V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

UNIWEST CONSTRUCTION, INC. and UNITED STATES FIRE INSURANCE COMPANY, Plaintiffs, vs. AMTECH ELEVATOR SERVICES now known as ABM AMTECH INCORPORATED ABM INDUSTRIES INCORPORATED PENNSYLVANIA MANUFACTURERS ASSOCIATION INSURANCE COMPANY FEDERAL INSURANCE COMPANY CONTINENTAL CASUALTY COMPANY AIU INSURANCE COMPANY, Defendants.	CIVIL ACTION NO. CL 2006-13227

Fairfax, Virginia

Friday, September 21, 2007

The above-entitled action came on to be heard before the Honorable Marcus D. Williams, a judge in and

LM07-143

1 for the Circuit Court of Fairfax County, in Courtroom
2 5-A, Fairfax County Judicial Center, 4110 Chain Bridge
3 Road, Fairfax, Virginia 22030, commencing at 10:35
4 o clock, a.m., when there were present on behalf of the
5 respective parties:
6 APPEARANCES:
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1 PROCEEDINGS
2 (The court reporter was sworn.)
3 THE COURT: Okay. Good morning.
4 MR. MCGAVIN: Your Honor, since we do have a
5 court reporter, would you like us to introduce all
6 counsel and the parties they represent?
7 THE COURT: Please, if you could, all counsel
8 of record.
9 MR. MCGAVIN: Thank you. Good morning, Your
10 Honor, I m John McGavin, and I represent AIU.
11 And I d like to introduce to the Court the
12 lead counsel from Atlanta, Mr. John C. Bonnie, who has
13 already been, by order of this Court, admitted pro hac
14 vice.
15 THE COURT: All right. Thank you. Who s
16 next?
17 MR. CAMERON: Edward Cameron for the
18 plaintiffs Uniwest and U.S. Fire, and my co-counsel is
19 here from New Jersey, Christopher Carroll.
20 MR. SCHMIELER: Your Honor, for Federal
21 Insurance Company, my name is Jeff Schmieler.
22 MS. LUSE: Your Honor, for Amtech Elevator
23 Services and ABM Industries, Inc., Jamie Luse on behalf

1 of both of those defendants. And with me is Scott
2 Thomas, who has been admitted pro hac vice, and he will
3 be handling any questions, if there are any, in this
4 matter today.
5 THE COURT: I hope there are not going to be
6 any.
7 MR. NORTON: Randell Norton, Your Honor, on
8 behalf of defendant Continental Casualty Company.
9 THE COURT: Okay.
10 MR. GAVETT: Good morning, Your Honor,
11 Geoffrey Gavett on behalf of Pennsylvania Manufacturers
12 Association Insurance Company.
13 THE COURT: That s everybody. All right.
14 This matter was fully briefed. I think I m the one at
15 calendar control that set the schedule.
16 And I think there was some discussion about
17 whether I needed a date certain, and I think I remember
18 specifically mentioning to calendar control that any
19 arguments that were to be made should be put into the
20 briefs, and I assume that s what was done.So that s why
21 I m not hearing any further argument on it, because I
22 think this matter has been fully briefed.
23 Let me deal first with the plaintiffs motion

1 for summary judgment for declaratory judgment, that the
2 indemnification provision in the subcontract with Amtech
3 is valid and enforceable, and not violative of public
4 policy.
5 And, of course, the flip side of that motion
6 is the cross one by Amtech for partial summary judgment
7 against the plaintiffs, and against Pennsylvania
8 Manufacturers and Federal, based basically on the same
9 issue, just the flip side of it, which is the validity of
10 that provision in the subcontract.
11 That provision, as you all know, purports to
12 indemnify Uniwest, and defend and indemnify Uniwest.
13 There is a co-provision in Virginia Code
14 Section 11-4.1, which would void such a provision if it s
15 for a claim based upon the negligence of Uniwest or the
16 owner; or, it says, "... solely from the negligence of
17 such other party, or its agents or employees..."
18 That s §11-4.1, that s the language that had
19 been argued in this motion for summary judgment; whether
20 or not that would invalidate the provision in the
21 subcontract which would allow indemnification of Uniwest,
22 which would also include its own negligence.
23 And based on what I ve read, I have to

1 conclude that the provision is void. And, therefore,
2 I ll deny the plaintiffs motion for summary judgment,
3 and, as far as that s concerned, grant Amtech s motion
4 for partial summary judgment.
5 As you know, by voiding that provision, a lot
6 of the other arguments become moot, and I m going to go
7 through each one:
8 Continental s motion for partial summary
9 judgment for declaratory judgment as to its policy
10 limits, I believe is moot.
11 The defendant AIU s motion for summary
12 judgment, again, I ve indicated that I m granting the
13 motion, insofar as their argument is that the
14 indemnification agreement is void under Virginia law, and
15 therefore, AIU, as Amtech s insurer, would not be
16 responsible for any contribution to the settlement.
17 Defendant Amtech s motion for summary judgment
18 against AIU is moot.
19 Defendant Federal s motion for summary
20 judgment against defendant AIU is moot.
21 Defendant Federal s motion for summary
22 judgment against U.S. Fire and PMA is moot.
23 Defendant Federal -- defendant s motion for

