*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.***

# REPLY BRIEF OF APPELLANT

**JEFFREY R. SCHMIELER, VSB# 32175**
**ALAN B. NEURICK, *Pro Hac Vice***
**LISA N. WALTERS, VSB# 72291**
**SAUNDERS & SCHMIELER, P.C.**
**8737 Colesville Road, Suite L-201**
**Silver Spring, Maryland 20910**
**T: (301) 588-7717**
**F: (301) 588-5073**
**schmielerj@sslawfirm.com**
**neuricka@sslawfirm.com**
**waltersl@sslawfirm.com**

***Counsel for Federal Insurance Company***

COUNSEL PRESS • VA – (800) 275-0668

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## Argument in Reply

## Summary of Argument

Appellant Federal Insurance Company ("Federal") must take exception to the alleged "Nature of the Case" and "Counterstatement of Facts" appearing in the Brief of Appellees Amtech Elevator Services n/k/a ABM Amtech, Inc., ABM Industries, Inc. and AIU Insurance Company ("Amtech"). Federal also takes exception to Amtech's failure to fully acknowledge the words of the contracts and the Virginia statute at issue. Amtech's attempts to talk around the terms and provisions at issue should fail because when Amtech's arguments are fully examined, this Court will apply the plain and ordinary meaning of the contracts and the statute and find in favor of Federal's positions.

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

Amtech asserts that the Trial Court correctly voided the indemnity provision in the Subcontract entered into between Amtech and Uniwest, with the argument that the provision on its face violates Va. Code Ann. § 11-4.1.

However, in determining that the Subcontract's indemnity provision was void and unenforceable, the Trial Court misconstrued the indemnity provision and controverted not only the intent of the contracting parties, but also the proper application of Va. Code Ann. § 11-4.1.

In its Brief, Amtech argues that the indemnification clause in the Subcontract is void, and focuses on the statute's use of the word "purport." Amtech's emphasis in this regard is misplaced as it fails to ascribe meaning to the most important aspect of the statute -- the inclusion of the word "**solely**" in the statutory language. The statute provides:

> 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 . . . .

VA. CODE ANN. § 11-4.1(emphasis added). "Solely" means: "Without another; singly, alone"; "to the exclusion of other . . . persons." WEBSTER'S NEW INTERNATIONAL DICTIONARY at 2393 (2nd ed.). It is clear from a reading of the plain and ordinary language that the indemnification clause in the Subcontract does not fall within the purview of the statute.

The obvious meaning of the Subcontract indemnification clause is that Amtech contractually agreed to indemnify Uniwest in the following circumstances: the sole negligence of Amtech, the concurrent negligence of Amtech and Uniwest, or the concurrent negligence by multiple parties. The indemnification provision states as follows:

> 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.) Under Virginia law, an indemnification agreement whereby the indemnitor agrees to indemnify the indemnitiee in cases of concurrent negligence by the indemnitee and the indemnitor, as is the case here, does not violate Virginia's public policy and is enforceable. *W.R. Hall, Inc. v. Hampton Roads Sanitation District*, 273 Va. 350, 641 S.E.2d 472 (2007).

Furthermore, courts applying have determined that the issue of whether the claimed damages were caused by or resulting solely from the negligence of the indemnitee is of substantial importance in applying the statute. Under *Utica Mut. Ins. Co. v. Atl. Foundations, Inc.*, 2007 U.S. Dist. LEXIS 3964 (E.D. Va. 2007), where it was determined that the claimed damages were not the result of the indemnitee's sole negligence, VA. CODE ANN. § 11-4.1 is not

triggered. *Id.* at *8. As the *Utica* court explained, 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.[1] Thus, the statute is inapplicable to the case at bar.

The primary purpose of the Subcontract indemnity provision was to protect Uniwest against any claims of negligence arising from Amtech's performance of Amtech's elevator work under the Subcontract. Amtech had complete control over the performance of the work and safety precautions taken at the Project. (J.A. at 2002 § 1.) Importantly, Amtech had an express obligation to "furnish safety equipment and protection per OSHA and local jurisdiction" (J.A. at 2002 § 2.10), and to "furnish all adequate on-site supervision for its work." (J.A. at 13 § 4 (c).) The uncontroverted evidence was that Amtech purchased, built, inspected, and tested the defective platform which was the subject of the underlying personal injury action. (J.A. at 2528; 2636.)

