

"The I's Have It"

**Independent Contractors,
Indemnity Agreements and
Intellectual Property**

Time, Manner, Method: Don't Let the Trifecta Get Ya

Presented By:

K. Marc Barré, Jr.

Swift, Currie, McGhee & Hiers

Independent Contractors

- An employer is not responsible for torts committed by a contractor when the contractor exercises an independent business and is not subject to immediate direction and control of the employer

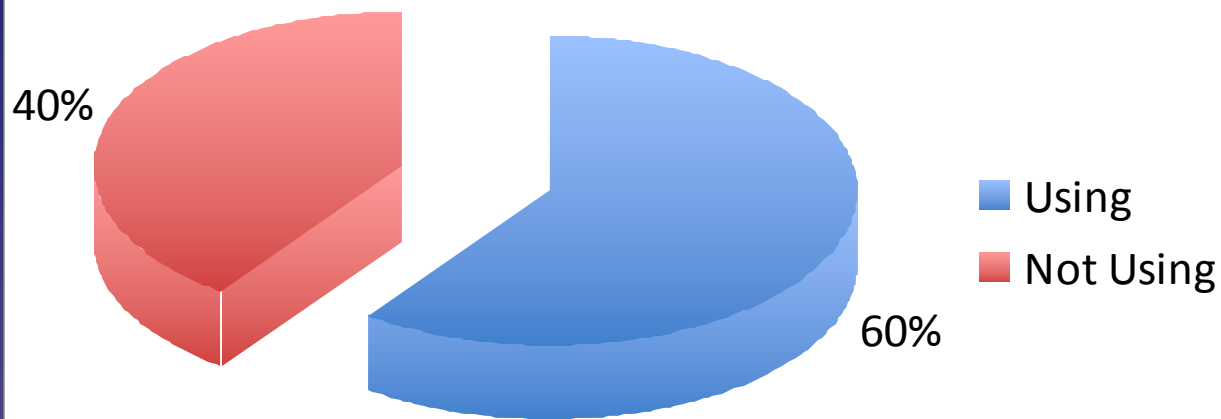
O.C.G.A. § 51-2-4

A Break from Tradition

- Today's workplace includes a variety of workers in contingent arrangements
 - independent contractors
 - leased employees
 - temporary employees
 - on-call workers
- Perceived to be a result of employers' desire to reduce labor costs and employees' desire to increase their flexibility

On the Rise

Independent Contractors in 2005*



* United States Bureau of Labor Statistics

Effect on Litigation

- Liability evaluation must account for independent contractor status
- Employer's portion of liability in cases involving independent contractor can be reduced or eliminated
- Plaintiff is looking for the deepest pocket and will sue all entities up the chain

6 Instances of Employer Liability (O.C.G.A. § 51-2-5)

- (1) Work done is wrongful in itself or if done in the ordinary manner, would result in a nuisance

Example: Plaintiff falls into excavation located on a public street dug by contractor for telephone company. Excavation for telephone lines, if done prudently, is not a nuisance if proper safety and guarding is utilized. Injured Plaintiff cannot recover from telephone company for actions of its independent contractor.

Dekle v. So. Bell Tel. & Tel. Co., 208 Ga. 254 (1951), overruled on other grounds by *Peachtree-Cain Co. v. McBee*, 254 Ga. 91 (1985)

6 Instances of Employer Liability (O.C.G.A. § 51-2-5)

(2) If, based on the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed

Example: Plaintiffs ordered propane from Employer gas company. Employer used Independent Contractor to deliver propane. IC dropped tank, causing an explosion, injuring Plaintiffs. Propane is inherently dangerous and Employer's duty to safely deliver was non-delegable. Employer liable for IC's actions.

Community Gas Co. v. Williams, 87 Ga. App. 68 (1952)

6 Instances of Employer Liability (O.C.G.A. § 51-2-5)

(3) Wrongful act of employee is the violation of a duty imposed by express contract upon the employer

Example: Contract required Employer to comply with OSHA regulations involving bracing and sheeting in excavation. Liability for breach of those contract requirements, causing injury, is non-delegable to Independent Contractor. Employer liable.

Horn v. C.L. Osborn Contracting Co., 591 F.2d 318 (5th Cir. 1979)

6 Instances of Employer Liability (O.C.G.A. § 51-2-5)

(4) Wrongful act of employee is the violation of a duty imposed by statute

Example: Materials recovery facility was responsible for ensuring transportation of its waste in compliance with regulations promulgated pursuant to the Georgia Comprehensive Solid Waste Management Act and could be responsible for an injury caused by an independent contractor's violation of the regulations.

