# COVER ME

**by DANIEL A. CRIBBS and RAVI R. MEHTA**

*Daniel A. Cribbs is a partner and Ravi R. Mehta associate counsel at Chapman, Glucksman, Dean, Roeb & Barger. Their practice includes complex construction litigation.*

The transfer of risk through express indemnity does not always lessen uncertainty when a claim arises

Additional insured endorsements and express indemnity provisions are common risk transfer mechanisms, but they have generated uncommonly complex and difficult-to-reconcile judicial holdings. Litigation concerning priority-of-coverage disputes that include consideration of the vertical and horizontal exhaustion doctrines is necessarily complex, but it is part of an evaluation of the risks, rights, and obligations of clients engaging in commercial contracts. Courts must consider the insurance policies of the parties as well as the agreements between the insureds to determine the order in which each party's policies must respond to a given loss. As one court has observed, "[E]stablishing a pecking order among multiple insurers covering the same risk…has been characterized as 'a court's nightmare. …'"1

In many jurisdictions, including California, courts resolving a priority-of-coverage dispute face a spectrum of options. On one end, courts may look only to insurance policy language. On the other, they may look only to the contract between the insureds. Insurance policies and contracts—especially those with express indemnity provisions—are often at odds, so, more likely than not, courts will give attention to one at the expense of the other. The difficulty of resolution does not end there. Complex insurance matters typically involve multiple parties, risk transfer provisions in contracts between those parties, additional insured status, multiple layers of coverage, losses exceeding the limits of a single primary policy, and losses that span several policy periods within primary and excess layers.2

To address these complex issues, courts follow one of two doctrines: horizontal exhaustion or vertical exhaustion. Under the former, all applicable primary policies must exhaust before any excess policy may trigger. Under the latter, all primary and excess policies for a given period or party must exhaust before the primary or excess policies of another period or party may trigger. In California, the horizontal exhaustion doctrine is the majority rule.3

An example is illustrative. A construction contract between a general contractor and subcontractor contains an express indemnity provision in favor of the general contractor. Both parties have primary and excess layers of liability insurance, and the subcontractor's primary and excess policies name the general contractor as an additional insured. The value of a loss is greater than the limits of either party's primary policy. The issue presented to a court is the order in which the policies must respond.

Under the horizontal exhaustion doctrine, the insurers in this example must respond to the loss in this order: 1) the subcontractor's primary policy, 2) the general contractor's primary policy, 3) the subcontractor's excess policy, and 4) the general contractor's excess policy. In contrast, under the vertical exhaustion doctrine the insurers must respond to the loss in this

order: 1) the subcontractor's primary policy, 2) the subcontractor's excess policy, 3) the general contractor's primary policy, and 4) the general contractor's excess policy.

When express indemnity is at issue, courts in vertical exhaustion doctrine jurisdictions have criticized the application of the competing horizontal exhaustion doctrine on the basis of circuity of action. The leading cases in this respect are Wal-Mart Stores, Inc. v. RLI Insurance Company and American Indemnity Lloyds v. Travelers Property Casualty Insurance Company.4 In Wal-Mart, Cheyenne, a distributor of halogen lamps, entered into a sales agreement with Wal-Mart that included an express indemnity provision in favor of Wal-Mart for liability resulting from sale of the lamps.5 St. Paul provided Cheyenne with a $1 million primary policy, and RLI provided Cheyenne with a $10 million excess policy.6 Pursuant to the sales agreement, Wal-Mart was an additional insured on both policies. Additionally, National Union issued a $10 million primary policy to Wal-Mart. After St. Paul and RLI paid $1 million and $10 million, respectively, to settle a claim, the Eighth Circuit was presented with the question of whether Wal-Mart and National Union were obliged to pay $10 million to reimburse RLI.7 The court answered no.8

The court based this outcome on the express indemnity provision in favor of Wal-Mart and not on the competing "other insurance" clauses in the RLI and National Union policies.9 These clauses commonly define priority of coverage for an insured when other insurance is available. The court explained its concern regarding circuity of litigation:

