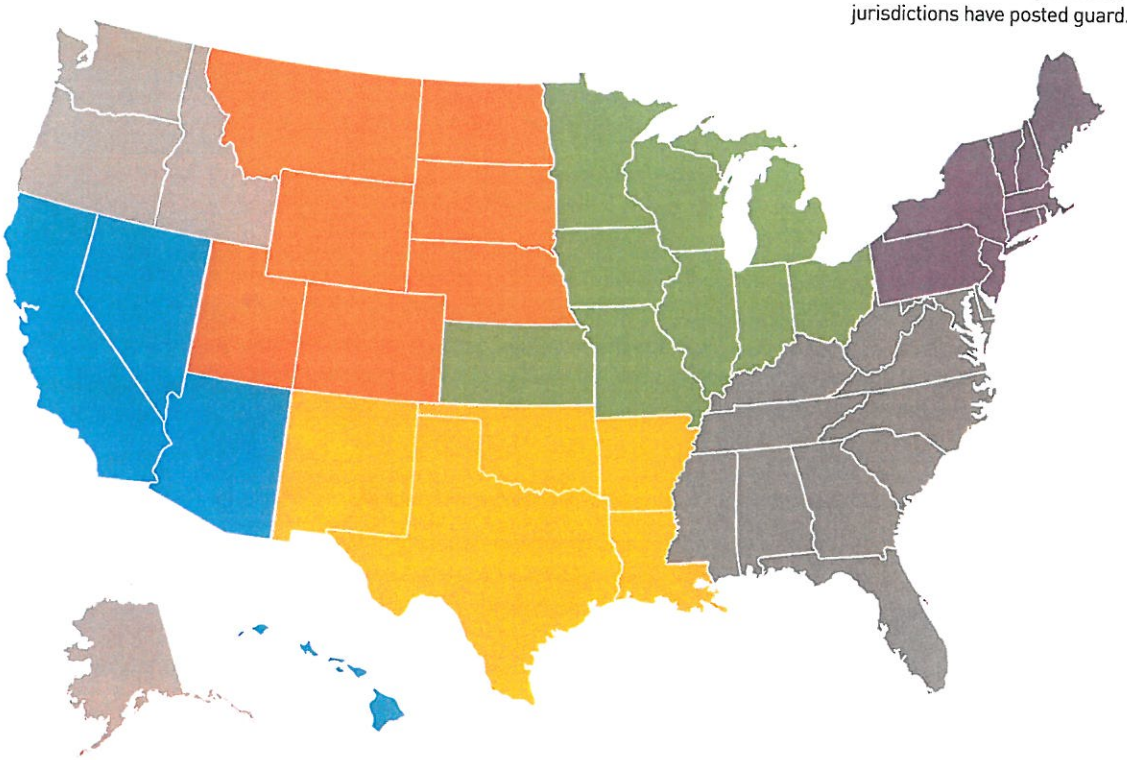
# THE BONES

SUMMER 2016

















Rulemakers

## Regulatory and Legislative Actions

**FLORIDA** Jacksonville City Council members want to transfer abandoned property owned by the city to Kairos Development International for a pilot affordable housing project. Kairos would facilitate a relationship with Energy Panel Structures, an Iowa-based pre-fab home manufacturer. Wall and roof panels would be built to local codes, then subcontractors would install electrical, plumbing and HVAC. A second phase of the project would be to help Energy Panel Structures build a factory in Jacksonville.

**NORTH CAROLINA** The state Senate approved changes to a 2013 construction permit law for wind farms to bar construction or expansion of wind energy facilities where military air training and maneuvers are conducted. The bill, if passed, could tank two proposed wind energy projects totaling about $700 million. It would give the state's new Department of Military and Veterans Affairs authority to review a construction permit application for wind projects and recommend approval or denial to the Department of Environmental Quality based on effects to military installations. It also allows the state's Department of Health and Human Services to weigh in on consequences to human health from the projects. The bill was sent to the House at press time.

**SOUTH CAROLINA** The S.C. House unanimously passed a bill June 1 to ban new construction close to the ocean. The bill grandfathers in current developers on Kiawah Island and elsewhere, but it will stem longer-term near-sea development. The Senate had already passed the bill. No word on Gov. Haley's signature by press time.

# Indemnification Is Only a Starting Point

Proper risk allocation necessitates the addition of the contractor to the subcontractor's CGL policy as an additional insured.