1 summary judgment against Uniwest is moot; Federal s
2 motion for summary judgment against defendant Amtech ABM
3 is moot;
4 Federal s motion for summary judgment against defendant
5 Continental is moot; defendant Federal s motion for
6 summary judgment against Uniwest -- okay, I ve already
7 said that s moot, it s the same thing; let s see.
8 (Pause.)
9 THE COURT: Okay. I think I ve covered
10 everything.
11 And obviously, these other matters are moot
12 because, by my analysis, the indemnification agreement is
13 void, then those others have no further obligations, and
14 there is no need to rule on those issues.
15 MR. CAMERON: May I be heard, Judge?
16 THE COURT: Yes, sir.
17 MR. CAMERON: Again, Sonny Cameron for the
18 plaintiffs, Your Honor, Uniwest and U.S. Fire.
19 Judge, I m not going to revisit Your Honor s
20 ruling.
21 I just want some clarification with respect to
22 the other issues that we ve raised in this case, that are
23 more of a factual nature, that being the estoppel --

1 THE COURT: Yes, I m not ruling on that.
2 MR. CAMERON: All right.
3 THE COURT: That -- okay.
4 MR. CAMERON: And, Your Honor, with respect to
5 the additional insured arguments that we raised as well;
6 You know, in the papers, for example, that were filed by
7 CNA -- and I think your ruling was the motion that they
8 had filed may have been moot, or you granted it, I m not
9 sure which -- but they concede in their pleadings that
10 Uniwest was always treated as an additional insured.
11 And so --
12 THE COURT: That issue I m not addressing.
13 MR. CAMERON: All right.
14 THE COURT: And I ll make it clear, I should
15 have made that clearer, too.
16 I know that that s an issue, and I m not
17 deciding on a summary judgment, one way or the other.
18 MR. CAMERON: Yes, sir.
19 THE COURT: So in that sense, insofar if
20 anybody is asking for summary judgment on that issue,
21 it s not granted, so I want to make that clear.
22 MR. CAMERON: Right. And --
23 THE COURT: I think there needs to be a larger

1 record to be developed, before that issue could be
2 resolved.
3 MR. CAMERON: Yes, sir. So the ruling today
4 is limited to the effect of the voiding of --
5 THE COURT: Exactly.
6 MR. CAMERON: -- the indemnification
7 provision?
8 THE COURT: Yes. And that let s a lot of
9 people, I think -- again, that makes those other issues I
10 was asked to rule on, concerning their obligations, makes
11 it moot, because their obligations are predicated on the
12 validity of that indemnification provision.
13 MR. CAMERON: I understand, Your Honor.
14 THE COURT: So that s the thinking behind what
15 I m saying.
16 And if there are other issues out there, and
17 there could well be, I m not ruling on those.
18 MR. CAMERON: This is just limited to the
19 indemnity --
20 THE COURT: Yes.
21 MR. CAMERON: -- the clause in the contract?
22 THE COURT: Yes.
23 MR. CAMERON: All right. Would Your Honor --

1 THE COURT: And the fallout --
2 MR. CAMERON: -- entertain any --
3 THE COURT: And the fallout --
4 MR. CAMERON: -- further argument on those
5 issues that you ve ruled on?
6 THE COURT: No, that s it.
7 MR. THOMAS: Your Honor, Scott Thomas for
8 Amtech and ABM. I m trying to get clarification, too.
9 I mean, is Your Honor saying that Amtech and
10 ABM owed no duty to --
11 THE COURT: I m saying that -- all I m saying
12 is the provision --
13 MR. THOMAS: -- is void.
14 THE COURT: -- is void. And if it s void --
15 the indemnification provision is void, that s what I m
16 saying.
17 I m not saying --
18 MR. THOMAS: You re not going anywhere past
19 that?
20 THE COURT: No, no.
21 MR. BONNIE: Judge, John Bonnie. Can I ask
22 also for a point of clarification?
23 THE COURT: This is for what party?

