In the

Supreme Court of Virginia

At Richmond

Record No. 091521

FEDERAL INSURANCE COMPANY,

Appellant,

– v. –

AMTECH ELEVATOR SERVICES N/K/A ABM AMTECH INC., et al.,

Appellees.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter involves an insurance coverage dispute arising from a construction site accident which resulted in the fatality of one construction worker and life threatening injuries to another. The case turns on the proper application of Virginia's rules of contract interpretation and construction with respect to contractual risk transfer through the use of indemnification provisions commonly used in the construction and insurance industries.

Appellant Federal Insurance Company ("Federal") excess policy insurance carrier for Uniwest Construction, Inc. ("Uniwest"), seeks reversal of the adverse decisions rendered in the declaratory judgment action below. In assessing whether coverage was available for the losses, the Trial Court incorrectly ruled that an indemnification provision contained in the Subcontract between Uniwest and its Subcontractor, Appellees Amtech Elevator Services n/k/a as ABM Amtech Inc., et al. ("Amtech"), was void under § 11-4.1 of the Virginia Code Annotated. As a result the Trial Court determined that Amtech's insurance carrier, Appellee AIU Insurance Company ("AIU"), was not obligated to acknowledge the existence of an insured contract or indemnify Appellant Federal for funds the Appellant paid

on behalf of Uniwest in settlement of the underlying personal injury and wrongful death actions (the “Underlying Litigation”).

In similar fashion, the Trial Court denied the proper application of an incorporation provision from the Prime Contract entered into between Uniwest and the Project’s Owner, The Fountains, which also created a valid “pass through” indemnity obligation flowing from Amtech to Uniwest. The Trial Court also erroneously disregarded a valid indemnity agreement subsequently entered into pursuant to Pennsylvania law, between Amtech and Uniwest for the defense and indemnity of Uniwest the Underlying Litigation.

Finally, the Trial Court permitted, in contravention of Virginia insurance law, Amtech and AIU to deny indemnity coverage at the last minute to the detriment of the insured, after providing an unqualified defense to the insured in the absence of a reservation of rights.

In each instance, the Trial Court acted against Virginia’s settled rules of contract construction, either by ignoring the contract provisions or mischaracterizing the practical application of those provisions. The consequence of these errors is obvious -- these rulings, if permitted to stand, would be to the detriment of the construction, insurance and

business industries in Virginia, and would create great uncertainty over otherwise known expectations for risk transfer and insurance defense.

ASSIGNMENTS OF ERROR

1. The Trial Court erred at the summary judgment hearing when it determined that the indemnity provision contained in the Subcontract agreement between Uniwest and Amtech violated § 11-4.1 of the Virginia Code Annotated, despite the undisputed fact that Uniwest was not negligent in causing the accident which is the subject of the Underlying Litigation and that Amtech at all times relevant to this action maintained complete and sole control of the safety and management of the work site where the accident occurred.

2. The Trial Court erred in ruling that Amtech was not obligated to indemnify Uniwest in the Underlying Litigation, pursuant to the plain language of the Subcontract and the incorporation of the indemnification provision from the Prime Contract.

3. The Trial Court erred in ruling that the prolonged negotiations between Amtech and Uniwest did not create an executory accord or second indemnity agreement under Pennsylvania contract law between the parties, obligating Amtech to defend and indemnify Uniwest in the Underlying Litigation.

4. The Trial Court erred in finding that based on the invalidity of the indemnification clause in the Subcontract, Uniwest was not an additional insured under Sections E-4 and E-7 of the AIU policy issued to Amtech and therefore did not require AIU to indemnify Uniwest in the Underlying Litigation.

5. The Trial Court erred in ruling that AIU was not estopped from denying indemnification to Uniwest for the Underlying Litigation after AIU appointed counsel for Uniwest's behalf and provided an unconditional defense to Uniwest without a reservation of rights.

QUESTIONS PRESENTED

1. Whether the Trial Court erred at the summary judgment hearing when it determined that the indemnity provision contained in the Subcontract agreement between Uniwest and Amtech violated § 11-4.1 of the Virginia Code Annotated, despite the undisputed fact that Uniwest was not negligent in causing the accident which is the subject of the Underlying Litigation and that Amtech at all times relevant to this action maintained complete and sole control of the safety and management of the work site where the accident occurred? *Relates to Assignments of Error 1.*

2. Whether the Trial Court erred in ruling that Amtech was not obligated to indemnify Uniwest in the Underlying Litigation pursuant to the

plain language of the Subcontract and the incorporation of the indemnification provision from the Prime Contract? *Relates to Assignment of Error 2*.

3. Whether the Trial Court erred in ruling that the prolonged negotiations between Amtech and Uniwest did not create a valid executory accord or second indemnity agreement under Pennsylvania contract law between the parties, obligating Amtech to defend and indemnify Uniwest in the Underlying Litigation? *Relates to Assignment of Error 3*.

4. Whether the Trial Court erred in finding that based on the invalidity of the indemnification clause in the Subcontract, Uniwest was not an additional insured under Sections E-4 and E-7 of the AIU policy issued to Amtech and therefore did not require AIU to indemnify Uniwest in the Underlying Litigation? *Relates to Assignments of Error 1 and 4*.

5. Whether the Trial Court erred in ruling that AIU was not estopped from later denying indemnification to Uniwest for the Underlying Litigation after AIU appointed counsel on Uniwest's behalf and provided an unconditional defense to Uniwest without a reservation of rights? *Relates to Assignment of Error 5*.

STATEMENT OF THE FACTS

A. The Prime Contract Between The Fountains and Uniwest

On or about August 16, 1999, Uniwest entered into a work-plus fee contract with The Fountains at Logan Square, LLC ("The Fountains"), to perform general contracting in connection with the renovation at The Fountains' building located in Philadelphia, Pennsylvania (the "Project"). (J.A. at 1911.)[1]

Thereafter, on March 29, 2000, Uniwest entered into a follow-on contract with The Fountains -- the Prime Contract -- to serve as the General Contractor in for the Project (the "Prime Contract"). (J.A. at 1911-1958.) The Prime Contract included AIA Document A101-1997, which is the Standard Form of Agreement between Owner and Contractor. The General Conditions attached to the 2000 agreement and which were adopted by reference, are the 1987 Edition, AIA Document A201. The Prime Contract contains an indemnification provision which requires Uniwest (General Contractor) to indemnify and hold harmless the Fountains (Owner) to the fullest extent permitted by law, for any claims, damages, losses and expenses arising out of, or resulting from work done,

[1] References to the Joint Appendix shall be cited as "J.A." followed by the page number(s).

in connection with the Project only to the extent caused in whole or in part by the negligent acts of omissions of Uniwest. (J.A. at 1943 § 3.18.)

B. The Uniwest-Amtech Subcontract Agreement

On or about March 30, 2000, Uniwest then entered into a Subcontract agreement with Amtech for work to be performed for the Project. (J.A. at 1995-2007.) An indemnity provision in the Subcontract required Amtech to defend and indemnify Uniwest for "any and all damage or injury of any kind or nature" and "whether or not such claim(s) are based upon the negligence of Uniwest or the Owner." (J.A. at 1997 § 10.)

