

CONTRACTUAL RISK TRANSFER IN CONSTRUCTION CONTRACTS

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I. "INSURED CONTRACT" – THE ESSENCE OF CONTRACTUAL LIABILITY COVERAGE

An issue that often arises in construction and contractual disputes is the issue of insurance coverage for liability assumed by the insured under a contract. This typically arises in the context of a hold harmless or indemnity agreement that the insured has entered into with another contractor or contractors on the site. Whether the indemnity agreement is even valid and enforceable is the first thing that must be determined. If the contractual obligation is enforceable, however, the question becomes whether such an obligation is covered under the liability policy issued to the party who has assumed the obligation.

A. 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 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. The organization should carefully review all hold harmless and indemnity agreements to make sure that they don't obligate the organization for any type of injuries that do not fall within the CGL policy definitions of bodily injury and/or property damage, because those are the only types of injury for which the CGL provides contractual liability coverage.

The contractual liability exclusion contains two exceptions (1) liability for

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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 definition of "insured contract" includes:

- 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. Therefore, it is imperative to determine whether the claim for indemnity against the insured involves the assumption of liability for bodily injury or property damage. If there are no claims of bodily injury or property damage, then contractual liability coverage is not triggered. Furthermore, assuming bodily injury and property damage exist, the coverage is limited to the scope of the assumption of liability. This means that if the insured did not assume liability for another's conduct, then no coverage is available for that conduct. Oftentimes, the indemnity agreement will be limited to injuries or damages caused by the insured's performance of work under the contract or some type of conduct required by the contract. Unless the damages relate to the scope of the assumption of liability, there is no contractual liability coverage.

The contractual liability exclusion typically cannot be used to preclude coverage for liability assumed by the insured under a contract at least in the context of construction defect cases or oil well servicing contracts. That is because much of the coverage that is excluded by the exclusion is given back in the exception to the exclusion. An indemnity agreement under which the named insured assumes the tort liability of another to pay for property damage to a third party or organization qualifies as an "insured contract" under the policy and is therefore excepted from the exclusion, meaning coverage is provided for such an indemnity agreement.

The requisites for an “insured contract” include:

- **Contract or Agreement** - notice that there is no requirement that the contract be in writing. We will see in further discussions that the validity of a contractual transfer of liability requires that the indemnity agreement be in writing.
- **Pertain to Your Business** – the agreement must pertain to the insured’s business.
- **You Assume Tort Liability of Another** – the insured must assume in the agreement the tort liability of another party (tort liability means liability that would be imposed by law without a contract or agreement).
- **Bodily injury or Property Damage to a Third Party** – the insured must assume the tort liability of another party for the bodily injury or property damage suffered by a third party.

There has not been a great deal of Texas case law in this area. Case law from other jurisdictions has held that coverage is afforded for typical indemnity agreements. *See Olympic, Inc. v. Providence Washington Ins. Co.*, 684 P.2d 1008, 1011 (Alaska 1982) (“liability assumed by the insured under any contract refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to liability that results from breach of contract”).

B. Mechanics of Determining Contractual Liability Coverage

There is a process to determine whether the contractual liability coverage exist under the “insured contract” exception. The following sets out that process.

1. Determine the Validity of the Indemnity Agreement

In order to determine whether contractual liability coverage is triggered, we must analyze first whether the transfer of liability in a contract or agreement is a valid transfer of tort liability according to the jurisdiction applicable to the contract. This means that we must determine whether the indemnity agreement requires the insured to assume the tort liability of another party. In Texas, a valid transfer of tort liability is determined by the express negligence rule and where applicable, the Texas Oilfield Anti-Indemnity Act, both discussed in later sections.

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. One case interpreting Texas law has directly addressed this issue and clearly indicates how coverage for liability assumed under a contract can be construed and construed quite broadly. In *Gibson & Assoc., Inc. v. Home Ins. Co.*, 966 F. Supp. 468 (N.D. Tex. 1997), the court addressed a fairly typical construction defect case. After reviewing the facts under a straight coverage analysis, the court concluded that the claims were not covered because they did not constitute an occurrence, finding essentially that claims for breach of contract for failing to perform as obligated under a construction contract were not covered. After making such a finding, however, the court completely reversed field and found coverage for the claims as claims for indemnity under an indemnification agreement. The court found that the indemnification agreement constituted an “insured contract” (an exception to the contractual liability exclusion) for which coverage was provided.

