

CONTRACTUAL RISK TRANSFER IN CONSTRUCTION CONTRACTS



TARRON L. GARTNER

KATIE MCCLELLAND

DANA HARBIN

900 Jackson Street, Suite 100

Dallas, TX 75202

214/712-9500

214/712-9540 (Fax)

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5TH ANNUAL CONSTRUCTION SYMPOSIUM

JANUARY 29, 2010

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I. CONTRACTUAL RISK TRANSFER IN CONSTRUCTION CONTRACTS

A. "Insured Contract" – The Essence of Contractual Liability Coverage

An issue that often arises in construction and contractual disputes is that of insurance coverage for liability assumed by the insured under a contract or agreement – written or otherwise. This typically arises in the context of a hold harmless or indemnity agreement that the insured has entered into with another contractor or subcontractors working on a common construction project, or in situations involving the lease of real property, cars, trucks or equipment. Regardless of the nature of the business involved, whether the indemnity agreement is valid and enforceable is the first task that must be tackled. If the contractual obligation is enforceable, the next question becomes whether the obligation is covered under the liability policy issued to the party who has assumed the obligation.

1. Contractual Liability Exclusion and Exception

Determining contractual liability coverage involves a two-step analysis that begins with the scope of the contractual liability exclusion and then the two exceptions. The standard contractual liability exclusion, Exclusion b, generally provides as follows:

This insurance does not apply to:

* * *

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or

- (2) Assumed in any contract or agreement that is an "insured contract," provided that the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purpose of liability assumed in an "insured contract," reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than insured are deemed to be damages because of "bodily injury" or "property damage," provided:

- (a) liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

- (b) such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

(Note that this exclusion only applies to Coverage A for bodily injury and property damage. There is a similar contractual liability exclusion applicable to Coverage B for personal injury and advertising injury under the 1986 ISO GL forms. However, the Coverage B exclusion does not have any exception for liability assumed under an insured contract. This means that unless the insured would be liable in the absence of a contract, Coverage B does not extend coverage for personal and advertising injury liability that the insured assumes under a contract, even though the contract is an insured contract where there is a valid transfer of tort liability.)

In any event, the contractual liability exclusion contains two exceptions (1) liability

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for damages that the insured would have in the absence of the contract or agreement and (2) liability assumed in any contract or agreement that is an “insured contract,” provided the bodily injury or property damage occurs subsequent to the execution of the contract.

The first exception involves circumstances where the insured’s own negligence causes the bodily injury or property damage. Then, the insured is liable in tort, whether or not a contract exists. The second exception is the “insured contract” exception. The standard ISO CGL policy contains the following definition of the term “insured contract”:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to your or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or with 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. 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 to pay for "bodily injury" for "property damage" to a third person or organization. Tort liability means the liability that would be imposed by law in the absence of the any contract or agreement.

The first five items in the definition of “insured contract” are fairly self-explanatory.

For example, if the insured assumes liability for property damage or bodily in a contract for lease of premises, then that is covered under the general liability policy. However, coverage is limited to the assumption of liability for bodily injury or property damage. A more complicated analysis is required, however, when the agreement involves part (f) of the definition of “insured contract.” This provision is the mechanism through which indemnity agreements often escape the clutches of exclusion (b), resulting in coverage for the insured’s assumed obligation. The criteria for validity under the definition of “insured contract,” however, are tough, and include:

- **An obligation assumed in a contract or Agreement** - notice that there is no requirement that the contract be in writing.
- **The agreement must pertain to the insured’s business.**
- **The named insured must assume the tort liability of another** – the *named* insured (i.e. “you”) must assume in the agreement the tort liability of another part. Tort liability means liability that would be imposed by law without a contract or agreement.
- **The liability assumed must be for bodily injury or property damage to a third party.**

B. Mechanics of Determining Contractual Liability Coverage

In order to analyze the insured’s obligation, and ultimately coverage for that obligation, the following steps must be taken:

1. Determine the Validity of the Indemnity Agreement

The first step in evaluating the validity of an indemnity agreement is to analyze whether the transfer of liability in the contract or agreement is a valid transfer of tort liability according to

the jurisdiction applicable to the contract. If the contract contains a “governing law” provision, the law of the governing jurisdiction will apply to determine the validity of the agreement. If there is no such provision, generally the law of the state where the contract was either made or performed will apply. *See, e.g., Snydergeneral Corp. v. Great American Ins. Co.*, 928 F. Supp. 674 (N.D. Tex. 1996).

2. **Determine Whether Covered Injuries are Alleged Against Indemnitee**

Once determined to be a valid transfer of tort liability, it is necessary to determine whether bodily injury and/or property damage have actually occurred for which the indemnitee is allegedly liable. This means looking at the claims made against the indemnitee, not the claims made by the indemnitee against the indemnitor. *See e.g. Gibson & Assoc., Inc. v. Home Ins. Co.*, 966 F.Supp. 468 (N.D. Tex. 1997).

3. **Determine Whether Indemnity Agreement was Executed Prior to Covered Injury**

After determining that the indemnity agreement is a valid transfer of tort liability, and determining that the indemnitee is allegedly liable for bodily injury and/or property damage, the next step is to insure that the indemnity agreement was executed before the bodily injury and/or property damage occurred. This raises several questions. Does an indemnity agreement endure even after the termination/expiration or completion of the contract? What happens if the agreement is not signed by the parties? The substance of these questions will be discussed below.

4. **Determine Whether to Assume Defense of Indemnitee**

Finally, after the validity of the indemnity agreement is determined, whether there are allegations of covered injuries against the indemnitee, whether the indemnity agreement was executed prior to the covered injuries or remains in force after expiration of the contract,

the next question is to determine whether to assume the defense of the indemnitee. Contractual liability coverage does not require that the insurer assume the defense of the indemnity. It only requires that the insurer indemnify the insured for its contractual indemnity obligations, which likely includes defense costs. The insurer, however, may choose to assume the defense of the indemnitee to obtain control of the defense. This is a business decision to be made based upon the circumstances of each claim. More likely than not, it is beneficial for all that the insurer assume the defense. Still, the insurer should be aware of potential conflicts between the insured, who may also be a defendant in the matter, and the indemnitee. Often times, the insurer will be providing a defense to both the insured and the indemnitee, but due to conflicts in interest, will be required to employ different counsel for each.

Along with this part of the analysis, you will want to consider whether the situation meets the criteria of the Supplemental Payments portion of the policy – meaning – are the costs of defense incurred for the insured’s indemnity obligation paid as Supplementary Payments or as part of Indemnity under the policy? Under the current standard ISO CGL form, costs of defense are payable as Supplementary Payments if:

- a. The suit against the indemnity seeks damages for which the insured has assumed the liability in an “insured contract.”
- b. The insurance applies to the liability assumed.
- c. The obligation to defend, or the costs of the defense have been assumed in the same “insured contract.”
- d. The allegations in the suit and the information known about the “occurrence” are such that no conflict of interest appears to exist between the insured and the indemnitee

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- e. The indemnitee and the insured ask the carrier to conduct and control the defense of the indemnitee and agree that the carrier can assign the same counsel to defend both.

If these criteria are met, any payments made on the indemnitee's behalf will not erode the limits of liability of the policy, but will be paid as Supplementary (or extra) Expenses.

C. Sole Negligence Variation on "Insured Contract"

There are variations on the definition of "insured contract," the most prevalent eliminating the indemnitee's sole negligence as follows:

That part of any written contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or "property damage." **However, this insurance does not apply to that part of any contract or agreement that indemnifies any person or organization for the indemnitee's sole tort liability.** Tort liability means a liability that would be imposed by law in the absence of any other contract or agreement.

We know of only one case where the court construed the exact same definition of "insured contract" and held that the language *did not* require negligence on the part of the insured for contractual liability coverage to apply to a transfer of liability. *Gainsco Ins. Co. v. Amoco Production Co.*, 53 P.3d 1051 (Wy. 2002). In rejecting Gainsco's argument the policy only provided coverage in situations involving sole or joint negligence on the part of the insured, the court held:

The issue of coverage was not fairly debatable because the exclusion simply

does not limit coverage to those situations where the insured is separately liable.

Id.

Clearly, if the insured limited the contractual liability coverage to the indemnitee's "tort liability," without segregating between sole or joint tort liability, there would be coverage whether or not the insured was also negligent. *Michael Nicholas, Inc. v. Royal Ins. Co. of America*, 748 N.E.2d 786 (Ill. App. – 2001). This is the plain language of the standard definition of "insured contract." However, it is unclear from the language of the amended definition of "insured contract" whether "sole tort liability" means that the insured must also be negligent or that any other party must also be negligent.

D. Insured Contract Exception to Employer's Liability Exclusion

The 2001 version of the ISO general liability policy contains the employer's liability exclusion that reads as follows:

This insurance does not apply to:

* * *

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone

else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract."

Generally speaking, then, injuries sustained to the insured's employees remain covered provided that liability for such injuries is assumed under a valid indemnity agreement that otherwise constitutes an "insured contract" under the policy.

II. Validity of Indemnity Agreement Under Fair Notice Rules

Under current Texas law, a party who attempts to indemnify itself from its own negligence must satisfy two fair-notice requirements: (1) the express negligence test and (2) a conspicuousness requirement. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex.1993). *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, 901 S.W.2d 789 (Tex. App.–Houston [14th Dist.] 1995, writ denied); *see also Rickey v. Houston Health Club, Inc.*, 863 S.W.2d 148 (Tex. App.–Texarkana 1993, writ denied), *per curiam* 888 S.W.2d 812 (Tex. 1994). In order for an indemnitee to recover for his own negligence, the recovery must be explicitly stated in the indemnity agreement, in a conspicuous manner. *Id.*; *Fisk Elec. Co. v. Constructors & Assoc.*, 888 S.W.2d 813 (Tex. 1994).

A. Express Negligence Test

The express negligence test was adopted by the Texas Supreme Court in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex.1987). The court stated, "The express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms." *Id.* The purpose of the express negligence rule is to prevent owners and contractors from surreptitiously imposing indemnity obligations on smaller subcontractors who may have no idea of the indemnity obligations they were undertaking by entering into the contract. As a

general rule, the law disfavors one party shifting its responsibility to another by an indemnity contract. Therefore, the express negligence rule was adopted to make sure that such a transfer of liability would be above-board and known by all the parties to the contract. The Supreme Court in *Ethyl* noted that:

As we have moved closer to the express negligence doctrine, the scribes of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of these provisions. The intent of the scribes is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine.

Id. at 708.

The contract at issue in *Ethyl* provided:

Contractor shall indemnify and hold Owner harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, Subcontractors, and agents or licensees.

Id. at 707. The court determined that this indemnity clause did not meet the express negligence test, finding that the phrases "any loss" and "as a result of operations" did not show an intent on Ethyl's part to cover its own negligence. *Id.*

Where there is no shifting of risk in a contract, the express negligence test is not applicable. *See The Sabine Min. Co. v. Minserco, Inc.*, 2006 WL 3751184 (E.D. Tex. 2006) (nonreported decision).

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1. General Rule

As a general rule, in order for an indemnity agreement to meet the express negligence doctrine, three elements must exist. They are: (1) the intent of the parties must be clear; (2) it must be set forth within the four corners of the agreement; and (3) the specific intent of the parties must be expressed. *Jobs Bldg. Servs., Inc. v. Rom, Inc.*, 846 S.W.2d 867, 870 (Tex. App.–Houston [1st Dist.] 1992, writ denied); *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358, 362 (Tex. App.–Dallas 1989), *aff'd* 817 S.W.2d 50 (Tex. 1991).

a. Cases Holding Agreement Valid:

In *Atlantic Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court upheld the validity of an indemnity agreement under which the indemnitor agreed indemnify the indemnitee for "any negligent act or omission of [the indemnitee], its officers, agents, or employees...." There, the Court stated that the purpose of the express negligence rule is to require parties to make it clear when the intent is to exculpate an indemnitee for the indemnitee's own negligence. The court considered this language to be sufficiently direct to define the parties' intent and satisfy the express negligence requirement. *Id.*

In *Spawglass, Inc. v. E.T. Services, Inc.*, 143 S.W.3d 897 (Tex. Civ. App.–Beaumont 2004, pet. denied), the court compared the agreement involved with the agreement interpreted in the *Atlantic Richfield* case. There, the court held that an agreement obligating the indemnitor to "indemnify Contractor...against and for all liability... and damages which Contractor may... become liable for by reason of any... injuries... to ...the workmen of either party...in any matter arising out of or resulting from Subcontractor's performance...hereunder, ...including, but not limited to, any negligent act or omission... of Contractor..." *Id.* met the criteria of the express negligence test.

Similarly, in *B-F-W Const. Co., Inc. v. Garza*, 748 S.W.2d 611, 612 -613 (Tex.App.–Fort Worth,1988, no writ) the court held the

following indemnity provision met the express negligence rule:

- (a) Subcontractor shall fully protect, indemnify and defend Contractor and hold it harmless from and against any and all claims, demands, liens, damages, causes of action and liabilities of any and every nature whatsoever arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to any of Subcontractor's work or operations hereunder or in connection herewith (regardless of cause or of any concurrent or contributing fault or negligence of Contractor) or any breach of or failure to comply with any of the provisions of this Subcontract or the Contract Documents by Sub-contractor. [Emphasis added.]

The court held that the language "regardless of any cause or of any concurrent or contributing fault or negligence of Contractor" met the express negligence test because it expressly stated the intent of the parties that the subcontractor would indemnify the contractor for the contractor's own negligence. *Id.* at 613.

Likewise, in *Permian Corp. v. Union Tex. Petroleum Corp.*, 770 S.W.2d 928, 929-30 (Tex.App.–El Paso 1989, no writ), the following language was held to satisfy the express negligence doctrine:

Contractor [Appellant] hereby indemnifies and agrees to protect, hold and save Union Texas [Appellee] ... harmless from and against all claims, ... including but not limited to injuries to employees of Contractor, ... on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by Contractor ... **and whether the same is caused or contributed to by the negligence of Union Texas, its agent or employees.**

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[Emphasis added.]

