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Construction Law Monograph

Protecting Contractors: Assessing Risks in Construction Agreements

Contractors are not often afforded the opportunity to make broad sweeping amendments to construction agreements. Instead, they are often presented construction agreements as "take it or leave it" propositions, resulting in contractors accepting the terms of the construction agreements in order to get awarded the project work and maintain their business relationships with the owner and/or general contractors. Consequently, numerous contract provisions contain potential pitfalls and risks that should be understood by contractors and their counsel.

The following sections offer example construction contract provisions, analysis of applicable Illinois law, references to other States' law where noteworthy, and practice tips. Though the example contract provisions are not identical to AIA contract documents, they are, in general, variations of AIA contract documents. This article is largely applicable to the commercial construction industry and does not address specifics related to residential projects. Although mainly directed toward subcontractors and their attorneys, much of the discussion in this article could apply to upstream contractors, such as general contractors, as well.

Insurance: Additional Insured Coverage Requirements

Owners regularly require general contractors to secure several types of insurance coverage for the general contractor and the owner. General contractors, in turn, require their subs to secure the same coverage for the sub, the owner and the general contractor; subcontractors then pass the coverage obligations onto lower tier subcontractors. Examples of different types of coverage that may be required include: worker's compensation, employer's liability, commercial general liability, professional liability, and excess/umbrella, to name a few. This discussion does not focus on the different types of insurance that may be required, or issues with each, but rather addresses only additional insured coverage since it is frequently required, but rarely understood.

The subcontractor is typically required to add certain entities and/or individuals as additional insureds, with a particular scope of coverage, to its commercial general liability policy (CGL policy). An example of what this requirement may look like is as follows:

> *The general liability insurance policy required above shall be endorsed to include General Contractor, Owner, and General Contractor's and Owner's Representatives, officers and employees thereof, as additional insureds ("Additional Insureds"). Every policy required above shall be primary insurance and any insurance carried by*

any Additional Insureds, or carried by or provided through any insurance pool of same, shall be excess and not contributory insurance to that provided by Subcontractor. No additional insured endorsement to any policy shall contain any exclusion for bodily injury or property damage arising from completed operations. All insurance shall be written on an "occurrence" basis and all insurance shall contain a waiver of subrogation in favor of Additional Insureds. The Subcontractor shall be solely responsible for any deductible losses under any policy required above.

If an entity is an additional insured on a CGL policy, it is generally not afforded the same coverage as the named insured. Instead, the additional insured is limited to the scope of coverage outlined in the additional insured endorsement. Note that numerous different additional insureds may be required to be named, and numerous different scopes of coverage may be required. Ideally, the contractor will work with an insurance broker who has read and understood the particular additional insured coverage requirements and procured policies containing them. Failure to secure the proper scope of additional insured coverage for the required parties is a breach of contract that can result in significant damages to the contractor.

Below is a brief explanation of common additional insured coverage requirements, along with specific analysis of exactly what the subcontractor has committed to purchasing under the example provision above.

Adding Required Additional Insureds

The owner, general contractor, and other upstream contractors (as well as any officers, employees, affiliates, and subsidiaries of each) are usually required to be named as additional insureds. Additional insured (AI) coverage is often provided via endorsement to a CGL policy. Generally, there are two types of AI endorsements: (1) schedule endorsements; and (2) blanket endorsements.

Schedule endorsements require the specific additional insured to be listed in the endorsement schedule. Because most subcontractor agreements require numerous entities to be added as additional insureds, schedule AI endorsements should quote the exact contract language in the schedule. For instance, using the Example above, a schedule AI endorsement should specifically list: "*General Contractor, Owner, and General Contractor's and Owner's Representatives, officers and employees thereof*" in the schedule. If the subcontractor's policy contains a schedule AI endorsement, it is imperative to compare the endorsement schedule with the subcontract agreement to ensure all the required entities/individuals are named.

Blanket AI endorsements, on the other hand, provide that anyone the named insured (subcontractor) is required by contract to add as an additional insured is considered an additional insured under the CGL policy. Thus, for blanket endorsements, there is no need to list the specific AIs. Blanket AI endorsements are useful in that there is no need to add specific additional AI endorsements to the policy each time the subcontractor executes a new contract. If a new contract requires certain AIs to be added to the subcontractor's CGL policy, assuming the new contract is executed within the policy's effective dates, those AIs will automatically be entitled to coverage pursuant to the blanket AI endorsement.

Though blanket AI endorsements are convenient, the subcontractor should beware of such endorsements that include the following highlighted language: "Who Is an Insured is amended to include as an additional insured any person or

organization for whom you are performing operations *when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy."*[1] In Illinois and the majority of states, the highlighted language requires the additional insured and the named insured to be in privity of contract for coverage under the policy. Typically, the owner will not be in privity of contract with the named insured subcontractor. As such, a blanket AI endorsement with the above language will *not* provide additional insured coverage to the owner or anyone else not in privity with the subcontractor.

ISO AI Endorsements vs. Manuscript AI Endorsements

Though not required in the Example above, many contract agreements require contractors to utilize specific (form) AI endorsements provided by Insurance Service Offices, Inc. (ISO Forms) or their equivalent manuscript forms. The purpose of requiring such forms is to ensure a desired scope of AI coverage.

ISO Forms are standardized forms with uniform, identical language, and can often be found online. *Manuscript forms*, on the other hand, are individualized forms written by insurance carriers. More often than not, the scope of additional insured coverage under a manuscript form is more limited than that provided in a comparable ISO Form. Also, because a particular manuscript endorsement may be the only one of its kind, and thus no court has interpreted the language, the exact scope of coverage is less predictable.

You can tell if a particular endorsement is an ISO Form or manuscript endorsement by looking at the bottom of the page. An ISO Form endorsement will read: "© Insurance Services Office, Inc., [year]" with no other language. A manuscript endorsement will usually look something like this: "© 2014 [Insurer Name]. All rights reserved. Includes copyrighted material of Insurance Services Office, Inc. with its permission."

Depending upon your position in the industry, you may find that ISO Forms are preferable to manuscript forms. Certainly they are more predictable because many have existed for decades, and thus courts have interpreted their respective language and there is considerable guidance regarding the exact scope of coverage each ISO Form endorsement provides. However, manuscript forms can be written to provide the same scopes of coverage, and can also be used to handle specific situations not addressed by currently available ISO Forms (*i.e.,* they are used when one size does not "fit all"). But, definitely be wary when working with manuscript endorsements—be sure to verify that the endorsement includes the required additional insureds with the required scope of coverage. Again, working with an insurance broker and/or attorney with the requisite knowledge in this arena is recommended.

