities only as to those hazards of which he has actual knowledge or reason to know. *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 770 N.E.2d 1175 (2nd Dist. 2002). There is no *a priori* obligation to require safe practices or inspect the work of others to insure compliance with safety standards.

As construction negligence under Section 414 involves a traditional negligence-based analysis once a duty is found, the contributory negligence of the injured party must be considered. In that regard Section 2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) applies. If the plaintiff's negligence preponderates, then he cannot recover. Otherwise, his negligence serves to proportionately reduce any recovery.

The same is true of comparative fault considerations under Section 2-1117 (735 ILCS 5/2-1117). Where multiple parties including the plaintiff contributed to cause the damages for which recovery is sought, several liability as to non-economic damages is available to any party whose comparative share of the total fault is less than twenty-five percent (25%). *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 783 N.E.2d 1024, 270 Ill. Dec. 724 (2002).¹

Fault Apportionment Among the Parties: Tangential Exposure

Construction negligence, as well as the former Structural Work Act, recognizes a legal duty with potential liability for its breach in the area of tangential responsibility. That is to say, the party from whom damages are sought was not directly responsible for either the condition that caused the plaintiff's injury or the plaintiff's exposure to that condition. Typically, the claimant is employed by a downstream subcontractor that has direct and primary control over the scaffold, crane or other instrumentality that causes the injury, as well as direct and primary responsibility for exposing the plaintiff to the perils that it presents.

Consequently, the focus of *both* the remedial ability to prevent the injury, and fault in failing to do so, rests with the employer, an independent contractor. Absent a recognized statutory duty or common law exception, the employer of an independent contractor is not liable for injuries that arise out of the contractor's work. As stated in *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 21, 276 N.E.2d 336 (1971):

Generally, it is the law that a master is liable for the acts of his servant committed within the scope of his employment; that a principal is liable for the acts of his agent performed within the scope of the agency; but neither is liable for the acts of an independent contractor unless the act or omissions causing harm was pursuant to the order or direction of the principal or employer, or unless under certain circumstances, the principal or employer failed to exercise reasonable care in selecting a careful and competent contractor.

As discussed *supra*, the Structural Work Act and Section 414 of the Restatement (Second) of Torts impose control-based duties in the setting of construction related injuries that flow upstream from the plaintiff's employer. However, the recognition of tangential exposure leaves open the dual issues of the employer's primary role in injury prevention and the inequity of requiring the general contractor or owner to pay for his failure to provide the requisite protection. The latter is compounded by Section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b)), which creates a lien in favor of the compensation-paying employer to the extent of any recovery by the injured plaintiff.

The apparent inequities in the preceding aspect of the civil reparations system have been the subject of numerous decisions borne of the struggle between defendants *inter se* and with employers as third party defendants, as well as ameliorative legislation. To understand the current state of fault apportionment in construction negligence cases, it is necessary to trace its historical evolution under the Structural Work Act.

Evolution of Fault Apportionment

Prior to 1977 Illinois did not recognize “contribution among joint tortfeasors.” *John Griffiths & Son Co. v. National Fireproofing Co.*, 310 Ill. 331, 339 (1924), and *Chicago & Illinois Midland Railway Co. v. Evans Const. Co.*, 32 Ill. 2d 600, 603, 208 N.E.2d 573 (1965). Consequently, under the doctrine of joint liability, the jury in a construction liability case involving multiple defendants was not permitted to consider the comparative fault of the owner, contractors, and subcontractors. A verdict was “all or nothing” as to each.

The plaintiff was then entitled to pick and chose among the liable defendants in satisfying his judgment, and they had no recourse *vis-à-vis* one another. Thus the least liable party with the deepest pockets was frequently the “target,” thereby effectively exonerating the others from the economic consequences of their fault.

Contractual Indemnity

It is well accepted in the setting of construction that leverage is “top down,” starting with the owner and descending thereafter to the general contractor and thence through the subcontractors to the sub-subcontractors. Prior to 1971, the issue of fault apportionment in construction liability cases was generally adjusted by contractual indemnity provisions that extended progressively downstream, requiring each lower level to indemnify each level of contractors above it up through and including the owner. In this way the employer of the injured party was customarily obligated to defend and indemnify each of the parties above it.