In *Banner Sign & Barricade, Inc. v. Price Const., Inc.*, 94 S.W.3d 692, 695 (Tex.App.–San Antonio 2002, pet. denied) the court upheld an indemnification provision reading as follows:

- (b) To fully and unconditionally protect, indemnify and defend [Price], its officers, agents and employees, and hold it harmless from and against any and all costs, expenses, reasonable attorney fees, claims, suits, losses or liability for injuries to property, injuries to persons (including subcontractor's employees), including death, and from any other costs, expenses, reasonable attorney fees, claims, suits, losses or liabilities of any and every nature whatsoever arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to, any of subcontractor's work or operations hereunder or in connection herewith, **regardless of cause or of the sole, joint, comparative or concurrent negligence or gross negligence of [Price], its officers, agents or employees.**

Id. [Emphasis added.] The court held that the express negligence doctrine was satisfied in this case by the inclusion of the phrase "regardless of cause or of the sole, joint, comparative or concurrent negligence or gross negligence of [Price], its officers, agents or employees" in the body of the agreement. *Id.* at 697.

Likewise, in *AABB Kraftwerke Aktiengesellschaft v. Brownsville Barge & Crane, Inc.*, 115 S.W.3d 287 (Tex.App.–Corpus Christi 2003, pet. denied), the Corpus Christi Court of Appeals upheld a similar indemnity provision:

ABB and or C.H. Robinson Company shall release, defend, indemnify and hold Brownsville Barge & Crane, Inc., its directors, officers, employees, agents

and subcontractors (Contractor Group) harmless from and against all liability, claims and losses, damages, punitive damages, costs, expenses, attorney's fees, demands, suits, and causes of action of every kind (the "claims"), arising on account of personal injury or death or damage to property in any way incident to or in connection with or arising out of the "Lifting Services Agreement" dated March 22, 1999 between Schaefer Stevedoring, Inc. and Brownsville Barge & Crane, Inc. **regardless of the sole, joint or concurrent negligence, negligence per se, gross negligence, statutory fault, or strict liability of any member of the Contractor Group** or the unseaworthiness of any vessel owned operated or chartered by any member of the Owner Group without limit and without regard to the cause or causes thereof that may have caused or contributed to the claim, to the extent such indemnity obligations are not prohibited by applicable law.

Id. [Emphasis added.]

In *Alcoa, Reynolds Metals Company, Ron Warpula, and Paul Stanley Danser, Jr. v. Hydrochem Industrial Services*, 2005 WL 608232 (Tex. Civ. App.–Corpus Christi 2005) (unpublished opinion) the court stated that an indemnity agreement need not be confined to one sentence when it is clear that the contract as a whole is sufficient to define the parties' intent that the indemnitor indemnify the indemnitee for the consequences of the indemnitee's own negligence. In *Alcoa*, the court found that although the indemnity language was divided into two sections, that taken together clearly define the parties' intent that Hydrochem indemnify ALCOA for any consequences of ALCOA's own negligence.

The indemnity clause in *Alcoa* provided:

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4. LIABILITY

- (a) The presence at the jobsite of Seller [Hydrochem]...is at Seller's risk. Seller shall protect, defend and indemnify Buyer [Alcoa]..from any and all claims, losses, damages, costs, actions, judgments, expenses and liabilities of every kind and nature whatsoever...in any way connected with...the performance of the Work, including, but not limited to, actual or alleged bodily injury...resulting from any act or omission, negligent or otherwise, on the part of Seller...(b) *The provisions of section 4(a) shall apply whether or not the damage, injury or loss was caused or contributed to.... by the active, passive, affirmative, sole or concurrent negligence...on the part of Buyer....*

Id. [Emphasis added.] The court held that the ALCOA-Hydrochem indemnity clause satisfied the express negligence requirement.

Similarly, in *Duininck Brothers, Inc. v. American Contractors Ins. Co.*, 2008 U.S. Dist. LEXIS 70938 (E.D. Tex. 2008), the Court held that the following agreement sufficed to meet the fair notice requirements under Texas law:

INDEMNIFICATION.
SUBCONTRACTOR AGREES TO ASSUME THE ENTIRE RESPONSIBILITY AND LIABILITY FOR ALL DAMAGES, INCLUDING BUT NOT LIMITED TO ATTORNEYS FEES AND EXPENSES OR INJURY TO ALL PERSON, WHETHER EMPLOYEES OR OTHERWISE, AND TO ALL PROPERTY ARISING OUT OF OR RESULTING FROM THE EXECUTION OF THE WORK PROVIDED FOR IN THE

SUBCONTRACT BY THE SUBCONTRACTOR, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, OR OCCURRING OR RESULTING FROM THE USE BY THE SUBCONTRACTOR ITS AGENT OR EMPLOYEES, OF MATERIALS, EQUIPMENT, TOOLS OR OTHER PROPERTY, WHETHER THE SAME BE OWNED BY CONTRACTOR, SUBCONTRACTOR OR THIRD PARTIES REGARDLESS OF WHETHER OR NOT SUCH DAMAGE OR INJURY IS CAUSED, IN WHOLE OR IN PART BY THE NEGLIGENT SUPERVISION, ACTS OR OMISSIONS OF CONTRACTOR, FOR WORK TO BE PERFORMED UNDER THIS SUBCONTRACT...IT IS THE EXPRESS INTENTION OF BOTH SUBCONTRACTOR AND CONTRACTOR TO DEFEND, INDEMNIFY AND PROTECT CONTRACTOR FROM THE CONSEQUENCES OF CONTRACTOR'S OWN NEGLIGENT SUPERVISION, ACTS OR OMISSIONS, IF SUCH NEGLIGENCE IS A CONCURRING CAUSE OR IS ALLEGED TO BE A CONCURRING CAUSE OF THE CLAIM, LOSS, CAUSE OF ACTION, DAMAGE OR INJURY, FOR WORK TO BE PERFORMED UNDER THIS SUBCONTRACT...

Rejecting the indemnitor's argument that the agreement was nonsensical and ambiguous, the court held that the fact that the phrase "*the* claim, loss, cause of action, damage or injury" was a clear an unambiguous sentence to let the reader know that the subcontractor is assuming claims for personal injury liability. The court further held that the language of the agreement was clear and straightforward, and sufficiently expressed the subcontractor's intent to indemnify the contractor for allegations of concurrent negligence.

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Interestingly, the Corpus Christi Court of Appeals held that the terms “**I...knowingly and freely assume all such risks, both known and unknown, even if arising from the negligence of others...**” were sufficient in a release signed by a patron of a chain of children’s party venues to release the chain from all liability for its own negligence and satisfied the express negligence test. The court reasoned that the plain meaning of the term “others” applies to claims which may arise from the negligence of any party other than the releaser, but including the released party. The court also held that the terms that released “**from and against any and all claims, injuries, liabilities or damages arising out of or related to participation in any and all Pump It Up programs, activities, parties, the use of the play area and/or inflatable equipment...**” are valid and enforceable under the express negligence test. The court noted that no authority requires that the word “negligence” is specifically necessary for the clause to be enforceable, but instead the intent to shift the risk of one party’s negligence to the other party must be “specifically stated” to meet the *Ethyl* test.

b. Cases Holding Agreement Not Valid:

In *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536, 538-39 (Tex.App.–Houston [1st Dist.] 1995, writ denied), the court held that the following indemnification clause did not meet the express negligence test:

The Subcontractor shall indemnify and hold harmless ... the Contractor ... from and against all claims ... arising out of or resulting from the performance of the Subcontractor's work under this Subcontract provided that any such claim...to the extent caused in whole or in part by a negligent act or omission of the Subcontractor ... regardless of whether it is caused in part by a party indemnified hereunder.

Id. at 538-539. Thus, an indemnity agreement that requires defense and indemnity “regardless of whether or not it is caused in part by a party

indemnified hereunder” is not sufficient language to meet the express negligence rule in Texas.

See also *Cabo Construction, Inc. v. R.S.Clark Construction, Inc. and Randall Food Markets, Inc.*, 227 S.W.3d 314 (Tex. App.–Houston [1st Dist.] 2007, no pet.); *Gilbane Building Company and Zurich American Insurance Company v. Keystone Structural Concrete, Ltd.*, 2007 Tex. App. Lexis 5903 (Tex. App.–Houston [1st Dist.] July 26, 2007); *Lee Lewis Const., Inc. v. Harrison*, 64 S.W.3d 1, 19 (Tex.App.–Amarillo 1999) affirmed, 70 S.W.3d 778 (Tex. 2001) (held that “regardless of whether it is caused in part by a party indemnified hereunder” does not expressly obligate indemnitor to defend and indemnify indemnitee for its own negligence); *Adams v. Spring Valley Constr. Co.*, 728 S.W.2d 412, 414 (Tex. App.–Dallas 1987, writ ref’d n.r.e.); *Robert H. Smith, Inc. v. Tennessee Tile, Inc.*, 719 S.W.2d 385 (Tex.App.–Houston [1st Dist.] 1986, no writ) (language obligating subcontractor to indemnify contractor for “any negligent act or omission of the Tennessee Tile, arising out of or resulting from the performance of the Subcontractor's Work ... regardless of whether it is caused in part by a party indemnified hereunder...” held invalid under express negligence rule in Texas).

The court in *Delta Air Lines, Inc. v. ARC Sec., Inc.*, 164 S.W.3d 666 (Tex.Civ.App.–Fort Worth 2005, pet. denied) held that the following indemnity provision did not satisfy the *Ethyl* criteria:

Contractor [ARC] shall indemnify, defend and hold harmless Delta ... from and against any and all claims ... of any kind or nature whatsoever, including, but not limited to, interest, court costs and attorneys fees, which in any way arise out of or result from any act(s) or omission(s) by Contractor ... in the performance or non performance of services under this Agreement... This section shall apply regardless of whether or not the damage, loss or injury complained of arises out of or relates to the negligence ... of, or was caused in

part by, a party indemnified hereunder. However, nothing contained in this section shall be construed as an indemnity by Contractor against any loss, liability or claim arising solely from the gross negligence or willful misconduct of Delta.

Delta argued that the language in the second sentence of the indemnification paragraph stating: "This section shall apply regardless of whether or not the damage, loss, or injury ... arises out of ... the negligence ... of, or was caused in part by, a party indemnified hereunder," met the express negligence test. However, the court found that language was limited by the contractual language of the first sentence of the paragraph, defining the indemnity obligation, while the second sentence defined only its parameters.

2. Sole Negligence

Prior to the adoption of the express negligence rule, one method employed by drafters of indemnity contracts was to provide that indemnity would be provided for any and all claims "except for the sole negligence of the party seeking indemnity." Before the *Ethyl* decision, this type of provision was sufficient to allow enforcement of the indemnity obligation. *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978). However, following the adoption of the express negligence rule, this language no longer suffices. *Getty Oil Co. and Texaco Inc. v. Insurance Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992); *Linden-Alimak, Inc. v. McDonald*, 745 S.W.2d 82 (Tex. App.—Fort Worth 1988, writ denied); *Singleton v. Crown Cent. Petroleum Corp.*, 729 S.W.2d 690, 691 (Tex. 1987).

In *Singleton v. Crown Cent. Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987), the plaintiff sued the premises owner and the contractor, for injuries caused by the contractor's employee. The jury found that the owner and contractor were concurrently negligent. The trial court required the contractor to indemnify the owner based on an indemnity agreement that provided as follows:

Contractor agrees to ... indemnify ... owner ... from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... *excepting only* claims arising out of accidents resulting from the sole negligence of owner.

713 S.W.2d 115, 118 (Tex.App.—Houston [1st Dist.] 1985). [Emphasis added.] The Texas Supreme Court held that the indemnity agreement did not satisfy the express negligence rule. *Singleton*, 729 S.W.2d at 691. The Court explained this result more fully in a later opinion:

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

Atlantic Richfield Co. v. Petroleum Personnel, Inc., 768 S.W.2d 724, 725 (Tex. 1989). See also *Quorum Health Resources, L.L.C. v. Averick*, 308 F.3d 451 (5th Cir. 2002)

In *Powerhouse Services Inc. v. Bechtel Corp.*, 108 S.W.3d 322 (Tex. App.—Amarillo 2002, pet. denied) involved a general contractor, Bechtel, who contracted with Mobil Chemical Company to construct an expansion at Mobil's Olefin's. The contract contained an "Indemnity" clause as follows:

SUBCONTRACTOR hereby releases and shall indemnify, defend and hold harmless CONTRACTOR, OWNER ... from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interest, attorney's fees, costs, expenses, and losses of whatsoever kind

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or nature in connection with or incidental to the performance of this subcontract, whether arising before or after completion of the Work hereunder and in any manner *directly or indirectly caused, occasioned, or contributed to in whole or in part, or claimed to be caused, occasioned or contributed to in whole or in part, by reason of any act, omission, fault or negligence whether active or passive of SUBCONTRACTOR, its lower-tier suppliers, subcontractors or of anyone under its direction or control or on its behalf.*

* * *

SUBCONTRACTOR'S aforesaid release, indemnity and hold harmless obligations, or portions or applications thereof, shall apply even in the event of the fault or negligence, whether active or passive, or strict liability of the parties released, indemnified or held harmless to the fullest extent permitted by law, but in no event shall they apply to liability caused by the willful misconduct or sole negligence of the party released, indemnified or held harmless.

Contrasting the *Singleton* decision, the court found that the indemnity obligation under this contract applied "even in the event of the fault or negligence" of Bechtel. In other words, Powerhouse was obligated to indemnify Bechtel "notwithstanding" Bechtel's fault or negligence, however, Powerhouse did not have any duty under the indemnity agreement where Bechtel's liability resulted from willful misconduct or sole negligence. The court concluded that the indemnity provision satisfied the express negligence test because it described what negligence *was* to be indemnified. *But see Motiva Enterprises, LLC v. Liberty Mutual Ins. Co.*, 2006 WL 3246039 (S.D. Tex. 2006), wherein the court held that an indemnity provision that applied to liability "irrespective of whether such Indemnified Losses are *caused or alleged to be caused by a failure to act by the Indemnified Person*" did not meet the express negligence test because the agreement did not contain the word "negligence."

