

RAILROAD CONTRACTOR LITIGATION & OUTSOURCE LIABILITY COVERAGE:

PRACTICAL CONSIDERATIONS WHEN ADDRESSING INDEMNIFICATION AND ADDITIONAL INSURED ISSUES.

A Johnson & Condon White Paper

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**CONTRACTOR LITIGATION & OUTSOURCE LIABILITY COVERAGE:
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Railroad risks and losses are unique. Endless liability potentials abound, largely because railroad rights-of-way intersect thousands of non-railroad-owned properties and thoroughfares. Risks and potential losses associated with railroad properties themselves are equally endless due to the unique nature of the industry. The risks are compounded when a railroad allows contractors to access railroad property, or outsources its activities to third parties. Railroad property access occurs when the contractor performs work for the railroad, or when a contractor must access or traverse railroad properties or rights-of-way in order for those contractors to perform work for others. Outsource liability can also occur in a variety of ways.

Railroads are, for the most part, self-insured, and thus highly motivated to offload exposures in as many ways as possible. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VI.R.1 (July 2002). Railroad risk management is most effective when it can prospectively offload its risk to another. Risk mitigation is most effective when the professional handling the claims arising out of contractor and outsource activities can effectively communicate to and persuade contractors and their carriers to assume the railroad's risks as they promised before the

¹ These materials are intended to educate, inform, and encourage discussion. A professional handling an actual claim involving these issues should analyze the facts of the case as applied to the various contracts and/or policies which may be involved in light of the particular applicable state law. The views expressed herein are not necessarily those of Johnson & Condon, P.A. or its clients.

accident. Risk management and risk mitigation are equally important bookends to effectively contain the railroad's risks.

Insightful risk containment includes the following strategies to offload potential liabilities related to contractors or the outsourcing of operations:

- Procurement of Railroad Protective Liability (“RPL”) coverage if possible to initially address railroad liabilities because of certain Contractor operations:
 - This protection provides direct primary occurrence coverage to the Railroad for risks which may otherwise be excluded under commercial general liability policies, and to provide possible first-line of defense in claims against the Railroad because of the Contractor operations;
- Indemnification agreements coupled with the obligation that the Contractor's Commercial General Liability (“CGL”) policy insures the indemnification obligation:
 - This protection insulates the Railroad against claims brought by others by, at a minimum, indemnifying the Railroad for the Contractor's fault in causing injury to the third person, or, if permissible, to indemnify the Railroad for the Railroad's own fault in causing the loss.
- Additional Insured status under the Contractor's CGL policy:
 - This protection, if available, provides the Railroad with direct primary insurance coverage for the loss at issue if the RPL coverage does not apply.

These materials overview each of these strategies, discuss how each separate tool can provide effective (and sometimes duplicative) protection for Railroad contractor and outsource exposures, and provide some considerations for risk managers and claims professionals handling contractor and outsource issues.

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INDEMNIFICATION AGREEMENTS

Indemnification agreements contractually obligate one party to indemnify, and many times defend, another against losses arising from the subject matter of the contract. Most jurisdictions interpret the construction and effect of indemnification agreements as a matter of law. See e.g., Art Goebel, Inc., v. North Suburban Agencies, 567 N.W.2d 511, 515 (Minn. 1997). “A party may contract to indemnify another for damages or injuries caused by the negligence of the indemnitee and beyond the control of the indemnitor.” Christy v. Menasha Corp., 297 Minn. 334, 211 N.W.2d 773, 777 (1973). Most courts will enforce the scope of an unambiguous indemnification agreement even if the contractual provision requires the Contractor to indemnify the Railroad for the Railroad’s own negligence unless the promise runs afoul of public policy or statutory considerations. Therefore, it is important to understand how the state law of the jurisdiction involved will interpret the indemnification agreement.

Choice-of-Law Considerations: What state law applies to the contract containing the indemnification agreement? Given that contract interpretation is a matter of state law, different states employ a variety of rules or law to determine whether or to what extent these agreements are enforceable. Therefore, risk containment professionals need to know exactly how the state law at issue applies to the agreement in order to determine if the indemnification obligation is enforceable as intended by the Railroad.

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Prospectively, this is handled best by adding a clause in the agreement which identifies what state law will apply to the Railroad/Contractor agreement. An example of such a clause is as follows:

“This Agreement shall be governed by the law of the state of _____.”

If the contract does not have this type of clause, the claims professional must determine what law will apply to the indemnification agreement. If there is a dispute over what state law is to apply, a detailed and often-times muddled “choice of law” analysis needs to be performed to answer this question. This is essentially the same analysis a court will employ if the matter proceeds to a lawsuit.

Historically, many courts applied a “lex loci” territorial approach concept to the case’s facts to determine which state law applied. The “lex loci” was the law of the place where the right was acquired or the liability was incurred which constitutes the claim or the cause of action. Gray v. Blight, 112 F.2d 696 (10th Cir. 1940). See also Huang v. D’Albora, 644 A.2d 1 (D.C. 1994); Prudence Life Ins. Co. V. Morgan, 213 N.E.2d 900 (Ind. 1966); Naughton v. Nakkier, 691 A.2d 712 (Md. 1997); Whitten v. Whitten, 548 N.W.2d 338 (Neb. 1996).

The modern trend in many jurisdictions is to analyze the contract under the Restatement (Second) of Conflicts of Laws to determine what state law applies. The Restatement provides that courts should apply the “most significant relationship” test to determine what law governs the contract. Restatement (Second) Conflicts of Law § 188. The “most significant relationship” test considers the following:

- (1) The rights and duties of the parties with respect to an issue in the contract are determined by the local law of the state which, with respect to that issue, has

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the most significant relationship to the transaction and the parties under the principles stated in § 6 of the Restatement.²

- (2) In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place of contracting;
 - (b) the place of negotiation of the contract;
 - (c) the place of performance;
 - (d) the location of the subject matter of the contract; and
 - (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contracts are to be evaluated according to their relative importance with respect to the particular issue.

- (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

² Section 6 of the Restatement sets forth general “choice of law principles”:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
 - (a) the needs of the interstate and international systems;
 - (b) the relevant policies of the forum;
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
 - (d) the protection of justified expectations;
 - (e) the basic policies underlying the particular field of law;
 - (f) certainty, predictability and uniformity of result; and
 - (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws §188. The Restatement also directs that, in insurance contracts, the principal place of the insured's risk is the most important factor. Restatement (Second) Conflict of Laws § 193.

This modern approach is not universal. Some jurisdictions apply other choice of law tests. For example, Minnesota and a few other states, primarily in the Midwest, employ a "choice influencing considerations" methodology to resolve conflict of laws issues. See, e.g., Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829, 832-33 (Minn. 1979), cert. denied, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980); Nodak Mut. Ins. Co. v. Wamsley, 2004 ND 174, 687 N.W.2d 226 (N.D. 2004). If there is a conflict in the application of competing states' laws, and if sufficient contacts exist as to each state to allow application of their law, then five "choice influencing" factors originally propounded by Professor Robert A. LeFlar in the 1960s are considered to determine which state law applies to interpret the contract:

- the predictability of the result;
- the maintenance of interstate and international order;
- the simplification of the judicial task;
- the advancement of the forum's governmental interest; and
- the application of the "better rule of law."

See, e.g., Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973).

It is an understatement to say that many times these tests do not provide express guides to determine which substantive law applies to the contract. However, the local law of the jurisdiction

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where the event causing liability occurred will generally apply so long as there is no choice of law clause in the contract and the Contractor is local, unless there are significant reasons to employ another state's law. Ultimately, this analysis must be done on a case by case basis.

As will be seen below, determining what state law applies could well be the difference between being able to rely on the indemnification agreement to offload the loss, or being forced to retain the exposure arising from the incident.

Is the Indemnification Agreement Enforceable Under the Appropriate State Law? The concept that one party may agree to assume another's liability is well accepted in many states' common law. The question is whether that state, either by caselaw or statute, has placed certain limits or restrictions on the enforceability of the indemnification agreement. There are several legal principles a particular state may have considered in determining whether, or to what extent, to enforce the indemnification agreement.

Connection Between the Project and the Liability: Typically, some nexus or connection between the liability and the project is required in order to enforce the indemnification agreement. Minnesota, for example, requires that a temporal and geographic nexus, or a causal nexus, between the contractor's work and the injuries or damages at issue exist to enforce the agreement. Anstine v. Lake Darling Ranch, 305 Minn. 243, 249, 233 N.W.2d 723, 727 (1975), overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838, 840 n. 4 (Minn. 1979). A temporal nexus exists between the contractor's work and the injury when the worker's injury occurs while the worker is preparing for work, or in the process of working, but not

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after the work is complete. Fossum v. Kraus-Anderson Const. Co., 372 N.W.2d 415, 418 (Minn. App. 1985). A geographic connection exists between the injury and the contractor's work if the injury is sustained on the job site, regardless of its cause. Id. at 417-18. Alternatively, a causal nexus exists when, "but for" the work, the injury would not have occurred. National Hydro Systems v. M. A. Mortenson, 528 N.W.2d 690, 693 (Minn. 1995).

Other states employ a variety of similar approaches to determine whether the indemnification agreement is enforceable under the circumstances. See e.g., Arthur's Garage, Inc. v. Racal-Chubb Security Systems, Inc., 997 S.W.2d 803, 814 (Tex. Ct. App. 1999)(citing Dresser Indus, Inc. v. Page Petroleum, Inc., 853 S.W.2d 705, 708 (Tex. 1987)) (indemnity provisions are valid and enforceable so long as the agreement meets the "fair notice" requirements of unambiguous terms and conspicuous terms); Burlington Northern Railroad Co. v. Pawnee Motor Serv., Inc., 171 Ill. App. 3d 1043, 525 N.E.2d 910(Ill. App., 1st Dist. 1988) (indemnity agreements are strictly construed).

Statutory or Other Public Policy Limitations: Indemnification agreements, and especially those which seek to indemnify a party such as a Railroad for its own negligence, may be void or unenforceable either because of public policy or statutory considerations. The most common statutory prohibition against indemnification for one's own fault are the Construction Anti-Indemnification Statutes now in place in well over 40 states. 3 Bruner and O'Connor on Construction Law, § 10:77, p. 917 (2002). Specific statutory prohibitions vary from state to state, and therefore the jurisdiction's statutes should be consulted if the Contractor will be engaging in construction activities. These statutes generally prohibit the Contractor from assuming the Railroad's

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sole negligence, or limit the Railroad's protection to the amount of fault imposed on the Contractor, or contain atypical or miscellaneous limitations. Id.

One statute in Minnesota, for example, is uniquely formatted to prohibit a Contractor from indemnifying a Railroad in a construction contract unless the Contractor obtains insurance to cover the indemnification obligation. Minn. Stat. Ch. 337. One of Arizona's statutes bars an indemnification obligation if the indemnity sought involves the sole liability of the indemnitee in certain types of claims, but does not enforce this limitation if the indemnitee is merely allowing the contractor access to the land to allow the project to be performed for another. Ariz. Rev. Stat. §§ 32-1159; 34-226; 41-2586. One of Texas' statutes bars a Contractor's indemnification of the Railroad for the Railroad's sole or joint negligence unless the injury is to the Contractor's employees or agents and involves public works projects. Tex. Govt. Code. § 2252.902. One of California's statutes bars enforcement of an agreement which indemnifies another for his or her sole negligence, Cal. Civ. Code. § 2782(a), although this prohibition does not apply to indemnification agreements where the Railroad would allow the Contractor an accommodation access through the Railroad's property to perform work for a third party. Cal. Civ. Code. § 2782.1. Illinois has a similar statute barring indemnification of the indemnitee's own negligence when the contract "deal[s] with construction, or for any moving, demolition or excavation;" 740 ILCS 35/1; however, the statute does not necessarily apply to an agreement seeking access through a railroad right-of-way because the right-of way access is not work "dealing with construction, or for any moving, demolition or excavation." Winston Network, Inc. v. Indiana Harbor Belt R. Co., 944 F.2d 1351 (7th Cir. 1991).

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Often times, a particular state will have several statutory provisions which could impact whether the indemnification provision is enforceable.

Some jurisdictions may void an indemnification agreement because of public policy reasons. Some courts look to whether, at the time of contracting, there was a great disparity of bargaining power between the parties. For example, in Cook v. Southern Pacific Trans. Co., 623 P.2d 1125 (Or. App. 1981), a court invalidated an indemnification clause where the agreement was on a form prepared by the railroad, did not specifically allocate risk of third-party negligence (the cause of the injury to the railroad's employee), and the railroad was under a broad duty of care pursuant to the Federal Employers Liability Act ("FELA"). Despite these "legal" reasons, it appears what motivated the court was the fact the Contractor was financially unable to actually perform the indemnification obligation. The Contractor was an individual who took on a job to demolish and remove an abandoned station house for the sum of \$1,500.00. Assuming what in effect was the railroad's liability under FELA was just too great of an obligation and reflected too great of a disparity between the parties to allow the court to enforce the agreement.

In California, an indemnification agreement will also be struck down if it is considered unconscionable. Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc., 89 Cal.App.4th 1042 (Cal. Ct. App. 2001). In order to determine whether an indemnification provision is unconscionable, the court will consider it procedurally and substantively. Id. At 653. The procedural element focuses on "oppression" and "surprise." Id. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Id.

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Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a pre-printed form drafted by the person seeking to enforce the agreement. The substantive element has to do with the effects of the contractual terms and whether they are unreasonable. A contract is substantively suspect if it reallocates the risk in an objectively unreasonable or unexpected manner. *Id.* To be unenforceable, a contract must be both procedurally and substantively unconscionable. *Id.*

Sovereign Immunity Statutes: Several states statutorily protect their governmental entities from the imposition of indemnification provisions running in favor of others. For example, in Georgia, the state may not waive its sovereign immunity by entering into an indemnification agreement. *CSX Transport, Inc. v. City of Garden City*, 588 S.E.2d 688 (Ga. 2003).

The impact of these statutes, as a practical matter, may be minimal. The statutes need to be further examined to determine if sovereign immunity can be waived up to a policy's limits by the purchase of insurance to protect the political subdivision's liability. See e.g., *Id.* It may also be that the simple entering into of the indemnification agreement waives the immunity defense. *National Railroad Passenger Corp. (AMTRAK) v. Roundtree Transport and Rigging, Inc.*, 422 F.3d 1275 (11th Cir. 2005).