Perry v. Soil Remediation, Inc., 221 Ga. App. 386 (1996)

6 Instances of Employer Liability (O.C.G.A. § 51-2-5)

- (5) Employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relationship of master and servant or so that an injury results that is traceable to his interference

Example: Plaintiffs injured by tractor-trailer hauling timber to company's mill. At time of incident, driver parking tractor-trailer in his driveway because it was too late to deliver the load to the mill. The driver was only subject to the company's direction while the tractor-trailer was being unloaded on the company's premises. This did not evidence the control necessary to make the company liable for the driver's actions.

Yow v. Federal Paper Board Co., 216 Ga. App. 652 (1995)

6 Instances of Employer Liability (O.C.G.A. § 51-2-5)

(6) Employer ratifies the unauthorized wrong of the independent contractor

Example: Plaintiff customer was injured when he tripped and fell on a convenience store's premises and was impaled by a protruding telephone booth anchor. Telephone company liable for actions of subcontractor hired to remove booth because it knew of the condition and allowed it to exist for 9 months after the removal of the booth.

Bodenheimer v. S. Bell Tel. & Tel. Co., 209 Ga. App. 248 (1993)

Other Considerations for Time, Method & Manner

- How is the contractor paid?
 - By the job?
 - By the ton?
 - By the hour?
- Who owns and provides the tools?
 - Trucks
 - Equipment

Other Considerations

- Instructions
 - Who gives them?
 - How are they given?
- Are taxes withheld from payment?
- Are benefits provided to contractor?
- Does the employer have the right to hire or fire the contractor?

Other Considerations

- Does the employer have the right to direct how the work is done or just the outcome?
- Is the contractor required by the employer to carry certain types of insurance or comply with state or federal laws?
 - Not dispositive

Other Considerations

- Does the employer require the work to be done in compliance with industry standards?
 - Not dispositive

What Do Courts Do?

- Courts consider all factors cumulatively
- Typically independent contractor determination is a question of fact for the jury, but courts sometimes will determine status as a matter of law

What Do Courts Do?

Example: General contractor controls:

- Manner in which truck drivers load their trucks
- Specific destination of haul
- Logistics of load tickets for each trip made to destination
- Whether a particular driver could participate in the job

RESULT: no independent contractor; GC exerts sufficient control over time, manner & method

Enviromediation Services LLC v. Boatwright, 256 Ga. App. 200 (2002)

What Do Courts Do?

Example: General contractor controls:

- What time driver begins work
- Time after which the final load could not be retrieved
- Route taken by drivers to reach destination
- Number of loads that could be taken in a day
- Provided a “Do’s and Don’t’s” book to driver

RESULT: no independent contractor; GC exerts sufficient control over time, manner & method

Davis v. Beasley Timber Co., 241 Ga. App. 706 (1999)

What To Do In Your Case

- If you are handling a claim or case where this issue arises:
 - Is there a contract between the parties explicitly stating the status of the subcontractor as an “independent contractor”?
 - What rights does the general contractor have to control the time, method and manner of the work of the IC?
 - In a litigated matter, file a motion for summary judgment asking the court to determine independent contractor status as a matter of law

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"The I's Have It"

**Independent Contractors,
Indemnity Agreements and
Intellectual Property**

INDEMNITY AGREEMENTS

Presented By:

Terry O. Brantley

Swift, Currie, McGhee & Hiers

Indemnity Agreements

- An agreement between two parties whereby one party, the indemnitor, agrees to hold harmless the other, the indemnitee, for loss or damage
- Common mechanism to shift risks associated with tort liability
 - Liability to third party
 - Costs
 - Expenses

Indemnity Agreements – Overview

- Creation of Indemnity Obligation
- Enforceability
 - “Sole Negligence” of Indemnatee
 - O.C.G.A. § 13-8-2
- Perfecting an Indemnity Claim
- Other Risk Shifting Tools
 - Additional Insured Provisions
 - Contribution

Contractual Indemnity

- Must express an intent to shift risk to indemnitor
 - Agreements strictly construed against indemnitee
 - Oral agreement generally barred by statute of frauds
 - Can be created by incorporating terms of another contract. *Walls v. Atlantic Realty* (Ga. App. 1988)
- “[Indemnitor] agrees to indemnify and hold harmless [Indemnitee] from any and all liabilities”
 - Arising out of
 - Occasioned by
 - Relating to

Enforceability

- Enforced as Written
 - If language is clear, courts will not pass on wisdom, mistake or ignorance associated with the decision to enter into the agreement
 - Must identify the extent of indemnity
- Agreement will be enforced if it comports with Georgia public policy

Myers v. Texaco (Ga. App. 1992)

 - Choice of law clause immaterial
- Exceptions to Enforcement
 - “Sole Negligence”
 - O.C.G.A. § 13-8-2

Sole Negligence

- Indemnity for sole negligence of another is generally against public policy
 - Court will not read terms into contract in order to save indemnitee from own negligence
 - Although no indemnity for sole negligence, indemnity exists if negligence combined to cause injury or damage.

