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Allocation of the Risk of Fire Damage Under a Standard Building Construction Contract

The building construction industry, like many others, makes frequent use of standard contracts that cover most of the terms of agreement between an Owner and Contractor. The American Institute of Architects' "General Conditions," one of the most widely used standard contracts, provides a scheme for shifting the risk of fire damage; but the provision is ambiguous as to the period of time during which it applies. In considering the problem raised by this ambiguity, the author of this Note examines the insurable interests of the Owner, Contractor, and subcontractors and discusses the proper considerations in allocating the risk between them.†

I. INTRODUCTION

Many contracts for the construction of buildings in the United States today are based upon standard provisions describing the rights, responsibilities, and relations between the Owner and Contractor, as well as the Architect and any subcontractors.¹ The most widely used contract form is "The Standard Form of Agreement Between Owner and Contractor," published by the American Institute of Architects (AIA),² which incorporates a set

† Much of the information and material upon which this Note is based was derived from personal interviews with contractors, architects, and insurancemen in the Minneapolis and St. Paul area. The author of this Note wishes to express his appreciation for the valuable cooperation and assistance of these people.

1. The Contractor is responsible for the construction of the building project according to the plans and specifications furnished by the Architect. The Owner often engages a single Contractor, called a General Contractor, who is in charge of the entire project. But the Owner may, especially for large, complex projects, contract directly with several independent Prime Contractors for separate major parts of the work, for example, general construction, mechanical, electrical, and specialty work. Either the General Contractor or the several Prime Contractors may let out part or all of their work to subcontractors, who have no direct contractual relations with the Owner. See generally AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE, ch. 2, at 2, ch. 16, at 2 (1963 ed.) [hereinafter cited as ARCHITECT'S HANDBOOK].

2. The AIA, a national professional society, publishes three basic Owner-Contractor Agreement Forms: AIA Doc. A101 (1963 ed.), in which the basis of payment is a stipulated sum; AIA Doc. A107 (1963 ed.), a short form for

of standard conditions known as "The General Conditions of the Contract for the Construction of Buildings" [hereinafter referred to as the General Conditions].³ The Owner-Contractor Agreement and General Conditions, along with the Supplementary General Conditions,⁴ the Working Drawings, the Specifications, and any Addenda, form the construction Contract Documents.⁵

The General Conditions, having been published by the AIA since 1911, are the result of years of experience in the building construction industry and reflect the customs and procedures most generally followed for both private and public building projects and under either stipulated-sum or cost-plus-fee contracts.⁶ The aim of the General Conditions is to establish a national standard, providing a uniform basis for those contract terms common to most building construction contracts.⁷ As a result of the general acceptance and wide use of the General Conditions, building contracts are easily negotiated, frequently without the assistance of legal counsel; it is important, therefore, that the standard provisions be clear and comprehensive.

An important topic covered by the General Conditions is the risk of damage to the building by fire during the contract period.⁸ Article 29 of the General Conditions requires the Owner, unless otherwise provided, to

effect and maintain fire insurance . . . upon the entire structure . . .

small construction contracts in which the basis of payment is a stipulated sum; and AIA Doc. A-111 (1963 ed.), in which the basis of payment is the cost of the work plus a fee. These documents are printed in ARCHITECT'S HANDBOOK App.

3. AIA Doc. A201 (9th ed. 1963), printed in ARCHITECT'S HANDBOOK App. The short-form Owner-Contractor Agreement, AIA Doc. A107, *supra* note 2, contains its own brief set of general conditions.

4. The Supplementary General Conditions are special and alternative conditions which supplement or modify the General Conditions according to the special needs of the parties and circumstances involved in the particular building project.

5. See General Conditions art. 1(a); ARCHITECT'S HANDBOOK ch. 17, at 1 & 2.

6. See *id.* ch. 13, at 1 & 2.

7. See ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., A SUGGESTED GUIDE TO BIDDING PROCEDURE ON BUILDING CONSTRUCTION pt. III (3d ed. 1959). This pamphlet may be found in MINNESOTA SOCIETY OF ARCHITECTS OF THE AMERICAN INSTITUTE OF ARCHITECTS AND THE ASSOCIATED GENERAL CONTRACTORS OF MINNESOTA, INC., "THE BLUE BOOK," RECOMMENDATIONS OF THE JOINT COOPERATIVE COMMITTEE pt. III, 4 (2d ed. 1962) [hereinafter cited as "THE BLUE BOOK"].

