WRITTEN INDEMNIFICATION AFTER DUTTON
HAVE WE CIRCUMVENTED THE GRAVE INJURY STATUTE

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      1. Obtain all contracts/leases, written agreements.

      2. Indemnification falls under the Statute of Frauds.

(a) The party seeking to be indemnified must have a signed contract which is executed by the party against whom indemnity is sought.

3. If written agreements are not obtained, they should be incorporated into preliminary conference orders/joint discovery orders/discovery stipulations.

4. Copies of entire agreements must be obtained.

(a) Review the documents which comprise the contract and obtain all exhibits, riders, specifications, and all other documents incorporated by reference in the written agreement.

5. Identity of parties.

(a) If successor corporations or other entities exist, obtain all written assumptions/assignments in order to enforce the agreement.

VII. ANALYTICAL FRAMEWORK: DOES INDEMNITY APPLY?

A. IS THE CONTRACT IN WRITING?

B. IS THE CONTRACT SIGNED BY THE PARTY WHO MUST INDEMNIFY?

C. ARE THE PARTIES WHO SIGNED THE CONTRACT THE SAME PARTIES IN THE LITIGATION?

1. If the identity of the parties are not equal, is there a written assumption or assignment?

D. IS THE INDEMNIFICATION CLAUSE TRIGGERED?

1. Is it broad based i.e. "arising out of"?

2. Is the clause triggered by geographic location?

3. Must one prove negligence/violations of statute/breach of contract to trigger?

4. Is the date of the contract prior to the date of accident?

E. DOES THE GENERAL OBLIGATIONS LAW RESTRICT OR PROHIBIT ENFORCEMENT OF THE INDEMNIFICATION AGREEMENT?

F. CAN INDEMNITY BE OBTAINED THROUGH AN INSURANCE PROCUREMENT CLAUSE?

1. Under the insurance policy: probably yes; under the indemnity clause: no.

VIII. OTHER STATUTORY PROVISIONS AFFECTING INDEMNIFICATION AGREEMENTS

BEYOND THE LABOR LAW CONTEXT

A. STATUTORY CONSIDERATIONS

B. OTHER PROHIBITIONS AGAINST WRITTEN INDEMNIFICATION UNDER THE GENERAL OBLIGATIONS LAW

I. THE CONCEPTS OF INDEMNITY AND CONTRIBUTION.

A. INDEMNITY; A DEFINITIONAL GUIDELINE:

Indemnity, as taught in law school and as defined in Black's Law Dictionary, involves the transfer of an entire risk from one party to another. Thus, indemnity has been defined as a reimbursement, or an undertaking whereby one agrees to indemnify another upon the occurrence of an anticipated loss. *See Black's Law Dictionary, 1990, at page 769*. An alternate definition is that indemnity is a "contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." *Id.* It is against this general definition that litigants are now forced to explore the issue of partial contractual indemnification.

B. WRITTEN INDEMNIFICATION IN GENERAL.

The Court of Appeals has recognized that provided the "'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'", a party is entitled to full indemnification even if the promisee/indemnitee is negligent. *See Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 521 N.Y.S.2d 216, 218 (1987) *quoting Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153, 344 N.Y.S.2d 336. *See also Di Sano v. KBH Construction Co.,* 721 N.Y.S.2d 200, 202-203 (4th Dep't 2001); *New York Tel. Co. v. Gulf Oil Corp.*, 609 N.Y.S.2d 244, 245-246 (1st Dep't 1994). It has been noted, however, that although one is able to be indemnified pursuant to the terms of a written agreement for one's own negligence, because such a principle is generally unfavored, the indemnification clause is subject to close judicial scrutiny under which the intention of the parties must be clearly expressed and deemed unequivocal. *See Hooper*

Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 549 N.Y.S.2d 365, 367-368 (1989); *Niagara Frontier Transportation Auth. v. Tri-Delta Construction Corp.,* 487 N.Y.S.2d 428, 430 (4th Dep't 1985), *aff'd*, 65 N.Y.2d 1038. Nevertheless, the Court of Appeals has recognized that indemnification for one's own negligence under these circumstances can be enforced provided, of course, contractual indemnification was not prohibited by statute. *See Drzewinski v. Atlantic Scaffold & Ladder Co*., 521 N.Y.S.2d at 218.

