THE EPA'S RENOVATION, REPAIR, AND PAINTING RULE AND HOW IT AFFECTS MASSACHUSETTS CONTRACTORS[1]

Michael P. Sams, Esq.
Hillary A. Lehmann
Kenney & Sams, P.C.
Old City Hall
45 School Street
Boston, MA 02108
(617) 722-6045

Introduction

On April 22, 2008, the United States Environmental Protection Agency ("EPA") issued the Renovation, Repair and Painting (RRP) Rule which is aimed at preventing lead poisoning. Under the RRP Rule, beginning on April 22, 2010, contractors performing renovation, repair and painting projects that disturb lead-based paint in homes, child care facilities, and schools built before 1978 must be certified and follow specific work practices as outlined in the RRP Rule.

The EPA may authorize states to administer their own RRP program that would operate in lieu of EPA regulations. Currently, Wisconsin, Iowa, North Carolina, Mississippi, Kansas, Rhode Island, Utah and Oregon have been authorized by the EPA.

Massachusetts is seeking a delegation of authority from the EPA to run its own RRP program, titled *Deleading and Lead-Safe Renovation*. Under the Massachusetts *Deleading and Lead-Safe Renovation* program, the Division of Occupational Safety (DOS) would act as the enforcing agency for the regulations, 454 CMR 22.00 and 801 CMR 4.02 454 (16) and (18). Massachusetts first issued temporary regulations which were effective April 2, 2010 and which replaced the Commonwealth's previous

[1] The authors are not offering legal advice. All contractors are directed to follow up with their own counsel for legal advice.

regulations. These regulations were not enforceable, however, because Massachusetts did not have delegated authority to run its own state program.

On June 25, 2010, the DOS finalized its permanent regulations and submitted them to the EPA to be published in the Federal Register. The regulations were submitted along with an application for a delegation of authority. Once the regulations are published, they will be enforceable and Massachusetts will be authorized to run its own RRP program. These regulations are expected to be published on July 9, 2010.

The Massachusetts regulations are expected to be substantially similar to the EPA's RRP Rule. The Massachusetts regulations were revised and issued on only June 25, 2010. Accordingly, no direct comparison has been done of the Massachusetts regulations and the EPA's RRP regulations as of the date of this article. Nonetheless, the differences discussed at previous RRP-related programs include: 1) $375 licensing fee for renovation firms rather than the $300 EPA licensing fee; 2) requirement of a training certificate for renovation supervisors rather than a license requirement; and that 3) a supervisor will be required to be on site at all times rather than intermittently, as required by the EPA. The training and work practice requirements are expected to differ slightly.

Contractors are recommended to follow the EPA's RRP Rule and obtain certification with the EPA until Massachusetts receives authority to administer and enforce its own state program. There will be a transitional period between the exchange of authority from the EPA to Massachusetts. The DOS advises contractors to check its website for updates.[2]

Immediately after Massachusetts receives delegated authority to administer its own program, it will not yet have its own training programs set up. We understand,

[2] The DOS website is: www.mass.gov/dos

however, that the DOS will recognize certifications from an EPA training program that were received before Massachusetts offered its own training program. Contractors previously certified under an EPA program should contact the DOS.

EPA's Renovation, Repair and Painting Rule[3]

A. Applicability and Scope

Anyone paid to perform work that disturbs paint or surface coating in target housing or child-occupied facilities built before 1978 is required to follow the RRP Rule.[4] This may include, but is not limited to: residential rental property owners/managers; general contractors; and special trade contractors (i.e. painters, plumbers, carpenters, and electricians).

With respect to landlords, there are two circumstances where work being done in target housing requires that the landlord be a certified firm and use (or be) a certified renovator. In the first circumstance, if the landlord does the renovation work, then the landlord must have firm and renovator certification. Second, if an employee of the landlord does the renovation work, then the landlord must have firm certification and the employee must be a certified renovator. However, if the landlord hires a renovation firm to perform the renovation, only the firm hired is required to be certified and must provide their own certified renovator.

Target housing is any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years old resides or is expected to reside in such housing) or any 0-bedroom dwelling (such as a lolft). 40 CFR §745.103.

