SEND LAWYERS, GUNS, & MONEY…
CGL COVERAGE AND ADDITIONAL INSUREDS

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CONTENTS

RECURRING QUESTIONS IN CGL COVERAGE

I. SEND LAWYERS, GUNS & MONEY - THE **** HAS HIT THE FAN

Since the days of Adam and Eve, shifting the blame has been the name of the game. Today, we see it in the political arena as a matter of course. Nowhere is the buck passing game more prevalent than in the world of litigation. When litigation arises out of a commercial construction project, everybody starts looking to point the finger elsewhere. This is especially true when it comes time to figure out who is going to pay for what.

Many owners and general contractors include indemnification provisions in their construction contracts.[1] When litigation arises, these entities seek to look to other parties to the contract, typically subcontractors, to shoulder the burden of defense and indemnity costs under an indemnity provision or pursuant to an obligation to make the entity an additional insured.

This paper will look at the issues of what it takes to have an enforceable indemnification agreement under Texas law and what coverage, if any, is available under its commercial general liability coverage to the party that owes indemnity.

Finally, this paper will look at issues relating to coverage for additional insureds.

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[1] Of course, indemnity provisions can appear in all types of contracts. As of January 1, 2012, the Texas Legislature significantly changed the landscape with respect to indemnity and additional insured issues in construction contracts. Those changes are outside the scope of this paper. We would refer you to the paper entitled *"The Anti-Indemnity Statute – Sharing the Misery."*

II. INDEMNITY AGREEMENTS AND THE LAW

A. Houston, Do We Have An Enforceable Indemnity Agreement?

An indemnity agreement is defined as a promise to safeguard or hold the indemnitee harmless against either existing or future loss liability. *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). This type of agreement creates a potential cause of action in favor of the indemnitee against the indemnitor. Such an agreement operates to transfer risk from one party to another.

Because indemnification of a party for its own negligence involves an extraordinary shifting of risk, Texas courts have developed certain fair notice requirements. The fair notice requirements include the express negligence doctrine and the conspicuousness requirement. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1994).[2] A contract which fails to satisfy either of the fair notice requirements when they are imposed is unenforceable as a matter of law. *Reyes*, 134 S.W.3d at 192.

The duty to defend and indemnify under an indemnity provision is determined as a matter of law from the pleadings, not upon the outcome of the underlying suit. *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813, 815 (Tex. 1994). As the court noted, "[e]ither the indemnity agreement is clear and enforceable or it is not." *Id.*

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[2] The fair notice requirements have also been applied to releases where such agreement operates to release a party in advance for its own negligence. *Dresser Indus., Inc.*, 853 S.W.2d at 507 n.1. Recently, the Texas Supreme Court expanded the application of the fair notice requirements to situations in which an employer enrolls its employees in a non-subscriber workers= compensation benefits plan. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 194 (Tex. 2004).

1. The Express Negligence Doctrine.

Under the express negligence doctrine, a party seeking indemnity for the consequences of its own negligence must express that intent in specific terms within the four corners of the contract. *Enserch Corp.*, 794 S.W.2d at 8; *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). Whether an indemnity provision satisfies the express negligence test is a question of law for the court. *Dresser Indus., Inc.*, 853 S.W.2d at 509.[3]

Although one court has suggested that the express negligence doctrine does not require that the provision actually use the specific word "negligence," *see Banahaf v. ADT Sec. Sys. Southwest, Inc.*, 28 S.W.3d 180, 189 (Tex.App.–Eastland 2000, pet. denied) (court holding that phrase "for failure of its equipment or service in any respect" clearly expressed an intent to cover claims against security company for its own negligence), this holding is questionable and should not provide a basis for scriveners to once again attempt to avoid a fair notice requirement. *See Quorum Health Resources, L.L.C. v. Maverick*, 308 F.3d 451, 467 (5th Cir. 2002).

[3] This same rule applies to a party seeking indemnity for strict liability claims. *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Ry.*, 890 S.W.2d 455, 459 (Tex. 1994); *see also Dorchester Gas Corp. v. American Petrofina, Inc.*, 710 S.W.2d 541, 543 (Tex. 1986). At least one court has extended the rule to statutory claims based on the standards necessary to impose liability. *Aetna Cas. & Sur. Co. v. Texas Workers= Comp. Ins. Facility*, No. 03-97-00285-CV, 1998 WL 153564, at *4 (Tex.App.BAustin Apr. 2, 1998, pet. denied) (not designated or publication) (DTPA, Insurance Code, and breach of duty of good faith and fair dealing).

There is no better way to understand whether an indemnity provision satisfies the express negligence test than to review some examples of provisions that fail for one reason or another.

Example 1

> **19.01 Indemnity**. Contractor shall perform the Work in a safe and proper manner and shall comply strictly with all Laws and the Contract Documents. Contractor shall indemnify . . . the indemnitees . . . from . . . all losses, liabilities, claims . . . arising out of: (a) any violation of the Laws . . . (b) any bodily injury . . . resulting . . . from the performance of the Work . . . and (c) any failure to comply with the Contract Documents.

This indemnity provision does not satisfy the test because it does not specifically and unequivocally indicate an intent to cover the indemnitees' own negligence.

Example 2

> Subcontractor shall indemnify, hold harmless and defend Construction Manager, Owner, and Architect, and all of their agents and employees from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of Subcontractor's work, or of other project work undertaken by Subcontractor, provided that any such claim, damage, loss, or expense (i) is attributable to bodily injury, sickness, disease or death, or patent infringement, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting therefrom, and (ii) is caused in whole or in part by any negligent act or omission of Subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable, or is caused by or arises out of use of any products, material, or equipment furnished by Subcontractor, regardless of whether it is caused in part by a party indemnified hereunder.

In this example, the drafter attempted to make the provision enforceable by use of the language "regardless of whether it is caused in part by a party indemnified hereunder." A number of courts have reviewed similar language and found it lacking under the express negligence doctrine because the language at issue does not expressly state that the indemnitee is to be indemnified against its own negligence. *See Glendale Constr. Servs., Inc. v. Accurate Air Sys., Inc.*, 902 S.W.2d 536, 539 (Tex.App.–Houston [1st Dist.] 1995, writ denied); *B-F-W Constr. Co. v. Garza*, 748 S.W.2d 611, 614 (Tex.App.–Fort Worth 1988, no writ); *Adams v. Spring Valley Constr. Co.*, 728 S.W.2d 412, 414 (Tex.App.–Dallas 1987, writ ref'd n.r.e.).

Scriveners have used a number of different phrases in an attempt to include a duty to indemnify a party for its own negligence without expressly stating that intent. Those attempts have failed. Courts strictly construe indemnity provisions against the party seeking indemnity. One type of provision that has garnered a lot of attention from the courts involves the use of language such as "except to the extent same is caused by the gross negligence or willful means" of the party to be indemnified or "excepting only those claims arising out of accidents resulting from the sole negligence" of the party to be indemnified. While these phrases seem to suggest that the indemnitee would not ultimately be liable for any claims save and except those arising out of a specific type of conduct, appearances can be deceiving.

In *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex.App.–San Antonio 1989, no writ), the indemnity provision in question provided "[O]perator shall have no liability to

owners of interests in said wells and leases for losses sustained, or liabilities incurred, except such as may result from gross negligence or from breach of the provisions of this agreement." *Id.* at 678. In reviewing this language, the court found that the contract provision was insufficient to require indemnity against the indemnitee's own negligence. *Id.*

The Texas Supreme Court reached a similar decision in *Singleton v. Crown Cent. Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987). It held that an indemnity provision which provided for indemnification "excepting only those claims arising out of accidents resulting from the sole negligence of Owner" did not satisfy the express negligence rule and the indemnitee was not entitled to indemnification for his own negligence. *Id.* at 691.

The court later took the opportunity to explain the *Singleton* decision in the case of *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989):

> The indemnity contract in Singleton did not specifically state that Mundy was obligated to indemnify Crown for Crown's own negligence. Rather, it specifically stated what was not to be indemnified, "claims resulting from the sole negligence of the owner." The agreement, therefore, was an implicit indemnity agreement requiring Mundy to deduce his full obligation from the sole negligence exception.

Id. at 725.

In *Texas Utilities Elec. Co. v. Babcock & Wilcox Co.*, 893 S.W.2d 739 (Tex.App.–Texarkana 1995, no writ), the indemnity provision in question required the seller to indemnify the purchaser from any and all claims, except that as to claims by persons other than agents, servants, or employee of the seller or purchaser. "Purchaser

shall not be entitled to indemnification for claims, demands, expenses, judgments, and causes of action resulting from Purchaser's sole negligence." *Id.* at 742. The court held that while the indemnity provision expressly stated the seller was not obligated to indemnify for sole negligence, it failed to contain language expressly stating the seller was obligated to indemnify for concurrent negligence. *Id.* The court found that the seller was not obligated to defend or indemnify the purchaser against a lawsuit in which both seller and purchaser were claimed to be concurrently negligent.

The foregoing discussion is not meant to suggest that scriveners never get it right. In fact, it is not even that hard to meet the test. Courts have found the following phrases to be sufficient: (1) "regardless of whether such claims are founded in whole or in part upon the alleged negligence of [the indemnitee]" - *Enserch Corp.*, 794 S.W.2d at 8; (2) "without regard to the cause of causes thereof, including...the negligence of any party or parties, whether such negligence be sole, joint or concurrent..." - *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 132 (Tex.App.–Houston [1st Dist.] 2002, pet. denied); and (3) "regardless of cause or of the sole, joint, comparative or concurrent negligence...of [the indemnitee]" - *Banner Sign & Barricade, Inc. v. Price Constr., Inc.*, 94 S.W.3d 692, 697 (Tex.App.–San Antonio 2002, pet. denied).

2. Conspicuousness.

The other fair notice requirement imposed by Texas courts is that of conspicuousness. Conspicuousness requires that something appear on the face of the contract to attract the attention of a reasonable person when he looks at it. *Dresser*

Indus., Inc., 853 S.W.2d at 508; *see also Griffin Indus., Inc. v. Foodmaker, Inc.*, 22 S.W.3d 33, 37 (Tex.App.--Houston [14th Dist.] 2000, pet. denied) (indemnity clause must be conspicuous under an objective standard). In adopting the standards for conspicuousness contained in the Uniform Commercial Code, the court noted that "[w]hen a reasonable person against whom a clause is to operate ought to have noticed it, the clause is conspicuous." *Dresser Indus., Inc.*, 853 S.W.2d at 508. As examples of what would make a clause conspicuous, the court mentioned language in capital headings, language in contrasting type or color, and language in extremely short documents. *Id.*; *see also Reyes*, 134 S.W.3d at 192 (language may satisfy this requirement by appearing in larger type, contrasting colors, or otherwise calling attention to itself).