Attached to the Subcontract was "Exhibit B - Scope of Work" which was incorporated into the Subcontract. (J.A. at 2002.) Under paragraph 1 of this "Scope of Work" section, Amtech agreed to furnish all labor, materials, tools, equipment, scaffolding and supervision necessary to perform the elevator work in accordance with the contract documents. (*Id.* at §1.) Under paragraph 2.1, Amtech agreed to "furnish and install elevator work in accordance with "Elevator Installation and Modernization Specifications for Logan Square East" as prepared by Zipf Associates and dated July 6, 1999" (the "Zipf Specifications"). (*Id.* at § 1.) Amtech further agreed to "furnish safety equipment and protection per OSHA and local jurisdiction" pursuant to paragraph 2.10. (*Id.* at § 2.10.)

Pursuant to paragraph three (3) of the Subcontract, Amtech agreed "to assume towards Uniwest all of the obligations and responsibilities that Uniwest has by the [Prime Contract], assumed toward the Owner." (J.A. at 1995 at § 3.)

Amtech was further obligated, pursuant to the Zipf Specifications incorporated into the Subcontract through "Exhibit B," to name Uniwest as an Additional Insured under the insurance policies issued to Amtech by Continental Casualty Company ("CNA") and AIU. (J.A. at 2017, § 1.07 (B).)

C. Policies of Insurance

1. Amtech's Tier of Insurance Policies

Amtech's first $500,000.00 of self-insurance coverage was a cost erosive Self-Insured Retention ("SIR") that was managed and maintained by ABM Insurance Services. (J.A. at 1693.) Continental Insurance Company ("CNA") issued a Commercial General Liability insurance policy to Amtech, effective November 1, 2000 through November 1, 2003 (Policy # 1 95963239), with an occurrence limit of $1,000,000.00 (the "CNA policy"). (J.A. at 1673-1862.) AIU issued a Commercial Excess Umbrella Policy to Amtech, effective November 1, 1999 through November 1, 2002, Policy # BE 701-75-30, with occurrence and aggregate limits of

$25,000,000.00 and a general aggregate in excess of $1,000,000 of underlying coverage (the "AIU policy"). (J.A. at 1863-1909.)

2. Uniwest's Tier of Insurance Policies

Pennsylvania Manufacturers' Association Insurance Company ("PMA") issued a primary Commercial General Liability policy to Uniwest, effective January 1, 2001 through January 1, 2002 (Policy # 820100-91-21-61-7), with limits of $1,000,000.00 per occurrence, with a $500,000.00 deductible (the "PMA policy"). (J.A. at 1390-1610.) United States Fire Insurance Company ("U.S. Fire") issued a Commercial Umbrella Policy to Uniwest, effective January 1, 2001 through January 1, 2002 (Policy #5530805091), with occurrence limits of $5,000,000.00 (the "U.S. Fire policy"). (J.A. at 1611-1647.) Federal issued a Commercial Excess Liability Insurance Policy to Uniwest, effective January 1, 2001 through January 1, 2002, (Policy # 7966-74-82DCO) with occurrence limits of $5,000,000.00 (the "Federal policy"). (J.A. at 1648-1672.)

D. The Underlying Litigation

Robert Bruce ("Bruce") and Thomas Stinson ("Stinson") were employees of Amtech on January 15, 2001, performing elevator work on the Project. Both Bruce and Stinson were performing elevator work for Amtech pursuant to the Subcontract between Amtech and Uniwest and

were utilizing a wooden scaffolding constructed in the elevator shaft at the Project by Amtech. The scaffolding gave way causing Bruce and Stinson to fall down the elevator shaft. As a result of the accident, Stinson was fatally injured and Bruce suffered serious injuries. At all times relevant to this action, Amtech had complete control over the means and methods of its portion of the construction as it was conducted at the Project. On October 30, 2002, Bruce and the Estate of Stinson filed suit in the Court of Common Pleas of Philadelphia County, Pennsylvania naming Uniwest and the Fountains as Defendants. (J.A. at 2068-2112.)

E. Uniwest's Tender of the Underlying Litigation to Amtech and AIU

Pursuant to the terms outlined in the Subcontract, Uniwest tendered the defense and indemnity of the Underlying Litigation to Amtech, AIU and CNA, based on Uniwest's status as an Additional Insured under the AIU and CNA policies issued to Amtech, as well as pursuant to the terms of the indemnification clause contained in the Subcontract between Uniwest and Amtech. (J.A. at 2194-2195; 2228-2230.) Upon tender of the defense, as part of the second valid agreement to indemnify, Amtech and its insurer, CAN, agreed to provide a defense and to indemnify Uniwest for the Underlying Litigation and retained defense counsel for Uniwest. (J.A. at 776:9-777:11; 2273-2277; 2306-2307; 2311-2312.)

In consideration of Amtech's agreement to defend Uniwest in the Underlying Litigation, Uniwest agreed to forego asserting a third-party claim for contribution or indemnification against Amtech and to not assert claims against Amtech's insurers for breach of contract or bad faith. (J.A. at 2249-2250; 2258-2259; 2306-2307; 2320-2329; 811:10-22; 1060:2-1061:20.)

Amtech then retained counsel who provided a defense to Uniwest in the Underlying Litigation. (*Id.*; J.A. at 465-472; 2318-2329.) Thereafter, AIU did the same. (J.A. at 891:2-8; 777:13-778:3; 779:4-10; 779:11-17; 813:12-21.) Amtech and its insurers at all times maintained exclusive control over the selection of defense counsel as well as all aspects of the pre-trial strategy with regard to the Underlying Litigation. Amtech provided an unqualified defense to Uniwest and without any reservation of rights at any time prior to the time that Uniwest was compelled to settle the claims asserted against it for fear that a jury verdict would bankrupt Uniwest. (J.A. at 742:12-743:2; 2273-2277; 2306-2307.)

On December 6, 2005, shortly before trial in the Underlying Litigation, AIU sent to Amtech -- but not Uniwest[2] -- what it would later claim was a reservation of rights letter asserting AIU's position that there may not be coverage afforded to Uniwest for damages arising out of the Underlying

[2] Uniwest subsequently learned of the letter on January 20, 2006. (J.A. at 782:1-19.)

Litigation. (J.A. at 782:1-19; 2421-2426.) Nevertheless, Amtech, CNA and AIU continued to provide an unqualified defense to Uniwest in the Underlying Litigation. (J.A. at 2419-2420.)

On February 9, 2006, Uniwest, U.S. Fire, PMA and Federal settled the Underlying Litigation on behalf of Uniwest for $9,500,000.00, while maintaining all remedial rights against Amtech and its insurance carriers. (J.A. at 742:12-18; 2889-2896; 2898-2905.) Specifically, PMA contributed its policy limits of $1,000,000.00, (J.A. at 2971-2797) U.S. Fire contributed its policy limits of $5,000,000.00, (J.A. at 2888-2897) and Federal contributed $3,500,000.00 in settlement of the Underlying Litigation. (J.A. at 2798-2804.) Amtech and AIU failed and refused to indemnify Uniwest. (J.A. at 8, ¶ 11.)