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[1] 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. 183,195; 498 A.2d at 608, 611 (1985) (stating with regard to a similar anti-indemnity statute: "the statute renders unenforceable a contract provision only insofar as it embodies an agreement providing for the indemnity to the promisee when the promisee is solely negligent.")

In its Brief, Amtech has stated that Uniwest was cited by the Occupational Safety and Health Administration (OSHA), however Amtech failed to admit that it itself received a total of nine (9) citations from OSHA. Amtech was cited for:

> (1) failure of the scaffolding to support its own weight and four times the maximum intended load applied or transmitted to it;
>
> (2) failure of a competent person to inspect the elevated wood platforms for visible defects before each work shift;
>
> (3) use of ladder on temporary elevated platforms to increase work level height;
>
> (4) failure to train workers on elevated platforms to recognize hazards and procedures; and
>
> (5) lack of personal fall arrest systems, *i.e.* safety belts and lifelines.

(J.A. at 2636 (emphasis added).) Indeed, Uniwest was only cited in its capacity as "controlling employer" and was served a fine of $4,200.00. (J.A. at 2637.) In contrast, Amtech was directly cited by OSHA, and was served a fine of $80,000.00. (J.A. at 2636.) Amtech's claims that Uniwest was sued for and settled its own negligence are absurd in light of the evidence presented at trial.

The evidence presented at trial established the sole or, at a minimum, the concurrent negligence of Amtech and Uniwest (with Amtech's negligence being the primary cause for the Underlying Litigation). Indeed, the undisputed history is that Amtech recognized the existence of concurrent negligence and

voluntarily assumed its duty to defend and indemnify Uniwest, until it suddenly changed its position shortly before the first trial of this declaratory judgment action when Amtech -- who was aligned with Uniwest and its insurers and who provided an uninterrupted defense to Uniwest -- suddenly re-alligned itself with AIU and against Uniwest and its insurers, leading to the nonsuit of that first action.

The Trial Court's invalidation of the indemnification provision in fact has the opposite effect of the statutory intendment of VA. CODE ANN. 11-4.1: Uniwest -- the innocent party -- would then be forced to suffer the losses resulting from, and attributable to, the tort and contractual liability of Amtech, the negligent party. As a matter of law, Amtech should be held responsible where the negligence was primarily, if not solely, its own.

With regard to Amtech's argument that Uniwest must prove that it did not settle claims stemming from its own negligence, Amtech cannot, and does not, cite to anywhere in the record where it preserved this argument for appeal. Therefore, Amtech has waived the issue, both at trial and for any appeal. *Martin v. Ziherl,* 269 Va. 35, 39, 607 S.E.2d 367, 368 (2005). Waiver aside, the record clearly supports Federal's assertion that Amtech was concurrently negligent, if not solely negligent, with regard to the claims arising out of the Underlying Litigation. (J.A. at 2636.) For these reasons, the Trial Court's

invalidation of the Subcontract indemnification clause should be reversed.

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

Amtech is incorrect in its position that there was no incorporation of the Prime Contract's indemnity clause into the Subcontract. The Trial Court never ruled that the indemnity provision from the Prime Contract did not pass through to the Subcontract; rather, in ruling on this issue, the Trial Court necessarily determined that the indemnity provision in the Prime Contract was incorporated into the terms of the Subcontract, but in doing so failed to properly adjudicate the legal efficacy of the Subcontract which Amtech and Uniwest had entered into. (J.A. at 3035-3036.) In sum, the Trial Court erroneously determined that the indemnity clause from the Prime Contract, incorporated into the terms of the Subcontract, only contractually required Amtech to indemnify The Fountains, and not Uniwest. Indeed, if the Trial Court had held that the flow through indemnity provision was not incorporated from the Prime Contract into the Subcontract, then there would have been no need to interpret the meaning of it.

Nevertheless, in its Brief, Amtech requests that this Court affirm the Trial Court's ruling on various alternative bases having to do with the mere incorporation of the indemnity clause: Amtech summarily argues that the Prime Contract indemnity clause should not have been incorporated in the first

instance because the Prime Contract indemnity clause somehow violates the Subcontract's supremacy clause because of a "conflict" between the two agreements. Amtech makes the similar second alternative argument that the Prime Contract's indemnity clause should not have been incorporated into the Subcontract because it was otherwise "excluded or modified" by the preamble language to the Subcontract.