The court in *Dresser Indus., Inc. v. Page Petroleum, Inc., supra*, ultimately determined that the release provisions at issue were not conspicuous. In both contracts, the provisions were located on the back of work orders. One contract contained eighteen uniformly printed and spaced paragraphs. The second contract had nine uniformly printed and spaced paragraphs. Further, the court noted that neither contract was so short that every term could be considered conspicuous. 853 S.W.2d at 511.

In *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, 901 S.W.2d 789 (Tex.App.–Houston [14th Dist.] 1995, writ denied), the Houston Court of Appeals reviewed the requirements of conspicuousness as applied to indemnity provisions. In this case, the indemnity provision was contained on the back of a rental contact. It provided:

> **LIABILITY FOR DAMAGE TO EQUIPMENT, PERSONS AND PROPERTY:**
>
> As U. S Rentals has no control over the use of the rented items by customer, customer agrees to indemnify....

The indemnitee argued that the provision met the conspicuousness requirement because it was set of by a conspicuous heading, the overall content and format of the contract would have drawn a reasonable person's attention to the indemnity provision, and that a person with the indemnitor's sophistication in the industry and experience in renting equipment would have notice the provision. *Id.* at 792. The court disagreed, stating:

> In the present case, the indemnity provision was the seventh of fifteen unrelated provisions spanning the back of the rental contract. **The headings and text of all fifteen were printed in the same respective sizes and types. Thus, the indemnity provision was no more visible than any other provision on the back of the page.** Moreover, neither the statements on the front of the contract nor the heading of the indemnity provision said anything to alert renters that they were entering into an indemnity agreement. In light of these considerations, we do not believe that the indemnity provision was written so that a person against whom it was to operate ought to have noticed it....

Id. (emphasis added).

Further, the court held that the conspicuousness of an indemnity provision must be established by objective factors on the face of the agreement, rather than vary according to the subjective sophistication and experience of the indemnitor. *Id.*

The following example sets out an indemnity provision that satisfies both the express negligence doctrine and the conspicuousness requirement under Texas law.

Example 3

INDEMNITY PROVISION

SUBCONTRACTOR SHALL FULLY DEFEND, PROTECT, INDEMNIFY, AND HOLD HARMLESS CONTRACTOR, ITS OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES, OR SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, ACTIONS OR CAUSES OF ACTION, AND ANY AND ALL LIABILITIES, COSTS AND EXPENSES (INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEYS' FEES AND EXPENSES, INCURRED IN DEFENSE OF CONTRACTOR), DAMAGE, OR LOSS IN CONNECTION THEREWITH, WHICH MAY BE MADE OR ASSERTED BY SUBCONTRACTOR, ITS OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES, OR SUCCESSORS AND ASSIGNS, OR ANY THIRD PARTIES (INCLUDING, BUT NOT LIMITED TO, CONTRACTOR'S AGENTS, SERVANTS, EMPLOYEES, OR CUSTOMERS) ON ACCOUNT OF, OR SUSTAINED OR ALLEGED TO HAVE BEEN SUSTAINED BY, OR ARISING OR GROWING OUT OF, PERSONAL INJURIES, INCLUDING DEATH, OR LOSS OF OR DAMAGE TO OR DESTRUCTION OF PROPERTY, CAUSED BY, ARISING OUT OF, SUSTAINED OR ALLEGED TO HAVE BEEN SUSTAINED BY, OR IN ANY WAY INCIDENTAL TO OR IN CONNECTION WITH THE PERFORMANCE HEREUNDER, REGARDLESS OF WHETHER SUCH CLAIMS, ACTIONS, LIABILITIES, OR LOSSES ARE FOUNDED IN WHOLE OR IN PART UPON, OR CAUSED OR CONTRIBUTED TO BY, THE NEGLIGENCE, FAULT, AND/OR STRICT LIABILITY OF CONTRACTOR, ITS OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES, OR SUCCESSORS AND ASSIGNS.

INSURANCE COVERING THIS INDEMNITY AGREEMENT SHALL BE PROVIDED BY SUBCONTRACTOR. THE LIABILITY OF SUBCONTRACTOR, AS HEREIN ABOVE PROVIDED, SHALL NOT BE LIMITED BY THE INSURANCE COVERAGE REQUIRED OF SUBCONTRACTOR.

3. Exception To The Fair Notice Requirements.

The courts have grafted an exception to the fair notice requirements: actual notice. If both contracting parties have actual knowledge of the provision's terms, the agreement can be enforced even if the fair notice requirements have not been satisfied. *Reyes*, 134 S.W.2d at 192; *Dresser Indus., Inc.*, 853 S.W.2d at 508 n.2.

It should be noted that this exception has only been applied to the conspicuousness requirement and its application to the express negligence doctrine is questionable. *See, e.g., Douglas Cablevision IV, L.P. v. Southwestern Elec. Power Co.*, 992 S.W.2d 503, 510 (Tex.App.–Texarkana 1999, pet. denied) (actual notice is an affirmative defense to conspicuousness requirement).

4. Is The Liability Of The Type The Indemnification Agreement Intended To Cover?

Another matter that is often overlooked, but must be considered in determining whether the indemnity agreement is enforceable, is whether the liability alleged against the indemnitee is of the type that the indemnification agreement intends to cover. In other words, is the indemnitee' s alleged liability within the scope of the indemnity agreement.

In *Martin Wright Elec. Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied*, 397 U.S. 1022 (1970), the court, after reviewing Texas jurisprudence on the subject, announced the following test as the appropriate scope of inquiry:

> [W]hen the accident or injury is caused by the negligence of the indemnitee, the circumstances of the cause of the

> accident, the negligent acts or omissions, are examined by the courts to determine if they had any connection with, involvement with or relation to the performance of the work of the indemnitor. If they had none, the injuries are not considered as having any "connection with" the work, "arising out of" it, or "resulting from" it under language of contracts having such broad connotation.

Id. at 1385.

As a brief review of several opinions shows, however, courts have, unfortunately, been all over the map on whether an injury arose out of the indemnitor's work. In *Alamo Lumber Co. v. Warren Petroleum Corp.*, 316 F.2d 287 (5th Cir. 1963), the court found that the asphyxiation of two of the indemnitor's employees arose out of operations embraced by the contract. Alamo contracted with Warren to build cabinets in a chemical laboratory on Warren's plant site. Alamo agreed to indemnify Warren for any injuries which arose out of or in connection with the activities of Alamo. During the course of the construction of the cabinets, it was determined that a sink needed to be removed. Two of the pipes leading into the sink were plugged up. A third pipe, for sewer drainage, was disconnected but was left open. Waste gas from Warren's plant backed up in the sewer and was discharged through the open pipe into the lab where Alamo's employees were working.

The employees were overcome by the poisonous gas and became unconscious. The two men recovered on their negligence claims against Warren. Warren, in turn, sought indemnity from Alamo under the terms of the contract.

Alamo contended on appeal that there had to be some causal connection between the work it was obligated to perform and the damages for which Warren sought indemnity. The court rejected this approach finding that the only requirement was that the injury have some connection with Alamo's work. *Id.* at 290.

A similarly broad interpretation was adopted in *Boyd v. Amoco Prod. Co.*, 786 S.W.2d 528 (Tex.App.–Eastland 1990, no writ). Boyd and Amoco entered into a Well and Lease Service Master Contract pursuant to which Boyd agreed to provide welding services on Amoco's equipment. Under the terms of that contract, Boyd agreed to indemnify Amoco for any injuries "arising out of, incident to, or in connection with any and all operations under the contract." Boyd sent one of its welders to a lease to cut the anchor bolts which secured a pumping unit to a concrete pad. Two of Amoco's employees began doing the work necessary to prepare for the removal of the pumping unit. They proceeded to disconnect the sucker rods. While they were working, Boyd's welder commenced cutting the anchor bolts. He was cutting the third of ten bolts when the Amoco employees loosened the bridle on the "horse's head" of the pump's rocker arm. The sucker rods slipped down, and then the large counterweights caused the rocker arm to move down. One of the counterweights grazed the welder's head and the rocker arm caught and mangled his left arm.

All three men stated that they should have ensured that the brake was set on the pumping unit. Had the brake been set, the accident would not have happened.

On appeal, Boyd argued that the injuries did not arise out of its welding operations because its welder was doing one operation (cutting bolts) while the Amoco employees were doing a completely different operation. The court of appeals rejected this argument finding that the indemnity provision was very broad and the injuries to the welder were incidental to and connected with operations under the indemnity agreement. *Id.* at 530-31.

There are also a number of cases on the other end of the spectrum. In *Robert H. Smith, Inc. v. Tennessee Tile, Inc.*, 719 S.W.2d 385 (Tex.App.–Houston [1st Dist.] 1986, no writ), a subcontractor's employee was electrocuted when he attempted to move armored cable containing electric wires. The employee sued the general contractor, which sought indemnity from the subcontractor under a provision that provided that the sub would indemnify the general for any claims "arising out of or resulting from the performance of the Subcontractor's Work." On appeal, the court found that the indemnity provision did not provide for indemnity for the general contractor's own negligence. The court went on to note, however, that even if the provision covered the general's own negligence, the employee's injury clearly did not arise out of the performance of the sub's work. The court noted that the employee's pleadings alleged that he was injured while handling live electrical wires in preparation of the assigned work.

Since the scope of the work portion of the contract between the general and the sub clearly did not include handling electrical wires as a term or condition of the contract,

the injury could not have arisen out of the performance of the subcontractor's work. *Id.* at 388.

In *Brown & Root, Inc. v. Service Painting Co. of Beaumont, Inc.*, 437 S.W.2d 630 (Tex.Civ.App.–Beaumont 1969, writ ref'd), an employee of a painting subcontractor was killed when a bumper under which he was painting fell and crushed him. Brown & Root was hired to install an automatic handling system for rolls of paper. The handling system included a bumper device which could be raised to control the rolls of paper. The painting subcontract called for painting, including the area under the bumper. On the day of the accident, the sub's employee was engaged in painting underneath the bumper in a pit. A leak developed in the air line controlling the bumper. It became necessary for employees of Brown & Root to bleed the line. While doing so, the bumper fell, killing the sub's employee. The general contractor, Brown & Root, sought indemnification from the painting subcontractor pursuant to an indemnity provision that provided for indemnity for all injuries which might occur "in connection with" performance of the painting subcontract work The trial court held that the death was caused solely by the negligence of an employee of the general contractor.