C. THE STATUTORY ENTITLEMENT TO CONTRIBUTION:

Prior to the appellate courts recognizing the possibility of partial contractual indemnity, parties who relied upon an apportionment of the loss, as opposed to an entire shifting of the loss, set forth claims for contribution. Noting the exceptions under the General Obligations Law Sections 15-108 and 18-201 as well as the grave injury statute, the statutory entitlement to contribution is set forth in Section 1401 of the CPLR. Under Section 1401 of the CPLR, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." *CPLR Section 1401*. Section 1402 of the CPLR merely codifies that the equitable shares amongst tortfeasors "shall be determined in accordance with the relative culpability of each person liable for contribution." *CPLR Section 1402*. If *Dutton* is upheld on appeal, then the New York courts have now established a means for a party to obtain contribution by contract under the misnomer of indemnification.

II. A BRIEF OVERVIEW OF CONTRACTUAL INDEMNIFICATION IN A LABOR LAW CONTEXT PRIOR TO THE 1981 AMENDMENT.

A. THE QUEVEDO DECISION:

In 1982, the Court of Appeals interpreted the former Section 5-322.1 of the General Obligations Law in the context of an owner seeking to obtain contractual indemnity from a contractor. *See Quevedo v. City of New York*, 451 N.Y.S.2d 651 (1982). Under the pre-1981

statute, a party in a construction context could not seek indemnification if the injury was caused by or resulted from the sole negligence of the party seeking to be indemnified. *See id* at 653. The Court of Appeals began its abrogation of the intentions of the Legislature to strike clauses in which a party could be indemnified for its sole negligence by taking a practical approach in interpreting the contract. *See id.* at 653-654. Thus, even when a clause created an obligation to indemnify one for one's sole negligence, the statutory bar as set forth by the General Obligations Law was not deemed void if the agreement required indemnification under circumstances where the sole negligence of the party obtaining indemnity was not at issue. *See id*. Thus, the Court of Appeals indicated that if the facts of a given case did not create circumstances under which the party seeking to be indemnified was solely negligent, the indemnification clause would be enforceable. *See id*. at 654. In providing this rationale, the Court seemed to indicate that clauses which violated the General Obligations Law should be deemed voidable as opposed to being void for all purposes depending upon the factual determination of a party's negligence. *See id*. This was the state of the law until the Legislature passed an amendment to the General Obligations Law governing contracts in the Labor Law/construction field.

III. THE LEGISLATIVE RESPONSE.

A. EXAMINING THE STATUTORY LANGUAGE OF THE GENERAL OBLIGATIONS LAW.

Effective in 1981, in order to avoid the harsh results of *Quevedo* in an industry in which the Legislature expressed a desire to protect workers from owners or general contractors who would cast safety aside knowing that they would be entitled to contractual indemnification from any subcontractor who entered upon a job site, and for other reasons, the Legislature set forth the following:

> Section 5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases
>
> 1. A covenant, promise, agreement or understanding in, or in

connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of a bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

2. The provisions of this section shall only apply to covenants, promises, agreements or understandings in, or in connection with or collateral to a contract or agreement, as enumerated in subdivision one hereof, entered into on or after the thirtieth day next succeeding the date on which it shall have become a law.

B. THE DECISIONAL ACKNOWLEDGEMENT OF THE LEGISLATURE'S INTENT.

In interpreting the prior General Obligations Law enacted in 1975, the Fourth Department, in the context of *Quevedo*, noted that the original 1975 Act was passed "to prevent a practice prevalent in the construction industry of requiring contractors and subcontractors to assume liability by contract for the negligence of others." *County of Onondaga v. Penetryn Systems, Inc.,* 446 N.Y.S.2d 693, 694 (4th Dep't 1981), *aff'd,* 56 N.Y.2d 729 (1982). The pre-amended statute was also noted to have been passed in order to avoid "coercive" bidding requirements which restricted the number of contractors who could afford appropriate coverage and in order to avoid unfairly imposing liability upon a contractor for the fault of others over whom no control existed. *See id*. The Legislature also hoped that the costs of construction would be reduced by avoiding higher bids which incorporated the costs of contractual insurance coverage. *See id*. Under the revised provisions of the General Obligations Law, even the First Department, which handed down *Dutton*, noted that the Legislature sought to prevent a prevalent practice in the construction industry of requiring subcontractors to assume the liability

of a responsible or negligent owner or general contractor under contracts which were often non-negotiable. *See Padro v. Bertelsman Music Group*, 718 N.Y.S.2d 296, 298 (1st Dep't 2000), *quoting Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.,* 89 N.Y.2d 786 (1997).