8. The term "contract period" purports to cover that time during which the relations of the parties are governed by the contractual documents. See text accompanying notes 14-23 *infra*.

to one hundred per cent of the insurable value thereof The loss, if any, is to be made adjustable with and payable to the Owner as Trustee for the insureds and Contractors and subcontractors as their interests may appear The Owner, Contractor, and all subcontractors waive all rights, each against the others, for damages caused by fire or other perils covered by insurance provided under the terms of this article

The purpose of this provision undoubtedly is to shift the risk of fire damage to an insurer while, by the exculpatory clause, exonerating the parties from liability to each other for damages caused by an insured risk.⁹ This article does not, however, contain any reference to the time period to which the provisions are applicable: The General Conditions do require, for a period of one year after substantial completion of the building, that the Contractor remedy any defective materials or workmanship.¹⁰ The parties should know whether the fire insurance coverage provision, including the exculpatory clause, extends over this one-year guarantee period, beyond the period of construction, so that they may adequately protect themselves against certain risks. The General Conditions' lack of clarity on this point substantially interferes with their usefulness as a standard for the construction industry.¹¹

This particular uncertainty recently resulted in litigation culminating in the Minnesota Supreme Court decision of *Independ-*

9. The exculpatory, or waiver of liability, clause precludes a subrogation suit by the fire insurer against one or more of these parties who might otherwise be liable to the others for part or all of the loss.

10. Article 20 of the General Conditions provides:

The Contractor shall remedy any defects due to faulty materials or workmanship and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of Substantial Completion as defined in these General Conditions, and in accordance with the terms of any special guarantees provided in the Contract. . . .

11. Compare article 29 of the General Conditions with the recommended alternative provision in "THE BLUE BOOK" pt. I, § 1:29, entitled "Builders Risk Insurance (Fire Insurance)," which provides:

The Owner or Contractor . . . as specified shall effect and maintain fire insurance . . . on a completed value form, upon the entire structure . . . to one hundred per cent of the insurable value thereof The loss, if any, is to be made adjustable with and payable to the named insured as their interest may appear

All contractors and all subcontractors, architects and engineers shall be named or designated in such capacity as insured jointly with the Owner in all policies

The recommended alternative to article 31 of the General Conditions concerning Damages in "THE BLUE BOOK" pt. I, § 1:31 adds:

*ent School Dist. v. Loberg Plumbing & Heating Co.*¹² In *Loberg* the building Owner's property insurer sought to recover damages in a subrogation action from a subcontractor whose negligence had substantially destroyed the building during the one-year guarantee period.¹³ The Minnesota court held that it was the intention of the parties, under article 29 of the General Conditions in the contract, to maintain fire insurance on the building for the benefit of both parties and to exonerate each other from liability for damages caused by fire covered by such insurance not only during the period of actual construction but through the one-year guarantee period as well.

The dispute in *Loberg* arose because of the ambiguity of the General Conditions. In order to protect the unwary, article 29, dealing with fire insurance coverage, should be clarified to either reflect the interpretation given it by the Minnesota court or specify a different result. The purpose of this Note is to consider the problem raised by *Loberg*, although without evaluating the *Loberg* court's interpretation of article 29, and to indicate all of the relevant factors that ought to be considered in determining the allocation of the risk of damage to a building by fire among the parties to the contract during the contract period. The building construction setting will be examined in order to identify the various insurable interests of the Owner, Contractor, and subcontractors during this period. Factors such as cost, certainty, and convenience of obtaining adequate insurance coverage will be considered from the standpoint of the parties, and an attempt will be made to clearly define the extent of the risks to which relevant insurers will be exposed. Once the rights, responsibilities, and relations of the parties are clearly established, insurance coverage or other protection can be obtained that will give the most satisfactory result to the problem raised by *Loberg*.

If either party to this contract should suffer damage in any manner other than fire . . . or other insured perils because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage

The effect of these provisions appears to be the same as that of the fire insurance provision of the General Conditions except that all the parties are to be named as joint insureds in the fire insurance policy.

12. 123 N.W.2d 793 (Minn. 1963).

13. The fire insurance and damage provisions were almost identical to those recommended by "THE BLUE BOOK," quoted in note 11 *supra*. The Owner had maintained a Builders' Risk fire insurance policy, see text accompanying notes 49-51 *infra*, naming all required Contractors and subcontractors as joint insureds until it expired, one week after the building was accepted as substantially complete, at which time policies naming the Owner alone as the insured were procured.