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As previously discussed, the facts of *Gibson* revolved around construction being performed on Main Street in downtown Dallas. Same business owners on Main Street sued the City for losses they had allegedly incurred as a result of the construction and the impact of that construction on their business. The City in turn brought a claim against the contractor for breach of contract and indemnity arising out of the financial losses claimed by the business owners. The indemnity claim was based upon an allegation by the City "that the contractor contracted and agreed to indemnify and save harmless the defendant, City of Dallas, from and against any and all claims, lawsuits or any other harm for which recovery of damages is sought, that arise out of a breach of any term of the contract by third party defendant [the contractor]." The policy contained the standard contractual liability exclusion with the exception to the exclusion for liabilities assumed under an "insured contract." The carrier argued that there was no coverage for the indemnity obligation because it was based in contract. The court disagreed and, citing a Louisiana case, noted that liability assumed under a contract is triggered by contractual performance, while breach of contract is triggered by contractual breach. The court then focused on the claims made against the third party seeking indemnity, stating as follows:

"The claims asserted against it [Gibson, the contractor] by the Shop Owners, however, sought to hold the City liable not for breach of contract, but rather for negligence and unconstitutional deprivations of property. [footnote omitted.] Clearly, the mere fact that the City's indemnification action against Gibson arose from the parties' contractual relationship does not convert the Shop Owners' tort based causes of action against the City into breach of contract claims.

* * *

Consequently, as the Shop Owners' actions do in fact include causes of action that sound in tort, and as the City's third party complaints allege that Gibson agreed to assume all such liability if it was caused by a breach of contract on Gibson's part, the Court finds that the indemnification clause constitutes an 'insured contract' not exempted from coverage by Exclusion (b)."

Id. at 479. **The Court makes clear that the focus when analyzing whether a claim is excluded by the contractual liability exclusion is on the allegations made against the third party seeking indemnity, not the contractual indemnity claim of the indemnitee against the insured.** The *Gibson* case is a good example of how a case that appears to be a straight forward breach of contract case for which there would be no coverage under a commercial general liability policy can nevertheless involve coverage depending upon the various contractual obligations of the parties involved.

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? This will be addressed in the following section on the fair notice rules.

Also, what happens if the indemnity agreement includes indemnity for injuries that occurred prior to its execution? Does this affect the contractual liability coverage?

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One particular indemnity agreement reads as follows:

1. Indemnity: CONTRACTOR [Taylor] agrees to release, protect, defend, indemnify and hold harmless LOWE,...from and against any claim, demand, cause of action, loss, expense, award, judgment, obligation to indemnify others, or liability on account of illness, injury or death to the employees, personnel or invitees of CONTRACTOR...and REGARDLESS OF WHETHER CAUSED OR BROUGHT ABOUT BY THE ACTS, OMISSIONS OR NEGLIGENCE (INCLUDING ACTIVE, PASSIVE, GROSS, SOLE, JOINT OR CONCURRENT NEGLIGENCE) OF ANY MEMBER OF THE LOWE GROUP, UNSEAWORTHINESS, UNAIRWORTHINESS, BREACH OF CONTRACT, FAULT OR STRICT LIABILITY, AND REGARDLESS OF WHETHER SUCH ILLNESS, INJURY, DEATH, LOSS OR DAMAGE PRE-EXISTS THE EXECUTION OF THIS AGREEMENT.

Arguably, if the scope of the indemnity agreement is beyond the coverage provided by the terms of the insurance policy, the insurance policy does not extend to that scope. The policy only insures for a valid transfer of tort liability for bodily injury and property damage that occurs subsequent to the execution of the indemnity agreement, whether or not the indemnity agreement is much broader in scope and duration.

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.

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.

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We have found 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 that case, the court was asked to interpret the same definition of “insured contract” where contractual liability coverage did not include the “sole tort liability” of the indemnitee. Gainsco argued that the phrase “the indemnitee’s **sole tort liability**” excludes from coverage those contracts wherein its insured agrees to indemnify the other contracting party in situations where the insured, himself, is not liable. Gainsco contended that the word “sole” does not mean the other party is the sole tortfeasor; rather, it means that, as between the other party and the insured, the other party is the only tortfeasor. *Id.* at 1063. Gainsco’s product manager, Glenda Bruton, who drafted this particular provision, testified that her intent was to provide “intermediate contractual liability” coverage which means, to her, that contractual liability coverage is provided only when there is sole or joint negligence on the part of the insured. *Id.* at 1064. The court found otherwise by ruling that:

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) (“insured contract” exception to provisions in subcontractor’s general comprehensive

liability policy excluding bodily injury to insured’s employees and contractually assumed liabilities was ambiguous, and applied to indemnity agreement between subcontractor and developer, or, at very least, included developer’s negligence complaint within the exception, so as to require insurer to defend and indemnify subcontractor in the underlying suit brought by the developer pursuant to the indemnity agreement; by defining insured contract exception in terms of assuming another party’s “tort liability,” insurer left open possibility that its insured could agree to be responsible for another party’s liability in a tort action even if that liability was not based on insured’s own negligence). 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 employers 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."