**BY WENDY GREVE AND OSCAR MOLINA**

Contractual indemnification agreements are necessary tools in risk allocation to downstream parties. Though here we address the relationship between a general contractor and a subcontractor, the same issues arise between any parties where risk is transferred downstream. Indemnification agreements alone are not enough. With many states holding indemnification agreements unenforceable, proper risk allocation necessitates the addition of the contractor to the subcontractor's commercial general liability policy as an additional insured.

An indemnification provision is an important risk allocation device that serves as a key negotiation point in most commercial contracts. These provisions tend to cover damages that arise from commercial contracts, and they are utilized to cover third-party claims against an indemnified party. Specifically, they are a means of shifting the financial consequences of a loss to certain parties.

The language in an indemnification provision must be clear and specific; it must show the indemnitor's intent to have it indemnify the indemnitee against a certain loss or liability. In

## STUCK BY STUCCO-REPAIR SETTLEMENT

Homeowners in Florida are finding fault with a settlement between KB Home and the state's Attorney General's Office, which confines coverage to homes purchased after April 17, 2005. That leaves out about 50% of homes in some neighborhoods. The settlement coverage exceeds the four-year statute of limitations under the Deceptive and Unfair Trade Practices Act, the attorney general says, noting that the relief is much better than the homeowners would have gotten in court. "Homeowners who do not qualify for relief under the settlement may have the ability to assert a warranty claim or file a construction defect lawsuit," the Attorney General's Office wrote in a statement on the settlement. KB Home has spent $71 million on water and stucco repairs, though homeowners complain the work has not solved leakage problems. Though KB Home has been in the headlines, the issue and settlement will affect many other builders. KB Home's agreement with the state includes a $17 million expenditure over the next five years to improve construction techniques, train subs, and use better materials in new construction. Its new construction will be subject to review by a third-party inspector. ■

other words, the question of whether an indemnification provision governs turns on contractual interpretation and the parties' intent expressed in the provision.

Most states' laws allow for implied indemnification between the parties to a contract where there is no express written provision for indemnification. However, the remedies available are significantly different, the likelihood of a successful outcome is unpredictable, and the indemnitee will incur litigation costs and attorneys fees in pursuing indemnification.

States vary in what indemnity provisions will be upheld. For example, by statute, Texas and Minnesota prohibit all indemnity agreements except limited-form indemnity agreements. States also differ on whether or not an indemnification agreement can require indemnification against one's own negligence.

West Virginia had held that contracts of indemnity against one's own negligence are valid and enforceable where the language of the indemnity agreement is sufficiently clear and definite. The court in *Sellers v. Owens-Illinois Glass Co.* found that the subcontractor did not have to indemnify the general when the subcontractor performed its work in accordance with the plans provided by the contractor, the subcontractor was not negligent, and damages to a third party resulted, because the following language from the contract did not clearly and

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definitely reflect an agreement that the subcontractor would indemnify the contractor for the contractor's negligence: "Subcontractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Subcontractor, his agents or employees."

After *Sellers*, West Virginia Code § 55-8-14 (1975) was enacted providing, in part, that an agreement relative to construction purporting to indemnify against liability for damages caused by or resulting from the sole negligence of the indemnitee is against public policy and is void and unenforceable. However, this statute has been interpreted to void language purporting to indemnify for one's sole negligence only where: (1) the indemnitee is found by the trier of fact to be solely (100%) negligent in causing the accident; and (2) it cannot be inferred from the contract that there was a proper agreement to purchase insurance for the benefit of all concerned. A contract that provides in substance that A shall purchase insurance to protect B against actions arising from B's sole negligence does not violate the statute, because public policy encourages both the allocation of risks and the purchase of insurance. Although the agreement was not one for construction (or to which W.Va. Code § 55-8-14 would apply), we can rely on the court's finding in *Elk Run Coal Company v. Canopius US Insurance, Inc.* that language requiring the subcontractor to obtain insurance to broadly indemnify the contractor for losses "relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, [subcontractor's] performance of the Work" is sufficiently broad, clear and definite to require indemnification.