IV. THE LEADING COURT OF APPEALS DECISIONS INTERPRETING THE 1981 AMENDMENT.

A. BROWN V. TWO EXCHANGE PLAZA PARTNERS.

After a rather long delay, the Court of Appeals next issued significant guidelines in the landmark decision of *Brown v. Two Exchange Plaza Partners*. *See Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172, 556 N.Y.S.2d 1991 (1990). In *Brown*, the Court was confronted with a fact scenario in which a general contractor was held liable pursuant to Labor Law Section 240(1) as a result of a scaffold collapsing. *See id.* at 992-993. The general contractor, however, was determined to be free of negligence. *See id*. There was also a finding that a subcontractor who retained plaintiff's employer was free of negligence. *See id.* at 993. Another subcontractor, who erected the scaffold, was found to be negligent. *See id.* Significantly, the *Brown* Court noted that it was interpreting a broad based indemnification clause. *See id.* [1] In light of the broad nature of the indemnification agreement, the subcontractor who like the general contractor was found to be free of negligence, argued that the general contractor could not enforce its indemnity agreement due to the fact that theoretically, the clause could have required indemnification even if the general contractor was

[1] The indemnification clause was quoted as follows: "Subcontractor hereby agrees, to the extent permitted by law, to assume the entire responsibility and liability for and defense of and to pay and indemnify the Owner and Contractor against any loss, cost, expense, liability or damage and will hold each of them harmless from and pay any loss, cost, expense, liability or damage (including, without limitation, judgments, attorney's fees, court costs and the cost of appellate proceedings), which the Owner or Contractor incurs because of injury to or death of any person or on account of damage to property, including loss of use thereof, or any other claim arising out of, in connection with, or as a consequence of the performance of the Work and/or any acts or omission of the Subcontractor or any of its officers, directors, employees, agents, subcontractors or anyone directly or indirectly employed by Subcontractor for whom it may be liable as it relates to the scope of this contract, whether such injuries to person or damage to property are due to any negligence of the Owner, the Contractor, its or their employees or agents or any other person. Subcontractor will purchase and maintain such insurance as will protect it including contractual coverage".

negligent. *See id*. at 994. Thus, the subcontractor argued that the general contractor's indemnity clause was void and unenforceable under the General Obligations Law. *See id.*

The Court of Appeals once again noted the purpose of the original enactment of General Obligations Law Section 5-322.1 as previously set forth *supra. See id.* at 995. The 1981 amendment was enacted, according to the *Brown* Court's reference to its legislative history, to prevent an owner or general contractor from being indemnified "for their *own negligent actions* . . . even if the accident was caused only in part by the owner's or contractor's negligence." *Id*. (emphasis added). In rationalizing that because there was no evidence of any fault on behalf of the general contractor, the Court ruled that neither the wording nor the intent of

the amended statute would be violated if the indemnification was enforced. *See id*. It is respectfully submitted that the Court emphasized, incorrectly, the concept of seeking out a promisee's degree of negligence rather than merely voiding the agreement if it was constructed too broadly. *See id*. The *Brown* Court in so holding, failed to explain how a job site could be safer, how the costs of construction could be decreased, or how non-negotiable contracts could be avoided by circumventing the seemingly explicit intention of the Legislature which would have, assumedly, simply voided the indemnification clause. *See id*. This is especially true in light of the memorandum prepared by Assemblyman Ralph Goldstein who stated, in reflecting upon the 1981 amendment, that by "holding promisors liable for 'partial' or 'contributory' negligence of the promisee, the law became less than fully effective. A clause in the contract between a promisor and promisee which requires the promissor (sic) to indemnify the promisee will be illegal." *See Mem. of Assemblyman Goldstein, 1981 N.Y. Legis. Ann., at 502.* Thus, a fair reading of Assemblyman Goldstein's comments would lead one to conclude that the passage of the 1981 amendment was not intended to create a doctrine of partial contractual indemnification even if a promisor only indemnified the promisee for the promisor's percentage of fault. *See id*. That is, seemingly, whether the law required partial indemnification for a promisor's or a promisee's negligence would be irrelevant to effectively reducing construction costs and fulfilling the other stated purposes of the legislation. *See id*.

It is respectfully submitted that if the *Brown* Court would have simply voided the indemnification clause rather than perform a *Quevedo* analysis of determining whether the contract was voidable under the facts of a given case depending upon whether the promisee was negligent, the circumvention of the grave injury statute and the development of a theory of partial contractual indemnity in Labor Law cases would not have arisen.