II. THE CONSTRUCTION SETTING

A. DEFINITION OF THE CONTRACT PERIOD

The "Contract Period" itself is somewhat uncertain. The General Conditions contemplate a period of time extending from the awarding of the contract¹⁴ to the end of the guarantee period, one year after the date of Substantial Completion of the building,¹⁵ the latter being the date on which the building is ready for the Owner's occupancy in accordance with Contract Documents.¹⁶ This date is generally set by the Architect, who, after a thorough inspection of the building, issues a "Certificate of Substantial Completion"¹⁷ for the approval and acceptance of the Owner and Contractor.¹⁸ This Certificate sets the date for completion of a "punch list," work that must be completed or corrected by the Contractor before final payment will be authorized,¹⁹ and provides that the Owner accepts the building as substantially complete and will assume full possession at a specified time.²⁰ If no Certificate is issued, the date of Substantial Completion is customarily regarded as the date on which the Owner occupies or assumes possession of the building or could occupy it for the purpose intended.²¹

The Contract Period can be significantly divided into two parts: the "Construction Period," the major part, which runs from the awarding of the contract to the date on which the building has been completed and final payment made; and the "Guarantee Period," one year in length, which runs from the date of Substantial Completion to the end of the Contract Period. Since final payment is seldom made until after the date of Substantial

14. The third paragraph of article 3 of the General Conditions provides: "Immediately after being awarded the contract the Contractor shall prepare an estimated Progress Schedule and submit same for Architect's approval. It shall indicate the dates for the starting and completion of the various stages of construction."

15. See note 10 *supra*.

16. See General Conditions art. 1(a).

17. AIA Doc. G-704 (1963 ed.), printed in ARCHITECT'S HANDBOOK App.

18. See General Conditions art. 25.

19. Generally 5 to 10% of the partial (monthly) payments due the contractor are withheld pending final completion, after which this final payment is made. See generally "THE BLUE BOOK" pt. I, §§ 2:13, :15, :16.1.

20. The Certificate of Substantial Completion, *supra* note 17, provides that "the Owner *accepts* the project or specified area of the project as substantially complete. . . ." (Emphasis added.) If no Certificate is issued, acceptance probably occurs at the time the Owner occupies the building. See generally ARCHITECT'S HANDBOOK ch. 18, at 10.

21. See "THE BLUE BOOK" pt. I, § 2:5 B.

Completion, these two periods often overlap. Contracts generally provide that final payment shall be made 30 days after the date of Substantial Completion, providing the punch list is complete and the Contractor has furnished satisfactory proof of payment for all labor, materials, and equipment as required under the contract.²² Although final payment may be delayed for many months for one reason or another, 30 days is generally adequate time for final completion.²³

B. THE INSURABLE INTERESTS

There are several somewhat overlapping insurable legal interests of the Owner, Contractor, and subcontractors during the Contract Period. Unless otherwise provided in the contract, the risk of fire damage, however caused, as well as casualty, is on the Contractor until acceptance of the building by the Owner, the date of Substantial Completion, at which time this risk shifts to him;²⁴ if the building were destroyed or damaged, the Contractor would have to rebuild it without being entitled to further payment,²⁵ notwithstanding that legal title to the partly finished structure is in the Owner.²⁶ This risk gives the Contractor an insurable legal interest in the building.²⁷

After acceptance of the building by the Owner, the Contractor remains obligated to complete his punch list and also remedy any defects in the work appearing during the remainder of the Guarantee Period. If he negligently damages the building while fulfilling these contractual obligations, he is liable to the Owner unless the contract provides otherwise; the subcontractors have a similar liability interest throughout the entire Contract Period. This potential liability for negligence gives the Contractor as well as the subcontractors an insurable legal interest.²⁸

22. See *id.* pt. I, § 2:15; AIA Docs. A101, A107, *supra* note 2 (article 5 of the Owner-Contractor Agreement forms).

23. See generally ARCHITECT'S HANDBOOK ch. 17, at 4.

24. Cf. PATTERSON, ESSENTIALS OF INSURANCE LAW 118 (2d ed. 1957).

25. See *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S.W. 892 (1906).

26. Cf. PATTERSON, *op. cit. supra* note 24, at 118.

27. See PATTERSON, *op. cit. supra* note 24, at 118. Article 12 of the General Conditions, entitled "Protection of Work and Property," seems to indicate that damage to the building which is beyond the Contractor's control and not caused by his negligence is not his responsibility:

The Contractor shall . . . protect the Owner's property from injury or loss arising in connection with the Contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the Contract Documents or caused by agents or employees of the Owner, or due to causes beyond the Contractor's control and not to his fault or negligence.

