



Chapter 9

Liability for Contractors in Connection with Mining: To Plus To May Not Equal For

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Synopsis

§ 9.01.	Introduction	245
§ 9.02.	Risks and Rewards—The Use of Contractors in Mining Operations.....	246
§ 9.03.	Common Law Liability	247
	[1] — The General Rule of No Vicarious Liability for Independent Contractors	247
	[2] — Determining Whether the Contractor Is “Independent”	248
	[a] — Factors Considered in Assessing Whether a Contractor Is Independent.....	248
	[b] — Restatement (Second) of Agency 220(2).....	249
	[c] — The “Control” Factor	250
	[3] — The Operator’s Duty to the Employees of an Independent Contractor.....	251
	[4] — The Operator’s Duty to Third Parties.....	251
	[a] — Non-Delegable Duties	252
	[i] — Ultra-Hazardous and Inherently Dangerous Activities.....	252
	[ii] — Work in Public Places	253
	[iii] — Illegal Activities.....	254
	[b] — Leases and Contracts.....	254
	[c] — Lateral Support.	254
	[d] — Trespass.....	254
	[e] — Public Policy Based Exceptions	254
§ 9.04.	Regulatory Schemes Applying to Contractors and Mine Operators.....	255
	[1] — Mine Safety and Health Laws.....	256
	[a] — Operator’s Vicarious Liability for Regulatory Violations.....	256
	[2] — Civil Liability Based Upon Mine Act Violations.....	258
	[3] — Other Legal Duties.....	261

	[a] — Environmental Liabilities.....	261
	[b] — Labor and Employment Liabilities	262
§ 9.05.	Other Liability Theories.....	262
	[1] — Contractual Liability	262
	[2] — Third-Party Vendors of Contractor/Mechanic’s Liens	262
	[3] — “Enterprise Liability”	263
	[4] — Corporate Conglomerate Liability.....	264
	[5] — Mass Tort and Exposure Cases.....	266
	[6] — Trucking and Transportation	266
	[a] — Criminal Liability for Operators’ Overweight Contract Truckers.....	266
	[b] — Civil Liability Arising Out of Transportation.....	267
§ 9.06.	Managing the Risks by Recognizing the Opportunities	268
	[1] — Trucking.....	268
	[2] — Nuisance.....	269
	[3] — Highway Damage.....	269
	[4] — Premises Liability	269
	[a] — Liability to Contractor Employees and Third Parties.....	270
	[b] — Liability to Third Parties.....	270
	[c] — Anticipatory Releases.....	270
	[5] — Mine Rescue Teams	271
§ 9.07.	Allocating Risks and Liabilities in Contracts.....	272
	[1] — Contract Types and the Need for Consistency.....	272
	[2] — Risk Considerations in Formulating “Control” Provisions.....	273
	[a] — Structure of the Relationship.....	273
	[b] — Contract Labor	273
	[c] — Contractors Working In or At Your Mine	274
	[d] — Rights and Duties.....	275
	[3] — Key Contract Provisions	276
	[a] — Insurance and Indemnity.....	276
	[i] — Covering the Operator	276
	[ii] — Indemnity.....	276
	[b] — Indemnity for the Operator’s Negligence	277
	[i] — Kentucky.....	277
	[ii] — Maryland.....	277
	[iii] — Pennsylvania.....	278
	[iv] — Virginia	278
	[v] — West Virginia.....	278
	[c] — Disclosures and Information Provided.....	278

[d] — Integration Clauses278
 [e] — Payment.....279
 [f] — Other “Terms and Conditions”279
§ 9.08. We’re the Government, and We’re Here to Help!.....280
 [1] — Regulatory Agency “Guidance”280
 [2] — MSHA Contractor Guidelines281
§ 9.09. Dealing with the “Irresolvable” Conflicts.....281
 [1] — Monitoring Contractor Safety281
 [2] — Reviewing Contractor’s Documentation and Plans283
 [3] — Defensive Documentation.....384
 [4] — Training284
§ 9.10. Conclusion.....284

§ 9.01. Introduction.¹

Mine Operators² use contractors for two main reasons: expertise and cost. Those advantages must be carefully weighed, however, against two significant disadvantages: loss of control and the potentially higher risk of liability. Moreover, with seemingly increasing frequency, traditionally accepted methods used to limit the risk of regulatory, tort and contractual liability conflict with regulatory requirements and risk management strategies. Operators are discovering, all too often after the fact, that requiring contractors by contract “to” maintain sole control of their work “plus” “to” indemnify and maintain insurance in case something does go wrong,

¹ The author wishes to acknowledge the significant contributions of Eric Waller and Jonathan Ellis, attorneys with *Steptoe & Johnson PLLC*, by way of research for this chapter.

² This chapter will use the term “operator” “mine owner” and/or “mine operator” interchangeably to refer to the entity hiring an independent contractor. Use of the term is not intended to connote meaning under any regulatory scheme or particular situation. Additionally, while the term “operator” generally refers to mine operators, as used in this chapter the term could also describe situations applicable to landowners, licensees and others who outsource services involving mining operations. For example, a landowner could potentially become liable as an “operator,” strictly as used in the liability discussions in this chapter, to the extent the landowner is found to “control” engineering or provides engineering services which are linked to an injury or damage in connection with mining operations. While not typical, it is not unheard of for the landowner’s engineer in residence to go beyond mere review of a mining plan, which could create a problem.

“*may not equal*” everything the operator needs to do to “*for*” maximum protection.³

Regulatory schemes and the common law are inherently intertwined when operators assess the potential liabilities associated with the use of contractors. Operators hiring contractors have traditionally counted on the independent contractor relationship to insulate from liability. However, regulatory requirements and the erosion of the independent contractor defense now make additional planning and risk management measures essential. A combination of a reasonable selection process, well-drafted contract, insurance and the appropriate level of monitoring are the best means for obtaining the highest level of protection. Reaching and maintaining the required balance, however, requires attention to detail, planning, training and defensive documentation.

§ 9.02. Risks and Rewards—The Use of Contractors in Mining Operations.⁴

There are a number of benefits an operator may seek to realize by hiring independent contractors. First, hiring an independent contractor means not hiring employees and the risks attendant to that process.

Utilizing an independent contractor also obviates the need to consider many other employment laws, including minimum wage and overtime protections, anti-discrimination laws and the Family and Medical Leave Act. Even if the independent contractor’s effective hourly charges are higher than an operator’s hourly rates, the operator generally still avoids the expense of

³ The body of knowledge contained in the scholarly publications of the Energy & Mineral Law Foundation is such that many of the areas applicable to the discussion in this chapter have already been the subject of excellent treatment by others. As such, the author acknowledges and thanks those who have so diligently covered those areas and refers the reader by citation to those chapters. Most of the cited chapters are available at the EMLF website at <http://www.emlf.org>.

⁴ See Heenan, Rausch and Dailey, “Vicarious Liability for Contract Mine Operations: Expanding Liability for Mineral Owners and Lessees,” 15 *E. Min. L. Inst.*, ch. 8 (1994).