Ambiguity: Despite careful drafting, many indemnification agreements do not distinctly and crisply detail the scope of the obligation imposed on the Contractor. These clauses are often times later challenged as being ambiguous. The following is an example of an indemnification agreement which initially seems to be clear, but on closer inspection can be read two different ways:

“The Contractor shall indemnify and hold harmless the [Owner] and [its] agents and employees from and against all claims . . . arising out of or resulting from the

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performance of the Work provided that any such claim . . . is caused in whole or in part by any negligent act or omission of the Contractor, . . . regardless of whether or not it is caused in part by [the Owner].”

It initially appears the language requires the Contractor to indemnify the Owner for all claims against the Owner, regardless of who is at fault. However (according to one court), the language can also be construed to mean that the Contractor is only required to indemnify the Owner for the Contractor’s negligence. Therefore, the indemnification agreement is not enforceable to the extent the Owner seeks indemnification for its own negligence. Katzner v. Kelleher Constr., 545 N.W.2d 378 (Minn. 1996).

Clear and unambiguous indemnification agreements will be enforced as written. See e.g., Tubb v. Bartlett, 862 S.W.2d 740 (Tex. Ct. App. 1993) (agreement identifying parties to be liable, a clear description of the agreement’s application to "all debts, and obligations, claims & demands arising out of Big Horn Energy and its subsidiaries," and supported by consideration was unambiguous and fully enforceable).

Scope of Liability Indemnified: The Kastner decision cited above underscores an additional analysis that is required to determine what may be indemnified under contract between the Railroad and the Contractor. Consider the following two indemnification agreements which were utilized for similar types of work to be performed by two different contractors:

Compare:

“Contractor shall assume all liability for and indemnify and save harmless [Railroad] from and against any and all claims, suits, losses, damages and expenses on account of injury to or death of third parties, contractor, subcontractors, employees of contractor, and of subcontractors and any and all damages to, loss or destruction of

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property, including property owned by, rented to, or in the care, custody or control of third parties, subcontractors and contractors *caused, in or in part, by the negligence of Contractor*, its agents or employees, or its subcontractors and their agents or employees and occurs by reason of or arising during the presence of the person or of the property of their parties, contractor, subcontractors, their employees or agents, upon or in proximity to the property of [Railroad] or while going to or departing from the same whether or not such injury or damage is caused by negligence of [Railroad] and unless such injury, death, loss, damage or destruction is due to the sole negligence of [Railroad].”

With:

“Contractor shall assume all liability for and indemnify and save harmless [Railroad] from and against any and all claims, suits, losses, damages and expenses on account of injury to or death of third parties, contractor, subcontractors, employees of contractors, and of subcontractors and any and all damages to, loss or destruction of property, including property owned by, rented to, or in the care, custody or control of third parties, subcontractors and contractors *arising or growing out of or in any manner connected with the work performed under this contract*, including Contractors' failure to secure the Work premises from third parties, or caused or occasioned, in whole or in part, by reason of or arising during the presence of the person or of the property of third parties, contractor, subcontractors, their employees or agents, upon or in proximity to the property of [Railroad] while going to or departing from the same. THE LIABILITY ASSUMED BY CONTRACTOR SHALL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE INJURIES OR DAMAGES WERE OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF [RAILROAD,] ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE.”

These paragraphs underscore the requirement that precise, exact language be utilized in each indemnification agreement. A court, in analyzing each of these clauses, held that the first clause does not indemnify the Railroad if the Contractor was not negligent for the loss at issue. Continental Cas. Co. v. Auto-Owners Ins. Co., 238 F.3d 941 (8th Cir. 2000). The same court determined the second clause, however, mandated that this contractor indemnify the Railroad for the Railroad’s own liability, even if the Contractor was not negligent. Id.

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Types of Injuries or Damage Indemnified: Another concern about indemnification clauses typically utilized in Railroad/Contractor agreements is that the type of injury indemnified may not be as broad as the Railroad needs. Typically, these clauses indemnify for damages due to “bodily injury” and “property damage.” However, especially in an age where security concerns predominate the industry, the Railroad may have additional exposures beyond physical injury to a person or property. There may be situations where a person may claim a more intangible injury such as those associated with false arrest, detention or malicious prosecution matters. There may well be other matters involved with a project which potentially involves a constructive eviction of a property owner adjacent to the project, or some type of libel or slander.

If the claim involves a more intangible type of injury, the indemnification agreement should be analyzed to see if the Contractor has also agreed to indemnify for these types of injuries as well.

Does the Indemnification Obligation Survive the Project’s Completion? Every project ends. However, the Railroad may still wish or need the contract’s indemnification agreement’s protection in order to avoid exposures for liabilities which have occurred but which are unknown, or which have not yet occurred. The duration of the indemnification agreement therefore needs to be considered when the agreement is negotiated, and identified in the contract once the claim is presented to determine if the Contractor’s obligation to indemnify has expired.

INSURING THE INDEMNIFICATION OBLIGATION

The Railroad's indemnification right is only as valuable as the Contractor's balance sheet, or the Contractor's ability to insure the obligation. Since many Contractors' balance sheets are not attractive to a railroad, the latter option is the only viable means of assuring the Railroad that the obligation will be performed if needed.

It is possible the Contractor's CGL Policy may contain some form of coverage for the indemnification agreement. However, the coverage may not be the type required, or be sufficient in coverage, to insure the agreement with the Railroad. Therefore, the Railroad should insist the Contractor procure contractual liability coverage which is sufficient to protect the obligation provided to the Railroad, and be ready to enforce this obligation early in the claims process. This duty to procure clause may also assist the Railroad in defeating a state's Anti-Indemnification Statute. See e.g., Minn. Stat. § 337.05, Subd. 2; *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473 (Minn. 1992).

“Contractual Liability” Exclusion and “Insured Contract” Definition Issues: An indemnification obligation running in favor of the Railroad (unlike other parties) often runs afoul of the Contractor's CGL Policy's “Contractual Liability” Exclusion. Under this exclusion, typical CGL coverage for bodily injury or property damage is barred if “the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” See e.g., Insurance Services Organization (“ISO”) Commercial General Liability Form CG 00 01 10 01 at p. 2.³ Therefore, unless

³ The Insurance Services Organization (“ISO”) publishes “standard” insurance forms which are promulgated from time to time by the industry. “CG” forms address commercial general liability risks. Each CG form is designated by a set of four two-digit numbers. The first two sets of

an exception to the exclusion applies, the main provision of this exclusion will eliminate coverage for the Contractor's obligation to indemnify the Railroad.

The Contractual Liability Exclusion contains an exception which restores coverage for liabilities "assumed in a contract or agreement that is an 'insured contract,' provided the bodily injury or property damage occurs subsequent to the execution of the contract or agreement." *Id.* The standard definition of "Insured Contract" in that policy, however, many times does not include the type of Railroad operations which would be covered by the exception to the exclusion. Specifically, while an indemnification agreement taken on in a sidetrack agreement would be covered, similar obligations in an easement or license agreement are not covered when the agreement is "in connection with construction or demolition operations on or within 50 feet of a railroad." *Id.* Also, the indemnification obligation in favor of the Railroad is not insured when the "bodily injury' or 'property damage' aris[es] 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."

numbers (here 00 01) describe the type of form involved (here, the commercial general liability base occurrence coverage form). The second two sets of numbers describe the edition date of the form (here 10 01 (October 2001)). It is absolutely imperative that ISO forms be identified, not just by the form number, but by the edition date as significant changes have taken place to all forms in the years since each form was originally issued. This will allow risk managers to specify types of coverages mandated in prospective contracts with Contractors, and allow claims professionals to examine the Contractor's policy at issue to determine that the forms listed in the policy's Declarations Pages or form list are as actually provided in the policy being examined as part of the claim process.

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The insurance industry recognizes that Railroads desire coverage for the indemnification agreements in its contracts with Contractors. Therefore, the Contractor's insurers will usually agree to endorse the Contractor's CGL Policy with a standard ISO Form, number CG 24 17 10 01 ("Contractual Liability – Railroads"), to eliminate Railroad-related limitations to the Insured Contract definition discussed above. CG 24 17 10 01 is a scheduled form which requires the Railroad and a description of the "Designated Job Site" to be printed on the form. The "Designated Job Site" description must be sufficiently broad to encompass all potential areas which might be impacted by the Contractor's operations or work.

The Railroad must be careful, however, to avoid where possible a series of reductions in coverage ISO has implemented to limit the scope of available coverage under the Contractor's policy to protect the Railroad's interests. Standard insurance forms issued prior to July 2004 provided the Contractor with various levels of coverage for indemnification obligations running in favor of Railroads, even if the Contractor or its subcontractors were not liable for the injuries or damages at issue. ISO forms issued starting in July 2004 are designed to *not* provide coverage for indemnification agreements running in favor of the Railroad if the Railroad is solely at fault for the loss.⁴ If these "current" forms are utilized in the Contractor's policy (such as new ISO form CG 24 27 instead of form 24 17), the Contractor will not have coverage for its indemnification obligation unless the injury or damage is caused in whole or in part by the named insured or those

⁴ Similar changes have been implemented in the Additional Insured arenas. See discussion in the Additional Insured Section of these materials.

acting on behalf of the named insured. In other words, insurance to cover the Contractor's indemnification obligation will not exist if the Railroad is solely at fault for the injury or damage at issue, and the new ISO forms (post-07 04) are utilized in the Contractor's policy.

Limited Contractual Liability Coverage for False Arrest, Detention and Imprisonment

Personal Injury Offenses: If the Railroad seeks indemnification from its Contractor for intangible injuries, the risk manager and claims professional should seek to determine if these liabilities are indemnified and the obligation is also insured under the Contractor's policy. A "standard" Contractor CGL policy will likely include coverage for personal injury and advertising injury offenses. However, this coverage section usually also includes a broad exclusion to bar coverage for personal injury and advertising injury "for which the insured has assumed liability in a contract or agreement." Form CG 00 01 10 01 at p. 6. Therefore, even if the Railroad bargained for indemnification of these additional liabilities, there will usually not be coverage available for the Contractor's obligation to indemnify the Railroad unless the Contractor's standard policy provisions have been modified.

The insurance industry recognizes that contractual liability coverage for at least some of these exposures (false arrest, detention and imprisonment) is marketable. ISO Form CG 22 74 10 01, entitled "Limited Contractual Liability Coverage for Personal and Advertising Injury" provides the Contractor with coverage for an indemnification agreement which assumes the Railroad's liability for these specific offenses. Therefore, especially in security-related claims, this coverage should be part of a risk manager's demands when negotiating with a Contractor, and should be looked for in the

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Contractor's policy to be sure Contractor's insurance will cover the Contractor's indemnification obligation in these areas.

Because the insurance industry provides this limited endorsement, it may well be that the Contractor's CGL carrier will reject attempts to expand the exceptions in this endorsement on a manuscript basis to have the Contractor covered for *all* contractually-assumed personal injury and advertising injury liability. However, this limited indemnification coverage for some personal injury and advertising injury offenses is better than nothing.

Insuring the Contractor's Obligation to Defend the Railroad: There are many occasions where defense costs may exceed the costs paid to settle a claim or pay a judgment. Therefore, it is critical to be sure that, if the Contractor assumed the obligation to defend the railroad, there be sufficient monies available to back up this obligation. If the Contractor is obligated to indemnify and defend the Railroad, and the indemnity obligation is covered by the Contractor's CGL policy, the Railroad should examine the Contractor's CGL policy to determine what coverage is available, if any, to insure the related defense obligation.

A standard CGL policy form contains two separate provisions which could apply to pay defense costs. The first is found in the standard CGL policy's "Supplementary Payments" provision. This provision states that, so long as the following conditions are met, the Contractor's CGL carrier will defend the Railroad in an action where *both* the Railroad and the Contractor are named as defendants:

- a. The "suit" against the Railroad seeks damages for which the Contractor has assumed the liability in a contract or agreement that is an "insured contract";

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- b. The Contractor's CGL policy applies to the liability assumed in the indemnification agreement;
- c. The obligation to defend, or the cost of the defense of, the Railroad has also been assumed by the Contractor in the same "insured contract";
- d. The allegations in the "suit" and the information the carrier knows about the "occurrence" are such that no conflict appears to exist between the Railroad's and the Contractor's interests;
- e. The parties each ask the carrier to conduct and control the Railroad's defense, and further agree that the carrier may assign the same counsel to defend both of the parties; and
- f. The Railroad:
 - (1) agrees in writing to:
 - (a) cooperate with the carrier in the investigation, settlement or defense of the "suit";
 - (b) immediately send the carrier copies of any demands, notices, summonses or legal papers received in connection with the "suit";
 - (c) notify any other insurer whose coverage is available to the Railroad; and
 - (d) cooperate with the carrier with respect to coordinating other applicable insurance available to the Railroad; and
 - (2) provides the carrier with written authorization to:
 - (a) obtain records and other information related to the "suit"; and
 - (b) conduct and control the defense of the Railroad in such "suit."

ISO Form CG 00 01 10 01 at p. 8.

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So long as these numerous conditions are met, the carrier will pay the defense expenses “in addition to limits” of the Contractor’s indemnity coverage (i.e., the defense expenses will not erode the indemnity limits of insurance).

If the Supplementary Payments provision described above does not apply, there is another provision which is available to pay the Railroad’s defense fees and costs. This language is found in the standard ISO form policy’s bodily injury and property damage “Contractual Liability” Exclusion:

“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
- “(b) Such attorneys’ fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceedings in which damages to which this insurance applies are alleged.”

ISO Form CG 00 01 10 01 at p. 2.