---

[3] 40 CFR §745

[4] If a renovator is reimbursed only for materials and is not paid for labor, the RRP Rule will not apply.

The RRP Rule defines a child-occupied facility as a building, or portion thereof, constructed before 1978 and visited regularly by the same child of under 6 years of age on at least two different days within any week (Sunday through Saturday period). The further qualification is that each visit must last at least three hours, the combined weekly visits must last at least six hours, and the combined annual visits must last at least sixty hours. Child-occupied facilities may include, but are not limited to, day care centers, preschools, and kindergarten classrooms. 40 CFR §745.83.

B. Certification

By April 22, 2010, all firms doing work that disturbs painted surfaces in target housing or child-occupied facilities must comply with the RRP. A "Firm" means a company, partnership, corporation, sole proprietorship or individual doing business, association, or other business entity; a Federal, State, Tribal, or local government agency; or a nonprofit organization. 40 CFR § 745.83. To comply with the RRP, the firm must:

1) be certified by the EPA;

2) employ supervisory certified renovators who have successfully completed an EPA-accredited one-day training course.[5]

3) use only trained workers who have received specific on-the-job training from a certified renovator.

Subcontractors who are hired to do work which does not disturb painted surfaces do not need to be certified. The EPA, however, strongly recommends that all firms involved in the renovation be certified and use properly trained and certified personnel. It is important for general contractors to remember that all firms are responsible for making sure the renovation is performed in accordance with the RRP standards. Therefore, if a

[5] Renovator means an individual who either performs or directs workers who perform renovations. 40 CFR §745.83.

firm hires a subcontractor who fails to follow the RRP Rule, the firm who hired the subcontractor also will be held responsible for the subcontractor's violation.

To become certified, renovation contractors and firms must submit an application and fee payment to the EPA. The EPA began processing applications on October 22, 2009 and has up to 90 days after receiving a complete request for certification to approve or disapprove the application. Renovators and firms must be re-certified by the EPA every five years prior to the expiration of their existing certification.[6]

Individuals who have successfully completed an accredited lead abatement worker or supervisor course, or individuals who have successfully completed an EPA, Department of Housing and Urban Development (HUD), or EPA/HUD model renovation training course, will need to take only a four-hour refresher course instead of the eight-hour initial renovator training course to become certified.

C. The Rule's Requirements for Certified Renovators/Renovation Projects:

Although each renovation firm must be certified and employ certified renovators, one certified renovator must be responsible for ensuring the entire project's compliance with the rule. The general contractor of the project must provide this certified renovator, unless an agreement among the project's firms is otherwise reached. The RRP Rule does not prohibit firms from agreeing on which firm will supply the certified renovator who is responsible for ensuring compliance with the RRP Rule and who directs and trains non-certified workers. Regardless of which firm provides the certified renovator, all firms remain liable for complying with the RRP Rule. A summary of the Rule's requirements for RRP applicable renovation projects is as follows:

[6] EPA recommends that a contractor seeking recertification submit their application at least 90 days prior to the expiration of their certification. If submitted at least 90 days prior, the EPA cannot prevent a contractor from working if the recertification is not processed timely by the EPA.

1) Before beginning work, owners, tenants and child-care facilities must be provided with a copy of the EPA's lead hazard information pamphlet, *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers, and Schools.*

2) Compliance with the above requirement must be documented. The EPA's *Pre-renovation Disclosure Form* may be used for this purpose. (See attached form).[7]

3) A test kit recognized by the EPA must be used to determine whether components to be affected by the renovation contain lead-based paint.[8] The results of paint testing using test kits are part of the official lead-based testing record for a home and must be disclosed under the EPA's Real Estate Disclosure regulation. 40 CFR §745.83. Therefore, a contractor should obtain permission from the homeowner prior to testing. A homeowner may prefer to bypass testing and assume there is a presence of lead paint, thereby subjecting the renovation project to the RRP Rule.

4) A certified renovator must be physically present at the work site when warning signs are posted, while the work-area containment is being established, and while the work-area cleaning is performed.

5) Certified renovators must regularly direct work being performed by other individuals to ensure that the work practices are being followed, including maintaining the integrity of the containment barriers and ensuring that dust or debris does not spread beyond the work area.