On appeal, the court noted the following:

> Appellant's argument is deceptively simple, and at first blush, seems unanswerable. It proceeds along these lines: Carpenter was killed at a time when he was painting under the bumper which descended upon him.
> Not only was he acting in the scope of his employment, but also it was the very work which he was doing which placed him in the position of danger wherein he met his death. Thus, in painting the area beneath the bumper, Carpenter

> was clearly effectuating the object of the sub-contract. It then follows, according to appellant, that "he met his death in connection with work he was performing under the sub-contract" and appellants are entitled to indemnity.

Id. at 632.

The court rejected this argument finding that the death did not grow out of any work undertaken by the subcontractor, but instead was due solely to the negligence of the general contractor performing work under the general contract. The court held that since the work had no connection with the painting and was work with which the subcontractor had no connection, Brown & Root was not entitled to indemnity. *Id.* at 634.

Finally, in *Westinghouse Elec. Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex.Civ.App.–Fort Worth 1961, writ ref'd), Westinghouse and Childs- Bellows entered into a contract pursuant to which Westinghouse was to act as the elevator installation subcontractor. Under the agreement, Westinghouse agreed to indemnify Childs-Bellows, the general contractor, against all claims "growing out of, arising out of, or incident to or resulting from the performance" of the work by Westinghouse. During the course of the construction work, two employees of Westinghouse were stuck by falling objects while working in the elevator shaft. The injuries were the result of negligence of employees of the general contractor. After settling with the subcontractor's employees, Childs-Bellows sought indemnity from Westinghouse.

On appeal, Westinghouse contended that the agreement only covered losses occasioned by the negligent acts of Westinghouse and did not cover losses occasioned by the negligent acts of the general contractor. The appellate court agreed.

> The agreement does not show an intent by the parties to indemnify Childs-Bellows for injuries to persons resulting from work which was under the exclusive jurisdiction of Childs-Bellows as general contractor. The injuries sustained by the Westinghouse employees were not injuries growing out of any work undertaken by Westinghouse but, according to the stipulations, were due solely to negligence of employees of the general contractor...in work which...had no connection whatsoever with the installation of the elevators, and work which Westinghouse had no connection.

Id. at 808.

One thing is clear. Just because an employee was at work or on a worksite when injured does not necessarily mean that an injury arose out of or was incident to the performance of the employee's work. In other words, all the surrounding facts and circumstances must ultimately be examined to determine whether the negligent act had any connection with or relation to the performance of the indemnitor's work. *Greer v. Servs., Equip. & Eng'g, Inc.*, 593 F. Supp. 1075, 1079 (E.D. Tex. 1984).

5. No Obligation To Defend And Reimburse Defense Costs Where The Indemnity Provision Fails The Fair Notice Requirements.

In *Fisk Elec. Co. v. Constructors & Assoc, Inc., supra*, the Texas Supreme Court held that there is no obligation to indemnify an indemnitee for the costs and expenses resulting from a claim made against the indemnitee unless the indemnification agreement complies with the fair notice requirements. 888 S.W.2d at 813-14. The indemnitor's obligation to pay attorneys' fees arises solely out of the duty to indemnify. *Id.* at 815.

6. Other Indemnity Issues.

There are two issues in the arena of indemnification agreements that have no clear answer in Texas. The first of these is with respect to indemnity for gross negligence. In *Crown Central Petroleum Corp. v. Jennings*, 727 S.W.2d 739 (Tex.App.–Houston [1st Dist.] 1987, no writ), the indemnification provision contained language "excepting only claims arising out of accidents resulting from the sole negligence of Owner." Crown, the indemnitee, sought to have the court interpret this language such that it would still include indemnification for Crown's sole gross negligence. The court rejected any such interpretation:

> Such an interpretation could not have been intended by the parties. They specifically excluded sole negligence, and it would logically follow that Crown's sole gross negligence would be excluded from indemnity also...If Crown had sought indemnity for its own gross negligence, such an obligation by Mundy should have been expressed in specific terms.

Id. at 742.

The court went on to note that since it held that the indemnity provision did not obligate Mundy to indemnify Crown for punitive damages, it would not reach the question of whether indemnification of punitive damages would violate public policy. *Id.*

In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989), the court recognized that although the indemnity provision did not differentiate between degrees of negligence, the language "any negligent act" was sufficient to define the parties' intent. *Id.* at 726. The court noted that it did not need to decide whether

indemnity for one's own gross negligence or intentional injury may be contracted for or awarded in Texas. *Id.* at 726 n.2.

Finally, in *Webb v. Lawson-Avila Constr., Inc.*, 911 S.W.2d 457 (Tex.App.–San Antonio 1995, writ dism'd), the court was faced with the question of whether an indemnity provision that satisfied the express negligence doctrine covered gross negligence as well. Noting that when parties to a contract use the term "negligence" it is assumed they mean all shades of negligence, the court determined that gross negligence would likewise be included. *Id.* at 461.

The last case is questionable authority given that the court applied a "fair and reasonable" construction to the provision instead of a strict construction because that was what the contract called for.

There is a real question as to whether conduct that provides the basis for exemplary damages can or should be indemnified. First, these damages are designed to punish the wrongdoer. There is no compensatory element anymore.

Given that, why should a party be allowed to pass off this obligation. Second, given the ongoing dispute with respect to the insurability of punitive damages, some of the same arguments would apply to indemnification outside the insurance context.

The second area in which no clear answer exists is with respect to the question of indemnity and vicarious liability claims. Unlike some states, there is little to no authority in Texas on this issue.[4]

In fact, the only opinion that directly addresses this issue in Texas is an unpublished opinion. Although the case can now be cited, it is not controlling authority. In *Texas Medicus, P.A. v. Polly Ryon Mem. Hosp.*, No. 01-93-00014-CV, 1993 WL 460098 (Tex.App.–Houston [1st Dist.] Nov. 10, 1993, no writ) (not designated for publication), the hospital entered into an agreement with a staffing company to furnish physicians for emergency services. The staffing company agreed to indemnify the hospital. The indemnity agreement provided:

> Physicians and its provided physicians shall defend, indemnify, and hold harmless Hospital, its directors, officers, and employees harmless from and against any and all claims...for injury to persons caused or asserted to have been caused by the negligent acts of Physicians or its provided physicians, agents, servants or employees.
> This indemnity provision is specifically intended to apply to those situations wherein Hospital is held liable for negligent acts of Physicians or its provided physicians or wherein it is claimed that Hospital is liable for said negligent acts.

4 For example, Florida law is clear on indemnification of vicarious liability claims. *See, e.g., Metropolitan Dade County v. CBM Indus. of Minn., Inc.*, 776 So. 2d 937 (Fla. Dist. Ct. App. 2000), *rev. denied*, 797 So. 2d 585 (Fla. 2001) (court noting that in provision providing indemnity obligation for all claims except those involving liability arising out of negligent acts or omissions of the indemnitee, a vicarious liability claim was covered and defense was owed as to all claims); *Association of Retarded Citizens, Dade County, Inc. v. State*, 619 So. 2d 452 (Fla. Dist. Ct. App. 1993) (indemnification existed for damages stemming from claim for vicarious liability).

The court held that the express negligence doctrine did not apply because the contract did not indemnify the hospital for its own negligence. Instead, it indemnified the hospital only if it was held liable vicariously for the physicians' negligence.

Interestingly, the court did not even comment on the fact that the provision in question directly addressed vicarious liability. Therefore, there is no way to know if Texas law would mirror Florida law in this area. This is the only opinion available. It should be noted that in a case not involving vicarious liability, the Texas Supreme Court has recently noted that the express negligence doctrine does not apply when a party does not seek indemnity for its own negligence. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 424 (Tex. 2000); *see also M.M. Sundt Constr. Co. v. Contractors Equip. Co.*, 656 S.W.2d 643, 645 (Tex.App.–El Paso 1983, no writ) (where damages result from conduct for which indemnity is provided and which does not involve the negligence of the indemnitee, liability is established and express negligence rule does not apply).

Absent the existence of the case out of Houston, a party could present good arguments on both sides of the question. For example, in *White v. Dennison*, 752 S.W.2d 714 (Tex.App.–Dallas 1988, writ denied), the court noted that under the doctrine of respondeat superior, the master and servant are one and the same and the employer and employee compose one entity for one wrongful act causing injury to one person.

Id. at 717. Under this reasoning, one could clearly argue that the indemnitee is actually attempting to obtain indemnification for its own negligence and would not be so entitled where the agreement fails the express negligence test. On the other hand, in *St.*

Anthony's Hosp. v. Whitfield, 946 S.W.2d 174 (Tex.App.–Amarillo 1997, writ denied), the court noted that respondeat superior is based on the theory that the employer is liable for the negligence of the employee, although there has been no negligence on the part of the employer. In other words, the employer is exposed to liability not because of any negligence on the part of the employer, but because of the employee's negligence in the scope of his employment. *Id.* at 178. This line of reasoning supports the position taken by the courts in Florida and would entitle the indemnitee to indemnity.

III. CONTRACTUAL LIABILITY COVERAGE

A. Who Is Going To Pay For The Indemnification Claim? (Or Do I Have Insurance For That?)

Once you get past the question of whether there is an enforceable indemnity agreement, the next issue becomes who is going to be responsible for paying that claim. In other words, does an indemnitor have insurance that might be applicable. The answer to this question is often yes.

1. Contractual Liability Coverage To The Rescue.

Contractual liability coverage provides coverage for the named insured's contractual assumption of the tort liability of another party.

Musgrove v. Southland Corp., 898 F.2d 1041, 1044 (5th Cir. 1990). This assumption of tort liability is typically in the form of an indemnity agreement. *Id.*

Under Coverage A of a typical CGL Policy, the policy provides that "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of

'bodily injury' or 'property damage' to which this insurance applies." Under this broad coverage grant, an insured is covered for any liability arising from its contractual obligation to indemnify another. Jill B. Berkeley, *Six Myths Concerning Contractual Liability Coverage*, CGL REPORTER, Spring 1995, at (7) 310-5 [hereinafter *Six Myths*]; *see also Hart Const. Co. v. American Family Ins. Co.*, 514 N.W.2d 384 (N.D. 1994).. This promise to indemnify is restricted by the standard "contractual liability" exclusion. Berkeley, *Six Myths*, CGL REPORTER, at (7) 310-5. That exclusion provides that Coverage A does not apply to damages for which the insured is obligated to pay by reason of the assumption of liability in a contract or agreement. There is, however, an exception to the exclusion. The CGL Policy provides that the exclusion does not apply to liability of others assumed by the named insured under an "insured contract." An "insured contract" is defined to include:

> That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization....

Therefore, under the terms of the typical CGL Policy, the insured/indemnitor would have coverage for the liabilities it might incur as a consequence of the indemnity

provision of a construction contract or other Agreement. *See Gibson & Assoc., Inc. v. Home Ins. Co.*, 966 F. Supp. 468, 476 (N.D. Tex. 1997).[5]

Exclusions in the policy may not be applicable to contractual liability coverage, such that coverage may be broadened. Some policy provisions expressly do not apply to contractually assumed liability; for example, the employer's liability exclusion.