This provision provides the Railroad with the ability to have its defense fees and costs paid pursuant to a defense provision in the indemnification agreement in situations where the carrier does not control the defense. This protection comes at a “cost,” however; any defense fees and costs expended will erode the CGL policy’s indemnity limits.⁵

⁵ Another reason to obtain the Contractor’s insurance policy is to see if these defense expense provisions have been modified by endorsement. For example, certain approved policy endorsements utilized in Minnesota eliminate the onerous mandates in the Supplementary Payments Provision as well as the provisions in the exception to the “Contractual Liability” Exclusion. These endorsements can have the effect of assuring the Railroad that its defense costs are paid “in addition

The Supplementary Payment Provisions and the cited language in the Contractual Liability Exclusion are fairly recent changes to the standard form CGL coverage. Before these provisions were part of a standard policy, numerous coverage disputes arose as to whether defense expenses were included within the phrase “assumption of tort liability of another.” An example of the difficulties caused by the lack of this type of language in the policy is seen in a recent Minnesota case, Soo Line Railroad Co. v. Brown’s Crew Car of Wyoming, 694 N.W.2d 109 (Minn. App. 2005). In Brown’s, the contractor agreed to indemnify and defend the railroad for any loss related to the contractor’s car transportation services. An automobile accident injured two of the railroad’s employees while they were riding in one of the contractor’s cars. The employees later sued several third parties. One of the third parties in turn sued the railroad for indemnification or contribution. The railroad tendered the suit to the contractor under the indemnification agreement in place between the parties. The contractor refused to defend the railroad. Ultimately, the underlying case was settled, apparently without the railroad participating in any of the settlement funding.

The contractor’s carrier challenged the railroad’s claim that the carrier covered the contractor’s obligation to defend the railroad. The carrier argued that the contractor’s assumption of the obligation to pay defense fees and costs was not an assumption of “tort liability” of the railroad, especially when the railroad was not found at fault in the underlying litigation. Such an interpretation, which had support in at least one other jurisdiction, would have left the contractor obligated to pay the railroad’s defense expenses in any situation where the railroad was ultimately not at fault (either

to limits.”

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because no settlement monies would be contributed on behalf of the railroad, or because the fact finder found the railroad was not at fault).

The court rejected the CGL carrier's technical application of the Insured Contract language. In so doing, the Court determined that defense costs are inseparable from the underlying events of the accident which gave rise to the indemnification claim. Since the fees and costs were incurred in defense of a tort claim, they are compensable to the railroad under the indemnification agreement, and are insured under the exception to the Contractual Liability Exclusion as an "Insured Contract." The Court was not swayed by the carrier's argument that the attorneys' fees and legal expenses were not a claim for liability to pay for bodily injury, but were a claim for liability to pay fees and expenses, items which did not meet the policy's "bodily injury" definition.

Other courts have held that the "duty" to defend in an indemnification agreement is only invoked when there is, in fact, a duty to indemnify. Therefore, a carrier might be able to properly withhold costs related to the Railroad's defense until it was determined whether the Railroad was in part liable for the loss at issue. See e.g., Carlson v. Consolidated Rail Corp., 105 F.Supp.2d 901 (Ill. 2000); Laiho v. Consolidated Rail Corp., 4 F.Supp.2d 45 (D. Mass. 1998); Grand Trunk Western Railroad, Inc. v. Auto Warehousing Co., 686 N.W.2d 756 (Mich. App. 2004). However, depending on the applicable state law, a Railroad may be able to avoid a specific adverse liability finding as a condition precedent so long as there was *potential* Railroad liability, and the Railroad had tendered the defense to the contractor. Auto Warehousing, 686 N.W.2d at 763.

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In sum, Brown's and the other cases cited underscore that there were considerable problems involved with determining whether and how the indemnification agreement's "defense" provisions are covered. The changes in the Supplementary Payment provision and the Contractual Liability Exclusion will allow a Railroad to be reimbursed in a timely fashion for defense expenses which are subject to the indemnification agreement. Therefore, it is likely that scenarios such as Brown's should not arise with much frequency in the future. Instead, these newer provisions should be sufficient to compel the Contractor's CGL carrier to immediately pay for the Railroad's defense, subject to a later resolution of whether the defense is "in addition to limits," or will erode the Contractor's coverage limits.

What remains unsettled with these recent changes to the Supplemental Payments provision and the Contractual Liability Exclusion is the issue of whether the Contractor's insurer must pay to defend all the claims asserted against the Railroad, or whether the insurer need only pay for the claims for which the Contractor is obligated to indemnify. The standard rule in virtually every jurisdiction is that the insurer's duty to defend the insured includes an obligation for the carrier to defend *all* the allegations asserted against the policyholder, even if some of the claims are not covered by the policy. See e.g., Prahm v. Rupp. Constr. Co., 277 N.W.2d 389 (Minn. 1979). See, e.g., Western Am. Ins. Co. v. Moonlight Design Inc., 95 F.Supp.2d 838, 842 (N.D. Ill. 2000). However, the Railroad (based just on the indemnification agreement) is not an "insured" under the policy, and therefore an argument exists to say these provisions do not compel the insurer to fully pay for all the Railroad's defense costs.

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The question also arises as to whether the Contractor's carrier has the right to control the Railroad's defense, including having the sole say in deciding what law firm will defend the Railroad. It is clear that compliance with the "Supplementary Payments" provisions in essence puts the Railroad into the same position as an insured under the policy. This would allow the carrier to control the Railroad's defense. The same is not true, however, for the payment provisions found in the standard form Contractual Liability Exclusion. Here, there is a better argument to state the carrier only pays for defense expenses which are incurred to defend the claims which will ultimately be indemnified. This might be the preferred approach to the Railroad, as this would allow the Railroad to retain its own counsel who is well versed in railroad liabilities. However, any payments under these provisions would erode coverage limits. Moreover, it is possible not all the defense fees would be paid by this provision if some of the allegations against the Railroad would not be indemnified by the Contractor.

Perhaps one approach to consider is, if the circumstances allow, to have the carrier-appointed counsel defend through the unlimited defense cost obligation, and retain shadow defense counsel to monitor the proceedings. Then, if a situation arises where the Railroad wishes to control the active defense, shadow counsel is ready and able to immediately substitute in as defense counsel. Of course, the shadow counsel's defense costs incurred until that point would be the Railroad's personal responsibility. However, this approach may well preserve needed coverage limits as best as possible.

Of note, there are no similar defense payment provisions contained in the standard policy form's personal injury and advertising injury Contractual Liability Exclusion. This is logical given that the exclusion is very broadly written and does not contain the exceptions set forth in the policy's

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bodily injury and property damage coverage counterpart. As well, the ISO standard Limited Contractual Liability Coverage for Personal and Advertising Injury Endorsement does not contain provisions to allow defense costs to be paid. Therefore, whether the carrier would be required to pay costs incurred to defend false arrest, detention and imprisonment claims will turn on whether such expenses fit within the policy's coverage language. Under positions analogous to the Brown's decision cited above, the Railroad may have a good argument to say the Contractor had coverage to pay for defense expenses related to these personal injury offenses.

* * * * *

ADDITIONAL INSURED COVERAGE

An additional time-tested method to offload the Railroad's risk is to compel the Contractor to add the Railroad as an Additional Insured on the Contractor's CGL policy. Particularly when the Railroad's RPL policy does not provide primary coverage for the loss at issue, Additional Insured status provides the Railroad with an attractive risk transference mechanism, usually at minimal costs incurred to the Contractor. The practice is widespread and well accepted within the insurance industry. Even if a state law prohibits enforcement of an indemnification provision with regard to the indemnitee's liability, most states will enforce the agreement to procure insurance to protect the indemnitee for its liability. See e.g., Chrysler Corp. v. Merrell & Garaguso, Inc., 796 A.2d 648 (Del. 2002) (agreements to procure insurance to protect another for its liability valid even if an

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indemnification obligation providing the same type of protection is invalid); Sherwin-Williams Co. v. Fred Burgland & Sons, Inc., 799 F.Supp. 64 (N.D. Ill. 1992) (same).

Despite the fact it is “common” to add another entity as an additional insured onto a policy, there are numerous pitfalls which can easily result in no coverage being available to the Railroad unless certain safeguards are followed before the loss. As well, the claims professional reviewing the Additional Insured issues after the loss needs to be equally cognizant of these potential problems to be able to determine whether or no this additional coverage is available to the Railroad.

State Statutory Prohibitions on Additional Insured Enforcement: Preliminarily, a few states’ Anti-Indemnification Statutes not only prohibit contractual indemnification of another’s liability, but some of these statutes also bar the party in the Railroad’s position from compelling the Contractor to procure CGL coverage by adding the Railroad as an Additional Insured under its CGL policy. Two examples of such statutes are Oregon and New Mexico. Oregon’s Anti-Indemnification Statute, Ore. Stat. § 30.140, has recently been interpreted in Walsh Constr. Co. v. Mutual of Enumclaw, 104 P.3d 1146 (Or. 2005) in just such a fashion. In Walsh Constr., the Oregon Supreme Court held that application of that state’s Anti-Indemnification Statute in construction contracts voids any clause compelling the indemnitor to also name the indemnitee as an Additional Insured under its CGL policy. This underscores that the relevant jurisdiction’s statutes and caselaw must be analyzed to determine if there is any legal bar to the Railroad being named as an Additional Insured in the Contractor’s CGL policy.

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Additional Insured Endorsements and the Impact of the ISO July 2004 and Thereafter

Editions of These Endorsements: The Railroad must examine the actual policy to determine whether the Additional Insured Endorsement indeed provides the coverage sought. This process involves an analysis of the Contractor's CGL policy provisions to determine what "standard" language is being used to provide the Railroad with the Additional Insured status.

ISO has developed several forms which are used to add another entity as an Additional Insured in CGL policies. These Additional Insured forms are scheduled forms which require the Endorsement to name the Additional Insured in the schedule before coverage can attach. Typically, a Railroad will see it added to the Contractor's policy as an Additional Insured by the use of ISO Form endorsements CG 20 10 or CG 20 26. Form CG 20 10 is the most common endorsement utilized. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VI.H.10 (Nov. 2004). There are other Additional Insured forms which are available, but these are generally not considered appropriate in a Railroad/Contractor situation.

As noted above, in 2004, the insurance industry made comprehensive changes to its commercial general liability forms to bar coverage for an entity seeking protection, either by way of insurance for the Contractor's indemnification obligation, or as an Additional Insured under the Contractor's policy. All Additional Insured forms were "updated" as of July 2004 to "clarify" the scope of coverage the Additional Insured status provided under the Contractor's CGL policy. This "clarification" actually may eliminate CGL coverage for the Railroad under the Contractor's CGL

policy. The following details how these language changes could eliminate Additional Insured coverage for the Railroad.

Prior to the insurance industry's 2004 standard policy language revisions, Additional Insured status conveyed coverage to a Railroad with respect to liability "arising out of" either the Contractor's "work" or "ongoing operations" (depending on the edition of the form) performed for a Railroad. "Arising out of" in essence means originating from, or having its origin in, growing out of, or flowing from. See, Associated Indep. Dealers, Inc., v. Mutual Serv. Ins. Cos., 304 Minn. 179, 182, 229 N.W.2d 516, 518 (1975). "Arising out of" is not the same as "proximate cause"; at best, the phrase requires a "but for" connection between the Contractor's activities and the Additional Insured Railroad's liability to allow the Railroad to obtain coverage under these pre-July 2004 Additional Insured Endorsements.

An example of this "but for" interpretation is seen in Andrew W. Youngquist v. Cincinnati Ins. Co., 625 N.W.2d 178 (Minn. App. 2001). In Youngquist, a subcontractor's employee was injured on a building construction site while providing subcontracted-for electrical work. There did not appear to be any fault or negligence on either the employee or the subcontractor. The contractor was listed as an Additional Insured under the subcontractor's policy. The endorsement adding the contractor as an Additional Insured utilized the "arising out of" language. Under these circumstances, the court had no problem in finding that the subcontractor's policy insured the contractor for CGL coverage as the injury arose out of the subcontractor's work. Moreover, the court did not require that the contractor be vicariously liable for the injury in order for the coverage to attach.

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The 2004 changes to the ISO Additional Insured forms attempt to narrow the circumstances under which the CGL carrier will be required to cover the Additional Insured Railroad. First, these forms eliminate the “arising out of” language referenced above, and replace the phrase with the term “caused . . . by.” Therefore, under these new forms, there must be more than a tenuous “but for” relationship between the Contractor’s ongoing operations and the loss in order for the Railroad to be covered as an Additional Insured. While there are few, if any, reported cases in the country directly interpreting this change as of yet, older cases analyzing similar issues support the carrier’s argument that the “caused . . . by” language requires an actual causal relationship between the Contractor’s Work (which likely imposes liability on the Contractor or its subcontractors) and the Railroad’s liability.

In Consolidation Coal Co. v. Liberty Mut. Ins. Co., 406 F.Supp. 1292 (W.D. Pa. 1976), a contractor agreed to haul coal for a coal company. The contractor’s policy listed the coal company as an additional insured under the policy, “*but only with respect to acts or omissions of the named insured* in connection with the named insured’s operations at [the coal company’s] premises.” Id. at 1294. One of the contractor’s employees was injured while working on the job, and brought suit against the coal company. He claimed one of the coal company’s employees was the sole and proximate cause of the accident. Id. In response to this allegation, the coal company sought insured status under the contractor’s policy.

The carrier argued the policy did not cover the coal company for this accident because the accident was not caused by the negligence (“acts or omissions”) of the contractor, but was instead

solely caused by the coal company. Id. at 1295. In opposing the carrier, the coal company argued that, “but for” the employee’s presence on the job site in connection with the contractor’s operations, the accident would never have happened. Id. The court rejected the coal company’s arguments, but not without going into some interesting analysis of the policy’s provisions.