6) Certified renovators must be available, either on-site or by telephone, at all times renovations are being conducted.

7) Certified renovators must have with them at the work site copies of their initial course completion certificate and their most recent refresher course completion certificate.

8) Certified renovators must keep records to demonstrate that the contractor and the contractor's workers have been trained in lead-safe work practices and that the contractor followed lead-safe work practices on the job.

---

[7] EPA's Sample Pre-Renovation Form will be valid until July 6, 2010. The owner-occupant Opt-out Acknowledgment included on the Pre-Renovation Form will no longer be applicable as the opt-out provision is being removed from the RRP Rule, effective July 6, 2010.

[8] A recognized test kit means a commercially available kit recognized by the EPA as being capable of allowing a user to determine the presence of lead at levels equal to or in excess of 1.0 milligrams per square centimeter, or more than 0.5% lead by weight, in a paint chip, paint powder, or painted surface. 40 CFR §745.83.

9) Certified renovators must perform project cleaning verification, unless a homeowner chooses to hire a certified third party to conduct clearance testing.[9]

   a. The cleaning verification procedure is performed by wiping all dust collection surfaces in the work area with a wet, disposable cleaning cloth and comparing that cloth visually to a cleaning verification card.[10] Cleaning verification may be performed only by a certified renovator.

   b. If clearance testing is chosen, a certified lead inspector, certified lead risk assessor, or certified lead sampling technician must conduct clearance testing.

10) Certified renovators must prepare required records and all documents must be retained for three years following the completion of a renovation. To make recordkeeping easier, the contractor may use the Sample Renovation Recordkeeping Checklist that the EPA has developed. (See attached.)

   a. Records that must be retained include:

      i. Reports certifying that lead-based paint is or is not present, if testing was performed.
      ii. Records relating to the distribution of the lead pamphlet.
      iii. Documentation of compliance with the requirements of the Lead-Based Paint Renovation, Repair, and Painting Program.

   b. The certified renovator assigned to the project to ensure overall compliance will be responsible for preparing the records documenting compliance. All renovation firms involved in a project, however, are responsible for retaining and making available to the EPA all records necessary to demonstrate compliance with the RRP Rule for a period of three years following completion of the renovation.

[9] The EPA has made a proposal to require dust wipe testing following most renovation projects. Accordingly, the current project cleaning verification requirements most likely will be replaced by dust wipe testing in the future.

[10] Cleaning verification card means a card developed and distributed, or otherwise approved, by the EPA for the purpose of determining, through comparison of wet and dry disposable cleaning cloths with the card, whether post-renovation cleaning has been properly completed. 40 CFR §745.83.

D. EPA Recommendations

The EPA recommends that contractors who perform RRP jobs also should:

1) Take training to learn how to perform lead-safe work practices. A list of EPA accredited training providers is available on EPA's website (www.epa.gov/lead).

2) Provide a copy of EPA or state lead training certificate to the client.

3) Tell the client what lead-safe methods the contractor will use to perform the job.

4) Learn applicable lead laws regarding certification and lead-safe work practices.

5) Ask client to share the results of any previously conducted lead tests.

6) Provide client with references from at least three recent jobs involving homes built before 1978.

E. Penalties

Fines for non-compliance under the RRP can be as high as $37,500 per day/per violation. The U.S. Senate, however, passed legislation on May 27, 2010 to block fines temporarily under the RRP to give contractors more time to comply with the new rule. One of the largest concerns behind the legislation is that there are not enough EPA-certified trainers in place to certify contractors. The Senate proposal was attached to a supplemental funding bill and passed to the House for further action. The House of Representatives has not yet voted on the matter.

Additionally, the EPA issued a memorandum on June 18, 2010 which offers additional time for renovation firms and workers to obtain training and certifications to comply with the RRP Rule. Specifically, the memorandum provides:

1) EPA will not take enforcement action for violations of the RRP Rule's firm certification requirement until October 1, 2010.

2) EPA will not enforce the training certification requirement of the Rule against individual renovation workers if the person has applied to enroll in, or has enrolled in, by not later than September 30, 2010, a certified renovator class.

