

Ajax Construction, LLC is a general contractor hired by the city to build the new civic center. Kenner Steel Co, Inc. has been engaged as a subcontractor of Ajax; Kenner’s role is to erect the civic center’s structural steel frame.

The Subcontract Agreement In the subcontract agreement between Ajax and Kenner, Kenner has agreed to indemnify Ajax for any damages and attorney fees resulting from injuries or property damage that is caused in whole or in part by Kenner’s negligence in the performance of the work. This clause, entitled “Indemnification,” also includes an express promise to indemnify Ajax for injuries to employees of Kenner.¹

The Incident The iron and steel work is running behind schedule – Ajax begins to pressure Kenner to get the work done so the other trade contractors can start. In its haste to catch up, Kenner starts putting cross beams in place while employees are actually working *underneath the area* where the beams are handled and seated.

Unfortunately, the employees of Kenner lose control of a beam while attempting to seat it – the beam falls and seriously injures the Kenner employee working on the metal deck below.

Workers’ Compensation The injured Kenner employee, Tom, begins to receive payment of workers’ compensation benefits by Kenner’s workers’ compensation insurer – including paying for his medical treatments and lost wages. But due to the severity of his injuries, including the possibility of permanent disability, Tom engages an attorney.

Exclusive Remedy After talking to his attorney, Tom learns the law generally prohibits lawsuits by employees *against employers* for work related injuries. As explained to Tom, this prohibition is because of the “exclusive remedy” provision in the state’s workers’ compensation law – Tom’s recovery from Kenner is *restricted* to payment of workers’ compensation benefits. The law does not allow Tom to sue his employer, Kenner.

Third Party Claim But Tom’s attorney points out that “exclusive remedy” does not forbid Tom from suing “third parties” that may be responsible for his injury; Tom’s attorney recommends that Tom sue Ajax, the general contractor. Tom agrees and a complaint is filed against Ajax, alleging Ajax is liable for Tom’s injuries as Ajax breached its duty to maintain a safe workplace. The suit demands damages not paid by workers’ compensation, such as pain and suffering. Tom’s suit against Ajax is considered a “third party” claim.

Contractual Indemnification Due to the seriousness of the claim, Ajax attorneys seek to *enforce* the terms of the “Indemnification” clause included in the Subcontract Agreement. The Ajax attorneys assert the injuries to Tom were caused (at least in part) by the negligence of Kenner and for that reason demand Kenner perform its contractual obligation per the “Indemnification” clause of the Subcontract Agreement. The performance being demanded of Kenner by Ajax is indemnification of Ajax attorney’s fees for Tom’s complaint and also indemnification of any damages for which Ajax may be liable to Tom for his injuries. The indemnification being sought by Ajax under the Subcontract Agreement is usually called *contractual indemnification* – the indemnity being sought is based on the *terms of a contract* and not indemnity in tort.

Third Party Over The demand by Ajax of Kenner is also known as a third party “over” claim.² The reference to “over” conveys that Tom’s claim for damages has *come full circle* – Tom first sued Ajax who, in turn, is demanding *contractual indemnification* from Kenner for injuries to Kenner’s employee, Tom.

Employers’ Liability Insurance Kenner’s workers’ compensation insurer (Assurance Insurance Co.) is already paying the *statutory* workers’ compensation benefits to Tom. But the standard April 1, 1992 edition National Council on Compensation Insurance (NCCI) Workers’ Compensation policy includes *multiple* coverage parts. One very important part of the NCCI policy is Part Two - Employers’ Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

For which you [Kenner] are liable to a third party [Ajax] by reason of a claim or suit against you [Kenner] by that third party [Ajax] to recover damages claimed against such third party [Tom’s claim against Ajax] as a result of bodily injury to your [Kenner’s] employee [Tom]³

In short, to the extent that Kenner is found to be responsible *in tort*⁴ for damages to Ajax because of

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Tom’s work related injury, Kenner is covered by Employers’ Liability Insurance, Part Two, of its workers’ compensation policy. However, the demand by Ajax is not a demand for damages *in tort* – the demand is *contractual indemnification* – the source of liability is a contract.

Employers’ Liability Exclusion – Kenner’s Part Two - Employers’ Liability insurance states:

This insurance does not apply to:

Liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner.

After Kenner sent the Ajax demand letter to Assurance, a flat denial of coverage was quickly communicated to Kenner by Assurance. Citing the exclusion in Part Two - Employers’ Liability Insurance for liability assumed under a contract, Assurance made it clear that it considered the demand by Ajax for contractual indemnification liability assumed under a contract.

Commercial General Liability Assurance’s claim denial was alarming to Kenner. After all, wasn’t this an injury to Kenner’s employee? If Employers’ Liability Insurance would not respond, did Kenner have *any insurance* for its contractual indemnification obligation to Ajax?

Unknown to Kenner, its insurance broker had already sent the Ajax demand letter for contractual indemnification to Kenner’s Commercial General Liability insurer (Enduring Indemnity). While the CGL policy does exclude bodily injury to employees of Kenner arising out of and in the course of employment, the *one sentence exception* to the CGL Employers’ Liability exclusion had not escaped Kenner’s insurance broker’s notice:

This exclusion does not apply to liability assumed by the insured under an “insured contract”.

Enduring Indemnity After establishing that the “Indemnification” clause in the Subcontract Agreement did meet the CGL policy’s definition of “insured contract,” Enduring did accept the claim of Ajax as an indemnitee (the person seeking contractual indemnification) and began reimbursing Ajax for its attorney’s fees according to the terms of the indemnity agreement. Enduring will also indemnify Ajax for Tom’s damages to the extent Kenner is required to do so by the terms of the “Indemnification” clause.

Of course, it was also possible that Enduring could have denied that Kenner *is liable* for contractual indemnification. For example, Enduring might have contended that the Indemnification clause is unenforceable as it is contrary to the state’s anti-indemnification construction statute. Or Enduring might have challenged Ajax’s assertion that Tom’s injury was caused by Kenner’s negligence (there was no *judicial determination* that Kenner was negligent). However, in both instances, it is critical to understand that Enduring is not denying that Kenner is *protected* for its potential liability imposed on Kenner by an “insured contract,” but rather Enduring is contesting that Kenner *is liable* under the “insured contract.”

This example is an illustration of third party over contractual indemnification claim. See Part One of Third Party Over Claims for a discussion on how Employers’ Liability may apply to third party over *tort* claims.

About the Author

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¹ While it is common for the Subcontract Agreement to require the subcontractor to also include the general contractor as an additional insured on the CGL policy of the subcontractor, additional insured coverage *is separate and distinct from indemnification*. For clarity, reference to additional insured status of the general contractor has been intentionally omitted.

² Alternately known as “action over”, “claim over” or “liability over”

³ For the purposes of this illustration, the names of the parties have been inserted into the policy wording.

⁴ See definition of “insured contract”: “...Tort liability means liability that would be imposed by law in the absence of any contract or agreement.” ISO Commercial General Liability Coverage Form CG 00 01 12 07 © ISO Properties, Inc. 2006

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