CHAPTER 7

Risk Allocation: How to Interpret Insurance and Indemnification Provisions in Mining Contracts

Michael B. Victorson

and

James S. Chase

Robinson & McElwee

Charleston, West Virginia

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§ 7.01. Introduction.

A well drafted indemnification clause in a mineral lease or contract does not, in and of itself, guarantee the indemnified party protection from liability. To protect itself fully, the indemnified party must further require the indemnitor to demonstrate proof of adequate funds to pay the potential liability. The primary method of funding this potential liability is through insurance. A prospective approach to risk allocation incorporates both indemnification and insurance in the written mineral contract. The terminology and issues in insurance and indemnity can be confusing. Nevertheless, a basic understanding of their interrelationship can prevent unanticipated liability and costly delays in settling claims.

[1]--Indemnity Defined.

To indemnify means to save harmless or to secure against loss or damage. Indemnity arises by operation of express contract or under principles of equity. It represents the shifting of losses from one who otherwise would have to bear liability or damage to another.

Contracts of indemnity are generally classified as those that indemnify against (1) loss or damage to property or (2) liability arising from law. A contract that simply indemnifies, and nothing more, protects against loss or damage only. A contract that binds the indemnitor to pay certain sums of money or to perform other acts that will prevent harm or injury to the indemnitee protects against liability.

Contracts of indemnity are interpreted under the general rules governing formation, validity, and construction of contracts. An indemnity clause within a mineral contract is interpreted in accordance with the plain meaning of the language used. However, courts interpret ambiguous contract provisions to provide indemnity. Unlike contracts of insurance, in which ambiguous provisions are generally interpreted against the insurer, an ambiguous indemnity provision may be construed against either the indemnitee or the indemnitor.

In addition to contractual indemnity, courts also recognize recovery under principles of equity. Equitable or non-contractual indemnity is based on the theory that a non-negligent or passively negligent party should not have to pay the liability of a substantially more negligent party. These rights may be waived, however, by an express agreement abrogating a party's rights to equitable indemnification. Finally, most jurisdictions allow parties to enter into a contract of indemnity to protect the indemnitee from liability arising from its sole negligence.

[2]--Insurance Defined.

Insurance is an agreement whereby one party, for consideration, undertakes to compensate the other for loss of a specified subject from a specified peril. The insurance contract is commonly divided into six parts:

1. Insurance Agreement states the risks covered by the insurance contract. Risks not specifically identified in the insurance agreement are not covered by the policy.
2. **Exclusions** set forth risks that are specifically not covered.

3. **Conditions** define the responsibilities of the insured under the contract. If the conditions are not met, the insurer may have no obligation to provide coverage for the liability.

4. **Limitations** establish the amount payable under the policy.

5. **Declarations** identify the insured, the description of the property or risk covered, the term of the policy, and the premium charged.

6. **Indorsements** are clauses added to the insurance contract either limiting or extending coverage.\(^{(11)}\)

Most mineral contracts require the contractor to secure workers' compensation and employer's liability insurance in addition to the contractor's comprehensive general liability policy (CGL). CGL insurance is the contractor's primary policy; it provides coverage for bodily injury and property damage due to all causes except exclusions stated within the policy and indorsements later added.\(^{(12)}\) As expected, these exceptions generate the majority of coverage disputes given the serendipity of some accidents and the conflicting interests of insureds and insurers in coverage under the policy.

Common exclusions to the CGL include coverage for automobile injuries, environmental damage, property in the "care custody and control" of the contractor, and "collapse, explosion and underground-damage hazard."\(^{(13)}\) To provide coverage for these exclusions, the operator and the owner should consider purchasing insurance for specific liabilities not covered by the CGL. Among the policies available are:

1. Contractor's injury liability insurance -- coverage against liability for injuries (other than injuries to employees) related to performance of the contract.\(^{(14)}\)

2. Contractor's equipment floater insurance -- coverage for loss or damage to equipment and tools owned by the contractor and usually used away from the contractor's premises.\(^{(15)}\)

3. Hazards of explosion and collapse insurance -- coverage for loss or damage to property arising from blasting operations and subsurface operations causing loss of subjacent support.\(^{(16)}\)

4. Pollution liability insurance -- coverage for personal injuries and property damage arising from the discharge of smoke, vapors, and toxic chemicals into or upon land, the atmosphere, or any body of water.\(^{(17)}\)

5. Professional liability insurance -- coverage for alleged professional misconduct or lack of ordinary skill in the performance of professional services. (Corporate director's insurance is included in this area.)\(^{(18)}\)