First, the court determined that the language “but only with respect to the acts or omissions” as utilized was ambiguous. Id. Therefore, the court engaged in an analysis of the language to ascertain the parties’ intent with regard to the language. Id. at 1296. In so doing, the court made it clear there was no “arising out of” language involved in this case. Id. Further, if the court were to adopt the more liberal interpretation of the language, it would end up “reading out” the key provision on which the case turned, an outcome courts generally disfavor. This principle, along with an examination of other cases utilizing the phrase “acts or omissions,” ultimately lead the court to determine that the “but only with respect to acts or omissions of the named insured” language required a causal connection, and not a “but for” relationship, between the contractor and the coal company’s liability to provide the coal company with coverage under the contractor’s policy. Id. at 1298-99.⁶

Similarly, in Shaffer v. Stewart Constr. Co., 865 So.2d 213 (La. App. 2004), cert. denied, 869 So.2d 886 (La. 2004), a contractor agreed to build a mooring facility for a new casino barge. Id. at 215. The contractor rented equipment from a company as part of this job. The equipment

⁶ This court reaffirmed the broader nature of the “arising out of” language when it held in Steadfast Ins. Co. v. Liberty Mutual Ins. Co., (E.D. Pa. March 8, 2000) that utilizing this language in a similar additional insured passage *does* invoke the desired status.

malfunctioned on the job site, and one of the contractor's employees was injured in the process of repairing the equipment. The employee thereafter brought suit against the equipment lessor, who requested that the contractor's carrier defend and indemnify the lessor pursuant to, among other provisions, an additional insured provision. In the subsequent lawsuit, the contractor's carrier alleged its additional insured coverage was excluded when the "sole negligence" of the additional insured caused the injuries. *Id.* at 223. The court rejected this argument as it was apparent the accident was not caused "solely" by the lessor, as other parties also appeared to be liable in some degree. *Id.*

Consolidation Coal's chief point, intuitively supported by Shaffer, is that policy language utilizing fault or liability concepts such as "caused by" will require a greater connection between the injury and the contractor's Work than a "but for" association to meet the provision's requirements. Therefore, the newer ISO forms' Additional Insured language, if seen in a Contractor's policy, will impose a greater requirement on the Railroad to prove it is an additional insured under the policy than merely the fact the Contractor was on the job site.

The upshot of this analysis is that it seems clear ISO did not want to provide a party with Additional Insured status under a contractor's policy if the party was solely at fault for the injuries or damage at issue. ISO made this concept abundantly clear, however, by changing another part of the endorsements to expressly say that the bodily injury, property damage, or personal injury and advertising injury must, "*in whole or in part,*" be caused by the Contractor's acts or omissions, or those acting on the Contractor's behalf, in the performance of the contractor's ongoing operations at the scheduled locations, for the Railroad to be an additional insured under the policy. See e.g., ISO

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Form CG 20 10 07 04. Therefore, if the new Additional Insured Endorsement forms are utilized in the Contractor's policy, the Railroad will not have coverage under that policy if it is solely liable for the damages.

Completed Operations Considerations: In situations where the at issue project involves access to or a need to cross Railroad property, the Railroad may not need to be directly insured for risks associated with putting the project to use after construction is completed. However, if the Contractor Agreement involves a project on Railroad premises, the Railroad would be highly interested in and motivated to obtain "completed operations" coverage for some length of time after the project's completion.

When the Additional Insured Endorsement Form CG 20 10 debuted in 1985, the Additional Insured received coverage with respect to "liability arising out of 'your work' performed for that insured by or for you." ISO Form CG 20 10 11 85. "Your work" was and generally is defined as the work or operations performed by the Contractor for the Railroad. Therefore, this early Additional Insured form not only provided coverage with regard to the Contractor's operations while being performed, but also provided coverage for the Contractor's *completed operations* once the project was put to use. This "completed operations" coverage was valuable additional protection for the Railroad if, for some reason, injury or damage arose after the project was completed.

The insurance industry did not believe it should be covering Additional Insureds for its Named Insured's completed operation exposures. Therefore, ISO modified the Additional Insured endorsement Form CG 20 10 in its October 1993 edition to only convey Additional Insured coverage

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to “liability arising out of your *ongoing operations* performed for that insured.” ISO Form CG 20 10 10 93.⁷ Despite the intent to eliminate “completed operations” coverage, many Additional Insureds continued to argue that the broad “arising out of” language, in conjunction with “ongoing operations,” continued to provide completed operations coverage to the Additional Insured once the project was completed as the injury would not have occurred “but for” the Contractor’s operations.

To eliminate this possible interpretation, ISO again modified the Additional Insured Form CG 20 10 in 2001 by explicitly excluding completed operations risks from the Additional Insured coverage:

“There is no coverage for injury or damage that occurs:

after all the work for the Additional Insured has been completed, or

after the portion of the work out of which the injury or damage occurs has been put to its intended use.”

ISO Form CG 20 10 10 01. This revision put to rest any concept that the Additional Insured endorsement provided completed operations coverage for the Additional Insured.

Despite the fact it appears Additional Insured endorsements which utilize “arising out of” and also “your work” phrases are commercially unavailable, Railroads should continue to seek them if possible, and claims professionals should examine potentially applicable policies to determine if this favorable language is utilized in the policies.

⁷ There are modified versions of the 11 83 editions of the ISO Additional Insured forms which also contain this “ongoing operations” language. Therefore, a Railroad should carefully review the Contractor’s Additional Insured form language, even if it claims to be form CG 20 10 11 85, to determine whether “work” or “ongoing operations” is utilized in the form.

If completed operations coverage is possible in the Additional Insured endorsement, the next issue is whether the Railroad is an Additional Insured in the coverage written in the years following the project's completion. Clearly, the Railroad could not request such an Additional Insured status indefinitely. However, Additional Insured status may well be appropriate for a period of two to three years following the project's completion, and should be requested as part of the contract with the Contractor. The exact length of time, however, should be considered on a case-by-case basis so as to not overburden any party with unreasonable clauses. This type of clause mandating completed operations Additional Insured status for years following the project's completion should always be looked for in the underlying contract by the claims professional.

Employee Injury Exclusion and Cross-Liability Exclusion: There may be certain additional policy exclusions or provisions which could impact the scope of coverage available to the Railroad despite the fact it is named as an Additional Insured under the Contractor's policy. The two exclusions discussed below should be removed from the Contractor's policy if the risk manager has the potential to prospectively do so. Additionally, the claims professional should specifically examine the Contractor's policy to determine if any of the following provisions, either alone or in connection with other provisions, may defeat Additional Insured coverage for the Railroad.

Employee Injury Exclusion: An Employee-Injury Exclusion bars coverage for "bodily injury sustained by *any* employee of *an* insured in the course of employment for that insured" (emphasis added). This exclusion underscores just how subtle the use of words can be in any contract. Note the exclusion utilizes the term "an." Since the Railroad seeks Additional Insured status, it is "an"

insured for the purposes of this exclusion. Therefore, this exclusion would bar coverage for the Railroad under the Contractor's policy for traditional FELA-related claims brought by its employees. However, the exclusion has a broader impact than to just bar coverage for the Railroad's employee's claims against the Railroad. The exclusion also bars coverage for any claim *the Contractor's* employee may bring against the Railroad so long as the loss was sustained in the course of the employment for the Contractor. See, e.g., Erdo v. Torcon Constr. Co., 645 A.2d 806, 809-10 (N.J. Super. 1994).⁸ This is because it is *any* employee of *an* insured bringing the claim against *an* insured.

The broad application of an Employee Liability Exclusion may be mitigated somewhat by the inclusion of a Severability Clause in the policy. A Severability Clause ensures that the insurance policy applies separately to each insured. Erdo, 645 A.2d at 809-10. See also, American Nat'l Fire Ins. Co. v. Estate of Fournelle, 472 N.W.2d 292 (Minn. 1991) (explaining that intent of severability clause is to provide each insured with separate and distinct coverage; existence of severability clause demands that policy exclusions be construed with reference to particular insured seeking coverage); Cook v. Country Mut. Ins. Co., 466 N.E.2d 587 (Ill. App. 1984) (auto policy applies separately to each insured against whom a claim or lawsuit is filed). Therefore, if the policy insures both the Contractor and the Railroad, the policy is to be read separately as to each of the insureds.

A Severability Clause in a policy with an Employee-Injury Exclusion can change the coverage determination when the claim is one brought by the Contractor's employee against the Railroad.

⁸ This result may change if the Contractor's policy also contains a Severability Clause. See following discussion.

Since the Severability Clause requires insureds to be treated separately, a claim brought by the Contractor's employee against the Railroad may no longer be barred by that exclusion. See, e.g., Erdo, 645 A.2d at 809-10. The rationale employed is that, if the policy is applied separately to each insured, the Contractor's employee suit against the Railroad is not one brought by the Railroad's employee. Id. However, again, this is a state law issue, and the applicable state statutes and caselaw should be consulted to see if this is the rule in the jurisdiction.

Cross-Liability Exclusion: An additional exclusion, however, may even trump the Severability Clause's effect on an Employee Injury Exclusion. A Cross-Liability Exclusion bars coverage for "any liability for bodily injury or personal injury caused by an employee of one Insured to an employee of another Insured." BP Chemicals, Inc. v. First State Ins. Co., 226 F.3d 420, 428-29 (6th Cir. 2000). In other words, This exclusion eliminates coverage for suits brought by one insured's employee for injuries and damages caused by another insured's employee. Moreover, given that the language of this exclusion actually contemplates more than one insured in its application of the language, it is likely impossible to argue that a Severability Clause renders this exclusion inapplicable if the Contractor's employee sues the Railroad.

Coverage Limits: The existence of Additional Insured status does not answer the question of how much coverage is available to respond to a particular loss. Even if the contract requires the Contractor to maintain a certain level of coverage limits, there may be a difference between the Contractor's liability limits already in place with its Carrier and the contractually mandated limits the Contractor is required to carry. Also, the Contractor's limits may be eroded by other claims without

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the Railroad's knowledge. Therefore, it is important to consider whether the Contractor should notify the Railroad of the erosion of limits, and/or compel the Contractor to replenish the limits at some point. As a practical matter, these "notice" provisions are cumbersome, and rely on later events usually not occurring in the normal course of events. Therefore, it would be very easy for even a conscientious Contractor to overlook providing the Railroad with mandated notice until it was too late to address the eroded limits issue when the claims professional begins to analyze how much coverage is available.

One approach to possibly limit the potential problems associated with the Contractor's coverage limits is to demand that the Contractor's policy contain an amendment of limits form which provides for separate operations (and, where appropriate, completed operations) coverage limits for the specific project involved. This approach allows the claims professional to immediately identify specific coverage limits which are available to the project at issue.

There are a variety of forms available to address these coverage limit issues. Unfortunately, not all of these forms provide the best protection to the Railroad. For example, ISO Form CG 25 01 07 98 is an "Amendment of Limits of Insurance (Designated Project or Premises)." This Endorsement has the ability to raise the limits of all the coverages available under the Contractor's policy to amounts that are mandated for the specific project. However, this form does not create separate limits, and therefore the limits are subject to erosion from other claims against the Contractor for liability on its non-Railroad sites. This form is also impractical when the scheduled limits in the Contractor Agreement are actually less than the general liability limits of the Contractor.

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There would be no reason to artificially limit the amount of coverage available for the project if the Contractor's insurance coverage limits are higher than those stated in the contract. Therefore, it is possible the only appropriate time to potentially use this form is in situations where the Railroad mandates limits that are higher than what the Contractor has in its policy.

One set of forms which provide fewer problems are ISO form CG 25 03 03 97 ("Designated Construction Project General Aggregate Limits") and its "locations" sibling, ISO form CG 25 04 03 97 ("Designated Location(s) General Aggregate Limits"). The former is utilized when the Railroad is involved in construction projects. The latter is utilized in situations where mere access to or through the Railroad premises is required in order for the Contractor to perform work for others. These forms, which schedule the "Designated Construction Project," provide a separate general aggregate limit for the Contractor's policy which will specifically and only be applied to the scheduled project or location. In other words, only the claims related to the Designated Construction Project will erode these separate limits. These forms therefore assure the Railroad that these limits will be available if needed.

There are a few shortcomings with these forms, however. First, the forms do not alter the contractor's CGL policy's per-occurrence limits, should the Railroad wish higher occurrence limits than what is stated in the policy. In addition, the forms do not provide a separate completed operations aggregate limit for the project or location, as the limits only apply to "ongoing operations." These forms also do not provide a separate aggregate limit for personal injury and advertising injury exposures for offenses such as false arrest, detention, or imprisonment. Finally, the

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Railroad may still be faced with an issue as to whether the Contractor is compelled to refresh the separate aggregate limits if more than one claim is made involving the project.

These various coverage limit forms are all scheduled forms which require identification of the specific project. The preferred language for scheduling projects to avoid additional paperwork would be to utilize a phrase in the schedule which states that the limits apply to all projects in which the Contractor engages, regardless of whether the project is with the Railroad or another entity. Example blanket language to avoid additional paperwork processing is as follows: “Apply separately to each of your projects away from premises owned by you or rented to you.” This in fact was the approach utilized in Form CG 25 03 before 1997. This language was omitted in the 1997 edition because of potential concern about a Contractor’s liability which may relate to several projects such as when a Contractor stores materials or equipment at a single location, and liability arises because of the storage of that equipment. This particular concern, however, is not as much of an issue in the Railroad-Contractor context. Instead, the claims professional should look at the description of the designated project to be sure the description imposes the separate set of limits to the specific location at issue.

There are options available to allow the Contractor’s policy to provide for separate completed operations coverage limits if that is what is needed by the Railroad. The question for the claims professional will be to determine if the right coverage limits are available for the type of claim being asserted. Usually, the claims are for bodily injury or property damage. However, if the claims

involve personal or advertising injury, or completed operations issues, the policy will need to be examined to determine if such limits are even available.

The insurance industry recognizes certain “manuscript” forms which provide separate completed operations aggregates for a scheduled project. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VII.E.3. An example manuscript form is as follows:

“Only with respect to your project’s schedule below, the General Aggregate Limit and the Products-Completed Operations Aggregate Limit under the Limits of Insurance (Section III) apply separately to each project.

“With respect to all your other projects, premises, and locations not specifically scheduled in this endorsement, the General Aggregate Limit and the Products-Completed Operations Aggregate Limit shown in the Declarations apply in accordance with the Limits of Insurance (Section III) of this policy.”

As seen, this form provides separate products-completed operations coverage for the project. However, it does not provide for a separate personal injury and advertising injury limit. Therefore, the Railroad may wish to consider modifying this manuscript form to include a requirement that a separate personal injury and advertising injury aggregate limit be included in this form.

Policy Deductibles: Many times a Contractor will employ a deductible or self-insured retention (“SIR”) feature in its policy in order to reduce its premium costs. The question therefore arises as to whether the Railroad could be compelled to pay the deductible or SIR if it makes a claim under the Contractor’s CGL policy. Such a self-insured exposure, either by deductible or SIR, is likely not the intent of the Railroad when it compels the Contractor to name the Railroad as an Additional Insured in the Contractor agreement.