F. Complaint for Declaratory Judgment

On May 5, 2008, Amtech and AIU filed a declaratory judgment action in the Circuit Court for Fairfax County, Virginia, which is the matter from which this appeal lies. (J.A. at 1-249.) In the Complaint for Declaratory Judgment, Amtech and AIU sought a declaration that they were under no obligation to indemnify Uniwest for its settlement of claims arising out of the Underlying Litigation. (*Id.*) Thereafter, the defendants, including Federal, filed Counter-Claims predicated on breach of contract and declaratory relief

that, *inter alia*, the Subcontract constituted an "insured contract" (as that term is defined by AIU's policy) under which Uniwest was entitled to indemnification from AIU based on its status as an Additional Insured (J.A. at 315-447), and that Amtech and AIU were estopped to deny indemnity to Uniwest.[3]

On December 5, 2008, an Agreed Order was entered that incorporated prior papers from an earlier related action, styled Uniwest Construction, Inc., *et al.* v. Amtech Elevator Services, *et al.,* Case No. CL 2006-13227. The case was non-suited following the disclosure on the original date of trial that Amtech had entered into a settlement agreement with AIU with respect to Amtech's then existing cross-claim against AIU for coverage for Amtech's indemnity obligation to Uniwest. (J.A. at 460-464.) The previously completed written discovery, depositions, stipulated exhibits, trial stipulations, motions and agreed orders, including the trial court's September 21, 2007 summary judgment ruling which held that the indemnification provision of the Subcontract Agreement was void pursuant to VA. CODE § 11-4.1, were incorporated into this action. (*Id.*)

The Trial Court thereafter conducted a bench trial from February 23, 2009 through February 26, 2009, and on March 2, 2009 made a number of

[3] CNA never contested the claims against it and admitted that Uniwest was an additional insured under its policy. (J.A. at 465-472.)

rulings. The Trial Court correctly ruled that Amtech had breached the Subcontract by failing to procure insurance on behalf of Uniwest and, therefore, entered judgment against Amtech only. (J.A. at 3037:16-3039:10.)

With respect to paragraph E-4 of the AIU policy, the Trial Court incorrectly determined that recognition by CNA of Uniwest as an additional insured could only be triggered when there was a written agreement to indemnify Uniwest. As a consequence of the invalidation of the indemnification clause in the Subcontract, there was no such written agreement and the Court determined that Uniwest, therefore, could not be recognized as an additional insured under the CNA policy. (J.A. at 3039:12-3040:19.)

Likewise, the Trial Court held that Uniwest could not be considered an Additional Insured under section E-7 section of AIU's policy. (J.A. at 3040:20-3041:14.) Specifically, the Trial Court found that section E-7 was inapplicable as it required an "insured contract" as a condition precedent to coverage. (*Id.*) Importantly, because the Trial Court invalidated the indemnification provision, the court held that no such insured contract existed between the parties and the condition precedent was not satisfied -- no coverage would be provided under section E-7 of the AIU policy. (*Id.*)

The Trial Court erroneously ruled that the Subcontract's incorporation provision of the Prime Contract indemnity obligations did not obligate Amtech to indemnify Uniwest. (J.A. at 3035:11-20.)

The Trial Court also erroneously ruled that a second indemnity agreement was not created in January 2004 despite the evidence admitted at trial; the Trial Court instead determined that the documented negotiations and correspondence between the parties were based upon the original Subcontract indemnity provision and were not intended to create a new indemnity agreement. (J.A. at 3036:17-21.) With regard to whether AIU owed indemnity to Uniwest as an Additional Insured under its policy, the Trial Court found that no such obligation existed. (J.A. at 3039:12-17.)

Finally, the Trial Court ruled that AIU was not estopped from denying indemnity to Uniwest, at the eleventh hour, even after AIU had hired counsel and provided an unqualified defense to Uniwest in the absence of a reservation of rights to Uniwest. (J.A. at 3041:15-18.) The Trial Court erroneously determined, and against the great weight of evidence, that AIU was only "monitoring" the case. (J.A. at 3041:19-22.) On April 24, 2009, the Trial Court entered its Final Order.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. Assignment of Error 1 – The indemnification Agreement between Uniwest and Amtech was Valid and Enforceable

On March 30, 2000, Uniwest, a Virginia general contractor, entered into a Subcontract Agreement with Amtech for the installation and modernization of elevators to be performed in a construction project in Philadelphia, Pennsylvania. The Subcontract Agreement contained a broad form indemnification agreement which states:

> Subcontractor [Amtech] hereby assumes entire responsibility for any and all damage or injury of any kind or nature, whatever, including death resulting therefrom, to all persons, whether employees of the Subcontractor [Amtech], its Subcontractors, or agents. If any claims for such damage or injury be made or asserted, whether or not such claim(s) are based upon the negligence of Uniwest or the Owner [Fountains], the Subcontractor [Amtech] agrees to indemnify and save harmless Uniwest from any and all such claims, and further from any and all loss, costs, expense, liability, damage or injury, including legal fees and disbursements, that Uniwest may sustain, suffer or incur as a result thereof. Further the Subcontractor [Amtech] agrees to and does hereby assume the defense of any action at law or in equity which may be brought against Uniwest or the Owner [Fountains] arising by reason of such claims . . . . (J.A. at 1997 § 10.)

At a pre-trial summary judgment hearing on September 21, 2007, the Trial Court determined that the above-mentioned provision provided for indemnification of Uniwest's sole negligence in violation of VA. CODE ANN. § 11-4.1. (J.A. at 3144:23-3146:4.)

VA. CODE ANN. § 11-4.1 (emphasis added) states:

> Any provision contained in any contract relating to the construction . . . of a building, structure or appurtenance thereto . . . by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting ***solely from the negligence of such other party*** or his agents or employees, is against public policy and is void and unenforceable . . . .
>
> ***This section shall not affect the validity of any insurance contract***, workers' compensation, or any agreement issued by an admitted insurer.

Based on the plain language of the Subcontract agreement, it is clear that Amtech agreed to defend and indemnify Uniwest, and that the indemnification clause did not include liability for damage caused by or resulting from the sole negligence of Uniwest.

Virginia's courts have ruled in favor of upholding indemnification agreements. *See*, *e.g.*, *Safeway, Inc. v. DPI Midatlantic, Inc.*, 270 Va. 285, 290, 619 S.E.2d 76, 79 (2005); *Richmond, Fredericksburg & Potomac Railroad Co. v. Hughes-Keegan, Inc.*, 207 Va. 765, 771-772, 152 S.E.2d 28, 33 (1967). This Court has previously explained that public policy does not forbid a party from indemnifying itself against its own negligence through a contractual provision negotiated at arm's length with a willing indemnitor. *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va.

358, 367, 641 S.E.2d 476, 480 (2007); *see also W.R. Hall, Inc. v. Hampton Roads Sanitation Dist.*, 273 Va. 350, 355, 641 S.E.2d 472, 475 (2007).

The Supreme Court has previously conducted a thorough review of over 100 years Virginia law pertaining to public policy concerns associated with both pre-injury release provisions and indemnity provisions and determined that: (1) indemnity provisions do not give rise to the same public policy concerns as pre-injury release provisions; and (2) pre-injury release provisions bar an injured party from recovering from a negligent tortfeasor as compared to indemnity provisions which merely shift the risk of loss by means of an independent contractual relationship. *See Estes,* 273 Va. at 365, 641 S.E.2d at 479.

The *Estes* Court began its review of the indemnity provision before it with the principle that: "the law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes." *Id.* (quoting *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 254 Va. 494, 498, 493 S.E.2d 364, 366 (1997)). *Estes* also noted that: "Although contracts that violate public policy are void, courts are averse to holding contracts unenforceable on the ground of public policy, unless their illegality is clear and certain." *Id.; see also Jessee v. Smith*,

222 Va. 15, 17-18, 278 S.E.2d 793, 795 (1981); *Ryan v. Griffin*, 199 Va. 891, 895, 103 S.E.2d 240, 244 (1958).

Similarly, in *W.R. Hall, Inc. v. Hampton Roads Sanitation Dist.*, 273 Va. 350, 352; 641 S.E.2d 472, 472-473 (2007), the Court examined the validity of an indemnification provision in a construction contract. In *W.R. Hall*, the construction company agreed to indemnify the Hampton Roads Sanitation District ("HRSD"), which in turn entered into a contract to indemnify the railroad upon whose property the construction was being performed. *See id*. The Court upheld the broad form indemnity agreement and noted that the indemnity provision did not violate any public policy. *See id*., 273 Va. at 356-57, 641 S.E.2d at 475.