6. Umbrella liability insurance -- excess insurance over the insured's conventional liability coverage in all areas for which certain minimum amounts must be carried to qualify for the umbrella coverage. (It may cover liabilities not included under other policies and provide high limits of coverage for hazards with low probability of occurrence.)\(^{(19)}\)

### § 7.02. Common-Law Liability.

A mineral lease usually conveys the mineral or the right to mine the mineral and establishes a landlord-tenant relationship between the mineral owner and mine operator. Under the principles of landlord-tenant law, the mineral owner's liability for damages arising from mining operations should be limited to a few specific instances of ultrahazardous activities, concealed conditions, failure to warn of known unsafe
conditions, and negligent selection of the mine operator. Despite this landlord-tenant relationship, courts have held mineral lessors liable for subsidence, trespass, and water damage caused by a lessee's strip mining under the theory that the owner's acceptance of royalties creates a common purpose. Additionally, courts have held owners liable for injuries to employees of independent contractors who were not warned of latent dangers on the property.

In Chamberlin v. Penn-Rich Contracting Co., the Pennsylvania Supreme Court held that the operator of a strip mine owes a duty of reasonable care to protect invitees or business visitors on its property from injury. The plaintiff had lost machinery in a cave-in while deep mining a tract of land. The plaintiff ceased operations and thereafter entered into an agreement with the defendant to strip-mine the property. The agreement included a provision that plaintiff could recover any of his machinery found by defendant during strip-mining operations.

After beginning to strip mine the tract, defendant partially uncovered one of plaintiff's machines. The defendant notified plaintiff and assisted plaintiff in his attempt to remove the equipment. However, the operation was unsuccessful, and plaintiff withdrew to defendant's office for three hours while defendant continued strip-mining operations, including blasting in the area where the equipment was buried. The defendant then told plaintiff that he could recover his machine but did not inform him of the blasting. The plaintiff was subsequently injured by a rock unloosened by the blasting. The plaintiff was awarded damages at trial. The appellate court affirmed, holding that plaintiff was on the property by virtue of an express contractual right and that, therefore, defendant owed plaintiff a duty to warn of unsafe conditions. Defendant was negligent in failing to warn plaintiff of the loose rock from the blast.

In assigning liability, courts have distinguished the duty owed by the mineral operator to trespassers and licensees. Generally, an owner owes a duty to business visitors or gratuitous licensees for bodily harm resulting from the owner's failure to carry on activities with reasonable care for the licensee's safety. In contrast, the duty to a tresspasser is, in most cases, limited to warning or making safe concealed, artificial, and unsafe conditions involving risk of death or serious bodily harm. Courts have also imposed strict liability for injuries caused by blasting operations or other ultrahazardous activities.

In Rafferty v. Davis, the plaintiff was injured in her home by a blast in a quarry a short distance away. In finding the defendant liable, the court held that a party conducting blasting operations on its own property must do so in a manner that does not injure other persons or property. If the blasting operations inflicted the injury, the party responsible for the operations was liable for trespass even if these operations were conducted in a non-negligent manner.

§ 7.03. Risk Allocation.

Indemnity is a form of risk allocation in which a loss is shifted from one who otherwise would have to bear liability or damage to another. The primary vehicle for allocating risk is by express contract; however, in the absence of an express contract, the risk may be allocated under principles of common law or by statute.

[1]-Express Risk Allocation.

Each mining operation presents unique problems concerning the land, parties, and numerous market variables. Although no standard form or clause will foresee all potential liability and risks, an
indemnification clause to a mining contract should, at a minimum, address the following four areas:

1. Claims arising out of injury to persons or property;
2. Claims arising out of any breach of any material covenant, representation, warranty, or other undertaking of the operator, including liability for consequential damages;
3. Claims arising out of the operator's violation of laws or ordinances or the terms and conditions of any mineral lease or other instrument affecting the right to mine; and
4. Claims arising out of the operator's failure to comply with environmental requirements, including land reclamation and restitution. (40)

Additionally, the parties must consider the terms by which performance of the contract will be excused due to unforeseen circumstances. (41) The *force majeure* clause can be considered an express provision of the common law doctrine of impracticability. It excuses performance of the contract due to causes that are outside the control of either party and that could not be avoided by the exercise of due care. (42) The most common conditions recognized by *force majeure* clauses are natural disasters and war-time acts, but the parties can incorporate any condition they want within this section. (43)

Finally, the parties must recognize statutory or common-law restrictions in drafting indemnity provisions. For example, some states prohibit one party from indemnifying another party for the first party's sole negligence. (44) Other states allow parties to negotiate sole indemnification clauses, but strictly construe those clauses against indemnification unless stated in unequivocal terms in the contract. (45)

[2]--Statutory Risk Allocation.