28. See PATTERSON, *op. cit. supra* note 24, at 117-18.

One type of interest that all of the parties have at some time during the Contract Period is a property interest — an ownership or security interest — in the building itself. The Owner has this interest prior to the date of Substantial Completion because he is the legal owner during this period.²⁹ The interest is insurable notwithstanding the Contractor's obligation to rebuild without additional compensation.³⁰ To the extent that the Owner has made progress payments during construction,³¹ his interest is a very real one, representing not only legal title, but a capital outlay as well. After acceptance of the building by the Owner on the date of Substantial Completion, at which time the risk of damage to the building by fire and casualty shifts to him,³² his insurable property interest becomes even greater. The Contractor and subcontractors have a property interest in the building during the Construction Period; this "mechanic's lien" is an insurable security interest that represents the amount of money owed them at any one time for work and materials dedicated to the project,³³ which terminates with final payment.³⁴

III. ALLOCATION OF RISKS

A. GENERAL CONSIDERATIONS

The primary consideration in allocating the risks should be to provide the parties with adequate protection — the parties may either acquire protection themselves or be protected by one of the other parties. Although this goal may be attained by several different allocations, such factors as minimization of costs, certainty of protection, and convenience will make some distribution schemes more desirable than others. The interests of the Owner, Contractor, and subcontractors are separate and distinct insurable interests, and the cost of insuring each one separately is not necessarily the same as insuring two or more under a single multiple-interest policy. The ease and certainty with which insurance companies can determine particular risks is a factor in determining the cost of insurance; for example, it might be easier to calculate

29. See text accompanying note 26 *supra*.

30. See *Foley v. Manufacturers & Builders' Fire Ins. Co.*, 152 N.Y. 181, 46 N.E. 318 (1897); PATTERSON, *op. cit. supra* note 24, at 114-15.

31. All three AIA Owner-Contractor Agreement Forms provide for periodic progress payments of the contract sum. See article four of AIA Docs. A101, A107 and articles 13 & 14 of AIA Doc. A-111, *supra* note 2.

32. See note 24 *supra* and accompanying text.

33. See PATTERSON, *op. cit. supra* note 24, at 113.

34. Final payment is usually made 30 days after the date of Substantial Completion. See notes 22 & 23 *supra* and accompanying text.

the appropriate premium for a fire insurance policy covering the property interests of all of the parties together than to figure the premiums for policies insuring each party's interest separately. Also, the more insurance policies used to cover one or more related interests, the greater the administrative costs to the insurers and the greater the possibility of overlapping coverage — both factors tend to raise the total premium. On the other hand, if each party insures his own interests, his certainty of coverage is greater since he is not taking the chance that he will be without protection if another party fails to properly insure for his benefit,³⁵ if the policy is cancelled or lapsed,³⁶ or if the insurer has some defense against the party obligated to insure. Some of the problems with a multiple-interest policy can be avoided, however, by requiring that certificates of insurance be filed with each of the parties; or by requiring that each of the parties be named a joint insured in the policy, for the insurer would then give each insured direct notice in case of cancellation, lapse, or expiration.³⁷ Further, if the policy were considered severable as to each insured, a defense against one party would not be good against the others.³⁸ In the event of a loss, however, the insurance proceeds from a multiple-interest policy are payable to all of the insureds jointly, so that the inability or unwillingness of any party to indorse could tie the proceeds up indefinitely.³⁹

Another consideration in allocating the risks is that most, if not all, contractors and subcontractors carry permanent liability insurance as a matter of course. In fact, article 27 of the General Conditions requires the Contractor to carry a specified amount of property damage liability insurance.⁴⁰ The limits and coverage

35. See KEETON, *BASIC INSURANCE LAW* 205 (1960).

36. See generally Young, *Insurance Contracts: The Discontinuance Question*, 30 *INS. COUNSEL J.* 146, 149 (1963).

37. Cf. *Fields v. Western Millers Mut. Fire Ins. Co.*, 290 N.Y. 209, 48 N.E.2d 489 (1943) (notice to mortgagee under standard (union) mortgage clause).