[T]o make Wal-Mart or National Union liable to RLI would simply be the first step in a circular chain of litigation that ultimately would end with RLI still having to pay the $10 million. To avoid these results, we hold that Wal-Mart and National Union have no obligation to RLI for any part of the $10 million settlement.10

The court reasoned that if it were to make Wal-Mart liable to RLI for the $10 million payment, Wal-Mart would successfully pursue Cheyenne for express indemnity, obtaining a judgment in its favor. According to the court, Cheyenne would then tender the judgment to its insurer, RLI, which in turn would have to pay $10 million to Wal-Mart, resulting in the same circumstances as those at hand in which RLI has paid $10 million to settle the claim. Similarly, the court reasoned that if it were to make National Union liable to RLI for the $10 million, National Union would step into the shoes of its insured, Wal-Mart, via subrogation against Cheyenne based on the express indemnity provision, again resulting in RLI's payment of $10 million.11 To avoid this circuity, the court in Wal-Mart applied the vertical exhaustion doctrine and relied on an express indemnity provision to shift the entire loss to the indemnitor by way of its insurers.

**A California Case**

In California, the seminal case discussing the treatment of express indemnity in a priority-of-coverage dispute is Rossmoor Sanitation, Inc. v. Pylon, Inc.12 Rossmoor engaged Pylon to construct a sewage pump station and related sewage lines, pursuant to a contract that required Pylon to "indemnify Rossmoor against all claims for damages arising out of the work. …"13 U.S. Fire Insurance Company insured Pylon as a named insured and Rossmoor as an additional insured. The Insurance Company of North America (INA) also insured Rossmoor as a named

insured. During construction, a trench cave-in killed one Pylon employee and injured another. The total loss to Rossmoor was $267,000. INA paid the damages on behalf of its named insured, Rossmoor. The INA and U.S. Fire policies contained nearly identical "other insurance" clauses stating that if the insured had other insurance available to respond to a covered loss, a pro rata apportionment should be made.

Rossmoor sought declaratory relief against Pylon and U.S. Fire for indemnity.14 The trial court found that INA was subrogated to the express indemnity rights of its insured, Rossmoor, that these rights could be exercised against Pylon, and that therefore Pylon's insurer, U.S. Fire, was responsible for the loss.15 The California Supreme Court affirmed the judgment in favor of Rossmoor and INA.16 As a preliminary matter, the Rossmoor court found the loss was sufficient to trigger express indemnity pursuant to the contract.17 Finding the agreement to contain a general indemnity provision, the court reasoned that indemnity may only operate if the indemnitee or Rossmoor is not actively negligent.18 The trial court's ruling that Rossmoor was "at most passively negligent" was unquestioned.19

Next, the court explained why it disagreed with the contention that "other insurance" clauses work to apportion the loss between INA and U.S. Fire. First, "to apportion the loss in this case pursuant to the other insurance clauses would effectively negate the indemnity agreement and impose liability on INA when Rossmoor bargained with Pylon to avoid that very result as a part of the consideration for the construction agreement."20 Second, the court reasoned that INA and U.S. Fire calculated policy premiums knowing that they each may be called upon to respond to a loss such as the one at issue and that neither insurer knew of the other's potential for responding to the loss at the time policy premiums were calculated. In fact, the court found the availability of coverage from INA to be a "mere fortuitous circumstance" for U.S. Fire. Third, the court distinguished its decision by concluding that express indemnity trumps "other insurance" language because the former is the result of bargained-for rights and obligations between the parties, whereas there is no evidence that either INA or U.S. Fire knew there would be other insurance available when they issued their respective policies.21

The Rossmoor court applied basic contract interpretation principles to the insurance policies and the contract. The court's inquiry into the information known to the insurers at the time of calculating policy premiums foreshadows a long line of case law that uses this inquiry as a guidepost in resolving priority-of-coverage disputes. However, subsequent cases have distinguished Rossmoor.