The Court recognized that the construction company was the party actually performing the construction work on the railroad's property and thus was in the best position to prevent damage to the railroad and its property. *See id*. The Court upheld the validity of the indemnification provision as the provision placed the ultimate burden for a personal injury upon the negligent party causing that injury, and it was the company's negligence, at least in part, that led to the employee's injury. *See id*.

In the instant matter, a plain reading of the language of the indemnification clause should likewise lead this Court to uphold the validity

of the indemnification clause. A plain reading of the broad form indemnification agreement contained in the Subcontract Agreement reveals that Amtech contractually agreed to indemnify Uniwest when there was sole negligence by Amtech, concurrent negligence by Amtech and Uniwest, or concurrent negligence by multiple parties.

Since the Subcontract governed the manner and scope of the work to be completed by Amtech, it naturally follows that the purpose of the Subcontract's indemnification provision was to set forth a broad form of indemnity agreement, the primary intendment of which was to protect Uniwest, as the General Contractor, against any claims of negligence arising from Amtech's performance of the work specified in the Subcontract Agreement, for the installation and modernization of elevators at the construction project, as Amtech had complete control over the performance of the work and safety precautions at the Project. (J.A. at 2002 § 1.) As a matter of law, Amtech should be held responsible where the negligence was primarily, if not solely, its own.

At trial, the Court was presented with uncontroverted evidence in the form of the testimony of Mr. David Clark, attorney and corporate representative for Amtech, in which this very interpretation of the indemnification provision was supported and deemed to be in strict accord

with Amtech's intention -- that Amtech was required to defend and indemnify Uniwest for Amtech's negligence arising out of its work on the Project. (J.A. at 2471-2474.)

Under the clear pronouncement of Virginia law, the Virginia anti-indemnity statute only voids indemnification against "liability for damage arising out of bodily injury suffered in the course of the performance of the contract, caused by or resulting solely from the negligence of such other party." VA. CODE ANN. § 11-4.1. In *Utica Mut. Ins. Co. v. Atl. Foundations, Inc.*, 2007 U.S. Dist. LEXIS 3964 (E.D. Va. 2007), the court analyzed whether an insurance company could properly claim contractual indemnity from its insured's subcontractor, for sums paid on behalf of its insured as a result of injuries sustained in a construction site accident. *See id.* at *1.

The indemnification provision at issue in *Utica* was set forth in a lease agreement regularly used by the parties throughout their course of dealing. *See id*. at *2. Additionally, pursuant to the terms of the lease agreement with the subcontractor, the subcontractor maintained exclusive supervision and control over the equipment and operator during the project. *See id*. at *4. In evaluating the subcontractor's assertion that the indemnity provision in the lease agreement was void pursuant to VA. CODE ANN. § 11-4.1, the court explained that "the statute would only apply to an agreement to

indemnify another party . . . for its sole negligence." *Id.* at *8. The court further explained that the intent and practical application of the statute is to prevent situations where the party seeking indemnification has been solely negligent in the events giving rise to the claim and unfairly attempts to make the indemnitor assume liability. *See id*. at *9.[4]

In the instant case, as was clearly enunciated in *Utica, supra*, the Trial Court would have had to determine that the damages in question resulted from the *sole* negligence of Uniwest and that Uniwest was in turn seeking indemnification from Amtech for claims arising out of Uniwest's sole negligence. However, in the instant matter, as in *Utica*, there has been no such allegation. (J.A. at 2068-2112.)

Furthermore, Amtech acknowledged that the underpinnings of the negligence claims in the Underlying Litigation arose from the negligence of Amtech and not Uniwest. (J.A. at 542:2-17.) Amtech was responsible for safety and all labor, materials, tools, equipment, scaffolding and

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[4] Maryland has adopted a similar interpretation to these kinds of indemnification agreements. *See Bethlehem Steel Corp. v. G.C. Zarnas and Co., Inc.*, 304 Md. at 187-88; 498 A.2d at 608 (1985) (holding that, although the indemnification clause covered the concurrent negligence of the parties as well as the sole negligence of either party, in the event that the evidence established that the promisor was either concurrently or solely negligent, the promisee could recover from the promisor under the indemnification provision of the contract).

supervision necessary to perform the elevator work**,** in addition to making sure that the work met the safety standards required by law. (J.A. at 2002 § 1.)

It is clear that the claims and causes of action alleged in the Underlying Litigation fall within the purview of the broad form indemnification agreement set forth in the Subcontract and that Amtech was at all times legally obligated to defend and to indemnify Uniwest for claims asserted in the Underlying Litigation.

It is submitted that the Trial Court's interpretation of the broad form indemnification agreement set forth in the Subcontract is not only contrary to Virginia's laws governing contract interpretation, and to the clear intention of the parties to the Subcontract, but also that the invalidation of the indemnification provision would have the opposite effect of the statutory intendment of VA. CODE ANN. 11-4.1: Uniwest -- the innocent party in this case -- would be forced to suffer the losses resulting from, and attributable to, the tort and contractual liability of Amtech, the negligent party.

The Virginia anti-indemnity statute by its express terms applies to invalidate on public policy grounds certain indemnity provisions of construction contracts, by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against

liability for damage arising out of bodily injury to persons suffered in the course of performance of the contract, caused by or resulting *solely* from the negligence of such other party. However, the specific exception to the statutory reach of § 11-4.1 is the validity of any insurance agreement:

> ***This section shall not affect the validity of any insurance contract***, workers' compensation, or any agreement issued by an admitted insurer.

A question arises as to the effect of the insurance contract exception to the anti-indemnity statute given the developing case law in Virginia and specifically the most recent pronouncement by the Virginia Supreme Court regarding the validity of broad form indemnity contracts.[5]

It is axiomatic that an insurance policy is the purest form of an indemnity agreement as the very purpose of a Commercial General Liability policy is to provide indemnification for the insured's sole negligence and legal liability.[6] It is submitted that the plain meaning of the exception to the anti-indemnity statute, as well as logic, necessitate the conclusion that an insurance policy, which provides liability insurance coverage for the insured's sole negligence, is not against Virginia's public policy. If this is so, why then under any circumstances could the enforcement of the terms

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[5] Federal has found no case law addressing this issue.

[6] This includes the contractual liability coverage set forth in the policy.

of a broad form indemnification agreement, contained in a construction contract and funded by an insurance contract, be against Virginia's pubic policy?

In the instant case, the coverage grant provisions of the AIU policy clearly provide liability coverage for the indemnity agreement entered into by Amtech as it meets the definition of "insured contract" in the policy. Indeed, such was the understanding of Amtech as evidenced by its attorney's demand against AIU for indemnity coverage under the AIU policy. (J.A. at 2471-2474.)[7]

It is submitted that the broad form indemnity agreement set forth in the Subcontract between Uniwest and Amtech which was negotiated at arm's length constitutes a common contractual risk transfer device supported by consideration and which was designed to shift the loss and risk of damage to Amtech. Furthermore, it does not purport to indemnify Uniwest for Uniwest's sole negligence, is fully funded by insurance, and, as a matter of law, does not violate Virginia's anti-indemnity statute or public policy.

