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# Escaping contribution liability, while tempting, could lead to big trouble

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A subcontractor, to secure work from a general contractor or owner, often will enter in an agreement that requires the subcontractor to name the owner or general contractor as an additional insured under the subcontractor's liability policy. In addition, the subcontractor may agree to waive its "*Kotecki* cap" to secure the contract.

As widely known in Illinois construction law, in the typical event that a plaintiff's employer is sued as a third-party defendant, a *Kotecki* cap limits a third-party defendant-employer's liability not to exceed workers' compensation benefits unless its *Kotecki* cap is deemed waived. *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 585 N.E.2d 1023 (1991).

A subcontractor most often will regret its prior decision to waive *Kotecki* when one of its employees is injured on a project and who then files suit against the general contractor or owner, whereupon the general contractor or owner then files a third-party contribution action against the employer pursuant to the Illinois Joint Tortfeasor Contribution Act.

Assuming the third-party defendant-employer has been found to have waived *Kotecki*, the third-party defendant-employer would be exposed to pro rata, uncapped exposure versus its capped exposure had no waiver been made. This clearly presents an alarming situation for a third-party defendant-employer.

A third-party defendant under this situation most often will turn to an unsettled issue of Illinois law as to whether simply purchasing insurance for or naming the general contractor or owner as an additional insured extinguishes the third-party contribution action against the third-party defendant-employer.

A third-party defendant-employer who has waived *Kotecki* often will take the position during motion practice or settlement negotiations that it cannot be liable in contribution since it provided insurance to the defendant-third-plaintiff.

Here, the third-party defendant-employer would be relying upon unsettled case law that holds that "when parties to a business transaction agree that insurance will be provided as a part of the bargain, the agreement must be interpreted as providing mutual exculpation to the bargaining parties. The parties are thus deemed to have agreed to look solely to the insurance in the event of loss, and not impose liability on the other." *Monical v. State Farm Insurance Co.*, 211 Ill.App.3d 215, 223, 569 N.E.2d 1230 (1st Dist., 1991) (citing *Briseno v. Chicago Union Station Co.*, 197 Ill.App.3d 902, 905, 557 N.E.2d 196, 198 (1990)).

Under this holding, a third-party defendant-employer will attempt to escape liability upon the sole basis that it purchased insurance for defendant-third-party plaintiff while disregarding 1st District Appellate Court case law such as *Rome v. Commonwealth Edison*, 81 Ill.App.3d 776, 401 N.E.2d 1032 (1st Dist., 1980), which disagrees with *Monical*.

*Therefore, litigants during discovery should explore the pre-project intentions between a general contractor or owner and a subcontractor as to requirements to purchase insurance.*

In *Rome*, a construction company contracted with a power plant, ComEd, to perform work on a power plant. Walsh, the construction company, purchased general liability insurance that only named ComEd as an insured.

The plaintiff, an employee of Walsh, was injured during the project and filed suit against ComEd for injuries he sustained while working at ComEd's plant. Subsequently, ComEd filed a third-party complaint for contribution against Walsh. In response, Walsh filed a motion to dismiss, arguing that naming ComEd as an additional insured extinguished ComEd's right to contribution.

The trial court granted Walsh's motion to dismiss. The 1st District reversed, holding that the obligation to obtain insurance was contractual and found nothing in the contract to indicate that the parties intended the mere obtaining of insurance to relieve Walsh of all liability to indemnify ComEd.

The *Rome* court found that absent evidence to support a relinquishment of a right to contribution, simply purchasing insurance for another did not eviscerate its third-party contribution rights.

In the months following the *Rome* decision, the 1st District decided *Vandygriff v. Commonwealth Edison Co.* where the court barred ComEd from seeking contribution after a subcontractor purchased insurance from ComEd, but under the specific factual circumstances of finding that two of ComEd's representatives testified that the insurance purchased by the contractor was to replace an indemnity provision in the contract. *Vandyriff v. Commonwealth Edison Co.*, 87 Ill.App.3d 374, 378, 408 N.E.2d 1129 (1980).

The *Vandyriff* decision highlights that a third-party defendant cannot escape contribution simply by purchasing insurance for a general contractor or owner absent other supporting evidence of the parties' intentions on indemnity (as in *Dowling v. Otis Elevator Co.*, 192 Ill.App.3d 1064, 549 N.E.2d 855 (1st Dist. 1989), where the 1st District found that a contribution action could be maintained where insurance was purchased because the contract terms did not include unequivocal language exculpating contribution).

Therefore, litigants during discovery should explore the pre-project intentions between a general contractor or owner and a subcontractor as to requirements to purchase insurance.

Lastly, *Monical* also brings to the forefront a potential public policy issue. Here, a later potential third-party defendant-employer could be misled and be enticed to decrease its on-site safety efforts and safety resources knowing it could have an avenue to escape contribution liability simply by naming a general contractor or owner as an additional insured.

A third-party defendant's efforts to escape contribution cannot simply rest on having purchased insurance but whether that purchase is further supported by evidence to establish that the parties agreed to mutually extinguish contribution.