



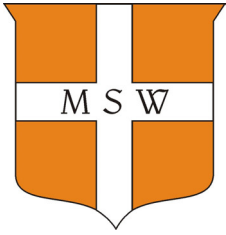
Preconference Workshop 1

***ADDITIONAL INSURED COVERAGE
UNDER COMMERCIAL GENERAL
LIABILITY INSURANCE POLICIES***

Presented by

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McGriff, Seibels & Williams, Inc.

Quote: "If you keep on doing what you've always done, you'll keep on getting what you've always got" - W.L. Bateman

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Mr. Postel is copresenting Preconference Workshop 1, "Contractual Risk Transfer," on Monday. He has practiced with Liberty Mutual's staff legal office in Chicago since 1986. He specializes in litigation of additional insured and related contractual risk transfer issues, and appeals. Mr. Postel, in 2003-04, is serving his sixth consecutive term as vice chair of the Insurance Coverage Litigation Committee of the American Bar Association's Tort and Insurance Practice Section. He is also a member of DRI's Insurance Law Committee and the Appellate Lawyers Association of Illinois. Mr. Postel serves as an Expert Commentator for IRMI.com, authoring quarterly articles on additional insured legal trends, and is a member of the editorial board of IRMI's *CGL Reporter*, for which he analyzes cases involving commercial trucking, bad faith, and additional insured issues. He has authored numerous articles on additional insured coverage for International Risk Management Institute and *IDC Quarterly*. This is Mr. Postel's third presentation on additional insured coverage for IRMI, having spoken on this topic at the 1997 and 1999 Construction Risk Conferences. In addition to those conferences, Mr. Postel made presentations on additional insured coverage at DRI's Insurance Claims & Coverage Institute in May 2002 and May 2003, and he has written papers and spoken on additional insured coverage and construction defect coverage at numerous conferences for ABA/TIPS/ICLC, as well as the American Corporate Counsel Association.

Mr. Postel has successfully represented Liberty Mutual and its policyholders in numerous insurance coverage and contractual risk transfer appeals, including *Alberici-Eby j.v. v Liberty Mutual Ins. Co.*, no. 5-98-0630 (Ill App 2000); *West Lafayette Corp. v Taft Contracting Co., Inc.*, 178 F3d 840 (7th Cir 1999); *Liberty Mutual Ins. Co. v Westfield Ins. Co.*, 703 NE2d 439 (Ill App 1998); *Fuller's Car Wash, Inc. v Liberty Mutual Ins. Co.*, 698 NE2d 237 (Ill App 1998); *North American Spec. Ins. Co. v Liberty Mutual Ins. Co.*, 697 NE2d 347 (Ill App 1998); *American States Ins. Co. v Liberty Mutual Ins. Co.*, 683 NE2d 510 (Ill App 1997); and *Prisco Serena Sturm Architects, Ltd. v Liberty Mutual Ins. Co.*, 126 F3d 886 (7th Cir 1997). He is admitted to practice before the Illinois Supreme Court, the United States District Court for the Northern District of Illinois, and the United States Court of Appeals for the 7th Circuit. He is a 1979 graduate of Willamette University College of Liberal Arts in Salem, Oregon, and a 1982 graduate of Willamette University College of Law.

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ADDITIONAL INSURED COVERAGE UNDER COMMERCIAL GENERAL LIABILITY INSURANCE POLICIES

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I. Introduction

In the last 15 to 20 years, additional insured coverage has emerged as the tool of choice for controlling liability insurance costs on large commercial ventures. Additional insured coverage is most frequently used in the construction setting. For that reason, the vast majority of additional insured cases in the reporters involve construction. This article will reflect that emphasis. Additional insured coverage is also important, however, in commercial real estate leases (particularly retail establishments) and retail product sales (vendors endorsements). Those cases will be included in this article as well, mainly as illustrations of principles that also apply to the construction setting.

Additional insured coverage for construction, real estate leases and product sales is accomplished by means of attaching standard endorsements to commercial general liability ("CGL") policies. These endorsements are drafted by an organization called the Insurance Services Office ("ISO"). They all have the same basic coverage grant: for the additional insured's liability "arising out of" the named insured's operations, premises leased to the named insured, or the named insured's products sold in the regular course of the additional insured's business. Many cases, however, involve disputes about "manuscript" endorsements, i.e., endorsements drafted by the insurer, usually in order to narrow the coverage provided by the equivalent ISO form. This article will also discuss those cases. There is also a large volume of case law pertaining to additional insured coverage in the commercial trucking setting. But because such coverage derives from completely separate policy language and involves wholly distinct issues, this article will not include it.

A. The Risks Facing General Contractors And The Need To Transfer Those Risks By Contract

Developments in tort law have left general contractors exposed to large claims both for construction defect and property damage on the one hand, and catastrophic bodily injury on the other, even where the general contractor was at best guilty only in the passive sense, but did nothing affirmative to contribute to the injury. For example, in California, developers are strictly liable for construction defects caused by the acts and omissions of subcontractors. *See, e.g., Stearman v. Centex Homes*, 78 Cal.App.4th 611, 92 Cal.Rptr.2d 761 (Cal.App. 2000) (collecting cases). In New York, Labor Law section 240 (commonly known as the Scaffold Law) imposes liability without negligence on the general contractor for injuries to subcontractors' employees. In many states, section 414 of the Restatement of Torts (2nd) has been construed as authorizing even subcontractors' employees to sue

general contractors for negligently failing to exercise the retained right to control the subcontractor's work, even though it was precisely because of the subcontractor's greater knowledge and skill in safe construction means and methods that the general contractor hired him. See, e.g., *Bokodi v. Foster Wheeler Robbins, Inc.*, 728 N.E.2d 726 (Ill.App. 2000) (general contractor held liable to subcontractor's employee for failing to exercise right to control subcontractor's work methods).

To some extent, this trend toward expanding the general contractor's liability has been checked in recent years. For example, with the Illinois legislature's 1995 repeal of the Scaffold Law, New York was left as the only state in the union that imposes liability without negligence on general contractors for bodily injury claims. These scaffold laws, which pre-date workers compensation statutes, were once common. In 2002, the California Supreme Court limited actions under section 414 by a subcontractor's employee against the general contractor to situations where the general contractor *affirmatively contributes to the injury*. *Hooker v. Department of Transportation*, 27 Cal.4th 198, 38 P.3d 1081 (Cal. 2002). It is no longer enough that the general contractor was passively guilty of failing to correct unsafe work practices by the subcontractor that the general contractor may not even have known about. And yet, these developments may only have slowed the train, not stopped it.

The reality remains that construction projects involve great risk for property damage and bodily injury claims, and general contractors are often exposed where their fault was at best passive, indirect, and derivative of the subcontractor's fault. In such situations, the general contractor will find himself holding the bag, because of joint liability rules, which are the law everywhere but in a handful of states such as Indiana. In other words, although his fault may be slight compared with the subcontractor, the general contractor is liable for the full amount of the damages sustained by the subcontractor's employee. In 47 states, moreover, the general contractor will be unable to obtain contribution from the employer, on account of the exclusive remedy provision of the workers compensation statute, which the courts in those 47 states have construed as immunizing employers from contribution liability to third parties sued by the employee. (The only states where a third party tortfeasor can sue an employer for contribution are New York, Illinois and Minnesota.) The twin blows of joint liability rules and the employer's immunity from contribution claims create a vast body of risk which does not even derive from the general contractor's active or direct fault, but rather, from the subcontractors' fault.

Ironically, the general contractor could avoid this problem by doing all of the work himself, using his own employees, instead of subcontractors. Doing so would limit his risk for bodily injury claims to the limited remedies provided for in the workers compensation statute. But to adopt such an approach might actually thwart the public policy of increased job site safety, by depriving the project of the specialized knowledge and skills the subcontractor brings to bear. In *Privette v. Superior Court*, 5 Cal.4th 689, 700, 854 P.2d 721, 729 (Cal. 1993), the California Supreme Court recognized this irony. In the words of that court:

[T]o impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees.

The great risk faced by a general contractor for liability involving only the most passive, technical kind of fault—liability which only exists because he has hired subcontractors—furnishes compelling justification, as well as financial incentive, for the general contractor to use the law of contracts to transfer that risk elsewhere. The most logical place to trans-

fer it, of course, is to the party best able to control the risk. That is invariably the subcontractor. Indeed, the same rationale applies to transferring to the subcontractor the risk of losses caused by the active or even sole negligence of the general contractor, because again, the general contractor could simply eliminate this risk by using his own employees instead of hiring subcontractors. See, Joseph P. Postel, Vicarious Liability And Additional Insured Coverage, CONSTRUCTION RISK MANAGEMENT (International Risk Management Institute, Dallas, Texas (hereinafter "IRMI"), August 2000).

B. The Disadvantages Of Indemnification Agreements

Traditionally, the general contractor's risk was transferred by means of an indemnity clause in the construction subcontract. But this tool has proved most imperfect, for numerous reasons. First, courts and legislatures tend to be very unfavorably disposed to indemnification agreements. The reasons for this are basically two: (1) a fear that they are the result of unequal bargaining position, and that subcontractors are poorly situated to bear such unlimited risk, and (2) that they provide too great a disincentive for the indemnitee to be vigilant for work place safety. This unfavorable attitude is most commonly manifested in anti-indemnity statutes, which are on the books in over 30 states, and in judge-made rules of strict construction against indemnity agreements, which are even more pervasive than anti-indemnity statutes.

1. Anti-indemnity statutes

There are 41 states with some form of anti-indemnity statute. Donald S. Malecki, Pete Ligeros and Jack P. Gibson, THE ADDITIONAL INSURED BOOK (IRMI, 4th ed., 2000) at p. 60. Mainly, anti-indemnity statutes apply to construction contracts. In some states, they apply to oilfield contracts or mining contracts. Some statutes apply to more than one of the above. Anti-indemnity statutes are worded in different ways. Some only limit—rather than eliminate—the extent to which a party can be indemnified for his own negligence. For example, California's construction anti-indemnity statute (Civil Code sec. 2782) prohibits agreements requiring indemnity for a party's *sole* negligence or willful misconduct. In contrast, the construction anti-indemnity statute in New York (General Obligations Law sec. 5-322.1) prohibits indemnity for liability of the promisee "contributed to, caused by or resulting from the negligence of the promisee." This is a broader restriction. Similarly, the Illinois construction anti-indemnity statute (740 ILCS 35/1) prohibits indemnity for the indemnitee's *own* negligence.

Other statutes may also interfere with enforcement of indemnification rights. For example, an Illinois statute prohibiting exculpatory agreements in commercial real estate leases has been construed as also prohibiting indemnification clauses in such leases. See, *Economy Mechanical Industries, Inc. v. T.J. Higgins Co.*, 689 N.E.2d 199, 202 (Ill.App. 1997). One would be hard put to find a state that does not have some sort of legislative restriction on indemnification agreements in commercial contracts.

2. The Rule of Strict Construction Against Indemnification For The Indemnitee's Own Negligence

Contracts not subject to the anti-indemnity statute (i.e., contracts that don't pertain to construction, oil and gas, or mining, as the case may be) are subject to a common law rule of strict construction against the indemnitee (called the "express negligence" test in Texas). Under this rule, indemnity agreements will not be con-

strued as requiring the indemnitor to indemnify the indemnitee for the indemnitee's own negligence unless the agreement spells out that requirement in clear, explicit and unequivocal terms. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987); *Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp.*, 70 N.E.2d 604, 607 (Ill. 1946). This rule of strict construction appears to be followed everywhere but Alaska, Massachusetts, Nevada, New Hampshire, and Virginia, according to Patrick J. Wielinski, W. Jeffrey Woodward and Jack P. Gibson, *CONTRACTUAL RISK TRANSFER* (IRMI, 1995) at ch. 4, § F.

3. The Indemnitee Has No Direct Rights Under The Indemnitor's Policy

Even though indemnity agreements are usually covered by a commercial liability policy's contractual liability coverage, the indemnitee has no direct rights in the indemnitor's policy. He is not an insured, he is a claimant. He must first obtain a judgment against the indemnitor before he can sue the insurer. *Alliance Syndicate, Inc. v. Parsec, Inc.*, 741 N.E.2d 1039 (Ill.App. 2000); *Alex Robertson Co. v. Imperial Cas. & Indem. Co.*, 8 Cal. App. 4th 338, 10 Cal.Rptr.2d 165 (Cal.App. 1992) ("no direct action lies against the insurer until a judgment has been obtained against the insured"). See also, *Travelers Cas. & Sur. Co. v. American Equity Ins. Co.*, 93 Cal. App. 4th 1142, 113 Cal.Rptr.2d 613 (Cal. App. 2001) (insurer cannot assert its insured's indemnity rights against indemnitor's insurer unless those rights have been reduced to judgment). Recent changes to the ISO CGL coverage form (these changes broaden contractual liability coverage to include the insured's obligation to pay his indemnitee's defense costs) do not alter this analysis, because the coverage is still owed only to the insured, not to the insured's indemnitee. An indemnitee thus has no way to compel the insurer to defend him.

C. The Advantages Of Additional Insured Status

These defects in the indemnification mechanism are almost entirely overcome by additional insured coverage. Additional insureds are insureds on the policy, so they have direct rights and can sue the insurer for a declaration of rights, including the right to a defense, and they need not obtain a judgment against the named insured (or even sue him) in order to do so. With rare exceptions, neither legislatures nor courts are hostile to additional insured coverage. Louisiana's oilfield anti-indemnity statute provides a unique exception by including within its scope "any agreement ... which requires ... additional named insured endorsements ...". (La. R.S. 9:2780).