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The standard CGL policy forms do not contain provisions for SIRs or deductibles. These must be endorsed onto the Contractor's policy. A typical ISO form providing for deductibles is Form CG 03 00 01 96, the "Deductible Liability Insurance" Endorsement. This form allows the Contractor to determine the amount of the deductible to apply for bodily injury, property damage, or for a combined deductible for both types of liability. The selection can be made on a "per-claim" basis, or a "per-occurrence" basis.

Under this form, the obligation to pay the deductible falls on the *Named Insured* under Part D of the endorsement:

"We may pay any part or all of the deductible amount to effect settlement of any claim or 'suit' and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as had been paid by us."

Id. "You" is defined in the standard ISO CGL form as "the Named Insured shown in the declarations, and any other person or organization qualifying as a Named Insured under this policy." See e.g., CG 00 01 10 01 at p. 1. In other words, if the Railroad is added as an "Additional Insured" under the policy, Form CG 03 00 01 96 will only obligate the Contractor as the Named Insured to pay the deductible. Moreover, if the carrier pays the deductible amount, its only recourse is to collect the deductible amount from the Contractor.

Waiver of Subrogation: An insurer rightfully also seeks to offload the risks it has taken on in its policies. In addition to an insurer's common law right of subrogation, typical CGL policies contain a "Transfer of Rights of Recovery Against Others to Us" clause in the conditions section of the policy. That condition states:

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“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 the loss to impair them. At our request, the insured will bring ‘suit’ or transfer those rights to us and help us enforce them.”

See e.g., CG 00 01 10 01 at p. 12. This language underscores the concept that an insurer has obligations which attach at the time of the incident implicating the coverage; it also has certain rights which attach at that time as well. Therefore, an insured cannot do anything *after the loss* to impair the carrier’s subrogation rights. However, since this is a temporal obligation (*after the loss*), an insured may compromise the insurer’s subrogation or transfer rights *before* the loss.

The insurance industry recognizes this type of waiver has a legitimate business purpose, and therefore provides an endorsement which effectuates this intent. ISO Form CG 24 04 10 93. This form is a scheduled endorsement which requires the Railroad’s identification in order to waive the transfer rights. However, a blanket schedule on this Endorsement with the following language may suffice:

“Any person or organization to whom the Named Insured is obligated by contract or agreement to provide a waiver of subrogation or recovery.”

Id. The waiver under this Endorsement not only applies to a loss arising out of the Contractor’s operations while they are being performed, but also applies to the Contractor’s completed operations.

“**Notice:**” Coverage under the Contractor’s CGL policy is only good if the scope of the coverage is applicable, *and* if the policy itself is in effect. There are numerous reasons why a policy could be cancelled, changed, or even expire without the Railroad’s knowledge. Therefore, the Railroad should consider how to be kept up to date on any changes to the Contractor’s CGL Policy.

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One approach is to mandate that the policy cannot be altered or terminated without providing at least 60 days' notice to the Railroad. Sixty days is the length of time a Railroad Protective Liability Carrier must provide cancellation notice to a Railroad under an RPL Policy. Therefore, selecting a 60-day notice provision will make uniform all potential insurance notices the Railroad may need to address in its relationships with its Contractors.

The claims professional will have no difficulty determining whether the policy was in effect at the time of a particular loss. This would typically be one of the very first bits of information the carrier would convey if it believed the policy was not in existence at the time of the loss.

Primary Coverage: There may be unique circumstances where a Railroad has the potential to access more than one CGL policy for a particular loss. At times, a Carrier may validly claim that its coverage for the Additional Insured is not first in line to respond with a defense, or with settlement or judgment monies. In those situations, Carriers may end up delaying payment of defense expenses in an effort to force other carriers to initially respond. Clearly, this type of "brinkmanship" between Carriers does not benefit the Additional Insured Railroad. Therefore, in order to avoid these types of inter-Carrier disputes, the Railroad may wish to consider including a clause in the Contractor Agreement which compels the Additional Insured coverage under the Contractor's CGL policy to be "primary and noncontributing" so that the CGL Carrier must respond to a valid tender of defense and request for indemnity. Language which would impose such an obligation on the contractor is as follows:

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“Such insurance afforded to the Railroad as ‘Additional Insured’ under the contractor’s policies shall be primary insurance and not excess over, or contributing with, any insurance purchased or maintained by the Railroad.”

This request will likely require the policy to be endorsed to change its “Other Insurance” clauses to reflect this primary and noncontributing status.

If the claims professional is faced with this situation, she or he will need to analyze the various policies’ “Other Insurance” clauses to determine if they can be harmoniously read together to rank the policies from primary (or co-primary), secondary, tertiary, and so on. There are a variety of types of “Other Insurance” Clauses:

- “Primary:” These clauses mandate that the coverages afforded are the first to respond to a loss. Typical RPL policies contain these types of Other Insurance clauses;
- “Pro-Rata:” These clauses seek to coordinate their coverage with other “primary” coverages so both policies respond jointly to the loss. These clauses may mandate that coverage limits are provided “by shares,” or “by limits;”
- “Excess:” These clauses seek to have their coverage respond after at least one primary policy has exhausted its limits;
- “Escape:” These clauses, rarely utilized today, seek to avoid any coverage obligations whatsoever so long as some other policy responds to the loss.

If these clauses can be applied without conflict, they should be so enforced. However, if there is a conflict in these clauses, then the issue of which policy responds first is determined by an analysis of the applicable state law rules governing Other Insurance clause interpretations. These rules vary from state to state, and the particular applicable state rule should be analyzed to answer this question.

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BREACH OF CONTRACT AS A REMEDY

Ultimately, if the Contractor breaches an obligation under the Contractor agreement to the Railroad's detriment, the Railroad technically has a breach of contract claim against the Contractor. Unfortunately, this type of a breach of contract claim will normally not be covered by the Contractor's CGL policy. However, if the Contractor is viable, the Railroad's remedy would be to collect any judgment directly from the Contractor itself.

Given that many Contractors cannot afford to pay a judgment on a large exposure created by its breach of contract with the Railroad, it is a better practice to be sure the Contractor has complied with its obligations under the Contractor Agreement. The best approach to employ to confirm that all conditions have been complied with is to obtain a copy of the Contractor's CGL policy as amended, and, if need be, coordinate with the Contractor's insurance broker or Carrier to implement each and every one of the contractual clauses discussed above. Only in this way can the Railroad be comfortable with the notion that it is as protected as much possible by the mandating of an Additional Insured status under the Contractor's CGL policy.

Once a loss has occurred, the claims professional should demand full and complete copies of any and all agreements or contracts between the Railroad and any Contractor who may be involved in the project or loss. In addition, any policies of insurance covering the various Contractors should also be gathered. Then, these contracts and policies can be analyzed to determine what the Railroad's rights and options are with regard to the outsource liability at issue. It is only in this way can the Railroad be fully protected against the losses involved with its Contractors.

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RAILROAD PROTECTIVE LIABILITY POLICIES

As intimated above, most standard form unendorsed CGL policies exclude Railroad-related risks. Therefore, a market was created long ago for a Railroad-specific insurance product to address Railroad-specific risks. The RPL Policy provides protection for the Railroad regardless of whether the Contractor is performing operations for the Railroad on Railroad property, or whether the Contractor's operations are for others and require the Contractor to access or traverse Railroad property to perform the operations.

RPL coverage is not a typical CGL policy, and its idiosyncrasies need to be appreciated in order to determine exactly what is and is not covered. The RPL policy historically was purchased by the Contractor, and not the Railroad. The purchase price, therefore, was built into the Contractor's overhead as part of the cost to the Railroad or the party seeking the Contractor's services. Despite the fact the Contractor purchased the policy, it was not an insured under the policy; the Railroad was the Named Insured. Today, more and more Railroads are purchasing the RPL policy instead of the allowing the Contractor to perform this function. This allows the Railroad to control the variables inherently involved when this coverage is purchased.

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ISO has issued a standard form for RPL policies. See e.g., ISO Form CG 00 35 10 01.⁹ The RPL policy covers bodily injury or property damage which:

“arises out of acts or omissions at the ‘job location’ which are related to or are in connection with the ‘work’ described in these Declarations.”

Id. at p. 1. “Work” means:

“work or operations performed by the ‘contractor’ including materials, parts or equipment furnished in connection with the work or operations.”

Id. at p. 7. “Contractor” is:

“the contractor designated in the Declarations and includes all subcontractors working directly or indirectly for that ‘contractor’ but does not include you.”

Id. at p. 6. Typically, the contractor is the entity either performing operations for the Railroad, or performing operations for an adjacent landowner.

“Job Location” is defined as:

“the job location defined in the Declarations including any area directly related to the ‘work’ designated in the Declarations. ‘Job location’ includes the ways next to it.”

Scope of Coverage Afforded: The coverage grant requires that the bodily injury or property damage “arise out of acts or omissions.” The question is whether the “acts or omissions” must be those of the Railroad in order for coverage to attach, and whether the “acts or omissions” must have

⁹ ISO has apparently issued a 12 04 edition of form CH 00 35. However, its changes appear to not impact the analysis presented in these materials.

some fault implications for the actor. One Court addressed these issues in Continental Cas. Co. v. Auto-Owners Ins. Co., 238 F.3d 941 (8th Cir. 2000). Continental Cas. resolved coverage issues raised by four carriers as to which insurer would ultimately be responsible to pay a settlement reached with an employee of a contractor (“Contractor A”) hired by the railroad to perform derailment salvage operations. The case was confounded by the presence of a second contractor involved with the derailment operations (“Contractor B”). Both contractors had purchased RPL policies, and each contractor had its own CGL policies which named the railroad as an additional named insured.

The court ultimately determined that Contractor A’s CGL policy was responsible for the settlement, and rationalized the ruling as follows. The court first considered whether a contractor’s actions can constitute a relevant “act or omission” satisfying this element of the granting language. The Court noted that the acts or omissions must be related to, or be in connection with, the “work” described in the Declarations. Because “work” is the “work or operations performed by the ‘contractor,’ the liabilities can arise from the contractor’s specific conduct.” Id. at 944. Therefore, not only can “acts or omissions” be the Railroad’s acts or omissions to invoke RPL coverage, but they can also be those of the relevant Contractor.

The Continental Cas. court then addressed whether the contractor’s acts or omission must be fault-based in order to invoke the coverage. In rejecting this point, the court observed that the coverage does not necessarily turn on whether the contractor was negligent or caused the actual injury in order to invoke the RPL coverage. Id. However, there does need to be some nexus between the acts or omissions of the contractor identified in the RPL and the loss to invoke coverage

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for the railroad under the purchased RPL policy. *Id.* Based on this analysis, the Court determined that there was insufficient proof to show that the loss “arose out of” Contractor B’s work, and therefore the RPL policy purchased by Contractor B did not need to initially respond to protect the railroad.

What Doesn’t the RPL Policy Cover? Since this initial grant of coverage is broad, the RPL policy’s scope of protection is defined more accurately by what it does not cover. As noted above, the insurance industry has modified several Additional Insured forms, as well as the Insured Contract definition, in an effort to limit coverage for an indemnitee/Additional Insured if that entity is solely at fault for the injury or damage at issue. This concept has already been in place in RPL policies for several years, and is exhibited in the policy’s “Acts or Omissions of Insured” Exclusion (alternatively characterized as a “Sole Liability” Exclusion):

“[This insurance does not apply to:] ‘Bodily injury’ or ‘property damage’, the sole proximate cause of which is an act or omission of any insured *other than acts or omissions of any of your designated employees*.’”

ISO Form CG 00 35 10 01 at p. 2. A “designated employee” is defined as:

- “a. Any supervisory employee of yours at the ‘job location’;
- “b. Any employee of yours while operating, attached to or engaged on work trains or other railroad equipment at the ‘job location’ which are assigned exclusively for the ‘contractor’; or
- “c. Any employee of yours not described in **a.** or **b.** above who is specifically loaned or assigned to the work of the ‘contractor’ for the prevention of accidents or protection of property.”

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This exclusion at first glance seems to gut the entire purpose for the RPL policy. However, on closer examination, it is clear that the exclusion applies narrowly to only bar coverage for the Railroad's liability essentially unrelated to the specific operations at the job location. This is accomplished by the italicized clause at the end of the exclusion. Coverage is restored, despite the Railroad being solely at fault, if the liability for the injury or damage is caused by an act or omission of one of the Railroad's "designated employees" which, by definition, is someone on the Railroad's behalf who is directly involved with the Contractor's work at the job location. These persons are supervisory employees, employees involved with Railroad equipment assigned exclusively to the Contractor, and other Railroad employees assigned to the project to prevent accidents or protect property. ISO Form 00 35 10 01 at p. 7.

The Sole Liability Exclusion goes on to also state:

"This exclusion does not apply to injury or damage sustained at the 'job location' by any of 'your designated employees' or employee of the 'contractor', or any employee of the governmental authority or any other contracting party (other than you) specified in the Declarations."

ISO Form CG 00 35 10 01 at p. 2. Under this exception, FELA claims asserted by the Railroad's designated employees are not barred so long as they arise out of the operations at the job location. The same is true for the Contractor's employee's claims (including Subcontractor employees), the government, or any other party to the contract necessitating the RPL policy so long as that entity is scheduled in the Declarations.

The "Sole Liability" Exclusion's impact is also minimized in an additional fashion. The exclusion does not bar coverage for the Railroad when the Railroad is jointly liable with another

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(regardless of how the liability arises), or when the Railroad is merely vicariously liable due to the act or omission of the Contractor. Therefore, if the Railroad's liability is not based on acts or omissions of one of its Designated Employees, the Railroad will need to show that another entity is also at fault in order to invoke the RPL coverage.

The RPL policy's scope of coverage is limited in several additional ways. First, there is a temporal limitation to the policy. The RPL coverage is only available while the Contractor's operations are in progress. Therefore, once one of the following has happened, the RPL policy's coverage will cease:

- all work involving the project is completed;
- all work at the job location is completed; or
- the work at the job location has been put to its intended purpose.

Id. at p. 1. There is an exception to this termination of coverage when an injury is caused by tools, uninstalled equipment, or abandoned or unused materials. Id. This is a logical exception in that these items are remainders of the Contractor's "work."

The timing of the RPL policy's termination underscores a critical reason why a Railroad seeks multiple ways to protect itself when dealing with Contractors: The RPL policy could terminate at a point in time when the work at the job location has been put to its intended purpose, but risks could still remain which require coverage for the Railroad through other means. Therefore, Additional Insured status, especially for completed operations, and indemnification, can come into play to protect the Railroad for these later-in-time risks.