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[7] Amtech's demand against AIU for indemnity coverage under the AIU policy continued in the instant litigation until the time that AIU entered into a settlement agreement with Amtech which was disclosed on the original date of trial in the underlying non-suited action.

Federal respectfully requests that this Court reverse the Trial Court's invalidation of the broad form indemnification provision in the Subcontract pursuant to VA. CODE ANN. 11-4.1 and determine that Amtech and its insurer, AIU, are required to indemnify Uniwest for all sums paid in settlement of the Underlying Litigation which occurred as a result of Amtech's negligence.

II. Assignment of Error 2 – The Indemnity Clause of the Prime Contract Obligates Amtech to Defend and Indemnify Uniwest

The uncontroverted evidence at trial established that the Subcontract Agreement between Uniwest and Amtech was based on an AIA form Subcontract which contained a "flow down" and "incorporation" provision commonly used in construction industry contracts. (J.A. at 746:15-747:6.) The evidence at trial further established that the Subcontract incorporated the terms and provisions of an intermediate form indemnification agreement contained in the Prime Contract, which required Amtech to indemnify and hold harmless Uniwest from claims arising from performance of the work, only to the extent caused in whole or in part by the negligent acts of omissions of Amtech. (J.A. at 1943 § 3.18.1; 1995 § 3.) The evidence introduced at trial also clearly established that Amtech had agreed to indemnify and hold harmless Uniwest for claims arising out of Amtech's work. (J.A. at 1997 § 10; 746:15-747:6.)

However, the trial court improperly found that Paragraph 3 of the Subcontract only required Amtech to indemnify The Fountains and not Uniwest. (J.A. at 3035:11-3036:16.) These findings of the trial court are not supported by a plain reading of the contracts, the evidence at trial or the Virginia case law that have previously examined these same issues.

The fallacy of the Trial Court's ruling is that the clear and unambiguous terms and provisions of both the Prime Contract and the Subcontract provide that Amtech agreed to indemnify Uniwest for damages arising out of the performance of the elevator installation and maintenance work performed by Amtech at the Project.

Under a plain reading of the Prime Contract, it is clear that Uniwest promised The Fountains that it was going to require that subcontractors -- including Amtech -- be required to enter into subcontracts with Uniwest, and that under those subcontracts the subcontractors would assume the same obligations and responsibilities to Uniwest that Uniwest promised to The Fountains in the Prime Contract. A review of the plain language of both the Prime Contract and the Subcontract makes clear that it was the mutual intent of Amtech and Uniwest that Amtech would provide the same obligations to Uniwest that Uniwest promised to provide to The Fountains, inclusive of the indemnity obligation.

The Flow down provision of the Prime Contract states, in pertinent part:

> 5.3 Subcontractual Relations
>
> 5.3.1 By appropriate agreement, written where legally required for validity, the Contractor [Uniwest] shall require each Subcontractor [Amtech], to the extent of the Work to be performed by the Subcontractor [Amtech], to be bound to the Contractor [Uniwest] by terms of the Contract Documents, and to assume toward the Contractor [Uniwest] all the obligations and responsibilities which the Contractor [Uniwest], by these Documents, assumes toward the Owner [The Fountains] and Architect.

(J.A. at 1947 § 5.3.) One of the obligations and responsibilities which Uniwest assumed toward The Fountains is found at paragraph 3.18 of the Prime Contract:

> 3.18 Indemnification
>
> 3.18.1 To the fullest extent permitted by law, the Contractor [Uniwest] shall indemnify and hold harmless the Owner [The Fountains], Architect, Architect's consultants, and agents and employees ***of*** any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including loss of use resulting therefrom, ***but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.*** Such obligation shall not

> be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

(J.A. at 1943 § 3.18.)[8] When Uniwest and Amtech entered into their Subcontract on March 30, 2000, these obligations from the Prime Contract were specifically referenced:

> Uniwest Construction, Inc., as Prime Contractor, has entered into an Agreement dated August 1999 with The Fountains as Owner, covering certain construction work on the following project:
>
> ** The Fountains at Logan Square East, 2 Franklintown Road, Philadelphia, PA 19103 **
>
> which Agreement inclusive of all Drawings and Specifications (General, Special, Technical, or as may be otherwise denominated) prepared by Partridge Tackett Architects and referred to in said Agreement (collectively referred to herein as "Agreement") are incorporated herein to the extent not otherwise excluded or modified by the terms of this Subcontract.

(J.A. at 1995.) The Subcontract further provides for the incorporation of the indemnity agreement in the Prime Contract by the flow through provision which contains the following pertinent language in paragraph 3:

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[8] As a matter of law, VA. CODE ANN. § 11-4.1 has absolutely no effect on this "flow down" indemnity provision; the indemnity obligation is expressly limited to claims "caused in whole or in part by negligence acts or omissions of [Amtech]." This type of indemnity provision is commonly referred to as an Intermediate Form of Indemnity Agreement and is distinguishable from a Broad Form Indemnity Agreement in that it provides for no indemnification of the sole negligence of the Indemnitee. Indeed, no issue was raised by Amtech or its insurers as to the validity of the pass through indemnity provision.

3. Applicability of the Agreement

> Subcontractor [Amtech] agrees to be bound to Uniwest by all the terms of the Agreement, above referenced, so far as that Agreement relates to the work specified herein and to assume toward Uniwest all of the obligations and responsibilities that Uniwest has by the said agreement assumed toward the owner [The Fountains].

(*Id.* at § 3.) When Paragraph 3 of the Subcontract is read in conjunction with paragraph 3.18.1 of the Prime Contract, there is no doubt that Amtech assumed the same obligation and responsibility to Uniwest that Uniwest promised to The Fountains; Amtech promised to indemnify and hold harmless Uniwest from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the elevator maintenance and installation work being performed by Amtech to the fullest extent of the law.

The flow down and incorporation provisions are recognized as common provisions in construction contracts and are valid under Virginia law. For example, in *Omni Alarm Sys., Inc. v. MCI Elec. Co., Inc.*, 58 Va. Cir. 264, 269 (2002), a Virginia trial court properly found that: "it is a common practice in the construction industry to have a set of interrelated contract documents and for there to be a flow down provision whereby the general or special conditions of the contract between the owner and general contractor will apply to the subsequent contracts entered into

between the general contract and its subcontractors and also to the contracts which the subcontractors enter into with their subcontractors." *See also Hertz Corp. v. Zurich Am. Ins. Co.*, 496 F. Supp. 2d 668, 675 (E.D. Va. 2007); *Steadfast Ins. Co. v. Brodie Contractors, Inc.*, 2008 U.S. Dist. Lexis 88448, *4 (W.D. Va. 2008) (stating, after analyzing similar subcontract incorporation language to the Subcontract at issue in this case, that: "It is clear that all contracting parties intended for the general conditions of the Prime Contract to be integrated with the Subcontract.") (applying Virginia law); *Bd. of Trustees v. DCI Signs & Awnings, Inc.*, 2008 U.S. Dist. LEXIS 17115, *8-9 (E.D. Va. 2008).[9]

Courts applying Virginia law have recognized incorporation by reference in situations where the identity of the second document is readily ascertainable from the first document, and the parties have knowledge of, and assent to, the incorporated terms. *See, e.g., Hertz Corp.* at 675.