Primary and Non-Contributory AI Coverage

Many CGL policies contain "other insurance" clauses that make AI coverage under the particular policy excess coverage only or require other policies available to the additional insureds to contribute to coverage. As a result, many insurance provisions, like the example above, require the contractor to procure a policy with *primary* AI coverage *without contribution* from any of the additional insureds' other policies. The required language can be found in a separate endorsement to the CGL policy amending the policy's "other insurance" clause or it can be added to the AI endorsement providing AI coverage to the additional insureds. Either way, to ensure primary and non-contributory AI coverage, the

endorsement should specifically provide that the named insured's policy is primary to any of the additional insureds' policies and that none of the additional insureds' policies are required to contribute toward the additional insureds' defenses or indemnity. [2]

Ongoing and Completed Operations AI Coverage

Both *ongoing* and *completed operations* AI coverage are typically required. Ongoing operations coverage covers the additional insured for bodily injury or property damage occurring at a construction site while the named insured's work is ongoing. Completed operations coverage, on the other hand, covers the additional insured for losses occurring *after* the named insured completed its work at the site.

To ensure both ongoing and completed operations coverage, there are two options: (1) include one AI endorsement that provides both ongoing and completed operations coverage; or (2) include two separate AI endorsements in the policy—one with ongoing operations coverage and another with completed operations coverage.

An example of the first option (both ongoing and completed operations coverage in one AI endorsement) is the ISO CG 2010 (11 85). This ISO endorsement is a schedule endorsement providing AI coverage to the individuals listed in the schedule with respect to "liability arising out of your work."[3] "Your" refers to the named insured, and "your work" is defined under most standard CGL policies to include both ongoing and completed operations. Thus, this endorsement provides AI coverage for both ongoing and completed operations under the named insured's (subcontractor) policy. Note that even though many carriers no longer offer the ISO CG 2010 (11 85) endorsement, it is still a valid and approved ISO Form. Do not let a carrier tell you it has been rejected or withdrawn by ISO, as that is not true.

Examples of the second option (two separate endorsements offering the same ongoing and completed operations coverage as the 11 85) are the ISO CG 2010 (10 01) and the ISO CG 2037 (10 01), or their manuscript equivalents. The ISO CG 2010 (10 01) is a schedule AI endorsement providing ongoing operations additional insured coverage for the entities/individuals named in the schedule. Such entities/individuals are covered with respect to liability "arising out of [the named insured's] *ongoing operations* performed for [the additional insured]."[4] The ISO CG 2037 (10 01) is a schedule AI endorsement providing AI coverage for the named entities/individuals, but only with respect to liability arising out of the named insured's work that is included in the "*products-completed operations hazard*."[5] Under this endorsement, additional insured coverage extends to property damage or bodily injury occurring after the named insured has completed its work if the injury arose from such work. To ensure both ongoing and completed operations coverage, it is imperative *both* of the above ISO Forms be included in the policy, or manuscript endorsements with equivalent language.

Occurrence-Based AI Coverage

Most construction contracts require occurrence, as opposed to claims-based, insurance coverage. An *occurrence-based* policy provides coverage for property damage or bodily injury occurring during the policy's effective dates, even if notice of the loss is not provided until after the policy expires. For *claims-based* policies, the loss must have occurred, and notice to the carrier must have been provided, within the policy's effective dates for coverage. Occurrence-based

policies are preferred in the construction industry because lawsuits are often filed after the policy covering the work expires. The certificate of insurance and, of course, the policy itself will indicate whether a particular policy is claims-based or occurrence-based.

Waiver of Subrogation

CGL policies typically allow subrogation rights for the insurer (*i.e.,* the right of the insurer to seek to recover a covered, paid loss against the party at fault). Owners and general contractors often require contractors on a project to secure policies in which the insurer agrees to waive these rights. The purpose is generally to control the amount of litigation among the contractual parties and to avoid reimbursement to one another for insured losses. With a waiver of subrogation in the policy, once the insurer pays a claim on behalf of the named insured contractor or any additional insureds, it cannot then go after any of the other insureds to recover the claim amounts.

Historically, and most commonly, these waivers are seen relative to matters and damages within Builders' Risk policies. However, they are becoming broader, and can apply to other policies as well. In assessing risk under such waivers, a contractor must consider the size of its deductible. The amount a contractor pays under a deductible—not to be confused with a self-insured retention—is generally considered "insured" and therefore cannot be recovered if subrogation rights have been waived.

The ISO CG 24 04 11 85 provides an example of an insurer's waiver of subrogation. It reads: "We [insurer] waive any right of recovery we may have against the person or organization shown in the schedule because of payments we make for injury or damage arising out of your [subcontractor's] work done under a contract with that person or organization."[6] To avoid exposure, the insurer's subrogation rights should be waived as to all individuals/entities required to be named as additional insureds under the contract agreement.

Practice Tips: Because most owners and general contractors require it for protection from exposure for losses arising from a subcontractor's work, it is imperative the subcontractor secure additional insured coverage (with the requisite scope of coverage) for the owner, general contractor and anyone else required by the contract agreement. Counsel should review the contract AI coverage requirements and inspect the subcontractor's policy for compliance. At a minimum, counsel should typically ensure (subject to the contract requirements of course): (1) the required AIs are covered; (2) AI coverage is primary and non-contributory to other policies; (3) there is both ongoing and completed operations AI coverage; (4) the policy is occurrence based; and (5) requisite waivers of subrogation are included. If these requirements are not met, counsel should explore the possibility of amending the existing coverage to comply.

Indemnity & Illinois' Anti-Indemnity Statutes

Construction agreements will inevitably contain indemnification provisions requiring lower tier contractors to defend, indemnify and hold the owner, general contractor and other upstream contractors harmless against claims or lawsuits related to the work. An example of such a provision is as follows:

> To the fullest extent permitted by applicable law, Subcontractor agrees to defend, indemnify and hold harmless Owner, Contractor, all those required by the Contract Documents including but not limited to the Prime Contract, each of their respective direct and indirect parent companies, subsidiaries, related entities, agents, officers, directors, partners, managers, members and employees from and against any and all claims, suits, demands, damages, liabilities, obligations, costs, losses, and expenses of whatsoever kind, including but not limited to attorneys' fees and costs arising out of or resulting from: (a) negligent performance of, or failure to perform, Subcontractor's obligations and Work hereunder; (b) claims by governmental authorities or others of any actual or claimed failure of Subcontractor to comply with any law, ordinance, regulation, rule or order of any governmental or quasi-governmental body; or (c) any material breach of the Contract Documents, including but not limited to any violation or breach of this Subcontract.