The other insurance provision is not applicable to contractual liability coverage. In other words, the carrier cannot look to see what other coverage is available to the indemnitee.

2. The Carrier Owes No Duty To Defend The Indemnitee.

The contractual liability coverage does not impose a duty on the carrier to defend the indemnitee. Berkeley, *Six Myths*, CGL REPORTER, at (7) 310-11. The contractual liability coverage does not make the indemnitee an insured under the CGL Policy. Since an insurance company only owes duties, including the duty to defend and indemnify, to its insured, the carrier owes no duty to the indemnitee under this analysis. Instead, the carrier simply owes a defense to its insured against the indemnity claim made by the indemnitee.

[5] This statement is, of course, subject to the caveat that contractual liability coverage does not provide coverage for breach of a contractual obligation. For example, if the insured fails to obtain coverage for the indemnity agreement or fails to have a party named as an additional insured, there will be no coverage because such acts constitute a breach of contract, not a tort liability.

Gibson & Assoc., Inc., 966 F. Supp. at 477; *see also White Mountain Constr. Co. v. Transamerica Ins. Co.*, 137 N.H. 478, 631 A.2d 907 (1993) (insured entitled to coverage and a defense for liability arising under indemnity agreement).

Although there was some dispute about the issue of the defense costs of the indemnitee, most commentators took the position that contractual liability coverage would also include the defense costs the insured owes under its indemnity obligation. CGL Policies now typically provide that defense costs will be covered (reasonable attorneys' fees and litigation expenses incurred by or for a party other than the insured (indemnitee)). Pursuant to the terms of the policy, these defense costs are treated as damages subject to the policy's liability limits. This is not true if the defense is being provided pursuant to the Supplementary Payments provision discussed below.

Because an indemnitee often requires that it also be named as an additional insured, the insurance company will typically undertake the defense anyway.

Since the 1996 version of the CGL Policy was drafted, the Supplementary Payments provision of the typical CGL Policy contains a provision for a direct defense of the indemnitee.

The conditions for provision of this defense are very restrictive. They include the following:

a. Insured must be named as a co-defendant with the indemnitee in the same suit;

b. There must be no existing or potential conflicts between the insured and the indemnitee;

c. It must be possible for both the insured and the indemnitee to be represented by the same counsel;

d. The indemnitee and the insured must concur in a request that the insurer provide a defense; and

e. The indemnitee must authorize the insurer to control the defense.

It is going to be a very rare situation in which all of these requirements can be met.

3. Has The Insured Actually Assumed Any Liability?

A question may arise as to whether the insured has actually assumed the tort liability of the indemnitee where the indemnity provision does not satisfy one or both of the fair notice requirements. Although there is no Texas case law on this subject, there is authority for the proposition that whether the indemnity provision is enforceable merely affects liability issues, but does not affect the obligation of the insurer to provide coverage in an "insured contract" situation. *See Mid-Continent Cas. Co. v. Swift Energy* Co., 206 F.3d 487 (5th Cir. 2000) (since company intended to assume tort liability, argument that contract was not insured contract was properly disposed of); *United Nat'l Ins. Co. v. Dunbar & Sullivan Dredging Co.*, 953 F.2d 334 (7th Cir. 1992); *Michael Nicholas, Inc. v. Royal Ins. Co. of Am.*, 748 N.E.2d 786 (Ill. App. Ct.), *appeal denied*, 763 N.E.2d 320 (Ill. 2001) (refusing to equate tort liability and negligence liability); Jill B. Berkeley, *How To Use Contractual Liability Coverage Effectively (Revised)*, CGL REPORTER, Fall 2001, at (13) 310-1 (inappropriate to impose construction rules applicable to indemnity agreements on meaning of insured contract; policy language does

not use negligence in definition, just tort liability); 9 COUCH ON INSURANCE § 129:30 (3d ed. 1998); *but see Rapid Leasing, Inc. v. National American Ins. Co.*, 263 F.3d 820 (8th Cir. 2001) (finding that since indemnity provision did not satisfy strict construction rules under state law, it did not constitute insured contract); *Office Structures, Inc. v. Home Ins. Co.*, 503 A.2d 193 (Del. 1985) (no coverage under contractual liability portion of policy where insured did not assume liability for indemnitee's negligence).

In reaching its decision in *Swift Energy Co.*, the Fifth Circuit cited to an article in the Drake Law Review which noted:

> From the insurer's perspective, there is a lack of case law addressing the effect of unenforceable indemnity language on insured contract coverage. An insured might argue that because it intended to assume the indemnitee's tort liability, the insurer should still cover the subject occurrence. In other words, the indemnitor should not be penalized for language in a contract that it probably did not draft. Although this argument wrongly ignores the fundamental principle that there can be no insured contract in the absence of assumed tort liability, courts inclined to find coverage may embrace such an argument. As a result, an insurer should always defend under a reservation of rights whenever a question exists about the scope or effectiveness of indemnification language in an incidental contract. Insurers cannot afford to forget the independence and breadth of their duty to defend.

Douglas R. Richmond & Darren S. Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds*, 44 DRAKE L. REV. 781, 795 (1996).

It appears then that courts and commentators generally believe that an insured should be entitled to a defense against a claim under an indemnification clause, even

when that provision is unenforceable. The only suggestion to the contrary was in dicta in *Mid-Continent Cas. Co. v. Swift Energy Co., supra*, where the court noted:

> Out of an abundance of caution, we nevertheless assume without deciding that, if the MSA's indemnity provisions were clearly invalid under or offense to the TOAIA, it might affect the MSA's status as an "insured contract" under the Policy.

206 F.3d at 493.

Because the majority of cases and commentators believe coverage exists so long as there is an assumption of tort liability, even if the agreement or provision fails the strict construction rules applicable to indemnity agreements, carriers should be advised to undertake their insured's defense in the matter and have defense counsel move for a summary judgment on the indemnity claim.

4. 2004 Changes.

Endorsement CG 24 26 was introduced by the ISO in 2004 in conjunction with the revisions to the additional insured endorsements discussed later in this paper to provide insurers with an endorsement that would tailor contractual liability coverage to match more closely the more restricted protection provided to the named insured's indemnitee as an additional insured. ISO has linked this endorsement to the additional insured endorsements not just by filing them together buy by explaining them as components of a single overall revision of the CGL policy's response to contractual risk transfer. ISO has characterized the endorsement as one that will "amend the definition of an insured contract in the CGL to remove coverage for the additional insured's sole

negligence." 2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI.36 (International Risk Management Institute, Inc. 2005).

IV. MOST PEOPLE WANT ADDITIONAL INSURED STATUS ALSO

A. Does The Additional Insured Have Coverage For Its Own Negligence?

In additional to contractual indemnity provisions, it is now quite common for contracts to require, and CGL policies to contain, endorsements which extend coverage to parties other than the named insured. Being named as an additional insured is another part of the risk-shifting strategy.

The provision of additional insured coverage is popular among contracting parties (other than insurance companies) because it usually involves little cost to the named insured, but can provide substantial coverage to the additional insured.

There are at least 28 standard ISO form endorsements available in the arena of general liability coverage as a means of securing additional insured status in a variety of business or social related contexts. Many of these endorsements are designed for use in relationships outside of a business context. This paper will focus on the "Owners, Lessees or Contractors" endorsement designed to address the additional insured requirements of construction contracts.

1. What The Additional Insured Wants And What It Gets.

An additional insured is a person or entity added to the named insured's CGL Policy by way of endorsement. The addition may be made specifically or by way of blanket endorsement. The endorsement amends the "who is an insured" portion of the

subject policy to include persons or entities being added. An additional insured is a third-party beneficiary of the insurance contract. It has the right to enforce policy in its favor.

Securing the status of an additional insured does not guarantee coverage, however. The additional insured is generally subject to all policy provisions, including exclusions, conditions, and definitions. As a general rule, the additional insured has no greater rights than those enjoyed by the named insured.[6]

Coverage may be governed by more than the insurance policy. In some jurisdictions, exclusions of which a certificate holder is unaware will not be given effect. In Texas, a certificate merely evidences status and the policy terms govern coverage.

Additional insureds expect the same scope of coverage as that provided to the named insured. Just because they expect it does not necessarily mean they get it. Where a contract requires only that party be named as an additional insured, and the named insured procures coverage, the named insured assumes no liability for injury or damages, even if the insurer breaches its duty to additional insured. The named insured is not liable for failing to obtain coverage for all claims arising out the contract. CGL Policy differentiates between named insured and additional insured by use of the terms "you" and "your."

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[6] Although there is some confusion on this point in a few reported cases, the name Aadditional named insured@ is really a misnomer in the context of a CGL policy. One is either a named insured, an automatic insured, or an additional insured (by endorsement).

References in the policy determine applicability of policy provisions, conditions, and exclusions. Examples.

i. Insuring agreement refers to "the insured" making it applicable to named and additional insureds.

ii. Intentional injury and employer's liability exclusions both refer to "the insured" making them applicable to both.

iii. Notice duties are only partially applicable to additional insured.

2. What Is The Relationship Between Indemnity And Additional Insured Status?

Because the two obligations often arise in the same contract, courts have looked at the interrelation, if any, between indemnity agreements and additional insured provisions. In *Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992), *cert. denied*, 510 U.S. 820 (1993), the Texas Supreme Court held that (1) additional insurance and indemnity provisions are separate and distinct obligations and (2) the express negligence doctrine does not invalidate an additional insured provision in an agreement that does not otherwise support an indemnity agreement.

Another question that often arises is whether an agreement requires the party providing insurance to insure against liability arising from the additional insured's own negligence. In *Emery Air Freight Corp. v. General Transp. Sys., Inc.*, 933 S.W.2d 312 (Tex.App.–Houston [14th Dist.] 1996, no writ), the court found that the issue requires a two-step analysis. First, the court must determine whether the indemnity clause satisfies the express negligence rule. Second, it must be determined whether the insurance clause merely supports the indemnity clause or stands alone, representing an independent

obligation. *Id. at 315.* Where the indemnity provision fails the express negligence test, and the insurance provision does not stand alone, the insurance would not provide coverage against the additional insured's own negligence. The court found that the most reasonable construction of the insurance provision was only to ensure performance of the indemnity agreement. In effect, where the provisions are interrelated, the agreement to procure insurance and the scope of same is determined by the scope of the indemnity agreement.

Not all jurisdictions follow this analysis. Invalid and unenforceable indemnity agreements do not necessarily render coverage for the additional insured null and void.