As contractual self-indemnification has never been a favorite of the law, such contracts were effective only to the extent that they *expressly* indemnified the upstream contractor or owner against that party’s *own* fault. (*Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.*, 395 Ill. 429, 432, 70 N.E.2d 604 (1947), and *Tartar v. Maxon Construction Co.*, 54 Ill. 2d 64, 66-68, 294 N.E.2d 272 (1973)).

Where a contract unequivocally provided for self-indemnification, the burden of the upstream contractor or owner’s negligence or Structural Work Act violation was borne in its entirety by the subcontracting employer. The onus of that liability was then the subject of contractual liability insurance that was routinely purchased by each contractor and subcontractor on the job. That coverage provided the insured party with a defense and indemnification against the upstream obligations that it had contractually assumed.²

The teeter-totter effect of contractually imposed indemnification created inequities on the other side. The respective fault of the parties was not considered. The superior contracting party was fully indemnified against the consequences of its own misconduct, thereby militating against its obligation to remedy unsafe construction practices.

As a consequence, the General Assembly adopted the Construction Contract Indemnification For Negligence Act in 1971. It specifically prohibits self-indemnification, stating in Section 1:

With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person’s own negligence is void as against public policy and wholly unenforceable.

The preceding public policy considerations, which led to adoption of the statute, were specifically affirmed by the Supreme Court in the context of both negligence and Structural Work Act cases in *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 498-99, 336 N.E.2d 881 (1975), wherein the court held:

It is generally known that indemnity and hold harmless agreements are most widely used in the construction industry. The legislature in enacting Section 1 may have considered that the widespread use of these agreements in the industry may have removed or reduced the incentives to protect workers and others from injury. (See, Prosser, Handbook of the Law of Torts sec. 4 (4th ed. 1971).) For example, persons having “charge of the work” and, thus, persons liable for violations of the Structural Work act are able to escape the consequences of this liability by requiring indemnifying agreements from, let us say, general contractors or subcontractors. Having arranged the avoidance of the burdens of liability they no longer have the same motivation “to lessen the extent of the danger” (*Halberstadt v. Harris Trust & Savings Bank*, 55 Ill. 2d 121, 127) to the prejudice of the worker’s safety and interest. Too, the members of the general public protected from dangers presented by, for example, the improper design, construction and maintenance of buildings would be obviously affected adversely if those charged with responsibility were able to avoid the consequences of liability through indemnity agreements. Viewed in this light, we consider that Section 1 of the indemnity statute serves to protect workers in the industry and the public as well from dangers associated with construction work. The statute would thwart attempts to avoid the consequences of liability and thereby insure a continuing motivation for persons responsible for construction activities to take accident prevention measures and provide safe working conditions.

Active/Passive Indemnity

The abolition of contractual indemnity transferred the process of fault shifting back to the common law. Under restitutionary principles, indemnity had always been available under the law of principal and agent where the former’s liability was based solely upon the doctrine of *respondeat superior*. In that setting the principal was viewed as blameless, whereas the fault of the agent was absolute. *Van Slambrouck v. Economy Baler Co.*, 105 Ill. 2d 462, 469-70, 475 N.E.2d 867 (1985), and *Gulf Mobile & Ohio R.R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E.2d 783 (1st Dist. 1951).

In order to accommodate the disparity in fault of a party whose liability derived from that of another, the doctrine of active-passive indemnity was adopted. *Chicago & Illinois Midland Railway Co. v. Evans Construction Co.*, 32 Ill. 2d 600, 603-605, 208 N.E.2d 573 (1965). Under that concept where a pretort relationship existed between the indemnitee and indemnitor, and the misconduct of the former was passive or secondary in comparison with the primary or active fault of the latter, the onus of liability shifted to the indemnitor in its entirety. *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 28-34, 687 N.E.2d 968 (1986).

Despite the equitable balancing that was contemplated by active-passive indemnity, the fundamental fact remained that the economic consequences of the indemnitee’s sins would be wholly assumed by the indemnitor. Thus, a party at fault received complete exoneration from the consequences of its own negligence or statutory breach.