**Reliance National Indemnity**

In Reliance National Indemnity Company v. General Star Indemnity Company,22 the California Court of Appeal explored the boundaries of Rossmoor regarding layers of coverage. Don Law Company and Lollapalooza Joint Venture were organizers and sponsors, respectively, of a rock music festival.23 The sponsorship agreement between the parties contained an express indemnity provision in favor of Lollapalooza. In a $1 million primary policy, Gulf Insurance Company insured Don Law as a named insured and Lollapalooza as an additional insured pursuant to the sponsorship agreement.

24 General Star Indemnity Company also insured both Don Law as a named insured and Lollapalooza as an additional insured with a $10 million excess policy. Reliance National Indemnity Company insured Don Law as a named insured with a $1 million primary policy and a $1 million excess policy.25

A crowd surfing personal injury generated a loss of $2,142,858.26 Reliance and Gulf paid $1 million each under their respective primary policies. Reliance and General Star each paid $71,429 under their respective excess policies. Reliance sought declaratory relief against Gulf and General Star that it was subrogated to the express indemnity rights of its insured, Lollapalooza, and therefore did not have a duty to indemnify its insured until both Gulf and General Star paid their combined policy limits of $11 million. In turn, General Star sought declaratory relief against Reliance that General Star's duty to indemnify did not arise until the Gulf and Reliance primary policies had exhausted.27 The trial court found in favor of General Star and denied the relief sought by Reliance.28 The court of appeal affirmed the trial court's judgment, refusing to enforce the express indemnity provision and relying on the horizontal exhaustion doctrine. The Reliance court's holding turns on the difference between primary and excess coverage. The former attaches immediately upon the occurrence giving rise to liability, while the latter attaches only after a predetermined amount of primary coverage has exhausted.29

The Reliance court also distinguished contribution and subrogation. Contribution is the right to recover from a coobligor, or one who shares liability for a loss.30 Subrogation is the right to recover from a party primarily responsible for a liability by stepping into the shoes of an insured.31 Therefore, "the duty to contribute applies to insurers that share the same level of obligation on the risk as to the same insured."32 In other words, contribution is a form of relief only available between insurers who share the same layer of coverage as to the same insured. By contrast, insurers covering different risks, including different layers of coverage, must rely on subrogation.33 Thus, while acknowledging that Reliance properly instituted its right of subrogation, the court refused to enforce that right, citing "well-established principles of insurance coverage."34 The Reliance court distinguished Rossmoor as a priority-of-coverage dispute between two primary insurers rather than a priority-of-coverage dispute between primary and excess insurers.35 According to the Reliance court, express indemnity cannot trump the well-established principle that a primary policy responds before an excess policy, regardless of which side of an indemnity provision an insured finds itself. Reliance thus highlights the differences between primary and excess insurers.36 A primary insurer charges a higher premium for accepting a greater risk, while an excess insurer charges a lower premium for accepting a lesser risk.37 For this reason, the primary policies of Reliance and Gulf were required to respond to the loss before General Star's excess policy did so. In Reliance, the court placed a limit on the operation of express indemnity in a priority-of-coverage dispute as fashioned by Rossmoor.

**Hartford Develops Rossmoor**

Several years after Reliance, the Second District returned to the treatment of express indemnity in a

priority-of-coverage dispute. Hartford Casualty Insurance Company v. Mt. Hawley Insurance Company38 develops Rossmoor and confronts Wal-Mart. In Hartford, a general contractor, PCS, and a subcontractor, Valley Metal, entered into a contract with an express indemnity provision in favor of PCS. A personal injury accident on the construction site generated a liability of $255,000, which Valley Metal's insurer, Hartford, paid. Hartford filed a contribution action against PCS's insurer, Mt. Hawley, seeking 50 percent recovery.39 The trial court granted Hartford's requested relief. The court of appeal reversed the judgment, however, enforcing the express indemnity provision in the contract to shift the entire loss to the insurer of the indemnitor.40 Hartford unsuccessfully relied on a decision by the First District, Travelers v. American Equity Insurance Company.41 In that case, the court resolved the coverage dispute by considering only the insurance policies. The explanation of why the court did not apply Travelers establishes Hartford as an important progeny of Rossmoor.