In Illinois, in construction and snow/ice maintenance contracts, indemnification is permitted only to the extent of the indemnitor's (contractor's) own negligence. Section 1 of the Construction Contract Indemnification for Negligence Act, 740 ILCS 35/1-3 (West 2018), reads as follows:

> With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to *indemnify or hold harmless another person from that person's own negligence is void* as against public policy and wholly unenforceable.[7]

And, the relatively recently enacted Snow Removal Service Liability Limitation Act, 815 ILCS 675/1 (West 2018) *et seq*. provides, in pertinent part:

> .10 §Certain indemnity agreements void. A provision, clause, covenant, or agreement that is part of or in connection with a snow removal and ice control services contract *is against public policy and void* if it does any of the following:
>
> (1) Requires, or has the effect of requiring, a service provider to indemnify a service receiver for damages resulting from the acts or omissions of the service receiver or the service receiver's agents or employees.
>
> ***
>
> (3) Requires, or has the effect of requiring, a service provider to hold a service receiver harmless from any tort liability for damages resulting from the acts or omissions of the service receiver or the service receiver's agents or employees.
>
> ***

(5) Requires, or has the effect of requiring, a service provider to defend a service receiver against any tort liability for damages resulting from the acts or omissions of the service receiver or the service receiver's agents or employees.[8]

Pursuant to these Acts, any indemnity provision in a construction or snow/ice maintenance contract requiring a party to indemnify for another party's own negligence is void and unenforceable as against public policy. The former Act has existed for decades and has been interpreted broadly to apply to most contracts even remotely related to construction. For example, in *Camper v. Burnside Construction*, the Appellate Court, First District, found the manufacture, delivery, and unloading of a manhole at a construction site was sufficient evidence that the manufacturer was involved in "*other work dealing with construction*" and "*for…moving… connected therewith* [construction]" so as to trigger the Act even though the manufacturer merely unloaded the manhole from a truck and set it at the construction site.[9] The latter Act was enacted in 2016 and applies to all contracts for snow and/or ice maintenance executed after August 25, 2016.[10]

Note that even if an applicable contract requires another State's law to apply, and the named State has no anti-indemnity statute, an indemnity provision requiring a party to indemnify for another party's own negligence in a construction contract will likely be void in Illinois, especially if the work is to be performed here.[11] But, also note that neither of the Illinois anti-indemnity statutes apply to insurance policies or agreements to procure insurance.[12] Thus, a requirement to obtain insurance, even one requiring a contractor to procure additional insured coverage for the owner's or upstream contractor's own negligence, will not be voided under either statute unless the insurance requirement is "inextricably intertwined" with a void indemnity provision.[13]

The example provision above would likely sustain scrutiny in that it only requires the subcontractor to indemnify the owner and general contractor for claims arising out of the subcontractor's: (1) negligence in performing the work; (2) violation of any laws; or (3) material breach of the contract documents. It does not require the subcontractor to indemnify the owner or general contractor for their own negligence, and therefore does not run afoul of either anti-indemnity statute. In Illinois, these types of provisions, and even those requiring the lower tier contractor to indemnify for the general contractor's or owner's own negligence, are typically interpreted not as true "indemnity" provisions, but rather as a waiver of the subcontractor's *Kotecki* cap rights, as discussed more fully in the Workers' Compensation/*Kotecki* Waiver section immediately below.[14]

Practice Tips: In Illinois, and many other states, including for example, Michigan,[15] Missouri,[16] and Iowa,[17] provisions in certain contracts requiring a party to indemnify for another party's own negligence are void and need not be honored. (Note, however, that in Illinois an otherwise void indemnity provision can constitute a *Kotecki* cap waiver (discussed below) that is still enforceable unless the waiver is too intertwined with indemnification as to violate one of the anti-indemnity statutes.) Further, it is important to note that in Illinois, a void indemnity provision will not affect insurance requirements unless the insurance requirements are inextricably intertwined with the void indemnity provision. This may not be the case in other states and therefore care should be taken to evaluate a given State's applicable anti-indemnity laws.

Workers' Compensation/*Kotecki* Waiver

It is not uncommon for a contractor to find itself named as a third-party defendant in litigation filed by one of its employees for injuries suffered on a jobsite. Despite the fact that the contractor paid workers' compensation benefits, many states allow the contractor to be named by other defendants (often other contractors on site) seeking contribution for the contractor's (employer's) pro rata share of liability (negligence) for the employees' injuries/damages. Fortunately, Illinois law provides employers (including contractors) with an opportunity to cap the amount they may owe in contribution to the amount owed/paid in workers' compensation benefits. Unfortunately, contractors are often required to contractually waive this cap.

In many states, and in particular in Illinois, the Workers' Compensation Act provides the exclusive remedy for an injured employee against the employer; an employee who collects workers' compensation has no statutory or common law right to recover other damages from his employer.[18] The Workers' Compensation Act, in pertinent part, states:

> .11 §The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act, or of any employer who is not engaged in any such enterprises or businesses, but who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act, and whose election to continue under this Act, has not been nullified by any action of his employees as provided for in this Act.[19]

However, the Illinois Joint Tortfeasor Contribution Act (Contribution Act) allows the employer (*i.e.*, a Subcontractor) to be named as a third party in a contribution claim for that same employee's injuries/damages, as follows:

> .2 §Right of Contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.
>
> (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.[20]

The Contribution Act further states:

> .3 §Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance

with their pro rata liability. If equity requires, the collective liability of some as a group shall constitute a single share.[21]

The language of the Workers' Compensation Act clearly shows an intent that the employer only be required to pay an employee the statutory benefits; these limited benefits are paid in exchange for a no-fault system of recovery.[22] Yet the Contribution Act requires that the employers contribute to tort judgments if they are partially responsible for an employee's injuries.[23] Prior to 1991, an Illinois employer enjoyed limited liability to its employee under the Workers' Compensation Act, but was exposed to unlimited contribution liability for the same injuries as a third-party defendant in the employee's civil suit.[24] In other words, the employer could be (and generally was) "third partied" into its employee's suit against a non-employer tortfeasor and was ordered to pay a sum equal to its *pro rata* share of fault in causing the employee's injury (i.e., the percentage of negligence assessed against it by the jury). The result was to deprive the employer of the limited liability conferred by the Workers' Compensation Act.[25]

In 1991, the Illinois Supreme Court, in the precedent-setting case *Kotecki v. Cyclops Welding Corp.*, addressed the conflicts between the Workers' Compensation Act and Contribution Act (whether an employer, sued as a third-party defendant, can be liable for contribution in an amount greater than its statutory liability under the Workers' Compensation Act).[26] The Illinois Supreme Court held that an employer's amount of contribution was limited to its liability under the Workers' Compensation Act.[27] This is commonly referred to as the "*Kotecki* cap." The Court explained that this "allows the third party to obtain limited contribution, but substantially preserves the employer's interest in not paying more than workers' compensation liability. While this approach may not allow full contribution recovery to the third party in all cases, it is the solution we consider most consistent with fairness and the various statutory schemes before us."[28]

Just five years later, the Illinois Supreme Court found that employers can waive the *Kotecki* cap by contract (*Kotecki* waiver)—concluding that parties to a contract are entitled to "bargain" away this protection should they so choose in that it does not contravene public policy, but instead conforms with the choice employers have regarding whether to raise defenses (and which defenses to raise) in litigation.[29] Courts have determined that there is nothing in the *Kotecki* case, the Workers' Compensation Act or public policy which prohibits an employer from agreeing to remain liable for its *pro rata* share of damages proximately caused by its negligence (by agreeing not to assert the protection of the "*Kotecki* cap").[30]

In order for there to be a contractual waiver of the *Kotecki* cap, however, the contract must have a specific valid provision by which the waiver is made.[31] Whether there has been a valid *Kotecki* waiver in a construction agreement is a matter of contract interpretation.[32] Although the framework set forth in *Kotecki* appears simple at first glance, numerous cases have followed that establish and clarify language that constitutes a *Kotecki* waiver.[33]

An example of a contract provision containing a *Kotecki* waiver is as follows:

This Subcontract Agreement shall not be limited in any way by any limitations on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under Workers' Compensation Acts, disability benefit acts or other employee benefit acts.