Of course, there are versions of employer's liability exclusions that attempt to exclude even the contractual liability of the insured for injuries to the insureds employees. One such attempt is found in the ML 11 90 (06/02) employer's liability exclusion that read basically the same as the ISO form, but includes the following limitation:

This exclusion shall be effective regardless of whether the liability or obligation is asserted directly or indirectly against any "insured" as an employer, contractor, subcontractor, third party defendant, or in any other capacity.

The endorsement could be clearer if its intent is to eliminate coverage for the insured's contractual liability to another party for the injuries to the insured's employees. However, the endorsement appears to be broad enough to eliminate coverage in the situation where the indemnitee is also an additional insured. For example, the named insured agrees to indemnify owner and to add owner as additional insured on the policy. Named insured's employee is injured on the project. Owner seeks indemnity from named insured and also seeks coverage as an additional insured. Does the employer's liability exclusion apply to both named insured and owner for the employee's injuries? The fact that the endorsement uses the terms "any insured" may be significant simply because it does not limit the liability to the employer insured. So any insured's liability to an

employee of any insured is excluded, no matter what capacity the insured is sued in.

II. VALIDITY OF INDEMNITY AGREEMENT UNDER FAIR NOTICE RULES

A. History of the Fair Notice Requirements

Texas courts for many years followed a rule that was known as the "clear and unequivocal" test. *Joe Adams & Sons v. McCann Constr. Co.*, 475 S.W.2d 721 (Tex. 1971); *Sira & Payne, Inc. v. Wallace & Riddle*, 484 S.W.2d 559 (Tex. 1972); *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208 (Tex. 1980). That test is whether the contract between the parties expressed in clear and unequivocal language the intent of the indemnitor to indemnify the indemnitee against the consequences of the indemnitee's own negligence whether such negligence was the sole proximate cause of the injury or a proximate cause jointly and concurrently with the indemnitor's negligence.

Under the clear and unequivocal test, three so-called exceptions had developed. These exceptions were: (1) agreements in which the indemnitor undertakes to indemnify the indemnitee against liability for damages caused by defects in certain premises or from maintenance or operations of a specified instrumentality. *Mitchells, Inc. v. Friedman*, 157 Tex. 424, 303 S.W.2d 775 (1957); *Houston & T.C.R. Co. v. Diamond Press Brick Co.*, 111 Tex. 18, 222 S.W.2d 204 (1920); (2) agreements made pursuant to situations where the indemnitor has complete supervision over the property and employees of the indemnitee in connection with the performance of the contract. *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 637-38 (Tex. 1963); and (3) agreements in which the indemnitor agrees to indemnify the indemnitee for all injuries sustained by the indemnitor's employees. *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963); *James*

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Steward & Co. v. Mobley, 282 S.W.2d 290 (Tex. Civ. App.--Dallas 1955, writ ref'd). Eventually, the court began to treat the "exceptions" as not "true exceptions, but in reality only applications of the general rule." *Eastman Kodak v. Exxon Corp.*, 603 S.W.2d 208, 212 (Tex. 1980).

Today, 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).

B. 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 scriveners 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 scriveners 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.*

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

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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).

Texas decisions demonstrate the application of the express negligence rule. 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.

Conversely, the Supreme Court upheld the indemnity clause in *Atlantic Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724 (Tex.1989). 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. *Id* at 726. The indemnity clause in *Atlantic Richfield* provided that the indemnitor would indemnify the indemnitee for "*any negligent act or omission of [the indemnitee], its officers, agents, or employees...*" *Atlantic Richfield* at 726. The court considered this language to be sufficiently direct to define the parties' intent and satisfy the express negligence requirement. *Id*.

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 Subcontractor. (emphasis added).

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

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

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services performed by Contractor ... **and whether the same is caused or contributed to by the negligence of Union Texas, its agent or employees.** [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 indemnification provision at issue reads:

(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 following phrase in the contract's indemnification provision, "regardless of cause or of the sole, joint, comparative or concurrent negligence or gross negligence of [Price], its officers, agents or employees." *Id.* at 697.

Recently, 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 interpreted a similar indemnity agreement that read:

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). The court held that this language sufficiently expressed the parties intent that the subcontractor assume liability for the contractor's own negligence as follows:

By its very terms, the agreement purports to indemnify Brownsville Barge for liabilities resulting from its own future negligence. The agreement provides that ABB would "indemnify and hold harmless Brownsville Barge & Crane, Inc from and against all liability ... arising on account of personal injury

or death ... arising out of the 'Lifting Services Agreement' ... regardless of the sole, joint or concurrent negligence" of Brownsville Barge employees. Brownsville Barge's intent as to what risk it intended to shift to ABB is clear from the four corners of the document. *See Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724, 726 (Tex.1989) (holding that language which sufficiently defines the parties' intent meets the requirements of the express negligence rule).