Both of Amtech's arguments fail because there is no basis for them under a plain and ordinary reading of the terms and conditions of the Prime Contract and Subcontract. As an initial matter, Amtech provides no explanation of how an indemnity obligation, from Amtech and favoring Uniwest, would "conflict" or be otherwise "excluded or modified" by the Subcontract. Amtech cannot articulate any explanation to support its position because there is no such inconsistency between the contracts.

Rather, a plain and ordinary reading of the Broad Form Indemnity Agreement and the Intermediate Form Indemnity Agreement of the contracts clearly show that both express the consistent intent of the parties that Amtech indemnity Uniwest for liability arising out of the elevator installation and modernization which Amtech was contracted to perform. As they are not in conflict with one another, the flow through/pass through indemnification provision is incorporated into the Subcontract as correctly determined by the

Trial Judge. The error in the Judge's ruling was not that the pass through indemnity clause was incorporated into the Subcontract, but rather was the Trial Court's erroneous construction of the incorporated Prime Contract indemnity clause.

## 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

Contrary to the arguments raised by Amtech in its Brief, the testimony and evidence introduced at trial unequivocally established that Amtech provided defense and indemnity to Uniwest pursuant to a separate and valid agreement, an executory accord (the "Second Indemnification Agreement"), for which Uniwest provided consideration, and both parties proceeded to perform under the terms of this new agreement. (J.A. at 1140:20-1141:16.)

Indeed, as part of the consideration for the new agreement, Uniwest forebore its right 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 811:10-19; 1040:20-1141:16; 1060:21-1061:12; 1062:5-1063:11; 2249-2250; 2269-2270.) Amtech's assertions that there was no waiver by Uniwest of claims against Amtech completely ignores the record.

The parties specifically 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." (J.A. at 2249-2250.) Amtech then appointed counsel for Uniwest and proceeded to provide Uniwest with an unqualified defense until its sudden failure to indemnify Uniwest at the settlement of the Underlying Litigation. (J.A. at 2403-2404; 2311-2312.) Accordingly, 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. *See Travelers Cas. & Sur. Case Co. v. AISLIC,* 465 F. Supp. 2d 1005, 1021 (S.D.Cal. 2006).

When Uniwest settled the Underlying Litigation, Amtech's duty to indemnify Uniwest pursuant to the terms of the Second Indemnification Agreement was triggered. Amtech's failure to indemnify Uniwest constitutes a breach of the terms of (not only the contractual indemnity obligations vis-à-vis the Subcontract) but also the Second Indemnification Agreement, and Uniwest and its insurers are entitled to complete and full indemnification from Amtech pursuant to the terms of either of those indemnification agreements.

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

As previously discussed, given the validity of the Subcontract indemnification clause, the incorporation of the Prime Contract indemnification clause and the separate and valid Second Indemnification Agreement, it is clear that Uniwest is an additional insured under sections E-4 and E-7 the AIU policy, since either qualifies as an "Insured Contract" as defined by the AIU policy.

## 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

Amtech's posturing around the argument that AIU had a right but not a duty to defend Uniwest under AIU's commercial umbrella policy ignores the undisputed evidence at trial which showed that AIU did provide a defense to Uniwest when it hired experienced litigation attorney Robert Devine to represent the interests of Uniwest in the Underlying Litigation, including, *inter alia*, to close out discovery, to meet with witnesses, select defense experts, take *de bene esse* depositions, file motions *in limine* and other motions, to try the case for Uniwest, to anticipate what issues to preserve for appeal and implement a strategy for doing so, and to provide reports of his activities to AIU including discussing one of the defense experts and providing an analysis

of defenses. (J.A. at 779:11-17; 813:12-21; 817:10-12; 820:5-6; 821:12-21; 828:18-20; 833:8-834:3-19; 835:4-7, 16-21; 838:5-10; 839:18-21; 852:13-22; 853:1-22; 854:1-19; 856:11-20;

Amtech's Brief omits the full impact of the testimony of James Lynn, the attorney hired by Amtech to defend AIU:

> **Q** Did Mr. Devine ultimately define for you his role in [th]is case?
>
> **A** More by actions than by words or -- certainly not by -- by anything that he put in letter. He did attend the pretrial conference representing himself as counsel for who would soon be entering an appearance on behalf of Uniwest.
>
> At that time point in time, he more or less was taking control by dividing up -- well, he indicated that he was going to take an active role at trial, and we were working on and did, in fact, start dividing up who would do what in terms of, for example, motions in limine and what experts or witnesses the two of us would either put on or cross examine.
>
> * * *
>
> **A** He is attempting to summarize what was decided upon the meeting we had. That would be our initial meeting where he showed up with an associate. I discussed the entire case with him, the same meeting he requested all of basically my file. And after explaining who all the witness[es] were and who all the expert witnesses were and what our defenses were, he decided to take charge by deciding who he was going to take lead on and we were dividing up the workload.
>
> . . . He participated fully. For example, when we met with one of the defense experts, the elevator experts for example, he was there. He was involved in everything. We did split up the motions in limine.
>
> With respect to who would be calling who, it was still a rather fluid situation. He basically was figuring out who he thought was more important, for example, damage witnesses for the

> plaintiff, and he was taking that lead role. By him calling me lead counsel, that is just him putting that in the letter. I certainly didn't challenge it, but it was obvious that he was taking control of the case at that time.

(J.A. at 779:4-17; 813:13-21; 814:4-16.) Robert Devine, the attorney hired by AIU to represent Uniwest at trial, himself testified below: "I entered an appearance for Uniwest Construction as co-counsel so as to provide trial services representing Uniwest."; and "My role is to try the case. Mr. Lynn was involved as the person who was involved with respect to settlement activity." (J.A. at 824:12-15; 828:18-20.)

Amtech is also mistaken that Uniwest never contacted AIU to challenge AIU's coverage position. The evidence at trial, also through the testimony of James Lynn, counsel for Uniwest retained by Amtech, was just the opposite. (J.A. at 809:22; 810:1-22; 811:1-6.)

Amtech similarly ignores the uncontroverted evidence from the trial below through James Lynn of the detrimental reliance by Uniwest that Uniwest believed it had coverage under the AIU Policy and that AIU's eleventh hour disappearance left Uniwest scrambling to save itself:

> **Q** Did, based on your assessment of the case at that time, Uniwest have exposure for a verdict in excess of $10 million?
>
> **A** Yes, they did.
>
> * * *
>
> **A** But once that coverage was reduced to 10 million,

which was their own insurance, now [Uniwest] was being exposed to an excess verdict. And the only thing they can do at that time was settle the case.

* * *

**A** Sure. I mean, I expressed verbally and in this letter that the position taken by [AIU] at that time, so late in the game, severely prejudiced Uniwest and made it virtually impossible to amicably resolve the matter, mainly settle the case. We were going to the settlement conference, and now he's [Samuel Carucci for AIU] just throwing a big, big problem there in the way by saying they are not paying. . . . I have here, since at least May of 2002. So we are more than, what, three-and-a-half years, after they knew about all of this that they are now taking the position that they were taking. And I indicate to him that in May of 2002, [AIU] actually received a copy of the opinion letter offered by Mr. Hohn with respect to his opinion that Amtech had a duty and obligation to both defend and indemnity Uniwest.

* * *

**A** And as counsel for Uniwest, I strongly advised that Uniwest's carriers get the case settled, because my fiduciary obligation is to Uniwest. Uniwest wanted the case settled and they certainly could not risk an excess verdict.

* * *

**Q** Attorney Devine's appearance in this case, did that make you think there was no longer an issue in AIU's perspective?

**A** Yes. [AIU] retain[ed] their own counsel of choosing. Obviously, I'm retained by Amtech to defend Uniwest. Amtech, I understood, had $500,000 self-insured retention. Then you had CNA that had the next 500,000. That money was gone once this lawsuit was filed. And that this was always an [AIU] case.

So it was of no surprise to me that [AIU] had retained their counsel of choosing to try this case, because it was their money that was exposed.

> So when Mr. Devine got involved in that case, it led me to believe that there was no problem with coverage.

(J.A. at 786:11-14; 787:3-7; 789:6-22; 793:20-22; 794:1; 810:3-10, 13-21.)

The President of Uniwest, Michael Collier, similarly testified below that Uniwest completely relied upon Amtech and AIU to protect it from the claims asserted in the Underlying Litigation. (J.A. at 719:18-22; 720:14; 736:10-14.)