When, as here, a contract provision specifically states that there is no limitation on damages to be paid by a contractor under the Workers' Compensation Act, courts have clearly found a *Kotecki* waiver. In fact, even when contract language does not specifically mention the Workers' Compensation Act but includes language granting a waiver of contribution and/or unlimited indemnification for any type of damages by the contractor for the contractor's own negligence, the courts have still found *Kotecki* waivers.

To that point, courts have found the following contract language to be *Kotecki* waivers:

> ". . . except to the extent that any such injury or damage is due solely and directly to [the employer's] or its customer's negligence, as the case may be, [the employer] shall pay [the third party] for all loss which may result in any way from any act or omission of [the employer], its agents, employees or subcontractors"[34];
>
> " . . .If Vendor performs services *** hereunder, Vendor agrees to indemnify and hold harmless [Chicago] from all loss or the payment of all sums of money by reason of all accidents, injuries, or damages to persons or property that may happen or occur in connection therewith"[35];
>
> Employer shall "save, indemnify, and keep harmless [Contractor] against all liability, claims, judgments, suits or demands for damages."[36]
>
> Subcontractor "shall indemnify and hold harmless" the other contracting parties "from and against all claims, damages, losses, and expenses ... to the extent caused in whole or in party by any negligent act or omission of the Subcontractor. . . . In any and all claims against the Owner, the Architect, or the Contractor . . . the indemnification obligation under this Paragraph 11.11 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts."[37]

Practice Tips: Contractors should be aware that provisions in their agreements may contain language constituting *Kotecki* waivers, and that language need not clearly mention the Workers' Compensation Act. Understanding the language that can constitute a waiver is critical, as is understanding the ramifications of such a waiver. In particular, coordination with the insurance broker is critical to ensuring that damages resulting from such a waiver are insured. Remember contribution and indemnity are mutually exclusive remedies. An agreement that contains an indemnity clause may or may not constitute a *Kotecki* waiver.

Payment Provisions and the Contractor Prompt Payment Act

Prior to the enactment of Illinois' Contractor Prompt Payment Act, 815 ILCS 603/1, (Act) subcontractors had no statutory recourse (other than through the Mechanics Lien Act) against general contractors who failed to pay in a timely manner for work under private construction projects.[38] With respect to subcontractors, the Act states as follows:

§10. Construction contracts. All construction contracts shall be deemed to provide the following:

***

(2) If a subcontractor has performed in accordance with the provisions of his or her contract with the contractor or subcontractor and the work has been accepted by the owner, the owner's agent, or the contractor, the contractor shall pay to his or her subcontractor and the subcontractor shall pay to his or her subcontractor, within 15 calendar days of the contractor's receipt from the owner or the subcontractor's receipt from the contractor of each periodic payment, final payment, or receipt of retainage monies, the full amount received for the work of the subcontractor based on the work completed or the services rendered under the construction contract.[39]

The Act applies to all private construction contracts not involving public funds executed after August 31, 2007, except for single family dwellings and condominiums or apartments with 12 or less units.[40] It requires general contractors and subcontractors to pay their respective subcontractors, suppliers and materialmen within 15 days of receiving payment from the owner if the owner, owner's agent, or upper tier contractor accepted the work.[41] If payment is not made within the allotted 15 days, the general contractor or subcontractor is liable for the payment plus 10 percent interest.[42] Interest is not compounded under the Act and it is not "duplicative of the interest charged under the Mechanics Lien Act."[43] Thus the 10 percent interest is not in addition to the interest due under the Lien Act. However, when a subcontractor is not paid in accordance with the Act, it may suspend performance after providing at least seven days written notice.[44] Moreover, the work can be suspended until the necessary payment (including 10 percent interest) is made without the subcontractor being in breach of contract.[45]

Notwithstanding the Act, subcontractor agreements often include provisions with specific payment schedules. An example of such a provision is as follows:

Subcontractor will receive payment from General Contractor thirty (30) days after the date General Contractor receives and processes Subcontractor's invoice so long as General Contractor: (1) received the invoice; (2) received a signed work order with the designated time frame and supporting documentation if applicable; (3) received a certificate of insurance demonstrating the required coverage and additional insured language; (4) verified that Subcontractor has performed the Services to the Owner's satisfaction; and (5) received payment for the work from Owner pursuant to the Prime Contract.

As long as it does not conflict with the Prime Contract, and to the extent that applicable law provides for payment other than what is provided in this Subcontract, the Parties agree that all provisions of such law are expressly waived and not applicable to the Work and payment provisions hereunder, and that instead payment shall be handled as outlined herein. In the event that waiver of any such applicable law is not permitted by law, the Parties agree that the applicable law shall apply in lieu of the terms in this Subcontract, but only to the extent specifically required.

Though this example payment provision sets out a payment schedule other than that outlined in the Act, and purports to waive the Act's requirements, it is questionable whether such a waiver is permitted in Illinois. An early version of the

Bill comprising the Act expressly allowed for contracting around the Act, but because the legislature removed the language before passing the Bill, there is a strong presumption the Act's terms cannot be waived.[46] As such, regardless of any waiver language in a subcontract, as in the example above, contractors and subcontractors should adhere to the Act's payment schedule requirements to avoid exposure.

The Act specifically applies to construction contracts related to Illinois projects.[47] But note that even for an Illinois project, it is likely work performed or materials supplied outside Illinois pursuant to contracts made under another state's law would not be subject to the Act. For example, if a contractor purchases material from a Wisconsin supplier that will ultimately be used in an Illinois project under a purchase order stating Wisconsin law applies, the material supplier likely could not claim interest or stop work based on the Act.

Several other states have similar prompt payment legislation. For example, in California, contractors must pay subcontractors their share of a retention payment within 10 days of receipt of payment from the owner.[48]

Though unrelated to the Prompt Payment Act, another important thing to note about the example payment provision above is that it includes what has been termed a "pay-if-paid" clause in Illinois. It states: "*Subcontractor will receive payment from General Contractor thirty (30) days after the date General Contractor receives and processes Subcontractor's invoice* ***so long as*** *General Contractor *** received payment for the work from Owner pursuant to the Prime Contract."* This language makes payment from the owner to the general contractor a condition precedent to the general contractor having to pay the subcontractor. That is, the general contractor is only obligated to pay the subcontractor *if* the owner paid the general contractor. For obvious reasons, contractors should be wary of such clauses as they are enforceable in Illinois.[49] However, courts disfavor such clauses and unless they contain "clear and unambiguous language" that payment from the owner is a "condition precedent" to payment to the subcontractor, the clause will be read only as a "pay-when-paid" clause that only addresses the timing of the payment and does *not* relieve the general contractor of its obligation to pay the subcontractor even if the owner never pays the general contractor.[50]

Practice Tips: Though a construction agreement may provide a specific payment schedule, the payment schedule may not be enforceable under the Contractor's Prompt Payment Act. If the contract calls for an unreasonable amount of time for payment, or a subcontractor is otherwise not being paid in a timely manner, counsel should advise of the Act's 15-day requirement and other rights under the Act. Moreover, counsel should be aware of pay-if-paid clauses and the risks such clauses may pose to a contractor.