3) EPA will continue to enforce the work practice and documentation requirements in the Rule.

F. Amendments to the RRP Rule[11]

The "opt-out" provision: Effective July 6, 2010, the EPA is eliminating the "opt-out" provision that currently exempts a renovation firm from the RRP's training and work practice requirements when the firm obtains a certification from the owner that no child under age 6 or pregnant women reside in the home and the home is not a child-occupied facility. "Environmental Protection Agency; Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program," 75 Federal Register 87 (6 May 2010), pp.24802-24819.

Post-renovation notification: Effective July 6, 2010, the EPA is requiring renovation firms to provide a copy of the records, including any sampling or testing results, which demonstrate compliance with the RRP's training and work practice requirements, to the owner and, if different, the occupant of the target building or child occupied facility. *Id.*

Vertical Containment: The EPA has specified in its final rule, which is to be effective July 6, 2010, that vertical containment may be necessary under some circumstances. The EPA requires renovation firms to cover the ground with plastic sheeting a distance of ten feet from the renovation and to "take extra precautions when in certain situations to ensure that dust and debris does not contaminate other buildings or

[11] As part of its final rule, effective July 6, 2010, the EPA has given states and Indian Tribal areas with authorized RRP programs two years to comply with new EPA requirements issued through amendments to the EPA Rule.

other areas of the property or migrate to adjacent properties." *Id.* Anecdotally, these "extra precautions" have been interpreted by the EPA to mean vertically containing any exterior work where contaminated dust may spread to other properties.

Training: The EPA has made two changes regarding training requirements in its July 6, 2010 final rule. First, the EPA states that the expiration date of certifications of renovators who took their RRP course before April 22, 2010 will be extended until July 1, 2015. Second, the EPA has reduced the number of training hours required of principle instructors of the RRP Rule from 16 to 8 hours. The EPA became aware that 16-hour courses were not available in every state and decided that an 8-hour training course would be sufficient. *Id.*

Dust wipe testing: The EPA has made a proposal to require dust wipe testing after certain renovations covered by the RRP Rule. This proposal is designed to ensure that lead-based paint hazards generated by the renovation work are adequately cleaned after the work is finished and before the work areas are reoccupied. The EPA is accepting comments regarding this proposal until July 6, 2010. "Environmental Protection Agency; Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Proposed Rule,: 75 Federal Register 87 (6 May 2010), pp. 25038-25073. The dust wipe testing amendment has not yet been drafted, but it can be expected to require the following:

A. A certified inspector, certified risk assessor, or certified dust sampling technician must perform dust wipe testing on uncarpeted floors, windowsills, and window troughs in the work area after the following types of interior renovations:

    a. Use of a heat gun at temperatures below 1100 degrees Fahrenheit.

    b. Removal or replacement of window or door frames.

c. Scraping 60 square feet or more of painted surfaces.

d. Removing more than 40 square feet of trim, molding, cabinets, or other fixtures.

B. If dust wipe testing is required, a certified inspector, certified risk assessor, or certified dust sampling technician must:

a. Perform a visual inspection to ensure that the work area is free of visible dust, debris or residue.

b. Collect dust wipe samples and send them to a recognized EPA laboratory for analysis.

c. Prepare a dust wipe testing report and provide it to the renovation firm within three days of the date that the results were obtained. *Id.*

Public and Commercial Buildings: The EPA has given notice of its intention to regulate renovation, repair and painting of public and commercial buildings. Comments regarding this proposal must be received by EPA on or before July 6, 2010. "Environmental Protection Agency; Lead; Renovation, Repair, and Painting Program for Public and Commercial Buildings; Advance notice of proposed rulemaking," 75 Federal Register 87 (6 May 2010), pp. 24848-24862.

RRP Consequences/ Areas of Concern

One potential consequence of the RRP legislation is third-party lawsuits by unaffected citizens against renovation contractors. The Toxic Substances Control Act (TSCA) contains a provision which allows citizens to file suit against a person who is alleged to be in violation of any rule promulgated under the Act. 15 U.S.C.A. §2619 (2007). The RRP Rule was issued pursuant to the EPA's authority and obligations under the TSCA.