The Travelers court refused to apply the express indemnity provision for three reasons. First, it was without sufficient evidence to determine whether the provision may operate.42 Second, only the insurers and not the insureds were parties to the action. Third, reliance on the express indemnity provision would result in an insurer's having to prove that its additional insured (the would-be indemnitee) was negligent.43

The Hartford court first turned to the issue of the factual predicates necessary to operate the express indemnity provision. The contract between PCS and Valley Metal contained an exception to indemnity for liability resulting from the sole negligence or willful misconduct of the would-be indemnitee, PCS.44 The court found the express indemnity provision applied because 1) neither the complaint nor Hartford alleged on appeal that PCS engaged in willful misconduct, and 2) Mt. Hawley had established as an undisputed fact in its summary judgment motion that PCS was not solely negligent.45 Similarly, in Rossmoor, the court relied on the factual finding of the trial court that the would-be indemnitee was "at most passively negligent," thereby triggering the general indemnity provision.46

However, even if the factual predicates necessary for the operation of an express indemnity are not established by a trial court, a reviewing court may use the record to establish those predicates, thereby eliminating the need for a separate action between insureds to determine indemnity rights. 47 For example, the record evidence may be sufficient to adjudicate the preliminary question of the negligence of a would-be indemnitee when liability results from the settlement of a claim. 48 The ability of a reviewing court to determine indemnity rights of insureds when a trial court has not made the requisite findings of fact is particularly significant in construction defect litigation, as a vast majority of disputes are resolved well before a trial court may make any findings of fact. Hartford espouses this position as a way to avoid a separate indemnity action between insureds. In discussing judicial economy and circuity of litigation, Hartford makes a direct comparison to Wal-Mart. The Hartford court observed that in the pending indemnity action between PCS and Valley Metal

PCS would almost certainly establish that it was not the sole cause of the accident, thereby requiring Valley

Metal to indemnify PCS. Mt. Hawley would then be subrogated to PCS's right to recover from Valley Metal the amount awarded to Hartford here. In essence, Hartford's recovery in this case would be returned to Mt. Hawley in the next one.49

Hartford demonstrates that reliance on express indemnity cannot be a matter of course in priority-of-coverage disputes. The express indemnity issue must be addressed in light of contractual and statutory exceptions to its application.

Hartford rejects the position of Travelers that express indemnity between two insureds cannot be adjudged unless those insureds are parties to the priority-of-coverage action.50 This is because insurers may step into the shoes of their insureds via subrogation.51 Even if insureds are not parties to a priority of coverage action, insurers may use discovery to obtain the information necessary to adjudicate express indemnity rights.52

Hartford also addresses a peculiar circumstance that results when a priority-of-coverage dispute arises involving insureds who are parties to an express indemnity agreement and one party is an additional insured of the potential indemnitor.53 For example, PCS was an additional insured of Hartford and a purported indemnitee of Hartford's named insured, Valley Metal. 54 This arrangement placed Hartford in the awkward position of having to prevent operation of the express indemnity provision by proving that liability resulted from the sole negligence or willful misconduct of PCS. Travelers labels this "bad public policy and clearly inconsistent with equitable considerations."55

While expounding on the key tenets of Rossmoor, Hartford was the first California case to subsume the reasoning of Wal-Mart. Hartford respects Reliance in that it recognizes that Rossmoor does not stand for the proposition that express indemnity always trumps the horizontal exhaustion doctrine. In other words, Hartford preserved the proposition in Reliance that express indemnity cannot upset principles of insurance priority when a dispute involves insurers of differing layers of coverage. Three years later a California court had an opportunity to respond to these issues.