1. Anti-indemnity statutes do not apply.

Anti-indemnity statutes do not apply to agreements to provide insurance. Such agreements are exempted either explicitly by the statutes themselves, or by judicial construction. The courts (and indeed the legislatures) have had little difficulty discerning the obvious difference between an indemnity obligation among private parties, and an agreement to provide commercial insurance. *Dalton v. Childress Serv. Corp.*, 432 S.E.2d 98, 102 (W.Va. 1993) (court construed indemnity clause as an agreement to procure insurance, not prohibited by anti-indemnity statute); *Getty Oil Co. v. Ins. Co. of North America*, 845 S.W.2d 794, 805 (Tex. 1992) (contract requiring additional insured status not prohibited by oil field anti-indemnity statute); *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 475 (Minn. 1992) (anti-indemnity statute does not prohibit agreement to indemnify and purchase insurance for the indemnity obligation—"the parties are free to place the risk of loss upon an insurer by requiring one of the parties to insure against that risk"); *Kinney v. G.W.*

Lisk Co., 556 N.E.2d 1090, 1092 (N.Y. 1990) (anti-indemnity statute does not prohibit contract that required subcontractor to procure “such insurance policies as will insure both the contractor and the subcontractor from claims for damages because of bodily injury which may arise ... out of [subcontractor’s] performance under this agreement;” opinion contains good discussion of policy rationale for distinction); *Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.*, 27 P.3d 594 (Utah App. 2001) (anti-indemnity statute does not apply to construction contract requiring subcontractor to furnish additional insured coverage for general contractor); *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 44 Cal.App.4th 1633, 1643-44, 52 Cal.Rptr.2d 580, 585-86 (Cal.App. 1996) (anti-indemnity statute does not apply to contracts to procure insurance; “insurance, of course, is commonly provided to protect from liability for solitary negligence”); *Juretic v. USX Corp.*, 596 N.E.2d 810, 813 (Ill.App. 1992) (anti-indemnity statute does not prohibit contract requiring additional insured status); *Terrace Shopping Center Joint Venture v. Oxford Group, Inc.*, 384 S.E.2d 679 (Ga.App. 1989) (anti-indemnity statute does not prohibit contract to indemnify, procure contractual liability coverage, and additional insured status—“the insurance clause shifts the risk of loss to the insurance company, regardless of which party is at fault”); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*, 180 Cal.App.3d 639, 644, 225 Cal.Rptr. 742, 745 (Cal.App. 1986) (to construe anti-indemnity statute as prohibiting agreement to procure insurance “would run contrary to a fundamental purpose of insurance, namely, to protect against liability for one’s own negligence”); *Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So.2d 851, 855-56 (Fla.App. 1984) (anti-indemnity statute does not prohibit contract requiring contractor to name owner an additional insured); *Brzezcek v. Standard Oil Co.*, 447 N.E.2d 760, 764 (Ohio App. 1982) (anti-indemnity statute does not prohibit contract requiring subcontractor to name general contractor an additional insured).

Two courts have held that such contractual risk transfer does violate the anti-indemnity statute, since it attempts to accomplish indirectly what the statute prohibits directly. *Walsh Constr. Co. v. Mutual of Enumclaw*, 189 Or.App. 400, 2003 WL 22096519 (Or.App. 2003); *Peeples v. City of Detroit*, 297 N.W.2d 839, 846 (Mich.App. 1980). However, among the small number of courts subscribing to that view, most have held that despite the unenforceability of the contract requiring additional insured status, once that contract has been performed, i.e., once the additional insured coverage has been obtained, the additional insured has rights under the policy which insurer cannot defeat by invoking the anti-indemnity statute. See, *Chrysler Corp. v. Merrell & Garaguso, Inc.*, 796 A.2d 648 (Del. 2002); *Sentry Ins. Co. v. National Steel Corp.*, 382 N.W.2d 753 (Mich.App. 1985). Accord, *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 578 A.2d 1201, 1207-08 (Md. 1990) (unnecessary to decide whether anti-indemnity statute prohibited contract requiring additional insured status since contractor did obtain additional insured endorsement naming owner, and insurer “cannot avoid its contractual obligations by claiming that Contractor was not compelled to purchase the endorsement”). To the contrary is *Walsh Constr. Co. v. Mutual of Enumclaw, supra*, where the court held that Oregon’s anti-indemnity statute barred a suit for declaratory relief by a general contractor against the subcontractor’s insurer on whose policy the general contractor was an additional insured.

2. The rule of strict construction against indemnity does not apply.

The rule of strict construction against indemnification for the indemnitee's own negligence does not apply to agreements to procure insurance or to name one party an additional insured on the other party's insurance policy. *Getty Oil Co. v. Ins. Co. of North America*, 845 S.W.2d 794, 805 (Tex. 1992); *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 578 A.2d 1201, 1208 (Md. 1990); *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 44 Cal.App.4th 1633, 1643-44, 52 Cal.Rptr.2d 580, 585-86 (Cal.App. 1996); *Duffy v. Poulos Bros. Constr. Co.*, 587 N.E.2d 1038, 1043 (Ill.App. 1991); *Pickhover v. Smith's Mgmt. Corp.*, 771 P.2d 664, 668 (Utah App. 1989); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*, 180 Cal.App.3d 639, 646-47, 225 Cal.Rptr. 742, 746-47 (Cal.App. 1986). *Contra*, *Fowler v. Boise Cascade Corp.*, 948 F.2d 49, 57 (1st Cir. 1991) (Maine law). Rather, such agreements are given a natural construction. Additionally, additional insured coverage itself is subject to the rule applicable to all insurance policies: policy terms are to be construed broadly in favor of coverage, with any ambiguities resolved against the insurer.

Although requiring additional insured status is an indispensable and effective means of accomplishing risk transfer, it is not without its problems. By far the two issues that have most preoccupied the courts are the scope of coverage, and the "other insurance" problem. Although these are by no means the only additional insured issues owners and contractors face, they are far and away the most common, and the most serious. This article will attempt a thorough treatment of those issues. The vast majority of the cases arise in the context of underlying bodily injury claims. But there are a number of frequently encountered property damage scenarios as well where additional insured coverage plays an important role, such as in construction defect cases. Other problems and issues encountered by additional insureds are the exclusion for injury to an employee of the insured, deductibles and self-insured retentions on the indemnitor's policy, the problem of shared limits where the policy limits are exposed on behalf of more than one insured, and targeted tenders.

II. Scope Of Coverage Under Standard (ISO) Additional Insured Endorsements

A. The Language Of The Additional Insured Endorsement Controls

Any discussion of the scope of coverage under an additional insured endorsement should begin with the language of the endorsement. And yet the case law is replete with discussions of the scope of coverage that are completely detached from the language. A striking example of this is *Pennsville Shopping Center Corp. v. American Motorists Ins. Co.*, 719 A.2d 182 (N.J.App. 1998), *app. den.*, 725 A.2d 1128 (1999). The insurer of a commercial landlord sought additional insured coverage for its policyholder under a policy issued by the tenant's insurer. The landlord and the tenant were both sued by a patron who fell when her shopping cart went into a pothole in the shopping center parking lot. The appellate court's opinion does not even contain the language of the additional insured endorsement. This was no oversight, either. The court simply thought the policy language was irrelevant:

Manifestly, *irrespective of the language of tenant's insurance policy covering landlord as an additional insured*, tenant could not be seen providing indemnification to landlord for damages sustained because of a condition for which tenant bore no responsibility at all and which, to the contrary, the parties had expressly agreed in

their lease was the sole responsibility of the landlord. * * * Under the terms of the lease in this case, tenant bore responsibility only for damages incurred on the demised premises. Its undertaking to name landlord as an additional insured must be taken to be coextensive with the scope of tenant's own liability.

719 A.2d at 184 (emphasis added). Needless to say, the court should have construed the additional insured endorsement issued by the insurer, not the lease between the landlord and tenant. See, e.g., *Township of Springfield v. Ersek*, 660 A.2d 672, 675 (Pa.App. 1995) ("insurance carriers are not parties to lease agreements and their liabilities are governed solely by the contract they enter into with their insureds").

In *Harbor Ins. Co. v. Lewis*, 562 F.Supp. 800 (E.D.Pa. 1983), the court, relying on the testimony of an "expert" who testified in the case, gave birth to a pervasive, but clearly false myth: that additional insured endorsements "are intended to protect parties who are not named insureds from exposure to vicarious liability for acts of the named insured." *Id.* at 803. This statement, like the New Jersey court's opinion in *Pennsville Shopping Center*, takes no account of the actual language of the endorsement, which, of course, may or may not lend itself to such an interpretation. ISO endorsements do *not* lend themselves to this interpretation.

Although the myth to which the *Harbor* court gave birth has been repeatedly debunked by courts all across the nation, it has been Rasputin-like in its refusal to die. Rote incantations of the myth can be found in *Maryland Casualty Co. v. Nationwide Ins. Co.*, 65 Cal.App.4th 21, 76 Cal.Rptr.2d 113 (Cal.App. 1998), *appeal after remand*, 81 Cal.App.4th 1082, 97 Cal.Rptr.2d 374 (Cal.App. 2000), *United States Fidelity & Guaranty Co. v. Drazic*, 877 S.W.2d 140 (Mo.App. 1994), and *Northbrook Ins. Co. v. American States Ins. Co.*, 495 N.W.2d 450 (Minn.App. 1993), to name just a few. The endorsements in *Northbrook* and *Drazic* were ISO endorsements that clearly did not lend themselves to the *Harbor* court's interpretation.

It is critical to ground additional insured coverage analysis in the language of the endorsement, not in preconceived notions of what ought and ought not to be covered. It is also critical to bear in mind the distinction between the broad coverage afforded by ISO endorsements, and the usually narrow or even illusory coverage provided by manuscript endorsements. Although the case law is replete with disputes over the meaning of manuscript additional insured endorsements (those will be discussed in some depth in Section III), standard, ISO-drafted and state-approved endorsements are more typical. We will discuss the more commonly litigated ISO endorsement forms in some depth in this section.

B. The ISO Endorsements' Basic Coverage Condition

What ISO CGL additional insured endorsements all have in common is that they amend Section II of the CGL coverage form (ISO CG 00 01), entitled Who Is An Insured, to include as an insured either a specifically named person or organization, or any unnamed person or organization to whom the named insured is obligated to furnish additional insured coverage, "**but only with respect to liability arising out of your [the named insured's] ongoing operations**" (this is the basic coverage grant of ISO form CG 20 10, used for construction), "**with respect to liability arising out of the ownership, maintenance or use of that part of the land leased to you**" (this is the basic coverage grant of ISO form CG 20 24, used for commercial real estate leases), or "**with respect to 'bodily injury' or 'property damage' arising out of 'your products' ... which are distributed or sole in the regular course of the vendor's business**" (this is the basic

coverage grant of ISO form CG 20 215, the vendors endorsement, used for retail product sales).

The most frequently litigated issues concerning the scope of coverage under these ISO endorsements are:

1. What does "arising out of" mean?
2. Is the additional insured covered for his own negligence?
3. Is the additional insured covered only when the named insured is negligent?

C. What Does "Arising Out Of" Mean?

The first issue is the meaning of the phrase "arising out of." A substantial majority of courts imparts a very broad meaning to those words. *See, e.g., Pro-Con Constr., Inc. v. Acadia Ins. Co.*, 794 A.2d 108 (N.H. 2002) ("the ongoing operations need not have been the proximate cause of the injuries but the causal connection between the two must be more than tenuous"); *Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.*, 27 P.3d 594 (Utah App. 2001) ("the words 'arising out of' are very broad, general and comprehensive ... and require only that there be some causal relationship between the injury and the risk for which coverage is provided"); *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 185 (Minn.App. 2001) ("but for Comm-Tech's operations, Klitzke would not have been injured"); *Acceptance Ins. Corp. v. Syufy Enterprises*, 69 Cal.App.4th 321, 328, 81 Cal.Rptr.2d 557, 561 (Cal.App. 1999) ("arising out of" "connotes only a minimal causal connection or incidental relationship"); *Container Corp. of America v. McKenzie Tank Lines, Inc.*, 680 So.2d 509 (Fla.App. 1996) ("[a] showing of proximate cause ... is not required[;] only a minimal causal connection ... is required for coverage to apply"); *Hormel Foods Corp. v. Northbrook Prop. & Cas. Co.*, 938 F.Supp. 555 (D.Minn. 1996), *aff'd.*, 141 F.3d 143 (8th Cir. 1997) (unpublished) (under Minnesota law, "but for" causation satisfies the requirements of an insurance policy which specifies that only liabilities 'arising out of the use' are covered"); *Township of Springfield v. Ersek*, 660 A.2d 672 (Pa.App. 1995) ("arising out of" means "causally connected with, not proximately caused by"); *Maryland Casualty Co. v. Chicago & Northwestern Transp. Co.*, 466 N.E.2d 1091 (Ill.App. 1984) (the phrase "arising out of" "is both broad and vague, and must be liberally construed in favor of the insured; accordingly, 'but for causation,' not necessarily proximate causation, satisfies this language"); *see also, Pennzoil Co. v. United States Fidelity & Guar. Co.*, 50 F.3d 580 (8th Cir. 1995) (under North Dakota law, oil well owner's liability to testing service's employee injured at well arose out of separate contractor's operation—even though no contractual relationship between testing service and contractor and no evidence contractor negligent—because contractor had done substantial work on the well and it was therefore part of contractor's operation).

Three federal courts of appeals have imparted an *intermediate* standard of causation to "arising out of." *Marathon Ashland Pipeline LLC v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001) ("[u]nder Wyoming law, 'arising out of' language as used in insurance contracts carries a 'natural consequence' level of causation"); *Merchants Insurance Co. of New Hampshire, Inc. v. United States Fidelity & Guaranty Co.*, 143 F.3d 5, 9 (1st Cir. 1998) ("under Massachusetts law the phrase 'arising out of' denotes a level of causation that lies between proximate and actual causation"); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993) (predicting Kansas law would hold "arising out of" "imparts a more liberal concept than proximate cause," but "rejecting strict 'but for causation' "). New Hampshire, California and Missouri appear to be in this camp as well. *See, Pro Con Constr., Inc.*

v. Acadia Ins. Co., 794 A.2d 108 (N.H. 2002); *Fireman's Fund Ins. Cos. v. Atlantic Richfield Co.*, 94 Cal.App. 4th 842, 115 Cal.Rptr.2d 26 (Cal.App. 2001); *Union Pacific R.R. Co. v. American Family Mut. Ins. Co.*, 987 S.W.2d 340 (Mo.App. 1998).