To file suit, the citizen must give notice of the violation to the EPA and the contractor who is alleged to be in violation. If, after receiving notice of the violation, the EPA does not commence an enforcement action against the contractor, the citizen may continue with a civil action against that contractor. The purpose of the citizen's lawsuit would be to obtain an order from the court restraining such violations.[12] Additionally, the rule provides that the court also may award costs of suit and reasonable fees for attorneys and expert witnesses if deemed appropriate by the court. 15 U.S.C.A. §2619(c)(2) (2007).

This is potentially troublesome for renovation contractors because even if the EPA decides not to pursue enforcement actions against a contractor who is in alleged violation of the RRP Rule, a citizen may file a lawsuit to enforce the EPA's regulation anyway.

Moreover, at least one commentator has opined that where some believe there to be a lack of training facilities available to contractors who wish to be certified, to allow the *ad hoc* enforcement of the RRP by citizens against a contractor who has not had the opportunity to comply with the RRP, may be unfair. See Letter from William P. Killmer, Executive Vice President NAHB, to Hon. Lisa Jackson, EPA Administrator (April 5, 2010).

Another issue which requires attention is the sufficiency of the EPA Certified Lead Courses. For instance, Shawn McCadden, a remodeling industry specialist, points out that the EPA RRP Model Certified Lead Renovator Course does not instruct on how to use and maintain the HEPA vacuum. Shawn McCadden- RRPedia,

[12] Under the citizens enforcement provision, a citizen may file also a lawsuit against the Administrator to compel the Administrator to perform any act or duty under the TSCA which is not discretionary. Therefore, a citizen could file suit seeking an order from the court for the EPA to enforce the RRP rule against any violating contractors.

http://www.shawnmccadden.com/rrpedia/. Shawn McCadden recommends that a contractor supplement his training with a course on how to properly use the HEPA vacuum because if used incorrectly, it may actually spread dust and cause contamination and poisoning. *Id.*

Another effect of the RRP Rule may be that the intended increase in public awareness of the new rules and the dangers of lead poisoning result in an increase in related lawsuits. Shawn McCadden- Legal Considerations, http://www.shawnmccadden.com/rrpedia/?Tag=Legal+Considerations. The EPA has published *Steps to Lead Safe Renovation, Repair and Painting*, which is a useful guide for contractors to follow concerning proper practices, which, if followed, at least theoretically should decrease the possibility of future lawsuits.

Increased costs are another obvious aspect of the RRP's implementation. Nonetheless, the EPA estimates that the cost of containment, cleaning, and cleaning verification will range from only $8 to $167 per job, with the exception of exterior jobs where vertical containment would be required. www.toxics.custhelp.com (EPA Frequent Questions page: Search "cost": Follow "how much will it cost…" hyperlink). This includes costs of equipment (e.g. plastic sheeting, tape, HEPA vacuums, etc.) and costs of labor (e.g. the time required to perform cleaning and cleaning verification).

These estimates may be low, however, depending on the contractor's previous work practices. Some contractors may have to change their work practices significantly to comply with this rule. There also is a concern that labor costs will significantly increase as a result of practicing containment. For instance, if a renovator desires to leave a contained work area to retrieve a tool from outside, he may have to HEPA vacuum his

clothes first to avoid spreading lead contaminated dust. Having to do so numerous times a day may obviously be very time consuming.

In addition to work practice costs associated with individual projects, contractors also will be required to pay for training and certification fees, and also should make sure to carry the proper liability insurance. The cost for a five-year certification should average $200. *Id.* Additionally, there is a $300 fee to the U.S. Treasury for a 5-year certification for firms. *Id.*

Another concern is whether contractors are aware of the difference between performing renovations on target housing versus performing lead abatement. Lead abatement is a set of activities aimed specifically at eliminating lead or lead hazards. The EPA has separate regulations for the certification and training of abatement professionals. Therefore, if a renovator wishes to perform lead abatement work, he also must have a lead abatement certification. Likewise, a lead abatement certified contractor also must obtain an RRP certification to perform renovations on target housing.