Statutory requirements prohibit certain risk allocation among parties to a binding mineral contract. For example, workers' compensation statutes require an employer to accept responsibility for its employee's workplace injuries. (46) In exchange, the employer is subject to a defined liability. (47) Although most workers' compensation statutory schemes fix the employer's liability, the statutes also allow the employee to recover full tort damages from a third-party tortfeasor. (48) Under this scheme, an injured employee of the contractor can obtain workers' compensation benefits from the contractor and can bring an action against the mineral owner based on that owner's alleged negligence or misconduct. (49) Because these premises-based actions potentially involve considerable liability, mineral owners often seek indemnification from the contractor for employee-raised suits. Some states allow the contractor to provide this indemnification by express contract; (50) others do not under the theory that the employer can not alter the liability scheme developed by the workers' compensation act. (51)

Another statutory form of risk allocation is found in the Surface Mining Control and Reclamation Act (SMCRA). (52) SMCRA regulates surface coal mining operations and the acquisition and reclamation of abandoned mines. Pursuant to SMCRA Section 506, (53) an operator seeking to conduct surface coal mining operations or underground mining operations that would disrupt the surface must first apply for a permit from the appropriate regulatory authority. If the permit is granted, the operator must file a performance bond with the regulatory authority before the permit will be issued. The purpose of the bond is to finance the cost of reclamation work required under the SMCRA in case of permit forfeiture. Although, the amount of the bond varies depending on the geological conditions at the permit site, Section 509(a) (54) requires a minimum bond of $10,000 for each area mined. In addition to this performance bond, the operator must also submit a
certificate of public liability insurance to the regulatory authority.

As an enforcement mechanism, Section 518(56) allows the regulatory authority to impose penalties for violations of the Act's provisions. Once the regulatory authority imposes a penalty, Section 518(c)(57) provides:

The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account.(58)

Section 518(c) further provides that failure to make the required escrow deposit within the 30 day time period constitutes a waiver of all legal rights to contest the violation or penalty amount.(59) Federal courts have held that prepayment of the penalty as a condition of appeal does not violate a party's constitutional rights and, in one situation, have held meritless a penalized company's defense that it was protected by a "hold harmless" indemnification agreement with its sublessee.(60)

In United States v. Hill, (61) the government sought to recover civil penalties under SMCRA against a construction company that had leased the right to remove coal from a tract of land. (62) The construction company subsequently subleased the tract for actual mining operations. As part of this agreement, the sublessee entered into a hold-harmless agreement with the construction company. (63) Thereafter, the United States brought a complaint against the construction company for various SMCRA violations. The construction company did not respond and a finding was entered against it as permit holder. The construction company also failed to put money in an escrow account under Section 518(c) to preserve its right of appeal.

The government sought to recover the penalties imposed. The contractor asserted in defense that it had forwarded the government's notices of violation to the sublessee and the sublessee was required to insulate it from liability under the hold-harmless agreement. (64) In ruling that the contractor, as holder of the permit, could not escape compliance with the statute, both the administrative review board and the district court rejected the "indemnity" agreement as a defense. (65)

§ 7.04. Indemnification and Insurance.

An express clause requiring insurance in a mining contract does not guarantee that the party allocated the risk has adequate resources to satisfy a potential liability. The party allocated the risk must also be able to fund the potential liability. Some individuals and corporations have sufficient capital to insure themselves, but the majority of contractors and mineral owners must fund the potential liability through an insurance policy purchased from an insurance company. Insurance creates its own set of issues, foremost of which is whether the insurance policy provides adequate coverage for the risks allocated by the contract.

Failure to require and to review insurance policies for coverage of risks allocated under the mineral contract can result in liability ultimately falling on the indemnified party.

Example 1

A mineral owner and contractor negotiate an agreement for the removal of coal from the mineral owner's property. As part of the agreement the mineral contract contains an indemnification clause by which the contractor agrees to indemnify and save the mineral owner harmless from any liability to any third party. The contract further requires the contractor to provide certificates of proof of valid CGL insurance and
personal injury liability insurance.

Shortly after mining operations begin, a non-employee is injured on the site, and the owner and contractor agree that the contractor is liable to the third party under the mineral contract's indemnification clause. The contractor then looks to the insurance company for coverage under the personal injury liability policy. If the policy's provisions do not cover the third-party's injuries, the contractor must pay the liability from its own assets. If the contractor has insufficient assets to pay this uninsured third-party liability, the owner may have to do so under various theories of tort recovery.