1. Cases Finding That The Additional Insured's Liability Did Arise Out Of The Named Insured's Operations, Use Of The Leased Premises, Or Products

a. Operations

i. Employment With Named Insured Constitutes Arising Out Of Named Insured's Operations

By far, the most common scenario satisfying this condition is when the injured plaintiff suing the additional insured is an *employee* of the named insured. See, e.g., *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 185 (Minn.App. 2001) ("but for Comm-Tech's operations, Klitzke (Comm-Tech's employee) would not have been injured"); *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487, 500 (5th Cir. 2000) ("[h]ere, when injured, Lozano was an Air Equipment employee on Swift's premises in connection with Air Equipment's operations * * * Lozano's injuries therefore 'arose out of' Air Equipment's operations"); *Liberty Mutual Ins. Co. v. Westfield Ins. Co.*, 703 N.E.2d 439 (Ill.App. 1998) ("[h]ere, Taylor was an employee of Westfield's insured Rivard, and he was injured while working on the construction project Olson hired Rivard to work on. As such, Olson's liability to Taylor arises out of Rivard's work as a matter of law"); *American States Ins. Co. v. Liberty Mutual Ins. Co.*, 683 N.E.2d 510 (Ill.App. 1997) ("We find that 'but for' [Navarrete's] employment by Fisher and Fisher's presence on the job site, [Navarrete] would not have been injured. The accident arose from Fisher's work for Turner"); *Township of Springfield v. Ersek*, 660 A.2d 672 (Pa.App. 1995) ("[i]t is undisputed that employee fell in the course and scope of his employment and that this activity is certainly within the definition of ... 'operations' conducted by [the named insured]"); *Florida Power & Light Co. v. Penn America Ins. Co.*, 654 So.2d 276, 279 (Fla.App. 1995) ("[o]bviously, Haywood's injuries and subsequent lawsuit arose out of some type of 'operations' of [the named insured] as Haywood was an employee of [the named insured] working at the FPL substation").

The condition is likewise satisfied where the named insured supplies an employee to work for the additional insured at the additional insured's premises, and the employee sustains injury on those premises. *Marathon Ashland Pipeline LLC v. Maryland Cas. Co.*, 243 F.3d 1232, 1239 (10th Cir. 2001); *Mid-Continent Casualty Co. v. Chevron Pipe Line Co.*, 205 F.3d 222, 229 (5th Cir. 2000). The inquiry in such cases is not whether the injured person is a loaned servant, or whose employee he is. Rather, the focus is on the simple fact that "but for" the named insured having sent the injured person to work at the additional insured's premises, he would not have been there. The additional insured's liability therefore arises out of the named insured's operations.

In *Tishman Interiors Corp. of New York v. Fireman's Fund Ins. Co.*, 653 N.Y.S.2d 367 (N.Y.App. 1997), the court held that the construction manager's liability to a sheet metal subcontractor's employee arose out of the prime sheet metal contractor's work (even though the injured man did not work for the prime sheet metal subcontractor), because he "was injured while performing sheet metal work which [the prime sheet metal contractor] was contractually obligated to perform for [the construction manager]." 653 N.Y.S.2d at 369. Thus, it did not matter that the named insured did not employ the injured man. Regardless of whose employee he was, he was doing the named insured's work because the named insured subcontracted that work to his employer. The New York court's analysis is consistent with *Shell Oil Co. v. AC & S, Inc.*, 649 N.E.2d 946 (Ill.App. 1995), in which the court, holding that the owner's liability to an injured employee of a sub-subcontractor arose out of the sub-subcontractor's work, observed in dicta that the owner's liability also arose out of the prime subcontractor's work. 649 N.E.2d at 952. See also, *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 44 Cal.App. 4th 1633, 52 Cal.Rptr.2d 580 (Cal.App. 1996) (owner covered as additional insured under engineer's policy for liability to employee of engineer's subcontractor).

Although most of the courts deciding this issue held that the employment relationship satisfied the "arising out of" coverage condition because the employment was the "but for" cause of the injuries, there is a division of authority on this precise question among courts that apply an intermediate, less loose standard of causation. Compare, *Marathon Ashland Pipeline LLC v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001) (Wyoming law) and *Merchants Insurance Co. of New Hampshire, Inc. v. United States Fidelity & Guaranty Co.*, 143 F.3d 5 (1st Cir. 1998) (Massachusetts law) (both holding that the employment relationship satisfied the coverage condition), with *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.*, 101 Cal.App.4th 1038, 124 Cal.Rptr.2d 818 (Cal.App. 2002) (when read in the context of the subcontract, with its limited form indemnity clause, the subcontractor's mere presence on the construction site does not satisfy the "arising out of the [subcontractor's] ongoing operations" condition for the general contractor's additional insured coverage under the subcontractor's CGL policy) and *Pro Con Constr., Inc. v. Acadia Ins. Co.*, 794 A.2d 108 (N.H. 2002) (condition not satisfied where employee was going for coffee break, rather than performing operations, when he slipped and fell). No such distinction between actually performing operations and mere presence on the work site should be relevant, however, in states that subscribe to the "but for" test. See, e.g., *Turner Constr. Co. v. Pace Plumbing Corp.*, 748 N.Y.S.2d 356 (N.Y.App. 2002) (general contractor's liability to subcontractor's employee who slipped and fell in construction site bathroom arose out of subcontractor's operations; going to the bathroom is a necessary and unavoidable activity that arose in the course of the construction project).

ii. **The Difference Between “Your Work” and “Your Ongoing Operations”**

The 11/85 version of CG 20 10 conditions coverage on the additional insured’s liability “arising out of your (the named insured’s) work.” The 10/93 and 3/97 versions, however, substitute “your ongoing operations” in place of “your work.” The sole reason for the change was to clarify the intent not to insure additional insureds for bodily injury or property damage taking place after the named insured’s work has been completed. This point is thoroughly discussed in *Pardee Constr. Co. v. Insurance Co. of the West*, 77 Cal.App.4th 1340, 92 Cal.Rptr.2d 443 (Cal.App. 2000), in which the court held that the 11/85 version of CG 20 10 does cover the additional insured for losses taking place after the named insured’s work is completed.

Thus, it is the insertion of the word “ongoing” that is key. The distinction between “ongoing” and “completed” would be of significance mainly in the realm of construction defect litigation, pollution cases, and other continuous loss scenarios, although claims for bodily injury to one not engaged in the work can also arise after the work is completed. For example, after a building is completed and put to use, a pedestrian or building tenant could sustain injury as a result of some defect in construction. The collapse of the pedestrian skyway at the Kansas City Hyatt Hotel in 1983 is an example of this.

The distinction could also be significant, however, where the construction project is still ongoing, but the named insured’s work is completed. For example, if a steel erector’s employee falls off a precast concrete wall and sues the general contractor, the general contractor’s liability would clearly arise out of the precast concrete fabricator’s “work,” but if the erection of all of the precast concrete on the job had been completed, it may not arise out of the fabricator’s “ongoing operations.” There are no reported cases yet deciding whether the named insured’s operations were “ongoing” or “completed,” for purposes of CG 20 10 coverage. One major concern for subcontractors is the fact that most subcontracts require the subcontractor to furnish completed operations coverage for the owner and general contractor. The current version of CG 20 10 will not satisfy that obligation.

The change from “work” to “operations” is in and of itself insignificant. That this is so is made clear by the CGL coverage form’s definition of “your work,” which is “work or operations performed by you or on your behalf.” Clearly, the two terms are synonymous and interchangeable. Nonetheless, some courts have gotten hung up on this non-distinction. The court in *Mid-Continent Cas. Co. v. Chevron Pipeline Co.*, 205 F.3d 222 (5th Cir. 2000) perceived a significant distinction between “your work” and “your ongoing operations.” The court therefore hesitated to apply the Texas precedent interpreting “your ongoing operations” to the case before it, which involved “your work.” However, noting that another Texas case involved “your work,” the court overcame its hesitancy and held the condition satisfied.

iii. **“Performed For That Insured”**

In *Mid-Continent Cas. Co. v. Swift Energy Co.*, *supra*, 206 F.3d 487 (5th Cir. 2000), the court struggled with the issue of whether the named insured’s operations were performed *for* the additional insured (that is a condition of CG 20 10 coverage), when the additional insured did not *hire* the named insured; rather, the additional insured hired a contractor that in turn hired the named insured. The court provided an interesting discussion of this issue which highlights some basic differences between the way courts treat indemnity agreements and additional insured coverage.

The first portion of the opinion analyzes whether Swift had any rights under its indemnity agreement with the named insured, Air Equipment. The district court, in deciding this question, had given a *narrow interpretation* to the indemnity agreement’s requirement that Air Equipment’s work be performed *for* Swift before any indemnity obligation could arise. The court concluded that because Swift did not hire Air Equipment directly, Air Equipment’s work was not “performed *for* Swift.” The Court of Appeals affirmed this conclusion.

The district court gave the same narrow construction and reached the same conclusion with respect to the question of whether, for purposes of Swift’s coverage under the additional insured endorsement, Air Equipment’s work was “performed *for* Swift.” The Court of Appeals said this was error:

We therefore reject the district court’s conclusion. We find that Swift should not be denied coverage as an additional insured under the Policy because the liability to Lozano did not arise from [Air Equipment’s] operations “performed for” Swift. Clearly, Air Equipment’s services were ultimately performed to benefit Swift. Air Equipment may have contracted directly with Flournoy, but Flournoy was merely Swift’s subcontractor, such that all of Flournoy’s operations were performed on Swift’s premises for Swift’s benefit. Given the absence of other applicable limiting language in the Policy (in contrast to the [indemnity agreement]), this fact alone likely is sufficient to find that Air Equipment’s operations were “performed for” Swift.

206 F.3d at 501.

The same issue came up in *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.*, 4 Cal.Rptr.3d 416 (Cal.App. 2003). Bigge Crane & Rigging Co. rented a crane to Schuff Steel Co. As required by the lease agreement, Schuff named Bigge an additional insured on its CGL policy. This was done by means of a CG 20 10-type endorsement that provided coverage to Bigge for liability arising out of Schuff’s work **performed for Bigge**. Cvitkovich, a Schuff employee, was killed when a load fell on him from the crane while operated by a Schuff employee. The court held that Bigge could not reasonably have expected coverage under

the endorsement, because Schuff's work was performed for the general contractor and the owner, not for Bigge.

iv. Coverage Where The Injured Person Is Not An Employee Of The Named Insured.

In *Gabe's Constr. Co., Inc. v. United Capitol Ins. Co.*, 539 N.W.2d 144 (Iowa 1995), the Iowa Supreme Court found the "arising out of your operations" language to be satisfied where the injured person was a motorist on a public highway who collided with a vehicle left on the highway by the subcontractor / named insured. The plaintiff alleged that the general contractor / additional insured's negligence consisted of failing to keep the highway safe for passing motorists, and failing to inspect and properly supervise the road construction. The court explained that the general contractor was covered under the subcontractor's policy because the accident occurred during the course of the subcontractor's work and the complaint alleged that the general contractor "is liable for the negligence of [the subcontractor]."

In *City of New York v. Consolidated Edison Co. of New York*, 655 N.Y.S.2d 496 (N.Y.App. 1997), the court held the "arising out of" condition satisfied where the additional insureds (the City and the construction manager) were sued by a pedestrian who slipped on an unlit icy sidewalk alongside a construction project; the named insured was an electrical contractor whose duties included the provision of temporary lighting. The court held the evidence of inadequate lighting created a possibility that the additional insureds' liability arose out of the electrical contractor's work, and therefore, the electrical contractor's insurer was obligated to provide a defense.

Endre v. Niagara Fire Ins. Co., 675 A.2d 511 (Me. 1996) involved a CG 20 10 endorsement, but an unusual set of facts. Foster, a propane gas and equipment manufacturer, named its licensed dealers as additional insureds. Endre was one of those dealers. He installed Foster propane equipment at a customer's house and in doing so, spliced into an existing propane line. A fire later consumed the customer's house, and after paying the loss, the homeowner's insurer filed a subrogation claim against Endre. Endre tendered his defense to Foster's CGL insurer under the CG 20 10 endorsement. The court found that there was at least a potential that Endre's liability could be said to arise out of Foster's work, thus entitling Endre to a defense. Foster's work could be construed as including not only the manufacture of its products, but also the distribution and installation of the products, even though done by others, such as Endre.

In *Vitton Constr. Co. v. Pacific Ins. Co.*, 110 Cal.App.4th 762, 2 Cal.Rptr.3d 1 (Cal.App. 2003), a roofing subcontractor's employee fell through an opening in the roof of a building under construction and suffered a serious injury. He sued the general contractor as well as another subcontractor (PEI, not his employer) that cut the openings in the roof. The issue in the case was whether the general contractor was covered as an additional insured on PEI's CGL policy. The court held that it did not matter whether it was PEI's responsibility—or someone

else's—to cover the roof openings it had cut. What mattered, said the court, was that:

Anderson's fall "arose out of" PEI's work in cutting the roof openings. Regardless of whether it was PEI's responsibility to make the holes safe, the fact is PEI's work created the dangerous condition that gave rise to Anderson's accident. Under these circumstances, we conclude there is a sufficient "minimal causal connection" between the named insured's work and the situation giving rise to liability to trigger coverage for Vitton as an additional insured.

110 Cal.App.4th at 767.

b. Premises

One of the most illustrative cases in the reporters is *Liberty Village Assoc. v. West American Ins. Co.*, 706 A.2d 206 (N.J.App. 1998), *app. den.*, 713 A.2d 500. The facts of the case furnished an opportunity to draw clear lines between a "nexus" and an "immaterial happenstance."

A shopping mall owner sought additional insured coverage on the policy of one of its tenants in connection with a bodily injury suit by a patron who was walking from one store, through a common area, to another store, and who then slipped and fell on ice just before reaching the covered entrance to the second store. She filed suit against the second store and the mall owner. The tenant's policy contained an additional insured endorsement (the ISO CG 20 24 form), naming the owner, but "only with respect to liability arising out of the ownership, maintenance or use" of the premises leased to the store. *Id.* at 208.