It is this author's opinion that once the Legislature precluded a promisee from obtaining indemnification for their own negligence whether they were negligent in whole or in part, the practice of not voiding the entire indemnification clause if improperly drafted, even for a

non-negligent promisee, should have terminated. It is this author's opinion that the legislative intent would best be met if the focus and analysis shifted from the degree of negligence of the promisee, or after *Itri Brick* if the indemnification clause is a valid partial indemnity agreement, to whether the indemnification agreement would allow indemnity, to any extent, if the promisee was negligent. Such clauses should be deemed void and unenforceable under any fact scenario. Thus, if the Court of Appeals adopted a strict construction of Section 5-322.1 of the General Obligations Law, thereby voiding indemnification clauses *ab initio* if the clause can be construed to require indemnification if the promisee is negligent in whole or in part, it is respectfully submitted, that such an approach would be consistent with the language and intent of the statute, and the issue of bypassing the grave injury statute by creating a doctrine of partial contractual indemnification would be avoided.

B. ITRI BRICK & CONCRETE CORP. V. AETNA CASUALTY & SURETY CO.

Following the analysis in *Brown*, the Court of Appeals' next significant pronouncement came in 1997. *See Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.,* 89 N.Y.2d 786, 658 N.Y.S.2d 903 (1997). In *Itri Brick*, the Court of Appeals next decided the issue of whether a general contractor, who had been found partially negligent, could enforce a broadly worded indemnification agreement under which full, rather than partial, indemnification was contemplated. *See id*. at 904-905. The two agreements which were before the Court were both found to have been drafted in extremely broad terms. *See id*. at 905-907. In the first agreement, the subcontractor was to hold the general contractor harmless:

> from all liability, loss, cost or damage from claims for injuries or death from any cause, while on or near the project, of its employees or the employees of its subcontractors, or by reason or claims of any person or persons for injuries to person or property, from any cause occasioned in whole or in part by any act or omissions of the second party [subcontractor], its representatives, employees, sub-contractors or suppliers and whether or not it is contended the first party [general contractor] contributed thereto in whole or in part, or was responsible therefore by reason of non-delegable duty.

Id. at 909. The second indemnification agreement was similar in that indemnity was to be triggered for any and all liability, just or unjust, and all resultant damages, "in connection with or resulting from the work or by reason of the operations performed on behalf of or on the property of [the general contractor] by the named insured Subcontractor, his agents, servants or employees." I*d*.

Under the facts of both cases decided by the Court of Appeals, the general contractor, who was seeking indemnity, was found to be partially negligent. *See id*. at pp. 905-906. In noting that both indemnification clauses contemplated a complete rather than a partial shifting of liability, the indemnification agreements were noted to be similar to the contractual language reviewed in *Brown. See id*. at 907. Both indemnification clauses also required the subcontractor to indemnify the general contractor without limitation in the event that the general contractor was found to be negligent. *See id*. In fact, as the Court noted, in the first agreement, the subcontractor was obligated to indemnify the general contractor even if the general contractor caused the injury in whole or in part. *See id*. The Court of Appeals correctly noted that because both general contractors were found to be negligent, the indemnification agreements were unenforceable. *See id*. Any other result would have been in contravention to the language, purpose, and history of the General Obligations Law, Section 5-322.1. *See id*. The Court supported its holding by noting that the purpose of the General Obligations Law was to prevent, as previously noted, coercive bidding which increased construction costs by unfairly imposing liability on subcontractors for the negligence of other entities who they did not control, and "to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others." *Id*. The Court also alluded to the economic impact created by the high expense of a contractor having to purchase double coverage for both general liability and contractual coverage. *See id*. The Court noted that its decision was consistent with a prior 1987 ruling in which the Court of Appeals presented little

analysis. *See Quain v. Buzzetta Construction Corp.*, 69 N.Y.2d 376, 514 N.Y.S.2d 701, 702 (1987). *See also Hawthorne v. South Bronx Community Corp.*, 78 N.Y.2d 433, 576 N.Y.S.2d 203 (1991).