To prevent this scenario, the owner not only must draft the indemnification clause to require adequate insurance, but also must draft contract provisions allowing review of the insurance policy for compliance with the contract's risk allocations.

[1]--Drafting Considerations.

As demonstrated in Example 1, merely allocating risk in an indemnification clause does not guarantee available funding should liability arise. The indemnified party must take further steps to guarantee adequate funding by requiring the indemnitee to purchase insurance comporting with the risks allocated to it in the contract. The following discussion sets forth some of the issues in drafting and verifying these requirements.

[a]--Policy or Certificate.

The mineral contract may contain a clause for insurance requiring the contractor to secure specific types of insurance coverage, e.g., workers’ compensation and employer's liability insurance. The contract may also require that the contractor maintain a CGL or personal injury liability policy, or both.

The contract may require the contractor to provide the owner with a certificate of insurance attested by an authorized representative of the insurance carrier evidencing that the required insurance is in force and effect. The certificate provides proof of insurance but does not inform the owner of the exclusions, conditions, limitations, and indorsements to the policy. Accordingly, the insurance policy evidenced by the certificate may contain either or both exclusions and indorsements limiting coverage of the risks allocated to the contractor.

Example 2

The contractor agrees to indemnify the mineral owner for liability arising from blasting operations and provides the owner with a certificate of personal liability insurance. Unknown to the mineral owner, the personal liability policy contains an indorsement denying coverage for liability arising from ultra-hazardous activities. Thereafter, a third party is injured in a blasting accident and subsequently sues the mineral owner. The mineral owner looks to the contractor who in turn looks to the insurance company to pay the liability. The insurance company denies coverage under the ultra-hazardous activity indorsement, and the contractor assumes liability for the injury. If the contractor is unable to pay the damages award, liability will ultimately fall on the mineral owner.

To protect against this situation, the owner can require the contractor to provide it with a copy of the policy as well as the certificate of insurance. By requiring copies of the policy and certificate, the owner can review the adequacy of the policy's coverage of risks assigned under the indemnification clause.

[b]--Subrogation.

Subrogation is the lawful substitution of one party for another with reference to a lawful claim or right. Subrogation arises under principles of equity or by express agreement and operates to prevent the legally
Subrogation allows the party who pays a liability to step into the shoes of the party who suffered the loss and recover money from the tortfeasor or other party responsible for the loss.\(^{(68)}\)

In the mining context, subrogation may arise when the parties do not properly allocate risks. For example, the operator may purchase insurance for all liability arising from mining operations without naming the owner as an additional insured. If the owner thereafter negligently causes injury to property or a third party covered under the operator's policy, the insurer may have a claim against the owner by right of subrogation. If the owner is unaware of the insurer's rights, it may find itself ultimately responsible for a liability it thought was protected by insurance. To prevent this from happening, the owner and operator can request that the insurer waive its right of subrogation against the owner. An insurer can contractually waive its right to subrogation, but courts strictly construe these waivers in accordance with the specific rights expressly stated in the waiver.\(^{(69)}\) As an alternative, the parties can request that the owner be named as an additional insured to the policy.\(^{(70)}\) Finally, a party can take nothing more by right of subrogation than the rights held by the party for whom it paid liability.\(^{(71)}\)

[c]--Additional Named Insured.

An additional named insured is a party other than the policy holder protected under the policy.\(^{(72)}\) The additional insured may be covered as a specified class (i.e., household member) or as a party specifically named in the policy.\(^{(73)}\) Generally, the naming of an additional insured to an existing policy is less expensive than purchasing a separate policy for the additional party. The disadvantage of naming an additional party to an existing policy, however, is that coverage is subject on all of the insureds complying with policy requirements. Consequently, failure by either the additional named insured or the policy's original insured to comply with the policy's conditions can relieve the insurer of its obligation to provide coverage under the policy.\(^{(74)}\)

Example 3

A CGL policy provides that the insurer is not bound to pay for any loss if the original insured impairs any right of recovery for loss to the property insured. The additional named party leases equipment to the original insured who damages the equipment. After the equipment is damaged, the insured impairs the insurer's right of recovery and the insurer denies coverage for the loss. The additional named insured's loss is not covered, through no fault of its own.

The naming of additional insureds may also delay settlement. Settlement usually requires filing necessary release forms or proofs of loss by all insureds. Failure by one party to file the necessary releases can delay settlement and tie up resources needed to continue the mineral contract.

[d]--Notice of Policy Termination.