Id.

Spawglass, Inc. v. E.T. Services, Inc., 143 S.W.3d 897 (Tex. Civ. App.—Beaumont 2004, pet. denied), involved the application of the “express negligence rule” to an indemnity contract between a contractor and a subcontractor. The contract provided “Subcontractor agrees 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.* The court noted that the indemnity clause in this case derives from a clause the Supreme Court held was enforceable under the express negligence doctrine in *Atlantic Richfield Co.*, supra. To distinguish its agreement to indemnify SpawGlass from the *Atlantic Richfield* indemnity, E.T. Services relied on the additional language contained within the contract's responsibility-shifting provision. To the *Atlantic Richfield* language "including, but not limited to, any negligent act or omission" of the indemnified party, the contract in this case added words "or claim involving strict liability or negligence per se of" SpawGlass. E.T. Services contended that the addition of this phrase made the indemnity clause ambiguous. The

court disagreed. The court stated that the language contained in a contract is accorded its plain grammatical meaning unless to do so would defeat the parties' intent. The drafter did not separate "any negligent act or omission or claim involving strict liability" from "or negligence per se of Contractor," and the subject phrase "any negligent act or omission" makes sense only in conjunction with the prepositional phrase "of Contractor or Owner." The court concluded that the indemnity clause in this contract satisfied the express negligence rule. *Id.* at 899.

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, pet. filed Jun. 3, 2005) , 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 this case provides:

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 other-wise, on the part of Seller...(b) *The provisions of section 4(a) shall apply whether or*

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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.

The court in *Delta Air Lines, Inc. v. ARC Sec., Inc.*, 164 S.W.3d 666 (Tex. Civ. App.—Fort Worth 2005, pet. denied) looked at the indemnity agreement to determine if it passed the "express negligence" test; that is, is ARC ever obligated to indemnify Delta for Delta's own negligence. The Indemnification Agreement stated in pertinent part as follows:

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.

In short form, the first sentence of the indemnification paragraph says that ARC will indemnify Delta against all claims against Delta "*that arise out of acts or omissions of ARC under the Agreement.*" However, Delta was not alleged to be responsible for the acts or omissions of ARC

but rather for its own acts or omissions. Even so, if Delta could prove that, regardless of the pleadings, the act or omission that Dalton alleged was caused by Delta employees was actually caused by ARC employees, then Delta would be entitled to indemnification under the Agreement.

Delta asserts that the language in the second sentence of the indemnification paragraph that states, "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," meets the express negligence doctrine requirements. However, the court found that language is limited by the contractual language of the first sentence of the paragraph. The first sentence defines the indemnity obligation, and the second sentence defines its parameters. In short form, the first sentence of the indemnification paragraph says that ARC will indemnify Delta against all claims against Delta *that arise out of acts or omissions of ARC under the Agreement.* The second sentence says that this indemnification by ARC will be applicable notwithstanding the negligence of a party indemnified under it, which is Delta. In other words, ARC's obligation to indemnify Delta *if Delta is sued for ARC's acts or omissions* exists even if Delta is also negligent, or the loss was "caused in part by" Delta. However, nowhere is there language that directly or indirectly says that ARC will indemnify Delta if Delta is solely at fault, because if Delta is solely at fault, then ARC cannot be at fault and Delta could not be sued for ARC's acts or omissions as required for indemnification in the first sentence. In other words, ARC will indemnify Delta if Delta is sued for ARC's acts or omissions (the obligation found in the first sentence) even if Delta is also partially at fault (the parameter of the obligation found in the second sentence). If Delta is wholly at fault, however, ARC's acts and omissions do not give rise to a claim against Delta, and no indemnification

is required. The court held that the indemnity provision in the Agreement did not satisfy the express negligence test, i.e., ARC did not agree to indemnify Delta for Delta's own negligence. *Id.* at 671.

In *Hernandez v. Big 4, Inc.*, 241 F. Supp. 2d 715 (S. D. Tex. 2003), Hernandez (an employee of a sub-subcontractor) sued the general contractor, David E. Harvey Builders, and its subcontractor, Big 4, for injuries he sustained at a construction site. *Id.* at 716-17. Harvey filed a cross-action against Big 4 seeking a declaratory judgment regarding Big 4's contractual duty to defend Harvey under the contract and subsequently sought summary judgment on the ground that the indemnity provision in question (which is a verbatim recitation of the indemnity provision in the KST/Harvey Subcontract, down to the title and number of the paragraph) clearly and unambiguously required Big 4 to defend Harvey for all claims relating to the subcontractor's operations irrespective of Big 4's fault. *See id.* at 717. Big 4 argued that the indemnity provision – referred to by the court as section 7(b) – was unenforceable because it was internally contradictory and, therefore, ambiguous. *See id.* at 718. The court agreed, explaining:

