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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:
PRACTICAL CONSIDERATIONS WHEN ADDRESSING INDEMNIFICATION AND ADDITIONAL INSURED ISSUES.[1]

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

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[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.

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 muddied "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

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.

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[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

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

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

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).

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.

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

> 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

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.

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

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[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."

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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.

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

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[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

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";

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.

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]

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[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