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The RPL policy generally does not cover contractual liability for the Railroad unless it is assumed as part of an agreement to transport persons or goods for a charge or any inter-change contract or agreement respecting locomotives or rolling stock.

Finally, the RPL policy contains an exclusion for many types of pollution liability, subject to several exceptions. Included within the pollution exclusion is a prohibition of coverage for the discharge of pollutants brought onto the job location in connection with the designated operations, except for bodily injury or property damage arising out of the escape of fuels or lubricants *from* equipment used at the job location,¹⁰ or arising out of heat, smoke, or fumes from a “hostile fire.” This particular exception relating to the escape of fuels and lubricants can be expanded by the inclusion of an ISO form, CG 28 31 07 98, which will expand the restoration of coverage to protect against property damage or bodily injury damages because of the discharge of fuels or lubricants brought onto the job location but which do not escape from equipment used at the job location (in other words, are stored at the job location).

Scheduled Policy Considerations: As seen by the granting language and definitions quoted above, the coverage is provided on a scheduled policy which requires specific information set out in the Declarations to confirm the exact scope and extent of the coverage afforded. Therefore, it is incumbent on the Railroad to be sure that the key items scheduled are correct when the policy is received from the insurance carrier. First, the “Description of Operations” must be clear and unambiguous, and fully describe the scope of work to be performed by the Contractor. Operations

¹⁰ A modification of this language in form CG 00 35 12 04 clarifies this exclusion.

not described will not be covered. If the Contractor's "work" expands during the project, this Description of Operations must be amended in order to expand the coverage to protect against liability from these additional operations.

In addition, the "Job Location" must be clearly set forth in the RPL policy schedule. This requires a full, and from a Railroad's perspective, broad description of what physical areas will be impacted by the Contractor's work. The Railroad prefers this description be as broad as possible so that technical interpretations of the Job Location cannot be utilized to unreasonably limit the scope of coverage. It is true that the broader the description, the higher the premium is for the Contractor. However, premiums for RPL policies are relatively modest, and may not even be a factor if the project merely requires access to or through the Railroad property itself in order for the Contractor to perform operations for an adjacent landowner. As with the Description of Operations, the Job Location descriptor on the schedule must be amended if there is any change in the physical dimensions of the job so that expanded coverage to these additional Job Locations, even if the Job Location has expanded within a particular area, is provided under the policy.

Finally, in order to potentially cover claims asserted by other entities involved in the contract which required access to the Railroad property, the identities of the other entities involved with the contract must be scheduled on the Declarations page.

RPL Policy Conditions: The RPL policy contains several conditions of note. First, the standard policy contains a cancellation clause which mandates that the Railroad be provided with 60 days' notice before the policy is cancelled. *Id.* at p. 3. Because this is as long of a notice period as

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provided by the various insurance coverages potentially involved with contractor negotiations, it is prudent for the Railroad to utilize this 60-day time period for all policies in force as a result of the negotiations with the Contractor. This should provide the Railroad with sufficient time in which to address the issue of the impending policy lapse or termination.

The RPL Policy also contains a condition mandating that coverage is primary but for any other applicable RPL Policy. *Id.* at p. 4. This clause is quite favorable for the Railroad in that it forces the RPL Carrier to defend the Railroad immediately, and allows potential disputes with other carriers to be addressed after a defense has been provided by the RPL Carrier. Additionally, if more than one RPL Policy is involved, these policies should equally share in the defense expenses, and will generally harmoniously share contributions for judgments or settlements by equal shares up to the limits of their respective policies.

Another condition in the RPL Policy is the Transfer of Recovery Rights provision. *Id.* As noted above, these subrogation clauses are disfavored by Railroads if they can be utilized by other carriers to assert claims against the Railroad. Conversely, as part of the ability to maintain low RPL premiums, it is favorable for a Railroad to have this Transfer of Recovery Rights condition incorporated into the RPL policy. Many times, the likely party the RPL policy will subrogate against is the RPL Policy-purchasing Contractor who entered into the relationship with the Railroad. Despite the fact the Contractor purchased the RPL Policy, the RPL Carrier can, and often does, subrogate over against that particular Contractor under any of the contractual, tort or equitable (contribution and/or indemnity) rights the Railroad holds. For example, in Continental Cas., cited above, the RPL

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Carrier initially held responsible to pay the settlement exercised the recovery rights transferred to the Carrier from the Railroad to enforce an indemnification agreement against Contractor A employing the Plaintiff. The indemnification agreement required Contractor A to protect the Railroad, even against its own negligence. Because the indemnification agreement was an “Insured Contract” under the Contractor’s CGL policy, the Court ultimately held that the Contractor’s CGL policy was liable for the settlement.

Despite the fact the Railroad is also an insured under the Contractor’s CGL Policy, a Transfer of Recovery Rights Clause may not be a valid basis for the RPL Carrier to pursue a claim against the CGL Policy based on the Railroad’s Additional Insured status. This is because the RPL Policy’s “Other Insurance” clause mandates that it be primary coverage. Unless the CGL Policy has been endorsed to change its Other Insurance Clauses, those clauses may be interpreted to have the CGL coverage be excess over the RPL coverage. See e.g., Form CG 00 01 10 01 at p. 11. This may be of no moment to the Railroad, however. If the RPL and CGL Policies both apply, the CGL coverage would be available as excess protection over the RPL limits.

Contractors may attempt to have the Railroad agree to a waiver of subrogation clause similar to the type of concession Railroads seek from contractors. However, RPL Carriers and Railroads rarely agree to such a waiver, and it is not recommended that a Railroad agree to such a concession unless compelling reasons are provided.

Finally, RPL Policies generally contain extremely high limits. For example, limits of at least \$5 million per occurrence, and \$10 million aggregate coverage, are not unusual. The key for

determining the amount of RPL coverage to mandate for the Policy is to underwrite the risk at issue with the designated operations given the job location. In examining this risk, the Railroad should keep in mind that the RPL Carrier does not perform an exhaustive independent analysis of the risks in order to come to an independent determination of the level of appropriate limits. Moreover, the Railroad should consider whether the “per-occurrence” limits should be part of a combined single limit with the aggregate limit, as the Policy may be called upon in a catastrophic situation to respond to multiple claimants involved with the one occurrence.

* * * * *

**CHECKLIST FOR CLAIMS PROFESSIONALS HANDLING CONTRACTOR
AND OUTSOURCE INDEMNIFICATION AND COVERAGE ISSUES**

Many of the concepts discussed above are compressed into a claims handling checklist which is attached as an Appendix to these materials. This checklist is intended to highlight issues the contractor or its carrier may or will raise. A delay in providing the information outlined in the checklist will only delay the time when these entities will also analyze these issues. An immediate, comprehensive presentation of the points set out in the checklist should provide the contractor and its carrier with an ability to analyze all major issues involved with the claim, the indemnification agreement, the coverage for the indemnification agreement, and/or the coverage directly for the Railroad under the Contractor’s policy.

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Since many times the Railroad's RPL carrier may be asserting recovery rights as part of the claim, it would be wise to involve the RPL carrier in the development of the answers to the checklist. This will allow the Railroad and the RPL carrier to present a united front to the Contractor and its carrier in an effort to have these entities step up as early as possible and accept their inevitable obligations.

The key in filling out the checklist is to obtain as early in the claims process as possible all available Contractor contracts with the Railroad, as well as copies of all potentially applicable Contractor insurance policies. Care should be had to be sure that especially the policies provided by the Contractor's carriers are complete, as even a single missing form endorsement could materially change the answers desired on the checklist.

* * * * *

RISK MANAGEMENT CONSIDERATIONS WHEN NEGOTIATING WITH CONTRACTORS

This final section addresses some strategic questions for risk managers who are involved in Contractor contract negotiations. The goal of this section is to be sure the Railroad has negotiated the maximum available protection it may achieve with the Contractor and its carrier. This section also highlights additional follow-up to be sure the Contractor and its carrier have performed as they are required prior to the time the particular project is commenced. Finally, the materials provide possible language to consider when implementing some of the considerations addressed above. While the

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suggestions set forth here are not exhaustive, they provide a general set of guidelines which should apply in the majority of Contractor negotiations.

Scheduled Insurance Forms: As referenced above, many standard form amendatory endorsements contain “schedules” which require specific language to be inserted into the forms to extend protections favorable to the Railroad. These schedules *must* be correctly filled out in order to provide the protection intended by the endorsement. Therefore, it is critical to understand how the language being actually inserted into the endorsement impacts the coverage provided. Each schedule must either have the information set forth in the schedule itself, or set forth on the policy’s Declarations Page. However, since most contractor CGL coverages will not provide this information in the Declarations page (most likely because the particular project at issue may not have been pending at the time of the policy’s commencement), it is critical that the information be set forth in each schedule. Failure to have a fully-filled-out schedule risks a potential loss of protection for the Railroad.

It is for this reason that the Railroad should obtain a copy of:

- each RPL Policy issued for each project; and
- the Contractor’s CGL policy as amended pursuant to the requirements set out in the Contractor Agreement

prior to the time the project commences. This will allow the Railroad to independently verify that the Contractor has actually satisfied the mandates set forth in the Contractor Agreement or, if not, to cure the deficiencies.

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“Duty” to Defend Issues: In a significant percentage of cases, a liability policy’s defense coverage is more valuable to an insured than its indemnity protections to pay for judgments or settlements. The Railroad’s goal is to have as many insurance policies provide the Railroad with an immediate defense so the Railroad does not end up fighting a “two-front war” between the underlying liability lawsuit and its putative insurance carriers.

The Railroad wants to determine early on if there will be any coverage disputes with carriers. Therefore, the claim or suit should be tendered to all potential carriers as soon as possible in order to provide the insurers with the opportunity to tell the Railroad whether it may be raising issues, seeking additional information, reserving rights or denying coverage. The phrase “tender early and tender often” is a polestar concept in a Railroad’s risk management practices. Repetitive tendering of the claim or suit should occur when additional facts are developed, as the new facts may change the carrier’s coverage position, even if a carrier has previously denied coverage.

Additional Insured Status Impacting the Duty to Defend: As outlined above, the Insurance Services Organization modified numerous Additional Insured Endorsements, as well as the Insured Contract definition in the CGL policy, in an effort to reduce the scope of coverage available under the Contractor’s CGL policy. These attempts to limit the scope of coverage also impact that Carrier’s duty to defend the Railroad as an Additional Insured if the most recent amendments of the ISO forms (07 04 editions) are utilized.

Often, the Railroad is sued by an injured Contractor’s employee. If this is the case, the RPL Policy should be ready to step up to defend the Railroad. However, especially if the exposure is

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extreme, the Railroad will want to be sure the Contractor's carrier is ready to step in to defend and, if need be, indemnify the Railroad.

In instances where others sue the Railroad, there may be situations where the RPL Policy or the Contractor's CGL Policy, as well as the Insured Contract coverage for the indemnification agreement, simply do not respond to defend. This may be as a result of allegations in the Complaint that the Railroad is solely at fault by acts or omissions of Railroad employees other than Designated Employees. If the Railroad seeks a defense under the RPL Policy or under the CGL policy which contains a 07 04 edition of an Additional Insured Endorsement, the carriers will claim there is no coverage as the Railroad is the only alleged bad actor. Many jurisdictions will allow the carrier to initially deny coverage based on the four corners of the Complaint. Some jurisdictions provide that the carrier is to also look at additional facts developed beyond the Complaint. In Minnesota, if the Complaint is the only source of "facts" provided to the Insurer, the Carrier is not obligated to investigate the claim beyond what is set forth in the Complaint in order to determine whether it may have a duty to defend. Garvis v. Employers Mut. Ins. Co., 497 N.W.2d 254 (Minn. 1993). Therefore, a Railroad will only be able to access defense coverage if it is able to submit facts beyond the Complaint which establish a good-faith basis on which to allege that the Contractor, or another entity, is also at fault for the injury or damage.

Who Controls the Defense?: The Railroad generally desires to control its defense of the lawsuit. If the defense is assumed by an RPL carrier, the practical concern over who controls the defense may not be an issue, especially if the RPL carrier allows the Railroad's chosen counsel to

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defend. If the RPL policy is inapplicable, however, and the Railroad seeks payment of defense expenses by the Contractor's carrier, there will be an inherent tension in how the interests of the Contractor, the Contractor's carrier, and the Railroad will be handled.

The "duty to defend" provided by insurance carriers is characterized in many jurisdictions as a service, and not merely an obligation to pay money. In other words, the duty to defend implies that the carrier shall handle and control the defense of the litigation, subject to the cooperation of the insured defendant. This right and duty provide the carrier, and not the Railroad, with the ability to develop and implement defense strategies, as well as to determine when and under what circumstances settlement may occur or whether the case will be taken to trial. This may not be the same strategy the Railroad would employ, especially if there are dynamics at issue beyond those involved with the specific litigation itself.

In many jurisdictions, certain situations can arise to convert the Insurer's "duty to defend" (provide a service) into a mere duty to reimburse defense expenses (with no "service" aspect to the obligation). These scenarios most often arise when the insurer agrees to defend under a reservation of its policy rights, and there is an ability to manipulate the facts developed in the case to the detriment of the insured's coverage rights. Under these circumstances, the carrier may well lose the right to control the defense strategy, and be left with the mere obligation to pay fees and costs reasonably incurred in the defense of the claim or suit. Whether an actual (or potential) conflict of interest exists to convert the defense obligation into a mere defense cost reimbursement obligation requires a very fact-specific analysis of the jurisdiction's state law, an analysis of which is beyond the

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scope of this survey. However, the Railroad should be ready to undertake this examination, especially if it wishes to retain the right to control the defense.

The distinction between a “duty to defend” and a “duty to reimburse defense expenses” is reflected in how the Railroad’s defense is handled when it enforces the indemnification agreement against the Contractor. As discussed above, the Railroad, as an indemnitee, is entitled to the Carrier’s “defense” of the suit, so long as it concedes several rights to control the defense. Under these circumstances, the carrier will pay the defense expenses in addition to the indemnity limits of the insurance policy and control the defense. In other words, the Railroad will have unlimited monies available to defend the lawsuit, so long as there is no conflict in the defense of the lawsuit with the Contractor, and the Railroad is willing to abdicate its wish to control the defense of the lawsuit.