38. See *Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n*, 305 N.Y. 243, 112 N.E.2d 273 (1953). See also *Aetna Ins. Co. v. Eisenberg*, 188 F. Supp. 415 (E.D. Ark. 1960), *aff'd*, 294 F.2d 301 (8th Cir. 1961).

39. If the contractor were going through bankruptcy, for instance, it might be very difficult to get his indorsement without considerable delay and bother. For similar considerations, see "THE BLUE BOOK," pt. V, ch. I, at 1 & 2.

40. This article, entitled "Contractor's Liability Insurance," provides:

The Contractor shall maintain such insurance as will protect him from . . . claims for damages to property—any or all of which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. This in-

under these policies vary considerably, however, depending on the particular job and the needs of the individual insureds, and may be insufficient to cover liability for extensive damage by fire.⁴¹ Moreover, this insurance will often exclude damage to "property in the care, custody, or control of the insured."⁴²

A further point to consider is the dual nature of fire insurance coverage. Traditionally, it covers the property interest of the insured, giving him the right to receive some or all of the insurance proceeds as indemnity for his loss.⁴³ A second aspect is to protect the insured from liability for his own negligence in causing damage to the insured property;⁴⁴ the basic principle that no subrogation is allowed against an insured⁴⁵ prevents the insurance company from enforcing its subrogation rights against someone it has agreed to protect in the same insurance contract. Thus where there is a single named insured, his negligence in causing the insured event does not bar recovery under the policy, absent fraud.⁴⁶ Where there are several parties named as joint insureds, whether the negligence of one will subject him to liability for damage to the interests of his fellow insureds is uncertain. Logically, the rights of the parties against each other for negligently damaging their particular interests should not be affected by the existence of an insurance policy covering them jointly; and a court would probably prevent the parties' rights against each other from passing to the insurer under subrogation principles by reading an exculpatory clause into the policy. If, on the other hand, one party takes out insurance on property for the benefit of himself and several other parties having an insurable interest, each of the parties should waive his rights against the other for damages caused by an insured fire, for the "beneficiaries" might not come

insurance shall be written for not less than any limits of liability specified as part of this Contract.

The period during which this insurance must be maintained is not specified.

41. For a general survey of the various endorsements and miscellaneous forms of liability insurance available, see "THE BLUE BOOK" pt. V, ch. I, at 7-13.

42. ARCHITECT'S HANDBOOK ch. 7, at 4. During the Construction Period, the entire building is considered as being within the Contractor's and subcontractors' "care, custody, or control."

43. See generally McCullough, *Property Insurance*, 1963 INS. L.J. 75.

44. See *Independent School Dist. v. Loberg Plumbing & Heating Co.*, 123 N.W.2d 793, 800 (Minn. 1963). See generally *United States v. Globe & Rutgers Fire Ins. Co.*, 104 F. Supp. 632 (N.D. Tex. 1952), *aff'd*, 202 F.2d 696 (5th Cir. 1953).

45. *Federal Ins. Co. v. Tamiami Trail Tours, Inc.*, 117 F.2d 794 (5th Cir. 1941); *PATTERSON*, *op. cit. supra* note 24, at 151.

46. See VANCE, *LAW OF INSURANCE* 91-92, 847 (3d ed. 1951).

within the principle preventing subrogation against an insured because they are not "insureds."⁴⁷

B. DISTRIBUTION OF RISKS DURING CONSTRUCTION PERIOD

During the Construction Period, the most desirable way of covering the risk of loss to the building by fire and protecting the various interests of the parties would seem to be the method provided by article 29 of the General Conditions, a single insurance policy and an exculpatory clause.⁴⁸ This method conveniently provides adequate protection for all of the interests of the Owner, Contractor, and subcontractors during this period for what seems to be the minimum cost, while giving considerable certainty of coverage. Builders' Risk fire insurance⁴⁹ provides coverage designed especially for this purpose, insuring the entire building and other specified property on the premises during the period of construction.⁵⁰ The risk of damage to the building by fire and casualty is on the insurer, and the insurance proceeds will fully protect the property interests of all the parties.⁵¹ By the inclusion in the contract of an exculpatory clause whereby all the parties waive their rights against each other "for damages caused by fire or other perils covered by insurance,"⁵² the Contractor and subcontractors are also protected from tort liability for their negligence. Thus, with only a single insurance policy the premium for coverage of the risks would be minimized, for there is no possibility of overlapping coverage or duplication of administrative costs. Although the Contractor and subcontractors usually carry general property damage liability insurance during the Construction Period, this insurance generally does not cover damage to the building by a negligently caused fire since the building is

47. Cf. *General Mills, Inc. v. Goldman*, 184 F.2d 359 (8th Cir. 1950), cert. denied, 340 U.S. 947 (1951); Matan, *Liability for Loss by Fire Among Insurer, Tenant and Landlord*, 25 OHIO ST. L.J. 335 (1958); 6 VAND. L. REV. 408 (1953).