The ruling of the trial court was clearly erroneous, and must be overturned as it fails to adhere to established Virginia contract law.

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[9] Incorporation by reference is also recognized and permitted under Pennsylvania law, as well as in other jurisdictions. *See*, *e.g.*, *Std. Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003) (applying Pennsylvania law); *Paine Webber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996) (applying New York law).

III. Assignment of Error 3 – Amtech is obligated to Defend and Indemnify Uniwest Pursuant to the Executory Accord or Second Indemnity Agreement of January 2004 under Pennsylvania Law

The Trial Court erred in failing to take into consideration that, under the applicable Pennsylvania law,[10] a Second Indemnification Agreement or executory accord was created between Uniwest and Amtech on January 29, 2004. (J.A. at 3036:17-3037:5; 2311-2312;1067-1073.)

The Trial Court ruled that:

> The subsequent agreement of January 2004 was based on the subcontract provision and its obligations. The additional terms that were negotiated between the parties were to implement that provision and were incidental to the indemnity provision in the contract. The parties were not contemplating replacing the subcontract indemnity provision with a new indemnity provision.

(J.A. at 3037:6-15.) The testimony and evidence introduced at trial established that Amtech did not accept the tender of defense and indemnity based upon the terms of the indemnity provision contained in the Subcontract. To the contrary, Amtech and Uniwest proceeded to negotiate further terms deemed acceptable to both parties in order to amicably

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[10] Pennsylvania law governs the interpretation and application of the Second Indemnification Agreement as the agreement was negotiated by Pennsylvania lawyers, and was entered into, and substantially performed in, Pennsylvania, and concerned Amtech's duty to defend and indemnify Uniwest for the claims asserted in the underlying Pennsylvania litigation. (J.A. 2273-2277.) *See Black v. Powers*, 48 Va. App. 113, 118, 628 S.E.2d 546, 554 (quoting *C.I.T. Corp v. Guy*, 170 Va. 16, 22, 195 S.E. 659, 661 (1938).

resolve the dispute, with the result being that the parties agreed to the terms of a new agreement. (J.A. at 1140:20-1141:16.)

The evidence at trial showed that Amtech engaged in extensive negotiations with Uniwest over a two (2) year period which resulted in a Second Indemnification Agreement which contained new terms not included in the indemnification agreement contained in the Subcontract. (*Id*.) This new agreement constituted a separate, valid and enforceable indemnification agreement under which Uniwest was entitled to a defense and indemnification from Amtech.

Contrary to the ruling by the Trial Court, the evidence at trial was that consideration for the Second Indemnification Agreement was the subject of extensive negotiations between Amtech and Uniwest culminating in an agreement by Amtech to defend and indemnify Uniwest. As part of the consideration for the new agreement, Uniwest agreed not to file an action against Amtech and these promises and undertakings became part of the benefit of the bargain negotiated between the parties. (J.A. at 2249-2250.)

As memorialized in a March 28, 2003 letter from Amtech's counsel, Richard K. Hohn, to Uniwest's counsel, Joseph W. Gibley, the parties agreed that: "Amtech, either on its own, through its insurer or both will defend Uniwest as to all claims raised against it in the above-captioned

matter, Amtech will provide Uniwest with a defense and indemnification if indemnification is required" and "[b]ecause Amtech will have agreed to defend and indemnify Uniwest, Uniwest will not file a joinder complaint asserting claims against Amtech." (*Id.*) It is indisputable that in consideration for Amtech's new agreement Uniwest forbore its legal right to file a claim against Amtech. (J.A. at 811:10-19; 2269-2270.)

The evidence at trial showed that Amtech then appointed James Lynn as counsel for Uniwest and proceeded to provide Uniwest with an unqualified defense through the entire course of the Underlying Litigation until its sudden failure to indemnify Uniwest at the settlement of the Underlying Litigation. (J.A. at 2403-2404; 2311-2312.)

By letter dated February 3, 2006, approximately four (4) days prior to the settlement of the Underlying Litigation, Amtech's own counsel and designated corporate representative in the instant litigation stated that: "Amtech believes good business ethics and the law require Amtech to live up to its promise of indemnification to Uniwest, which it has been doing for some time." (J.A. at 2471-2474.)

At no time during the course of the Underlying Litigation in Pennsylvania, nor at any time prior to the filing of this brief, did Amtech issue a reservation of rights to Uniwest. (J.A. at 782:1-19; 2421-2426.) At

all times subsequent to the Pennsylvania litigation, until the date that Amtech reached a settlement with AIU in the non-suited action, Amtech steadfastly took the position that it owed Uniwest a defense and that Uniwest was entitled to be indemnified under Amtech's policy with AIU. (J.A. at 2471-2474.)

Amtech should be estopped from denying its contractual obligation to defend and indemnify Uniwest by its conduct in providing an unqualified defense on behalf of Uniwest in the Underlying Litigation.[11]

Under Pennsylvania law,[12] the Second Indemnity Agreement between Uniwest and Amtech constituted an executory accord. The applicable Pennsylvania case law dictates that where a bona fide dispute exists between the parties, and the parties thereafter reach a new agreement whereby the performance of the new agreement discharges all

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[11] Federal incorporates by reference its position set forth in argument #5, *infra*, as it applies with equal force, if not with greater force, to Amtech as well as AIU. Federal throughout the course of this litigation has consistently asserted that Amtech as well as AIU is estopped to deny its obligation to indemnify Uniwest. The SIR provision of the CNA policy has the effect of rendering the primary CGL carrier the "excess" insurer to Amtech as the "Primary Carrier." *See Travelers Cas. & Sur. Case Co. v. AISLIC,* 465 F. Supp. 2d 1005, 1021 (S.D.Cal. 2006).

[12] Executory accords are similarly recognized in Virginia. *See, e.g., Kasco Mills, Inc. v. Ferebee*, 197 Va. 589, 593; 90 S.E.2d 860, 870 (1956); *Montagna v. Holiday Inns*, 221 Va. 336, 346-347; 269 S.E.2d 838; 844-845 (1980); *Nelson v. Food Lion, Inc.*, 23 Va. Cir. 136, 138 (1991).

duties, then an accord has been reached. *See*, *generally*, RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981). If the accord has not yet been performed, *i.e.*, satisfied, then the accord is executory. *See Beechwood Commons Condo. Ass'n. v. Beechwood Commons Ass'n. LTD*, 397 Pa. Super. 217, 226, 580 A.2d 1, 5 (1990). When an executory accord is breached by the obligor's failure to perform, the law gives the obligee the choice of enforcing the original duty or any duty arising under the breached accord. *See Norwicki Const. Co. v. Panar Corp.*, 342 Pa. Super. 8, 17, 492 A.2d 36, 40 (1985); *Beechwood,* 397 Pa. Super. 227, 580 A.2d 6.[13]

Uniwest entered into a settlement agreement with the plaintiffs in the Underlying Litigation in April 2006, under which Uniwest paid to the plaintiffs $9,500,000.00 to settle the Underlying Litigation. (J.A. at 2888-2905.) This settlement triggered Amtech's duty to indemnify Uniwest pursuant to the terms of the Second Indemnification Agreement. Satisfaction of the executory accord would only have occurred if Amtech had performed its promise to defend and indemnify Uniwest.

To date, Amtech has only partially performed its obligations under the executory accord, but the executory accord has not been fully satisfied as Amtech has failed and refused to indemnify Uniwest as it promised. Thus,

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[13] This is also the rule in Virginia. *See Rorer v. Trout*, 83 Va. 397, 410-411; 2 S.E. 713, 719 (1887).