Contribution

In 1977, the Supreme Court recognized that inequity when it abolished the prohibition against joint tortfeasor contribution. *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1, 11-16, 374 N.E.2d 437 (1978). Thereafter in 1979, the legislature adopted the Joint Tortfeasor Contribution Act (740 ILCS 100/1 *et seq.*). Under that statute, fault is apportioned among the parties who are “subject to liability in tort arising out of the same injury . . .” to the extent that the fault of each contributed to cause any damages which are awarded.

Where one tortfeasor is required to pay more than his “pro rata share of the common liability,” he is entitled to contribution from the others for the excess. Settlement is encouraged, with the settling

tortfeasor being exonerated from further liability to the extent that there is an adjudication that the release was “given in good faith.” (740 ILCS 100/2).

In the event of settlement, the remaining tortfeasors receive a credit for the consideration paid by the settling tortfeasor. (740 ILCS 100/2(c) and *Wilson v. Hoffman Group, Inc.*, 132 Ill. 2d 308, 546 N.E.2d 524 (1989). In that regard, the amount paid for the settlement is substituted for the settling tortfeasor’s *pro rata* share of the common liability.

The statutory equation between proportionate fault and liability was then extended to employers, despite the employer’s statutory immunity from a direct action by the employee under Sections 5(a) and 11 of the Workers’ Compensation Act. (820 ILCS 305/5(a) and 305/11). *Doyle v. Rhodes*, 101 Ill. 2d 1, 14, 461 N.E.2d 382, 389 (1984).

As discussed by the court in *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 546 N.E.2d 524 (1989), and *Schrock v. Shoemaker*, 159 Ill. 2d 533, 640 N.E.2d 937 (1994), the objective of the liability apportionment process is to equate exposure with fault in order that each party pays its share and the plaintiff receives only one recovery. However, the purity of that equation has been skewed by two countervailing considerations.

First, the court in *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 585 N.E.2d 1023 (1991), “capped” an employer’s contribution exposure at the amount of its workers’ compensation obligation. Second, as a part of the tort reform amendments of 1986 the General Assembly mitigated a plaintiff’s right to joint liability by the adoption of Section 2-1117 of the Code of Civil Procedure (735 ILCS 5/2-1117).³

***Kotecki* Considerations**

Under the holding of *Doyle v. Rhodes, supra*, an employer’s liability for contribution was commensurate with its proportionate share of the common liability, without regard to its exposure under the Workers’ Compensation Act. Thus it was possible for a plaintiff to recover workers’ compensation benefits from the employer and receive a judgment in excess of that amount from the defendant.

The defendant could then pass a substantial portion of that liability down to the employer through a contribution claim, even though the employer would thereby be obligated to pay sums in excess of its lien. As an offset, the employer would then be entitled to recover the amount of workers’ compensation benefits which it had been paid, after reduction for a twenty-five percent (25%) attorney’s fee and subtraction of a proportionate share of the litigation costs and expenses. (820 ILCS 3055(b) and *J.L. Simmons ex rel Hartford v. Firestone*, 108 Ill. 2d 106, 111-14, 473 N.E.2d 946 (1984)).

Following *Kotecki v. Cyclops Welding Corp., supra*, the employer’s contribution exposure was limited to the amount of its lien, without regard to the extent of its fault in causing the plaintiff’s damages. Given that degree of protection, employers were and are able to effectively gamble upon whether their proportionate share of the common liability will exceed seventy-five percent (75%) of the lien that they are entitled to recover back. That “gamble” discourages the waiver of workers’ compensation liens in most cases because the employer can defer its decision until its exposure is determined at trial. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 398-404, 706 N.E.2d 441 (1998).

Impact of *Braye* and *Liccardi*

In most construction liability cases the *Kotecki* rule has been subordinated to the contractual intentions of the parties. As discussed *supra*, the Construction Contract Indemnification For Negligence Act (740 ILCS 35/1 *et seq.*) eliminated the ability of the owner and upstream contractors to obtain contractual self-indemnification. While that preclusion is still effective *per se*, the forbidden language is effective to waive the employer’s *Kotecki* immunity. *Herington v. J.S. Alberici*

Construction Co., 266 Ill. App. 3d 489, 639 N.E.2d 907 (5th Dist. 1994), *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 210-12, 676 N.E.2d 1295 (1997), and *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 545-50, 687 N.E.2d 968 (1997).