**The Limits of Rossmoor**

In JPI Westcoast Construction, LP v. RJS & Associates, Inc.,56 the First District considered Rossmoor and its progeny. JPI and RJS entered into a construction subcontract that contained an express indemnity provision in favor of the general contractor, JPI.57 Transcontinental Insurance Company insured JPI as a named insured via a $1 million primary policy.58 Underwriters at Lloyds insured RJS as a named insured and JPI as an additional insured, pursuant to the subcontract agreement, via a $1 million primary policy.59 Agricultural Excess and Surplus also insured RJS as a named insured and JPI as an additional insured with a $9 million umbrella policy.

A fatal construction accident generated a liability of $4.9 million.60 Lloyds paid $1 million and Great American $3.9 million. Approximately 22.2 percent of these payments were on behalf of each insurer's additional insured, JPI. Transcontinental did not make any payment. JPI and Transcontinental sought a declaration that by virtue of express indemnity in the subcontract agreement, Great American must respond to the loss before Transcontinental.61 In turn, Great American sought recovery of the portion of settlement it had paid on

behalf of JPI on the ground that express indemnity "does not trump the rule that as an excess carrier Great American's obligation is not triggered until the limits of the Transcontinental policy are exhausted."62 After review of opposing motions for summary judgment, the trial court ruled in favor of Great American.63 The court of appeal upheld the lower court's ruling, extending Reliance and rejecting the applicability of Rossmoor.

First, the court rejected Rossmoor's approach of shifting the entire loss to the indemnitor and its insurers, instead concluding that Great American's policy was excess under California law because it provided coverage only after a predetermined amount of primary coverage was exhausted.64 Great American's policy contained a schedule of insurance that had to be exhausted before coverage could trigger.65 Unlike the contribution action in Rossmoor, the facts of JPI were akin to those of Reliance, in which an excess insurer advanced a subrogation claim against a primary carrier.66 Accordingly, as in Reliance, the express indemnity provision could not contravene the principle that a secondary policy such as that of Great American may only be called upon to respond to a loss after all applicable primary insurance has been exhausted.67

Second, the court enforced the terms of the Great American policy rendering it excess to the Transcontinental policy. The schedule of underlying insurance in the Great American policy explicitly included not only the Lloyds policy but also the applicable limits of any other insurance providing coverage.68 As JPI was an additional insured under the Great American policy, and as JPI's Transcontinental policy did provide coverage to JPI, that latter policy qualified under the schedule. Thus, pursuant to the terms of the Great American policy, the Transcontinental policy needed to be exhausted prior to coverage under the Great American policy.

Third, the court determined that "the equities favor the primary carrier, Transcontinental."69 The court minimized Rossmoor's warning that to not give breath to the express indemnity provision would negate it. JPI did receive the benefit of express indemnity because RJS's insurer, Lloyds, absorbed a portion of the loss under its $1 million limit. Had the total loss been within the Lloyds policy limit, Transcontinental would have been able to subrogate to its insured's right to express indemnity against RJS, and effectively Lloyds. Because the loss exceeded the $1 million limit of the Lloyds policy, Transcontinental's subrogated right to express indemnity became unavailable.

Interestingly, the court pointed out that had JPI required RJS to procure insurance with limits exceeding $1 million, the Transcontinental policy would not be called upon to respond to the loss.70 In holding that a failure to enforce an express indemnity provision in a priority-of-coverage dispute does not negate the intent of the parties to that provision, the JPI court turned Rossmoor on its head. According to the JPI court, in light of the holdings in Rossmoor and Reliance, would-be indemnitees such as JPI could have contracted to require greater limits of primary insurance from would-be indemnitors. These greater limits would minimize the potential for a would-be indemnitee, or its insurers, to face liability. The JPI court thereby removes any suggestion that its decision fails to honor the intent of the parties to the contract.