Indemnification Primer[13]

Construction contracts commonly require certain parties ("Indemnitors") to indemnify others ("Indemnitees") for liability arising from the Indemnitor's work or otherwise caused by the Indemnitor. "Indemnification" is simply an agreement that the Indemnitor will assume financial responsibility for the payment of certain claims asserted against the indemnitee. For example, the general contract often requires the general contractor to indemnify the owner for claims against the owner arising from the prime contractor's work. Likewise, subcontract provisions often require subcontractors to indemnify the general contractor and owner from any liability they incur as the result of

[13] This section is written by Christopher A. Kenney, Esq. a shareholder of Kenney & Sams, P.C.

the subcontractor's work. In this way, the indemnification provisions in construction contracts often act like a "food chain" ultimately resulting in the lowest tier party (usually a subcontractor), being asked by the owner and general contractor (and occasionally design professionals) to resolve personal injury or property damage claims arising on construction projects.

Massachusetts law provides some protection to subcontractors faced with this dilemma. Mass. Gen. L. Ch. 149, §29C invalidates indemnity provisions in construction contracts which purport to require a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents, or subcontractors. In short, if the subcontractor had nothing to do with causing the incident giving rise to the claim, then the indemnification provision in the contract is void as a matter of public policy.

Courts will, in the first instance, analyze the indemnification provision in the contract to determine whether, as written, it violates the statute. Thus, a contractual provision which, as written, purports to require a subcontractor to assume responsibility for all claims asserted against the general contractor, without regard to whether the subcontractor caused the incident giving rise to the claim, will be declared void and unenforceable. Jones v. Vappi & Company, 28 Mass. App. Ct. 77 (1989). Accordingly, when drafting indemnification provisions, remember that the wording of the indemnity agreement, not the particular facts of the subsequent accident giving rise to the claim, controls the enforceability of the indemnification provision. Harnois v. Quannapowitt, 35 Mass. App. Ct. 286 (1993).

There is certain "saving language" which may enable the court to excise offending language in an indemnity agreement which otherwise would violate the statute. For example, in Callahan v. AJ Welch Equip. Corp., 36 Mass. App. Ct. 608 (1994), the Appeals Court enforced an indemnification provision in a construction contract because the introductory clause "[t]o the fullest extent permitted by law..." saved the otherwise offensive language in the remainder of the indemnification provision.

A party seeking indemnification must provide prompt notice of its indemnification claim to the Indemnitor, or the claim may be barred. In Cheschi v. Boston Edison Company, 39 Mass. App. Ct. 133 (1995), the Massachusetts Appeals Court denied an indemnification claim because the Indemnitee failed to meet the contract requirement that it provide the Indemnitor with prompt notification of the claim as a condition precedent to indemnification. In Massachusetts Port Authority v. Johnson Controls, 54 Mass. App. Ct. 541 (2002), the Court ordered that, even without language making prompt notice a condition precedent to indemnity, prompt notice is still the Indemnitee's requisite consideration in the bargained-for right to indemnification. Therefore, if a party client has a right to indemnification from another party, promptly demand it. If you delay too long in seeking indemnification, the contract right to indemnity may be lost due to failure of consideration.

Negligent conduct by the subcontractor's employees, agents or subcontractors suffices to activate the subcontractor's obligation under an indemnification agreement in accordance with Chapter 149, Section 29C. Kelly v. DiMeo, Inc., 31 Mass. Appt. Ct.

626, 627 n.2 (1991). This is an important consideration to keep in mind as you build your case on plaintiff's comparative negligence.

Keep in mind that not all indemnification agreements in the construction context are regulated by statute. For example, indemnification actions based upon an express indemnification provision in the Owner/General Contractor Agreement or Owner/Architect Agreement are not affected by ch. 149, §29c, nor are they barred by the common law "clean hands" doctrine. W. Prosser and W. Keeton, Torts, § 51 at 341, n. 4 (5th Ed. 1984) ("a contract agreeing to indemnify a party against the consequences of that party's own negligence is not against public policy"). Of course, because of the application of ch. 149, § 29C, this rule applies only to Indemnitors other than construction subcontractors.