In most jurisdictions the insurer is required to serve notice of policy cancellation or termination on the insured.\(^{(75)}\) The insurance company's notice of termination to the insured contractor does not guarantee, however, that the mineral owner will also receive a notice of policy termination.\(^{(76)}\) If the mineral owner is not given notice of the policy termination, the contractor may continue operations without having adequate insurance. Although conducting operations without the required insurance may constitute a breach of contract, the right to damages for this breach does not protect the mineral owner from uninsured liability if the contractor subsequently becomes insolvent.
The mineral owner can protect itself by requiring the contractor to incorporate a clause in the insurance contract whereby the insurer agrees to serve notice on the owner should the insurer cancel the contractor's policy. For example, the mineral owner may require that the insurance policy provide that insurer will not cancel or materially change the policy without giving the mineral owner 30 days prior written notice. By requiring notice, the mineral owner imposes an affirmative duty on the insurance company to notify it before the insurance company will be released from its duty under the insurance contract.

[e]--Claims or Occurrence Coverage.

Another issue to be considered in developing an insurance plan is the type of event which will trigger coverage under the policy. Liability insurance policies are categorized as providing coverage for either "occurrences" or for "claims made." An occurrence policy provides coverage for events taking place within the policy period, regardless of when the claim is made. Although subject to numerous interpretations, an occurrence can be defined as an "accident, an event, or a continuous or repeated exposure to a condition which results, during the policy period, in bodily injury or property damage never expected nor intended by the insured."

In contrast, a claims policy provides coverage only for claims presented during the policy period. If the claim is made while the claims-made policy is in effect, the insurer provides coverage, if not, there is no coverage.

The event which triggers coverage under an occurrence policy is the sustaining of actual damage by the complaining party rather than the negligent act or omission causing the damage. Accordingly, the controlling inquiry under an occurrence policy occurs when the complaining party suffers actual damage. Situations often arise, however, in which the damage caused by a negligent act during the policy's term does not manifest injury until after the policy has expired. For example, the situation has arisen where excavation during the policy's coverage dates caused a landslide after the policy had expired.

In *Travellers v. Humming Bird Coal Co.*, the Kentucky Court of Appeals affirmed a lower court ruling that injuries to an adjacent property's water supply from a landslide caused by the insured strip mining operations were covered under the insured's "occurrence" policy. In *Travellers*, the insured coal company purchased two policies from the same insurer. The first policy ran from February 1956 to February 1957; the second, from September 1957 to September 1958. Each policy had a $5,000.00 award limitation and provided coverage for "all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of . . . the ownership, maintenance or use of premises and all operations."

The coal mining company conducted strip mining operations, including moving earth onto a slope that gradually slipped onto the adjacent property causing damage to the water supply. The adjacent property owner sued after expiration of the first policy and the insurer denied coverage. The coal company settled with the adjacent property owner and sued the insurer for the policy limit. At trial, the coal company was awarded the full policy limit. The appellate court affirmed, holding:

It was unforeseen that the earth removed from the shelf would not secure a firm foothold. Heavy rock and earth do not flow like water. To remove this earth and rock from the shelf was a natural operation of strip or surface mining. It is true if the earth continued to move, it would inevitably reach the Melton farm. But a foothold might be regained, particularly at the beginning of the process. The fact that the possibility of injury is foreseeable is not pertinent for that possibility is always present during the operation of heavy machinery and is indeed the reason for the issuance of the policy.
A more current and hotly contested issue in insurance litigation is coverage for environmental liability. In particular, parties and courts have repeatedly litigated the issue of whether actions made 20 or 30 years ago, which create environmental liability under today's statutes and regulations, are covered under the CGL policy issued at the time the actions were taken.

[i]--Environmental Liability Coverage Under the CGL Policy.

A contractor's CGL policy insures the contractor from liability from bodily injury and damage to personal property arising from the negligent acts of the contractor. Coverage under the CGL before 1966 was triggered by an "occurrence." In the 1970s, insurers issued a revised CGL policy containing a pollution exclusion endorsement. The pollution exclusion clause excluded coverage of pollution-caused liability unless the bodily injury or property damage was caused by a "sudden and accidental" toxic release.

A significant amount of litigation arose out of the "sudden and accidental" exception to the pollution exclusion clause. In the mid 1980's, the insurance companies redrafted the pollution exclusion clause without the "sudden and accidental" exception. The litigation explosion under the pollution exclusion clause has given rise to a split in authority in both federal and state courts.

