

# Insurance Coverage Newsflash



January 2007

## ILLINOIS SUPREME COURT CHANGES LAW REGARDING COVERAGE FOR CONTRIBUTION CLAIMS AGAINST EMPLOYER UNDER A CGL POLICY

On January 19, 2007, the Illinois Supreme Court released its decision in *Virginia Surety Company, Inc. v. Northern Insurance Company of New York* (No. 102036. Jan. 19, 2007). The Court held that agreements whereby employers of injured parties agree to indemnify others for liability arising from the employers' negligence are not "insured contracts" as defined by a CGL policy. As a result, the Court held that contribution actions against the employers fall within the employee exclusion of the standard CGL policy and are not subject to the "insured contract" exception to the exclusion.

It is common in construction projects for subcontractors to enter into an agreement to indemnify the general contractor and the site owner for damages arising from injuries to employees of the subcontractors as a result of negligence by the subcontractor. Should an employee of the subcontractor then bring an action for personal injuries against the general contractor or the owner, those parties will typically file a contribution claim against the subcontractor who agreed to indemnify them. Until *Virginia Surety Company* most of the appellate court decisions that had addressed this issue held that coverage for such contribution claims existed under a CGL policy if the employer had agreed to indemnify the parties seeking contribution. The appellate courts concluded that the employee exclusion of the CGL policy did not bar coverage because the indemnity agreements fell within the "insured contract" exception to the exclusion. That exception provides that the exclusion does not apply to written agreements whereby the insured agrees to assume the tort liability of another. In *Virginia Surety*, however, the Supreme Court held that such contracts did not constitute an agreement to assume the tort liability of another, but rather constituted an agreement to waive the "Kotecki" defense that is available to employers of injured parties. The *Kotecki* defense generally limits the liability of the employer of an injured party, in suits for contribution, to the extent of its workers' compensation liability. Subcontractors, however, frequently are requested, if not compelled, to waive that limitation in their construction contracts. Those waivers are often in the form of "indemnity" agreements. *Virginia Surety Company* stands for the proposition that if a waiver is given, that waiver constitutes the waiver of an affirmative defense rather than the assumption of the tort liability of another party. Accordingly, the contract does not fall within the "insured contract" exception to the employee exclusion of a standard CGL policy.

*Virginia Surety Company* represents a very significant change in the law. As a result of the decision, employers sued for contribution as a result of injuries to their employees will not have coverage for those contribution claims under their CGL policy, even if the contribution claim is based on a written "indemnity" agreement. Employers will be required to look for coverage for such claims under their employer's liability/workers' compensation policies. In *Virginia Surety*, the Supreme Court also overruled the holding in *Christy-Foltz v. Safety Mutual Insurance Casualty Corp.*, 309 Ill. Ap.3d 686 (4<sup>th</sup> Dist. 2000) that an employer's agreement to waive the *Kotecki* limitation on liability fell within the standard exclusion in an employer's liability policy for the voluntary assumption of liability. Thus coverage for contribution claims against employers of injured parties should now rest with the employer's liability insurers.

If you would like a copy of the Court's decision or have questions about it or other coverage questions, please contact either Terrence J. Madden or Storrs W. Downey.

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