More often, however, a conflict does exist between the Contractor and the Railroad, most likely because there are disputes between the Railroad and Contractor over who is at fault. Alternatively, the Railroad may simply choose to control its defense of the lawsuit. In these circumstances, and so long as the indemnification agreement is valid, the Railroad’s “defense” assumed by the Contractor is paid by the Contractor’s carrier as part of the limits of coverage under the Contractor’s policy. These costs, however, will erode the policy’s available coverage to pay any settlement or judgment. In exchange for this compromise of the CGL limits, the Railroad retains the right to control the lawsuit’s defense.

Scope of the Defense Obligation Under the Contractor’s Indemnification Agreement:

Another potential shortcoming with the defense obligation in indemnity agreements is how much of

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the lawsuit against the Railroad the Contractor must defend. Unlike a carrier's duty to defend, a Contractor may well be within its contractual rights to only defend those portions of the claim or suit which implicate its indemnity obligation. In other words, it is possible some causes of action in the lawsuit may not be defended by the Contractor, as it would not be required to indemnify those claims.

In order to provide the Railroad with as much defense protection as possible, the obligation to "defend" in the indemnity agreement should include a provision which requires the Contractor to "fully" defend the Railroad by *also* defending any causes of actions or theories under which no indemnification is permitted under the agreement so long as any one cause of action asserted against the Railroad is subject to the Contractor's obligation to indemnify. This type of language expands the Contractor's defense obligation to a scope similar to that mandated on insurance carriers. However, unlike a Carrier's defense obligation The Railroad should also insist that the case's defense be controlled by the Railroad.

Subcontractor Dynamics: The Contractor involved with the project will often employ Subcontractors, frequently without knowledge of the Railroad. Additional entities have the potential of heightening the risks involved with that project. Therefore, the issue arises as to whether the Railroad should, and if so, to what extent, examine the Contractor's subcontract relationships to determine the Subcontractors' impact on the protection mechanisms discussed above.

The relationship between a Contractor and a Subcontractor raises similar issues to those discussed above. Contractors are also risk adverse and wish to offload as much of the project's risks onto Subcontractors as possible. Frequently, Contractors also have indemnification clauses in their

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agreements with their Subcontractors, and also compel the Subcontractors to name the Contractor as an Additional Insured under the Subcontractor's CGL policies. Often, however, these Contractor-Subcontractor agreements constitute construction contracts which run afoul of the statutory Anti-Indemnification provisions now enacted across the country. Therefore, many times a Contractor will simply not be able to offload its own tort liability on a Subcontractor.

One potential question is whether the Contractor may offload to the Subcontractor its "insured contract" liability to the Railroad. This generally is not a concern. First, the Contractor's assumption of the Railroad's tort liability which it might attempt to lay off on the Subcontractor is a contractual liability, not a tort liability as between the Contractor and the Subcontractor. Standard form Insured Contract definitions will not consider the assumption of contract liability to be an exception to the Contractual Liability Exclusion. Therefore, this is not something the Contractor will normally be able to offload onto its Subcontractor.

Second, regardless of whether the Contractor is able to lay off the liability assumed from the Railroad, the Railroad still has its indemnification obligation rights against the Contractor. If, in turn, the Contractor is unable to collect from the Subcontractor, either because there is no insurance coverage or the Subcontractor is not financially viable, the risks of noncollection from the Subcontractor are with the Contractor, and not the Railroad. Therefore, the Railroad typically will not be left uncompensated, so long as it can collect from the Contractor or its insurer.

Moreover, in 1986, an amendment to the "your work" definition in the standard CGL insurance policy operates to restore insurance coverage to a Contractor where the work at issue in

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the lawsuit is performed by a Subcontractor. See e.g., O’Shaughnessy v. Smuckler Corp., 543 N.W.2d 99 (Minn. App. 1996), rev. denied (Minn. Mar. 28, 1996). Therefore, the Contractor will likely have coverage for tort claims if the damage arises out of the Subcontractor’s work.

Third, the Railroad’s Additional Insured status under the Contractor’s policy is unaffected by the Contractor hiring Subcontractors. The Railroad’s Additional Insured relationship is with the Contractor’s carrier, and cannot be offloaded by the Contractor. Even if the Contractor was named as an Additional Insured on the Subcontractor’s policy, and further was able to have the Subcontractor’s policy primarily respond to pay the Contractor’s fault, the Railroad would still have its rights against the Contractor’s CGL policy.

Finally, there is no particular reason from an RPL policy standpoint to focus on the Subcontractors hired by the Contractor. The RPL Declarations requires the scheduling of the party for which the work is being done, and not the Subcontractors. Moreover, the RPL policy’s “Contractor” definition “includes all subcontractors working directly or indirectly for the ‘contractor’” See e.g., ISO Form CG 00 35 10 01. Therefore, a suit by a Subcontractor’s employee against the Railroad will invoke RPL protection, as the exception to the “Sole Liability” Exclusion applies to restore coverage.

Given these dynamics, there appears to be no particular insurance-related reason for the Railroad to pay close attention to the Subcontractors retained by the Contractor. However, the Railroad should utilize its usual risk management considerations to address any particular non-insurance-related issue which may arise from a Subcontractor’s involvement with the project.

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Prospective Comfort--Suggested Language: Several practical tips have been discussed throughout these materials. What follows are specific items to consider in future contractor negotiations.

Indemnification Clauses: Be sure the indemnification clause is clear and unambiguous. Review the provisions of the materials above addressing indemnification clauses, and consider how each insight may be applicable or advantageous to the Railroad.

Possible language to consider for an indemnification clause is as follows:

“Contractor shall indemnify, fully defend and hold harmless the Railroad for all judgments, awards, claims, demands, and expenses (including attorneys' fees and costs incurred in the defense of any matter), for injury or death to all persons, including Railroad's and Contractor's officers and employees, for any loss and damage to property belonging to any person, for any personal injury, and for any advertising injury, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or failure to perform any obligation hereunder. THE LIABILITY ASSUMED BY CONTRACTOR SHALL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF THE RAILROAD, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY OR DIRECTLY CAUSED BY THE SOLE WILFUL MISCONDUCT OF THE RAILROAD.

“THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR SHALL INCLUDE ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST THE RAILROAD UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY APPLIANCE ACT OR THE BOILER INSPECTION ACT, WHENEVER SO CLAIMED.

“Contractor agrees that its obligation to defend the Railroad shall be controlled by the Railroad, and that the Railroad shall, at its sole discretion, appear and defend any suits or actions brought against Railroad on any claim or cause of action arising out of or in any manner connected with any liability assumed by Contractor under this

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Agreement for which the Railroad is liable or is alleged to be liable. Contractor further agrees that its obligation to defend the Railroad shall extend to any and all causes of action or claims asserted against the Railroad so long as any one cause of action or claim asserted against the Railroad is subject to the Contractor's defense obligation assumed above. Contractor also agrees that its obligation to defend the Railroad includes the adjustment or other handling of any claims for which the Railroad is liable or is alleged to be liable.

"It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement shall survive any termination of this Agreement."

Again, caution is urged in utilizing any "form" language for indemnification agreements. Before language is utilized, the Railroad should consult the jurisdiction's statutes and caselaw to consider how any language will be interpreted by the jurisdiction's courts.

Duty to Procure Insurance Provisions: Numerous clauses relating to the duty to procure insurance should be considered and included if the Railroad believes the protections are required, and the endorsements are commercially feasible. The Railroad may wish to consider some of the following language which incorporates many of the topics discussed above in crafting the language compelling the Contractor to procure insurance:

- "Before commencing any work under this Agreement, Contractor must provide and maintain in effect throughout the term of this Agreement, insurance at Contractor's sole expense, covering all of the work and services to be performed hereunder by Contractor and each of its subcontractors, as described below:

"(1) Commercial General Liability occurrence insurance covering liability, including but not limited to Public Liability, Bodily Injury, Property Damage, Premises, Operations, Completed Operations, Personal Injury, Advertising Injury, and Contractual Liability covering the obligations assumed by Contractor in the Indemnification Provisions above, with coverage of at least \$X,000,000 per

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occurrence and \$Y,000,000 in the aggregate for all coverages under separate per occurrence and aggregate limits for this designated project. The Commercial General Liability insurance described in this paragraph must specifically name the Contractor as the policy's Named Insured, and further must specifically identify the Railroad as an Additional Insured under the policy or policies providing this insurance on ISO form CG 24 10 11 85 or equivalent language, and shall provide for the severability of the various insureds' interests. In addition, the Contractor shall continue to identify the Railroad as an Additional Insured on Commercial General Liability insurance as described in this paragraph until the expiration of three (3) years after the Contractor's completion of the Work described in this Agreement. Any coverage afforded the Railroad as an Additional Insured shall apply as primary and non-contributing coverage and not excess to any other coverage issued in the name of the Railroad. Where explosion, collapse, or underground hazards are involved, exclusions limiting coverage for such hazards must be removed from the policy. The Commercial General Liability insurance described in this paragraph must contain an endorsement containing ISO Form CG 24 17 10 01 or equivalent language; in no case will the Commercial General Liability insurance described in this paragraph contain ISO Form CG 21 39 10 93 or equivalent language, or ISO Form CG 24 27 03 05 or equivalent language. The Commercial General Liability insurance described in this paragraph must contain a specific waiver of the insurance company's subrogation and recovery rights against the Railroad.

“(2) Railroad Protective Liability insurance stating Railroad is the Named Insured and covering all of the liability assumed by the Contractor under the provisions of this Agreement with coverage of at least \$A,000,000 per occurrence and \$B,000,000 in the aggregate. Coverage shall be issued on a standard ISO form CG 00 35 10 01 and endorsed to include ISO form CG 28 31 10 93 and the Limited Seepage and Pollution Endorsement.

- “All insurance shall be placed with insurance companies licensed to do business in the States in which the work is to be performed, and with a current Best's Insurance Guide Rating of A- and Class VII, or better.”

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- “The insurance Contractor is obligated to obtain under this Agreement shall be approved by the Railroad before any work is performed on Railroad's Property and shall be carried until all work required to be performed on or adjacent to Railroad's Property under the terms of the Contract is satisfactorily completed as determined by the Railroad, and thereafter until all tools, equipment and materials not belonging to the Railroad have been removed from the Railroad's Property and the Railroad's Property is left in a clean and presentable condition.”
- “The insurance Contractor is obligated to obtain under this Agreement shall guarantee that the policies will not be amended, altered, modified, canceled or expire insofar as the coverage contemplated hereunder is concerned, without at least 60 days' notice mailed by registered mail to the Railroad in care of the following: [NAME, POSITION, ADDRESS].”
- “It is further distinctly understood and agreed by the Contractor that its liability to the Railroad herein under Section 1 will not in any way be limited to or affected by the amount of insurance obtained and carried by the Contractor in connection with said Contract.”
- “The Contractor is fully obligated to pay all premiums for all insurance procured pursuant to this Agreement, and the Contractor will not be permitted to seek any charges related to insurance premiums as an add-on from the Railroad under this Agreement or in any other manner. Full compensation for all premiums which the Contractor is required to pay on all the insurance described hereinafter shall be considered as included in the prices paid for the various items of work to be performed under the Contract, and no additional allowance will be made therefor or for additional premiums which may be required by extensions of the policies of insurance.”
- “The Contractor shall provide the Railroad with a copy of each policy under which the Railroad is an Additional Insured. Additionally, immediately upon Contractor's future receipt of any policy referenced herein which is required to name the Railroad as an Additional Insured, the Contractor shall immediately provide the Railroad with a copy of said policy.”

Once the Contractor Agreement is in place, the Railroad should follow up with the Contractor to confirm that all policies relating to the project have been provided to the Railroad, and not just

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Certificates of Insurance. Policies are preferred, as Certificates of Insurance are mere evidence of insurance, and do not convey coverage absent extremely unique and rare situations in which an Insurer itself may have issued the certificate (but not under all circumstances). Therefore, the only assurance a Railroad has to full compliance with the Contractor's duty to procure insurance provisions is to obtain a full copy of the policy and analyze its specific provisions, endorsements and schedules. This will also allow the Railroad to maintain these policies in its archives in case a later suit is brought and the Contractor is no longer viable or for some other reason.

* * * * *

CONCLUSION

These materials provide the Railroad with a nonexhaustive set of considerations to weigh in negotiating with Contractors and in analyzing how to effectively handle Contractor-related litigation.

The Railroad's protection is maximized when it:

- prospectively:
 - utilizes an effective indemnification agreement which is properly insured by the Contractor's CGL carrier;
 - obtains Additional Insured status on the Contractor's CGL Policy with the appropriate Endorsements; and
 - has obtained a high limit RPL Policy identifying the Railroad as the Named Insured; and
- early in the claim process:

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- confirms the Contractor's and its carrier's obligations based on an analysis of the Contractor's agreement with the Railroad and the Contractor's policy; and
- opens communications with the RPL carrier, the Contractor and its carrier to effectively inform and educate those entities regarding their obligations to the Railroad.

If the risk management and risk mitigation considerations discussed above are effectively developed and communicated, the Railroad will maximize its protection from risks and losses involved in its relationships with Contractors and other vendors performing outsource work.

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INDEMNIFICATION AGREEMENT ENFORCEMENT CHECKLIST

1. Does Any Railroad Protective Liability Policy Initially Apply to Defend and Indemnify the Railroad?

- If Yes, the RPL Policy is Likely Primary to Pay Defense and Indemnity. However, the Railroad Must Cooperate With the RPL Carrier in Making the Following Analysis to Determine if the RPL Carrier’s Recovery Rights are Enforceable.
- If No, Proceed to Following Analysis.

2. Does the Contract Contain an Indemnification Agreement?

- If No, There is No Indemnification Opportunity.
- If Yes, What is the Operative Language:

- Does the Indemnification Agreement Include a Defense Obligation? (See Additional Discussion Below.)

- Yes.
- No.

3. Is the Indemnification Agreement Still in Effect?

- If No, There is No Indemnification Opportunity.
- Yes.

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4. What State Law Applies to Interpret the Indemnification Agreement?