1 MR. BONNIE: I m for AIU.
2 THE COURT: All right.
3 MR. BONNIE: You started out by saying that
4 the -- you were ruling that the indemnity was void, and
5 that that was going to have impact on some other issues
6 in the case.
7 THE COURT: At least for purposes of summary
8 judgment --
9 MR. BONNIE: I understand.
10 THE COURT: -- as being able to -- I said they
11 were mooted, I m not saying that they ve been resolved.
12 MR. BONNIE: I understand.
13 THE COURT: I m just saying there s no need
14 for me to rule on those --
15 MR. BONNIE: Right. One of --
16 THE COURT: -- because -- unless there s some
17 other context in which they have to pay.
18 MR. BONNIE: I understand. And for purposes
19 of the record, I want to respond to what Mr. Cameron said
20 about the issue of additional insured status not being
21 implicated by the ruling that the indemnity is void.
22 Regardless of what insurance policy you look at, both
23 insurance policies required there to be an enforceable

1 indemnity, in order for there to be any argument of
2 additional insured status.
3 So I have to say for purposes of the record, I
4 disagree that the issue of additional insured status has
5 not been resolved by the ruling on the enforceability of
6 the indemnity.
7 THE COURT: Well, I m just not willing, I
8 don t want to go that far. You may well be right in your
9 position, but I m just not going to do it on summary
10 judgment.
11 MR. BONNIE: All right.
12 MR. CAMERON: And, judge, just for the record,
13 our position is they are estopped to denying that, based
14 on the factual evidence that we re going to present at
15 the trial.
16 But the other argument that we raised,
17 judge -- and I just want to make sure that this is not
18 part of the ruling -- is that in the alternative, on the
19 off chance -- and I guess we re here now -- is that the
20 Court voided that provision in the contract.
21 We also argued that, and everybody has
22 conceded that, the indemnity provision in the prime
23 contract is valid and enforceable by statute in Virginia.

1 We argued that if you treat that clause in the
2 subcontract as a nullity, that then, by definition, based
3 upon the incorporation language, the broad incorporation
4 language in the subcontract, that that indemnity
5 provision from the prime contract is then read into this
6 document, and so it essentially saves it.
7 And their argument essentially was that the
8 two provisions are in conflict, and so that s not going
9 to be read in.
10 But if you -- Your Honor has already ruled
11 that this provision in the subcontract is void, it s as
12 though it never existed. And if that s the case, then,
13 clearly, the indemnity provision in the prime contract,
14 which everybody says is valid, ought to be read into it.
15 THE COURT: Well, I m not going to rule on
16 that argument.
17 MR. CAMERON: Okay. Thank you.
18 THE COURT: I m not -- and I understand there
19 are other kind of, what I call ancillary arguments out
20 there.
21 MR. CAMERON: Yes, sir.
22 THE COURT: I ve tried to make mine very
23 narrow in focus, because summary judgment is reluctantly

1 given.
2 MR. CAMERON: Yes, sir.
3 THE COURT: And if there s some other -- I
4 mean, in some of this, I think a judge would prefer to
5 have a better record.
6 That was a fairly narrow easy legal issue to
7 resolve, because you had a law, you had a contract
8 provision.
9 Some of these other arguments may involve some
10 other things, and I don t want to make that part of my
11 summary judgment motion.
12 MR. CAMERON: Judge, I have just one last
13 question on the indemnification provision in the
14 subcontract.
15 You ll recall from the federal case that was
16 decided earlier this year, the Utica case, that the court
17 there indicated that the inquiry doesn t just stop with
18 this laboratory analysis of -- or comparison of the
19 language of the statute, and the language of the
20 indemnity.
21 THE COURT: Is that district court case you re
22 talking about --
23 MR. CAMERON: Yes, the --

1 THE COURT: Which case are you talking about?
2 MR. CAMERON: The U.S. District Court from
3 down in Norfolk.
4 THE COURT: Yes, I know.
5 MR. CAMERON: Well, the point is, Your Honor,
6 that --
7 THE COURT: I m not persuaded by that case.
8 MR. CAMERON: The reasoning that there would
9 have to be a factual predicate laid out, that there, in
10 fact, was sole negligence in the case, which there isn t
11 any in this case.
12 THE COURT: I don t think so. I think by
13 operation of that provision, it invalidates it.
14 I think the only analysis you need to apply is
15 whether or not a contract provision violates that
16 statute.
17 If you read the statute, it says very
18 succinctly -- and this is where I probably disagree with
19 the federal court on that -- it says, if I can find it --
20 oh, here it is.
21 It says, "... solely from the negligence of
22 such other party, or its agents or employees, is against
23 public policy and is void and unenforceable."

1 MR. CAMERON: That s right.
2 THE COURT: I mean, so the provision is void
3 and unenforceable, not that any act or -- so long as
4 there s --
5 And my understanding is that, in effect,
6 Uniwest was asking to be indemnified, based on its
7 negligence.
8 MR. CAMERON: It is, on its negligence, but
9 the clause that s in the subcontract doesn t say anything
10 about sole negligence, judge.
11 THE COURT: I understand that, but I think
12 that s what it means, it includes that.
13 MR. CAMERON: When you look at the Supreme
14 Court cases, judge --
15 THE COURT: I m not going to reargue this.
16 MR. CAMERON: Yes, sir.
17 THE COURT: I ve gone through this, believe
18 me, and I understand your position.
19 Please do an order.
20 MR. CAMERON: Yes, sir.
21 THE COURT: Who is going to do an order?
22 MR. MCGAVIN: Your Honor, we ll try to craft
23 an order. Do you want that order today, before we leave?