Practice Tip: Contracts providing one with the right to indemnification by a third party often provide a false sense of security. The indemnification right is only as good as the Indemnitor's ability to pay the defense costs and any settlement or judgment incurred. For example, if the Indemnitor is a lower tier subcontractor on the project without substantial assets, and the plaintiff's accident results in a catastrophic injury or death, the subcontractor corporation may have insufficient assets to make good on the indemnification obligation. Consequently, general contractors should obtain, at the earliest stage of the project, the subcontractors' liability insurance policies to determine whether their contractual indemnification obligation will be insured under their policies.

The standard general liability policy produced by the Insurance Services Office, Inc. ("ISO") commonly excludes "liability assumed by a contract," which is essentially what a contractual indemnification obligation is. However, the ISO form usually

contains an exception to that exclusion for "insured contracts." Counsel should check the definition of "insured contract" in the policy, because it often includes contractual indemnification obligations. Thus, the exception to the exclusion often brings the indemnification obligation back within coverage under the policy. That will ensure that your indemnification claim will be honored by an insurer with the financial ability to meet the obligation.

Your Indemnification Provision May Be Less Protective Than You Believe

In North American Site Developers, Inc. v. MRP Site Development, Inc., 63 Mass. App. Ct. 529 (2005), the Appeals Court interpreted an often used contractual indemnification provision from the 1987 AIA A401 form document, limiting this provision's breadth and application.

In that case, a contract between a subcontractor and sub-subcontractor required the sub-subcontractor to defend and indemnify the subcontractor. The indemnification provision stated in relevant part that the sub-subcontractor had to, indemnify [the subcontractor] from and against claims, damages, losses, and expenses …but only to the extent caused in whole or in part by the negligent or willful acts or omissions [of the sub-subcontractor].

The subcontractor argued that this provision required the sub-subcontractor to indemnify it for all attorney's fees, costs, and damages assessed in a case in which the subcontractor had been sued. The sub-subcontractor contended that the phrase, "but only to the extent caused…by [sub-subcontractor]," limited its indemnity obligations to its proportionate fault and asserted that it did not have to indemnify the subcontractor for one hundred percent of damages assessed. The Court agreed, finding that the phrase,

"but only to the extent," did limit the breadth of the indemnification provision to the sub-subcontractor's percentage of fault.

Additional Insured Status On Construction Projects

Like indemnification obligations, insurance obligations often flow downhill in public construction contracts. In other words, subcontractors are frequently required by contract to list the general contractor and owner as additional insureds under the subcontractor's liability insurance policies. This requirement provides additional protection to the general contractor and owner so that, if the indemnification provision is declared void or the subcontractor goes bankrupt, they will still be insured against the financial consequences of claims on the project. The subcontractor's insurers owe the "additional insureds," in most respects, the same duty to defend and indemnify them from claims that the subcontractor obtained for itself by purchasing the insurance policy. TransAmerica Ins. Group v. Turner, 33 Mass. App. Ct. 446 (1992).

If the subcontractor breaches its obligation to procure insurance coverage for the general contractor or owner in violation of the subcontract, the general contractor and owner can sue the subcontractor for breach of contract and seek damages in the form of all insurance coverage they would have had covering the loss at issue.

Practice Tip: If you are an additional insured on another party's insurance policy, you may find that your own policy is still required to contribute to the loss. This is because most general liability insurance policies are written with an "other insurance" mandating that if the additional insured (i.e. your seeking coverage under the subcontractor's policy) has other valid and collectable insurance covering this loss (i.e. your own insurance policy) then the subcontractor's policy will only contribute on a pro

rata basis with any other policies providing coverage to you. Thus, your own insurance policy might have to contribute dollar for dollar with any other policies on which you an additional insured, despite your intention to have obtained full coverage under the subcontractor's liability insurance policy as part of the construction contract.

General contractors should review their subcontract forms to ensure that the subcontractors are required to maintain liability insurance in an amount sufficient to cover serious claims, list the owner and general contractor as additional insureds under the policy, and require that the subcontractors' policies do provide primary coverage to the owner and general contractor for any loss arising from the subcontractors' work on the project.

General contractors also should review with their agent, having their respective insurance policies revised so that the "other insurance" provision in the policy provides that it is excess to any other valid and collectable insurance.