Contract section 7(b) contains three sentences. The first sentence is a very broad obligation stating that Subcontractor . . . 'shall defend, indemnify and hold harmless Contractor . . . from and against any and all claims . . . including all expenses of litigation, court costs, and attorneys' fees . . . relating to or in connection with the operations, performance, or acts of Subcontractor' The first sentence is followed by two sentences that appear to further define the specific duties that Big 4 owes Harvey. The second sentence deals exclusively with Big 4's 'above indemnity obligation,' stating that it is 'limited to the extent such injury or damage is

caused in whole or in part [sic] by negligent acts or omissions of Subcontractor.' Essentially, Big 4 is obligated to indemnify Harvey only for the percentage of fault that is attributed to Big 4. However, the third sentence, which defines the 'Subcontractor's above duty to defend,' appears to be much broader. It states that such duty extends to 'damage caused by the negligence of an indemnified party, including the sole negligence of an indemnified party.' . . .

The Court concludes that after reviewing these three sentences, individually and as a whole, and against the broader backdrop of the entire contract, section 7(b)'s meaning is uncertain and ambiguous, and thus, section 7(b) does not meet Texas's express negligence test. The specific language in the third sentence that troubles the Court is that Big 4 must defend Harvey, even if the accident is a result of 'the sole negligence of an indemnified party [presumably Harvey for analysis purposes].' If the Court assumes Harvey was solely negligent for Hernandez's injuries, Harvey could not become an 'indemnified party' because the second sentence of section 7(b) only requires Big 4 to indemnify a party for the percentage of fault attributable to Big 4. Hence, if Big 4 was attributed 0% fault because Harvey was 100% at fault, Harvey would not be indemnified. Thus, the language in section 7(b)'s third sentence . . . can be reasonably read as contradictory with the second sentence-because Harvey cannot be both solely negligent *and* an indemnified party at the same time.

Id. at 719-20 (emphasis in original). This opinion is the result of the ambiguous use of the term "indemnified parties" in the contract. The court explained that although

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the first sentence of the paragraph used the term “indemnified parties” to mean any party other than the Big 4, that the failure to capitalize the term created confusion and could be read as meaning either an indemnified party in fact or Harvey. *See id.* at 720.

Where the indemnity agreement requires defense and indemnity “regardless of whether or not it is caused in part by a party indemnified hereunder”, this is not sufficient language to meet the express negligence rule in Texas. *See 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); *Glendale Const. Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536, 538 (Tex.App.-Houston [1 Dist.] 1995, pet. denied) (“To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from the performance of the Subcontractor’s work under this Subcontract provided that any such claim, damage, loss or expense attributable to bodily injury, sickness, disease, or death or to injury to or destruction of tangible property (other than work itself) including the loss of use resulting therefrom, to the extent caused in whole or in part by a negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder.”); *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).

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 will no longer suffice. *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.

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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. Maverick*, 308 F.3d 451 (5th Cir. 2002) (language in management agreement between hospital management company/indemnitee and hospital/indemnitor excluding losses or claims caused by company's gross negligence, but including medical malpractice and other tort claims was not explicit obligation to indemnify for company's own simple negligence); *Texas Utils. Elec. Co. v. Babcock & Wilcox Co., Inc.*, 893 S.W.2d 739, 740 (Tex.App.--Texarkana 1995, no writ)(Indemnity provision in the contract between the parties provided that "[Seller] shall ... indemnify ... [Purchaser] ... from and against any and all claims ... of every kind and character whatsoever arising in favor of any person or entity ... with the only exception being that ... [Purchaser] shall not be entitled to indemnification for claims, demands, expenses, judgments, and causes of action resulting from [Purchaser's] sole negligence" and was held invalid under express negligence test). These cases demonstrate the Texas courts' unwillingness

to assume any indemnity obligation for another's negligence unless it is clearly and explicitly set out in the language.

More recently, *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 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.

The indemnity section as restated below provides:

[Powerhouse] shall indemnify ... [Bechtel] ... from and against any and all suits ... claims, demands, damages ... attorney's fees ... and losses of whatsoever kind or nature in connection with or incidental to the performance of this subcontract ... in any manner directly or indirectly caused, occasioned, or contributed to ... by reason of any act, omission, fault or negligence whether active or passive of [Powerhouse] ... or of anyone acting under its direction or control of on its behalf.

* * *

[Powerhouse's] ... indemnity ... shall apply even in the event of the fault or negligence ... of [Bechtel] ... 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 [Bechtel]....

The court found that the indemnity obligation under this contract applies "even in the event of the fault or negligence" of Bechtel. Otherwise stated, Powerhouse had the duty 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 satisfies the express negligence test. Giving the "plain grammatical meaning" to the language "even in the event of the fault or negligence" of Bechtel, they concluded the provision satisfied the express negligence test.