Amtech's failure to indemnify Uniwest constitutes a breach of the terms of the First and Second Indemnification Agreements, and Uniwest is entitled to complete and full indemnification from Amtech pursuant to the terms of either of those indemnification agreements. Accordingly, the Trial Court's ruling on this issue should be reversed.

IV. Assignment of Error 4 – Uniwest is an Additional Insured pursuant to Sections E-4 and E-7 of the AIU Policy

The Trial Court erroneously determined that Uniwest was not recognized as an Additional Insured under the AIU policy and that the Subcontract did not constitute an "insured contract" under the AIU policy. (J.A. at 3039:12-3041:14.)

Under Section E-4 of AIU's policy, an Insured is defined as someone who is deemed an Additional Insured in the schedule of underlying insurance. (J.A. at 1867 § E-IV.) Specifically, pursuant to Section E-4, an insured is:

> Any person or organization, other than the Named Insured, included as an additional insured in the policies listed in the Schedule of Underlying Insurance but not for broader coverage than is available to such person or organization under such underlying policies.

The schedule of underlying insurance lists the CNA policy issued to Amtech. (J.A. at 1881.) By way of the Zipf specifications, incorporated into

the Subcontract, Amtech was obligated to add Uniwest as an Additional Insured under its insurance policies. (J.A. at 2017 § 1.07 (F).)

Section E-7 of the AIU policy provided for indemnification of Uniwest, this time in the event that Amtech was obligated to indemnify another by "insured contract." (J.A. at 1867 § E-VII.)[14] According to Section E-7:

> Any person, organization, trustee, or estate to whom you are obligated by written Insured Contract to provide insurance such as is afforded by this policy, but only with respect to . . . (a) liability arising out of operations conducted by you or on your behalf. *Id.*

The AIU policy then goes on to define an insured contract as:

> Any oral or written contract or agreement entered into by you and pertaining to your business under which you assume the tort liability of another party to pay for Bodily Injury, Property damage, Personal Injury or Advertising injury to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(*Id.* at § F.) The Subcontract contained an indemnity provision which obligated Amtech to indemnify Uniwest for Uniwest's tort liability. While Federal strongly asserts that this provision was incorrectly invalidated by the Trial Court, in the event that the Supreme Court upholds the Trial Court's ruling with respect to the broad form indemnity agreement set forth in the Subcontract, then and in that event Federal's submits that the flow

[14] In the citation to the trial transcript, the Trial Court used the term "*insurance* contract," however, it is believed that the Court meant to use the term "*insured* contract" as that term is used in the AIU policy.

down provisions of the Prime Contract and Subcontract the pass-through intermediate form indemnity agreement constitutes an "insured contract" triggering coverage under the AIU policy.

The coverage grant provisions of the AIU policy afford liability insurance for "insured contracts" as defined by the AIU policy. (J.A. at 1867 § F.) The definition includes an indemnity agreement whereby an insured Indemnitor agrees to indemnify an Indemnitee for tort liability of another entered into in the ordinary course of business. *Id.* Both the indemnity agreement in the Subcontract as well as the pass-through indemnity agreement constitute an "insured contract" under the AIU policy. In the instant case, the AIU policy directly affords "insured contract" coverage to Amtech in the coverage grant provisions of the AIU policy and provides no temporal limitation to such coverage.

Additionally, it should be noted that, unlike the CNA policy which used ISO form language that imposed a temporal limitation for an indemnification agreement in its definition of an "insured contract," the AIU policy did not have such qualifying temporal language and as a result the Second Indemnity Agreement does constitute an "insured contract" under the AIU policy. *See Golden Eagle Ins. v. Ins. Co. of the West*, 99 Cal. App. 4th 837; 121 Cal. Rptr.2d 682, 691 (Cal. App. Ct. 2002) (holding that "courts should

construe "insured contract" provisions broadly in favor of coverage.) Accordingly, AIU's duty to defend in this case was triggered when Amtech and Uniwest entered into the agreement in Pennsylvania whereby Amtech agreed to indemnify Uniwest.

The AIU policy expressly provides that, with respect to any loss not covered under the primary CNA policy but which was covered under the AIU policy, that AIU had the duty to provide a defense. (J.A. at 1864 § 1864 IIA.) Drop down coverage is provided under the AIU policy for the duty to indemnify Uniwest which was agreed to by Amtech, as it constitutes an "insured contract" as defined in the AIU policy. *See Golden Eagle,* 99 Cal. App. 4th at 846, 121 Cal. Rptr.2d at 687.

It necessarily follows that Uniwest has a right of indemnification for those sums paid in settlement of the Underlying Litigation, up to the limits of insurance provided by the AIU policy issued to ABM, with Amtech as an additional insured.

V. Assignment of Error 5 – AIU is Estopped from Disclaiming Coverage to Uniwest after AIU Appointed Counsel for Uniwest and Provided an Unconditional Defense without a Reservation of Rights

The Trial Court was incorrect in its ruling that AIU was not estopped from denying indemnity to Uniwest. (J.A. at 3041:15-18.) California law should control this issue because the AIU policy was delivered to Amtech in

California; nevertheless, Virginia law is consistent with California law.

Neither the applicable case law, nor the evidence presented at trial, supports the Trial Court's decision as it contravenes a universal principle of insurance law, often repeated by this Court and California courts, that estoppel should be applied to preclude an insurance carrier from denying indemnity coverage when the carrier has provided an unqualified defense to an insured in the absence of a reservation of rights. *See Miller v. Elite Ins. Co.*, 100 Cal. App. 3d. 739, 754; 161 Cal. Rptr. 322, 330 (1980).

AIU waived any right it had to disclaim its duty to indemnify under the terms of its policy when it provided an unconditional defense to Uniwest in the Underlying Litigation without a reservation of rights, and it was error for the Trial Court to not apply the doctrine of estoppel to prevent AIU and Amtech's disclaimer of indemnity coverage.

Courts have held that an insurer's duty to disclaim or reserve its rights extends back to when the insurer first received notice of the potential claims. *See Northland Ins. Co. v. Guardsman Products, Inc.*, 141 F.3d 612, 619-620 (6th Cir. 1998) (applying California law). Accordingly, AIU had a duty to disclaim coverage or to reserve its rights upon first receiving notice of the Underlying Litigation. 10 CAL. CODE REGS. § 2695.7(b) (2009). AIU failed to provide the requisite notice under the law and instead

engaged in an unqualified defense of Uniwest up to, and until, the settlement of the Underlying Litigation. (J.A. at 2471-2474.)

Under California law, "if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage." *Garamendi v. Golden Eagle Ins. Co.*, 116 Cal. App. 4th 694, 719, 10 Cal. Rptr. 3d 724, 746 (2004) (quoting *Miller v. Elite Ins. Co.*,100 Cal. App. 3d 739, 755, 161 Cal. Rptr. 322, 331 (1980)); s*ee also Feury v. Princeton Ins. Co.*, 68 Va. Cir. 330, 334 (2005).