In both instances, the general contractor raised the argument that the General Obligations Law would not preclude the enforcement of their agreements either *ab initio*, as already decided in *Brown* but also, even in the event that the general contractor was found to be partially at fault. *See id.* at 908. The argument was made that the general contractors should be indemnified for that portion of the award not attributable to their own negligence. *See id.* In other words, if the general contractors were found 20% liable, and the subcontractor from whom indemnity was sought was found to be 80% liable, rather than voiding the entire right to indemnification, the general contractors argued that they should be entitled to collect 80% of their contribution from their subcontractor. *See id.* The Court of Appeals in addressing this argument, noted the statutory language which would void any agreement purporting to indemnify or hold harmless the promisee against liability which was caused by or resulted from the negligence of the promisee. *See id*. Unlike the indemnification agreement in *Brown*, there was no savings clause under which indemnification was to be enforced only to the fullest extent permitted by law. *See id*. Thus, in noting that the *Itri Brick* agreements contemplated full indemnification even under circumstances wherein the general contractor was found to be negligent in whole or in part, there was no rationale under which the general contractors could enforce their indemnification agreements without violating public policy and the provisions of the General Obligations Law. *See id*.

In denying the general contractors' attempts to enforce a theory of partial contractual indemnification, the Court of Appeals, rather than merely rejecting such a theory under circumstances where a broad indemnification agreement existed and the party seeking to enforce indemnification was found liable, added language, arguably gratuitously, which has been the focus of much debate. *See id*. That is, in *dictum*, the Court of Appeals noted that

whether or not the General Obligations Law would allow enforcement of a "partial indemnification" agreement was irrelevant due to the fact that the agreements before the Court contemplated complete indemnification. *See id*. The Court of Appeals then noted that the "question whether a negligent contractor/promisee could enforce an indemnification agreement, not withstanding section 5-322.1, so long as the agreement did not purport to indemnify the contractor for its own negligence is not before us." *Id*. It is based upon this statement that the First Department has now handed down *Dutton*.

V. THE DUTTON CASE.

The First Department in a decision dated July 2, 2002 adopted a theory of partial contractual indemnification based upon percentages of fault and, of course, the terms of the indemnification clause. *See Dutton v. Charles Pankow Builders, Ltd.,* 745 N.Y.S.2d 520, 521-522 (1st Dep't 2002). As a point of reference, this is the same Court which in July, 1999, precluded enforcement of a general contractor's indemnification clause which contained a savings clause, and required indemnification even if the general contractor was negligent in part for plaintiff's injuries. *See Correia v. Professional Data Management, Inc.*, 693 N.Y.S.2d 596, 598-601 (1st Dep't 1999).

In turning first to the *Correia* case, the indemnification clause which the general contractor sought to enforce against its subcontractor would have required indemnification from all liability while on or near the construction project for injuries occasioned in whole or in part by any act or omission of the subcontractor and whether or not it was contended that the general contractor "contributed thereto in part, or was responsible therefore by reason of non-delegable duty." *Id.* at 598. The contract also stated that if the indemnification provision was limited by applicable law, then indemnity was to be limited to conform with the law provided that the enforcement of the indemnification provision "shall be as broad as permitted by applicable law . . . " *Id*. Indemnification also applied to any loss "whether or not caused or claimed to have been caused in part (but not solely) by the negligence of [the general contractor]." *Id.* In denying the

general contractor's motion for summary judgment, the First Department noted that issues of fact existed as to whether or not the general contractor might be negligent. *See id*. at 599. Although it would seem unlikely that a scenario could have existed under which the general contractor could have been solely responsible for the accident, nevertheless, the First Department seemed to imply that contractual indemnification could not be enforced if the general contractor was found to be negligent in part. *See id*. In fact, the First Department noted that an indemnitor/subcontractor's negligence would be irrelevant in considering whether or not to enforce an indemnification agreement, "while the negligence of the indemnitee . . . is critical and, if established, would fall afoul of [the] General Obligations Law." *Id.* at 600. Thus, no mention was made that if negligence was established as to the indemnitee/promisee, an entitlement to some form of indemnification would survive such a finding. *See id*. Rather than to set forth a specific precedent regarding the issue of partial indemnification, the First Department noted "that the validity of partial indemnity agreements appears still to be unsettled." *Id. See also Bright v. Tishman Construction Corp. of New York,* 1998 U.S. Dist. Lexis 1659 (U.S.S.D. NY 1998) (holding that a broadly worded indemnity clause was void even under a theory of partial indemnification due to the absence of clear and specific language indicating indemnification was not sought for one's own negligence under circumstances where the promisee/general contractor was found negligent).