48. See text following note 8 *supra*.

49. This is a standard fire policy with a Builders' Risk endorsement. See, e.g., Uniform Standard Minnesota Builders' Risk Completed Value Form No. 17 C (1962 ed.).

50. See ARCHITECT'S HANDBOOK ch. 7, at 5. Note that under article 29 of the General Conditions loss of use coverage is left to the Owner's discretion.

51. The policy can be carried either by the Owner or Contractor for the benefit of all the parties, as under article 29 of the General Conditions, or all the parties can be named or designated as joint insureds, as under the alternative to article 29 recommended in "THE BLUE BOOK" pt. I, § 1:29.

52. General Conditions art. 29; see text accompanying note 8 *supra*.

deemed to be in the Contractor's and subcontractors' "care, custody, or control" until the date of Substantial Completion.⁵³

C. DISTRIBUTION OF RISKS FOLLOWING CONSTRUCTION PERIOD

Builders' Risk fire insurance is designed to cover interests in a building only during the period of actual construction. After the building is occupied by the Owner and put to the use for which it was intended, the building has a new risk classification, and the Builders' Risk policy is no longer applicable.⁵⁴ Also, interests of the parties change at about this time so that it is necessary to redetermine the most desirable way of protecting the various interests for the remainder of the Contract Period.

The parties have two basic interests regarding the risk of damage to the building by fire after final payment has been made: a property interest, representing the full value of the building, in the Owner, who also bears the risk of loss by fire or casualty; and a liability interest in the Contractor and subcontractors for possible negligence leading to damage to the building by fire. The latter interest is primarily a result of the Contractor's and subcontractors' obligation under the General Conditions to remedy any defect in the work during the remainder of the Guarantee Period.⁵⁵ In their frequent contact with the building, they are exposed to a certain risk that could, as *Loberg* illustrated, result in substantial liability for damages. Furthermore, since the making of final payment is not a waiver of claims by the Owner for work not complying with the Contract Documents, the Contractor is legally responsible for any such irregularities, regardless of when they appear, limited only by the statute of limitations in the particular state.⁵⁶

The most desirable way of protecting the parties against the risk of fire damage following the Construction Period appears to be simply to require each party to protect his own interest as he sees fit. The nature of the interests is such that it would seem

53. See note 42 *supra* and accompanying text.

54. The third clause of the Builders' Risk Completed Value Form, *supra* note 49, entitled "Occupancy Clause," provides: "It is a condition of this insurance that the premises shall not be occupied without obtaining the consent of this Company endorsed hereon; except that machinery may be set up and operated solely for the purpose of testing the same without prejudice to this policy." It might be desirable to change this language to read: "the premises shall not be occupied for longer than 30 days without obtaining the consent of this Company endorsed hereon"

55. See note 10 *supra* and accompanying text; General Conditions art. 37(a) (dealing with the obligations of the subcontractors to the Contractor).

56. See General Conditions art. 25; ARCHITECT'S HANDBOOK ch. 13, at 5.

unwise to prescribe any rigid pattern of protection in the General Conditions. Since the entire property interest in the building is in the Owner, he should be free to protect it according to his own particular needs. Thus, governmental bodies and large business enterprises might prefer to self-insure the building, while other Owners might rather take out varying amounts of fire insurance upon expiration of the Builders' Risk policy. The general property damage liability insurance, carried as a matter of course by Contractors and subcontractors,⁵⁷ would clearly cover their liability for fire damage to the building caused by their negligence since the building is no longer in their "care, custody, or control."⁵⁸ The normal limits of this insurance might be inadequate, however, since liability for fire is likely to be greater than for any other single insured event, so that additional coverage might be needed.