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.

5. Application to Releases

In *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993), the Texas Supreme Court extended the fair notice requirements from indemnity agreements to include releases which purport to relieve a party in advance of responsibility for its own negligence. The *Dresser* court expressly limited its discussion to these types of releases. The court defined a release for purposes of this case, and noted that "in general, a release surrenders legal rights or obligations between parties to an agreement." *Id.* at 508. An indemnity agreement, by

comparison, the court defined as "a promise to safeguard or hold the indemnitee harmless against either existing and/or future loss liability." *Id.* at 508. Quoting Justice Vance in his dissent from the appellate level opinion, the court noted that these agreements, whether labeled as indemnity agreements, releases, exculpatory agreements, or waivers all operate to transfer risk. *Dresser*, 821 S.W.2d at 368. While in the past fair notice requirements had only been applied to indemnity agreements, the court held that

We can discern no reason to fail to afford the fair notice protections to a party entering into a release when the protections have been held to apply to indemnity agreements and both have the same affect. . . . Therefore, we hold that the fair notice requirements of conspicuousness and the express negligence doctrine apply to both indemnity agreements and to releases in the circumstances before us. *Id.* at 508-09.

In expanding the fair notice requirements to releases which relieve a party in advance for its own negligence, the court expressly disapproved *Whitson v. Goodbods, Inc.*, 773 S.W.2d 381 (Tex. App.--Dallas 1989, writ denied), wherein the court specifically declined to extend the express negligence doctrine to in exculpatory provision.

Similarly, in *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), the court addressed the application of the express negligence doctrine to a release signed in favor of a health club, and executed as part of a membership contract. Relying upon the decision in *Dresser Indus., Inc. v. Page Petroleum, Inc.*, the court applied the fair notice requirements to the release, and held that in order to indemnify the indemnitee,

the release must meet the express negligence requirements.

C. 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. The Texas Supreme Court has stated 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 (This conspicuousness standard is met by a heading printed in capital letters and by text printed in larger or other contrasting type).

Indemnity Agreements are subject to the standard of conspicuousness contained in the Texas Uniform Commercial Code. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d at 511; *U.S. Rentals, Inc. v. Mundy Serv. Corp.*, 901 S.W.2d at 792. In order to be conspicuous, a provision must afford fair notice of its existence. A term is thus conspicuous when it is written so that a person against whom it is to operate ought to have noticed it. *Id.*

Courts have ruled on this conspicuous requirement whereby a sufficiently conspicuous provision is one that is readily apparent to attract the attention of the reasonable person. The conspicuous test is an objective test, and 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. 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. The Amarillo court 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

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322, 327 (Tex.App.-Amarillo 2002, pet. denied). Another court held that an indemnity agreement labeled "RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK" in all capital letters would attract the attention of a reasonable person sufficient to meet the fair notice and conspicuous requirement. *See Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 132 (Tex.App.-Houston [1 Dist.]2002, pet. denied) ("Paragraph 14 of the drilling contract, providing for indemnification and release, is labeled "RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK." [Capitals in original.] Similarly, paragraph 13 is labeled in capital letters, "INSURANCE." We find that both provisions would attract the attention of a reasonable person.").

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 the 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 courts have also looked to cases interpreting the Uniform Commercial Code "conspicuousness" requirement by analogy. *K & S Oil Well Servs., Inc. v. Cabott Corp., Inc.*, 491 S.W.2d 733 (Tex. Civ. App.--Fort Worth 1973, writ ref'd n.r.e.). "Pad contracts" with indemnity provisions jumbled in with numerous other provisions in small print on the back have received very

strict scrutiny by Texas courts. *See Safway Scaffolding Co. of Houston, Inc. v. Safway Steel Prod., Inc.*, 570 S.W.2d 225, 227-28 (Tex. Civ. App.--Houston [1st Dist.] 1978, writ ref'd n.r.e.); *Goodyear Tire, supra*. At the very least a "pad contract" with terms on the reverse side must have a "conspicuous" reference to the act that provisions are contained on the reverse side. *K & S Oil Well*, 491 S.W.2d at 738-39. In *K & S Oil*, the bottom of the second page of a purchase order contained a statement in "ordinary, but slightly smaller type" which said "subject to the terms and conditions on the reverse side ." *Id.* at 736. On the reverse side, the indemnity clause was located under the heading "Terms and Conditions," in the fourth paragraph entitled "Warranty." The entire indemnity clause consisted of one sentence which was surrounded by unrelated terms. *Id.* at 737-38. This Court held that the indemnity clause was not conspicuous enough to import fair notice. *Id.* at 738.