Most recently, in *XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 513 F.3d 146 (5th Cir. 2008), the Court, following *Payne & Keller, Inc. v. P.P.G. Industries, Inc.*, 793 S.W.2d 956 (Tex. 1990), held that the following agreement did satisfy the express negligence test:

To the fullest extent permitted by law, Subcontractor specifically obligates itself to Contractor, Contractor's partners, individually and all Keiwick companies (defined as any company or business entity in which Peter Kiewitt Sons, Inc. directly or indirectly holds a controlling interest). Contractor's surety, Owner and any other party required to be indemnified under the Prime Contract, jointly and severally, (hereinafter "Contractor Indemnified Parties") in the following respects, to wit:

(b) TO DEFEND AND INDEMNIFY THEM AGAINST AND SAVE THEM HARMLESS FROM ANY AND ALL CLAIMS, SUITS OR LIABILITY FOR DAMAGES TO PROPERTY, INCLUDING LOSS OF USE THEREOF, INJURIES TO PERSONS, INCLUDING DEATH, AND FROM ANY OTHER CLAIMS, SUITS OR LIABILITY ON ACCOUNT OF ACTS OR OMISSIONS OF SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, SUPPLIERS, OFFICERS, AGENTS, EMPLOYEES OR SERVANTS, WHETHER OR NOT CAUSED IN PART BY THE ACTIVE OR PASSIVE NEGLIGENCE OR OTHER FAULT OF A CONTRACTOR INDEMNIFIED PARTY; PROVIDED HOWEVER SUBCONTRACTOR'S DUTY HEREUNDER SHALL NOT ARISE IF SUCH CLAIMS, SUITS OR LIABILITY, INJURIES OR DEATH OR OTHER CLAIMS OR SUITS ARE CAUSED BY THE SOLE NEGLIGENCE OF CONTRACTOR, UNLESS OTHERWISE PROVIDED IN THE PRIME CONTRACT. SUBCONTRACTOR'S OBLIGATION HEREUNDER SHALL NOT BE LIMITED BY THE PROVISIONS OF

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ANY WORKERS' COMPENSATION ACT OR SIMILAR STATUTE.

There, the Court held that the term "on account of" was synonymous with the phrase "arising out of," and broadly obligated the indemnitor under the terms of the agreement signed.

In *Enron Corp. v. Hewitt Associates, LLC*, 611 F.Supp.2d 654 (S.D. Tex. 2009) the court held the following language from an indemnity agreement did not obligate Enron to indemnify Hewitt for Hewitt's own negligence:

"Client [Enron] shall indemnify, defend and hold Hewitt harmless from and against any Claims...: (1) arising out of any breach by Client of any material obligations, representations or warranties contained in this Agreement; (ii) arising from Client's negligence, gross negligence or willful, fraudulent, or criminal misconduct; (iii) arising from bodily injury, including death or damage to tangible property or real property arising from physical acts or omissions that constitute Client's negligence, gross negligence or willful, fraudulent or criminal misconduct; (iv) arising out of the infringement of the Proprietary Rights of a third party by use of the Client Information provided to Hewitt hereunder; (v) arising from Losses for which Hewitt is not liable under Section 10; or (vi) arising from the acts or omissions of any third party provider of services to Client, the Plans and Participants.

The court further held that this provision was not conspicuous where the paragraphs defining the parties' rights and obligations were found in seventeen sections, spanning twenty-two, single spaced pages, all in the same font, typeface, and color as the remaining fifty-one pages of the contract, without distinction sufficient to attract the attention of a reasonable person against whom the provision was to operate. *Id.* at 665.

3. Vicarious Liability

Prior to the adoption of the express negligence rule, there was at least one court which held that in order to deny indemnity, an

indemnitor must show the injury or damage was caused, at least in part, by some negligence of the indemnitee other than that derived from the indemnitor's negligence. *Barnes v. Lone Star Steel Co.*, 642 F.2d 993 (5th Cir. 1981). This rule was also abolished by the adoption of the express negligence rule in *Ethyl*. *Ethyl*, 725 S.W.2d at 707.

4. Kind, Character or Degree of Negligence

At least one attempt has been made to assert that the express negligence test is not met unless the indemnity agreement specifies the kind, character, or degree of negligence that is to be indemnified. Under this argument, usage of the terms "joint," "concurrent," and "comparative contractual," would be required in the indemnity agreement. This argument was rejected by the Court of Appeals in *Amoco Oil Co. v. Romanco, Inc.*, 810 S.W.2d 228, 229 (Tex. App.—Houston [14th Dist.] 1989, no pet.). Moreover, as will be discussed later, gross negligence is currently considered by Texas courts to be included when an indemnity provision meets the express negligence rule.

In *Payne & Keller, Inc., v. P.P.G. Industries, Inc.*, the Texas Supreme Court held the following language expressed the parties' clear intent that Payne & Keller would indemnify P.P.G. for P.P.G.'s own concurrent negligence:

By its terms, the Payne & Keller/P.P.G. contract required Payne & Keller to indemnify P.P.G. for work-related claims "arising out of . . . the acts or omissions . . . of [Payne & Keller] or its . . . employees . . . in the performance of the work . . . irrespective of whether [P.P.G.] was concurrently negligent . . . but excepting where the injury or death . . . was caused by the sole negligence of [P.P.G.]." [Emphasis added.]

793 S.W.2d 956, 957 (Tex. 1990) (brackets and ellipsis in opinion).

Likewise, in *XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 336 F. Supp.2d 673 (S.D. Tex. 2004), affirmed, 2008 U.S. App.

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Lexis 34 (January 2, 2008) the court held that the following indemnity agreement in relevant part satisfied the express negligence test:

...whether or not caused in part by the active or passive negligence or other fault of a contractor indemnified party; provided however subcontractor's duty hereunder shall not arise if such claims, suits or liability, injuries or death or other claims or suits are caused by the sole negligence of contractor, unless otherwise provided in the prime contract. [Emphasis added.]

The court held that the terms "on account of" as found in the RBT/Kiewit indemnity agreement was synonymous to the phrase "arising out of" in the Supreme Court's *Payne & Keller, Inc.* ruling. *Id.* at *6 citing *Joe Adams & Son v. McCann Construction Company*, 475 S.W.2d 721 (Tex. 1971).

B. Conspicuous Requirement

Texas law further requires that a party seeking indemnity for the consequences of its own negligence must meet the fair notice requirement of conspicuousness contained in the Texas Uniform Commercial Code. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993); *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, 901 S.W.2d at 792. In *Dresser*, the Texas Supreme Court held that "a provision is ordinarily conspicuous when a reasonable person against whom it is to operate ought to have noticed it." See *Dresser Industries, Inc. v. Page Petroleum*, 853 S.W.2d at 511.

The test for whether an indemnity agreement is conspicuous or not is an objective test that does not vary according to the sophistication of the party against whom the clause is to operate. *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, 901 S.W.2d at 791-92. Whether indemnity agreement that seeks to shift risk of one party's future negligence to other party meets requirement that language of indemnity provision be conspicuous is question of law for court. *American Home Shield Corp. v.*

Lahorgue, 201 S.W.3d 181 (Tex.App.–Dallas 2006, pet. requested October 2, 2006).

In *Dresser*, the court held that examples of conspicuousness consisted of language and capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram. Other courts applying *Dresser* have held that an indemnity agreement that was in larger type than the preceding paragraphs and titled "Indemnity" with capitalized and bold letters was conspicuous and met the fair notice requirement. See *Powerhouse Services, Inc. v. Bechtel Corp.*, 108 S.W.3d 322, 327 (Tex.App.–Amarillo 2002, pet. denied).

In *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 132 (Tex.App.–Houston [1 Dist.] 2002, pet. denied), the court held that an indemnity agreement labeled "RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK" printed in all capital letters would attract the attention of a reasonable person sufficient to meet the fair notice and conspicuous requirement.

Likewise, the court in *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329 (Tex.App.–Houston [14 Dist.] 2006, no pet.) held that a pre-injury release, in document in which health club member transferred her membership to another club location, satisfied conspicuousness prong of fair notice doctrine where the document was only one page with only three paragraphs with large, bolded, underlined letters at top of the page that indicated it was an agreement and a release, and the member initialed each paragraph.

In *Amtech Elevator Services Co. v. CSFB 1998-p1 Buffalo Speedway Office Ltd., et al*, 2007 Tex. App. Lexis 9804 (Tex. App.–Houston [1st Dist.] December 13, 2007) the court held that the following agreement met the fair notice requirement:

"CONTRACTOR HEREBY AGREES TO DEFEND, INDEMNIFY, AND HOLD . . . OWNER [CSFB] . . .

HARMLESS FROM ALL . . . SUITS, . . . PROCEEDINGS, CLAIMS, DEMAND[S], ACTIONS, OR CAUSES OF ACTION, OF ANY KIND AND OF WHATSOEVER NATURE." and ends the paragraph with, "INCLUDING BUT NOT LIMITED TO,"

On the other hand, in *U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789, 792 (Tex.App.-Houston [14 Dist.] 1995, pet. denied) the court held that an indemnity agreement was not sufficiently conspicuous where: (1) the indemnity provision was the seventh of fifteen unrelated provisions spanning the back of the rental contract; and (2) the headings and text of all fifteen were printed in the same respective sizes and types. The court held the indemnity provision was no more visible than any other provision on the back of the page. Furthermore, the court noted that 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.

The most obvious defense to a claim that a provision is not "conspicuous" is that the indemnitor had actual knowledge of the provision. The conspicuous requirement is immaterial if the indemnitee had actual knowledge of the indemnity clauses. *Cate v. Dover Corp.*, 790 S.W.2d 559, 561-62 (Tex.1990); *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978); *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, *supra*. In *U.S. Rentals*, the court addressed the issue of actual knowledge, holding that actual knowledge of the indemnity provision is in the nature of an affirmative defense to a claim of lack of fair notice. It is the indemnitee's burden to prove that the indemnitor had actual knowledge of the provision. In this case, as *U.S. Rentals* failed to prove, or sufficiently address the issue of actual knowledge, the court declined to address the issue in full, concluding that *U.S. Rentals* was not entitled to reimbursement for its defense costs.

In *American Home Shield Corp. v. Lahorgue*, 201 S.W.3d 181 (Tex.App.-Dallas 2006, pet. requested October 2, 2006) the court held that regardless of whether, under actual knowledge exception to fair notice requirements to enforceability of indemnity agreement, appropriate standard is "actual notice" or "actual knowledge" of the indemnity provision, something more is required to do away with fair notice requirements than mere evidence that the indemnifying party read the agreement before signing it. The court reasoned that to hold that reading the agreement is enough to by-pass the fair notice requirements would allow exception to swallow the rule and would render fair notice requirements ineffectual in all but most rare instances, which would defeat the policy behind fair notice requirements.

In fact, not only is knowledge of the terms of the agreement a defense to conspicuousness. It may also be a defense to the express negligence test. *See Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004) (an agreement can be enforced even if the fair notice requirements of the express negligence doctrine or conspicuousness were not satisfied, if both contracting parties have actual knowledge of the plan's terms); *ALCOA v. Hydrochem Indus. Services, Inc.*, 2005 WL 608232 (Tex.App.-Corpus Christi 2005).

C. Fair Notice Requirements Only Apply to Future Occurrences

The application of the fair notice requirements has been "explicitly limited to releases and indemnity clauses in which one party exculpates itself from its own future negligence. *Green Int'l. Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997); *Dresser Indus.*, 853 S.W.2d at 508 n.1 ("Today's opinion applies the fair notice requirements to indemnity agreements and releases only when such exculpatory agreements are utilized to relieve a party of liability for its own negligence in advance.); *Oxy USA, Inc. v. Southwestern Energy Production Co.*, 161 S.W.3d 277 (Tex. App.-Corpus Christi 2005, review requested May 26, 2005) (indemnity agreement executed between two major oil and gas companies after

negotiations that specifically contemplated the adoption of the agreement releasing Oxy from liability was not subject to the fair notice requirements); *Lehman v. Har-Con Corp.*, 76 S.W.3d 555, 560 (Tex. App.–Houston [14th Dist.] 2002, no pet.) (holding that express negligence did not apply to release executed after acts giving rise to released liability had occurred); *Lexington Ins. Co. v. W.M. Kellogg Co.*, 976 S.W.2d 807, 809 (Tex. App.–Houston [1st Dist.] 1998, pet. denied) (holding that fair notice did not apply when release was executed “after the acts that could give rise to liability were completed”).

D. Scope of Indemnity Agreement

Often, the indemnity agreement is a valid transfer of tort liability under the express negligence rule and meets the conspicuous requirements, but the indemnity obligation is limited in scope. For example, the indemnity obligation may be limited to damages or loss “arising out of or relating to or connected with the performance, or failure in performance, of the subcontractor’s work....” Arguably, there is no indemnity obligation where the injury does not arise out of, relate to or connect with the indemnitor’s work under the contract. This means that the fact that an employee is injured while at work does not necessarily mean that his injury arose out of the performance of that work. See *Robert H. Smith, Inc. v. Tennessee Tile, Inc.*, 719 S.W.2d 385, 387 (Tex. App.–Houston [1st Dist.] 1986, no writ)(where injury was not caused by and/or incurred during an activity that fell within subcontractor’s responsibility, indemnity agreement did not apply); *Sun Oil Co. (Delaware) v. Renshaw Well Service, Inc.*, 571 S.W.2d 64, 68 (Tex. Civ. App.–1978) (terms “all claims... arising out of, incident to, or in connection with this agreement or performance of work or services thereunder...” define the scope of the area within which the indemnity obligation applies); *McLane v. Sun Oil Co.*, 634 F.2d 855 (5th Cir. 1981)(once intent of the parties is gleaned from the contract, the court will then impose strict construction upon that intent to prevent the indemnity obligation from being broadened beyond the terms of the agreement); *Brown & Root, Inc. v. Service*

Painting Co. of Beaumont, 437 S.W.2d 630 (Tex. Civ. App.–1969) (painting subcontractor’s agreement providing for indemnification for any injury, including death, to person, including subcontractor’s employee, occurring “in connection with” performance of sub-contract did not cover death of sub-contractor’s employee occurring because of negligence of general contractor’s employee notwithstanding fact that decedent was engaged in sublet work at the time of the death). Much depends upon the wording of the limiting language in the indemnity agreement and the actual cause of the injuries for which indemnity is sought. For this reason, each claim for indemnity must be taken on a case by case basis.