In *Dutton*, a jury rendered a verdict in favor of two construction workers which apportioned liability 20% against the general contractor and 80% against a subcontractor/employer. *See Dutton v. Charles Pankow Builders, Ltd*., 745 N.Y.S.2d at 521. In citing *Itri Brick*, the employer/subcontractor sought to void the indemnification clause due to the fact that it purported to indemnify the general contractor for its own negligence in violation of the General Obligations Law. *See id.*

The general contractor's indemnification clause required the subcontractor to indemnify the general contractor to the fullest extent permitted by applicable law for all damages

"sustained in connection with the subcontractor's work 'regardless of whether [the general contractor is] partially negligent . . . excluding only liability created by the [general contractor's] sole and exclusive negligence'". *Id.*

As of July, 2002, the First Department now found "that the clause calls for partial, not full, indemnification of the general contractor for personal injuries partially caused by its negligence, and is therefore enforceable." *Id.* The First Department reasoned that because the contract contained a savings clause limiting the subcontractor's obligation to that which was permitted by law, **and** because the indemnification clause excluded an obligation to indemnify the general contractor for its sole and exclusive negligence, the indemnity agreement was enforceable. *See id*. The only reference to this striking conclusion, apart from general contract interpretation, was a reference to *Itri Brick*. *See id*. Thus, the Court made no attempt whatsoever to provide a reasonable basis for allowing the general contractor to partially enforce its indemnification clause to the extent that it was not negligent irrespective of the amendment to the General Obligations Law which required an indemnification clause to be void and unenforceable if it purported to indemnify or hold harmless a general contractor against liability caused by or resulting from the negligence of the general contractor "whether such negligence be in whole or in part." *See General Obligations Law Section 5-322.1*. Thus, we have now come full circle in abrogating exactly that which the Legislature attempted to enforce. *See id.* Now, because the Court from as early as *Quevedo*, adopted an analytical approach to rendering an indemnity clause void and unenforceable, depending upon whether or not the promisee was negligent, rather than simply voiding the clause in its entirety if the clause did not exclude enforcement for a negligent promisee, assuming *Dutton* or a similar case is upheld by the Court of Appeals, we have created a means for a general contractor to enforce an indemnification agreement despite an adverse finding of negligence and in contravention not only to the language of the General Obligations Law, but also, in direct contravention to the rationale and purpose of the statute and its amendment as discussed *supra*.

The problem in this author's opinion is not that the First Department misapplied prior decisional guidelines, but rather, was almost forced into rendering such a decision by the historically improper application of the General Obligations Law. One has to believe that the Legislature carefully drafted the title of the statute which reads "[a]greements exempting owners and contractors from liability for negligence void and unenforceable; certain cases." *General Obligatons Law Section 5-322.1.* What is missing from the Court of Appeals' rationale, it is respectfully submitted, is reasoning as to how an analytical approach can be taken in interpreting indemnification clauses when the Legislature intended the clauses to be both void and unenforceable. After all, the Legislature did not entitle this section "agreements to be partially enforced even if an owner and contractor is partially at fault" or "agreements which may be void." It is respectfully submitted that if our Legislature required the courts to interpret and analyze the facts of each case to determine whether the language of an indemnity agreement should be deemed void and unenforceable, a much different title and statutory language would have been drafted. If the amendment to the General Obligations Law was enacted in order to further restrict negligent owners and general contractors from obtaining indemnity not just when they were solely negligent, but whenever they were partially negligent, the 1981 amendment has clearly been circumvented. How does the present interpretation make the job site a safer place? Even more obvious, in view of the stated purpose of the enactment of the General Obligations Law and its amended form, even more glaringly and alarmingly, how will a subcontractor/employer's cost of insurance not increase exponentially as a result of *Dutton* and the historical approach to interpreting Section 5-322.1 of the General Obligations Law?

VI. RELATED CONSIDERATIONS.

A. WRITTEN INDEMNIFICATION AND INSURANCE LAW.

It is now black letter law in New York that agreements to insure and written indemnification agreements bear separate consideration. *See Kinney v. G.W. Lisk Co.,* 76 N.Y.2d 215, 557 N.Y.S.2d 283, 285-286 (1990). The Second Department has recently also

noted that even if the insurance procurement language and the written indemnification language are contained within the same paragraph, a separate analysis as to both issues must be presented. *See Cappellino v. Atco Mechanical,* 708 N.Y.S.2d 704, 705 (2d Dep't 2000).

