I have always treasured my informal Construction Law Network (SWEETNET). It enables me to obtain valuable information from people on the firing line. Though currently I divide my time between Berkeley and Jerusalem, the SWEETNET still functions. This column is based upon thoughts that were triggered by a recent communication on the Network.

In 1986, I was preparing the first edition of Sweet on Construction Industry Contracts (third coming out in spring). The AIA graciously sent me drafts of the documents which were to emerge in 1987. I also had periodic conversations with AIA staff. The 1976 A 201 had contained § 4.18.1, an “all or nothing” intermediate indemnity clause (the indemnitor pays the cost of defense and the entire claim even if the indemnatee was in part to blame for the loss).

An early draft of A 201 had contained a formula, deleted in subsequent drafts, for implementing “comparative” indemnification. The indemnitor pays the portion of the cost of defense (as to defense costs, I have employed the language in the Dillard case to which I will refer later though the language in § 3.18.1 is not clear) and the portion of the loss caused by its negligence. Some statutes require comparative indemnity and there was a mood at that time for more loss sharing.

The AIA usually seeks comments and, hopefully, approval from the insurance industry for insurance-sensitive clauses such as indemnity clauses. The insurance industry was incurring underwriting losses. The industry was not, I was told by AIA staff, in “an adventurous mood.” Back to “all or nothing” or so I thought.

The language that found its way into the 1987 A 201, § 3.18.1 was a mixed bag. It included leftover language from earlier comparative indemnity language, “but only to the extent caused” yet it also included all or nothing language, “regardless of whether or not...caused in part by a party indemnified.” This phrase was needed to validate an “intermediate” indemnity clause, one which transferred the entire loss despite some negligence by the indemnitee. This would not be as crucial if the clause were one for comparative indemnification. I concluded that “to the extent caused” made the clause one for comparative indemnity. I said so in my text, as did others.

But before I proceed further, let me report the letter response of Howard G. Goldberg, currently AIA outside counsel, to my suggestion that what came out may not have been what AIA intended. He did not serve in that capacity at the time the 1987 A 201 was drafted. He wrote that he never understood that the drafters of the 1987 edition intended that the final version be an “all or nothing indemnity” and that the language, “confirms that fact.”

Now to my SWEETNET communication. A lawyer sent me Dillard v. Shaugnessy, Fickel and Scott, Arch., Inc., 884 S.W. 722 (Mo. App. 1993.) It held 3.18.1 created comparative indemnification. He wanted to let me know the court agreed with me.

I am dealing with drafting errors and how they can be corrected. Drafting errors can include using language the drafter wishes he had left out, omitting language he wishes he had included or using language which achieves an unintended outcome. Goldberg says there was no error, that the AIA achieved its intended outcome. I suggest the possibility that either § 3.18.1 produced an unintended outcome or the AIA changed its mind and decided to go for comparative indemnity.

My purpose is not to decide whether it made an error. Let us assume “without deciding” that the AIA had made a drafting error. How could it correct the error?

The most drastic step would be to issue a new A 201. (A new edition is planned for 1997.) To rush out a new edition before one is scheduled risks drafting errors, requires an unplanned outlay of space resources and can appear to be a confession of error.

Less drastic would be issuance of an A 512, amendment to its guide to Supplementary Conditions. The AIA did this in response to complaints about its handling of the discovery of hazardous materials in A 201, § 10.1 issued in 1987. This takes much less resources than an emergency new edition. But is still a confession of error. Least drastic would be an announcement in the AIA Supplement Service (a service I recommend highly). Unfortunately, this would not reach many users.

First, this communication made me realize how hard it would be for the AIA to correct drafting errors. Errors cannot be corrected, as are statutes, by a revision the next legislative session. The efforts and resources to crank out a new edition can be mustered about every 10 years. This is a reason, among others, for the current AIA 10-year cycle. Precise, mistake-free drafting required talented drafters, thorough research, long lead time, input from those affected, careful review and, I would add, preview hypotheticals and solutions like law school exams to flush out errors.

Second, this communication made me reflect upon structures in a standard contract. The AIA could have given users a choice, “all or nothing” or “comparative”, by including alternate clauses. The use of alternates along with more blanks in A 201 would create a framework which would allow users to customize their contracts to fit their special needs and desires. Pity it does not.

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