This is in accord with the approach taken by the vast majority of courts interpreting the requirements of § 2-316 of the U.C.C. The same courts have also assumed that "capitalization, typeface, and color methods" are absolute requirements for making a reference on the first page of the contract, or any other reference for that matter, sufficiently "conspicuous." *See Tex. Bus. & Comm. Code* §1.201(10) (Vernon 1987).

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

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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 fact, not only is knowledge of the terms of the agreement a defense to conspicuousness. It is also 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).

In *ALCOA v. Hydrochem Indus. Services, Inc.*, 2005 WL 608232 (Tex.App.-Corpus Christi 2005) (unpublished opinion) the ALCOA-Hydrochem contract consisted of the purchase order and six additional contract documents which are incorporated by reference. The type on the face of the purchase order was in all capital letters. The indemnity clause was located on Supplemental Terms and Conditions Form R-380-1. Form R-380-1 consists of two pages of small type-written text divided into sixteen numbered sections. Each section heading was printed in bold capital letters. The indemnity provision was found in Section 4, entitled "**LIABILITY.**" The court concluded the indemnity provision was not sufficiently conspicuous to satisfy the fair notice requirement. In order to meet the conspicuous requirement, something indicating the intent to transfer liability must appear on the face of the contract sufficient to attract the attention of a reasonable person. *Dresser Indus.*, 853 S.W.2d at 508; *UPS Truck Leasing, Inc. v. Leaseway Transfer Pool, Inc.*, 27 S.W.3d 174, 176 (Tex.App.-San Antonio 2000, no pet.). Of the six additional contract documents incorporated by reference on the face of Purchase Order 060972LQ, five were

labeled to indicate their contents: (1) "AFFIDAVIT, RELEASE AND WAIVER OF LIENS FORM R-379-5," (2) "SAFETY POLICY PROCEDURE # 151," (3) "RMCO. FORM R-379-8 POLICY ON SUBSTANCE ABUSE," (4) "RMC SPEC. WS-LQ-192 R/11 'CONTRACTORS' GENERAL WORK CONDITIONS,' " and (5) "RATE SHEETS." However, the reference to the document containing the indemnity clause was generically labeled "SUPPL. TERMS & CONDITIONS FORM R-380-1." The court reasoned that had Form R-380-1 been the only document incorporated by reference, its singularity may have called sufficient attention to itself. However, as one document in a list of several, the court concluded the generic title did not attract the attention of a reasonable person to afford fair notice of the presence of a risk-shifting indemnity clause contained therein. The court concluded that whether the heading "**LIABILITY**" was conspicuous enough to attract the attention of a reasonable person looking at Form R-380-1 was inconsequential if nothing on the face of the purchase order indicated that a reasonable person should look at Form R-380-1. The court concluded that the intent of the fair notice requirements is defeated if parties are allowed to remove risk-shifting clauses to secondary documents that are only inconspicuously referenced on the face of the contract.

D. 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”).

E. 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 subcontract did not cover death of subcontractor’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.

F. 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

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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 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

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.

Section 130.002 reads as follows:

(a) A covenant or promise in, in connection with, or collateral to a construction contract is void and unenforceable if the covenant or promise provides for a contractor who is to perform the work that is the subject of the construction contract to indemnify or hold harmless a registered architect, registered engineer or an agent, servant, or employee of a registered architect or registered engineer from liability for damage that:

- (1) is caused by or results from:
 - (A) defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or

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(B) negligence of the architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract; and

(2) arises from:

(A) personal injury or death;

(B) property injury; or

(C) any other expense that arises from personal injury, death, or property injury.

(b) A covenant or promise in, in connection with, or collateral to a construction contract other than a contract for a single family or multifamily residence is void and unenforceable if the covenant or promise provides for a registered architect or licensed engineer whose engineering or architectural design services are the subject of the construction contract to indemnify or hold harmless an owner or owner's agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner's agent or employee.

TEX. CIV. PRAC. & REM. CODE ANN. § 130.002 (Vernon 2004).

Under section 130.002, an indemnity agreement is void where the damage is caused by the conduct of the architect. See *Foster, Henry, Henry & Thorpe, Inc. v. J.T. Construction Co.*, 808 S.W.2d 139, 141 (Tex. App.—El Paso 1991, writ denied). An indemnity agreement between the owner and the contractor wherein the contractor agreed to indemnify both the owner and the architect was valid and enforceable by the architect, because the indemnity provision was to cover the negligent acts or omissions of the contractor, and the jury found the contractor's negligence, not that of the architect, was the proximate cause of the damage to the adjoining property owner. *J.T. Construction Co.*, 808 S.W.2d at 141.

Section 130.005 states that Chapter 130 of the Civil Practice and Remedies Code:

. . . does not apply to a contract or agreement in which an architect or engineer or an agent, servant, or employee of an architect or engineer is indemnified from liability for:

(1) negligent acts other than those described by this chapter; or

(2) negligent acts of the contractor, any subcontractor, any person directly or indirectly employed by the contractor or a subcontractor, or any person for whose acts the contractor or a subcontractor may be liable.