The General Obligations Law in invalidating contracts which would indemnify a negligent promisee for its own negligence specifically states that such a prohibition "shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer." *General Obligations Law Section 5-322.1*. Thus, the *Kinney* Court ruled that an "agreement to procure insurance is *not* an agreement to indemnify or hold harmless, and the distinction between the two is well recognized." *Kinney v. G.W. Lisk Co.,* 557 N.Y.S.2d at 285 (citations omitted). The Court of Appeals noted that the General Obligations Law was amended to support "the strong public policy of placing and keeping responsibility for maintaining a safe workplace on [an owner or a general contractor]." *Id*. (citations omitted). The Court of Appeals reasoned that unlike an indemnification agreement that would hold an owner or general contractor harmless for their own negligence, and thus violate public policy, "the same cannot be said for an agreement which simply obligates one of the parties to a construction contract to obtain a liability policy insuring the other." *Id.* (citations omitted). In addition, the *Kinney* Court, in citing the legislative history of the General Obligations Law 1981 amendment noted that "the statute would effect substantial savings in the cost of construction projects specifically because it had found that liability protection insurance, which contractors and subcontractors could still be required to procure, was considerably less expensive than hold-harmless coverage, which they would no longer need to purchase." *Id.* (citations omitted).

B. COVERAGE CONSIDERATIONS.

Although the far reaching insurance implications of *Dutton* can best be analyzed as a separate presentation, one must nevertheless at least inquire as to what coverage will now be afforded to a subcontractor/employer who must render payment for their equitable share of

liability under a qualified, indemnification agreement. *See Dutton v. Charles Pankow Builders, Ltd.*, 745 N.Y.S.2d 520 (1st Dep't 2002). One would certainly expect the workers' compensation carrier to deny coverage based upon the fact that its insured is only obligated to render payment under its contractual obligations. One would expect that the general liability carrier will argue that its employee exclusion provision should apply. Clearly, a general liability carrier has, under the prior status of New York law, not sought to collect premiums for partial contractual indemnification coverage for accidents relating to its insured's employees. In addition, by assessing indemnification on an equal basis with an apportionment finding, clearly cases such as *Dutton* are in actuality merely assessing comparative fault or apportionment against a subcontractor/employer as opposed establishing liability under contract law. *See id*. After all, under *Dutton* the percentage of liability assessed against the employer is only computed by ascertaining the fact finder's determination as to the employer's apportionment of fault. This is purely a contribution/negligence analysis that invokes no application of contract law. Nevertheless, it seems inescapable that although the Court is essentially requiring apportionment under *Dutton*, coverage will have to be afforded under the contractual liability coverage portion of the CGL policy. *See generally Hawthorne v. South Bronx Community Corp.*, 78 N.Y.2d 433, 576 N.Y.S.2d 203 (1991).

In *Hawthorne*, strikingly similar arguments were set forth, in a separate context, between the general liability carrier and the workers' compensation carrier. *See id*. The *Hawthorne* Court decided the issue of "whether the existence of an insured's contractual duty to indemnify supersedes a common-law duty to indemnify and thereby relieves the insurer of the latter risk from liability on its policy." *Id*. at 204. An employee of the mutual insured had been injured while working at a construction site. *See id*. The employer, prior to the passage of the grave injury statute, was impleaded under theories of contribution, common law indemnity, and contractual indemnity. *See id*. Plaintiff recovered against the owner and general contractor under the Labor Law and the employer was deemed to be 100% at fault. *See id*. Both of the

insurers of plaintiff's employer claimed that their coverage should not be triggered. *See id.* As usual, the workers' compensation policy excluded coverage for its insured's contractual liability. *See id.* The general liability carrier's policy contained a traditional exclusion as to common law liability as to injuries incurred by its insured's own employees. *See id.*

The workers' compensation carrier argued that because the indemnification language of the contract between its insured and the general contractor was applicable, and because its duty to insure for common law indemnity was quasi-contractual in nature and therefore would be superseded by an express contract for written indemnification, no coverage existed. *See id*. Additionally, the workers' compensation carrier argued that in light of the insurance procurement provisions of its insured's contract, indemnity should be provided by the general liability carrier because it was the clear intent of the parties to allocate the risk of loss in such a manner. *See id.* at 204-205.

The general liability carrier argued that because common-law liability and contractual liability existed, indemnity should be shared equally between the general liability carrier and the workers' compensation carrier. *See id* at 205. These exact same arguments can be expected to be raised by claims examiners and practitioners who attempt to apply *Dutton*. Thus, the Court of Appeals' reasoning in *Hawthorne* becomes important and in all likelihood, controlling, when these issues are raised in a *Dutton* context.