Thus, even though a self-indemnifying provision cannot be enforced for its intended purpose, it nonetheless functions to expand an employer's liability to its full pro rata share. As stated by the court in *Liccardi*, 178 Ill. 2d at 550:

Because Stolt did not construe paragraph seven as relieving it of liability for its own acts or omissions, that paragraph did not extinguish Stolt's incentive to exercise due care, and the primary purpose behind the Construction Contract Indemnification for Negligence Act was not implicated. Accordingly, paragraph 7 is not void under the Act and can be invoked by Stolt to establish a waiver of the cap to which Gunderson would otherwise be entitled under *Kotecki*. *Braye*, 175 Ill. 2d at 217-18.

From a practical perspective construction contracts have never ceased to contain the boilerplate language of self-indemnification. Moreover, a *Kotecki* waiver is also triggered by provisions which contains an express waiver or language from which the intent to waive may be reasonably inferred. In both respects the premise is that "a construction of a contract which renders the agreement enforceable rather than void is preferred." *Braye* at 217.

As the court in *Liccardi* makes clear, the fact that an otherwise prohibited provision may be used to waive the *Kotecki* "cap" does not render it enforceable for the purposes of indemnification. That reasoning is consistent not only with the statute against self-indemnification but also with the common law evolution away from active-passive indemnity.

Following adoption of the contribution statute, implied indemnity atrophied to the point where it is no longer viable, except in the classic restitutionary settings of *respondeat superior* and like instances of pure derivative fault. *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 34-35, 687 N.E.2d 968 (1986). Where the plaintiff's complaint alleges negligence or other fault on the part of a defendant, common law indemnification is foreclosed, as any recovery would be based upon proof of that party's misconduct. *Dixon v. Chicago & Northwestern Transportation Co.*, 151 Ill. 2d 108, 118-23, 601 N.E.2d 704 (1992).

The preceding analysis is significant, as it demonstrates the clear judicial preference in construction liability cases for the apportionment of liability based upon the Contribution Act. Neither contractual indemnity nor active-passive indemnification exists to permit a complete transfer of liability from one party to another. Nor does *Kotecki* serve to limit an employer's exposure in instances involving standard contractual language that expressly or by implication waives the employer's partial immunity.

The same priority and rationale preclude the concept of "partial contractual indemnity" or contractual "contribution." In some cases an upstream party to a construction contract has attempted to circumvent the statutory prohibition against self-indemnification by claiming contractual recourse limited to the other contracting party's fault. Those efforts are aimed at creating a contractual remedy that parallels the statute but permits consensual control of the defense and attorney's fees.

Such efforts have been consistently rejected, as they would subvert the legislature's intention in adopting the Contribution Act. Specifically, partial indemnification or contractual contribution would frustrate the downstream party's ability to obtain exoneration through a "good faith" settlement, as provided by Section 2(d) of the statute. (740 ILCS 100/2(d)). *Pettie v. Williams Bros. Construction, Inc.*, 225 Ill. App. 3d 1009, 1014-17, 589 N.E.2d 169 (2nd Dist. 1992), and *Herington v. J.S. Alberici Construction Co.*, 266 Ill. App. 3d 489, 494-95, 639 N.E.2d 907 (5th Dist. 1994), and *Stifle v. Marathon Petroleum Co.*, 876 F.2d 552, 556-58 (7th Cir. 1989).

Section 2-1117

Section 2-1117 of the Code of Civil Procedure also skews the apportionment of fault among joint tortfeasors. It provides that a joint tortfeasor whose proportionate share of the total fault is less than twenty-five percent (25%) is only severally liable for the plaintiff's non-economic damages. While the constitutionality of Section 2-1117 was called into question following *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997), it has withstood that challenge. *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 783 N.E.2d 1024, 270 Ill. Dec. 724 (2002).

Unzicker also resolved the question of whether an immune employer should be included in the allocation of fault, as it could not qualify as a "third party defendant who could have been sued by the plaintiff." Consistent with its decision in *Doyle v. Rhodes, supra*, the court held that an employer is susceptible of suit, subject to raising its statutory immunity under the Workers' Compensation Act.