Advance Waiver of Mechanics Liens

One of the common remedies relied upon by contractors in collecting payment from the general contractor/owner is the ability to record mechanics liens on property. For this reason, general contractors/owners have historically attempted to include advance waiver provisions in their construction agreements that require contractors to waive their rights to maintain mechanics liens.

Prior to 1992, the Illinois Mechanics Lien Act provided that a "no lien" contract clause in a contractor's contract with the owner was valid against a subcontractor if the subcontractor had constructive notice of the provision at least ten (10) days before it made its subcontract.[51] However, in 1992, the Act was amended to make "no lien" clauses

unenforceable if agreed to in anticipation of and in consideration for being awarded the contract/subcontract.[52] In 1998, this amendment was upheld as constitutional by the Illinois Supreme Court.[53]

In 2014, Section 60/1 of the Act was further amended to include a subordination clause; its current language reads as follows:

> An agreement to waive any right to enforce or claim any lien under this Act, or an agreement to subordinate the lien, where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, either express or implied, to perform work or supply materials for an improvement upon real property is against public policy and unenforceable. This Section does not prohibit release of lien under subsection (b) of Section 35 of this Act, nor does it prohibit an agreement to subordinate a mechanics lien to a mortgage lien that secures a construction loan if that agreement is made after more than 50% of the loan has been disbursed to fund improvements to the property.[54]

With the 2014 amendments, Section 60/1 allows a subcontractor's mechanics lien to be subordinated to a mortgage lien in accordance with the requirements in subparagraph (d); however the Act offers no specificity as to whom has to agree to the subordination. Despite the lack of direction, it has been suggested that because mechanics liens are property rights protected by the U.S. and Illinois Constitutions, the contractor and subcontractor would be required to consent to the subordination agreement in order to be bound by it.[55]

Essentially, the subordination language in Section 60/1(d) allows a change in lien priorities, moving the contractor's mechanics lien to a lower priority level than the mortgage lien if, in fact, it held a higher priority originally. For these reasons, contractors should be aware that although an advance waiver in Illinois may not be enforceable per Section 60/1(d), subordination in compliance with Section 60/1(d) may have the same effect as an advance waiver if there is ultimately not enough money/equity in the property to pay all liens if enforcement is necessary.

An example of a contract provision containing an advance mechanics lien waiver is as follows:

> *In consideration for being awarded this Subcontract, Subcontractor covenants and agrees that no mechanics liens will be filed or maintained against the Premises or any part thereof or any interests therein or any improvements thereon, for or on account of any work, labor, services, materials, equipment or other items performed or furnished for or in connection with the work, and the Subcontractor does hereby expressly waive, release and relinquish all rights to file or maintain such liens.*

Just as a cautionary note, although an advance lien waiver provision containing language as in the example above would likely be unenforceable as against public policy, other lien waivers (not given in anticipation of and in consideration for being awarded the subcontract) may be enforceable, such as waivers given after certain work is completed. The Illinois Mechanics Lien Act also states: "If the legal effect of a provision in any contract between the owner and contractor or contractor and subcontractor is that no lien or claim may be filed or maintained, or that such contractor's lien shall be subordinated to the interests of any other party, and the provision is not prohibited by this Act, such provision shall be binding if made as part of an agreement not prohibited by this Act."[56] In analyzing other lien

waivers, courts have stated that, as a general rule, a clear, unambiguous waiver of lien rights bars an action under the Mechanics Lien Act.[57]

Practice Tip: For those who practice beyond Illinois borders in neighboring states, note the following states also have anti-advance waiver of mechanics liens statutes: Indiana,[58] Michigan,[59] Minnesota[60] and Missouri.[61]

Damage Waivers

Damage waivers are found in most construction agreements. They are designed to cut off potential exposure for a party's breach of contract. They come in several different forms and can be under several different headings. This discussion focuses on the following forms and headings because they are most commonly found in construction contracts: consequential damage waivers, no damage for delay clauses, and liquidated damages clauses.

Consequential Damage Waivers

In reviewing a consequential damages waiver, it is important to know exactly what types of damages the contractor has agreed to waive/forego. An example of a consequential damage waiver is as follows:

> *The Subcontractor waives all claims against the Owner and General Contractor for consequential damages arising out of or relating to this Agreement. This waiver includes but is not limited to damages incurred by the Subcontractor for principal office expenses including compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work. This waiver is applicable, without limitation, to all consequential damages due to the termination of this Agreement.*

In general, Illinois law allows for two types of damages for breach of construction contracts: direct and consequential. Direct damages (also referred to as general damages) are those which naturally result from the breach, and it is generally presumed these damages were within the contemplation of the parties at the time of contracting.[62]

Consequential damages (also referred to as indirect, special, or incidental damages), on the other hand, are damages that do not necessarily flow naturally from the breach, but may reasonably be supposed to have been within the contemplation of the parties as a probable result of the breach.[63] Consequential damages are typically recoverable only if the non-breaching party can show the breaching party had reason to know at the time of contracting the particular loss could occur from the breach.[64]

Though different definitions are provided for direct and consequential damages, the line between the two is less than clear. In fact, the same type of damage can be classified as both a direct and a consequential damage. For instance, in Illinois, lost profits can be both. If a general contractor breaches a contract by causing delay, a subcontractor's lost profits from the particular contract (the profit the subcontractor stood to gain from the specific contract) would be considered direct damages, while the subcontractor's lost profits from other projects it had to forego during the delay would be

considered consequential damages. Because the line is blurred, ideally, a consequential damages waiver will list the exact types of damages considered consequential and, therefore waived, as in the example above, but often they do not.

In construction, direct damages will almost always include lost profits to the subcontractor for the specific project if the general contractor or owner breached the contract. Consequential damages, on the other hand, will include such things as loss of business reputation, loss of business opportunity, increased overhead costs, and increased financing costs. Obviously, these latter costs can be substantial and agreeing to waive them could cause substantial risk for the subcontractor.

In general, consequential damages waivers will be upheld in Illinois.[65] Illinois law reflects "a wide-spread policy of permitting competent parties to contractually allocate business risks as they see fit."[66] Accordingly, Illinois courts will enforce consequential damages waivers unless the waiver at issue is unconscionable. But, damage waivers are strictly construed: they "must spell out the intention of the parties with great particularity and will not be construed to defeat a [damages] claim which is not explicitly covered by their terms."[67] Thus, before conceding particular consequential damages have been waived, and in assessing the subcontractor's risks, subcontractor's counsel should carefully examine the waiver language to determine which, if any, damages were explicitly waived.