Peacock Constr. v. Montgomery Elev. (Ga. App. 1970)

- Exception
 - Indemnity for sole negligence is allowed if the language is CLEAR and UNAMBIGUOUS

O.C.G.A. § 13-8-2

- Indemnity agreements indemnifying indemnitee for sole negligence relating to construction, alteration, repair or maintenance of a building structure, appurtenances and appliances are against public policy
 - Construction of scaffolding needed for repair of paper machine held to “relate to the repair of an appliance or appurtenance.”

Smith v. Seaboard (5th Cir. 1981)

O.C.G.A. § 13-8-2

- Exception
 - Allows indemnity for sole negligence **IF** contract also contains a mandatory insurance provision
 - Permissible to shift risk to insurer.
Federal Paper v. Harbit Yeargin (N.D. Ga. 1999)

Enforcement

- Settlement or Judgment
 - Must be reasonable
 - Must assert available defenses in underlying claim
- Attorney's fees, Costs and Expenses
 - Contract must provide for recovery

Enforcement

- 20-Year Statute of Limitations
 - Begins at time of settlement or final judgment
- Utilize third party practice
- Vouchment - O.C.G.A. § 9-10-13
 - Provides indemnitor opportunity to participate in litigation
 - Prevents challenge regarding reasonableness of settlement
 - Prevents challenge regarding underlying plaintiff's right to recover

Other Risk Shifting Devices

- Insurance
 - Require CGL policy
 - Prevents application of 13-8-2
 - Require “additional named insured” status in CGL policy
- Contribution
 - Ability to obtain pro-rata contribution from joint tortfeasor
 - 20-year statute of limitations

Additional Insured

- Provides a broad duty to defend, i.e. no attorney's fees
- Practical tips
 - Know language of additional insured endorsement
 - Require a certified copy of the policy
 - Abide by the terms of the policy - provide timely notice!
 - Ensure indemnitees are additional insureds
 - Otherwise you become the insurer!
3060 Corp v. Cresecent One (Ga. App. 2009)
 - Consider purchasing a blanket additional insured endorsement

Conclusion

- Indemnity Agreements
 - Generally enforced if clear, concise, unambiguous
 - Exceptions to enforcement of indemnity agreements
- Attempt to Negotiate Additional Risk Shifting Tools

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"The I's Have It"

**Independent Contractors,
Indemnity Agreements and
Intellectual Property**

Intellectual Property and Insurance

Presented By:

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Swift, Currie, McGhee & Hiers

“About half the practice of a decent lawyer is telling the clients they are damned fools and should stop.”

Elihu Root

American Intellectual Property Lawyers Asso. 2007 Survey

Average Costs, Patent, Trademark, Copyright Litigation

Patent:	\$ 2 million
Trademark:	\$ 700,000
Copyright:	\$ 600,000
Trade Secret:	?

Top Three Mistakes Companies Make Re: Insurance

1. Companies **do not** tender insurance claims for intellectual property or antitrust. These are the most under-tendered claims in America.

David Gauntlett

Top Mistakes Companies Make Re: Insurance

2. Companies rely on insurance broker's analysis of complex insurance policy language regarding intellectual property and antitrust claims. Further, insurance brokers give perfunctory verbal analysis of these complicated terms.

David Gauntlett

Top Mistakes Companies Make

Re: Insurance

3. Companies **do not** read their insurance policy language thoroughly.

David Gauntlett

DUTY TO DEFEND

V.

DUTY TO INDEMNIFY

An insurer has a duty to defend the entire complaint if it is arguable that any single claim falls within the policy.

**D. H. Pace Company d/b/a
“Overhead Door Company of
Atlanta”**

v.