However, the issue remains open as to whether a party that has settled can be included in apportioning fault for the purposes of joint versus several liability. *Lannom v. Kosco*, 158 Ill. 2d 535, 543, 634 N.E.2d 1097 (1994), *Blake v. Hy-Ho Restaurant, Inc.*, 273 Ill. App. 3d 372, 375, 652 N.E.2d 807 (5th Dist. 1995), *appeal denied* 163 Ill. 2d 549, and *Freislinger v. Emro Propane Co.*, 99 F.3d 1412, 1419 (7th Cir. 1996).

Liability Coverage Considerations: Purchase of "Additional Insurance"

Many construction contracts contain downstream insurance provisions requiring the contractor or subcontractor to provide liability insurance for an upstream party or parties. These provisions are valid under Section 3 of the Construction Contract Indemnification For Negligence Act, which expressly provides:

§ 3. This Act does not apply to construction bonds or insurance contracts or agreements.

The provision of primary liability insurance that obligates the insurer to both defend and indemnify another party vitiates that party's right to contribution. The rationale is that coverage stands in the place of the contracting party's contribution exposure. Moreover, as the court in *Briseno v. Chicago Union Station*, 197 Ill. App. 3d 902, 905 (1990), held, it would be unconscionable for a subcontractor's own insurer to look to its insured for contribution. However, application of the so-called *Briseno* rule is limited to instances where full and unqualified coverage is provided to the contributee. *Tanns v. Borenstein and Company*, 293 Ill. App. 3d 582, 688 N.E.2d 667 (1st Dist. 1997).

Where a downstream contractor agrees to provide liability insurance but fails to do so, it is liable for a breach of contract. The damages are equated to performance. That is to say, the contractor becomes the insurer and is obligated for any damages that are awarded, as well as the costs of defense. *St. John v. City of Naperville*, 155 Ill. App. 3d 919, 922, 508 N.E.2d 1128 (2nd Dist. 1987), and *Zettel v. Paschen Contractors, Inc.*, 100 Ill. App. 3d 614, 617-20, 427 N.E.2d 189 (1st Dist. 1981).

However, claims for coverage damages have been held subject to the defense of waiver where the contracting party was permitted to perform its work despite not providing the liability insurance that it had agreed to procure. *Whalen v. K-Mart Corp.*, 166 Ill. App. 3d 339, 343-45, 519 N.E.2d 991 (1st Dist. 1988), *appeal denied* 121 Ill. 2d 587, and *Geier v. Hamer Enterprises, Inc.*, 226 Ill. App. 3d 372, 389-91, 589 N.E.2d 711 (1st Dist. 1992).

While the procurement of first party liability insurance for a contracting party does not violate the statute against self-indemnification, the same is not true of contractual liability insurance which protects the indemnitor against its failure to indemnify the indemnitee against the consequences of its own misconduct. *Transcontinental Insurance Co. v. National Fire Insurance Co.*, 278 Ill. App. 3d 357, 662 N.E.2d 500 (1st Dist. 1996), and *GTE North, Inc. v. Henkels & McCoy, Inc.*, 245 Ill. App. 3d

322, 328, 612 N.E.2d 1375 (4th Dist. 1993). In *GTE North, Inc.* the court describes the distinction thusly:

Thus, the appellate court decisions clearly set forth that in construction contracts where one party purports to indemnify the other, provisions such as those here - which insure the indemnitor for liability for not indemnifying or providing a defense to the indemnitee are not valid, while provisions which require the indemnitor to provide liability insurance for the indemnitee, making the indemnitee an insured under the policy, are valid. The supreme court has not spoke on this question, but the different treatment given by the appellate court in the two different situations is consistent with the supreme court's analysis of the intent of the Act.

However, where there is a *Liccardi* waiver of the *Kotecki* limitation, contractual coverage may be triggered for the excess of the employer's exposure over the workers' compensation liability. *Michael Nicholas, Inc. v. Royal Insurance Co.*, 321 Ill. App. 3d 909, 913-14, 748 N.E.2d 786 (2nd Dist. 2002), *appeal denied* 196 Ill. 2d 545.

Concurrent Coverage and the "Targeted Tender"

In instances where additional insurance is obtained for an upstream contractor or owner that party usually has its own liability policy. The "other insurance" provisions in both policies customarily create concurrent coverage with the two carriers sharing the obligation to indemnify pursuant to a formula which is generally tied to their respective policy limits. *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570, 573-74, 727 N.E.2d 211 (2000).