If the Owner carries fire insurance and the Contractor and subcontractors carry liability insurance, in the event one of the latter negligently damages the building, the fire insurer might bring a subrogation action, like *Loberg*, against the liability insurer. This result simply shifts the burden among insurers and tends to increase the total cost to the parties as well as increase the possibility of litigation.⁵⁹ Therefore, if the Owner plans to

57. See note 40 *supra* and accompanying text. Protection of this type is generally needed anyway, to protect them from liability arising out of small repair and installation jobs and other activity not covered by the General Conditions.

58. There may be an overlapping of coverage here since the insurance carried by the Contractor must also cover damage caused by his subcontractors, see General Conditions art. 27, and they presumably have liability insurance covering such risks as well. These risks could possibly be covered by the subcontractors for the benefit of the Contractor as well as themselves or he could carry a master liability policy covering both his subcontractors and himself. The feasibility of such an arrangement, however, is probably best left up to the ingenuity of the insurance industry.

59. Since the cost of insurance is distributed among its insureds, it should not be shifted to those who cause the fire unless the two groups or enterprises are fairly distinct and unrelated. See James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. Rev. 537, 562 (1952). Investigations with subrogation in mind must be much more extensive and thorough than those merely to determine that an insured fire occurred. See Sinnot, *Subrogation Investigations of Fires and Explosions*, 1962 Ins. L.J. 41. Furthermore, the enforcement of subrogation rights amounts to a net loss to the insurance industry as a whole, since what the fire insurer gains, the liability insurer loses, and the costs of litigation are subtracted from the recovery. See Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 871 (1962).

carry his own fire insurance on the building after the Construction Period, the Contractor should require a provision in the Supplementary General Conditions whereby the Owner waives all rights against the Contractor and subcontractors for damage caused by fire or other perils covered by insurance.⁶⁰ This will provide sufficient protection by preventing subrogation by the Owner's fire insurer.⁶¹ Such a waiver should be called to the attention of the fire insurer, however, to prevent a possible defense by the insurance company for impairing its rights of subrogation.⁶² This practice would probably not be strongly opposed by fire insurers and should not result in any appreciable increase in premiums. Furthermore, it might enable the Contractor or subcontractors to carry lower limits of property damage liability insurance. Where the Owner does not plan to carry his own fire insurance after expiration of the Builders' Risk policy, he may not be willing to waive his rights of recovery for negligence against the Contractor;⁶³ but it should be kept in mind that the overall cost to all of the parties is important even in this case, since the cost of protecting the various interests will be reflected in the contract price one way or another.

CONCLUSION

Article 29 of the General Conditions should be changed to specify clearly the time during which fire insurance is to be main-

60. See "THE BLUE BOOK" pt. V, ch. 3, at 1 & 2.

61. In situations where final payment is not made within 30 days after the date of Substantial Completion, the Contractor and subcontractors will still have a property interest in the building until such payment is received. In such a case, if the solvency of the Owner is in doubt, special steps can be taken to protect this interest, such as including all the parties as joint insureds or requiring the Owner to post a bond.

The *Loberg* court suggested that a contractor might have materials and equipment in the building after completion, but as a matter of practice contractors seldom if ever leave anything belonging to them in the building. Any materials intentionally left behind belong to the owner and are for his own use in making repairs. Note also that article 29 of the General Conditions specifically excludes from coverage under the fire insurance policy "tools owned by mechanics, any tools, equipment, scaffolding, staging, towers, and forms owned or rented by the Contractor, the capital value of which is not included in the cost of the work, or any cook shanties, bunk houses or other structures erected for housing the workmen."

62. The Minnesota Standard Fire Insurance Policy allows the insured to designate explicitly in the policy those to whom he has relinquished all rights to recover for loss or damage by fire. MINN. STAT. § 65.011(4). See generally King, *Subrogation Under Contracts Insuring Property*, 30 TEXAS L. REV. 62, 85-92 (1951).

63. *But see* "THE BLUE BOOK" pt. V, ch. 3, at 2.

tained for the benefit of all the parties, in order to avoid the kind of problem raised by *Loberg*. Thirty days after the date of Substantial Completion would be an adequate time limit under most building construction contracts and could be conveniently covered by a Builders' Risk fire insurance policy. Beyond this point there does not seem to be any method of protecting the parties which would be generally acceptable, and their various needs and circumstances would probably best be handled by the Supplementary General Conditions. The cost, certainty, and convenience of various insurance schemes, plus the possibility of an exculpatory clause, are relevant factors in making a final allocation.