After the second store owner's insurer (West American) declined the owner's tender, they jointly funded a settlement of the underlying case and reserved their rights to contest coverage in a separate action. The trial court in that separate action granted summary judgment to the owner, finding that the mall owner's liability to the patron arose out of the second store's use of the demised premises. The appellate court affirmed. The court discussed prior New Jersey precedent construing the language of the ISO CG 20 24 form endorsement, which held that the incident giving rise to liability need not have occurred within the leased premises, but rather, there must be some "nexus" between the use of the premises and the incident giving rise to liability. In noting the factual similarities between this case and the earlier of the two precedents the court relied on (*Franklin Mutual Ins. Co. v. Security Indemnity Ins. Co.*, 646 A.2d 443 (N.J.App. 1994)), the court said:

In both, the critical policy language provides coverage for an incident "arising out of the use of" the leased premises. In both, a fall occurred outside of, but very close to, the leased premises. In both, the injured party was where she was precisely because of the tenants' use of the premises: it was the tenant's business that had brought her to the area. * * * Questions of precisely where the fall took place—whether within or slightly outside of the extended sidelines of the [leased] property, or completely or only partially under the overhang in front of

the [leased] store, and lease provisions dealing with maintenance and snow or ice removal, are not dispositive. [I]nsurance coverage is not contingent upon a finding of the tenant's liability. Indeed, the very premise of the need for the policy is the actual or potential liability of the landlord—not the tenant.

Id. at 210-11.

The decision is also enlightening because it compares the “nexus” between the injury and the use of the *second* store, where the patron was headed, and the lack of a nexus between the injury and the *first* store, where she had been. The court pointed out that it was the presence and use of the second store that brought the patron to the spot where she fell, not the first store. Moreover, the court said, the spot of the fall was just outside the second store, but across the street from the first store. The first store had no maintenance responsibility for the spot of the accident but the second store did. Indeed, the court said, the only connection between the first store and the injury was the “immaterial happenstance” that the patron had just come from that store. But that connection is no more significant than if she had just come from six or eight other stores, the court said. The connection did not meet the “nexus” test New Jersey applies to determine whether the “arising out of” language is satisfied. Accordingly, the court affirmed the trial court's summary judgment in favor of the first store's insurer.

The “nexus” argument was accepted in *ZKZ Assoc. L.P. v. CNA Ins. Co.*, 679 N.E.2d 629 (N.Y. 1997), a case also involving a CG 20 24 endorsement. There, a pedestrian tripped and fell on a sidewalk outside a building that housed a garage. The building owner was named an additional insured on the garage owner's policy, but “only for liability arising out of the ownership, maintenance and use of that part of the described premises which is leased to [the garage owner].” The high court determined that the building owner was at least entitled to a defense, since “the part of the sidewalk where the alleged accident occurred was necessarily used for access in and out of the garage ... and was thus, by implication, ‘part of the ... premises’ [leased]. Consequently, the claim arose out of ‘the ownership, maintenance [or] use of’ the garage.”

It would, of course, be interesting to know whether the injured claimant had used the sidewalk to get into or out of the garage, or was merely walking past the garage on his way to and from somewhere other than the garage. But neither the high court's opinion, nor the opinion of the intermediate court, contains this information. One would think if the claimant was simply walking down the sidewalk, not having been in the garage and not intending to go there, that the mere proximity of the sidewalk to the garage would not be a sufficient “nexus” to trigger coverage for the building owner under the garage owner's policy. Rather, it would be a mere “immaterial happenstance,” as the *Liberty Village* court put it.

In *Milano v. Bd. Of Comm. of Orleans Levee Dist.*, 691 So.2d 1311 (La.App. 1997), the injured claimant tripped and fell on stairs while departing a restaurant at the New Orleans Airport. The restaurant owner, who leased the restaurant space from the airport, named the airport an additional insured on its CGL policy for “liability arising out of [the restaurant's] operations or

premises owned by or rented to [the restaurant].” The court held the loss clearly arose out of the restaurant’s operations.

In *State of Alaska v. State Farm Fire & Cas. Co.*, 939 P.2d 788 (Alaska 1997), a motorcyclist was injured on a public road when he collided with a train of baggage carts, which was in transit to an airport from a freight handling warehouse space that United Airlines leased from the airport’s owner, the State of Alaska. The State sought coverage for the loss as an additional insured on the lessee’s policy. What is strange about this case is that the policy placed no limitations on the scope of the additional insured coverage, and the court simply reformed the policy to limit it to “arising out of the use of the lessee’s premises” coverage. So reformed, however, the court held there was coverage: “[m]oving baggage from the warehouse to the airport is an activity which arises out of the use of the premises ...”.

In *Maryland Cas. Co. v. Chicago & Northwestern Transp. Co.*, 466 N.E.2d 1091 (Ill.App. 1984), an employee of a news stand located in a commuter railway station was assaulted in the early morning, in the station, on her way to work, before the news stand opened. She sued the railroad that owned the station, which was an additional insured under a CG 20 24 endorsement to the news stand’s CGL policy. The railway tendered its defense to the news stand’s insurer. The insurer contended that since the assault took place outside its premises, in the common areas of the railway station, before the news stand was even open for business, the loss did not arise out of the use of the premises leased to the news stand. The court rejected this contention, holding that “but for” her employment at the news stand, the employee would not have been in the station and would therefore not have been assaulted. Her presence was not a “fortuitous happenstance,” said the court, but rather, the result of her employment. Her injuries therefore arose out of the use of the leased premises.

c. Products

Vendors endorsement cases tend to diverge somewhat from the analysis of construction and premises cases. This is largely due to the laundry list of very specific exclusions contained in CG 20 15. Many courts have allowed their analysis of these exclusions to color their analysis of the basic coverage grant. The result has been that vendors often are not given the same broad construction of their additional insured coverage that contractors and landlords receive. And yet some of the cases echo the same themes, as they should, given the similarity of the basic coverage condition. This article will discuss vendors cases only to the extent that those cases analyze the basic coverage grant.

In *Sportmart, Inc. v. Daisy Mfg. Co.*, 645 N.E.2d 360 (Ill.App. 1994), a sporting goods store sold “BB” pellets to a 15 year-old boy. The boy was injured when a pellet he shot ricocheted off a utility pole and hit him in the eye. His parents sued the sporting goods store on his behalf, alleging that the store was negligent in selling the BB pellets to a minor. The store tendered its defense to the BB pellet manufacturer under a CG 20 15 vendors endorsement to the manufacturer’s CGL policy. The insurer refused to defend, contending that the boy’s lawsuit contained no allegation of any defect in the product, but only the store’s own negligence in selling the product to a

minor. The court rejected the insurer's contention, noting that "there is nothing in Continental's policy limiting coverage to claims alleging a product defect." *Id.* at 363. It was enough, the court found, that the injury was "directly caused by the product." *Id.* The court also noted the absence from the endorsement of any exclusion for the negligence of the additional insured vendor. The court reversed the judgment in favor of the insurer. *Sportmart* was followed under nearly identical facts in *Pep Boys v. Cigna Indem. Co. of North America*, 692 A.2d 546 (N.J.App. 1997).

2. Cases Finding That The Additional Insured's Liability Did *Not* Arise Out Of The Named Insured's Operations, Use Of The Leased Premises, Or Products

a. Operations

In *Pro Con Constr. Co. v. Acadia Ins. Co.*, 794 A.2d 108 (N.H. 2002), a subcontractor's employee was injured when he slipped and fell on an icy sidewalk as he walked from his work area to a coffee truck parked on the site's lot. He sued the general contractor, Pro Con, for negligently failing to maintain the sidewalk free of ice and snow. Pro Con tendered its defense to the employer's CGL carrier, Acadia, which named Pro Con an additional insured on a CG 20 10 endorsement. Rejecting the majority "but for" analysis, under which the employment itself satisfies the coverage condition, the court instead held that something less than proximate cause, but more than "but for" causation, was needed to satisfy the condition. The court held that since the employee was not performing operations, but rather, walking to a coffee truck, the condition was not satisfied.

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. City of St. Louis*, 947 S.W.2d 505 (Mo.App. 1997), the City was an additional insured on a policy issued to a curbside baggage checking service at St. Louis Airport. When a motorist lost control and struck an employee of the baggage service, the employee sued the City, alleging negligent design and maintenance of the ingress and egress for vehicles on the airport roadway. The City tendered its defense to the baggage service's insurer, which declined. Although the City advanced the majority view—that the employment relationship in and of itself satisfies the coverage condition—the court spent little time rejecting this view and instead based its decision on the dictionary definition of "operation" ("the performance of practical work"), concluding that "[i]t cannot be said, as the City contends, that being struck by a car while at work ... could constitute a company's operation." The court accordingly held there was no coverage for the City.

In *Regent Ins. Co. v. Estes Co.*, 564 N.W.2d 846 (Iowa 1997), the court also held that the additional insured's liability did not arise out of the named insured's work, despite the fact that the injured man was employed by the named insured.

b. Premises

Several cases have held that there was no coverage for the additional insured because the injury took place outside the leased premises. For example, in *Northbrook Ins. Co. v. American States Ins. Co.*, 495 N.W.2d 450

(Minn.App. 1993), an employee of a bakery slipped and fell in the parking lot of the mall where the bakery was located. The mall owner controlled the parking lot, which was not within the premises leased to the bakery. When the employee sued the mall owner, the owner sought coverage as an additional insured on the bakery's CGL policy, which was endorsed with a CG 20 24 form. The court held that the owner was not covered, because the injury took place outside the leased premises. This conclusion, of course, is the result of giving the endorsement a narrow construction. The endorsement does not limit its coverage to accidents taking place inside the leased premises, as the court read it. Rather, it provides coverage for accidents "arising out of the use" of those premises. Surely, the tenant's use of the leased premises includes its employees walking from the mall parking lot to their place of employment. *Northbrook* was followed under nearly identical facts in *United States Fidelity & Guaranty Co. v. Drazic*, 877 S.W.2d 140 (Mo.App. 1994). The same narrow construction of CG 20 24 produced a finding of no coverage in *General Acc. Fire & Life Assurance Corp. v. Travelers Ins. Co.*, 556 N.Y.S.2d 76 (N.Y.App. 1990).

Light v. Robert Martin Corp., 653 N.Y.S.2d 16 (N.Y.App. 1997) was a breach of contract to procure insurance case. The court held that the contract was not breached because the insurance that was required would not have covered the loss. The contract required standard additional insured coverage conditioned on the building owner's liability arising out of the named insured's operations or use of the demised premises. The court concluded that the accident, which occurred on a driveway under the control of the landlord, did not arise out of the use of the demised premises, which were on an upper floor of the building.

Associated Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65 (Kansas 1997), involved a gigantic underground cold storage facility where food was stored. A fire originating in Portal A of the facility caused smoke damage to tenants' food supplies in Portal B. Those tenants submitted claims to their property insurers, who then filed subrogation claims against the owner. The owner sought coverage for those claims as an additional insured on the tenants' liability policies. The owner was an additional insured on the tenants' policies for liability for property damage claims incurred in ownership or use of the leased premises. The court concluded there was no coverage for the owner as an additional insured on the tenants' policies, because the coverage applied only to events occurring on the leased premises and attributable to tenants' operations, but the fire was in Portal A, away from the tenants' leased premises in Portal B.

c. Products

In *Salerno v. Atlantic Mut. Ins. Co.*, 6 P.3d 758 (Ariz.App. 2000), a patron at a school book fair fell as a result of a change in the level of the floor she was walking on. She sued the school and the publisher of the books on display at the book fair, alleging that the school was negligent in its design of the floor, and that the book publisher's brightly colored books contributed to the fall by distracting her attention from the configuration of the floor. Not surprisingly, the publisher was granted summary judgment. The school tendered its defense to the publisher's insurer under the CG 20 15 vendors endorsement to the publisher's CGL policy. The court held that there was no coverage be-

cause the books did not cause the injury. The causal connection between the books and the injury was too attenuated to satisfy the “arising out of your products” coverage condition.

In *Texas Medical Liab. Trust v. Zurich Ins. Co.*, 945 S.W.2d 839 (Tex.App.-Austin 1997), the court held that physicians who inserted the manufacturer’s breast implants into their patients were not covered under the manufacturer’s CG 20 15 vendors endorsement, because the physicians did not “sell the named insured’s product in the regular course of the vendor’s business.”

In *Mitchell v. Stop & Shop Cos., Inc.*, 672 N.E.2d 544 (Mass.App. 1996), a commercial bakery’s delivery truck driver was injured while making a delivery to a retail store. He sued the owner of the retail store for negligently maintaining its loading dock. The store owner tendered its defense to the bakery under the bakery’s CG 20 15 endorsement. The court held that since the bread did not cause the driver’s injury, there was no coverage for the store owner. The facts and the result were nearly identical in an earlier case relied on by the *Mitchell* court: *Dominick’s Finer Foods, Inc. v. American Mfrs. Mut. Ins. Co.*, 516 N.E.2d 544 (Ill.App. 1987).

D. Is The Additional Insured Covered For His Own Negligence?

1. Majority View: Yes

The answer to this question, under ISO endorsements, is yes. The simple explanation is that the endorsements don’t exclude the additional insured’s negligence. Since coverage for liability resulting from one’s own negligence is the principal reason for buying liability insurance, and since restrictions and limitations on coverage are not read into policies if they are not expressed, there is no good reason to believe that additional insureds don’t enjoy coverage for their own negligence. The only limitation is the one found in the endorsement: that the liability must arise out of the named insured’s work, ongoing operations, use of the premises, etc., as the case may be.