In *Superior Snubbing Services, Inc. v. Energy Service Company*, 158 S.W.3d 112 (Tex. App.–Fort Worth 2005), *reversed*, 236 S.W.3d 190 (Tex. 2007), the appellate court held that according to the Texas Labor Code, a third party that does not have a direct contract with the employer of any injured party is not entitled to indemnity from the employer. In this case, Mitchell Energy (“Mitchell”) entered into a Master Service Agreement with Superior for work to be performed by Superior for Mitchell. Paragraph seven of the contract states that the “contractor”, Superior, will indemnify the “company”, Mitchell, and its contractors, which include Energy Service, (“Energy”), for claims of injury to Superior’s employees. Superior’s employee, Faulk, was injured and subsequently made claim against Energy and others for his injuries. Energy filed suit against Superior seeking indemnity under the contract between Mitchell and Superior.

Superior argued that Texas Labor Code Section 417.004 prohibited Energy from any right to defense or indemnity. The Code reads:

In an action for damages brought by an injured employee...against a third party liable to pay damages for the injury...under this chapter that results in a...settlement by the third party, the employer is not liable to the third party for reimbursement or damages based upon the...settlement unless the

employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability.

Tex. Lab. Code Ann. Section 417.004. There is no question that Superior and Energy did not enter into a contract with each other. Instead, Superior entered into the contract with Mitchell. However, Energy argued that because it was a third party beneficiary under the contract between Superior and Mitchell, Energy is entitled to step into the shoes of Mitchell and enforce the contract, thereby transforming the agreement in a “written agreement with the third party [Energy] to assume the liability.” *Id.* at 114.

The court of appeals disagreed with Energy and held that the history of this section of the Labor Code demonstrates that prior to the 1989 revisions of the statute, the inclusion of “third party beneficiary” clearly included an indemnitee because all that was required for inclusion was that the employer execute a written agreement expressly assuming the indemnification liability. However, the 1989 revisions to this section of the Code added the language to the statute that restricted the breadth of the indemnification obligation to only those situations where there is a written agreement directly between the indemnitor and the indemnitee. Therefore, the court of appeals concluded that “combining the plain language of the present statute with the legislative inclusion of more restrictive language in the statute leads to the conclusion that nonsignatories, such as third party beneficiaries, are not included as permissible indemnitees under section 417.004 of the Texas Labor Code.”

The Supreme Court recently reversed the Fort Worth Court of Appeals in *Energy Service Company of Bowie, Inc. v. Superior Snubbing Services, Inc.*, 236 S.W.3d 190 (Tex. August 24, 2007). The Supreme Court reasoned that there is nothing in the history of section 417.004 or its current reading that would indicate to the reader that the third party was required to sign the agreement. The court also reasoned that protection has been provided for signatories of

indemnity agreements from unknowingly obligating themselves by the Texas Oilfield Anti-Indemnity Act where the act expressly contemplates that parties will “agree to indemnify each other and each other’s contractors and their employees”. However, the Supreme Court did not limit its interpretation of section 417.004 to the practices in the oil field, but held that nothing suggests that other applications of the statute require a different construction. The Supreme Court reversed the court of appeals and remanded the case for rendition of judgment in favor of Superior.

In *Jane Doe, Individually and as Next Friend for Sally Doe, A Minor v. Texas Association of School Boards, Inc. and Texas Association of School Boards Risk Management Fund*, 283 S.W.3d 451, 460 (Tex. App.–Fort Worth 2009, no writ) the insurance carrier (TASB RMF) for the released school district was held to be a third-party beneficiary to a release that contained a valid indemnity agreement and was allowed to enforce the indemnity agreement even though TASB RMF was not a signatory to the agreement. Note that TASB RMF was specifically identified as a released party in the release agreement.

E. Duration of Indemnity Agreement

Sometimes the indemnity agreements will include a period of duration, whereby the indemnity obligation endures even after completion of the subject project. In that case, it is likely that a court will recognize an indemnity obligation beyond expiration of the contract. However, where there are no explicit duration terms, which is more often than not, then it is less clear.

One case is instructive. *Sieber & Calicutt, Inc. v. La Gloria Oil & Gas Co.* involved a maintenance contract for services at a refinery owned by La Gloria. *Sieber & Calicutt, Inc. v. La Gloria Oil & Gas Co.*, 66 S.W.3d 340, 344 (Tex.App.–Tyler 2001, pet. denied). For more than a year after the contract expired by its own terms, Sieber continued to perform maintenance services at the refinery and sent La Gloria invoices for those services. *Id.* La Gloria

continued to pay the invoices. *Id.* A La Gloria employee died at the refinery after the contract's expiration date, and a dispute arose about whether an indemnity agreement in the contract was still in effect. *Id.* at 347. The Tyler Court held that, because the parties continued to perform under the contract after it had expressly expired, the indemnity provision of the contract was in effect on the date of the employee's death. *Id.* The court said, "An extension of time for performance may be implied as well as express.... When the exact duration of an extension of time is not express, the law will imply a reasonable time.... The extension of a term of a contract is the extension of all of its provisions." *Id.* (citations omitted); *see also Motiva Enterprises, LLC v. Liberty Mutual Ins. Co.*, 2006 WL 3246039 (S.D. Tex. 2006) (continuing to perform under an expired agreement creates an implied-in-fact contract that continues the application of the indemnity agreement); *Triton Commercial Prop., Ltd. v. Norwest Bank Texas, N.A.*, 1 S.W.3d 814, 818 (Tex.App.–Corpus Christi 1999, pet. denied) (extension of time for performance may be implied as well as express). *See also Double Diamond, Inc. v. Hilco Elec. Co-op., Inc.*, 2003 WL 22976336, *4 (Tex.App.–Waco, 2003) (The parties to a written agreement may impliedly extend the agreement after the written agreement expires).

III. ANTI-INDEMNITY STATUTES RELATING TO CONSTRUCTION CONTRACTS

A. Chapter 130 TCPRC:

There are statutory provisions that void certain "broad-form" indemnity clauses in construction contracts. Chapter 130, *Texas Civil Practice and Remedies Code*, makes void and unenforceable any contract provision in connection with a construction contract that requires a contractor to indemnify or hold harmless a licensed architect or registered engineer or their employees from liability for damage from defects in the design documents prepared by the architect or the engineer or from the negligence of the architect or engineer in the performance of their professional duties in

connection with the construction contract and that arises from property or personal injury or death. TEX. CIV. PRAC. & REM. CODE ANN. §130.002(a) (Vernon 2004).

Provisions in construction contracts, other than contracts for the construction of single or multi-family residences entered into on or after September 1, 2001, that purport to require a licensed architect or registered engineer to indemnify or hold harmless a property owner from liability from damage caused by the owner's negligence, are also void and unenforceable. §130.002(b).

Additionally, contract provisions in engineering or architectural services agreements with state or local governmental agencies that purport to require a licensed architect or registered engineer to indemnify or hold harmless a governmental agency for liability for damages caused by the governmental agency's negligence (or the negligence of its agents or employees) are void and unenforceable. TEX. LOC. GOV'T CODE ANN. § 271.904.

These statutes do not prohibit clauses in contracts that call for a contractor to indemnify another party for liability for damages caused by the contractor's negligence or that call for an architect or engineer to indemnify another party for liability for damages caused by the architect or engineer's negligence.

B. Texas Government Code:

Section 2252.902 of Texas Government Code prohibits indemnity agreements contained in a construction agreement involving the construction of a "state public building" or "carrying out or completing any state public work" that purport to indemnify a person against all or a portion of loss caused by sole, joint or concurrent negligence of an indemnitee.

There is no prohibition in section 2252.902 from *insuring* against that liability. Only from indemnifying it. One problem we see in the language of the statute is the neither the term "state public building" nor "state public work" are defined. We generally believe, however,

that state public works do not include local municipalities.

C. TOAIA – TEXAS OILFIELD ANTI-INDEMNITY ACT

The Texas “legislature finds that an inequity is fostered on certain contractors by the indemnity provisions in certain agreements pertaining to wells for oil, gas, or water or to mines for other minerals.” Tex. Civ. Prac. & Rem. Code § 127.002(a). For this reason, the legislature has created a statutory prohibition on indemnity agreements affecting oil, gas, and water wells or mines for minerals, rendering indemnification of a negligent indemnitee against public policy in Texas. This statute is known as the Texas Oilfield Anti-Indemnity Act (“TOAIA”). Tex. Civ. Prac. & Rem. Code § 127.002(b).

There is another exception to the prohibition against indemnity agreements in contracts affecting oil, gas and water wells and mines. This exception is known as the “safe harbor provision” and is set out as follows:

§127.005. Insurance Coverage

a. This chapter does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) and (c).

b. With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee.

c. With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed \$500,000.

Tex. Civ. Prac. & Rem. Code §127.005. The statute contains the following relevant definitions:

(3) “Mutual indemnity obligation” means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which the parties agree to indemnify each other and each other’s contractors and their employees against loss, liability, or damages arising in connection with bodily injury, death, and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from the performance of the agreement.

* * *

(6) “Unilateral indemnity obligation” means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee with respect to claims for personal injury or death to the indemnitor’s employees or agents or to the employees or agents of the indemnitor’s contractors but in which the indemnitee does not make a reciprocal indemnity to the indemnitor.

The TOAIA allows for indemnity agreements that are mutual if supported by insurance. Mutual indemnity obligations can be valid under the Texas Oilfield Anti-Indemnity Act, even if the parties agree to provide liability insurance in differing amounts. *See Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344 (Tex. 2000).

IV. DIFFERENCE BETWEEN INSURANCE AND INDEMNITY REQUIREMENTS OF CONTRACT

Usually, the contract includes separate sections involving insurance and indemnity requirements. The insurance provision sets out the insurance that each party must maintain. This is where the parties set out any requirements that one party be named an additional insured on the other party's insurance. The indemnity agreement is where the parties transfer or assume liability for specific damages, usually tort liability. These are analyzed and scrutinized separately to determine each party's responsibilities under the contract.

It is not an unusual argument that the coverage provided by an additional insured endorsement should correspond to the scope of the contractual indemnity agreement between the parties. As the Texas Supreme Court noted in *Urrutia v. Decker*, 992 S.W.2d 440, 442 (Tex.1999) (citing *Goddard v. East Tex. Fire Ins. Co.*, 67 Tex. 69, 1 S.W. 906, 907 (1886)), "Texas law has long provided that a separate contract can be incorporated into an insurance policy by an explicit reference clearly indicating the parties' intention to include that contract as part of their agreement." One of the purposes of the agreement to procure insurance is to secure the right to indemnity. See D. MALECKI, P. LIGEROS AND J. GIBSON, *THE ADDITIONAL INSURED BOOK*, p. 56 (4th 2000). However, unless explicit, the contract terms do not become part of the insurance policy, primarily because the insurer and the insured are the contracting parties to the insurance policy, including the additional insured endorsements. The indemnitee usually has no contractual relationship with the insurer. Thus, it is unlikely that a court would impose upon an insurer an interpretation of an endorsement in line with the scope of an indemnity agreement to which the insurer is not privy, unless explicit provisions tie the indemnity agreement to the agreement to procure insurance.

A. Texas Courts Interpret Additional Insured Coverage According to Scope of Indemnity Agreement Only When

Requirement to Procure Insurance Supports Indemnity Obligation

The Houston Court of Appeals addressed the issue in *Emery Air Freight Corp. v. General Transportation Systems, Inc.* 933 S.W.2d 312 (Tex. App.–Houston [14th Dist.] 1996, no pet.), GTS contracted with Emery to provide local delivery services in Beaumont, Texas and Lake Charles, Louisiana. The contract, the "Cartage Agreement," provided that GTS would add Emery as an additional insured under its liability insurance policies. However, GTS did not comply with this contractual requirement. Subsequently, an employee of GTS was injured and filed suit against Emery. Emery then filed the Houston action against GTS when it discovered it had not been added to GTS' insurance policies.

The central issue in the *Emery* case is whether the Cartage Agreement required GTS to insure Emery against liability arising from Emery's own negligence. However, Emery made arguments that shed light on Texas courts' view of the relationship between indemnity agreements and additional insured endorsements. Emery argued that GTS' contractual requirement to add Emery as an additional insured shifted the risk of Emery's own negligence to GTS' insurer. The specific language upon which Emery relied is found in clauses 7 and 8 of the Cartage Agreement:

7. Contractor shall obtain and maintain at its own expense insurance in such forms and minimum amounts as set forth below naming Emery as an additional insured. Contractor shall furnish Emery certificates from all insurance carriers showing the dates of expiration, limits of liability thereunder and providing that said insurance will not be modified on less than thirty (30) days' prior written notice to Emery.

Minimum Limits of Insurance:

- A. Worker's Compensation – Statutory
- B. General Liability Insurance - \$1 Million Combined Single Limit

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C. Automobile Liability - \$1 Million Combined Single Limit

If Contractor fails to obtain and maintain the insurance coverage set forth above, Emery shall have the right, but not the obligation, to obtain and maintain such insurance at Contractor's cost or, at its option, to terminate this Agreement for cause as provided in Section 9 hereof.