**Contintental Returns to Reliance**

In Continental Casulty Company v. St. Paul Surplus Lines Insurance Company, 71 the U.S. District Court for the Eastern District of California affirmed JPI in a complex priority-of-coverage dispute. Tasq Technology, Inc., entered into a lease agreement for a forklift with the manufacturer, Crown Equipment Corporation, which contained an express indemnity provision in favor of Crown.72 St. Paul insured Crown as a named insured and Tasq as an additional insured, pursuant to the lease agreement, with a $5 million primary policy.73 Continental insured Tasq as a named insured and Crown as an additional insured, pursuant to the lease agreement, via a $1 million primary policy. Continental also insured Tasq as a named insured via a $25 million umbrella policy.74

Each party was therefore an additional insured on the other's insurance policy, making the facts of this case especially complicated. Particularly curious is that the St. Paul policy that insured Crown also named Tasq as an additional insured, because the express indemnity provision in the agreement between the two insureds rendered Tasq an indemnitor and Crown an indemnitee. Thus, the indemnitee's primary policy named the indemnitor as an additional insured.

After a forklift accident on Tasq's property, Continental settled a wrongful death action against both Crown and Tasq for $3.5 million, with $1 million from Crown's primary policy and the remaining $2.5 million from Crown's umbrella policy.75 Continental sought a declaration that with respect to Crown's liability, its primary St. Paul policy had to be exhausted prior to any obligation under its umbrella policy. St. Paul sought a declaration to the contrary, holding that the express indemnity provision shifted the entire loss to Tasq and its insurers.76 Siding with Continental, the court held "indemnification under the terms of the lease is a concept distinct from the priority of coverage in this case, and the lease terms are not controlling in that regard."77

First, the court established that, pursuant to the horizontal exhaustion doctrine, the St. Paul policy was primary to the Continental umbrella policy.78 The court refused to enforce St. Paul policy language that it may be applied as excess insurance, characterizing it as an impermissible escape clause.79 The court also cited to the "other insurance" clause in the St. Paul policy, which designated it as "primary insurance."80 Second, the court discussed why the express indemnity provision did not affect the finding that the St. Paul policy was primary to the Continental umbrella policy. As in Reliance and JPI, the Continental court rejected the application of Rossmoor, distinguishing it as a priority-of-coverage dispute between two primary insurers and not between insurers affording differing layers of coverage.81 In short, the court relied on Reliance: "[T] he terms of an indemnity agreement cannot trump general rules governing the application of primary, as opposed to excess, coverage."82

The court did not address the operation of the express indemnity provision because it was immaterial to the priority-of-coverage determination. The court specifically acknowledged that St. Paul's request for summary adjudication of the legal effect of the provision "goes beyond the scope of the present action."83 Had the court's finding that the St. Paul policy was primary to the Continental umbrella policy been coupled with a determination that the underlying

wrongful death action was a liability properly triggering the express indemnity provision in favor of Crown and against Tasq, then St. Paul would have been able to initiate a cause of action for equitable subrogation against Tasq and, in effect, its umbrella insurer, Continental, to recover the $1 million it had become obligated to pay. Simply put, had the court determined that the express indemnity provision was operable, St. Paul would have been able to subrogate to the express indemnity rights of its insured, Crown, and seek recovery of any amounts it had become liable to pay to Continental. Instead, the court avoided this question altogether.

Despite reasoning to the contrary, the Continental court could have decided the operability of the express indemnity provision, particularly pursuant to Hartford. The Continental court refused to decide the operability question because "no determination of the relative fault for [the decedent's death] as between Tasq and Crown has occurred," and "[t]he parties to the lease agreement at issue [containing the subject provision]…are not even parties to this litigation."84 First, the court could have used record evidence to obtain the requisite findings of fact. 85 Chiefly relevant is the lower court's order that "in all future motions and proceedings in this litigation, an adverse inference will be drawn in Continental's favor on any factual dispute, claim, or defense that depends on proving or disproving…Crown's insistence that the settlement agreement exclude apportionment of liability between Crown and Tasq."86