However, commencing with *Institute of London Underwriters v. Hartford Fire Insurance Co.*, 234 Ill. App. 3d 70, 599 N.E.2d 1311 (1st Dist. 1992), the courts have consistently recognized the right of an insured to select one insurer to provide the defense, to the exclusion of the other. The concept has become known as the "targeted tender" and overrides the selected carrier's right to rely upon the concurrent coverage provisions of its own policy. *John Burns Construction Co. v. Indiana Insurance Co.*, *supra* at 575-78, and *Cincinnati Companies v. West American Insurance Co.*, 183 Ill. 2d 317, 324, 701 N.E.2d 499 (1998). A targeted tender may be made even after the "deactivated" insurer has undertaken the defense. *Alcan United v. West Bend Mutual Insurance Co.*, 303 Ill. App. 3d 72, 81-84, 707 N.E.2d 687 (1999), *appeal denied* 188 Ill. 2d 561.

In making a targeted tender, the issue remains open as to the extent to which the targeting party must unequivocally renounce coverage from its own carrier. In *Institute of London Underwriters, supra*, *Cincinnati Companies, supra*, *John Burns, supra*, and *Alcan United, supra*, the "additional insured" had specifically rejected coverage from its own insurer, or after accepting that coverage, had unequivocally deactivated it.

The reasoning in those opinions is that the effect of unequivocal rejection or deactivation is to eliminate coverage under the rejected or deactivated policy, thereby vitiating the existence of "other insurance" and *ergo* the right to contribution pursuant to the "other insurance" portion of the additional insurer's policy. *Alcan United v. West Bend Mutual Insurance Co.*, *supra* at 81-84 and *John Burns Construction Co. v. Indiana Insurance Co.*, at 577-78.

The preceding authorities involve the concurrent coverage provisions of primary policies. No court has gone so far as to recognize the conversion of an excess policy to a primary policy by the expedient of rejecting or deactivating a precedent primary policy. While public policy may support an insured's right to chose among its primary carriers, it appears likely that the rationale behind it would not extend to the creation of obligations which were neither anticipated by the insurer nor consonant with the premiums charged for the type of coverage which was obtained.

Imputed Liability Limitations

The extent of coverage afforded under an “additional insured” endorsement is the frequent subject of debate. Often the endorsement is tied to claims that are caused by the subcontractor’s conduct or arise out of its work. *J.A. Jones Construction Co. v. Hartford Fire Insurance Co.*, 269 Ill. App. 3d 148, 150, 645 N.E.2d 980 (1st Dist. 1995), *appeal denied* 162 Ill. 2d 568, and *U.S. Fire Insurance Co. v. Aetna Life & Casualty Co.*, 291 Ill. App. 3d 991, 994-98, 684 N.E.2d 956 (1st Dist. 1997), *appeal denied* 176 Ill. 2d 593.

In those instances the courts generally reject the contention that liability on the part of the subcontractor is required to trigger coverage. On the other hand, where a true “imputed liability” endorsement is used it will be enforced. In *Hoffman Estates v. Cincinnati Insurance Co.*, 283 Ill. App. 3d 1011, 1013, 1014, 670 N.E.2d 874 (1st Dist. 1996), *appeal denied* 168 Ill. 2d 591, the endorsement provided:

The “Persons Insured” provision is amended to include as an INSURED the person or organization named above but only with respect to liability incurred *solely as a result of some act or omission of the NAMED INSURED.* (Emphasis added.)

In construing that language, the court applied the following interpretive principles:

We begin our analysis by noting that the general rule in Illinois is that a duty to defend exists where a complaint alleges a cause of action within or potentially within the coverage of an insured’s policy with the underwriter. The corollary of this rule is that an insurer has no duty to defend if the alleged facts fail to bring the case within the policy’s coverage. *Dorre v. Country Mutual Insurance Co.*, 48 Ill. App. 3d 880, 883, 363 N.E.2d 464 (1977). In construing an insurance policy, a court’s primary function is to ascertain and enforce the intentions of the parties as expressed in the agreement. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 607 N.E.2d 1204 (1992). The insured has the burden of proving that his loss falls within the terms of the policy. *St. Michael’s Orthodox Catholic Church v. Preferred Risk Mutual Insurance Co.*, 146 Ill. App. 3d 107, 496 N.E.2d 1176 (81986).