A carefully constructed, written indemnification agreement can provide for both indemnification and a defense. The contract can, and should, allow for the recovery of attorneys fees when the indemnitee is forced to defend a claim that

## MISSISSIPPI DOT FACES MOT NEGLIGENCE SUIT

The Mississippi Supreme Court has permitted a maintenance of traffic lawsuit against the Mississippi Department of Transportation to move forward, upholding a 2014 circuit court decision that denied a motion from MDOT and the Mississippi Transportation Commission seeking dismissal of the case based on immunity. The case centers on the death of a motorcyclist who accidentally drove into a construction zone on Interstate 10. When he tried to move back into an open lane, he hit an uneven road surface, was thrown into traffic and was killed. His wife brought the suit, which also names Millette Brothers Construction Co., alleging the defendants failed to comply with the state's Standard Specifications for Road and Bridge Construction; failed to comply with the Manual on Uniform Traffic Control Devices; failed to place proper warnings in advance of lane closures; failed to place proper warnings in advance of uneven pavement; failed to act with ordinary and reasonable care; created and allowed a known and unreasonably dangerous condition to exist; and failed to erect or maintain signs warning of dangerous conditions. ■

is indemnified and when the indemnitee is forced to litigate the application of the indemnification provision.

But what happens when neither the contractor nor the subcontractor is found negligent? Since that finding is made by a judge or jury, the parties would certainly have incurred defense costs to get that answer. Additional insured status on the subcontractor's CGL policy may allow for the defense of the contractor to that claim.

Contractual indemnification clauses should include express provisions requiring not only that the subcontractor indemnify the general contractor but also that the subcontractor purchase and maintain insurance for the general as an additional insured *and* that the subcontractor provide for the cost of defense of any claim made against the general arising out of the work of the subcontractor. Express indemnification clauses that include this language ensure that the general contractor and its insurer have additional recourse.

While additional insured status often allows for uncapped defense costs, it is preferred since contractual liability coverage can be fraught with problems. It can also protect the general from the subcontractor's carrier's pursuit of subrogation against it.

Additional insured status will not protect the contractor in all circumstances. Coverage questions may arise where the contractor is an additional insured and damage was not caused by the subcontractor's negligence. "Acts or omissions" language in CGL policies has sometimes been interpreted to mean "negligent acts or omissions." Where that is the case, the contractor can be denied coverage as an additional insured when the damage was not caused by the negligence of the subcontractor, even when it was caused by the act of the subcontractor.

The additional insured status is affected in policies where the 2013 ISO changes to the AI forms have been incorporated. The 2013 changes include: limiting coverage to the additional insured "only to the extent permitted by law" (aligning coverage with anti-indemnity statutes); making sure that coverage of the additional insured is not broader than that which the named insured is required to provide by the contract or agreement; and limiting what the insurer is required to pay to the amount required by the contract or the available limits, whichever is less.

Whether a contractor and its insurer will have to pay damages to a third party as a result of the acts of its subcontractors depends on the presence and clarity of a contractual indemnification clause and the additional insured status of the contractor under the subcontractor's CGL policy. ■

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Rulemakers

## Regulatory and Legislative Actions

**FEMA Flood Maps Wash Out Condo Sales**

Errors in flood insurance maps developed by the Federal Emergency Management Agency have led insurers to substantially raise premiums along the Maryland shoreline. FEMA reportedly delineated the zone for high-risk properties along an old dune line, thereby placing multiple oceanfront condominiums and a hotel in the wrong category. A building that averaged $22,000 to insure through the National Flood Insurance Program now costs about $500,000 a year to insure. City officials are working with FEMA to correct the error, but an update of the maps could take time. FEMA flood map errors are not uncommon; that is why review and input by builders and developers is crucial. FEMA maps are typically offered for public scrutiny and comment before adoption.

## ASSURANT TAKES OVER NATIONWIDE FLOOD POLICIES

Assurant, the second-largest provider of flood insurance under the National Flood Insurance Program, has agreed to offer renewals to about 250,000 Nationwide flood insurance policyholders, following Nationwide's exit as a Write Your Own carrier under NFIP. Nationwide is shifting its focus to its core products and is working with Assurant to ensure a smooth handoff, and the company's agents will be able to offer NFIP policies through Assurant on an ongoing basis, Assurant says in a press release. The policies affected represent about $230 million in written premium under NFIP. Write Your Own providers issue policies and service claims, which are underwritten by the federal government's flood insurance program. Nationwide benefits and policies remain in effect through their renewal date, at which point the Assurant option is available. ■