3. Coverage For The Additional Insured's Own Negligence? - The Endorsements Have Changed.

One of the biggest questions that often arises is whether the additional insured has coverage only for vicarious liability or whether it is insured for its own negligence. The majority view throughout the country is that coverage exists for the direct negligence of the additional insured. In other words, the additional insured endorsement triggers coverage even when the named insured is not negligent or even sued. Courts find that "arising from" or "arising out of" have broad meaning: not necessarily proximate causation. As the court noted in *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App.–Houston [1st Dist.] 1999, pet. denied):

> The majority view of these cases is that for liability "to arise out of operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather, it is sufficient that the named insured's employee was injured while present at the scene in

> connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured.

Id. at 454.

In 2004, the industry adopted new versions of the additional insured endorsements. Each includes similar general coverage language: "bodily injury" or "property damage" that is caused, in whole or in part by the named insured.

According to the National Underwriter, ISO made the changes in response to what it perceived to be a "straightforward" problem with the courts' interpretation of "arising out of" endorsements. In its Explanation of Changes section of the filing memorandum, ISO stated:

> Because the phrase "arising out of" has been interpreted broadly by some courts, we are revising several of the additional insured endorsements to add specific language to provide an additional insured with coverage for their vicarious liability or contributory negligence only. The additional insured will have only coverage for bodily injury, property damage or personal and advertising injury that is caused in whole or in part by the acts or omissions of either the named insured or those acting on behalf of the named insured. A major effect of that wording will be to prevent any alleged coverage for the additional insured's sole negligence. These revisions will better reflect the intent of the endorsements.

The National Underwriter, FC&C Bulletins, "ISO's Solution: Granting Additional Insured Coverage Based on Fault," (citing "Revisions to Additional Insured Endorsements," ISO Commercial General Liability Forms Filing GL-2004-OFGLA, at 2-3).

Additionally, according to the National Underwriter, ISO's latest version of the CG 20 series of additional insured endorsements attempts to achieve a fault based coverage by linking the potential coverage to the acts or omissions of the named insured. In other words, the basis for the additional insured's liability must be vicarious or if the additional insured is liable for contributory negligence, it will only be covered provided that the named insured, and not some other party, is also at fault. *See* 2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI.H.12.

The ISO takes the position that "caused in whole or in part by" expresses a stronger causal connection than "arising out of." DONALD S. MALECKI, PETE LIGEROS & JACK P. GIBSON, THE ADDITIONAL INSURED BOOK at 179 (5th ed. 2004). At least one court, in discussing the application of an exclusion, suggested the ISO may be right in its conclusion. *See New England Mut. Life Ins. Co. v. Liberty Mut. Ins. Co.*, 667 N.E.2d 295, 298 (Mass. App. Ct.), *rev. denied*, 671 N.E.2d 952 (Mass. 1996) ("arising out of" much broader than "caused by").

The Massachusetts court is not alone in this regard. The Fifth Circuit and the Texas Supreme Court have agreed that "caused by" is much more restrictive in scope that "arising out of." *See American States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998); *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951); *Utica Nat'l Ins. Co. v. American Indem. Co.*, 141 S.W.3d 198, 202-203 (Tex. 2004); *see also Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, 2010 U.S. Dist.

LEXIS 127126, at *24 (E.D. Pa. 2010) (requiring an allegation of proximate cause to invoke duty to defend under policy language).

Commentators have suggested, however, that it is not clear that the language at issue in this CGL Policy will not respond to injury or damage for which the additional insured is solely liable. The commentators note that the named insured's act or omission that must be a partial cause of the injury or damage does not have to be a negligent act, or any sort of act that could impose legal liability on the named insured. For example, a named insured's act of assigning a worker to a specific task, in the course of which the worker is injured through the negligence of the additional insured's acts or omissions could be enough to trigger the insuring agreement, if "caused by" is given a broad meaning by the courts. *See* 2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI.H.12. Given that courts often go out of their way to find coverage, a broad reading of this phrase may result given the right set of facts. Additionally, another commentator has suggested that it will be the insurance company's burden to prove that the named insured is not responsible in any way. DONALD S. MALECKI, PETE LIGEROS & JACK P. GIBSON, THE ADDITIONAL INSURED BOOK at 178.

One area that suggests that the new language might end up being given broad interpretation by the courts is the area of third party over suits: injured employee of named insured, barred by the workers' compensation exclusion from suing his employer, brings a third party action against the additional insured. Commentators suggest that

insurers and the courts should be guided by the following considerations in determining whether the additional insured should have coverage in this arena:

> 1. Coverage under the new endorsement is not dependent upon alleging negligence of the named insured - "acts or omissions" does not say anything about negligence;
>
> 2. Allegations of negligence against one party imply nothing necessarily about the possibility of other concurrent causes of injury; and
>
> 3. The coverage intent of the new endorsement language does not seem to encompass a blanket exclusion of third party over suits.

2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI.H.13-4.

Additionally, some risk management professionals have suggested that the phrase "those acting on your behalf" may constitute an additional argument for coverage in these type of actions. The allegation that an additional insured failed to maintain a safe workplace could be viewed as an allegation of acts or omissions by the named insured or that the additional insured was or should have been acting "on behalf of" the employer and its employees since as the employer, the named insured has a non-delegable duty to provide a safe workplace. DONALD S. MALECKI, PETE LIGEROS & JACK P. GIBSON, THE ADDITIONAL INSURED BOOK at 183; *see General Elec. Co. v. Moritz*, 257 S.W.3d 211, 215 (Tex. 2008) (court reminding all litigants and lower courts that it is the independent contractor that owes its own employees a nondelegable duty to provide them a safe place to work, safe equipment to work with, and to warn them of potential hazards).

In this discussion, the commentators also note that the ISO left out any specific mention of the additional insured's sole negligence as an exception to coverage because its inclusion might have created the impression that only three possible negligence scenarios exist in a construction accident (although such an exception exists in the CGL Policy):

1. sole negligence of the additional insured;
2. sole negligence of the named insured; and
3. shared negligence of the named and additional insured.

Since injury or damage on a project can be caused by the negligence of persons and entities that are not insureds under the policy at all, ISO wanted the key to coverage to be not just the partial or sole negligence of someone else besides the additional insured, but rather the partial or sole negligence of the named insured. Including that exclusion could conceivably have obscured the point. *Id.* at 179-80. To illustrate, the commentator offers the following situation:

> [I]magine an injury caused by a parcel delivery driver bringing a shipment to a construction site. Negligence is attributed 50 percent to the driver and 50 percent to the general contractor, who failed to take precautions that would have prevented the accident. Language suggesting that the additional insured general contractor has coverage - *except for injury or damage arising out of its sole negligence* - could be used to make a case for coverage in this instance, since the additional insured was not solely negligent.

Id. at 180 (emphasis in original).

In *American Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 2006 U.S. Dist. LEXIS 33556 (S.D. Tex. 2006), Finger was the general contractor for a residential construction project. Multi was a framing subcontractor. The agreement between these two companies required that Multi have Finger named as an additional insured on its liability policy. The policy that was issued to Multi contained the language at issue herein (caused, in whole or in part, by [acts or omissions of the named insured or acts or omissions of those acting on the named insured's behalf]). Two workers were injured when they fell from an aerial lift. The plaintiffs sued both Multi and Finger alleging that both were negligent.

The carrier denied coverage arguing that Finger's liability was not caused in whole or in part by the acts or omissions of Multi. The carrier's primary argument was that coverage existed only when the additional insured was found vicariously or derivatively liable for the acts of the named insured. The court rejected this argument finding that the "whole or in part" language focuses solely on whether the named insured was partially or wholly responsible for the injuries and the additional insured's liability for same. The court noted that the endorsement should be construed to cover situations where the additional insured and named insured are found jointly liable for their collaborative or jointly undertaken negligent conduct. *Id.* at *23. The court went on to note that the focus of the endorsement is on whether the plaintiff alleges a theory in the operative pleading under which the additional insured could be held liable for conduct by the named insured that caused injury to a third party in any way. *Id.* Noting that the

pleadings alleged various acts of negligence committed by the additional insured and/or the named insured, the court found that the carrier had a duty to defend.

> The First and Second Amended Petitions, as well as the Petition in Intervention, easily support the liability theories that Multi's conduct, in whole or in part, caused Plaintiffs' injuries. Plaintiffs and Martinez may argue at trial – at least as an alternative theory of liability – that Finger and Multi acted in concert in participating in the decisions to use, supply, or design the makeshift aerial lift; that Finger and Multi collaborated in directing the workers' use of the lift; or that Finger and Multi jointly made other decisions that rendered the workplace unsafe for Plaintiffs and Martinez. These liability theories are encompassed by the "whole or in part" sentence of the Endorsement to the extent the injuries allegedly were "caused, in whole or in part" by Multi's acts or omissions.

Id. at*26-7.

The court further noted that the only allegations that would fall clearly outside the coverage provisions would be explicit allegations of the additional insured's sole fault. *Id.* at *23 n.13 (citation omitted). The court also refused to determine whether coverage would exist where the additional insured and the named insured independently committed negligent acts finding that this coverage issue would have to await the conclusion of the underlying lawsuit. *Id.* at *28 n.17.

In *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp. 2d 712 (S.D. Tex. 2010), Parr, an employee of Empire Steel, was injured wile climbing down a ladder at a construction site. The evidence suggested that the fall was caused by the fact that the ladder was muddy. Parr sued Gilbane, the general contractor, alleging negligence, and Baker Concrete, the company responsible for installing and maintaining the ladder.

Under the terms of a contract between Gilbane and Empire Steel, Gilbane was to be named as an additional insured on Empire Steel's CGL policy. Gilbane sought coverage, but the carrier refused to defend or indemnify. The policy at issue contained the same "Who Is An Insured" language at issue in this case. The carrier denied coverage on the basis that there were no allegations in the petition against the named insured, Empire Steel.

After undertaking a review of many of the same authorities cited herein, the court noted that a petition that does not, and cannot, state allegations of negligence against an employer does not indicate that the employer was not at fault, but only that it is statutorily immune. *Id.* at*29.

After noting that the petition alleged that the injured worker was an employee of the named insured and was performing work under a contract between the named insured and additional insured, the court concluded:

> [T]he court cannot say that Parr himself, acting on behalf of Empire Steel in the course of his job, was not possibly a contributing, proximate cause of his injuries. The plain language of the petition states that he was injured while working for Empire Steel. The petition also states that the injuries occurred when Parr was walking down the ladder with muddy boots. This raises at least an inference that Parr himself could have been partly at fault…Additionally, under Texas's comparative responsibility statute, Parr's negligence would have been at issue should Gilbane have been found liable in the underlying suit. The fact Parr's petition does not mention Empire Steel's possible negligence speaks only to the fact that the company is statutorily immune from suit, not that it is without fault. After resolving any ambiguities in favor of coverage, the facts in the underlying petition allege a possible theory

> under which Gilbane could be liable for conduct by Empire Steel or someone on its behalf.