8. Contractor shall be solely responsible and liable for any and all loss, damage or injury of any kind or nature whatever to all persons, whether employees or otherwise, and to all property, including Emery shipments while in the Contractor's custody and control, arising out of or in any way resulting from the provision of services hereunder, and Contractor agrees to defend, indemnify and hold harmless Emery, its agents, servants, and employees from and against any and all loss and expense, including legal costs, arising out of the provision of the services hereunder, by Contractor.

The Houston Court of Appeals relied on two previous Texas Supreme Court decisions in its analysis. In *Fireman's Fund Insurance Company v. Commercial Standard Insurance Company*, 490 S.W.2d 818 (Tex. 1972) the contract at issue had a liability insurance clause that required the contractor to obtain liability insurance to "protect the owner . . . against all liabilities, claims, or demands for injuries or damages to any person or property growing out of the performance of work under this specification." *Id.* at 821. In the same contract, another clause indemnified the owner from claims arising from performance of the contract, excluding those claims arising out of the owner's negligence. The Supreme Court addressed whether the language of the insurance clause reflected an intention for the contractor to carry insurance covering the owner's negligent acts. The court first noted that the above-quoted language was "insufficient to clearly indicate an intention to protect the contractor-indemnitee against liability for damages caused solely by the

latter's own negligence." *Id.* at 822. The court then carefully considered all the other relevant provisions of the contract and held:

While the meaning of the contract provisions relating to liability insurance are not clear, the most reasonable construction is that they were to assure performance of the indemnification agreement as entered into by the parties. Such provisions are often required to guard against the insolvency of the indemnitor, and they should not be considered as evidence of intent to broaden the contractual indemnity obligation.

Id. at 823.

The *Emery* court also relied upon *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794 (Tex. 1992). In *Getty*, the insurance and indemnity provisions fell within the same contractual clause. The insurance provision required the seller to carry liability insurance to protect the purchaser and the indemnity provision required the seller to indemnify the purchaser from claims "arising out of or incident to the performance or the terms of this order. . . ." *Id.* at 796-97. The *Getty* court distinguished *Fireman's Fund* based upon the difference in the two contracts. The indemnity provision in *Getty* contained an internal provision for insurance to support it, while the agreement to procure insurance required the extension of coverage "whether or not required [by the other provisions of the contract]." *Id.* at 804. Based upon this distinction from the *Fireman's Fund* contract, the Supreme Court held the insurance provision did not support the indemnity provision, but was instead a free-standing obligation. *Id.* at 804-06.

In *Emery*, the Houston Court of Appeals applied a two-step analysis: (1) whether the indemnity clause satisfies the express negligence rule as set out in *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987) and (2) whether the insurance clause supports the indemnity clause or stands alone, representing an independent obligation. In so doing, the court held that the two clauses in the Cartage

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Agreement resembled those in the Fireman's Fund contract more closely than those in the Getty Oil contract. The court found that the Cartage Agreement did not meet the express negligence test. The court concluded that neither the indemnity clause nor the insurance clause expressly covered negligence.

The court held that the most reasonable construction of the insurance provisions in the Cartage Agreement "is that they were to ensure performance of the indemnity agreement as entered into by the parties." *Emery*, 933 S.W.2d at 315. In effect, the Houston Court of Appeals held the indemnity clause and insurance clause were interrelated, such that the agreement to procure insurance was determined by the scope (or validity) of the indemnity agreement.

The Texas Supreme Court has held that an "additional insured" provision which does not support an indemnity agreement is not prohibited by the TOAIA. *Getty Oil Co. v. Insurance Company of North America*, 845 S.W.2d 794, 804 (Tex. 1992); *Certain Underwriters at Lloyd's London v. Oryx Energy Co.*, 142 F.3d 255 (5th Cir. 1998); *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000). This means that even if the indemnity agreement is invalid under the TOAIA, there could be coverage for the indemnitee as an additional insured.

In *Certain Underwriters at Lloyd's London v. Oryx Energy Co.*, 142 F.3d 255 (5th Cir. 1998) the court applying Texas law held that the TOAIA did not reach an additional insured provision even if the underlying indemnity contract, which expressly required that Oryx be named as an **"additional insured...to the extent of the indemnity,"** was invalid. This court rejected any limitation on the additional insured coverage based on whether the indemnity agreement was unenforceable under the reasoning that "there is no justification for an argument that Texas courts would engraft a limit on coverage to match the Texas law defense as if the suit were only to enforce the indemnity itself." *Id.* at 258. Also, in *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000)(applying Texas law) the court relied upon

Getty and *Oryx* in holding that the subject indemnity agreement that required the indemnitor to **"name Company [indemnitee] an additional insured, for liabilities and indemnities assumed by Contractor"** was sufficient to impose the duty to procure insurance whether or not the indemnity agreement was valid under Texas law. *See also Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co.*, 2007 U.S. Dist. Lexis 2191 (January 11, 2007) (following *Oryx* reasoning that there is no justification for limiting additional insured coverage to validity of indemnity agreement especially where insurance and indemnity clauses are separate, do not reference each other, are not intertwined or interrelated, and stand as separate obligations).

Recently, the Supreme Court addressed the issue in *Evanston Ins. Co. v. ATOFINA Petrochemicals*, 256 S.W.3d 660 (Tex. 2008) where it held that one must look to the insurance policy itself to determine the scope of coverage of additional insured endorsements and not the indemnity contract. The court held that "where an additional insured provision is separate from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity clause." *Id.* at 664. *See also Aubris Resources LP v. St. Paul Fire and Marine Ins. Co.*, 566 F.3d 483, 490 (5th Cir. 2009) (In contract that required United to be named as an additional insured, the court held that it is "reasonable to assume the neither party intended the requirement to be a virtual cipher, excluding from additional insured coverage all incidents for which it could possibly owe J&R Valley indemnity under a general indemnity provision."); *The Lubrizol Corp. v. The Gray Ins. Co.*, 2009 U.S. App. Lexis 2807 (5th Cir. 2009) (provision "[Pat Tank]...to the extent necessary to provide coverage under [its] insurance for the liabilities assumed by [it] under the indemnity provisions of this Agreement, shall designate Lubrizol as an additional insured on Comprehensive Contractor's General Liability Insurance" was written as a stand-alone obligation, completely divorced from the prior additional insured requirement, and therefore, following *Evanston*, did not limit the scope of the additional insured coverage).

B. Other Jurisdictions Vary In Considering Indemnity Agreement When Determining Scope of Additional Insured Coverage

Several jurisdictions seem to follow the same trend to analyze whether the insurance requirement is dependent upon the indemnity agreement or whether the requirement to procure insurance is separate and independent. See *Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So.2d 336 (Fla. App. 1996) (manufacturer's agreement to provide insurance to franchisees as additional insureds did not require coverage beyond manufacturer's own liability, where manufacturer had no duty to indemnify franchisee for franchisee's own negligence); *Transcontinental Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 662 N.E.2d 500 (Ill. 1996) (agreement to procure insurance to the extent of indemnitor's agreement to assume indemnitee's negligence held void under Illinois Indemnification Act, and, thus, no coverage was available to indemnitee as additional insured); *Shaheed v. Chicago Transit Auth.*, 484 N.E.2d 542 (Ill. Ct. App. 1985) (insurance clause and contract required that subcontractor maintain insurance "insuring all subcontractor's indemnity obligations", court rendered insurance provision unenforceable because it sought insurance against an invalid agreement to indemnify); *Posey v. Union Carbide Corp.*, 507 F. Supp. 39 (M.D. Tenn. 1980) (agreement to indemnify owner from any claims for bodily injury sustained on premises resulting from construction work along with agreement to procure insurance to the same effect held unenforceable by virtue of invalid indemnity agreement). Under one theory, where an indemnity agreement is in violation of state law, the obligation to provide insurance to cover the void contractual obligation may not be enforceable. See, e.g., *Walsh Construction Co. v. Mutual of Enumclaw*, 104 P.3d 1146 (Or. 2005) (Oregon anti-indemnity status applies to additional insured requirements in construction contracts); *Shaheed v. Chicago Transit Authority*, 484 N.E.2d 542 (Ill. App. 1985). The argument is that a party cannot circumvent a statutory prohibition against indemnity by simply becoming an additional insured. Where the indemnity agreements are allowed, but possibly

invalid contractually, the parties may argue that the insurance requirement is also invalid, or, at least, very limited in scope. See *Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So.2d 336 (Fla. App. 1996) (manufacturer's agreement to provide insurance to franchisees as additional insureds did not require coverage beyond manufacturer's own liability where manufacturer had no duty to indemnify franchisee for franchisee's own negligence). Another argument suggest that where the additional insured endorsement is limited to "as required by written contract," and the contract includes an insurance requirement that solely supports the indemnity obligation, then the scope of coverage for the additional insured is limited to the indemnity obligation. See e.g. *St. Paul Fire and Marine Ins. v. Hanover*, 187 F. Supp.2d 584 (E.D. N.C. 2000).

On the other hand, more courts recognize the distinction between the indemnity obligation and the insurance requirement and rule that an invalid and unenforceable indemnity agreement does not necessarily render coverage for an additional insured null and void. See *American Cas. Co. v. General Star Indemnity Co.*, 24 Cal. Rptr. 3d 34 (Cal. Ct. App. 2005) (held that statutory provision precluding indemnity for a party's sole negligence did not apply to an additional insured endorsement because an additional insured endorsement is separate from a contractual indemnification obligation); *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 52 Cal. Rptr.2d 580 (1996) (though Washington statute forbids risk transfers for sole negligence, such law has no bearing upon insurance coverage, including coverage for indemnitee's sole negligence); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*, 225 Cal. App. 740 (1986) (agreement to procure insurance for additional insured's sole negligence held enforceable despite state statute prohibiting risk transfers for sole liability); *Chrysler Corp. v. Merrell & Garaguso, Inc.*, 796 A.2d 648 (Del. Ct. App. 2002) (additional insured status remained despite void indemnity agreement); *Container Corp. of America v. Maryland Cas. Co.*, 707 So.2d 733 (Fla. 1998) (language of policy naming additional insured is controlling as to scope of coverage, not indemnity agreement);

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McAbee Constr. Co. v. Georgia Craft Co., 343 S.E.2d 513 (Ga. Ct. App. 1986) (court held indemnification provision construed with insurance clause enforceable where parties to a business transaction mutually agreed that insurance would be provided as part of the bargain); *W.E. O'Neill Const. Co. v. General Cas. Co.*, 748 N.E.2d 667 (Ill. App. 2001) (though indemnity contract was rendered void, court held additional insured status remained valid, where requirement to procure insurance was not inextricably tied to indemnity agreement); *Bosio v. Branigar Org., Inc.*, 506 N.E.2d 996 (Ill. Ct. App. 1987) (court held that construction contract provision requiring public liability insurance for owner's benefit did not violate states' anti-indemnity statute prohibiting broad form hold harmless agreements); *Heat & Power Corp. v. Air Prod. & Chem., Inc.*, 578 A.2d 1202 (Md. Ct. App. 1990) (indemnitee as additional insured on indemnitor's liability policy can obtain protection against its own negligence even though Maryland's statute forbids transfer of liability for sole negligence); *Long Island Lighting Co. v. American Employers Ins. Co.*, 517 N.Y.S.2d 44 (N.Y. Sup. Ct. 1987) (court ruled that a utility as an additional insured under another entity's liability policy was protected by the policyholder's insurer, even if the indemnity provision were to be void as being against public policy). See also P. BRUNER and P. O'CONNOR, JR., 2 BRUNER & O'CONNOR ON CONSTRUCTION LAW, § 11:63, Slippery Slope of Additional Insured Coverage (May 2003), and D. HENDRICK, INSURANCE LAW: UNDERSTANDING THE BASICS REGARDING "ADDITIONAL INSURED," 690 PLI/Lit 591 (2003), for discussion of acquiring an owner's and contractor's protective liability policy (OCP) to insure all parties on a project as named insureds. These cases generally rely only upon the policy language to determine the scope of coverage afforded to the additional insured.

One way for the insurer to clear this issue is to include language in its policy limiting its liability to the extent the insured is liable under an indemnity agreement. This is what happened in the case of *Certainfeed Corporation v. Employers Insurance of Wausau*, 939 F. Supp. 826 (D. Kan.

1996). In *Certainfeed*, Wausau included an additional insured endorsement in the insurance policies issued to Teichmann. The endorsement:

Section Two--Who Is An Insured:

5. Any person or organization other than a joint venture, for which you have agreed by written contract to procure bodily injury or property damage liability insurance, but only for liability arising out of operations performed by you or on your behalf, provided that:

* * *

b. The insurance afforded to any person or organization as an insured under this paragraph 5. shall include only the insurance that is required to be provided by the terms of such agreement to procure insurance, and then only to the extent that such insurance is included within the terms of this policy.

Id. at 829.

Of course, in the *Certainfeed* case, neither party disputed *Certainfeed's* status as additional insured. The parties did disagree, however, on the extent of coverage that the additional insured provision extended to *Certainfeed*. The court resolved this issue by determining what liability *Teichmann* assumed under the construction contract, requiring an analysis of the scope of the indemnity agreement.

One interesting aspect of the *Certainfeed* case is not only the fact that the additional insured endorsement limited coverage to that required by the terms of the agreement between the parties, but the parties had included a section in their construction contract that required *Teichmann* to secure insurance that would indemnify *Certainfeed* for any liability that *Teichmann* assumed under that contract. Because the contract between *Certainfeed* and *Teichmann* required *Teichmann* to provide *Certainfeed* with insurance coverage that would indemnify *Certainfeed* for its own negligence, except for its sole negligence, the

court held Certainteed was entitled to additional insured coverage, except for injuries arising out of Certainteed's sole negligence. *Id.* at 831.