Virginia case law on this important insurance principle is identical. In *Norman v. Ins. Co. of N. America,* 218 Va. 718, 726, 239 S.E.2d 902, 906 (1978), the Court ruled: "when a liability insurer has knowledge of a breach by the insured of the terms of the policies and continues to defend the case without notice to the insured that it is reserving a right to deny ultimate liability, it is estopped afterwards to avoid liability on the ground of such a breach. Such reservation of right must be communicated to the insured, must fairly inform him of the insurer's position, and notice thereof must be timely given." *Id.* (quoting *Nationwide Ins. Co. v. Gentry*, 202 Va. 338, 345,

117 S.E.2d 76, 81 (1960)); *see also Ins. Co. of N. America v. Atlantic Nat'l Co.*, 329 F.2d 769, 775-76 (1964).

Similarly, in *Dairyland Ins. Co. v. Hughes*, 317 F. Supp. 928, 938 (W.D. Va. 1970) (applying Virginia law), the court examined the issue of whether an insurance company could deny liability in an action where it defended the action in the state court and participated in the settlement of the suit. *Id.* The court ruled that the insurance company was estopped from denying coverage and held that:

> If a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. In other words, the insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds.

See id. The court further stated that: "the doctrine of estoppel serves the oft repeated policy that a man shall not be allowed to approbate and reprobate at the same time." *Id. at* 317 F. Supp. 928, 939.

In *Burch v. Grace Street Bldg., Corp.,* 168 Va. 239, 340, 191 S.E. 672 (1937), the Court stated: "in Virginia, we have . . . approved the general rule that a party is forbidden to assume successive positions in the course of a suit or series or suits, in reference to the same fact or state of facts,

which are inconsistent with each other, or mutually contradictory." *Id.; see also Stillwell v. Iowa National Mutual Insurance Company*, 205 Va. 588, 594, 139 S.E.2d 72 (1964).

Under the applicable law, AIU should be estopped from denying indemnity coverage to Uniwest under the AIU policy. AIU had been aware of the tort claims asserted against Uniwest and Uniwest's claims for indemnity from Amtech since 2001. (J.A. at 2471-2474.) Furthermore, AIU was aware that Amtech and Uniwest reached an agreement in connection with the Underlying Litigation at which time Amtech agreed to defend and to fully indemnify Uniwest in early 2004. (J.A. at 2403-2404.)

The Trial Court heard evidence that AIU retained counsel to represent Uniwest in the Underlying Litigation without reserving its rights to deny indemnity coverage to Uniwest, and in fact continued to provide an active defense to Uniwest through the remainder of the Underlying Litigation on Uniwest's behalf. (J.A. at 890:5-11.) Specifically, the Trial Court heard testimony that in September 2005, AIU retained attorney Robert Devine to represent Uniwest in the Underlying Litigation. (J.A. at 889:21-890:1-14; 891:2-8.)

That action, standing alone, is sufficient to constitute a waiver of any coverage defense that AIU otherwise may have had and serves as an

estoppel prohibiting AIU, as an insurance carrier who has provided an unqualified defense from thereafter contesting coverage. This principle also applies to Amtech by virtue of its self insured retention. Under California law when an insured is in effect self-insured under a self-insured retention, such as Amtech was in the instant case, the Insured's position is for all intents and purposes the functional equivalent to one made by primary insurance. *See Travelers Casualty & Surety Case Company v. AISLIC,* 465 F. Supp. 2d 1005, 1021 (2006).

Evidence was also presented at trial which showed that Mr. Devine requested and was forwarded copies of the entire case file (J.A. at 777:13-778:3), attended the pretrial conference representing himself as counsel who would subsequently enter the case on behalf of Uniwest (J.A. at 779:4-10), and took control and developed an active role in the case by dividing up work with respect to motions in limine and the preparation of lay and expert witnesses for examination. (J.A. at 779:11-17; 813:12-21.)

The Trial Court heard from Mr. Devine directly that he was retained on behalf of AIU to participate at the trial level with respect to the Underlying Litigation. (J.A. at 823:13-824:17.) He testified that he developed experts and that he attended depositions as late as March or April of 2006. (J.A. at 833:8-834:16.) He also stated that he was handling

the most important portion of the Underlying Litigation -- the damages portion -- inclusive of examining plaintiffs, doctors and economists. (J.A. at 834:3-16.) Mr. Devine testified at trial that over a three (3) month period of time, the staff and attorneys at his firm spent approximately 300 hours working on the Underlying Litigation. (J.A. at 837:2-12.)

James Lynn, Uniwest's attorney appointed by Amtech and CNA, testified that it was obvious that Mr. Devine was trying the case on behalf of AIU. (J.A. at 806:5-22.) Mr. Lynn's testimony was that Mr. Devine was involved in everything, including selecting defense experts, and that his role became increasingly active as time progressed. (J.A. at 813:22-814:16.)

The Trial Court heard evidence that Uniwest first became aware of AIU's reservation of rights to Amtech on January 26, 2006, which was sent in the form of a letter to Amtech, exclusively, without any notice to Uniwest. (J.A. at 782:1-19; 2435-2436.) The Trial Court also heard evidence that from a factual standpoint, AIU was aware that Amtech had $500,000.00 as part of its self-insured retention, that CNA had another $500,000.00, and that those funds were accounted for prior to the start of the high exposure Underlying Litigation. Consequently, the Underlying Litigation has been, at all times relevant to this action, a matter within AIU's coverage. (J.A. at 789:6-22.) Furthermore, it was Mr. Devine, counsel retained by AIU to

represent Uniwest, who was handling damages issues (J.A. at 834:3-16.)

The evidence presented at trial showed that Uniwest relied on Amtech and its carriers to protect it from the Underlying Litigation and never had any reason to expect that they would renege on the obligation. (J.A. at 736:10-737:4.) In fact, David Clark, counsel hired on behalf of Amtech, pleaded with AIU to reconsider its untimely reservation of rights to Amtech, stating: "AIU has threatened now to withdraw the bargained-for insurance coverage Amtech thought it had. Amtech believes this calculated effort by AIU is the height of bad faith and unreasonable conduct." (J.A. at 2473.)

The Trial Court was presented the deposition testimony of Mr. David Clark, at which time he stated that there was an agreement to defend Uniwest as an insured which is typically not done unless the carrier is settled as to the issue of coverage and normally not done in the absence of a reservation of rights. (J.A. at 1025:19-1026:13.) At all times prior to the settlement between AIU and Amtech disclosed on the original trial date in the non-suited action, Amtech took the position in these proceedings that AIU was estopped to deny indemnity coverage to Uniwest and Amtech.

This Court has clearly indicated that even in the case where no coverage existed -- as a sole exception to the principle that insurance

coverage cannot be established by a waiver -- that once an insurance company provides an unqualified defense it can not as a matter of law thereafter disclaim coverage. The adjudication by the Trial Court that AIU *merely monitored* the Underlying Litigation is, simply stated, plainly wrong and must be reversed.

In the final analysis, it is clear that both Amtech and AIU provided an unqualified defense to Uniwest in the absence of any reservation of rights and that under both California and Virginia law, both AIU and Amtech must indemnify Uniwest as they are estopped from denying indemnity by virtue of their conduct in providing an unqualified defense to Uniwest in the absence of any reservation of rights.

CONCLUSION

For the reasons stated above, Appellant Federal Insurance Company respectfully requests that the Court reverse the Trial Court's rulings with respect to Appellant's Assignments of Error 1 through 5.

Respectfully Submitted,

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In addition, all parties have received electronic copies of both the briefs and the appendix. Paper copies of the briefs and appendix were mailed or delivered on this the 10th day of March, 2010 to the addresses above. This same date, 15 copies of the same were hand delivered to the clerk's office and a copy was filed electronically on CD.

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