No Damage for Delay

Generally, contractors are entitled to delay costs if the owner or upstream contractor causes the delay. These costs can include such things as: lost income or profit; rental expenses for tools and equipment; loss of use of tools, equipment and personnel; loss of business reputation; and loss of management or employee productivity. No damage for delay clauses often require the lower tier contractor to waive all these expenses even if the owner or general contractor causes delay in the project. An example of such a clause is as follows:

> *In the event the Subcontractor's performance on this subcontract is delayed or interfered with by acts of the Owner, contractor or other subcontractors, he may request an extension of time for the performance of same, as herein provided, but shall not be entitled to any increase in the subcontract price or to damages or additional compensation as a consequence of such delays or interference, except to the extent the prime contract entitled the Contractor to compensation for such delays, and then only to the extent of any amounts that the Contractor may, on behalf of the subcontractor, recover from the Owner for such delays.*

In general, these types of clauses are enforceable, but they are strictly construed against the party seeking to invoke them and they are subject to several exceptions.[68] These exceptions may include: when the delay is unreasonable in duration; when the owner or general contractor was not acting in good faith; when the cause of the delay was not within the contemplation of the parties; or the delay is attributable to inexcusable ignorance or incompetence on the part of the owner or general contractor.[69]

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Liquidated Damages

Liquidated damages are an agreed upon amount specified in a contract for damages caused by the breach of one party or the other. An example of a liquidated damages clause is as follows:

> *Subcontractor agrees that if the date or duration set forth above in this paragraph for Substantial Completion is not attained, Subcontractor shall pay Contractor $1,000.00 as liquidated damages and not as a penalty for each day that Substantial Completion extends beyond such date or duration. The liquidated damages provided herein shall be in lieu of all liability for extra costs, losses, expenses, claims, penalties, and other damages. The total costs for liquidated damages shall not exceed $50,000.00.*

A liquidated damages clause such as the example above can benefit a subcontractor if the subcontractor causes delay and the owner's or upstream contractor's losses due to the delay exceeded $1,000 per day. Under this provision, the general contractor has waived any claim for damages that may exceed $1,000 per day during the delay. Obviously, however, if the subcontractor does not cause the delay or the losses the general contractor actually sustains is less than $1,000 per day, the subcontractor may have exposure under this provision that it otherwise would not have had.

In general, liquidated damages clauses are enforceable in Illinois if the party seeking to enforce one shows: (1) the parties intended to agree in advance to settling damages that might arise from the breach; (2) the amount of liquidated damages was reasonable *at the time of contracting,* bearing some relation to the damages which might be sustained; and (3) actual damages are uncertain in amount and difficult to prove.[70] Liquidated damages "must be for a specific amount for a specific breach; they may not be a penalty to punish nonperformance or as a threat used to secure performance."[71] Highly excessive amounts not related to actual damages that may be suffered are considered punitive (a penalty) and not enforceable.[72] Further, if a liquidated damages clause states it is an "optional" remedy, Illinois courts will most likely not enforce it because the fact they are optional means the parties did not intend to agree in advance to settling damages that might arise from the breach.[73]

Practice Tips: Inevitably, construction agreements will contain damage waivers in some form or another. Contractor's counsel should review the contract documents for such waiver provisions, determine their enforceability, and advise their client accordingly of potential exposure due to same.

Choice-of-Law and Forum Selection

A choice-of-law provision in a construction agreement may impact fundamental issues relative to the validity and interpretation of the agreement, especially if challenged in a court of law. Upstream parties may include a choice-of-law provision in a contract that benefits the upstream parties more than the downstream parties (subcontractors), and those provisions may be enforceable under Illinois law.

In Illinois, choice-of-law considerations are not implicated unless there is an actual conflict of law among the various states with an interest in a particular dispute, and an actual conflict exists if the outcome of a dispute will differ depending on which state's law is applied.[74] In making choice-of-law decisions where the parties have made an express choice of state law in their written contract, Illinois courts generally turn to the Restatement.[75]

Restatement (Second) of Conflict of Laws 187§states as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either:
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.[76]

Generally, Illinois will enforce the parties' choice-of-law provision unless certain Section 187 exceptions apply. Under Section 187, Illinois courts have looked at such things as an entities' state of incorporation, principal place of business, physical location of employees/offices and where the parties' contract was negotiated to determine substantial relationships and material interests.[77] However, it is important to note that Illinois courts have declined to "rigidly" follow Section 187 at times, especially in relation to subparagraph (2)(b), stating that the Restatement is simply a guide for courts, not black letter law.[78]

Illinois is among those states that generally follow the modern approach to choice-of-law questions, and this approach places the greatest importance on the public policy of the state in which a case is brought.[79] To ascertain the public policy of a state, courts look to its constitution, legislative enactments, and judicial decisions.[80] And, in fact, Illinois' public policy that contracts for construction occurring in Illinois be litigated in Illinois is articulated in its Building and Construction Contract Act.[81] Illinois' Building and Construction Contract Act states that "[a] provision contained in or executed in connection with a building and construction contract to be performed in Illinois that makes the contract subject to the laws of another state or that requires any litigation, arbitration, or dispute resolution to take place in another state is against public policy. Such a provision is void and unenforceable. "[82] Of particular note, the Illinois appellate

court has held that the Building Act (enacted in July 2012) does not apply retroactively to void parties' choice of law provisions entered into prior to the Act.[83]

It is important to understand that forum selection and choice-of-law are closely related, however separate issues.[84] Under Illinois law, a forum-selection clause may be voided if it violates a fundamental Illinois public policy or that enforcement would be unreasonable under the circumstances such that the selected forum will be so gravely difficult and inconvenient that the opposing party will, for all practical purposes, be deprived of its day in court.[85]

Generally, to determine whether a forum-selection clause is enforceable, Illinois courts have applied a multi-factor test to determine whether the clause is reasonable: (1) the law governing the formation and construction of the contract, (2) the residency of the parties, (3) the place of execution or performance of the contract, (4) the location of the parties, (5) the inconvenience of the location, and (6) the parties' relative bargaining positions.[86] A forum selection agreement reached through arm's-length negotiation between experienced and sophisticated business people should be honored by them and enforced by the courts, absent some compelling and countervailing reason for not enforcing it.[87] However, a forum selection clause contained in boilerplate language indicates unequal bargaining power, and the significance of the provision is greatly reduced.[88]

An example choice of law/forum selection provision in a construction contract is as follows:

> *The validity, interpretation, construction and performance of this Subcontract Agreement will be governed by the laws of the State of New York. Any claims or legal actions by one party against the other arising out of the relationship between the parties herein shall be commenced or maintained in Albany County, New York.*

In our example above, arguably an Illinois court would not uphold said provision if there was a conflict between the applicable New York and Illinois laws and the subject construction was performed in Illinois by Illinois based contractors. Although Illinois has a public policy that supports the application of Illinois law in litigation involving Illinois construction and keeping said litigation in Illinois, special attention should be given to the applicable laws of the other state noted in the construction agreement's choice-of-law and/or forum selection provisions regardless of whether counsel believes they would be enforceable. Contractors should be familiar with the nuances of the chosen state's laws in order to fully understand the potential risks in accepting the choice-of-law provision. Additionally, contractors should consider the potential risks/costs of commencing or defending litigation in the chosen forum state, especially if the chosen state is not the state in which the contractors have their principle place of business.