Numerous cases resound this theme. *See, e.g., Fireman’s Fund Ins. Cos. v. Atlantic Richfield Co.*, 94 Cal.App.4th 842, 853, 115 Cal.Rptr.2d 26, 34 (Cal.App. 2001) (“the majority view implies a public policy which favors freedom of contract and allows parties, if they so choose, to obtain coverage for the additional insured that goes beyond vicarious liability arising out of the negligence of the named insured”); *Marathon Ashland Pipeline LLC v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001) (rejecting insurer’s contention that ISO endorsement does not cover negligence of the additional insured); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 454 (Tex.App.-Houston 1999) (additional insured covered “even if the cause of the injury was the negligence of the additional insured”); *Container Corp. of America v. Maryland Casualty Co.*, 707 So.2d 733, 735 (Fla. 1998) (“[b]ecause the endorsement in the instant case contains no limiting language, we hold that Container was entitled to coverage under the Maryland policy for its own negligence arising out of ‘operations [of the named insured]’”); *Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity & Guaranty Co.*, 143 F.3d 5, 10 (1st Cir. 1998) (Massachusetts law) (“[u]nder [the *contra proferentem* approach], the phrase ‘arising out of’ would not be read to exclude coverage for [the additional insured’s] own negligence”); *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 44 Cal.App.4th 1633, 1643-44, 52 Cal.Rptr.2d 580, 585-86 (Cal.App. 1996) (“insur-

ance, of course, is commonly provided to protect from liability for solitary negligence"); *Township of Springfield v. Ersek*, 660 A.2d 672, 675 (Pa.App. 1995) ("policy clearly provides coverage to the Township where an injury occurs on the pro shop premises as a result of the pro shop's operations, regardless of whether the negligence which gives rise to the claim rests with [the pro shop operator] or the Township"); *Sportmart, Inc. v. Daisy Mfg. Co.*, 645 N.E.2d 360, 363 (Ill.App. 1994) ("there is no policy exclusion for injuries directly caused by the product which are also attributable to the negligence of [the vendor-additional insured]"); *Consolidated Edison Co. of New York v. Hartford Ins. Co.*, 610 N.Y.S.2d 219, 221 (N.Y.App. 1994) ("the [arising out of] coverage condition] focuses not upon the precise cause of the accident, as defendants urge, but upon the general nature of the operation in the course of which the injury was sustained * * * [the fact that the cause of the injury may have been [the additional insured's] fault or due to [the additional insured's] negligence, is immaterial); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 254 (10th Cir. 1993) (Kansas law) (collecting cases) ("the additional insured endorsement does not limit the policy's coverage to cases where Wichita is held vicariously liable for Festivals' negligence"); see also, *Freund v. Utah Power & Light Co.*, 793 P.2d 362 (Utah 1990) ("[o]ne reason, at least, why the licensor wanted to be an additional insured was to have coverage for its own negligence"); Lisa Oonk, *The Construction Industry: Coverage Issues Created By Claims Against Additional Insureds*, 28 THE BRIEF 8, 11 (Summer 1999) ("many cases flat out reject arguments that coverage does not exist if the additional insured's liability arises from its own conduct or negligence").

2. **Minority View: No**

Those jurisdictions continuing to subscribe to the minority view—that additional insureds are not covered for their own negligence—are becoming an endangered species. The largest state clinging to this view is Ohio. But Ohio law on this issue is rooted not in contract interpretation so much as statutory construction—of Ohio's anti-indemnity statute. This produces the anomalous result that although contracts to procure additional insured coverage do not run afoul of Ohio's anti-indemnity statute (*Brzeczek v. Standard Oil Co.*, 447 N.E.2d 760, 764 (Ohio App. 1982)), additional insured endorsements that cover the additional insured's own negligence violate that statute and thus will not be so construed. *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.*, 699 N.E.2d 127 (Ohio App. 1997). This rule against coverage for the additional insured's own negligence does not seem to apply when the additional insured is a public entity, however. *Stickovich v. City of Cleveland*, 757 N.E.2d 50 (Ohio App. 2001).

In *G.E. Tignall & Co., Inc. v. Reliance Nat'l. Ins. Co.*, 102 F.Supp.2d 300 (D.Md. 2000), the court construed a CG 20 10 endorsement as not covering the additional insured's negligence. The court erred, however, in relying on *Baltimore Gas & Elec. v. Commercial Union Ins. Co.*, 688 A.2d 496 (Md.App. 1997). That case involved a CG 20 09 endorsement, which contains an exclusion for the negligence of the additional insured, other than its general supervision of the named insured. But no such exclusion is contained in CG 20 10. Thus, even assuming that *Baltimore Gas & Elec.* was decided correctly, it does not support the decision in *G.E. Tignall & Co.*

In *Washington Sports and Entertainment, Inc. v. United Coastal Ins. Co.*, 7 F.Supp.2d 1 (D.D.C. 1998), the owners and developers of a sports arena—the newly constructed MCI Center—were sued by the Paralyzed Veterans of America for violating the Americans With Disabilities Act in the design and construction of the

arena. The architect, Ellerbe Becket, was also sued. The owners were additional insureds on Ellerbe Becket's professional liability policy, and they sought a defense from the issuer of that policy, United Coastal. The court accepted United Coastal's argument that it owed no defense because the owners themselves made design decisions. The court construed the additional insured coverage language, which conditioned coverage on "liability arising from the professional services performed by [Ellerbe Becket]," as excluding coverage for the owners "for mistakes made by [the owners] themselves." The owners, the court acknowledged, argued that the policy does not limit the coverage for additional insureds to vicarious liability, because it lacks an explicit limitation to that effect. However, the court responded, the "arising out of" language *is* an explicit limitation of the policy's coverage to vicarious liability.

E. Is The Additional Insured Covered Only When The Named Insured Is Negligent?

It is well settled that ISO additional insured endorsements do not condition coverage on the named insured's fault. See, *Township of Springfield v. Ersek*, 660 A.2d 672, 676 (Pa.App. 1995) ("[t]he township's rights against Phoenix (the insurer) [do not] rest upon a showing that Ersek (the named insured) was negligent"); *Florida Power & Light Co. v. Penn America Ins. Co.*, 654 So.2d 276, 279 (Fla.App. 1995) ("[n]o language in the provision requires fault on behalf of [the named insured] before [the additional insured] can be considered an additional insured"); *Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co.*, 501 N.E.2d 812, 815 (Ill.App. 1986) ("there is no reference in the endorsement requiring the fault of [the named insured] * * * regardless of the role of any acts or omissions of [the named insured], [the additional insured] is entitled to a defense from Casualty").

In *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 499-500 (5th Cir. 2000), the court rejected the insurer's contention that coverage depended on the named insured's negligence:

Mid-Continent could have expressly stated in the policy that liability not resulting from Air Equipment's sole negligence was not covered by the additional insured endorsement. It did not do so. To read such an additional limitation into the policy's language seems contrary to the Texas rule that exclusionary language is narrowly interpreted[.] * * * We reject Mid-Continent's argument and hold that Swift is covered as an additional insured under the policy even though Air Equipment was not negligent.

This holding echoed the opinion in *Casualty Ins. Co. v. Northbrook Prop. & Cas. Co.*, *supra*, where the subcontractor's insurer argued that it had no duty to defend the general contractor, because the underlying complaint did not allege the subcontractor was negligent. In rejecting that argument, the Illinois Appellate Court noted that the additional insured endorsement extended coverage to the general contractor for liability arising out of the *operations* of the subcontractor, not the *negligence* of the subcontractor. Thus, the court concluded, it was immaterial whether the subcontractor / named insured was negligent. The court noted the contrast with *Consolidation Coal Co. v. Liberty Mutual Ins. Co.*, 406 F.Supp. 1292 (W.D.Pa. 1976), where the additional insured endorsement explicitly limited coverage to liability arising out of *acts or omissions* of the named insured, as opposed to *operations* of the named insured.

If Casualty had intended to limit its obligation to [the additional insured] to those situations where the negligent acts or omissions of [the named insured] had been

established, it could have done so by using language similar to that found in *Consolidation Coal*. However, such language was not used. The language that was employed requires only that [the additional insured's] liability arise out of operations of [the named insured].

Admiral Ins. Co. v. Trident NGL, Inc., 988 S.W.2d 451 (Tex.App.-Houston 1999, writ denied) involved an injured employee of the named insured suing the additional insured, which had hired the named insured to work on its oil and gas facilities. The endorsement contained the CG 20 10-type "arising out of your operations" language. The parties agreed that the named insured was free from fault and did nothing to cause the explosion that injured the underlying plaintiff. The insurer argued that under *Granite Constr. Co. v. Bituminous Ins. Co.*, 832 S.W.2d 427 (Tex.App.-Amarillo 1992), the additional insured's liability therefore could not be said to arise out of the named insured's operations—hence, no coverage. The additional insured, however, contended that its coverage was not limited to those losses caused by the named insured's *negligence*; rather, "arising out of" requires only a loose causal connection between the loss and the named insured's *activities*.

The court surveyed various out-of-state decisions and concluded that these decisions were more persuasive than *Granite Construction*:

The majority view of these cases is that for liability to "arise out of operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather, it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured.

* * * *

We hold that, because the accident in this case occurred to a KD employee while the employee was on the premises for the purpose of performing preventive maintenance on the compressor that exploded, the alleged liability for the employee's injuries "arose out of KD's operations," and, therefore, was covered by the "additional insured" provision.

988 S.W.2d at 453, 455.

In *McCarthy Bros. Co. v. Continental Lloyds Ins. Co.*, 7 S.W.3d 725 (Tex.App.-Austin 1999, no writ), a case again involving a standard endorsement—in this case the 11/85 version of CG 20 10—a subcontractor's employee was injured in a fall at a construction site. He sued the general contractor for negligently allowing a dangerous condition to exist on the site.

The general contractor tendered its defense to Continental Lloyd's, which had added the general contractor as an additional insured, but Lloyd's refused to defend on the grounds that the suit sought damages for the general contractor's own negligence, and that the suit did not allege that the subcontractor (the named insured) was negligent. The general contractor argued that because the injured plaintiff was injured while in the course and scope of his employment with the named insured, the general contractor's liability "arose out of" the named insured's work. Following *Admiral Ins. Co.*, the court reiterated the majority view and held that there was coverage for the claim by the named insured's employee against the additional insured.

In *Vitton Constr. Co. v. Pacific Ins. Co.*, 110 Cal.App.4th 762, 2 Cal.Rptr.3d 1 (Cal.App. 2003), a roofing subcontractor's employee fell through an opening in the roof of a building

under construction and suffered a serious injury. He sued the general contractor as well as another subcontractor (PEI, not his employer) that cut the openings in the roof. The issue in the case was whether the general contractor was covered as an additional insured on PEI's CGL policy issued by Pacific. Pacific argued that its named insured, PEI, was not negligent, because its men had left the site after completing their work, and it was the general contractor's responsibility—not PEI's—to cover the roof openings PEI had cut. The court rejected this contention, however, explaining that "the fact that an accident is not attributable to the named insured's negligence is *irrelevant* when the additional insured endorsement does not purport to allocate or restrict coverage according to fault." 110 Cal.App.4th at 767 (emphasis in original).

F. Form CG 20 09—Exclusion For Additional Insured's Own Negligence Other Than Its General Supervision Of The Named Insured

The CG 20 09 form contains the same "arising out of your operations" coverage condition as CG 20 10, but it also contains several exclusions. Exclusion 3 is an extremely broad exclusion that takes away coverage for " 'bodily injury' or 'property damage' arising out of any act or omission of the additional insured(s), or any of their 'employees', other than the general supervision by the additional insured(s) of your ongoing operations performed for the additional insured(s)." What this means then is that the additional insured is not covered for his own negligence, *unless* that negligence consisted of negligent supervision of the named insured. The coverage grant is the same as an OCP (owners and contractors protective liability) policy, although the courts seem to take a broader view of OCP than CG 20 09.

In addition, since CG 20 09's coverage is so narrow, it is doubtful that it complies with most contracts requiring the procurement of additional insured coverage, since most contracts call for the coverage to include "any and all claims arising out of the subcontractor's work," or language to that effect. This presents a serious problem for the party obligated to provide the insurance, since if his insurer's additional insured endorsement does not satisfy the contract, he will be subject to a claim for breach of contract to procure insurance, which, of course, is an uninsured claim. *Reliance Ins. Co. of Illinois v. Nick J. Giannini, Inc.*, 511 N.E.2d 755 (Ill.App. 1987). At least two courts, however, have concluded that the CG 20 09 coverage satisfied a contract with relatively standard insurance procurement requirements. *Tanns v. Ben A. Borenstein Co.*, 688 N.E.2d 667 (Ill.App. 1997); *Baltimore Gas & Electric Co. v. Commercial Union Ins. Co.*, 688 A.2d 496 (Md.App. 1997).

While a clear majority of courts holds that the CG 20 10 form covers the additional insured for his own negligence, so long as that negligence arises out of the named insured's operations, the courts have struggled with the question of whether the additional insured is covered for his own negligence under the CG 20 09. That question was answered in the negative in *First Ins. Co. of Hawaii v. State, by Minami*, 665 P.2d 648 (Haw. 1983). There, the state was an additional insured on a CG 20 09 issued by a public contractor's CGL insurer. The jury verdict in the injury suit absolved the contractor of any blame for the injury, and the Supreme Court held that the jury's determination meant that any liability the State had was independent of its supervision of the contractor, and thus outside CG 20 09's coverage.

A similar result was reached in *Baltimore Gas & Electric Co. v. Commercial Union Ins. Co.*, 688 A.2d 496 (Md.App. 1997), where the court held that although the insurer issuing the CG 20 09 initially had a duty to defend the additional insured—because the suit contained allegations against the named insured as well, thus creating potential additional insured

coverage—the duty to defend, and any potential for coverage, came to an end when the injured plaintiff dismissed all of the defendants from the suit except the additional insured.

However, in *Casualty Ins. Co. v. Northbrook Prop. & Cas. Co.*, 501 N.E.2d 812 (Ill.App. 1986), the court rejected Casualty's argument that the absence of the subcontractor (who was the employer and the named insured) from the underlying injury suit precluded coverage for the general contractor / additional insured:

Casualty's argument ... ignores [the employer's] inchoate immunity under the Workers' Compensation Act ... to a suit by its employee. In addition, just because [the injured man] has not sued [the named insured] does not mean that [the additional insured] could not be held liable by virtue of its general supervision of [the named insured].