V. AVENUES FOR ADDITIONAL INSURED COVERAGE

In the context of insurance coverage procured by contractors/subcontractors seeking to add as additional insureds project owners, lessees or contractors, the most frequently used standard ISO endorsements to the general liability type policies are CG 2010 and CG 2033. These endorsements can be written to provide additional insured coverage on either a “scheduled” basis, where the additional insured is listed either on the endorsement itself or on the declarations page, or on a “blanket” basis, where the additional insured is determined by whether a written contract requires that such insurance be procured. These forms afford good examples of the various interpretations of the standard ISO terminology and the issues arising out of its usage.

A recent version of CG 2010 reads:

ADDITIONAL INSURED-OWNERS,
LESSEES OR CONTRACTORS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL
LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

Who Is An Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

This version of CG 2010 was substantially changed from the prior versions. The 1985 version broadly included coverage for the additional insured’s “liability arising out of ‘your work’” for the named insured. The 1997 version was narrower, extending coverage to the designated additional insured only for “liability arising out of your ongoing operations.” Then, the 2001 version was modified to delineate between the “work” and the “ongoing operations” of the named insured to make more explicit the intention that such additional insured coverage was not to include “completed operations” coverage for occurrences arising after completion of the named insured’s work. *See Mid-Continent Cas. Co. v. Chevron*, 205 F.3d 222 (5th Cir. 2000), and *Pardee Const. Co. v. Ins. Co. of the West*, 92 Cal. Rptr. 443 (2000), where both courts concluded that “your work” included completed operations coverage, but in dictum concluded that “your ongoing operations” language in the later versions of the endorsement did not. *See also* D. HENDRICK, *INSURANCE LAW: UNDER-STANDING THE BASICS REGARDING ‘ADDITIONAL INSUREDS,’* Insurance Law 2003: Understanding the ABC’s, Practising Law Institute, p. 619 (2003) (including the terms “ongoing operations” in additional insured endorsements clarified the intention that such additional insured coverage was not to include “completed operations” coverage for occurrences arising after completion of the named insured’s work).

The narrowed coverage under the 2001 versions of CG 2010 is intended to correspond with another additional insured ISO endorsement form issued in 2001, CG 2037, which specifically affords only completed operations coverage to an additional insured to the extent included in the “products-completed operations hazard” coverage.

The Owners, Contractors and Lessees additional insured endorsements have been the center of various judicial decisions. One of the primary issues is the scope of coverage available to the additional insured. Specifically, the question in many cases is whether the endorsements afford coverage for the additional

insured only for vicarious liability or whether they insure the additional insured for its own negligence.

A. Minority View: Additional Insured Coverage Limited to Vicarious Liability for Named Insured's Acts

The minority view is to limit the additional insured's coverage to vicarious liability of the named insured's own negligence. This is certainly the interpretation preferred by the insurance industry because only recently did insurance companies begin to actually charge a worthy premium for additional insured coverage. *See G.E. Tignall & Co., Inc. v. Reliance Nat'l Ins. Co.*, 102 F. Supp.2d 300, 306 (D. Md. 2000) (coverage provided to an additional insured under the Reliance policy, namely, for liability arising out of named insured's ongoing operations performed for additional insured, was indistinguishable from provision in parties' contract, so court held policy limited additional insured coverage to liability arising out of the named insured's work and does not cover additional insured for its own negligent acts); *Gates v. James River Corp. of Nev.*, 602 S.2d 1119 (La. Ct. App. 1992) (court recognized that owner obtained Additional Insured Endorsement for two reasons: (1) proof of insurance from contractors for their own liability, and (2) an additional layer of insurance for the owner's own coverage in the event of its liability arising from the fault of the named insured).

Various arguments support this view. Some argue that the additional insured's coverage cannot exceed the named insured's indemnity obligation. *See e.g., St. Paul Fire and Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.*, 124 Cal.Rptr.2d 818, 830 (Cal. Ct. App. 2002); *see also G.E. Tignall & Co., Inc. v. Reliance Nat. Ins. Co.*, 102 F. Supp.2d 300, 301 (D.Md., 2000). Others limit additional insured coverage to the imputed liability of the additional insured because broader interpretation could erode the limits of coverage. *See P. BRUNER and P. O'CONNOR, JR.*, 2 BRUNER & O'CONNOR ON CONSTRUCTION LAW, § 5:219, ¶11.3.3 – No Additional Insured Coverage (Risk Allocation) (May 2003), for

discussion of issues arising from broad interpretation of additional insured endorsements.

The insurer's efforts to limit coverage available to the additional insureds are premised upon obvious concerns. Once an owner is included as an additional insured on a contractor's general liability policy, the contractor's insurer faces liability to its additional insured for virtually any type of premises liability claim involving the completed project, whether that claim involves the negligence of the named insured or the additional insured owner. This problem appears to have been addressed by the latest version of CG 2010 limiting coverage for the additional insured to "ongoing operations," and the CG 2037 endorsement extending coverage for completed operations. Another concern is that the coverage premium reflects a rating for coverage for vicarious liability only, not the additional insured's own negligence.

B. Majority View: Additional Insured Coverage Extends to Negligence of Additional Insured

The majority approach to the additional insured endorsement is to give it a liberal construction so that the additional insured is covered for its own negligence if a causal connection exists between the injury and the named insured's work on the subject project. *See i.e., Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.*, 243 F.3d 1232, 1234 (10th Cir. 2001); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993); *Vitton Constr. Co. v. Pacific Ins. Co.*, 2 Cal.Rptr.3d 1 (Cal. Ct. App. 2003); *Acceptance Ins. Co. v. Syufy Enters.*, 81 Cal.Rptr.2d 557 (1999); *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.* 625 N.W.2d 178, 183 (Minn. Ct. App. 2001); *Tishman Constr. Corp. of New York v. American Mfrs. Mut. Ins. Co.*, 303 A.2d 323 (N.Y. App. Div. 2003); *Consolidated Edison Co. v. N.Y., Inc. v. Hartford Ins. Co.*, 203 A. 2d 83, (N.Y. App. Div. 1994).

Questions arise about what level of causal connection is necessary to trigger additional insured coverage. *See Mikula v. Miller Brewing*

Co., 2005 WL 839519 (Wis. Ct. App. April 12, 2005) (no negligence need be alleged against named insured for additional insured to be covered); *Pro Con Constr., Inc. v. Acadia Ins. Co.*, 794 A.2d 108 (N.H. 2002) (general contractor's alleged liability for slip and fall by painting subcontractor's employee walking from work area to coffee truck for a break did not arise out of the subcontractor's ongoing operations performed for the general contractor, and, thus, the general contractor was not an "additional insured" under the subcontractor's commercial general liability policy; no nexus or causal connection existed between the painting operations and the injuries). However, the majority of jurisdictions that employ this interpretation give it such a liberal construction that the required causal connection is tenuous.

C. Texas View

Texas decisions demonstrate the ever changing "truth" of the additional insured endorsements by first adopting the interpretation that precludes coverage for an additional insured unless there has been negligence on the part of the named insured, and then later adopting the majority view.

In 1992, the Amarillo Court of Appeals first addressed the issue. In *Granite Construction Company, Inc. v. Bituminous Insurance Company*, 832 S.W.2d 427 (Tex. App.–Amarillo 1992, no writ). Granite was a contractor who contracted with Joe Brown company to haul asphalt materials from its construction site. Pursuant to this contract, Brown agreed to and did carry liability and property damage insurance, which had been issued to Brown by Bituminous in the form of general and excess liability policies. Granite was named as an additional insured under the general liability insurance policy by way of an endorsement which read:

1. The "Persons Insured" provision is amended to include as an insured the person or organization named below [Granite Construction Company] but only with respect to liability arising out of operations performed for such insured [Granite] by or on behalf of the named insured [Brown].

Id. at 428.

Brown's employee, Valchar, brought a negligence action against Granite, alleging that Granite negligently loaded his truck with dirt in such a manner that it overturned and injured him. Thereafter, Granite requested Bituminous defend it against Valchar's action. Bituminous refused, stating that the acts of Granite were not covered by Brown's policy and, therefore, Bituminous owed no duty to defend. Granite brought a declaratory judgment action seeking a determination that Bituminous had a duty to defend and a duty to indemnify.

Granite argued that, because Valchar alleged that his claim against Granite stemmed from operations performed pursuant to the Granite/Brown contract, Valchar's claim clearly arose "out of operations performed [namely, hauling] for such insured [Granite] by or on behalf of the named insured [Brown]." *Id.* at 429. Thus, Bituminous was liable under the general liability insurance policy endorsement.

The Court held in favor of Bituminous:

. . . Valchar's claim against Granite was for its negligent loading of his truck. Under the Granite/Brown contract, the loading operation was the sole obligation of Granite, and Brown was not responsible for that operation. Measuring the policy coverage provided Granite by the allegations in Valchar's petition, it is at once obvious that Valchar's claim of Granite's liability arose out of the loading operations performed by Granite; it was not a claim "arising out of operations performed for [Granite] by or on behalf of [Brown]," the only operations for which Granite was insured.

It follows that the endorsement is susceptible of only one reasonable interpretation: Granite is not afforded coverage for its own loading operations upon which Valchar's suit is predicated. Accordingly, the trial court correctly

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determined as a matter of law that Bituminous had no duty to defend Granite against Valchar's suit.

Id. at 430.

The *Granite* court focused specifically on the exact activity that gave rise to Valchar's claim and then reviewed each parties' contractual obligations. Thus, it can be argued that the *Granite* decision is limited solely to the factual scenario presented to the court.

In 1995, the federal district court in the Northern District of Texas dealt directly with this issue, but it failed to provide any guidance. In *Northern Insurance Company of N.Y. v. Austin Commercial, Inc.*, 908 F. Supp. 436 (N.D. Tex. 1995). Judge Maloney relied upon *Granite* in holding that when the third party's claims involve direct negligence on the part of the named insured, then the insurance company is obligated to defend those claims on behalf of the additional insureds. This case involved Northern's additional insured endorsement extending coverage for "liability arising out of 'your work'." In this case, the court recognized that the lawsuit against the additional insured did not involve the direct negligence of the named insured. In fact, the named insured was not named as a defendant in the state court actions. There were no allegations that the injuries were caused by the named insured. Instead, the injured parties sought recovery directly from the additional insured on the basis of its own negligence.

Austin Commercial claimed contributory negligence against the injured claimant worker in the underlying state court action. However, the federal court held such allegations have no bearing on whether the injury arose out of the named insured's [Process Piping's] liability for its employee's claims against Austin Commercial.

The *Granite* and *Austin Commercial* decisions raise several questions about the true purpose of the CG 2010 endorsement, especially given the common circumstances under which parties seek such coverage. For example, an

employee of the named insured is injured while working on the owner's project. The employee recovers under the named insured's worker's compensation policy and is thereafter barred from raising a claim against the named insured. Even if the employee asserts a claim against the named insured, there is no coverage under a general liability policy due to the employee's bodily injury and worker's compensation exclusions. So, the employee sues the owner for the owner's own negligence. Arguably, the owner is not entitled to the status of additional insured under the *Granite* and *Austin Commercial* decisions. However, the only equitable defense available to the owner is the benefit of the worker's compensation bar. Thus, one justification for limiting the scope of the CG 2010 endorsement is that the general liability policy is not designed to cover employee injuries, whether the claim is brought against the named insured or the additional insured. Instead, the policy is designed to cover bodily injury and/or property damage suffered by a third party.

In 1999, the Texas courts switched gears and found new truth in the additional insured endorsements. In both *McCarthy Brothers Company v. Continental Lloyds Insurance Company*, and *Admiral Insurance Company v. Trident NGL, Inc.*, the courts concluded that the additional insured endorsements covered the additional insured for claims involving injuries to employees of the named insured. See *McCarthy Bros. Co., v. Continental Lloyds Ins. Co.*, 7 S.W.3d 725 (Tex.App.—Austin 1999, no pet.); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App.—Houston [1st Dist.] 1999, pet. denied); see also *St. Paul Ins. Co. v. Texas Dept. of Transp.*, 999 S.W.2d 881, 886 (Tex.App.—Austin 1999, pet. denied) (additional-insured endorsement provides coverage for damage that "results from" Abrams' work for TxDOT or TxDOT's supervision of that work; to be covered, the claim need only arise out of Abrams' work or TxDOT's supervision).

In *McCarthy*, the McCarthy Brothers Company was sued by an employee of a subcontractor, Crouch, for negligence arising out

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of a duty it owed him as a business invitee. Crouch's employee was injured as he walked down a slippery incline. Walking down the incline to get tools to perform Crouch's work was an integral part of its work for McCarthy. McCarthy was an additional named insured on a general liability policy issued to Crouch as the named insured. The endorsement insured McCarthy "only with respect to liability arising out of 'your work' for that insured by or for you." The court noted the employee's injury occurred while he was on the construction site for the purpose of carrying out Crouch's work for McCarthy. Thus, the court held, there was a causal connection between the injury and Crouch's performance of its work for McCarthy; accordingly, McCarthy's liability for the injury "arose out of" Crouch's work for McCarthy. 7 S.W.3d at 730.

Trident NGL involved a similar "additional insured endorsement" that restricted coverage for the additional insured to liability arising out of the named insured's operations. *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d at 454. *Trident* also involved an injury to an employee of the named insured occurring on "premises of the additional named insured." In *Trident*, the court followed the rule of a majority of courts around the country, that it was 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 injury was the additional insured's negligence. *Id.* at 454-55. See *General Agents Ins. Co. v. Arredondo*, 52 S.W.3d 762, 767 (Tex.App.-San Antonio 2001, pet. denied) (for injuries to "arise out of" a contractor's or subcontractor's operations, they need not be caused by an act of the contractor or subcontractor; all that is required is a causal connection); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 454-55 (Tex. App.--Houston [1st Dist.] 1999, pet. denied) (holding "arising out of" in the context of an "additional insured" endorsement does not require that named insured's act caused accident). The Fifth Circuit has recognized that the phrase "arising out of" is "understood to mean 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.'" *American States Ins. Co. v.*

Bailey, 133 F.3d 363, 370 (5th Cir.1998) (quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir.1951)). Thus, "a claim need only bear an 'incidental relationship' to the excluded injury for the policy's exclusion to apply." Cf. *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156-57 (Tex.1999) ("For liability to 'arise out of' the use of a motor vehicle, a causal connection or relation must exist between the accident or injury and the use of the motor vehicle.").