The *Hawthorne* Court reasoned that without the contractual indemnification clause, the workers' compensation carrier would have been fully responsible for plaintiff's damages. *See id.* The mere fact that an indemnification provision existed, in no way altered the common-law duty of the mutual insured. *See id.* Thus, the Court further reasoned that under what will be an often repeated fact pattern, both "a contractual duty and a common-law duty to indemnify existed, with the common-law duty depending not on contract, but on the fact that the owner and general contractor have been held vicariously liable, without fault, for [the

employer's] negligence." *Id.* (citations omitted). Now, however, barring a grave injury, under the same fact pattern no common law obligation would exist. *See infra*.

In *Hawthorne*, in light of the fact that separate insurance policies were issued to cover both contractual and common-law liability, there was no equitable principle under which either insurer would be able to avoid covering the loss. *See Hawthorne v. South Bronx Community Corp.* at 205-206. To enable an insurer to avoid payment at the expense of the other carrier would simply have resulted in a windfall for one of the insurers. *See id*. at 205. The Court noted that under the facts which create an insured's liability on two separate theories under which coverage was afforded under two separate policies, an insured, having paid for both coverages, is entitled to obtain coverage under both policies. *See id.* The *Hawthorne* Court concluded that because either carrier would have been obligated to pay the entire judgment should the other policy not have been purchased, where "both policies exist, and coverage limitations are not implicated, each insurance company is equally responsible for indemnifying their insured." *Id.* at 205-206. Before applying *Hawthorne* to the implications of *Dutton*, one must first consider the significance of the passage of the grave injury statute.

C. HOW DUTTON CIRCUMVENTS THE GRAVE INJURY STATUTE.

The grave injury statute, enacted in 1996, states in pertinent part that the "liability of an employer . . . shall be exclusive and in place of any other liability whatsoever to such employee, . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, [and] [f]or purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." *Workers' Compensation Law Section 11*. The statute also notes that an "employer shall not be liable for contribution or indemnity to any third person

based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury'". . . *Id.* Thus, an employer of an injured worker is not liable to a third person for contribution or common law indemnity unless a grave injury is proven. *See id*.

Dutton perhaps gives insight as to what a contract for contribution would entail under the statutory language. Nevertheless, under traditional theories of liability, the general liability carrier of an employer had come to rely upon the fact that absent an insurance procurement provision, unless a valid indemnity agreement existed **and** the promisee was found to be free of negligence, any liability which could be asserted against its insured would fall within the ambit of the workers' compensation policy should the insured's employee have sustained a grave injury. This is clearly no longer the case if *Dutton* or a similar holding is affirmed by the Court of Appeals.

In *Hawthorne*, the Court noted that prior to the passage of the grave injury statute, dual coverage existed. *See Hawthorne v. South Bronx Community Corp.*, 576 N.Y.S.2d at 204-206. Barring a grave injury, there seems to be little room for argument that provided a valid *Dutton* clause existed, coverage under the contractual liability portion of the CGL policy will be triggered to the extent of the percentage of negligence found as against the employer. *See id*. In essence, therefore, the Court of Appeals has successfully circumvented the grave injury statute by judicially creating a theory of apportionment or contribution as against a negligent employer under a contractual indemnity nomenclature provided of course the subcontractor/employer entered into a judicially qualified partial indemnification agreement. Rendering this analysis even more difficult to accept is that if the same contractor/employer entered into an agreement in which the indemnification clause sought full indemnification, the grave injury statute would still protect the subcontractor/employer's general liability carrier who issued appropriate contractual liability coverage. It is hard to believe that in the construction field, subcontractors have or even in the future will take into account such a scenario. Insurers of subcontractors, however, must now navigate dangerous waters as their insurance risks have obviously been greatly affected. Claims representatives and defense practitioners alike should be well aware of the implications of *Dutton* and be prepared to set forth appropriate arguments depending upon the language set forth in the indemnity agreement and any other defenses which might exist. Practitioners who represent self-insureds, should also advise their clients of the risks which now exist regarding exposure even in cases in which their employees have not sustained a grave injury provided, of course, an indemnification clause has been drafted within the meaning and application of *Dutton* or for that matter a written contribution clause has been drafted to satisfy the grave injury statute.