Second, the court could have remanded the matter to the trial court for determination of the factual predicates necessary to operate the express indemnity provision. In the remanded proceeding, St. Paul and Continental could both have availed themselves of discovery instruments.87 Thus, Crown and Tasq do not need to be parties to an action to determine one another's express indemnity rights and obligations. Yet, in the remanded action Continental may be obliged to establish that its additional insured, Crown, was negligent so that the express indemnity provision cannot operate. Conversely, in the remanded action, St. Paul may have to establish that its named insured, Crown, was not negligent in such a way as to prevent operation of the express indemnity provision. However awkward, Hartford would term the establishment of these evidentiary positions to be of "practical necessity."88 St. Paul did not initiate a separate action for a determination on the legal effect of the express indemnity provision. Thus, the court's failure to make this determination, coupled with St. Paul's failure to pursue one, made circuity of litigation a nonissue.

**Recommendations**

The treatment of express indemnity in priority of coverage disputes offers valuable insight into practical ways to minimize liability, particularly as an indemnitee such as a general contractor or developer risking construction litigation. The potential solutions below are specific to general contractors and developers but may be similarly applied to any relationship between parties to an express indemnity agreement and insurers of those parties.

First, a general contractor must ensure that its subcontractors obtain an endorsement on their excess policies calling for those policies to provide primary and noncontributory coverage for their additional insureds as required by contract. As an additional insured, a

general contractor can thus rely on the express indemnity agreement and the subcontractors' primary and excess policies to absorb a loss before the general contractor and its insurers are required to do so. The excess policy endorsement coupled with the express indemnity agreement provides a strong illustration of the intention to contravene the horizontal exhaustion doctrine.

Second, a general contractor must require its subcontractors to obtain primary coverage with per-occurrence limits higher than the standard $1 million. This increases the potential for a subcontractor's primary policy to respond to an entire loss without implicating excess coverage. While this may be a suitable alternative to the excess policy recommendation above, in practicality, the higher premium for this type of insurance may prove unfeasible. Subcontractors may either refuse to absorb the higher premium cost or insist on passing through at least a portion of it to the general contractor.

Third, a general contractor must ensure that both its insurers and those of its subcontractors are on notice of any express indemnity agreement before the policies are issued. This must be done at the underwriting stage as a deliberate effort to have the insurers acknowledge the existence of the express indemnity agreement, so that premiums may be calculated accordingly. In addressing priority-of-coverage disputes, every decision discussed above considers what the insurers knew when they calculated premiums as relevant. For a general contractor, this option may have the effect of lowering its insurance premiums, while the opposite may hold true for subcontractors. Nevertheless, it is important to provide as much information as possible to the insurers, including the existence of an express indemnity agreement, so that the subcontractor's insurers can be said to knowingly assume the risk transfer occasioned by the express indemnity provision.

The circuity of litigation concern developed in Wal-Mart is fact-specific and reliant on the operation of the express indemnity provision. As alluded in Hartford, such a provision cannot operate automatically. Rather, available record evidence and statutory exceptions need to be considered. Yet Wal-Mart, Rossmoor, and its progeny all bring to light one common problem that does not respect jurisdictional boundaries: Risk transfer may prove to be more difficult in application than parties originally contemplate. Disparities in the transfer of risk via additional insured endorsement and via express indemnity agreement have the potential to create uncertainty when a claim arises. Consistency and uniformity of intention in these risk transfer mechanisms, as well as the coordinated efforts of an insured, insurer, counsel, risk manager, and broker at all stages, are necessary to minimize this uncertainty.

1 State Farm v. LiMauro, 65 N.Y. 2d 369, 372 (1985) (quoting Carriers Ins. Co. v. American Home Assurance Co., 512 F. 2d 360, 362 (1975)).

2 See, e.g., JPI Westcoast Constr., L.P. v. RJS & Assocs., Inc., 156 Cal. App. 4th 1448, 1460 (2007). Primary coverage may be triggered upon the occurrence that gives rise to liability. By contrast, excess coverage liability attaches only after a predetermined amount of primary coverage has been exhausted.