During the last few years, federal courts have increasingly found the "sudden and accidental" exception to be unambiguous, providing coverage only for abrupt discharges or releases outside the scope of the standard pollution exclusion clause. State supreme courts have differed in their interpretation of the same phrase. Massachusetts, Michigan, New York, North Carolina, and Pennsylvania have all decided that the exclusion clause releases insurers from liability for gradual and intentional pollution.

In 1992, the West Virginia Supreme Court of Appeals held that a pollution exclusion clause did not discharge an insurer from its duty to defend and indemnify the insured from liability arising from long-standing pollution on the insured's property. In Joy Technologies v. Liberty Mutual Insurance Co., the court held that the insertion of a "sudden and accidental" clause into an existing CGL did not alter coverage under the policy as originally issued. The CGL discharged the insurer from liability only for injury and damage resulting from expected and intended pollution. Although the pollution in dispute was gradual and occurred over a long period of time, the court held that it was not intended or expected. Accordingly, the insurer was not discharged.

Other states reaching similar interpretations favoring coverage for damages arising from long-standing pollution on an insured's property include Florida, Georgia, Illinois, New Jersey and Wisconsin. In Claussen v. Aetna Casualty & Surety Co., the Supreme Court of Georgia held that the word "sudden" as used in the clause was capable of more than one reasonable interpretation and, therefore, had to be construed in favor of the insured to mean "unexpected and unintended." The court concluded that the pollution exclusion clause did not preclude coverage for liability for environmental contamination caused by the discharge of pollutants over time.

[ii]--Pollution Insurance in Today's Market.

The dramatic increase in the number of personal and bodily injury claims arising from pollution and toxic waste disposal has caused the insurance industry to restrict the availability of pollution insurance in the current market. The new pollution exclusion clause represents a reappraisal of the risks to be covered and is limited to "laser indorsements," so named because the indorsement will either include or exclude a
specific risk. Coverage under a laser indorsement is limited to specific risks at specific sites involving circumstances where scientific knowledge and periodic inspections can control risks. For example, asbestos removal has become a known controllable risk. Available coverage is restricted, however, by high premiums, large deductibles, and aggregate policy limits.

[f]--Omitted and Duplicated Coverage.

The differing policies and exclusions contained in the policies purchased by various parties to the mining contract create potential for both gaps and unnecessary overlaps in coverage. Accordingly, close coordination among policies is necessary to prevent an omission in coverage that could expose parties to unplanned risks and potential liability. On the other hand, failure to coordinate coverages can result in overinsurance or duplication of policies that provide an added degree of security, but involve needless expense. Duplicate coverage also creates the problem of assigning responsibility among carriers to pay for the loss.

A common drafting error in insurance clauses is the failure to define which insurance contract has primary funding responsibility for the loss. Most policies contain pro rata clauses providing that losses will be paid in proportion to the amount the insurance contract bears to the entire amount of insurance covering the loss. In contrast, some policies contain "excess insurance" clauses or provisions against liability if more specific insurance is present. These clauses provide coverage only for loss or damage in excess of a stated amount provided by another policy. By statute, regulation, and case law, these often conflicting provisions have been interpreted in each jurisdiction. Coordination among insurance carriers before liability arises will result in a speedier settlement.

One way to disentangle conflicting insurance policies is through a Coordinated Insurance Program (CIP). A CIP integrates the parties' various policies into one consolidated package. For example, a CIP would provide coverage for workers' compensation, professional liability, pollution, and other specific risks under a single program managed by a single carrier. The advantage of this program is elimination of gaps and duplicate coverage. Additionally, a CIP may be less expensive than the combined premiums of separate policies.

[g]--Care, Custody, and Control Exclusion.

One common exclusion to the CGL worth special discussion is damage to property in the care, custody, and control of the insured. This provision excludes coverage for damage to property that is the subject of the work. For example, in Meiser v. Aetna Casualty & Surety Co., the Wisconsin Supreme Court held that a plasterer who damaged the wall he was contracted to plaster was not covered under his CGL policy because the wall was in his "care, custody, or control." On the other hand, the court held that damage to the window pane within the wall was covered because the pane was incidental to the property (wall) being worked on and, therefore, not within the exclusion.