**American Overhead Garage
Doors, Inc.**

Allegations

1. Google search leads to sponsored link with heading “Overhead Doors in Atlanta”
2. Domain name
<**overheaddoorsatlanta.com**>
confusing with
<**overheaddooratlanta.com**>
3. Phrase “Welcome to Overhead Doors Atlanta” on website unfair



overhead doors in atlanta

Search

About 163,000 results (0.31 seconds)

[Advanced search](#)

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Garage Door

www.AtlantaOverheadDoor.com Serving 770, 404, 678 Area Codes Valuable "Internet Only" Specials!

[Show map of AtlantaOverheadDoor.com locations near Atlanta, GA](#)

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft

watercraft

b. While it is "auto"; or

c. While it is craft or "au
livered;

but "loading o
movement of
device, other
tached to the a

12. "Mobile equip
types of land v
chinery or equ

a. Bulldozers,
vehicles de
roads;

b. Vehicles m
premises y

c. Vehicles th

d. Vehicles, v
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(1) Power
drills; or

(2) Road o
such as

e. Vehicles no
that are no
primarily to

tached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Construction

it not construction

devices mounted
assis and used to
d

and generators,
g, building clean-
ion, lighting and

nt, including con-
substantially the

y" means injury,
njury", arising out
enses:

risonment;

wrongful entry into,
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that a person oc-
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erson's or organi-
ervices;

n any manner, of
erson's right of pri-

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

vacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - (1) Power cranes, shovels, loaders, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
- e. Vehicles not described in a., b., c. or d. above

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

considered "autos":

- (1) Equipment designed primarily for:
 - (a) Snow removal;
 - (b) Road maintenance, but not construction or resurfacing; or
 - (c) Street cleaning;
- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

- (a) When all of the work called for in your contract has been completed.
- (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
- (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Compare

ISO 2001CG00011001

This insurance does not apply to:

a. Knowing Violation of Rights of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

"Personal and advertising injury" arising out of

2. Exclusions

This insurance does not apply to:

a. Knowing Violation of Rights of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

ability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

ment".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

I. Unauthorized Use of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants or irritants.

- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

- a. Any Insured
To any insured, except "volunteer workers".
- b. Hired Person

I. Unauthorized Use of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

provided that:

- (1) The accident takes place in the "coverage territory" and during the policy period;
 - (2) The expenses are incurred and reported to us within one year of the date of the accident; and
 - (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.
- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:
- (1) First aid administered at the time of an accident;

Due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

- 1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
 - a. All expenses we incur.

**With
ISO
1998
CG00010798**

**COVERAGE B PERSONAL AND ADVERTISING
INJURY LIABILITY**

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance ; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. "Personal and advertising injury":

- (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";
- (2) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
- (3) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
- (4) Arising out of a criminal act committed by or at the direction of any insured;
- (5) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;

- (6) Arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement";
 - (7) Arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement";
 - (8) Arising out of the wrong description of the price of goods, products or services stated in your "advertisement";
 - (9) Committed by an insured whose business is advertising, broadcasting, publishing or telecasting. However, this exclusion does not apply to Paragraphs 14.a., b. and c. of "personal and advertising injury" under the Definitions Section; or
 - (10) Arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
- b. Any loss, cost or expense arising out of any:
- (1) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement

- a. We will pay medical expenses as described below for "bodily injury" caused by an accident:
- (1) On premises you own or rent;
 - (2) On ways next to premises you own or rent; or
 - (3) Because of your operations;
- provided that:
- (1) The accident takes place in the "coverage territory" and during the policy period;
 - (2) The expenses are incurred and reported to us within one year of the date of the accident; and
 - (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

**No
IP
Exclusions**

**Stand Alone
Coverage for Trademark, Patent, Copyright,
or Trade Secret Abatement or Defense**

IPIISC

- **I**ntellectual
- **P**roperty
- **I**nsurance
- **S**ervices
- **C**orporation

The only place in the U.S. for patent and trade
secret insurance.

Cyber Insurance

- **Cyberspace Policies**
 - **Claims – defamation, invasion of privacy, misappropriation of name or likeness, alleged, violation of IP rights in covered media.**

Cyber Insurance

- **Net Secure Policies**
 - Inadvertent mistake, error or omission in the creation, distribution, installation maintenance, modification, processing repair, testing or use of computer system, spread of computer virus, other forms of interruption to electronic information processing systems.

IPO's as Licensors

Key Questions:

1. Is your licensee insured?
2. Is insurance adequate?
3. Is your company named as an additional insured under the policy?
4. Does your license agreement require their insurance to step up before your indemnification provisions are covered?
5. Are indemnification issues covered under the patent owner's policies?

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