Casualty, however, involved only the question of defense, not indemnity.

In *Citgo Petroleum Corp. v. Yeargin, Inc.*, 690 So.2d 154 (La.App. 1997), CNA paid a bodily injury claim arising out of an offshore oil drilling operation on behalf of Citgo, then brought a claim against St. Paul, which listed Citgo an additional insured on a CG 20 09 endorsement. The appeals court affirmed the trial judge's determination that CNA did not meet its burden of proving coverage under the CG 20 09. The court agreed with the trial judge that Citgo's mere failure to maintain a safe workplace was not equivalent to a failure to supervise St. Paul's named insured, and thus was not covered by St. Paul's CG 20 09.

In *Home Ins. Co. v. Liberty Mutual Ins. Co.*, 641 N.E.2d 855 (Ill.App. 1994), the court held that although the subcontractor's CG 20 09 endorsement would cover Turner Constr. Co.'s negligent failure to supervise that subcontractor (the negligence count), it would not cover the Scaffold Law count alleging that Turner failed to build a suitable scaffold.

These decisions clearly indicate the relatively narrow coverage CG 20 09 provides. Oddly enough, several cases involving OCP policies have given a broader construction to precisely the same coverage language as CG 20 09. *See, e.g., Waterwiese v. KBA Constr. Mgrs., Inc.*, 820 S.W.2d 579 (Mo.App. 1991); *Detroit Edison Co. v. Michigan Mutual Ins. Co.*, 301 N.W.2d 832 (Mich.App. 1980); *Continental Cas. Co. v. Florida Power & Light Co.*, 222 So.2d 58 (Fla.App. 1969); *Western Cas. & Sur. Co. v. Southwestern Bell Tel. Co.*, 396 F.2d 351 (8th Cir. 1968); *Union Elec. Co. v. Pacific Indem. Co.*, 422 S.W.2d 87 (Mo.App. 1967). *But see, Citizens Mutual Ins. Co. v. Employers Mutual Liab. Ins. Co.*, 212 N.W.2d 724 (Mich.App. 1973) (narrow construction of OCP policy). It seems that the CG 20 10 form would have provided full coverage in all of these cases.

G. Blanket Additional Insured Endorsements

A subcontractor that does frequent, short-duration jobs may, in the course of a one-year policy period, be required to name dozens of owners and contractors as additional insureds on his policy. For this reason, it may be impractical to *name* all of the owners and contractors on an additional insured endorsement. Accordingly, the practice has arisen in the industry of using "blanket" language on additional insured endorsements. A blanket clause usually says something like, "[the definition of insured] is amended to include as an insured any person or organization to whom the named insured is obligated by contract or agreement to provide insurance such as is provided by this policy."

Blanket endorsements were manuscripted until ISO introduced the CG 20 33 endorsement in 1997, entitled, "Additional Insured—Owners, Lessees, or Contractors—Automatic Status

When Required In Construction Agreement with You.” The coverage is the same as the CG 20 10, except that CG 20 33 contains the professional services exclusion found in CG 20 07, the additional insured endorsement for architects, engineers, and surveyors. The agreement to add the additional insured must be *in writing* in order for the endorsement to apply. One problem with the wording of this endorsement is that arguably, it only applies when the named insured has a contract directly with the additional insured. Thus, technically, the form may not cover a general contractor to whom the named insured is obligated—by a contract *with someone other than the general contractor*—to furnish insurance for the general contractor. This is actually fairly common. An example would be where a steel erector is required by its contract with the steel fabricator to name the general contractor an additional insured. The CG 20 33 endorsement would arguably not satisfy this requirement, because the steel erector has no contract with the general contractor.

Since the use of blanket endorsements requires reference to the construction contract in order to determine whether a person or organization qualifies as an additional insured, several courts have had to point out that in such cases, the construction contract determines *only who is an additional insured*, not the scope of coverage. See, e.g., *Mobil Oil Corp. v. Maryland Cas. Co.*, 681 N.E.2d 552, 559 (Ill.App. 1997) (additional insured entitled to full limits of policy, not only limits required by contract); *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980, 982-83 (Ill.App. 1995) (fact that contract only required additional insured coverage for liability arising out of named insured’s *negligence* immaterial; policy endorsement provided coverage for liability arising out of named insured’s *operations*). *Accord, Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal.App.4th 321, 81 Cal.Rptr.2d 557 (Cal.App. 1999).

A contrary result obtained, however, in *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.*, 101 Cal.App.4th 1038, 124 Cal.Rptr.2d 818 (Cal.App. 2002). The subcontractor’s CGL policy was endorsed with a CG 20 10 endorsement naming the general contractor an additional insured. The subcontract, however, contained an indemnity clause that required the subcontractor to indemnify the general contractor only for liability arising in whole or in part from “acts or omissions” of the subcontractor. It was undisputed that no act or omission of the subcontractor caused the injury to the subcontractor’s employee. (The injury was caused by an explosion resulting from the general contractor’s pressure testing of pipes in a different area of the site.) The court found that the language in the additional insured endorsement (“arising out of the [subcontractor’s] ongoing operations”) was ambiguous, because it could reasonably be construed as “embracing either (1) any liability arising while [the subcontractor] was on [the construction site] doing work under the subcontract or (2) liability restricted to that arising, at least in part, from [the subcontractor’s] actual performance of such work.” Instead of resolving that ambiguity against the insurer and in favor of additional insured coverage, however, the court found that it was necessary to construe the endorsement along with the subcontract. Since the subcontract required indemnity only for liability arising from the subcontractor’s acts or omissions, concluded the court, the additional insured endorsement could not be read to provide broader coverage.

This decision is difficult to justify. First, the court construed what it found to be an ambiguous policy term in favor of the insurer that drafted it. Second, the court, in looking to the subcontract, ignored the additional insured requirement, which required coverage for the subcontractor’s ongoing operations, and instead focused on the indemnity clause, with its more restrictive obligation. But if it was proper to look to the subcontract at all to determine the scope of coverage, surely, the portion of the subcontract that prescribed the scope of additional insured coverage is more relevant than an indemnity clause. Third, the

court overlooked the fundamental differences between private-contract indemnity and commercial liability insurance. To import the narrow construction against indemnification for one's own negligence that applies to an indemnity clause into a discussion of additional insured coverage is unprecedented and unwarranted.

Where the blanket language specifically limits additional insured coverage to the extent required by the contract, however, the contract will be read with the policy to determine the scope of coverage. *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 44 Cal.App.4th 1633, 52 Cal.Rptr.2d 580, 584 (Cal.App. 1996), *Certain Underwriters at Lloyds, London v. Oryx Energy Co.*, 957 F.Supp. 930, 936 (S.D.Tex. 1997).

III. Manuscript Additional Insured Endorsements

The manuscript endorsements that have been construed by appellate courts have largely fallen into three categories:

1. endorsements that condition coverage on the named insured's work, operations or premises,
2. endorsements that condition coverage on the named insured's negligence, and
3. endorsements that limit coverage to the additional insured's vicarious (or imputed) liability for the negligence of the named insured.

A. Coverage Based On Named Insured's Operations, Use Of Leased Premises, Or Products

Courts considering the first type of endorsement have reached differing conclusions. Some have given them a broad interpretation, as courts interpreting CG 20 10 have done.

In *Continental Heller Corp. v. St. Paul Fire & Marine Ins. Co.*, 54 Cal.Rptr.2d 621 (Cal.App. 1996, subsequently depublished), the contractor was an additional insured on the subcontractor's policy, written by St. Paul. The manuscript endorsement provided that the contractor was an additional insured, "but only for damage that results from the subcontractor's work for [the contractor]." An employee of the subcontractor was injured while fetching his tools to start the day's work. The case turned on whether there was any significant difference between "arising out of," the CG 20 10 language, and "results from," the manuscript language in that case. St. Paul conceded it would owe at least a duty to defend if the "arising out of" language had been used, but argued that the "resulting from" language required a closer causal connection between the injury and the subcontractor's work. St. Paul argued that the contractor's liability could not be said to "result from" the subcontractor's work, since: (1) the trial court had found the contractor 100% responsible for the injury, and the subcontractors free from fault, and (2) the subcontractor's work was not yet being performed (rather, it was about to be performed) when the accident occurred.

The Court of Appeal disagreed. Applying the insured's reasonable expectations test to the endorsement's language, the court found it "reasonable for an insured to expect coverage for an accident occurring while a worker was fetching tools on the theory that such an accident 'results from' the work." The court also said:

[t]he argument that these injuries cannot be covered if [the contractor] is 100% liable is based on the proposition that the additional insured endorsement covers

only those injuries for which [the contractor] is found vicariously liable. This is not a legally compelled construction of the language used ...

Philadelphia Electric Co. v. Nationwide Mutual Ins. Co., 721 F.Supp. 740 (E.D.Pa. 1989), involved a utility (PECO) that hired a tree trimming service (Davey) to trim trees near power lines. Davey purchased a CGL policy from Nationwide on which PECO was an additional insured "for any work performed by [Davey] on [PECO's] behalf." Moran, a Davey employee, was injured while trimming trees when electricity arced from a nearby power line. He sued PECO, and PECO tendered the suit to Nationwide. Nationwide refused, contending that its coverage was limited to PECO's vicarious liability for Davey's negligence, but that PECO was being sued only for its own negligence. In rejecting that argument, the federal district court echoed the familiar refrain that if the insurer had intended to limit its coverage to vicarious liability, it could easily have done so by using the appropriate language. The court read the language actually used to include "all liability arising in connection with Davey Tree's work, including PECO's own negligence."

In *Hartford Acc. & Indem. Co. v. U.S. Natural Resources, Inc.*, 897 F.Supp. 466 (D.Or. 1995), the court held the additional insured was covered for its own negligence under an endorsement providing for coverage "with respect to operations performed by or on behalf of the named insured or facilities owned or used by the named insured." See also, *Hartford Casualty Ins. Co. v. Travelers Indem. Co.*, 110 Cal.App.4th 710, 2 Cal.Rptr.3d 218 (Cal.App. 2003) ("but only with respect to your operations, your work, or facilities owned or used by you" does not require a showing that the named insured's conduct directly caused the accident).

Other courts have given a narrower interpretation to similar endorsements. *Travelers Indemnity Co. v. Hanover Ins. Co.*, 470 F.Supp. 630 (E.D.Va. 1979) is in this category. The City of Norfolk leased an auditorium to a concert promoter for the purpose of putting on a concert by Loggins & Messina. The City was an additional insured on the policy written by Hanover for the concert promoter. The endorsement stated: "The City of Norfolk is included as an additional insured as respects the activities of the named insured in connection with the concert featuring Loggins & Messina April 17, 1976 at Norfolk Scope, Norfolk, Virginia." A concert goer fell to his death at the concert and his estate sued the City, among others, which tendered the claim to Hanover. Hanover refused. Although the court recognized the difference between additional insured coverage for the *activities* of the named insured (the endorsement's language) and the *negligence* of the named insured (the lease's language), the court nonetheless read the lease and the policy together and concluded that the coverage for the City was limited to "any obligations of the City of Norfolk arising out of the negligence of [the concert promoter] ... Hanover was only to insure the City of Norfolk insofar as the City's liability was derived from an act of [the concert promoter]." Since the underlying complaint alleged acts of negligence both by the City and the promoter, but not any liability of the City resulting from the promoter's acts, the court held there was no coverage for the City.

One court found this type of endorsement ambiguous and remanded the case to the trial court to consider evidence outside the contracts as to the parties' intent. *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 578 A.2d 1202 (Md. 1990). The endorsement in that case provided, "[T]he 'persons insured' provision is amended to include as insureds [Owner]. The provisions of this endorsement apply only in connection with work performed by the named insured for [Owner]."

In *City of Cedar Rapids v. Ins. Co. of North America*, 562 N.W.2d 156 (Iowa 1997), the City owned a ballroom that it leased to an adjacent hotel. A ballroom guest was departing

the ballroom using the main means of access to and from the ballroom—a city-owned pedestrian skyway over the street below—and fell through the plate-glass wall of the skyway. The injured claimant sued the City, which tendered the claim to the hotel’s insurer. The manuscript additional insured endorsement extended coverage to the City “only [for] the designated premises ... which are directly connected with the [hotel’s operations.]” The court contrasted this coverage grant with the broader coverage grant of ISO’s CG 20 24 endorsement (“arising out of the use of the leased premises”) and concluded that there was no coverage for the City because the manuscript coverage restriction limited coverage to the leased premises, and the loss occurred outside those premises. The court implied that it may well have accepted the City’s argument concerning the close nexus between the skyway and the leased premises had the CG 20 24 form been used.

B. Coverage Based On Named Insured’s Negligence

The second type of endorsement covers the additional insured for its own negligence, so long as that negligence arises out of the named insured’s negligence.

A good example of the coverage afforded by the second type of manuscript endorsement is a case that did not actually involve such an endorsement; rather, it involved a CG 20 10. Nonetheless, the facts of the case illustrate how an additional insured’s liability can arise out of the named insured’s *negligence*. *Transamerica Ins. Co. v. Turner Constr. Co.*, 601 N.E.2d 473 (Mass.App. 1992) involved a subcontractor’s employee who was injured while working on the 28th floor of a building under construction when his employer (the named insured on the Transamerica policy), who was installing granite panels on the exterior of the 31st floor, dropped a chunk of granite on him. He sued the general contractor, Turner Construction Co. (which was an additional insured on the Transamerica policy), alleging that Turner was negligent in allowing the injured man to work in an area where dangerous work was being done above him, and in failing to cordon off the area below the 31st floor.

Although *Transamerica* did not involve the issue of whether Turner’s liability arose out of the subcontractor’s *negligence* (because the additional insured endorsement did not condition coverage on the named insured’s negligence), this case nonetheless serves as a good illustration of the scope of coverage under the second type of manuscript endorsement, that limits coverage for the additional insured to liability arising out of the *negligence* of the named insured. In *Transamerica*, the subcontractor was obviously negligent in dropping a chunk of granite on its employee. Turner’s negligence consisted chiefly in failing to supervise that subcontractor so as to prevent those negligent acts. Turner’s liability, then, clearly arose out of the subcontractor’s *negligence*.