- Is There a Choice of Law Provision in the Contract?
 - Yes. State Law to Apply: _____.
 - If No, What "Choice of Law" Analysis Will the Court Employ to Determine Which State Law Applies to the Contract?
 - Will the Court Employ the Restatement (Second) Analysis?
 - If so, _____ State Law Applies; or
 - Will the Court Hearing the Issue Employ Another Analysis?
 - If so, _____ State Law Applies.

5. What is the Scope of the Contractor's Indemnification Agreement With the Railroad?

- Contractor Indemnifies Railroad for *Railroad's Tort (Including FELA) Liability* "Arising Out Of" the Involved Project?
 - If So, Railroad's Tort Liability May Be Indemnified by Contractor.
- Contractor Indemnifies Railroad for *Railroad's Contractual Liability* "Arising Out Of" the Involved Project?
 - If So, Railroad's Contractual Liability May Be Indemnified by Contractor.
- Contractor Indemnifies Railroad for *Contractor's Liability* "Arising Out Of" the Involved Project?
 - If So, Then Railroad's Liability is Not Indemnified. However, Contractor's Liability May Be Insured By Its Own Policy.

6. Does Applicable State Law Bar or Limit Enforcement of the Indemnification Agreement to Some Degree (Such as Prohibiting the Contractor From Indemnifying the Railroad for the Railroad's Liability)?

- State Statute? Examples:
 - Construction-Related Anti-Indemnification Statutes;
 - If Yes, Then Contractor's Indemnification for Railroad's Liability is In Question.
 - No.
 - Sovereign Immunity Statutes;
 - No.
 - If Yes, Does the Statute Allow Waiver of Immunity if Insurance is Purchased?
 - If No, Then Political Subdivision's Indemnification for Railroad's Liability is In Question.
 - If Yes, Indemnification May Be Permitted.
- Other State Law (e.g., Caselaw)? Examples:
 - Caselaw Requiring Nexus Between Contractor and Railroad Liability:
 - No.
 - If Yes, Is the Nexus Met Here?
 - No.
 - If Yes, Is the Nexus Met Here?

- Caselaw Addressing Unequal Bargaining Power?
 - If Yes, Then Contractor's Indemnification for Railroad's Liability is Unlikely.
 - No.
 - Sub-issue: Caselaw Limiting "Defense" Obligation to Reimbursement of Defense Expenses?
 - If Yes, Then Reimbursement for Railroad's Defense Expenses Likely Only at End of Case.
 - If No, Then Railroad May Be Able to Argue Reimbursement for Railroad's Defense Expenses Is On an Ongoing Basis.
7. Is There Any Ambiguity in the Indemnification Agreement Which May Limit Enforcement?
- If Yes, How Will the Court Limit Its Application?
 - Deny Any Enforcement?
 - Limit Enforcement, Such as to Just the Extent of the Contractor's Liability?
 - No.
8. Does the Contract Require the Contractor to Buy Insurance to Protect Against the Indemnification Obligation?
- If No, Then Must Rely on Contractor Solvency to Pay Indemnification Obligation.
 - If Yes, Did Contractor Actually Buy the Required Insurance?

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- If No, Then Must Rely on Contractor Solvency to Pay for Contractor's Breach of Contract for Failure to Buy the Insurance.
- Yes.

9. Does the Contractor's Policy Insure the Contractor's Agreement to Indemnify the Railroad for the Railroad's Tort Liability *Due to Physical Injury (Including FELA) or Property Damage?*

- Does the Contractor's Policy's Contractual Liability Exclusion Contain an Exception for "Insured Contracts?"

No.

If Yes:

A. Does the Claim Involve an *Easement or Licence Agreement in Connection With Construction or Demolition Operations on or Within 50 Feet of a Railroad?*

No.

If Yes, has the Contractor's Policy's "Insured Contract" Definition Been Changed to Include Easements or Licences in Connection With Construction or Demolition Operations on or Within 50 Feet of a Railroad? (E.g., Using ISO Form CG 24 17 10 01 ("Contractual Liability - Railroads") Endorsements);

No.

If Yes, Then There May Be Coverage as to These Easements or Licences.

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B. Does the Claim Involve the Railroad's Request for Indemnification (in a Contract Other Than an Easement or a Licence) 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, Trestle, Tracks, Roadbeds, Tunnel, Underpass or Crossing?*

No.

If Yes as to All Three Conditions, Has the Contractor's Policy's "Insured Contract" Definition Been Changed to Include These Types of Indemnification Agreements as "Insured Contracts"? (E.g., Using ISO Form CG 24 17 10 01 ("Contractual Liability - Railroads") Endorsements);

No.

If Yes, Then There May Be Coverage for These Types of Railroad Risks.

C. Does the Definition of "Insured Contract" Include That Part of *Any Other Contract or Agreement* Where the Contractor Agrees to Assume the Tort Liability of Another?

No.

If Yes, Was the Indemnification Agreement Entered Into Prior the Time of the Loss?

No.

Yes.

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D. Is the "Designated Job Location" Described in the Endorsement Eliminating Railroad Risk Exclusions From the Insured Contract Definition Sufficiently Broad to Include the Exact Location of the Injury or Damage?

No; May Not be Coverage.

Yes.

- Does the State Law Applicable to the Insurance Contract (Not Necessarily the Same State Law Applicable to the Indemnification Agreement) Have Any Unique Interpretations of the Policy Provisions at Issue?

Yes: _____.

No.

- Does the Contractor's Policy Require the Contractor or "Those Acting on [the Contractor's] Behalf" to Also Be Liable "In Whole or In Part" to Insure the Indemnification Obligation?

No.

If Yes, No Coverage if Railroad is Solely Liable.

10. Is the Railroad's Liability Related to False Arrest, Detention or Imprisonment?

No.

If Yes, has the Contractor Agreed to Indemnify the Railroad's Liability Related to False Arrest, Detention or Imprisonment?

No.

If Yes, has the Contractor's Policy Been Amended to Include an Endorsement (Such as ISO Form CG 22 74 10 01) to Insure the Contractor's Obligation to Indemnify the Railroad's Liability Related to False Arrest, Detention or Imprisonment?

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No.

Yes.

11. Does Contractor Agree to Indemnify the Railroad for the Railroad's Contractual Liability to Others?

No.

If Yes, Does the Contractor's Policy's "Insured Contract" Definition Use the Word "Tort" in Its Definition?

Yes.

No; If No, There *May* be an Argument to Say the Policy Covers the Contractual Liability.

12. Is the Contractor's Carrier Required to Defend the Railroad Based on the Contractor's Indemnification Agreement?

- Where the Railroad and the Contractor are Both Defendants in the Lawsuit, the Carrier is Obligated to *Defend* All Claims Asserted Against the Railroad in the Lawsuit "In Addition to Limits" if the Following Conditions are Met:

The Policy Covers the Contractor's Obligation to Indemnify the Railroad (See Discussion Above);

The Carrier is Aware of No Conflicts of Interest Between the Railroad's and Contractor's Interests;

The Railroad and the Contractor Each Request the Carrier to Conduct and Control the Railroad's Defense;

The Railroad and the Contractor Each Agree the Carrier May Assign the Same Counsel to Defend Both the Contractor and the Railroad;

The Railroad Agrees in Writing to:

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- Cooperate With the Carrier in the Investigation, Settlement or Defense of the "Suit";
 - Immediately Send the Carrier Copies of Any Demands, Notices, Summonses or Legal Papers Received in Connection with the "Suit";
 - Notify Any Other Insurer Whose Coverage is Available to the Railroad; and
 - Cooperate With the Carrier With Respect to Coordinating Other Applicable Insurance Available to the Railroad;
 - Authorize the Carrier to Obtain Records and Other Information Related to the "Suit"; and
 - Authorize the Carrier to Conduct and Control the Defense of the Railroad in Such "Suit."
- Where the Railroad Declines to Agree to the Above Conditions, or Where the Railroad is a Defendant and the Contractor is Not, the Carrier is Obligated to *Reimburse the Railroad's Defense Expenses*, Subject to the Policy's Indemnity Limits, if the Following Conditions are Met:
 - The Policy Covers the Contractor's Obligation to Indemnify the Railroad (See Discussion Above); and
 - The Contractor's Obligation to Indemnify the Railroad Includes an Obligation to Defend the Railroad.

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ADDITIONAL INSURED ENFORCEMENT CHECKLIST

1. Does the Agreement Require the Contractor to Add the Railroad as an Additional Insured to the Contractor's Liability Policy?

If No, Then no Additional Insured Coverage Possible.

If Yes, What is the Operative Language:

Are There Other Policies Which May Also Insure the Railroad for the Claim?

No.

If Yes, Do all Potentially Applicable Policies' "Other Insurance" Clauses Identify Which Policy(ies) Primarily Respond to Defend and Indemnify the Railroad?

Yes: _____.

If No, See Point 2.

2. What State Law Applies to Interpret the Additional Insured Obligation?

• Is There a Choice of Law Provision in the Contract?

Yes. State Law to Apply: _____.

If No, What "Choice of Law" Analysis Will the Court Employ to Determine Which State Law Applies to the Contract?

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- Will the Court Employ the Restatement (Second) Analysis?
 - If so, _____ State Law Applies; or
- Will the Court Hearing the Issue Employ Another Analysis?
 - If so, _____ State Law Applies.

3. Does That State's Law Bar or Limit the Mandated Additional Insured Status?

- State Statute? Examples:
 - Construction-Related Anti-Indemnification Statutes?
 - Other?
- Other State Law (Caselaw)? Examples:
 - Caselaw Addressing Unequal Bargaining Power?
 - Caselaw Limiting "Defense" Obligation to Reimbursement of Defense Expenses?
 - Other?

4. Is the Railroad Actually Insured by the Additional Insured Provision in the Contractor's Policy for the Liability at Issue?

A. Is the Additional Insured Coverage In Effect When Needed?

- Did the Contractor's Additional Insured Obligation Expire Before Liability Attached?
 - If Yes, Likely no Additional Insured Coverage.
 - No.

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- Did the Liability Arise After the Time the Contractor Completed its Construction Operations or After the Time the Relevant Portion of the Contractor's Work Was Put to Its Intended Use?
 - No.
 - If Yes, Does Contractor's Policy Provide Completed Operations Coverage?
 - If No, Coverage Unlikely.
 - Yes.

B. What Policy Language Is Used to Provide the Additional Insured Coverage When the Railroad is Solely Liable?

- Post 07/04 ISO Form Language: Coverage with Respect to Liability "*Caused . . . By*" the Contractor's Work:
 - Yes; Likely no Additional Insured Coverage.
 - No.
- Pre- 07/04 ISO Form Language: Coverage With Respect to Liability "*Arising Out Of*" Either the Contractor's "Work" or "Ongoing Operations" (Depending on the Edition of the Form) Performed for a Railroad:
 - Yes; Likely Additional Insured Coverage so Long as There is a Connection Between the Contractor's Work and the Railroad's Liability.
 - No.

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C. Employee Injury Exclusion, Severability Clause and Cross-Liability Exclusion:

- Is the Claim by a Railroad Employee Against the Railroad?
 - No.
 - If Yes, Employee Injury Exclusion Likely Applies.
- Is the Claim by the Contractor's Employee Against the Railroad?
 - No.
 - If Yes, Employee Injury Exclusion Likely Bars Coverage Unless There is a Severability Clause:
 - If No, Employee Injury Exclusion Likely Bars Coverage.
 - Yes; Employee Injury Exclusion Likely Does Not Bar Coverage Unless Minority Rule Applies.
 - Is There a Cross-Liability Exclusion:
 - No.
 - If Yes, Cross-Liability Exclusion May Bar Coverage Despite Existence of Severability Clause.

5. What Language is Used to Provide Additional Insured Coverage for the Railroad?

- Additional Insured With Respect to "Liability Arising Out of 'Your Work' Performed for That Insured by or for You"?
 - No.
 - If Yes, Conveys Additional Insured Coverage for Completed Operations Claims.

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- Additional Insured Status With Respect to "Liability Arising Out of Your *Ongoing Operations* Performed for That Insured"?
 - No.
 - If Yes, Does the Contractor's Coverage Bar Coverage "After All the Work for the Additional Insured Has Been Completed, or After the Portion of the Work Out of Which the Injury or Damage Occurs Has Been Put to Its Intended Use"?
 - No.
 - If Yes, There Will Be No Completed Operations Coverage.

6. What Coverage Limits are Available to the Railroad?

- Are There Coverage Limit Endorsements?
 - No; Policy's Limits Likely are Eroded by Past Claims.
 - If Yes, What Coverage Limit Endorsements Have Been Added to the Policy?
 - Are Policy Limits Raised to the Level of the Project's Mandated Coverage Limits?
 - No.
 - Yes.
 - What Remains of the Policy Limits After Payment of Prior Claims? _____
 - Are Separate Policy Limits Provided for the Involved Project?
 - No.
 - Yes.

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- What Remains of the Policy Limits After Payment of Prior Claims? _____
- Is the Scheduled Location on the Endorsement the Location at Issue?
 - No.
 - Yes.
- Are the Policy Limits Available for the Type of Claim at Issue (Such as Bodily Injury, Property Damage, Personal and Advertising Injury, Completed Operations)?
 - No.
 - Yes.
- If Eroded Policy Limits are Insufficient to Pay Claim, was Contractor Compelled in the Contract to Name the Railroad as an Additional Insured to Refresh the Policy's Aggregate Limits?
 - No.
 - If Yes, and Failure to do so Results in Inadequate Limits to Pay the Claim, May Have a Breach of Contract Claim Against Contractor.

7. Are Any Deductibles/Self-Insured Retainers Involved in the Contractor's Policy?

- No.
- If Yes, Who Pays the Deductible/Self-Insured Retainer?

_____.

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8. Is Waiver of Subrogation Mandated in the Contractor's Contract?

No.

If Yes, Have the Subrogation Rights Been Waived in the Contractor's Policy?

No.

Yes.

9. If More Than One Policy is Available to Pay the Loss, Which is Primary?

• Does the RPL Policy Also Cover the Loss?

If Yes, the RPL Policy is Likely the Primary Policy.

If No, How do the Various Potential Policies' "Other Insurance" Provisions Apply?

Harmoniously to Identify Which Policy(ies) is (are) Primary and Which is (are) Excess.

A Conflict Exists Between the Other Insurance Provisions; If So, How Does the State's Law Resolve the Conflict?

Primary Policy (ies):

Excess Policy (ies):

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