TEX. CIV. PRAC. & REM. CODE ANN. § 130.005 (Vernon 2004). In *J.T. Construction*, section 130.005 did not render unenforceable a contract pursuant to which the contractor agreed to indemnify architects for losses and expenses if there was injury to, or destruction of, tangible property and the loss and destruction was caused by negligent act or omission of contractor. Chapter 130 only made the indemnity agreement void where the damage was caused by the conduct of architect and specifically stated that it was not applicable when indemnity was for the negligent acts of contractor. *J.T. Construction Co.*, 808 S.W.2d at 141.

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

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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
- 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

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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 Agreement resembled those in the *Fireman's Fund* contract more closely than those in the *Getty Oil* contract. The

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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.

The Beaumont Court of Appeals recently addressed the issue of interrelation between the insurance requirement and the indemnity obligation in *ATOFINA Petrochemicals, Inc. v. Evanston Insurance Company*, 104 S.W.3d 247 (Tex. App. – Beaumont 2003, pet. filed), *Evanston* argued that ATOFINA was not entitled to insurance coverage beyond the scope of the indemnification provision. The contract between Triple S and ATOFINA required that (a) Triple S obtain general liability insurance and excess liability insurance, (b) the general liability policy include coverage for Triple S’s indemnity obligations, and (c) a certificate be issued listing ATOFINA as additional insured. The court noted that when Triple S agreed to purchase insurance for ATOFINA it did not limit that agreement to insuring only the indemnity obligation. The court relied upon *Emery* and *Getty Oil* for the proposition that the insurance requirement is limited to the indemnity liability only when the agreement to provide insurance is provided solely to support the indemnity obligation; but, when the additional insured provision stands separately from the indemnity provision, the scope of the insurance requirement is not limited to the scope of the indemnity clause. *Id.* at 250. The court then noted that the language in the ATOFINA/Triple S contract, requiring that the general liability coverage include coverage for the indemnity obligation, did not apply to the excess policy because the term “including” was a term of enlargement. This meant that insurance for the indemnity obligation was in addition to the other contractually required insurance.

Id. On that basis, the court held that the insurance purchasing requirement of the contract was not merely in support of the indemnity provision. See also *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000)(Texas law)(because there was nothing in the insurance provisions or the indemnity agreement that expressly stated an intention to indemnify the party against its own negligence and because there was no language as in *Getty* demonstrating that the insurance obligation was independent and free-standing, the obligation to procure insurance was not insurance for the indemnitee as an additional insured, but only for the indemnitor's indemnity obligations).

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*

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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); *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 INSUREDS," 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

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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 Certainfeed was entitled to additional insured coverage, except for injuries arising out of Certainfeed'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, lessors 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: UNDERSTANDING THE BASICS REGARDING 'ADDITIONAL INSURED,' Insurance Law 2003: Understanding the ABC's, Practicing 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].

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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 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.

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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 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

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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.

The most recent decision from a Texas court is *ATOFINA Petrochemicals, Inc. v. Evanston Insurance Company*, 104 S.W.3d 247 (Tex. App. – Beaumont 2003, no pet.), ATOFINA sought insurance coverage as an additional insured under a policy issued to Triple S by Evanston. The liability policy included as additional insured the following:

A person or organization for whom you have agreed to provide insurance as is afforded by the policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you.

The court rejected the argument that the subject injury did not arise out of Triple S' operations because the evidence showed that the death actually occurred while the Triple S employee was performing work for Triple S on the project for ATOFINA.

It appears that Texas courts have swung the pendulum of ever changing truth about the additional insured endorsements, from coverage limited to vicarious liability of the additional insured to full coverage for the additional insured's own negligence. The issue has not gone before the Texas Supreme Court and it's anybody's guess as to how it will rule, though it is likely the Supreme Court will follow the majority.

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

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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.

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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 property 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 property 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. *Phillips Petroleum Co. v. St. Paul Fire & Marine Ins. Co.*, 2003 WL 21197132 at *6 (Tex. App.-Houston [1st Dist.] 2003, pet. filed). 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.*, 2005 WL 3445514 (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. Fina responded that its written bid, dated August 12, 1997, which proposed to "furnish ... insurance," became the written contract when it was accepted by Fina. Fina argues 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

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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 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 purchase were 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).

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.*, 2005 WL 3445514 (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 (a) PUNITIVE OR EXEMPLARY DAMAGES IN WHATEVER FORM ASSESSED AGAINST THE ADDITIONAL INSURED AND/OR (b) 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.

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, much like you are arguing, 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

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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.*, 2005 WL 3445514 (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."