The *Hoffman Estates* court then went on to find the language of the endorsement limited coverage to liability of the additional insured that resulted from an act or omission of the named insured.

Similarly, in *American Insurance Co. v. Kraemer Bros.*, 298 Ill. App. 3d 805, 808, 699 N.E.2d 1056 (1st Dist. 998), the endorsement limited coverage for the additional insured to liability resulting from the conduct of the named insured which was “imputed” to the additional insured. As in *Hoffman Estates*, the policy was singular in precluding coverage for the additional insured’s conduct by restricting the insurer’s obligations to liability that was “solely” or “only” derived from the conduct of the named insured.

To the same effect is *American Company Insurance Co. v. Cline*, 309 Ill. App. 3d 501, 510-14, 722 N.E.2d 755 (1st Dist. 1999), in which the court rejected a duty to defend because a comparison of the complaint to the endorsement in question did not demonstrate a potential that the additional insured’s liability in the underlying case resulted “solely” or “only” from the conduct of the named insured. In that regard the court applied the reasoning in *Hoffman Estates*, *supra*, stating:

Peppers and Andersen respond that *Hoffman Estates* is distinguishable because the additional insured endorsement in that case is not the same as that in the instant case, and that the *West Bend* decision should control here. We disagree. First, we read both the endorsement in *Hoffman Estates* and that in the case at bar as limiting coverage of additional insureds “solely” to liability resulting from the conduct of the named insureds. Cline’s complaint does not make this

allegation. Second, while it is true that *West Bend* relied on allegations in both the underlying complaint and the third-party complaint to find a duty to defend (*West Bend*, 238 Ill. App. 3d at 337), if we look to the allegations in Pepper's third-party complaint for contribution, we must then assume that both the named insured and the additional insureds are responsible. This assumption would take us outside the ambit of the coverage provided in plaintiff's additional insured endorsement because it limits coverage to liability solely and specifically resulting from the conduct of the named insured.

However, where an "imputed liability" endorsement is so drafted that the additional insured is deprived of any meaningful coverage, the court may construe it on an active/passive basis. That is to say, if the conduct of the "named insured" actively produced the injury for which the passive "additional insured" is liable, the endorsement will be "stretched" to require a defense and indemnification. *Great American Insurance Company v. West Bend Mutual Insurance Company*, 311 Ill. App. 3d 534, 540, 723 N.E.2d 1174 (1st Dist. 2000).

Whether or not a subcontractor is obligated to provide "additional insurance" to an upstream contractor or owner depends upon the language of the contract. Thereafter the insurer's obligations to an "additional insured" depend upon the language of the endorsement. While ambiguities will be construed in favor of coverage, clear policy language will be interpreted as it is written.

Conclusion

The preceding analysis is intended to provide an overview of a number of the issues in a construction negligence case, including the factors that give rise to a defendant's duty and the breach of that duty, as well as the defenses afforded to parties who are alleged to have "control" over the work. It also considers the liability apportionment rights and obligations of contractors and subcontractors *inter se*, including the exposure of workers' compensation paying employers.

Finally, it focuses upon the all too frequent problem of "additional insurance" coverage that is procured by one contractor in favor of others, including the scope and priority of such coverage *vis-à-vis* other policies. It is not intended to be either exhaustive or comprehensive. However, it provides a good starting point for identifying and understanding many significant questions that frequently arise in construction negligence cases.

Endnotes

¹ This is a generalization that applies in most cases. However, a number of questions remain unresolved, including inclusion in the fault "stew" of any party who settles before the case goes to verdict. The subject of "fault apportionment" is discussed in the next section of this Article.

² That is in contradistinction to the inclusion of another party as an "additional insured," which creates a direct coverage relationship between the "additional insured" and the insurer. *Transcontinental Insurance Co. v. National Fire Insurance Co.*, 278 Ill. App. 3d 357 (1996), and *GTE North, Inc. v. Henkles & McCoy, Inc.*, 245 Ill. App. 3d 222, 238 (1993).

³ Section 2-1117 is considered in current context *infra*.

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