Id. at 29-31.

The court went on to hold that the petition was sufficient to invoke a duty to defend Gilbane, the additional insured.

4. Operations And Ongoing Operations.

Many, if not most, current additional insured endorsements define coverage in terms of the named insured's operations. The typical CGL Policy does not define the terms "operations." When words or terms are not defined in a policy, such terms are given their plain, ordinary, and generally accepted meaning. *Vanguard Ins. Co. v. Plains Helicopter, Inc.*, 529 S.W.2d 277, 279 (Tex.Civ.App.–Amarillo 1975, writ ref'd n.r.e.).

In *Vanguard*, the court noted that the term "operations" was used as a synonym for the word "work." *Id.*; *see also Pan American v. Cooper*, 157 Tex. 102, 109, 300 S.W.2d 651, 655 (Tex. 1957).

In *Merrell v. Republic Western Ins. Co.*, 931 P.2d 577 (Colo. Ct. App. 1997), the court defined operations as those activities actively engaged in by the named insured for the benefit of its business. *Id.* at 578. In *Container Corp. v. Maryland Cas. Co.*, 707 So. 2d 733 (Fla. 1998), the Florida Supreme Court found that an insured's operations was defined as that work done in the performance of the insured's contract with the additional insured. *Id.* at 737. In *Mid-Continent Cas. Co. v. Swift Energy Co.*, *supra*, the court found that work fell within the meaning of the term operations if it was done in

connection with performing the named insured's business. The court looked to the contract between the parties to determine the scope of those operations.

Commentators have taken a similar view with respect to the meaning of the term "operations." One commentator has noted that in determining if an activity constitutes operations, the court must look at the nature and extent of the activity being performed, viewing it in terms of the insured's business. *See* 9 COUCH ON INSURANCE § 129:2 (3d ed. 1999). Another has defined operations as activities or processes or a series of acts actively engaged in by the named insured for the benefit of its business. 11 COUCH ON INSURANCE § 158:45 (3d ed. 1999).

The term "operations" is broadly defined to mean almost any activity done in furtherance of the named insured's business or the work to be performed under the terms of the contract between the named insured and the additional insured.

Interestingly, in *St. Paul Ins. Co. v. Texas Dep't of Transp.*, 999 S.W.2d 881 (Tex.App.–Austin 1999, pet. denied), the court held that TxDOT was entitled to coverage as an additional insured for claims arising out of highway construction being performed by Abrams, the general contractor. The endorsement in that case provided coverage for injury or damage that resulted from "[the named insured's] work." The court held that since the named insured's work was done pursuant to its contract with TxDOT, the allegations regarding improper construction fell squarely within the terms of the policy providing additional insured coverage for damage resulting from Abram's work for TxDOT. *Id.*

The current versions of both the 20 09 and 20 10 additional insured endorsements provide that they apply to liability arising out of the "ongoing operations" of the named insured. This type of language significantly limits the scope of coverage available to the additional insured because coverage is limited to the named insured's work in progress. *Pardee Constr. Co. v. Insurance Co. of the West*, 77 Cal. App. 4th 1340, 1359 n.16, 92 Cal. Rptr. 2d 443, 456 n.16 (Cal. Ct. App. 2000, rev. denied). In other words, when the named insured's operations are no longer ongoing, the additional insured no longer has coverage. *Id.*; *see also* D. HARBIN, THE TRUTH ABOUT ADDITIONAL INSURED ENDORSEMENTS at 18; DONALD S. MALECKI, PETE LIGEROS & JACK P. GIBSON, THE ADDITIONAL INSURED BOOK at 237-38 (4th ed. 2000). This is a significant change from earlier additional insured endorsement forms that contained no such language, effectively providing completed operations coverage to the additional insured. If the additional insured wants completed operations coverage now, it has to specifically request same and the policy endorsement will need to reflect that coverage.[7]

5. The CG 20 09 Endorsement - What Is Supervision?

This additional insured endorsement amends the "who is an insured" language of the CGL Policy to include as an insured the person or organization shown in the

[7] The additional insured could also specify that it wanted coverage under the CG 20 26 endorsement. This endorsement provides broader coverage than the newest version of the CG 20 10 by extending coverage to liability arising out of the named insured's operations or premises owned by or rented to the named insured. There is no "ongoing operations" limitation in this endorsement, nor any exclusion for completed operations.

Schedule, Declarations, or Change Endorsement but only with respect to liability arising out of:

1. Your ongoing operations performed for the additional insureds at the location designated above; or

2. Acts or omissions of the additional insureds in connection with their general supervision of such operations.

This endorsement also contains certain exclusions to coverage. One exclusion contained therein provides that this insurance does not apply to "bodily injury" or "property damage" arising out of any act or omission of the additional insureds or any of their "employees'" other than the general supervision by the additional insureds of your ongoing operations performed for the additional insureds.

Therefore, the exclusion limits coverage for claims involving the additional insured's direct negligence to claims involving general supervision of the named insured's work. Therefore, the scope of coverage under this endorsement is only as broad as the interpretation of the "general supervision" trigger of coverage. Marc Schneier, *Insuring Against Independent Contractor Exposure*, 21 No. 18 INS. LIT. REP. 564 (Oct. 15, 1999). Unlike the typical "arising under" endorsement, the exclusion limits coverage such that negligent acts or omissions unrelated to the act of general supervision would not be covered. *California Appellate Court Interprets Additional Insured Endorsement in Contractor's Liability Policy to Cover Owner's Independent Negligence*, 21 No. 2 INS. LIT. REP. 44 (Feb. 1, 1999).

The endorsement provides coverage for the named insured's work for the additional insured or the additional insured's general supervision of that work. *St. Paul Ins. Co. v. Texas Dep't of Transp.*, 999 S.W.2d 881, 886 (Tex.App.–Austin 1999, pet. denied). Unfortunately, courts have been all over the map on what can constitute "general supervision."

There is no doubt that when the courts first began interpreting this phrase, they broadly construed the language in favor of coverage for the additional insured. In *Duke Power Co. v. Indemnity Ins. Co. of N. Am.*, 229 F.2d 588 (4th Cir. 1956), the court held that general supervision coverage was extended to work performed by the principal in furtherance of the project, in which an employee of the independent contractor was killed.

"It is not necessary to restrict these words to the work to be performed by Combustion [independent contractor procuring insurance] to give them a reasonable interpretation. Certainly the removal of the reducers was connected with the work which Combustion was doing at the time." *Id.* at 592.

In *Union Elec. Co. v. Pacific Indem. Co.*, 422 S.W.2d 87 (Mo. Ct. App. 1967), an injured employee of the general contractor sued the owner for injuries sustained while performing tree-trimming services. The accident occurred when a pruning shear came into contact with the owner's uninsulated circuit. Under the contract between the electric company and the tree trimming service, the electric company was required to designate the areas for trees to be trimmed and to inspect the work to ensure that proper clearance

was being obtained around the electrical lines. At issue in the insurance policy was the language "general supervision." In determining that coverage existed, the court noted:

> A liberal interpretation of the words `general supervision' surely includes the supervisory duties of insured's employees in designating the area along the distribution and transmission lines where Davey would cut and trim trees and the providing of area plats in regard thereto and the subsequent inspection by insured's employees. This would be supervision....

Id. at 93.

In *Continental Cas. Co. v. Florida Power & Light Co.*, 222 So. 2d 58 (Fla. Dist. Ct. App.), *cert. denied*, 229 So. 2d 867 (Fla. 1969), an employee of an independent contractor sued the power company complaining that the company failed to have its lines in such a condition that they could be safely worked on at the time he was injured. Among the specific allegations were the following: (1) negligently failed to provide the employee with a safe place to work; (2) negligently failed to make a reasonable inspection of the work site and equipment; (3) negligently failed to take reasonable precautions and adopt proper safeguards; and (4) negligently required work to be done on a high voltage line which was situated such that there was a great danger of grounded material and equipment thereon being energized. In light of these allegations, the court held that the insurer had a duty to defend because all of the allegations charged acts which constituted omission of general supervision. *Id.* at 59.

In *Western Cas. & Sur. Co. v. Southwestern Bell Tele. Co.*, 396 F.2d 351 (8th Cir. 1968), Missouri Conduit contracted with Southwestern Bell to enlarge several of its

manholes. Bell furnished Missouri Conduit several plats of other utility facilities in the area of construction, but these plats did not indicate an underground power cable. Bell had knowledge of the power cable but never advised Missouri Conduit. One of Missouri Conduit's employees was injured when he hit the underground energized cable while using an air hammer. He then sued Bell claiming that Bell was negligent in failing to warn him of the presence and location of the power cable. The court held that Bell was entitled to coverage under the "general supervision" language of the policy because Bell maintained general supervision of Missouri Conduit's work by supplying the specifications and plats of the work to be done. Additionally, the contract between the two companies reserved for Bell the right to inspect the work to see that the specifications were being followed.

The court found coverage to exist because "Bell's failure to warn the injured employees arose out of a supervisory function which in fact was the only connection Bell had with the work." *Id.* at 354.

In *Detroit Edison Co. v. Michigan Mut. Ins. Co.*, 301 N.W.2d 832 (Mich. Ct. App. 1980), an employee of a contractor sued the owner of a plant. He alleged that the owner was negligent in failing to properly maintain the machinery and equipment, in failing to properly control the equipment plaintiff was working on, and in leaving the equipment in an operating condition despite knowing that plaintiff would be working on said equipment. The court determined that these allegations could reasonably be construed to

be alleging that the owner failed to properly supervise the work to insure the plaintiff's safety. *Id.* at 835.

In *Waterwiese V. KBA Constr. Managers, Inc.*, 820 S.W.2d 579 (Mo. Ct. App. 1991, transfer denied), an employee of a masonry company was injured when he fell from scaffolding while working on the construction of a state office building. The court held that coverage existed under the phrase "general supervision" because:

> The evidence in the instant action was that Waterwiese sustained injury as a result of KBA's failure to adequately supervise the work; in particular, Smith Masonry's erection of scaffolding was not in compliance with O.S.H.A. safety requirements. Waterwiese's injury did arise out of KBA's general supervision of the construction project.

Id. at 586.

Finally, in *Insurance Co. of N. Am. v. Travelers Ins. Co.*, 692 N.E.2d 1028 (Ohio Ct. App. 1997), the court held that a subcontractor's insurer had a duty to defend the general contractor, as an additional insured, in a negligence suit brought by an employee of the subcontractor who fell on an exit ramp from the job site on the basis that the general contractor constructed the ramp for the subcontractor's use at its job site and the claim was arguably within coverage for the general contractor's negligence in supervision of the subcontractor's work.

