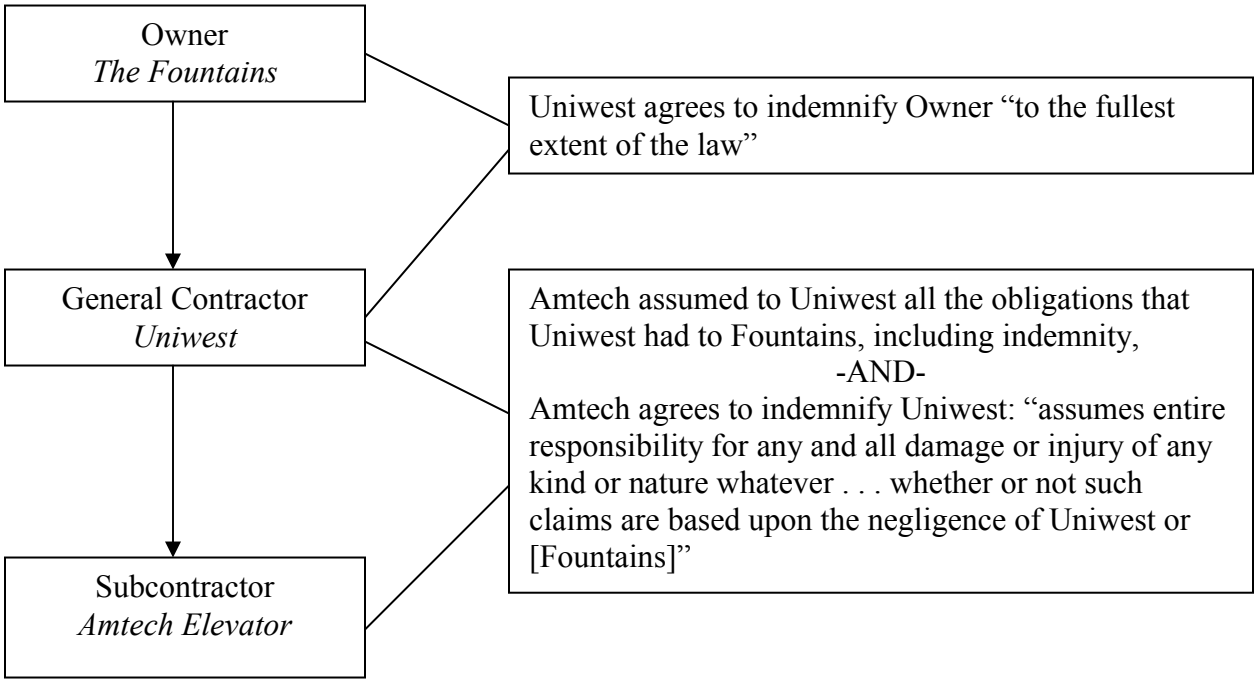
<u>Uniwest Const., Inc. v. Amtech Elevator Services, Inc., et al.</u>, 280 Va. 428 (2010), *withdrawn and remanded in part by* Rec. Nos. 091495, 091496, 091521 (April 21, 2011).



Owner, The Fountains, contracted with general contractor, Uniwest, to renovate a building in Philadelphia. The Prime Contract contained an indemnity provision requiring Uniwest to indemnify The Fountains "to the fullest extent of the law." This indemnity provision also "flowed down" to Uniwest's subcontractor, Amtech, under its Subcontract for elevator work. The Uniwest-Amtech Subcontract also contained the following additional indemnity obligation in Paragraph 10:

> [Amtech hereby assumes entire responsibility for any and all damage or injury of any kind or nature whatever, including death resulting therefrom, to all persons, whether employees of [Amtech], its subcontractors or agents. If any claims for such damage or injury be made or asserted, whether or not such claim(s) are based upon the negligence of Uniwest [or Fountains], [Amtech] agrees to indemnify and save harmless Uniwest from any and all such claims, and further from any and all loss, costs, expenses . . . ."

During the course of the project, scaffolding in the elevator shaft collapsed, killing one Amtech employee and seriously injuring another. The injured employee and the estate of the deceased employee sued Uniwest and others in Pennsylvania. The cases were settled out of court for $9.5 million. Amtech's umbrella insurer, however, refused to participate in the defense and settlement negotiations on the grounds that the indemnity provision of the Subcontract was void under Virginia law.

Uniwest then sued Amtech in Virginia for its failure to fully indemnify Uniwest (through its umbrella coverage) during the litigation and settlement of the Pennsylvania cases. Resolving the case required analysis of two primary issues: (i) first, the indemnity provisions of the Prime Contract and Subcontract; and (ii) secondarily, if there was indemnity, the coverage provisions of the various insurance agreements that may have been available to indemnify Uniwest. On appeal, the Supreme Court of Virginia reached several conclusions regarding the indemnity obligations framed by the contracts:

> 1. The broad indemnity obligation of Paragraph 10 of the Subcontract was void because it violated the public policy of Code § 11-4.1. This statute invalidates all contractual provisions under which a party is indemnified from liability "caused by or resulting solely from the negligence of the other party." In other words, Virginia prohibits Party A from indemnifying Party B for damages caused by Party B's own negligence. As a result, because Paragraph 10 of the Subcontract was so broad as to include this type of prohibited indemnity, it was void in its entirety. The provision was void even though the particular circumstances at issue indicated that the accident was not the sole fault of Uniwest. The validity of an indemnity provision is to be determined by its language, not the circumstances from which the claim arose.
>
> 2. The "flow down" indemnity from the Owner-Uniwest contract did, however, obligate Amtech to indemnify Uniwest, just like Uniwest was obligated to indemnify the Owner. This conclusion underscores that "flow down" provisions incorporated into lower-tier contracts are enforceable.
>
> 3. Because the "flow down" indemnity obligated Amtech to indemnify Uniwest, Amtech's insurer also was required to step up to the plate and indemnify Uniwest.

Initially, the Supreme Court also remanded the case for a determination of the damages for which Amtech was responsible as a result of its indemnity obligations, noting that those damages would need to be apportioned between Amtech and other parties based on each party's relative liability for its own negligence. This determination, however, was withdrawn on April 11, 2011 as inconsistent with the insurance policies at issue Uniwest, however, filed a petition for rehearing noting that the Supreme Court's instructions were inconsistent with language in the operative insurance policies that only covered liability which "arose out of operations conducted by [Amtech] or on [Amtech's] behalf." As a result, the Supreme Court instead remanded for determination of whether the actions would fall under those insuring provisions. Determination of those remand issues in the Circuit Court could take many months.

Chandra D. Lantz, Esq. | Hirschler Fleischer, P.C.
Post Office Box 500
Richmond, Virginia 23218-0500
The Edgeworth Building
2100 East Cary Street, Richmond, Virginia 23223
804.771.9586 phone |804.644.0957 fax
clantz@hf-law.com | www.hf-law.com

This update is a summary overview that may be relevant to the construction industry and does not cover all recent development or issues pertaining to the topic. The information is intended to provide readers with awareness of topics and issues and is not legal advice.