Parties to a mining contract must also provide for losses occurring after completion of the work. Unless provided for by indorsement, CGL policies generally do not cover losses occurring after the operator completes the contract. To obtain this protection, the owner often requires the operator to purchase coverage for bodily injuries or property damages occurring after the insured relinquishes possession or completes the contract. As with the CGL, injury to property in the "care, custody or control" of the operator is excluded from coverage.
Insurance contracts may be categorized as either liability or indemnity policies. The general distinction between the two is the time when the insured is entitled to receive coverage under the policy. Coverage under a liability policy attaches, regardless of actual loss, at the time of liability. In contrast, coverage under an indemnity policy attaches only when an actual loss is sustained by the insured in the form of a judgment. In practical terms, a liability policy provides coverage from the moment an action is filed; an indemnity policy provides coverage once a judgment is awarded. An injured third party can not maintain a direct action against the insurer under an indemnity policy because the insurer has no duty to provide coverage for the insured until judgment in favor of the injured third party has been entered against the insured.\(^{(120)}\)

Courts look to the policy's terms to determine the parties' intent as to whether the policy is one for liability or for indemnity.\(^{(121)}\) If the terms are ambiguous, courts generally interpret the policy as providing liability coverage.\(^{(122)}\) The distinction between indemnity policies and liability policies is not self evident. One way to identify an indemnity policy is by a "no action" clause in the contract. A "no action" clause provides that the insured will take no action to recover any loss or expense from the insurer until after a final judgment has been entered against and paid by the insured.\(^{(123)}\)

**§ 7.05. Conclusion.**

The topics discussed in this Chapter represent only a sample of the drafting problems of risk allocation and the funding of assigned risks in a mineral contract. The first step in allocating risk is carefully to draft indemnification provisions assigning responsibility for liability. The second step is to require that potential liability be adequately funded through an insurance policy. Evidence of an insurance policy (e.g., a certificate) does not, in itself, adequately protect the mineral owner. The owner must scrutinize the insurance policy carefully to verify that it adequately protects the contractor from the risks assigned to that contractor by the contract. By double checking the insurance policy, the mineral owner protects itself, verifying that the risks assigned to the contractor are funded. This minimizes the owner's exposure to future liability.

**§ 7A. Appendix -- Sample Indemnity and Insurance Clause to Coal Mining Contract.\(^{(124)}\)**

Contractor shall indemnify owner for claims or liability growing out of or by reason of any act or failure to act of contractor or its agents or employees in connection with any of its or their operations under this agreement.

Contractor shall indemnify owner for any liability that may be sought to be imposed relative to the work to be performed pursuant to the provisions of any law or regulation or permit relating to operations contemplated under this agreement.

The above-specified covenants of indemnity shall survive cancellation, termination or expiration of this agreement.

Contractor shall carry [insurance that will include coverage for any civil action arising under [cite statute, if applicable, making self-inflicted injury or injury intentionally caused by an employer to an employee outside coverage of workers' compensation insurance] and to carry] liability insurance that will include, without limitation, coverage for the liability assumed in the preceding paragraphs, with an insurance company acceptable to owner, licensed to do business in [state], and with minimum general liability bodily injury limits of Dollars ($    ) per person, Dollars ($    ) for each occurrence, and minimum property damage limits of Dollars ($    ) for each occurrence, with owner and its lessor as named insureds, or with such other minimum limits as owner may require from time to time.
The insurance shall not be deemed a limitation on any liability of contractor provided for in this agreement, but shall be additional security therefor.

Contractor shall provide owner with a copy of the policies of insurance required under this agreement and written assurance of the insurance company or companies that owner will be advised in writing not less than ( ) days prior to any cancellation of any insurance.

If at any time contractor shall allow this insurance to lapse, owner may, at its option, terminate this agreement.


2. 2. General Elec. Co. v. Cuban Am. Nickel Co., 396 F.2d 89, 90 (5th Cir. 1968); see generally Restatement (Second) of Torts § 886B (1979).

3. 3. 41 Am. Jur. 2d Indemnity § 1 (1968).

4. 4. Id.

5. 5. Id.

6. 6. Id. at § 6.

7. 7. Id. at § 13.


10. 10. 1 Couch on Insurance 2d § 1:2 (Rev. ed. 1984).


13. 13. Id.


15. 15. Rasmussen at § 11.04.


18. 18. King at § 11.08[3]; 1 Couch on Insurance 2d § 1:91 (Rev. ed. 1984).

1. Campbell v. Louisville Coal Mining Co., 89 P. 767 (Colo. 1907).


25. 6. Id. at 659.

26. 7. Id.

27. 8. Id. at 660.

28. 9. Id. at 661.

29. 10. Id.


32. 13. Id. at 299.


34. 15. Bartnes v. Pittsburgh Iron Ore Co., 143 N.W. 117 (Minn. 1913); Rafferty v. Davis, 103 A. 951 (Pa. 1918); see generally Restatement (Second) of Torts §§ 519-524A (1976).

35. 16. 103 A. 951 (Pa. 1918).

36. 17. Id. at 952.