Other courts have limited the concept of general supervision. Although many of these cases are more recent, for the most part, than the cases cited for a broad construction, we caution against seeing this as a trend.

In *Citizens Mut. Ins. Co. v. Employers Mut. Liab. Ins. Co.*, 212 N.W.2d 724 (Mich. Ct. App. 1973), a contractor's employee on a sewer construction project drowned when a water main ruptured, flooding the trench where the employee was working. His co-workers attempted to shut off the main valve, but the key needed to turn it off was missing. The court ruled that the failure to have the key present at the valve constituted a negligent omission, but was not negligent supervision for purposes of coverage.

In *First Ins. Co. of Hawaii, Inc. v. State*, 665 P.2d 648 (Haw. 1983), the plaintiff's claim was based on the alleged failure of the subcontractor and the State to adequately advise and warn the public the a particular intersection should be approached with caution due to changed conditions. The jury absolved the subcontractor of any negligence.

The court found that the jury had effectively determined that the State was negligent in failing to adequately warn the public. Faced with similar exclusionary language as in the CGL Policy, the court held that the State was not entitled to coverage as an additional insured because its negligence did not hinge on a failure to supervise the subcontractor. *Id.* at 656.[8]

In *Citgo Petroleum Corp. v. Yeargin, Inc.*, 690 So. 2d 154 (La. Ct. App.), *writ denied*, 701 So. 2d 169 (La. 1997), several workers were injured due to a fire at a

[8] Interestingly, the court had determined that the plaintiff's pleadings alleging that the subcontractor's work was done under the supervision of the State and that each of the defendants had failed to warn about the condition raised the possibility that the State could be liable for its own negligence in connection with its general supervision of the subcontractor's operations, such that there was a duty to defend.

refinery. At the time of the fire, PCC was conducting maintenance work at Citgo's refinery. The fire was caused by gasoline and hydrocarbons which leaked from a missing valve in a collection line. Citgo personnel sent excess gasoline, which had built up in a debutanizer tower, to the collection line. Because of the maintenance operations being performed by PCC, part of the collection system was blinded off, which caused the gasoline to backup in the system and to eventually leak through the missing valve and onto the ground in the vicinity of PCC's maintenance work. The gasoline ignited and the workers were injured in the fire. Most of the injured workers were PCC employees. Two of the injured workers were employed by Lake Charles Electric Company.

Citgo was also named as an additional insured on Lake Charles Electric Company's liability policy. The policy contained an exclusion in the additional insured endorsement that coverage would be provided but would not cover any act or failure to act of Citgo other than the general supervision of work done by Lake Charles for Citgo. Another insurance company sought indemnity from St. Paul, Lake Charles's insurer, asserting that general supervision included Citgo's failure to maintain a safe workplace and its failure to protect the contractor's employees from hazards. The court disagreed finding that the insurance company failed to produce any evidence that the fire resulted from Citgo's general supervision of the electric company's work. *Id.* at 173.

In *Liberty Mut. Ins. Co. v. Capaletti Bros., Inc.*, 699 So. 2d 736 (Fla. Dist. Ct. App. 1997), Community Asphalt was hired by Capaletti Bros. to work on a road construction project. Pursuant to their contract, Capaletti was named as an additional

insured on Community's policy. The policy contained language excluding coverage for the additional insured for bodily injury or property damage arising out of any act or omission of the additional insured other than the general supervision of work performed for the additional insured by the named insured. Capaletti and Community were sued by a car passenger who was injured when the driver lost control while driving through the construction area. The complaint alleged that Capaletti was negligence in causing the accident by failing to follow standard procedures to ensure safety of motorists driving through the construction area.

Community's insurer assumed Capaletti's defense under a reservation of rights asserting no coverage with respect to any act of independent negligence on the part of Capaletti that did not relate to negligent supervision. Capaletti disagreed and filed a declaratory judgment action to determine the scope of its coverage as an additional insured. The court held that the plain language of the exclusionary clause in the additional insured endorsement precluded coverage for Capaletti's acts of negligence that did not constitute supervision of Community's work. *Id.* at 738.

In *Baltimore Gas & Elec. Co. v. Commercial Union Ins. Co.*, 688 A.2d 496 (Md. Ct. Spec. App. 1997), the court was faced with construing a CGL endorsement issued by Commercial Union contained the same language as is at issue in the present case. The plaintiffs were injured when their car fell into a utility pit. The sued BGE, Ferguson, and others. Pursuant to a contract with BGE, Ferguson dug the pit into which the car was driven. Ferguson was obligated to obtain insurance coverage naming BGE as an

additional insured. The plaintiffs later amended and dropped all defendants other than BGE. The plaintiffs sued BGE claiming that BGE was solely responsible for the injuries due to its own negligence. The court noted that since the plaintiffs were only claiming that BGE was liable, there was no coverage under the endorsement.

Finally, in *National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 69 Cal. App. 4th 709, 82 Cal. Rptr. 2d 16 (Cal. Ct. App. 1999), Pangborn was hired as the plumbing subcontractor for the construction of a building in Los Angeles. Tutor was the general contractor.

Pursuant to the terms of their contract, Pangborn was required to maintain general liability coverage naming Tutor as an additional insured. Schain worked as a plumber for Pangborn. On the morning of the accident, Schain reported to his foreman and was told to take care of some supposedly unfinished plumbing work on the 20th floor. Schain stepped off the elevator on the 20th floor to find several inches of standing water on a recessed concrete floor. The water had leaked through open portions of the roof. Despite complaints from Pangborn, it was Tutor's practice to allow the water on upper levels to evaporate rather than vacuum it up. Schain walked through the water to get to the area he was to fix. Because his shoes got wet, he slipped on a marble floor and injured his knee. He then sued Tutor for negligence.

The court found that since Tutor's liability arose solely from the failure to prevent the accumulated rainwater, it was not entitled to coverage because that liability did not arise from its supervision of Pangborn's work. *Id.* at 720, 82 Cal. Rptr. 2d at 22.

There is only one Texas case that has construed a similar endorsement. In *St. Paul Ins. Co. v. Texas Dep't of Transp., supra*, TxDOT contracted with Abrams to construct a five-mile section of Beltway Eight outside Houston. The contract required Abrams to provide commercial general liability insurance for TxDOT. The policy contained an additional insured endorsement which limited coverage to injury or damage resulting from Abram's work or TxDOT's general supervision of that work.

In 1995, a class-action lawsuit was filed against TxDOT and Abrams by a group of property owners and residents of Brazoria County, alleging that the construction of the highway caused flooding that damaged the plaintiffs' property. Specifically, the plaintiffs' petition included the following allegations: (1) damages were caused by the diversion of runoff storm waters resulting in part from the construction of the highway; (2) TxDOT and Abrams designed, scheduled, constructed, and supervised the construction of the highway and its drainage channels; and (3) TxDOT, through its employees and representatives, committed acts that resulted in an invasion of the plaintiffs' property. A dispute arose between St. Paul and TxDOT over what claims would be covered under the additional insured endorsement.

Undertaking a very liberal reading of the plaintiffs' petition in order to favor the insured seeking coverage, the court found that the petition made at least some claims that were covered under the policy. 999 S.W.2d at 886. The court further rejected St. Paul's attempt to rely on its professional service exclusion to avoid coverage for a claim of general supervision. *Id.*

Although not directly on point because the court did not focus on what the policy meant by the term "general supervision," the case illustrates the broad reading Texas courts give to pleadings to afford an insured coverage under the policy.

B. Do Insurance Companies Know How To Avoid Coverage For The Additional Insured's Own Negligence?

Several courts have suggested that if insurance companies desire to exclude coverage arising out of the sole negligence of the additional insured, such language could be easily added into the subject endorsement. *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. Ct. App.), *appeal denied*, 652 N.E.2d 342 (Ill. 1995) (court noting that if carrier had wanted to limit coverage to additional insured, it could have done so by clearly stating level of coverage afforded in its endorsement); *Consolidated Edison Co. of New York, Inc. v. Hartford Ins. Co.*, 610 N.Y.S.2d 219, 221 (N.Y. App. Div. 1994); *see also Maryland Cas. Co. v. Regis Ins. Co.*, No. CIV.A. 96-CV-1790, 1997 WL 164268, at *6 (E.D. Pa. Apr. 9, 1997) (not reported in F. Supp.). Despite this suggestion, however, the courts have failed to clearly identify what language would accomplish this purpose.

In *Maryland Cas. Co.*, *supra*, the additional insured endorsement in question stated:

> It is agreed that the "Persons Insured" provision of this policy is amended to include the person or organization named below but only with respect to liability sought to be imposed upon the Additional Insured as the result of an alleged act or omission of the Named Insured....

The insurance company argued that the endorsement only insured the additional insured for liability imposed as a direct and proximate result of the negligence of the named insured. In other words, coverage was only afforded for vicarious liability imposed upon the additional insured because of the negligence of the named insured.

Therefore, the insurer had no duty to defend or indemnify the additional insured because the underlying suit was premised on independent acts of negligence of the additional insured.

In rejecting the insurance company's arguments because it found the endorsement to be ambiguous, the district court noted that if the insurance company desired to impose a higher level of causation than "but for" causation, it should have explicitly stated such a requirement. The court suggested that the endorsement could have read:

> It is agreed that the "Persons Insured" provision of this policy is amended to include the person or organization named below **but only to the extent of liability vicariously imposed** upon the Additional Insured **as the direct and proximate result of the negligence** of the Named Insured....

Maryland Cas. Co., 1997 WL 164268, at *4 n.3 (emphasis added to reflect suggested changes by the Court).

In *Bonner County v. Panhandle Rodeo Ass'n, Inc.*, 620 P.2d 1102 (Idaho 1980), the additional insured endorsement in question contained the following exclusions:

> [T]his insurance does not apply:
>
> 1. To any occurrence which takes place after the named insured ceases to have use of said premises, facilities or above items;

> 2. To structural alterations, new construction or demolition operations performed by or on behalf of the person or organization as described above.
>
> 3. To liability arising out of the sole negligence of the additional insured hereunder.

The Idaho Supreme Court held that this exclusionary language was ambiguous relying on the existence of language in the underlying contract between the named insured and the additional insured which required that the named insured afford coverage for the additional insured's sole negligence. *Id.* at 1106. The court also focused on the fact that such exclusion was never relayed to the additional insured. The decision by this court is questionable because of its reliance on evidence outside the policy language itself, but is cited because it is one example of how courts have viewed an attempt to limit coverage for the additional insured.