Two cases that actually did involve this type of manuscript endorsement were *Harbor Ins. Co. v. Lewis*, 562 F.Supp. 800 (E.D.Pa. 1983) and *Consolidation Coal Co. v. Liberty Mutual Ins. Co.*, 406 F.Supp. 1292 (W.D.Pa. 1976). The court in both of those cases held there was no coverage for the additional insured. The endorsement in *Harbor* said, “[i]t is agreed that the insurance afforded by this policy shall apply to the following additional insureds but only to the extent of liability resulting from occurrences arising out of negligence of [the named insured].”

Consolidation Coal involved an additional insured endorsement that provided: “but only with respect to acts or omissions of the named insured in connection with the named insured’s operations on Consolidation’s premises.” The court found the phrase ambiguous. The court also rejected the contention that the language in the endorsement was equivalent to the “arising out of” language construed in several older decisions as requiring less than direct, or “proximate,” causation. The court concluded that the policy coverage was

limited to “those instances where the acts or omissions—the negligence—of [the named insured] leads to [the additional insured’s] liability.”

However, the Illinois Appellate Court gave a very broad construction to the terms “with respect to acts or omissions of the named insured” in *United States Fire Ins. Co. vs. Aetna Life & Casualty*, 684 N.E.2d 956 (Ill.App. 1997). There, the court held that “act or omission” does not necessarily imply *negligent* act or omission, and concluded that because the named insured was the employer of the injured claimant, the additional insured’s liability may well have “arisen out of” some act or omission of the named insured employer, notwithstanding the lack of any such allegations in the pleadings.

C. Vicarious Liability Coverage

The pure vicarious liability endorsement is apparently becoming more common. Courts are divided over how to interpret these endorsements. Illinois courts have considered a number of them in recent years, with some decisions favoring the additional insured and others favoring the insurer. The Illinois Supreme Court even reviewed one such case, resulting in a divided opinion.

In *West Bend Mutual Ins. Co. v. Sundance Homes, Inc.*, 606 N.E.2d 326 (Ill.App. 1992), Ronald Bass, an employee of Lenny Szarek, Inc., was injured on a construction site and sued the general contractor, Sundance Homes, under the Illinois Scaffold Law. Sundance was the named insured on Great American’s policy and an additional insured on a policy issued to Szarek by West Bend. West Bend’s additional insured endorsement limited Sundance’s coverage to liability “imputed to it as a result of the actions or conduct of the named insured.”

West Bend argued that the condition for Sundance’s coverage was not satisfied since the underlying complaint did not allege that its named insured’s actions or conduct were a cause of Bass’s injuries. The Appellate Court, however, looked beyond the allegations of the underlying complaint to find coverage: “Sundance’s third-party complaint against Szarek for contribution as well as statements by co-workers raise the possibility that Szarek may also have been at fault.” West Bend also argued that there was no coverage for Sundance, because the Scaffold Law does not allow for liability to be imputed. The court similarly rejected this argument, however: “If this line of reasoning is pursued, it would result in the determination that Szarek purchased nothing with the additional premiums he paid to West Bend for the privilege of naming Sundance an additional insured.” But the court did not explain how the fault of Szarek, an independent contractor, could be “imputed” to Sundance. Though the court determined West Bend owed Sundance a defense, it is apparent that Sundance would have had a harder time obtaining indemnity from West Bend.

This case returned to the Appellate Court for the purpose of determining indemnity in *Great American Ins. Co. v. West Bend Mut. Ins. Co.*, 723 N.E.2d 1174 (Ill.App. 2000). But because the court’s analysis is confined to coverage for liability under the now repealed Scaffold Law, and because the court reversed the summary judgment entered in favor of West bend and remanded for further proceedings, the opinion does not shed much light on this subject.

Yet another manuscript additional insured endorsement, limiting coverage to liability “incurred solely as a result of some act or omission of the named insured,” was involved in *Village of Hoffman Estates v. Cincinnati Ins. Co.*, 670 N.E.2d 874 (Ill.App. 1996). There, the injured plaintiff sued both the named and additional insureds, alleging that they were each negligent and violated the Scaffold Law. The court, affirming summary judgment for

the insurer, noted that the condition of the additional insured coverage was not met, because the “complaint is not based solely on the acts of [the named insured]. Rather, the liability was alleged against [the additional insured] directly.” Thus, the additional insured in this case did not even get a defense.

In *National Union Fire Ins. Co. of Pittsburgh v. Glenview Park District*, 632 N.E.2d 1039 (Ill. 1994), National Union argued that its coverage was limited to liability imputed to the additional insured as a result of the named insured’s negligence, *i.e.*, vicarious liability. The court held, however, that the additional insured endorsement’s exclusion for damages “arising out of the negligence” of the additional insured would not apply to allegations that the additional insured violated the Scaffold Law: “We agree with the Appellate Court that “[t]he expansive construction necessarily required to include a violation of the [Scaffold Law] within the meaning of negligence under the subject policy contravenes the rule that insurance policy exclusions be read narrowly rather than broadly.” The court therefore held that the insurer must defend the entire complaint, including the negligence count.

D. Is Vicarious Liability Coverage Illusory?

The Idaho Supreme Court construed a similar additional insured endorsement in *Bonner County v. Panhandle Rodeo Assoc., Inc.*, 620 P.2d 1102 (Idaho 1980). The endorsement contained an exclusion for “liability arising out of the sole negligence of the additional insured.” The court refused to enforce the exclusion, reasoning that to do so would “defeat the very purpose of the insurance.” Numerous other courts have also recognized that the purpose of additional insured coverage is to furnish coverage for the additional insured’s own, even his sole, negligence. See, *Marathon Ashland Pipeline LLC v. Maryland Cas. Co.*, *supra*, 243 F.3d 1232, 1240 (10th Cir. 2001) (“it is obvious that additional insureds expect more from an endorsement clause than mere protection from vicarious liability”); *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, *supra*, 44 Cal.App.4th at 1643-44, 52 Cal.Rptr.2d at 585-86 (Cal.App. 1996) (“restricting the CGL to indemnifiable claims, and thus excluding from it those involving Shell’s sole negligence, would have left Shell unprotected for those claims for which it most needed insurance”); *Freund v. Utah Power & Light Co*, *supra*, 793 P.2d 362 (Utah 1990) (“[o]ne reason, at least, why the licensor wanted to be an additional insured was to have coverage for its own negligence”); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*, *supra*, 180 Cal.App.3d 639, 644, 225 Cal.Rptr. 742, 745 (Cal.App. 1986) (“a fundamental purpose of insurance [is] to protect against liability for one’s own negligence”); Douglas R. Richmond & Darren S. Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds*, 44 Drake L.Rev. 781, 806 (1996) (“an endorsement that provides coverage only for the additional insured’s vicarious liability may be illusory and provide no coverage at all”). The recognition by these authorities that the purpose of additional insured coverage is to protect the additional insured from liability for his own negligence begs a question: do endorsements that exclude such coverage furnish illusory coverage?

That question was presented squarely to the Illinois Supreme Court in *Glenview Park District*, *supra*, but the court declined to answer it. Chief Justice Bilandic, dissenting, said the exclusion clearly rendered the policy’s coverage illusory, since it “undercuts the entire coverage that CGL policies purport to assume, *i.e.*, coverage for the insured’s negligence.” Moreover, the Chief Justice continued, although National Union conceded that at most, the policy provided coverage for the Glenview Park District’s vicarious liability for the negligence of the named insured:

The Glenview Park District does not need, nor did it seek, coverage for vicarious liability ... [the named insured] is an independent contractor and the Glenview Park

District cannot be held vicariously liable for its acts except under a narrow exception. Even if it was to be held vicariously liable for the acts of [the named insured], the Glenview Park District would have an action for indemnity against [the named insured], and, therefore, would have no need for vicarious liability coverage.

Subsequent to the *Glenview Park District* case, two Illinois Appellate Court panels rejected the argument that exclusions for the negligence of the additional insured render the coverage illusory. *American Country Ins. Co. v. Kraemer Bros., Inc.*, 699 N.E.2d 1056 (Ill.App. 1998); *American Country Ins. Co. v. Cline*, 722 N.E.2d 755 (Ill.App. 1999). In sparsely reasoned and poorly explained decisions, these courts simply bent over backward to avoid what should have been an obvious conclusion: these endorsements provide illusory coverage. As yet, no court has squarely held that additional insured endorsements that do not cover the additional insured's negligence are illusory. There is a fully briefed case pending in the 7th Circuit Court of Appeals, however, that squarely presents the question. See, *Liberty Mutual Fire Ins. Co. v. Statewide Ins. Co.*, no. 03-2003, <http://www.ca7.uscourts.gov/briefs.htm>. (After following this link, input the case no. (03-2003) in the appropriate field to access the briefs.)

IV. Equitable Contribution, Other Insurance, Targeted Tenders, Self-Insurance, Injury To An Employee Exclusion, And Multiple Insureds

A. Equitable Contribution

The context in which most litigation concerning additional insured coverage takes place is an action by the insurer that paid a loss on behalf of its insured (say, e.g., the general contractor) against the subcontractor's insurer on whose policy the general contractor was an additional insured. Generally speaking, if the insurer that paid the loss and seeks reimbursement is an excess carrier (either because his policy is a true excess policy or, more typically, because his primary policy has an excess "other insurance" clause), his action will be one for equitable *subrogation*. On the other hand, if he is also a primary carrier, his action will be one for equitable *contribution*.

The distinction is thoroughly explained in *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 65 Cal.App. 4th 1279, 77 Cal.Rptr.2d 296 (Cal.App.1998). The issue before the court was whether a release the insured had given to Maryland Casualty barred an action by Fireman's Fund for reimbursement of sums it had paid to defend and settle a construction defect suit against the insured. *Id.* at 300. Both insurers agreed that under a subrogation theory, the release would be a bar to Fireman's Fund's claim, since a subrogee has no greater rights than its subrogor, and is subject to any defenses that could have been raised against the subrogor. *Id.* Maryland argued that equitable contribution is available only where the plaintiff insurer is subrogated to the rights of the insured. 77 Cal.Rptr.2d at 301. In rejecting this argument, the court gave an explanation of equitable contribution that is worth quoting:

Equitable contribution is entirely different. It is the right to recover, not from the party primarily liable for the loss, but from a co-obligor who shares such liability with the party seeking contribution. * * * Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its co-insurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. * * * This right of equitable contribution belongs to each insurer individually. It is not

based on any right of subrogation to the rights of the insured, and is not equivalent to standing in the shoes of the insured. * * * Unlike subrogation, the right to equitable contribution exists independently of the rights of the insured.

Id. at 302-03. Because of the independent nature of equitable contribution, the court held, the release the insured gave to Maryland did not preclude Fireman's Fund's action. *Id.* at 308.

The elements of a claim for equitable contribution were discussed in *Schal-Bovis, Inc. v. Casualty Ins. Co.*, 732 N.E.2d 1179 (Ill.App. 2000). The insurer making the claim must prove: (1) all facts necessary to the claimant's recovery against the insured; (2) the reasonableness of the amount paid to the claimant; and (3) an identity between the policies as to parties and insurable interests and risks. 732 N.E.2d at 1186. It is this third element that was at issue in *Schal-Bovis*.

The dispute involved coverage for the general contractor (Schal) and the owner (Buck). There was no dispute, the court noted, that Schal and Buck were additional insureds on policies issued to four different subcontractors by Great American, Wausau, Casualty and American States. For ease of reference, here are the four subcontractor's insurers and their named insureds:

Great American	⇒	Ranken Steel
Wausau	⇒	Ozark Steel Fabricators
Casualty	⇒	Alcan United Concrete
American States	⇒	Chicago Forming

Great American and Wausau paid their share of the loss on behalf of Schal and Buck, and sought equitable contribution from Casualty and American States, which also covered Schal and Buck as additional insureds, but did not pay on their behalf. The court analyzed whether the third element for an equitable contribution claim was satisfied, i.e., did the four policies cover the same risk? It began its analysis with a quote from Couch on Insurance 3d at sec. 218:6:

It is not necessary that the policies provide identical coverage in all respects in order for the two policies to be considered concurrent, and each insurer entitled to contribution from the other; **as long as that particular risk actually involved in the case is covered by both policies, the coverage is duplicate, and contribution will be allowed.** To illustrate, the fact that the first liability insurer's policy covered only property damage while the second insurer's policy covered bodily injury and property damage did not relieve the first insurer from having to contribute; both policies covered the same risk because both provided coverage for property damage that occurred during their respective policy periods.

732 N.E.2d at 1186 (emphasis supplied). The court concluded that the four policies did not cover the same risk, reasoning as follows:

Although the Great American policy covered Schal and Buck as additional insureds, it did so only to the extent that Schal's and Buck's liability arose out of Ranken's work. The Wausau policy covered Schal and Buck from liability, but only when that liability arose out of Ozark's work. Clearly, the risk that a plaintiff might be injured

in connection with Ranken's work is a different risk than the risk that a plaintiff might be injured in connection with Ozark's work. These risks are, in turn, different from the risks associated with a plaintiff being injured in connection with Alcan's work or in connection with Chicago Forming's work (as is required by the Casualty and American States policies). Thus, because each insurer insured substantively different risks, each is precluded from seeking equitable contribution from the others.