37. 18. Id.


39. 2. See Rasmussen for a thorough analysis of risk allocation in mining contracts.

40. 3. D.H. Vish, "Mining Contracts," 4 Coal Law & Regulation § 83.09[8][b] (Vish & McGinley ed. 1987) [hereinafter cited as Vish].

41. 4. Mineral development contracts are structured as a contract for services and not for the sale of goods; accordingly, the Uniform Commercial Code does not apply. In particular, U.C.C. § 2-615, relating to commercial impracticability, does not apply except by analogy. See H. McC. Ingram, "Contract Mining Agreements -- The Contract Miner's Perspective," 86 W. Va. L. Rev. 853, 886 (1984); but see U.C.C. §§ 2-509 and 2-510 (allocation of loss in sale and transportation of goods applies to minerals sold after extraction).

42. 5. Vish at § 83.09[9].


47. Id. at § 66.

48. Id. at § 71.

49. Id.


55. 30 C.F.R. § 800.60 (1992) provides:

The regulatory authority shall require the applicant to submit as part of its permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface coal mining and reclamation operations for which the permit is sought. Such policy shall provide for personal injury and property damage protection in an amount adequate to compensate any persons injured or property damaged as a result of the surface coal mining and reclamation operations, including the use of explosives, and who are entitled to compensation under the applicable provisions of State law. Minimum insurance coverage for bodily injury and property damage shall be $300,000 for each occurrence and $500,000 aggregate.


57. 30 U.S.C. § 1268(c).

58. 30 U.S.C. § 1268(c).

59. 30 U.S.C.S. § 1268(c).


61. Id.

62. Id. at 812.

63. Id.

64. Id. at 815.

65. Id.

67. 2. Legal subrogation arises under principles of equity to secure the ultimate discharge of the debt by the party who, in good conscience, ought to pay it. Conventional subrogation, on the other hand, is established by contract or agreement and has been held to be the same as an assignment. 73 Am. Jur. 2d Subrogation § 1 (1974).

68. 3. 16 Couch on Insurance 2d § 61:137 (Rev. ed. 1983).

69. 4. See, e.g., Marathon Oil Co. v. Mid-Continent Underwriters, 786 F.2d 1301 (5th Cir. 1986); Industrial Risk Insurers v. Garlock Equip. Co., 576 So. 2d 652 (Ala. 1991).


72. 7. Policies of insurance define "insured" to include the named insured on the policy and certain other classes of persons, such as household members and employees. 12 Couch on Insurance 2d § 45:273 (Rev. ed. 1981).

73. 8. Id.

74. 9. Rasmussen at § 11.04.

75. 10. Cancellation is the termination of a policy prior to its expiration arising from the acts of one of the parties. It is distinguished from lapse, expiration, or termination of the policy by the policy's own terms. 17 Couch on Insurance 2d § 67:1 (Rev. ed. 1983).

76. 11. Most states regulate by statute the requirements for policy cancellation to include the number of days of advance notice required and parties to be notified. See, e.g., Minn. Stat. Ann. § 65B.17 (1986) (automobile insurance).

77. 12. A reservation in an insurance policy of a right to cancel upon notice to the insured or other parties identified in the policy makes notice a condition precedent to the right of the insurer to cancel the policy. See, e.g., John Bader Lumber Co. v. Employers Ins. of Wausau, 441 N.E.2d 1306 (Ill. Int. App. Ct. 1982).


81. 16. Id.

82. 17. See generally, R.C. Tinney, Annotation, Event as occurring within period of coverage of "occurrence" and "discovery" or "claims made" liability policies, 37 A.L.R.4th 382, 390 (1985).


84. 19. 371 S.W.2d 35 (Ky. 1963).

85. 20. Id. at 37.
86. 21. *Id.*

87. 22. *Id.* at 38.

88. 23. Insurance companies have restricted the availability of claims-made policies in response to an industry wide proliferation of latent claims for acts taken prior to a policy's effective dates. *King* at § 11.08[6].


100. 35. Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co., 528 A.2d 76 (N.J. 1987).


103. 38. *Id.* at 687.


105. 40. *Id.*

106. 41. *Id.*

107. 42. *Id.*

108. 43. *King* at § 11.08[4][b].

109. 44. *Id.*

110. 45. Rasmussen at § 11.04.
111. 46. Id.

112. 47. King at § 11.08[5].

113. 48. Id.


115. 50. 98 N.W.2d 919 (Wis. 1959).

116. 51. Id. at 922, 923.

117. 52. Id. at 923.

118. 53. King at § 11.08[1].