Amtech itself took the position, up through the first trial date of this declaratory judgment action, that AIU was estopped to deny indemnity coverage to Uniwest (and also Amtech). Even when giving deference to the Trial Court as a fact finder, it was clearly erroneous for the Trial Court to have found that AIU did not provide a defense to Uniwest given that the uncontroverted facts at trial were clearly that AIU and Amtech each appointed trial counsel for Uniwest and each did so without any reservation of rights.

## CONCLUSION

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

Respectfully Submitted,

Federal Insurance Company

*/s/ Jeffrey Schmieler*

JEFFREY R. SCHMIELER, VSB# 32175
ALAN B. NEURICK, *Pro Hac Vice*
LISA N. WALTERS, VSB# 72291
SAUNDERS & SCHMIELER, P.C.
8737 Colesville Road, Suite L-201
Silver Spring, Maryland 20910
T: (301) 588-7717
F: (301) 588-5073
schmielerj@sslawfirm.com
neuricka@sslawfirm.com
waltersl@sslawfirm.com

## CERTIFICATE OF SERVICE

Per agreement of the parties and in compliance with Rule 5:26(d), three copies of the brief were mailed or delivered to each of the following party:

## UNIWEST CONSTR., INC. AND U.S. FIRE INS. CO.

EDWARD W. CAMERON, VSB# 29448
CAMERON/MCEVOY, PLLC
11325 Random Hills Road
Suite 200
Fairfax, Virginia 22030
T: (703) 273-8898
F: (703) 273-8897
ecameron@cameronmcevoy.com

MATTHEW J. LODGE, *Pro Hac Vice*
CHRISTOPHER R. CARROLL, *Pro Hac Vice*
CARROLL, MCNULTY & KULL, P.C.
120 Mountain View Boulevard
Basking Ridge, New Jersey 07920
T: (908) 848.6300
F: (908) 848.6310
ccarroll@cmk.com
mlodge@cmk.com

## PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE CO.

GEOFFREY S. GAVETT, VSB# 33393
GAVETT & DATT, P.C.
15850 Crabbs Branch Way, Suite 180
Rockville, Maryland 20855
T: (301) 948-1177
F: (301) 948-4334
ggavett@gavettdatt.com

**AMTECH ELEVATOR SERVICES N/K/A ABM AMTECH, INC., ABM INDUSTRIES, INC. AND AIU INSURANCE COMPANY**

JOHN D. MCGAVIN, VSB# 21794
TRICHILO, BANCROFT, MCGAVIN,
HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030
T: (703) 385-1000
F: (703) 385-1555
jmcgavin@tbmhjlaw.com

BARBARA I. MICHAELIDES, *Pro Hac Vice*
AGELO L. REPPAS, *Pro Hac Vice*
BATES & CAREY LLP
191 North Wacker Drive, Suite 2400
Chicago, Illinois 60606
T: (312) 762-3100
F: (312) 762-3200
bmichaelides@batescarey.com
areppas@batescarey.com

JOHN C. BONNIE, *Pro Hac Vice*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
950 East Paces Ferry Road, NE, Suite 3000
Atlanta, Georgia 30326
T: (404) 876-2700
F: (404) 875-9433
jbonnie@wwhgd.com
HOWARD J. RUSSELL, *Pro Hac Vice*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
3773 Howard Hughes Parkway, Suite 390N
Las Vegas, Nevada 89169
T: (702) 938-3810
F: (702) 938-3864
hrussell@wwhgd.com

**FEDERAL INSURANCE COMPANY**

JEFFREY R. SCHMIELER, VSB# 32175
ALAN B. NEURICK, *Pro Hac Vice*
LISA N. WALTERS, VSB# 72291
SAUNDERS & SCHMIELER, P.C.
8737 Colesville Road, Suite L-201
Silver Spring, Maryland 20910
T: (301) 588-7717
F: (301) 588-5073
schmielerj@sslawfirm.com
neuricka@sslawfirm.com
waltersl@sslawfirm.com

In addition, all parties have received electronic copies the brief. Paper copies of the brief were mailed or delivered on this the 19th day of April, 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.

*/s/ Catherine B. Simpson*
Counsel Press LLC
1011 East Main Street
Suite LL-50
Richmond, Virginia 23219
(804)648-3664

Filing and service were performed by direction of counsel.