3 Community Redevelopment Agency v. Aetna Cas. & Sur. Co., 50 Cal. App. 4th 329, 339-40 (1996).

4 Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F. 3d 583 (8th Cir. 2002); American Indemnity Lloyds v. Travelers Prop. Cas. Ins. Co., 335 F. 3d 429 (5th Cir. 2003).

5 Wal-Mart, 292 F. 3d at 585.

6 Id.

7 Id. at 585-86.

8 Id. at 594-95.

9 Id at 587.

10 Id.

11 Id. at 593-94.

12 Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622 (1975).

13 Id. at 625-26.

14 Id. at 626-7.

15 Id. at 633-35.

16 Id. at 635.

17 Id. at 633.

18 Id. at 629.

19 Id. at 629-33.

20 Id. at 634.

21 Id.

22 Reliance Nat'l Indem. Co. v. General Star Indem. Co., 72 Cal. App. 4th 1063 (1999).

23 Id. at 1068.

24 Id. at 1069.

25 Id.

26 Id. at 1071.

27 Id.

28 Id. at 1073.

29 Id. at 1076 (internal citations omitted).

30 Id. at 1079.

31 Id.

32 Id. at 1080.

33 Id. at 1079.

34 Id. at 1076.

35 Id. at 1082-83.

36 Id. at 1082.

37 Id.

38 Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co., 123 Cal. App. 4th 278 (2004).

39 Id. at 282-86.

40 Id. at 282.

41 Travelers v. American Equity Ins. Co., 93 Cal. App. 4th 1142 (2001).

42 Id. at 1157.

43 Id.

44 Hartford, 123 Cal. App. 4th at 282.

45 Id. at 291-92.

46 Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 629 (1975).

47 Hartford, 123 Cal. App. 4th at 301-04.

48 Id. at 303 (citing St. Paul Fire & Marine Ins. Co. v. American Int'l Spec. Lines Ins. Co., 365 F. 3d 263, 273-74 (2004)).

49 Hartford, 123 Cal. App. 4th at 302.

50 Id. at 303-04.

51 Id.

52 Id. at 303.

53 Id. at 303-05.

54 Id. at 282.

55 Travelers v. American Equity Ins. Co., 93 Cal. App. 4th 1142, 1157 (2001).

56 JPI Westcoast Constr., LP v. RJS & Assocs., Inc., 156 Cal. App. 4th 1448 (2007).

57 Id. at 1451-52.

58 Id. at 1452.

59 Id. at 1452-53.

60 Id. at 1454.

61 Id. at 1455.

62 Id. at 1456.

63 Id. at 1456-57.

64 Id. at 1460.

65 Id. at 1453.

66 Id. at 1460-63.

67 Id. at 1462.

68 Id. at 1463-64.

69 Id. at 1464.

70 Id.

71 Continental Cas. Co. v. St. Paul Surplus Lines Ins. Co., 803 F. Supp. 2d 1113 (2011).

72 Id. at 1117.

73 Id. at 1116.

74 Id.

75 Id. at 1116.

76 Id.

77 Id. at 1118.

78 Id. at 1120-21.

79 Id. at 1120.

80 Id.

81 Continental, 803 F. Supp. 2d at 1121; JPI Westcoast Constr., L.P. v. RJS & Assocs., Inc., 156 Cal. App. 4th 1448, 1460-63 (2007); Reliance Nat'l Indem. Co. v. General Star Indem. Co., 72 Cal. App. 4th 1063, 1082-83 (1999).

82 Continental, 803 F. Supp. 2d at 1122.

83 Id. at 1126.

84 Id. at 1118, 1126.

85 Hartford, 123 Cal. App. 4th at 301-04.

86 Continental, 803 F. Supp. 2d at 1124.

87 Hartford, 123 Cal. App. 4th at 303

88 Id. at 304.