Practice Tips: Neighboring states that adhere to Section 187 or a similar public policy analysis of choice-of-law provisions are: Iowa,[89] Missouri[90] and Michigan.[91] Relative to Wisconsin, be cautious in that Wisconsin statute states that "[t]he following provisions in contracts for the improvement of land in this state are void: (2) Provisions making the contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state."[92]

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Contract Documents & Flow Down Provisions

Although a downstream construction agreement may not contain the provisions as outlined in the sections above, most contain provisions which define the complete agreement between the parties beyond the four corners of the construction agreement itself, incorporating various other documents as part of the overall "Contract Documents." As in the example below, those Contract Documents can be varied, including the contract between general contractor and owner, general contractor and another upstream (sub)contractor, plans and specifications applicable to that work, among others. The contractor's execution of the construction agreement usually represents full knowledge and understanding of all Contract Documents. See below for contract provision defining the Contract Documents:

> *The Subcontract Documents shall consist of this Subcontract Agreement, all Exhibits attached hereto, the General Contractor's Agreement with Owner, Preliminary Design Documents as defined herein, the Project Schedule, the Bid Package including the Scope of Work, and any Purchase Orders/Change Orders issued hereafter. The Subcontract Documents are available for examination by the Subcontractor at the General Contractor's office. By executing this Agreement, the Subcontractor represents that it has fully examined the Subcontract Documents and has executed this Agreement with full knowledge and understanding of the Subcontract Documents.*

Under Illinois law, one instrument may validly incorporate another instrument by reference.[93] The only requirement is that the contract show an intent to incorporate the other document and make it part of the contract itself.[94] The written words of the contract and the instrument it incorporates must be read together and, where possible, effect must be given to all their parts.[95] Thus, a contract can specifically adopt provisions of the general contract and other contract documents, and those additional provisions then become part of the construction agreement as if they were expressly written in it.[96] A contractor is under a duty to learn, or know, all contents of a written contract before it is executed and is under a duty to determine the obligations which are undertaken by the execution of a written agreement.[97] Accordingly, contractors have a duty to learn or know the terms of all contract documents before they sign a construction agreement.[98]

One of the primary reasons for incorporating the applicable upstream contract(s) into downstream contracts is to ensure that all relevant responsibilities and obligations flow down to lower tier subcontractors responsible for the work, from the general contractor to lower tier subcontractors—thus making all contractors onsite responsible for the same terms and completion of the work in a safe manner as per the plans and specifications. The concept of flow down does not eliminate the responsibilities/obligations of the general contractor, but simply puts those same responsibilities/ obligations on contractors downstream as well.

Two contract provisions that are generally subject to flow down relate to insurance and indemnification. Owners generally obligate the general contractor to obtain a certain amount of insurance coverage, name identified parties as additional insureds and indemnify the owner and others for loss/damages resulting from the general contractor's work. By incorporating these terms into the subcontract agreement, the subcontractor is obligated (with the general contractor) to obtain the same insurance coverages, name the same individuals/companies as additional insureds and indemnify the

same parties per the terms of the upstream contract. (See Sections supra for discussion on insurance and indemnity provisions).

Practice Tips: Contractors at all levels on the project should carefully review the Contract Documents prior to execution to ensure full understanding of all provisions and corresponding obligations and risk - in a perfect world, prior to bid and execution, as the various obligations could significantly affect their profit analysis and therefore bid amount. While contractors rarely have the opportunity to make broad stroke revisions to the Contract Documents, consideration should still be given to the potential for amendments as needed - if the request for revision is narrowly focused on only a handful of provisions, the customer (owner, general contractor, other (sub)contractor) may be more likely to grant those revisions. Finally, if your client anticipates hiring sub-subcontractors for the work, ensure all the same Contract Documents are incorporated in the sub-subcontracts to ensure flow down of all the same responsibilities/obligations to the sub-subcontractor.

Summary

The construction agreement provisions analyzed above are not intended to be an all-inclusive list of provisions that need to be considered when assessing risks to your contractor clients but rather consider them a good place to begin your construction agreement risk analysis. Contract provisions such as environmental compliance, assignment rights, termination for cause/convenience, intellectual property right, security and confidentiality of electronically stored information, are beyond the scope of this article. However, they are equally important in assessing risks.

Endnotes

[1] *Westfield Ins. Co. v. FCL Builders, Inc.,* 407 Ill. App. 3d 730, 732 (1st Dist. 2011).

[2] *See, e.g.*, ISO CG 20 01 04 13 Primary and Noncontributory-Other Insurance Condition (an ISO Form endorsement requiring that "This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under [the named insured's] policy.")

[3] ISO CG 2010 (11 85).

[4] ISO CG 2010 (10 01).

[5] ISO CG 2037 (10 01).

[6] ISO CG 2404 (11 85).

[7] 740 ILCS 35/1 (West 2018) (emphasis added).

[8] 815 ILCS 675/10(1), (3), and (5) (West 2018) (emphasis added).

[9] *Camper v. Burnside Constr. Co.*, 2013 IL App (1st) 121589, ¶ 58.

[10] 815 ILCS 675/15(a),99 (West 2018).

[11] *See, e.g.*, *Lyons v. Turner Constr. Co.*, 195 Ill. App. 3d 36 (1st Dist. 1990).

[12] 740 ILCS 35/3 (West 2018); and 815 ILCS 675/15(d) (West 2018).

[13] *See, e.g., USX Corp. v. Liberty Mut. Ins. Co.*, 269 Ill. App. 3d 233 (1st Dist. 1994); and *W.E. O'Neil Const. Co. v. Gen. Cas. Co. of Ill.*, 321 Ill. App. 3d 550, 557 (1st Dist. 2001) (a contract provision requiring a subcontractor to procure insurance coverage for an owner or general contractor is wholly enforceable unless it is "inextricably intertwined" with a void indemnity provision).

[14] *See*, *Va. Sur. Co., Inc. v. N. Ins. Co. of N.Y.*, 224 Ill. 2d 550, 560 (2007) .

[15] *See*, Mich. Comp. Laws. 691.991§.

[16] *See*, Mo. Rev. Stat. §434.100.

[17] *See*, Iowa Code §537A.5.

[18] 820 ILCS 305/11; *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991).

[19] 820 ILCS 305/11.

[20] 740 ILCS 100/2.

[21] 740 ILCS 100/3.

[22] *Kotecki*, 146 Ill. 2d at 165.

[23] *Id.* at 165.

[24] *Va. Sur. Co.*, 224 Ill. 2d at 557–58.

[25] *Id.*

[26] *Kotecki*, 146 Ill. 2d 155.

[27] *Id.* at 166.

[28] *Id.* at 165, citing *Lambertson v. Cincinnati Corp.,* 312 Minn. 114, 130 (1977).

[29] *Herington v. J.S. Alberici Const. Co.,* 266 Ill. App. 3d 489, 496–97 (5th Dist. 1994).

[30] *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 210 (1997).

[31] *Liccardi v. Stolt Terminals, Inc.,* 178 Ill. 2d 540, 545 (1997); *Estate of Willis v. Kiferbaum Const. Corp.,* 357 Ill. App. 3d 1002, 1006 (1st Dist. 2005).

[32] *Fleck v. W.E. O'Neil Const. Co.*, 2016 IL App (1st) 151108-U, ¶ 81.

[33] *Avalos v. Pulte Home Corp.*, No. 04 C 7092, 2006 WL 3813735, at *8–11 (N.D. Ill. Dec. 22, 2006).

