

# The Melito & Adolfsen Law Firm

## Workers' Comp

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### CGL vs. WORKERS' COMP 1B - COVERAGE IN CONSTRUCTION CASES

The question as to the applicability of CGL and/or 1B Coverage in any given case remains a fertile ground for dispute. The 1B Coverage generally provides liability coverage for bodily injury sustained by an employee, excluding coverage of the employer for contractual indemnity but covering it for common law indemnity or contribution. The CGL coverage covers the employer for contractual indemnity but excludes coverage for common law indemnity or contribution.

Generally, both common law and contractual claims are asserted against the employer. While the two policies cover different types of liability, in Labor Law cases a common scenario arises in which both policies apply. Because the Labor Law imposes strict liability on owners and general contractors ("GC") regardless of fault, such entities are commonly found liable in construction accidents, particularly involving scaffolding claims under Labor Law § 240, even where they are free from fault and have no involvement in the accident or in the work. In such cases, the owner and GC will commonly pass the entire liability on to the contractor who is at fault by means of a third-party action or a cross-claim. Furthermore, although New York General Obligations Law ("GOL") § 5-322.1 prohibits contractual indemnification in the construction context where the party to be indemnified is to any extent negligent, the New York Court of Appeals held in *Brown v. Two Exchange Plaza Partners* that a finding of absolute liability under the Labor Law will not prevent an owner and GC from obtaining contractual indemnity as long as they are not found to any extent negligent.

In a common situation where an owner and GC are held liable under the Labor Law solely by virtue of their status, the Courts have permitted judgment over in favor of these entities against the responsible contractor. Furthermore, where a broad-based indemnity agreement runs in favor of the owner and GC, the Courts have held that such liability against the third-party contractor is premised both on principles of common law indemnity as well as contractual indemnity. In such circumstances, the New York Court of Appeals has held in *Hawthorne v. South Bronx Community Corp.*, that the CGL carrier and the worker's compensation carrier must share the loss equally, since it falls under each of the policies.

If some percentage of negligence is found against the owner or GC in the action, and even assuming that most of the fault is assessed against the subcontractor, the provisions of GOL § 5-322.1 which prohibit contractual indemnification of a negligent party come into play. That is, if negligence on the part of the owner and GC completely negates the indemnity contract, then liability against the subcontractor will be premised solely on the principle of common law contribution. This liability would be covered solely under the worker's compensation policy since it is excluded under the CGL policy's employee exclusion. On the other hand, if partial contractual indemnity is permitted, i.e., contractual indemnity is allowed except for the portion of the owner or GC's percentage of negligence, then both the CGL policy and the worker's compensation policy would be triggered. See, *Hawthorne*, supra.

The New York Court of Appeals addressed this issue in its recent decision in *ITRI Brick & Concrete Corp. v. Aetna Casualty & Surety Co.* In that case, the Court of Appeals held that broad-based indemnity agreements which purport to shift full liability from a GC found partially negligent onto a subcontractor are rendered wholly void under GOL § 5-322.1. Thus, the Court of Appeals struck down the contractual indemnity claim by a GC found partially negligent, and held that the GC was solely entitled to common law contribution from the subcontractor who employed the plaintiff to the extent of the subcontractor's negligence. The result of this holding was that the subcontractor's

worker's compensation carrier was required to pay the entire third-party judgment against the subcontractor.

In ITRI Brick, the Court of Appeals left open the issue of whether a partial indemnification agreement (i.e., an agreement that expressly provides for contractual indemnification except for any portion of the liability based on negligence) would be enforceable under GOL § 5-322.1. In so doing, the Court noted that the indemnification agreements at issue in that case did not provide for such partial indemnification and therefore were plainly invalid under the statute in view of the GC's negligence. However, the Court of Appeals strongly indicated in dicta that it seemed unlikely that such partial indemnity agreements would be enforceable. As always, the coverage determination will depend on an interpretation of the precise language used in the indemnity provision.