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 632 N.E.2d 1039 (Ill. 1994), the additional insured endorsement provided:

> The Persons Insured provision of this policy is amended to include as an Insured any Person or organization whom the Named Insured has agreed by contract, either oral or written, prior to loss, to include as an Insured with respect to operations performed by or on behalf of the Named Insured. **Such Insureds included by contract shall hereinafter be referred to as Additional Insureds, and the insurance afforded [herein] shall not apply to damages arising out of the negligence of the Additional Insured(s)**.

Id. at 1040-41 (emphasis added).

On appeal, the court was faced with the question of whether the endorsement excluded from coverage allegations that the additional insured was negligent. The court bypassed the question of whether the provision was valid, finding that because of an allegation of a statutory violation, a duty to defend existed because the endorsement did not explicitly refer to statutory violations, only negligence.

Additionally, the court left open the question of whether any duty to indemnify existed because the underlying suit had not been decided. The court also avoided the question of whether this provision violated public policy finding that any such decision was unnecessary because of its holding that a duty to defend existed.

The dissent in the case squarely faced the public policy argument, however. The additional insured argued that the endorsement violated public policy because any coverage under the policy was illusory. The insurance company, on the other hand, argued that the endorsement clearly and unambiguously afforded coverage only for vicarious liability. The dissenting judge argued that the exclusion violated public policy because it undercut the entire coverage that CGL policies purport to insured - coverage for the insured's negligence. *Id.* at 1046 (Bilandic, C.J., dissenting). The judge further found that the endorsement purported to insure the additional insured under a comprehensive liability policy, and not under a policy for vicarious liability.

> The [additional insured] does not need, nor did it seek, coverage for vicarious liability in connection with the NDS painting contract. [The named insured] is an independent contractor and the [additional insured] cannot be held vicariously liable for its acts except under a narrow exception. Even if it was to be held vicariously liable for

> the acts of [the named insured], the [additional insured] would have an action for indemnity against [the named insured] and, therefore, would have no need for vicarious liability coverage on the painting contract. The endorsement is illusory and provides no coverage at all. Since the negligence exclusion deceptively affects the general liability risks that the endorsement purports to assume, the endorsement's exclusion violates public policy and should not be enforced.

Id.

However, in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000), the court, applying Texas law, noted that the additional insured endorsement limited coverage to the additional insured's vicarious liability for the acts of the named insured by including the language "but excluding any negligent acts committed by such additional insured."

What the foregoing cases tell us is that despite what some courts have indicated, the ability to limit an additional insured's coverage may not be as easy as they would have the insurance industry believe.

C. **Other Issues With Additional Insureds**.

Most liability policies contain separation of insured provisions (also known as severability clauses). These clauses effectively create multiple policies with identical terms, but different insureds. The clause requires that the policy should be read as if each insured were the only insured. *See King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002). Application of policy provisions are to be made against the insured against whom a claim is made independent of any other insured. The effect may be to expand coverage.

The exception to the expanded coverage potential lies in the application of policy limits. There is only one policy limit available for all insureds. The severability provision allows for availability of cross liability coverage to each insured. In other words, the additional insured could sue the named insured and coverage would exist.

Another issue that arises with respect to additional insureds is the potential for a conflict of interest between the insureds and the carrier. This potential exists because of the single policy limit to protect the named and additional insured if both are sued. Additionally, different insureds may have different interests with respect to issues such as comparative liability and indemnity agreements. As a result, separate counsel may be required for each insured.

There are other potential issues the carrier should be aware of as well. The insurer should send reservation of rights letters to all potential insureds. Additionally, the antisubrogation doctrine may come into play. Under this doctrine, the insurer generally has no right of subrogation against its own insured from a risk for which the insured is covered. This doctrine extends to additional insureds.

V. "OTHER INSURANCE" CLAUSES AND APPORTIONMENT BETWEEN POLICIES

When more than one liability policy applies to a particular insured, an immediate question often arises as to how those policies relate to each other. This issue almost always arises when additional insured coverage applies, since most additional insureds maintain their own liability insurance. Like the interpretation of additional insured

provisions, interpretation of "other insurance" clauses is fact and case specific, and depends almost entirely upon the language of the particular clauses involved.

The question of interpretation of these clauses arises only where there are two or more policies insuring the same risk, and the same interest, for the benefit of the same person, during the same period. In other words, the clauses only operate when there is concurrent coverage for an insured.

Resolving coverage and apportionment issues between multiple policies requires a review of the policies' "other insurance" clauses. *See Texas Property & Cas. Ins. Guar. Ass'n/Southwest Aggregates, Inc. v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 606 (Tex.App.–Austin 1998, no pet.) (when more than one policy applies to loss, other insurance provisions provide scheme by which liability is apportioned). The standard ISO form endorsements making another party an additional insured do not address whether such coverage is primary or excess. Other insurance clauses essentially provide that if the insured has other insurance against a loss covered by the subject policy, then the subject policy will either: (1) be liable for a proportion of the loss no greater than the ratio of the subject policy limit to the total limit of all applicable policies ("pro rata" clauses); (2) be excess insurance over and above such other insurance ("excess" clauses); or (3) not apply at all ("escape" clauses).[9]

The typical CGL policy contains the following language :

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[9] There is also an "other insurance" clause called an excess escape clause - Insurer is liable for that amount of a loss exceeding other available coverage.

> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary.
>
> Then, we will share with all that other insurance by the method described in c. below.

This provision establishes that the CGL policy's coverage as primary in most instances. It also acknowledges that where there is other insurance which is excess, the CGL policy's coverage will not be affected.

The excess clause in the standard CGL policy's "other insurance" condition is more extensive. It provides:

> This insurance is excess over:
>
> (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
>
> (b) That is Fire Insurance for premises rented to you or temporarily occupied by you with permission of the owner;
>
> (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
>
> (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent

> not subject to Exclusion g. of Section I - Coverage A - Bodily Injury And Property Damage Liability.
>
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.
>
> When this insurance is excess, we will have no duty under Coverage A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers....

Item (2) is a recent addition to the CGL form and solves an "other insurance" issue which arose in almost every additional insured situation. Often, the contract requiring the named insured to have another party added as an additional insured, also required that such coverage be primary and non-contributing with the additional insured's own coverage. Without some language in the policies altering the normal operation of the "other insurance" clauses, this requirement was not met. For some time, this issue had to be addressed by way of a special endorsement. Since 1998, however, subsection (2) is now standard and the additional insured's own policy will be excess.

The third section of the standard "other insurance" clause deals with the method of sharing between the concurrent policies. It states:

> c. Method of Sharing
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has

> paid its applicable limit of insurance or none of the loss remains, whichever comes first.
>
> If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

As noted above, the typical CGL policy contains pro rata "other insurance" clauses. *See State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 155 (Tex.App.–Houston [1st Dist.] 1994, no writ); *see also* Mark C. Guthrie, Comment, *"Other Insurance Conflicts: A Common-Sense Proposal,"* 36 BAYLOR L. REV. 689, 690 n.8 (1984). The legal effect of such a clause is to provide that the insurer will not be liable for any greater proportion of a loss than the amount named in the policy bears to the entire amount of the insurance coverage available. *Griffin*, 888 S.W.2d at 155. When there are two insurers who have contracted to pay a loss and each policy contains such a clause, each insurer is liable only for its proportion of the loss. *Id.* For other insurance to trigger the operation of the clause and relieve the insurer of its primary liability beyond that specified in the pro rata clause, the other insurance must cover the same property and interest against the same risk in favor of the same insured. *Id.*

Where both policies contain similar language making them primary, absent the existence of certain types of insurance, the two insurers will typically apportion costs between themselves in equal shares, up to their respective policy limits. *See Foremost County Mut. Ins. Co. v. Home Indem. Co.*, 897 F.2d 754, 762 (5th Cir. 1990).

This mechanism of apportionment does not, however, affect the contractual relationship between the insurer and insured that requires the insurer to provide full indemnification. *Southwest Aggregates, Inc.*, 982 S.W.2d at 606.

In a "pro rata" vs. "excess" conflict, the majority rule is that the excess clause is given preference, with the result that the insurer whose policy contains the primary "pro rata" clause is liable to the extent of its policy limits, and the excess policy does not come into play, if at all, until such time as the primary policy limits have been exhausted. Mark C. Guthrie, Comment, "*Other Insurance Conflicts: A Common-Sense Proposal*," 36 BAYLOR L. REV. at 694. On the other hand, if the policies contain conflicting clauses, such as excess vs. excess, then the courts will treat them as mutually repugnant, ignore the provisions, and make the insurers prorate coverage. *See Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969) (court found excess and escape clauses were mutually repugnant).

Texas courts have generally given full effect to the excess clause over a pro rata clause. *See, e.g., Snyder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972) (both policies contained excess only clauses with respect to non-owned autos; court found that if car was an owned auto within the meaning of one of the policies, then that policy would be primary and "non-owned" coverage would be excess according to the clauses); *Canal Ins. Co. v. Gensco, Inc.*, 404 S.W.2d 908 (Tex.Civ.App.--San Antonio 1966, no writ) (courts uniformly give full effect to excess clause and require primary policy to be exhausted before excess policy becomes effective); *see also Union Indem. Ins. Co. of*

New York v. Certain Underwriters at Lloyd's, 614 F. Supp. 1015 (S.D. Tex. 1985) (general rule in which two policies afford coverage to a particular loss and one contains a pro rata clause while other contains excess clause is that policy containing excess clause does not provide any coverage until other policy is exhausted).

It is important to remember that these clauses only affect insurer's rights among themselves; they do not affect the insured's right to recovery under each concurrent policy.

VI. IN CONCLUSION...

Despite a fairly consistent line of cases since 1987, many scriveners still seem to have problems with drafting enforceable indemnity agreements. It is not clear whether this results from a simple misunderstanding of the law, really old documents being relied on as source materials, or whether the drafters are simply suffering from attempting to be too tricky for their own good.

If the indemnity provision satisfies the fair notice requirements, an insured is going to have coverage for that indemnity obligation under the contractual liability coverage part of its commercial general liability policy. That coverage is owed exclusively to the insured and not to the indemnitee. The indemnitee does not become an insured by virtue of the indemnity obligation. If it wants that status, it will have to require additional insured coverage in the same contract.

If additional insured coverage is required by contract, and the subcontractor remembers to advise its carrier so that an endorsement is put in place, the additional insured is likely to have coverage for its own negligence.

About the Author:

Craig L. Reese – Partner of the firm, Craig leads the appellate and coverage practice group. He has over 23 years practice experience including appeals at the federal and state level, insurance coverage/defense, and commercial litigation. His appellate experience includes cases before every level of the state courts of appeals and appeals to the Fifth Circuit Court of Appeals.