Recently, in *Highland Park Shopping Village v. Trinity Universal Insurance Company*, 36 S.W.3d 916, 917-18 (Tex. App.-Dallas 2001, no pet.), the Dallas Court of Appeals held that an injury to the employee of a contractor, the named insured, as he returned to his car in a Man-Lift occurred while he was on premises to do the work of his employer and arose out of the named insured's work. Thus, the landowners were additional insureds, even though the employee alleged negligence only by the landowners.

The interesting aspect of about *Highland Park* is that the employee was not even actually working at the time he incurred an injury. He had completed his work and used the Man Lift to get to his car parked outside the garage so that he could leave the premises. These Texas cases demonstrate the court's willingness to interpret the terms "arising out of" broadly and with little actual causal connection between the named insured's work and the injury or damage.

A recent decision from a Texas court is *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), ATOFINA sought insurance coverage as an additional insured under a policy issued to Triple S by Evanston. Atofina hired Triple S to perform maintenance and construction work at Atofina's Port Arthur oil refinery. A Triple S employee was killed at the Atofina facility while working pursuant to this agreement. The employee's relatives sued Atofina and Atofina settled. Subsequently, Atofina sought indemnification from Evanston as an additional insured.

CONTRACTUAL RISK TRANSFER IN CONSTRUCTION CONTRACTS

The contract between Atofina and Triple S required that Triple S purchase primary and excess liability coverage and name Atofina an additional insured on each. Triple S purchased primary coverage from Admiral and that policy listed Atofina as an additional insured, but specifically excluded from coverage any liability arising from Atofina's sole negligence. Triple S purchased excess insurance from Evanston that insured any person that is an insured under the underlying insurance, limited to the coverage of the underlying insurance.

The question presented to the court was whether the Evanston policy provided coverage for Atofina's acts of negligence. Evanston argued that the additional insured coverage was limited to covering only the liability reflected in the indemnity agreement between Triple S and Atofina. The court held otherwise, and noted that an insurance policy, though secured to insure an indemnity agreement, stands on its own.

Then the court looked to the terms of the underlying Admiral policy to determine the coverage available under the Evanston policy since Evanston's coverage was limited to that provided by the underlying insurance. The court held there was no coverage for Atofina's sole negligence under the Evanston policy because the Admiral policy specifically excluded coverage for Atofina's sole negligence. However, without a determination of liability, the court could not rule on whether Atofina was solely responsible for the employee's injury, especially where there were allegations of negligence on the part of Triple S and contributory negligence against the employee.

In *Burlington Northern v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2009 Tex. App. Lexis 9347 (Tex. App.–El Paso 2009) the court interpreted the following additional insured endorsement:

“BLANKET – AS REQUIRED BY WRITTEN CONTRACT, BUT ONLY WITH RESPECT TO LIABILITIES ARISING OUT OF THEIR OPERATIONS PERFORMED BY OR FOR THE NAMED INSURED, BUT EXCLUDING

ANY NEGLIGENT ACTS COMMITTED BY SUCH ADDITIONAL INSURED.”

The court held that BSNF qualified as an additional insured and National Union had a duty to defend BSNF even though the petitions in the underlying lawsuit contained factual allegations that charged BSNF with fault for their damages. The court refused to consider the fault based limitation in the additional insured endorsement when determining the duty to defend an additional insured under that endorsement.

In *Colony Ins. Co. v. Peachtree Construction, Ltd., et al.*, 2009 U.S. Dist. Lexis 96061 (N.D. Tex. 2009) the district court interpreted the following additional insured endorsement:

“An [i]nsured is ...any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.”

Colony insured Cross Roads, LP. Cross Roads contracted with Peachtree on a highway project. Cross Roads agreed in the contract to provide general liability insurance and provide additional insured coverage to Peachtree.

Peachtree sought defense as an additional insured under the Colony policy when it was by a motorist's estate when the motorcyclist lost control of his bike and died on the road being constructed by Peachtree and Cross Roads. Peachtree filed a third party action against Cross Roads in the estate lawsuit. However, the estate did not sue Cross Roads direct.

The court held that Colony did not have a duty to defend Peachtree under the additional insured endorsement because there were no

claims in the underlying action against Cross Roads. The court refused to consider the contract between Peachtree and Cross Roads and Peachtree's third party petition against Cross Roads as extrinsic evidence to prove that Cross Roads was somehow liable, triggering additional insured coverage. The court held such evidence contradicted the facts alleged in the underlying suit, specifically, that the death was caused by Peachtree's failure to prevent drop-off conditions adjacent to the construction sites and to use warning signs and barricades. Because the petition in the underlying suit only alleged facts against Peachtree, the court held that Colony was not required to defend Peachtree. *Id.* at *12.

D. Recent Versions of Additional Insured Endorsement Solve the Interpretation Problems By Limiting Coverage for Additional Insured to Sole Negligence of Named Insured or Excluding Sole Negligence of Additional Insured

The various interpretations of additional insured endorsements has created opportunity for more clear and concise policy language. Most general contractors/owners expect coverage as an additional insured in situations beyond the named insured's sole negligence. Conversely, the named insured does not intend to provide coverage to an additional insured where the additional insured is solely negligent. It is somewhat unfair, according to some, that subcontractors' policy experience is negatively affected by the actions of negligent parties that are not named insureds, when the additional insured's own policies are nonresponsive. Randy J. Maniloff, *Additional Insureds Coverage and Legislative Changes on the Horizon*, Mealeys' Litigation Report: Insurance, April 12, 2005 at 20.

In an attempt to find a balance between the two extreme interpretations of the additional insured endorsements, the ISO has created new "fault-based" additional insured endorsements. The 2004 version of CG 2010 reads in part as follows:

A. Section II – Who Is An Insured is amended to include as an additional insured any person(s) or organization(s)

shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and/or advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
 2. The acts or omissions of those acting on your behalf.
- in performance of your ongoing operations for the additional insured(s) at the locations designated above.

Note that the previous "arising out of" language has now been replaced with the "caused in whole or in part" language. It is expected that the language "caused in whole or in part" will be interpreted to preclude coverage to the additional insured in situations where the additional insured is solely negligent. Furthermore, the language requires some act or omission on the part of the named insured, not simply a tenuous causal connection. The only requirement is that the named insured's acts or omissions to be at least some minimal causative factor in the bodily injury and/or property damage. Absent any fault of the named insured, there will be coverage for the additional insured. See *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976).

The 2002 version of the ISO GL2033 solves this dilemma of the scope of coverage by limiting coverage for the additional insured to the sole negligence of the named insured. The endorsement reads:

A. Section II – Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. **But regardless of the terms and provisions of such contract or agreement or other provisions of this policy, such person or organization is an additional insured only with respect to liability directly related to your sole negligence and directly related to your ongoing**

operations performed for that additional insured under such contract or agreement. A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

This particular endorsement limits coverage to the additional insured in several respects. First, the additional insured coverage is limited to the additional insured's liability directly related to the named insured's sole negligence. This means that the additional insured's coverage is only for vicarious liability, not direct negligence, of the additional insured. Second, the additional insured's coverage is limited to ongoing operations of the insured under contract or agreement. There is no coverage for the additional insured for liability for damages that occur after the operations of the named insured are complete.

Several courts have identified the struggle to enforce additional insured coverage under similar limiting endorsements. In *Transport International Pool, Inc. D/B/A GE Capital Modular Space v. The Continental Ins. Co., et al*, 166 S.W.3d 781 (Tex. App.—Fort Worth 2005, no pet.) policy provided that the additional insured endorsement “does not apply to ‘bodily injury’...arising out of the sole negligence of such...organization.” GE argued that additional insured coverage was not negated because Vratsinas was responsible for the duties that gave rise to Plaintiff's alleged injuries. However, the court noted that in the underlying lawsuit against GE, the plaintiff alleged that GE “furnished and set up” the trailer and “negligently and carelessly failed to properly anchor and tie the trailer down...” The court held that giving the pleadings the most liberal interpretation, these allegations do not suggest anything other than the conclusion that Plaintiff's injuries resulted from GE's failure to properly secure the trailer. The Plaintiff did not allege any other acts of negligence or omissions from any other persons or organizations. The court refused to consider the matters of Vratsinas duties under the lease agreement with GE because they were outside the policy and the

pleadings. Because Doolin, Plaintiff, only alleged that GE's conduct led to his injuries, and because the court looked only to the policy and the pleadings, the court concluded that coverage under the additional insured endorsement did not apply because the policy excluded coverage for GE's sole negligence.

Recently, the court in *Employers Ins. Co. of Wausau v. General Star Nat. Ins. Co.*, 2004 WL 1555143, *2 (S.D.N.Y., 2004) addressed an additional insured endorsement in a liability policy issued by General Star that provided that the policy will cover:

[A]ny person or organization *whom you have agreed, by written contract* prior to an 'occurrence' or offense, to include as additional insured, but only for liability arising out of your premises and operations and *not for liability arising out of the sole negligence* of the aforementioned person or organization.

General Star contended that any determination of whether it has a duty to defend and indemnify the additional insured, 75 West Construction, should be stayed pending the outcome of the Underlying Action. According to General Star, until it is determined whether Kandic's injuries were the result of 75 West Construction's "sole negligence," it is impossible to know whether 75 West Construction can recover under the General Star Policy. Under New York law, "an insurer's duty to defend is 'exceedingly broad' and is separate from and more expansive than the duty to indemnify." *Id.* citing *Commercial Union Assurance Co., PLC v. Oak Park Marina, Inc.*, 198 F.3d 55, 59 (2d Cir. 1999) (citation omitted); *see also International Business Machines Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 424 (2d Cir. 2002) ("*IBM Corp.*"). The complaint in the underlying action alleges that Kandic suffered "bodily injury" while working for R & J at the Job Site pursuant to its Subcontract with 75 West Construction. The court held that the allegations in the complaint do not preclude a finding at trial that Kandic's injuries were caused by the contributory negligence of others, such as R & J, or Kandic himself. *Employers Ins. Co. of*

Wausau, 2004 WL 1555143, *4. Thus, the court held that there was a possibility in the underlying action that 75 West Construction could be found liable based on something other than its sole negligence. Accordingly, the court held that the complaint in the underlying action raised the possibility of coverage sufficient to trigger General Star's duty to defend 75 West Construction. The court held that it was premature, however, to decide whether General Star has a duty to indemnify 75 West Construction. The court interpreted the General Star Policy to provide that it will not indemnify an additional insured for an injury caused by its sole negligence, even though the additional insured coverage also included defense benefits. It appears that there were other defendants in the *General Star* matter besides 75 West Construction. Also, even if not, the court took note that Kandic's own contributory negligence could relieve 75 West Construction of sole negligence, even though Kandic's pleadings obviously did not assert his own contributory negligence.

In *Shaffer v. Stewart Const. Co., Inc.*, 865 So.2d 213, 223 (La.App. 5 Cir.,2004) the court considered the "sole negligence" exclusion. The court held it was not an issue of apportionment of fault, as the matter had already been settled, but only an issue of whether a rational trier of fact have found that the additional insured was solely negligent or was there evidence of fault on the part of others. After thorough review of the record, the court found that the trial court did not err in finding that a rational trier of fact would have concluded that the additional insured was not solely negligent in causing the injuries where the evidence clearly supported the finding of some fault on the other parties, including other employees and/or plaintiff himself. See also *Department of Social Services v. Aetna Cas. & Sur. Co.*, 177 Mich. App. 440, 443 N.W.2d 420 (Mich.App., 1989) (Additional insured under liability policy was entitled to indemnity for judgment entered against it in underlying negligence action arising from slip and fall injuries; insurer was unable to prove that insured was solely negligent in causing injury, so as to bring claim within exclusion precluding

coverage for injuries resulting from the "sole negligence" of the additional insured).

E. "As Required By Written Contract" Requirement

Often, an additional insured will not be identified on the endorsement, but where the endorsement seeks identity of the named insured, the terms "as required by written contract" will be used. GL2033 is designed to extend coverage to any additional insured where there is a contract between the named insured and the additional insured that requires the named insured to purchase additional insured coverage. One Texas court has held that an additional insured endorsement that identifies the additional insured as "required to be made an additional protected person in a written contract" merely clarifies which persons or entities are to be additional insureds under the policy. See *Phillips Petroleum Co. v. St. Paul Fire & Marine Ins. Co.*, 113 S.W.3d 37, 44 (Tex.App.-Houston [1st Dist.] 2003, pet. denied). The provision is not an explicit reference clearly indicating the parties' intention to include the terms and provisions of the contract between the parties as part of the insurance policy.

A provision in a construction contract will not be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured. *Trapani v. 10 Arial Way Assoc.*, 301 A. 2d 644, 647 (N.Y. App. Div. 2003).

In *Atofina Petrochemicals, Inc. v. Continental Cas. Co.*, 185 S.W.3d 440 (Tex. 2005) the additional insured endorsement was premised upon the requirement to procure additional insured insurance under a written contract. Continental argued that Fina was not an additional insured as defined by the additional insured endorsement because no written contract or agreement requiring A&B to add Fina as an additional insured existed. Fina responded that A&B's written bid, dated August

12, 1997, which proposed to "furnish ... insurance," became the written contract when it was accepted by Fina. Fina argued it was an additional insured under the additional insured endorsement at the time of the accident. The court agreed, reasoning that Fina orally accepted A&B's written proposal on August 12 and therefore, as of that date, A&B and Fina had a written contract that required A&B to provide insurance covering the Fina property. Though the agreement did not specify the type of insurance coverage or policy limits, the construction contract that stated A&B's obligation to "furnish...insurance" contained all the material terms of the contract. Also, there was evidence presented at trial that Fina and A&B had worked together in the past and that A&B understood that Fina required that it be named an additional insured on A&B's policy for any work. Thus, the court held that the contract was sufficiently definite for the parties to understand their obligations.