[34] *Braye,* 175 Ill. 2d at 213.

[35] *Liccardi,* 178 Ill. 2d at 548.

[36] *Avalos*, 2006 WL 3813735.

[37] *Estate of Willis,* 357 Ill. App. 3d at 1004.

[38] The State Prompt Payment Act, 30 ILCS 540/0.01 (West 2018), addresses prompt payment for work on public projects, but will not be discussed here.

[39] 815 ILCS 603/10(2) (West 2018).

[40] 815 ILCS 603/5(b) (West 2018).

[41] 815 ILCS 603/10(2) (West 2018).

[42] 815 ILCS 603/15(a) (West 2018).

[43] 815 ILCS 603/15(c) (West 2018).

[44] 815 ILCS 603/15(b) (West 2018).

[45] *Id.*

[46] 2007 Illinois House Bill No. 743, Illinois Ninety-Fifth General Assembly - First Regular Session.

[47] 815 ILCS 603/5(b) (West 2018).

[48] See Cal. Civ. Code §§ 8800, 8812, and 8814.

[49] *See, e.g.*, *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.,* 132 Ill. App. 3d 325, 327 (1st Dist. 1985).

[50] *See, e.g.*, *Beal Bank Nev. v. Northshore Ctr. THC, LLC*, 2016 IL App (1st) 151697, ¶ 24.

[51] Howard M. Turner, *Turner on Illinois Mechanics Liens* (2016).

[52] *Id.*

[53] *R.W. Dunteman Co. v. C/G Enter., Inc.*, 181 Ill. 2d 153 (1998).

[54] 770 ILCS 60/1(d).

[55] Howard M. Turner, *Turner on Illinois Mechanics Liens* (2016).

[56] 770 ILCS 60/21(b).

[57] *Cordeck Sales, Inc. v. Constr. Sys., Inc.,* 382 Ill. App. 3d 334, 364 (1st Dist. 2008), citing *Luczak Brothers, Inc. v. Generes,* 116 Ill. App. 3d 286, 298 (1st Dist. 1983).

[58] Burns Ind. Code Ann. 32-28-3-16(b).

[59] MLCS 570.1115(1).

[60] Minn. Stat. § 337.10 (Subd 2).

[61] Mo. Rev. S. 429.005(1).

[62] *Edward E. Gillen Co. v. City of Lake Forest*, 221 Ill. App. 3d 5, 12 (2d Dist. 1991).

[63] *Jones v. Melrose Park Nat. Bank*, 228 Ill. App. 3d 249, 258 (1st Dist. 1992).

[64] *Jones*, 228 Ill. App. 3d at 259.

[65] *See*, *e.g.*, *Rayner Covering Sys., Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 512 (2d Dist. 1992) (holding "parties can limit remedies and damages for breach if their agreement so states and no public policy bar exists.")

[66] *McClure En'g Assocs., Inc. v. Reuben H. Donnelley Corp.*, 95 Ill. 2d 68, 72 (1983).

[67] *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 395 (1986).

[68] *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 276 (1994).

[69] *See J&B Steel*, 162. Ill. 2d at 278*;* and *Gust K. Newberg, Inc. v. Ill. State Toll Highway Auth.*, 153 Ill. App. 3d 918 (2d Dist. 1987).

[70] *Jameson Realty Group v. Kostner*, 351 Ill. App. 3d 416, 423 (1st Dist. 2004).

[71] *MED+PLUS Neck & Back Pain Ctr., S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 860 (2d Dist. 2000).

[72] *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420 (1st Dist. 2011).

[73] *Resource Tech. Corp. v. Congress Dev. Co.*, No. 03C2254, 2003 WL 22057489 (N.D. Ill. Sept. 2, 2003).

[74] *Allianz Ins. Co. v. Guidant Corp.*, 373 Ill. App. 3d 652, 658 (2d Dist. 2007).

[75] *Hall v. Sprint Spectrum L.P.,* 376 Ill. App. 3d 822, 825 (5th Dist. 2007).

[76] Restatement (Second) of Conflict of Laws § 187 (1971).

[77] *PCM Sales, Inc. v. Reed*, No. 16-CV-02334, 2017 WL 4310666 (N.D. Ill. Sept. 28, 2017); *Flava Works, Inc. v. Rossi*, No. 12-cv-1885, 2013 WL 1337326 (N.D. Ill. Mar. 29, 2013); *Maher & Assocs, Inc v. Quality Cabinets,* 267 Ill. App. 3d 69 (2d Dist. 1994); *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839.

[78] *Maher,* 267 Ill. App. 3d at 77.

[79] *Id.*

[80] *Hall,* 376 Ill. App. 3d at 826.

[81] *Dancor Constr., Inc.* 2016 IL App (2d) 150839, ¶ 47.

[82] 815 ILCS 665/10.

[83] *Foster Wheeler Energy Corp. v. LSP Equip., LLC,* 346 Ill. App. 3d 753, 762 (2d Dist. 2004).

[84] *Brandt v. MillerCoors, LLC,* 2013 IL App (1st) 120431, ¶ 15.

[85] *Maher,* 267 Ill. App. 3d at 75; *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 19.

[86] *Calanca v. D & S Mfg. Co.,* 157 Ill. App. 3d 85, 88 (1st Dist. 1987); *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 86 (1st Dist. 2007).

[87] *Calanca,* 157 Ill. App. 3d at 88; *IFC Credit Corp.*, 378 Ill. App. 3d at 86.

[88] *Williams v. Ill. State Scholarship Comm'n,* 139 Ill. 2d 24, 72 (1990).

[89] *Hussemann v. Hussemann*, 847 N.W.2d 219, 222 (Iowa 2014).

[90] *Sturgeon v. Allied Prof'l Ins. Co.*, 344 S.W.3d 205, 210 (Mo. Ct. App. 2011).

[91] *Delphi Auto. PLC v. Absmeier*, 167 F. Supp. 3d 868, 875 (E.D. Mich. 2016), *appeal dismissed* (June 16, 2016), *modified*, No. 15-CV-13966, 2016 WL 1156741 (E.D. Mich. Mar. 24, 2016).

[92] Wis. Stat. Ann. § 779.135 (2) (West).

[93] *Provident Fed. Sav. & Loan Ass'n. v. Realty Ctr., Ltd*, 97 Ill. 2d 187, 192-193 (1983).

[94] *Golen v. Chamberlain Mfg. Corp.* 139 Ill. App. 3d 53, 59 (1st Dist.1985).

[95] *Heifner v. Bd. of Ed. of Morris Cmty. High Sch. Dist. No. 101, Grundy Cty.,* 32 Ill. App. 3d 83, 88 (3d Dist. 1975).

[96] *Preski v. Warchol Const. Co., Inc.* 111 Ill. App. 3d 641, 645 (1st Dist. 1982).

[97] *Leon v. Max E. Miller & Son, Inc.,* 23 Ill. App. 3d 694, 699 (1st Dist. 1974).

[98] *Ridgeview Const. Co. v. Am. Nat. Bank & Trust Co. of Chi.,* 205 Ill. App. 3d 1045, 1051 (1st Dist. 1990).

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