Continental argued that subsequent purchase orders supersede the commitment to furnish insurance in the initial written proposal. The court, however, disagreed and held instead that the bid was consistent with the original construction contract. Even if the purchase orders superseded the August 12 agreement, the orders do not affect the coverage question, which looks only at August 14, the date of the incident. The purchase orders were issued after August 14 so that Fina and A&B were performing under a written construction contract that included an obligation to furnish insurance. *See also Transport International Pool, Inc. D/B/A GE Capital Modular Space v. The Continental Ins. Co., et al*, 166 S.W.3d 781 (Tex. App. – Fort Worth 2005, no pet.) (lease agreement between insured and GE required insured to "procure and keep in full force and effect...the following policies of insurance...naming GECMS as an additional insured" met written contract requirement in additional insured endorsement).

In *Bituminous Cas. Corp. v. McCarthy Building Co.*, 2009 Tex. App. Lexis 2336 (Tex. App.–San Antonio 2009) (unpublished) the issue was whether McCarthy qualified as an

additional insured under a commercial auto policy. The contract required the following:

"5.2.2 McCarthy and the Owner *shall be added as additional insureds,...under Subcontractor's Comprehensive General Liability Policy*, including Completed Operations Insurance, to insure them,..."

5.4 All policies required under this Agreement shall contain a provision that coverages afforded under the policies will not be cancelled or not renewed until at least thirty (30) days prior written notice has been given to McCarthy. Certificates of Insurance and insurers shall be acceptable to McCarthy and shall name McCarthy, the Owner, and others, as noted in this Agreement, as additional insureds *as provided herein ...*" (emphasis added).

The court held that the language of article 5 did not require that McCarthy be named as an additional insured on the commercial auto policy. Article 5.2.2 says nothing about the commercial auto policy and article 5.4 limits naming McCarthy as additional insured on certificates of insurance to "as provided herein". *Id.* at *5-6.

F. Manuscript Additional Insured Endorsements More Likely to Limit Coverage

It is not unusual for insurers to include manuscript additional insured endorsements. Often, the purpose of these endorsements is to make clear the intent not to insure the additional insured for its own negligence. A case in point is *Atofina Petrochemicals, Inc. v. Continental Cas. Co.*, 185 S.W.3d 440 (Tex. 2005) where the liability policy included the following manuscript additional insured endorsement:

1. THAT PERSON, OR ORGANIZATION, IS ONLY AN ADDITIONAL INSURED FOR ITS LIABILITY ARISING OUT OF PREMISES "YOU" OWN, RENT, LEASE OR OCCUPY OR FOR "YOUR WORK" FOR OR ON

- BEHALF OF THE ADDITIONAL INSURED; AND
2. THE INSURANCE AFFORDED THE ADDITIONAL INSURED UNDER THIS ENDORSEMENT DOES NOT APPLY TO ... ANY LIABILITY ARISING OUT OF ANY ACT, ERROR OR OMISSION OF THE ADDITIONAL INSURED, OR ANY OF ITS EMPLOYEES.

In *Atofina*, the Supreme Court adopted Fina's interpretation of the endorsement, which interpreted paragraph 2 to exclude only Fina's sole negligence, in contrast to Continental's argument that the exclusion bars all coverage when any negligence on the part of the premises owner is pleaded, unless the owner's responsibility is based solely upon vicarious liability for the acts of the contractor. The court held that Continental's interpretation would render coverage under the additional insured endorsement largely illusory. The court further noted that the pleadings in the underlying action contained factual allegations of injuries caused by A&B's negligence while working at Fina's facility, so that Fina could not be solely negligent.

G. Duties To and From the Additional Insured

In *Coastal Refining & Marketing, Inc. v. United States Fidelity and Guaranty Company*, 2006 WL 1459869 (Tex. App.–Houston [14th Dist.] 2006, no pet.) the court held the additional insured to the same duties of notice of suit as the named insured, but found that the additional insured's delay in notifying USF&G of the suit until less than a month before trial did not prejudice the insurer because the delay did not prevent USF&G from investigating the claims, defending the suit, or controlling the ongoing settlement negotiations. Furthermore, where the additional insured and its other insurers settled the matter without the consent of USF&G, the court held the settlement was not voluntary and did not prejudice USF&G because it was settled for a reasonable amount.

In *Crocker v. National Union Fire Insurance Company of Pittsburgh, PA.*, 466 F.3d 347 (5th Cir. 2006) the Fifth Circuit certified the following questions to the Texas Supreme Court:

Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage?

If the above question is answered in the affirmative, what is the extent or proper measure of the insurer's duty to inform the additional insured, and what is the extent or measure of any duty on the part of the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions?

Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?

In this case, Crocker sued Morris and Morris' former employer, Emeritus, for injuries suffered when Crocker was struck by a swinging door allegedly pushed by Morris acting in the course and scope of his employment at a nursing home where Crocker resided, owned by Emeritus. Because Morris was an employee of Emeritus, he was an additional insured under the terms of the National Union policy issued to Emeritus. National Union provided a defense for Emeritus, but not Morris because Morris failed to tender the suit papers to National Union or otherwise inform it of the suit. After judgments were final in the action against Emeritus and Morris, Crocker sued National Union as a third-party beneficiary of the liability policy. It was undisputed that there was coverage for the claims against Emeritus and Morris and that National Union knew or should have known that Morris had been served in the lawsuit. It was

also undisputed that Morris did not know that he was an additional insured under the policy and therefore, did not forward the suit papers to National Union. It was also undisputed that National Union did not inform Morris that he was an additional insured.

In Crocker's suit against National Union, National Union argued that Crocker, who stood in Morris' shoes, could not recover under Texas Law as National Union's duty to defend Morris was never triggered because Morris did not forward the suit papers to National Union or otherwise notify National Union of the suit and did not ask National Union to defend him. Crocker argued that National Union was not prejudiced by Morris' failure to forward the suit papers because National Union was aware of the lawsuit against Emeritus and Morris. The district court agreed with Crocker. The Fifth Circuit certified the questions to the Texas Supreme Court.

Subsequently in *National Union Fire Insurance Company v. Crocker*, 246 S.W.3d 603, 2008 Tex. LEXIS 119 (Tex., Feb. 15, 2008), the Texas Supreme Court answered two of three certified questions from the Fifth Circuit Court of Appeals on the issue of whether an insurer has a duty to notify an additional insured of available liability insurance coverage. See *Crocker v. National Union Fire Ins. Co.*, 466 F.3d 347 (5th Cir. 2006) (certifying questions). In short, the Texas Supreme Court held that, on the facts presented, Texas law imposes no such extracontractual duty on an insurer. *National Union*, 246 S.W.3d at 604. The Court also held, with respect to a late notice defense, that an insurer's actual knowledge that an additional insured has been served with process does not establish, as a matter of law, that the insurer has not been prejudiced by the by the additional insured's failure to comply with the notice-of-suit provision in the policy. *Id.* Subsequently in *National Union Fire Insurance Company v. Crocker*, 246 S.W.3d 603, 2008 Tex. LEXIS 119 (Tex., Feb. 15, 2008), the Texas Supreme Court answered two of three certified questions from the Fifth Circuit Court of Appeals on the issue of whether an insurer has a duty to notify an additional insured of available liability

insurance coverage. See *Crocker v. National Union Fire Ins. Co.*, 466 F.3d 347 (5th Cir. 2006) (certifying questions). In short, the Texas Supreme Court held that, on the facts presented, Texas law imposes no such extracontractual duty on an insurer. *National Union*, 246 S.W.3d at 604. The Court also held, with respect to a late notice defense, that an insurer's actual knowledge that an additional insured has been served with process does not establish, as a matter of law, that the insurer has not been prejudiced by the by the additional insured's failure to comply with the notice-of-suit provision in the policy. *Id.*

VI. OTHER INSURANCE CLAUSES AND CONTRACTUAL RISK TRANSFERS

In *American Indemn. Lloyds v. Travelers Property & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003) (Texas law) AIL sought to recover from TPC all sums that AIL paid in settlement and incurred in defense of a suit against Caddell Construction. Similar to this case, Elite Masonry entered into a subcontract with Caddell that included a valid indemnity agreement wherein Elite assumed liability for Caddell's joint negligence. AIL issued the general liability policy to Elite and TPC issued the CGL policy to Caddell. Caddell was also an additional insured under the AIL policy. The parties did not dispute that the AIL policy's "insured contract" provisions afforded Elite with both indemnity and defense coverage for amounts that Elite might be obligated to Caddell under the indemnity provisions of the subcontract. TPC initially undertook the defense of Caddell, but in October 1998 AIL assumed the defense and indemnity and TPC withdrew. Consequently, AIL settled the lawsuit against Caddell and sought reimbursement from TPC for one half of the funds expended in defense and settlement of the suit against Caddell.

AIL argued that by virtue of the identical "other insurance" clauses in the TPC and AIL policies under which each policy provided primary coverage to Caddell, TPC should pay half of the amount expended to benefit Caddell. The court held otherwise. First the Fifth Circuit recognized the general rule that where each of two liability insurance policies issued by

different insurers provides primary coverage to the same insured in respect to the claim in question and contains mutually consistent “other insurance” provisions, the insurer paying more than its share of the claim is ordinarily entitled to recover from the other insurer for the excess paid. *Id.* at 435. However, the court then recognized the exception to that general rule where the indemnity obligation between the parties shifts the entire loss to one particular insurer, namely AIL, notwithstanding the existence of an “other insurance” clause. In other words, the indemnity obligation of one insured has controlling effect over the “other insurance” or similar clauses, particularly where one of the policies, like AIL, covers the indemnity obligation. *Id.* at 436. See also *Pacific Life Ins. Co., Ltd. v. Liberty Mutual Ins. Co.*, 2005 WL 1801602 (M.D. Ala. 2005).

VII. CERTIFICATES OF INSURANCE

When a party requires the other party to procure additional insured insurance, the parties often also require that a certificate of insurance be issued by the insured’s agent to confirm coverage. Sometimes the certificate will indicate that the policy contains an additional insured endorsement when, in reality, no such endorsement is attached to the policy. In other cases, the certificate may be silent as to the existence of additional insured coverage, without notice to either of the parties to the contract or the insurance agent. In other situations, the named insured fails to provide the certificate of insurance and the project commences without objection by the additional insured.

Generally, the certificate of insurance plays no part in determining the actual coverage afforded to the additional insured. For example, the certificate of insurance may identify one party as an additional insured, but unless the named insured’s policy is endorsed to that effect, it provides no additional insured coverage. See *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991) (stating majority rule that standard ACORD certificate does not alter terms of policy); *Empire Fire & Marine Ins. Co. v. Bell*, 64 Cal. Rptr. 2d 749 (1997); *Pekin Ins. Co. v. American*

Country Ins. Co., 572 N.E.2d 1112 (Ill. Ct. App. 1991) (certificate of insurance that stated general contractor was a named insured where policy expressly excluded coverage if subcontractor was to perform roofing work, afforded no coverage because certificate of insurance was not part of the policy; and therefore no conflict arose between the certificate and the policy language); *Trapani v. 10 Arial Way Associates*, 301 A. 2d 644, 647 (N.Y. App. Div. 2003) (a certificate of insurance which expressly states that it is “a matter of information only and confers no rights upon the certificate holder” is insufficient, by itself, to show that additional insured coverage has been purchased); *but see Niagara Mohawk Power Corp. v. Skibeck Pipeline Co.*, 270 A. 2d 867 (2000) (where agent preparing the certificate of insurance, which showed the “additional insured” coverage, was deemed an “agent” of the insurer, additional insured coverage afforded, even though it was omitted through clerical error by the agent from the policy itself).

Applying Texas law, the federal court followed this majority rule most recently in *TIG Insurance Company v. Sedgwick James of Washington*, 184 F. Supp. 2d 591 (S.D.Tex. 2001). In that case, the court held that a certificate, which stated it was issued “as a matter of information only” and does not purport to “amend, extend, or alter” the terms of any insurance policies listed therein, did not provide additional insured coverage where the policy at issue did not include an additional insured endorsement. Relying upon uncontroverted Texas precedent, the court recognized that a certificate of insurance cannot create coverage where none exists. *Id.* at 597 (citing *Wann v. Metropolitan Life Ins. Co.*, 41 S.W.2d 50, 52 (Tex. Comm’n 1931)(noting that certificate of insurance does “not constitute the complete contract of insurance” and must be construed in connection with underlying insurance policy); *RNA Invest., Inc. v. Employers Ins. of Wausau*, 2000 WL 1708918 (Tex.App.-Dallas 2000) (unpublished opinion) (certificates of insurance in and of themselves do not create insurance coverage); *C & W Well Service, Inc. v. Sebasta*, 1994 WL 95680, at *7 (Tex.App.-Houston [14th Dist.] 1994) (unpublished opinion) (citing

Granite and noting insurance coverage is that provided by policy, not certificate of insurance); *CIGNA Ins. Co. of Texas v. Jones*, 850 S.W.2d 687 (Tex.App.-Corpus Christi 1993, no writ) (certificate of insurance does not extend the terms of the insurance policies certified therein); *Granite Construction Co., Inc. v. Bituminous Ins. Co.*, 832 S.W.2d 427 (Tex.App.- Amarillo 1992, no writ); *Boyd v. Travelers Ins. Co.*, 421 S.W.2d 929 (Tex.Civ.App.-Houston [14th Dist.] 1967, writ ref'd n.r.e.). This is the law whether or not the certificate holder chose to review the subject policy to insure that additional insured coverage was endorsed. *Id.* at 598.

In *Atofina Petrochemicals, Inc. v. Continental Cas. Co.*, 185 S.W.3d 440 (Tex. 2005) the Texas Supreme Court recognized that issuance of a certificate of insurance does not affect a party's status as an additional insured. The certificate issued in this case stated that it "IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS."

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