732 N.E.2d at 1187.

The analysis in *Schal-Bovis* conflicts with a number of cases that took a broad view of the requirement that there be an identity of interest, insured and risk. See, *Continental Cas. Co. v. Security Ins. Co. of Hartford*, 665 N.E.2d 374 (Ill.App. 1996); *Western Cas. & Sur. Co. v. Western World Ins. Co.*, 769 F.2d 381, 383 (7th Cir. 1985); *Home Ins. Co. v. Certain Underwriters at Lloyd's London*, 729 F.2d 1132 (7th Cir. 1984); *Kirkland v. Ohio Cas. Ins. Co.*, 569 P.2d 1218 (Wash.App. 1977); *Indiana Ins. Cos. v. Granite State Ins. Co.*, 689 F.Supp. 1549 (S.D.Ind. 1988). There are, likewise, a number of cases taking the same broad view of a closely analogous question: whether, for purposes of an "other insurance" clause in one policy, a second policy can be considered "other insurance" when it does not provide coverage identical to the first. The courts have almost universally determined that where both policies cover the loss, any differences between them are immaterial, and the "other insurance clause" in the first policy will apply. See, e.g., *United States Fire Ins. Co. v. Aetna Life & Cas. Co.*, 684 N.E.2d 956 (Ill.App. 1997).

Not surprisingly, it did not take long for the analysis in *Schal-Bovis* to be rejected. In *Cincinnati Ins. Co. v. River City Constr. Co.*, 757 N.E.2d 676 (Ill. App. 2001), a downstate district of the Illinois Appellate Court, rejecting *Schal-Bovis*, recognized that the distinction between the subcontractors is unimportant in determining whether the requirements for an equitable contribution claim have been met, so long as the general contractor was covered under both subcontractors' policies for the loss. Clearly, *River City* is consistent with the majority view not only of the doctrine of equitable contribution in particular, but of the broad construction that should be given to equitable remedies in general.

B. Other Insurance

1. The three types of other insurance clauses and the "clause-matching" rules

There are three basic types of other insurance clauses: *pro rata*, excess, and escape. The courts have developed a series of "clause-matching" rules that are designed to resolve conflicts between competing clauses. An excellent primer on these rules can be found in *Scottsdale Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 95 Cal.App.4th 891, 116 Cal.Rptr.2d 174 (Cal.App. 2002). Basically, the rules provide that where both policies have mirroring other insurance clauses, they will share coverage. Where one policy has a *pro rata* clause, but the other has an excess or escape clause, the policy with the *pro rata* clause will pay the entire loss up to its limits. Finally, where one policy has an excess clause and the other an escape clause, the policy with the escape clause will pay the entire loss up to its limits. These rules are followed almost everywhere, with two exceptions: (1) *Lamb-Weston* jurisdictions, and (2) a handful of jurisdictions that refuse to enforce escape clauses on public policy grounds. Pennsylvania appears to be such a jurisdiction. *Fryer v. Allstate Ins. Co.*, 573 A.2d 225 (Pa.App. 1990). But those jurisdictions refusing to give effect to escape clauses otherwise follow the general rules.

These “clause-matching” rules are not followed in Lamb-Weston jurisdictions, however. The Lamb-Weston rule, whose initials “have come, in insurance parlance, to stand for ‘Lazy Way’” (8A Appleman, *Insurance Law and Practice* § 4906), abandons any pretense at giving effect to the language of the policies or the intent of the parties, and instead adopts a blanket rule that all “other insurance” clauses are repugnant to each other, and whenever there is more than one policy that applies to a loss, all policies prorate coverage, regardless of the language of their “other insurance clauses.” Appleman says, “the resulting injustice is the same as if all leases were construed to permit recoveries by landlords, or all criminal cases to uphold the prosecution. It simply is not a proper judicial function to abandon the court’s responsibilities and to push a cash register button to arrive at a result.” *Id.* There are opposing views, however. In his treatise *Insurance Claims and Disputes* (McGraw/Hill, 3rd ed. 1995), Allan D. Windt recommends a rule that provides, except in the case of umbrella insurance, “other insurance clauses, by attempting to obtain contrary goals, are mutually repugnant regardless of how they happen to be worded.” *Id.* at § 7:02. This is virtually identical to the *Lamb-Weston* rule. It is difficult to keep track of which states follow *Lamb-Weston*, since several of them, most notably Maine, Michigan, Louisiana and Tennessee, appear both to have adopted the rule and rejected it at different times. It appears that the rule, also known as the “Oregon rule,” has been consistently followed in Alaska, Arizona, Delaware, Idaho, Indiana, Nevada, Oregon, and Rhode Island.

The difficulty of keeping track of which jurisdictions follow this approach is exemplified by California, whose courts have declined to adopt any rigid rule for resolving other insurance disputes. Recently, the Court of Appeal, in a long-tail loss scenario involving construction defects occurring over several policy periods, refused to give effect to an excess clause in a CGL policy covering one of those policy periods. *See, Century Surety Co. v. United Pacific Ins. Co.*, 109 Cal.App.4th 1246, 135 Cal.Rptr.2d 879 (Cal.App. 2003). The court, echoing previous decisions, observed that “imposing liability for a loss on the insurer with a policy providing for pro rata coverage would annul that policy’s language, and create the anomaly that courts will only predictably enforce proration between policies when they all have conflicting ‘excess other insurance’ language barring proration.” 109 Cal.App.4th at 1258.

But the next month, a different panel of the same court gave effect to an excess clause in a CGL policy. *See, Hartford Casualty Ins. Co. v. Travelers Indem. Co.*, 110 Cal.App.4th 710, 2 Cal.Rptr.3d 18 (Cal.App. 2003). There, a commercial landlord was an additional insured on a tenant’s CGL policy. An employee of the tenant fell off a balcony of the building and died. His estate sued the landlord, which sought coverage under the tenant’s CGL policy. The landlord’s insurer cited its excess other insurance clause in support of its assertion that the tenant’s insurer owed sole primary coverage. That clause is contained in the 1998 and subsequent versions of the ISO CG 00 01 coverage form, and provides that the coverage is excess over any other policy on which the insured has been added as an additional insured by an endorsement. In this case, the court gave effect to the excess clause, finding that it was a narrow clause applying only in certain situations, in contrast to the broad excess clause at issue in *Century Surety Co. v. United Pacific Ins. Co.*, *supra*. The court explained that the trend in California is toward disfavoring the broad excess clauses, not the narrow ones, and that the narrow excess clause in this case frustrated neither public policy nor the insured’s reasonable expectations.

2. How other insurance clauses affect additional insured coverage

The other insurance clause in the subcontractor's policy is the most common and vexatious obstacle to successful risk transfer via additional insured status. The standard CGL policy has a *pro rata* other insurance clause, and unless negated or modified by some other provision, that clause will limit the additional insured coverage under the subcontractor's policy to its *pro rata* share of the loss, along with the owner's and contractor's own policies.

Historically, there are two basic ways that owners and contractors have tried to overcome this problem: (1) by requiring, in the construction contract, that the additional insured coverage be *sole primary*, or *non-contributing*, and (2) by endorsing the owner's or contractor's own policy with an *excess* other insurance clause. Although both of these methods have met with some degree of success, the first method is more complicated, since it requires the subcontractor to communicate the requirement to his insurer, and that insurer to issue an endorsement conforming to the requirement. As often as not, the process breaks down and the required coverage is not obtained, leaving the owner or contractor with only *pro rata*, also known as *concurrent*, additional insured coverage.

The second method is simpler and more reliable, but it too can be thwarted. The 1998 version of the CGL CG 00 01 coverage form provides, at Section IV, Other Insurance, that the policy's coverage is excess over:

Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

This type of excess other insurance provision was commonly added by manuscript endorsement prior to 1998. For the most part, courts gave it its intended effect. See, e.g., *American States Ins. Co. v. Liberty Mutual Ins. Co.*, 683 N.E.2d 510 (Ill.App. 1997); *Transamerica Ins. Group v. Turner Constr. Co.*, 601 N.E.2d 473 (Mass.App. 1992); *Northbrook Prop. & Cas. Co. v. United States Fidelity & Guaranty Co.*, 501 N.E.2d 817 (Ill.App. 1986). It would be expected that they would continue to do so.

The excess-over-additional-insured-coverage approach can be thwarted by making the additional insured endorsement apply on an excess basis, however. Under the majority rule, the conflicting excess clauses cancel each other out and the two policies prorate coverage. However, as a practical matter, most of the larger insurers that endorse their additional insured endorsements with an excess clause (St. Paul, Travelers and CNA, for example) also include an "elastic" provision, which make the coverage primary if a contract requires it. The courts tend to hold that standard additional insured requirements in contracts do require primary coverage, even if they do not specifically say so. In *Pecker Iron Works v. Travelers Ins. Co.*, 2003 WL 297546 (N.Y. 2003), for example, Travelers issued an additional insured endorsement that provided for excess coverage "unless [the named insured] ha[d] agreed in a written contract for this insurance to apply on a primary or contributory basis." New York's highest court held that the requirement in the subcontract that the subcontractor provide additional insured coverage for the general contractor necessarily meant primary coverage.

Moreover, even where the subcontractor's insurer does not endorse its additional insured endorsement with an excess clause, the excess clause on the owner or contractor's own policy will not be recognized in the states that have adopted the "Lamb-Weston" rule.

The excess-over-additional-insured-coverage approach can also be thwarted by an exclusion or other limitation in the additional insured endorsement. This is what happened in *Home Ins. Co. v. Liberty Mutual Ins. Co.*, 641 N.E.2d 855 (Ill.App. 1994). The subcontractor's policy was endorsed with the ISO CG 20 09, which contains an exclusion for all liability arising out of any act or omission of the additional insured, other than his general supervision of the named insured's work. The court reasoned that since the CG 20 09 would not cover the allegation that the general contractor built an improper scaffold, then as to that allegation, the subcontractor's policy would not constitute "other insurance," and therefore the excess clause in the general contractor's policy would not apply. A similar analysis and result can be found in *Maryland Cas. Co. v. Nationwide Mut. Ins. Co.*, 81 Cal.App.4th 1082, 97 Cal.Rptr.2d 374 (Cal.App. 2000).

3. The horizontal exhaustion rule

An additional insured facing a large loss must keep in mind the "horizontal exhaustion" rule. Under this rule, all primary insurance must be exhausted before any excess insurance is triggered. Most cases applying this rule arise in the context of long tail claims involving continuous loss over several policy periods, where the rule operates to require exhaustion of all triggered primary policies for all relevant years before any excess policy is triggered. The rule also applies, however, to cases involving only one policy period, such as garden variety bodily injury cases. Thus, an additional insured general contractor cannot access the subcontractor's excess policy until he has first exhausted his own primary insurance. As applied to the additional insured scenario, the rule requires not just the exhaustion of all policies listed as primary underlying insurance in the subcontractors' excess policy declarations, but also other primary insurance not listed, such as the general contractor's own policy.

The horizontal exhaustion rule has been applied in the bodily injury / non-auto scenario in the following cases: *Travelers Indem. Co. v. American Casualty Co. of Reading, Pa.*, 2003 WL 751081 (Ill.App. 2003), *United States Fire Ins. Co. v. CNA*, 752 N.Y.S.2d 765 (N.Y.App. 2002), *New Hampshire Ins. Co. v. Hanover Ins. Co.*, 696 N.E.2d 22 (Ill.App. 1998), *app den.*, 705 N.E.2d 440, *Smith v. Wausau Underwriters Ins. Co.*, 977 S.W.2d 291 (Mo.App. 1998), and *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir. 1996) (Texas law). In the auto context, the rule was also applied in *Continental Ins. Co. v. Lexington Ins. Co.*, 55 Cal.App.4th 637, 64 Cal.Rptr.2d 116 (Cal.App. 1997). The court held that Lexington's umbrella policy issued to a tractor lessor need not contribute towards the settlement of the underlying wrongful death claim until exhaustion of all other underlying insurance, whether listed as such in the umbrella declarations or not, including Continental's commercial auto policy issued to the trailer lessor, which was excess by coincidence when the trailer was pulled by a non-owned tractor. The court rejected the notion that this case should be decided like any competing "other insurance" clause case, and focused instead on the different risks insured by a commercial auto policy and an umbrella policy.

4. "Super" excess and "super" escape clauses

In an attempt to overcome the horizontal exhaustion rule, some general contractors' insurers draft their other insurance clauses to render the coverage excess over any other insurance, "whether primary, excess or contingent." Armed with this clause, the insurer argues that he is excess even over a "true excess" policy. These arguments have met with only limited success however, with most courts giving no effect all to the terms, "whether primary, excess or contingent," a minority giving them the intended effect, and some courts requiring proration. Most, but not all of the cases on this subject come from the automobile context.

The following cases gave no effect to the "whether primary, excess or contingent" language: *Automobile Underwriters, Inc. v. Hardware Mut. Cas. Co.*, 273 NE2d 360 (Ill. 1971) (no effect; excess policy is excess over super-escape policy); *Sonoco Products Co., Inc. v. Fire & Cas. Co. of Connecticut*, 767 A.2d 1018 (N.J.App. 2001) (no effect; excess policy prorates with super-excess policy); *Bowerman v. State Farm Ins. Co.*, 1996 WL 549207 (unpublished) (Ohio App. 1996) (super-escape clause not given effect); *Insurance Co. of N. America v. Continental Cas. Co.*, 575 F.2d 1070 (3rd Cir. 1978) (Pennsylvania law) ("[t]he question we must answer is whether 'other valid insurance' should be given a different meaning than 'other insurance, whether on a primary, excess or contingent basis[;]' [w]e think not"); *but see, Maryland Cas. Co. v. Horace Mann Ins. Co.*, 551 F.Supp. 907 (W.D.Pa. 1982) (words, "whether primary or excess" in primary policy rendered that policy excess over a true excess policy).

The following cases held that the policy with the terms "whether primary, excess or contingent" prorated with the excess policy: *Titan Indem. Co. v. American Justice Ins. Reciprocal*, 758 So.2d 1037 (Miss.App. 2000) (excess policy prorates with super-escape policy; court holds that the usual rule that excess policies are excess over escape policies is not the law in Mississippi and that both policies prorate—rule is the same for excess vs. super-escape); *Avis Rent-A-Car System, Inc. v. Allstate Ins. Co.*, 937 P.2d 802 (Colo.App. 1996), *aff'd.*, 947 P.2d 341 (1997) (excess policy prorates with super-excess policy).

The following cases gave effect to the "whether primary, excess or contingent" language: *New Hampshire Indem. Co. v. Budget Rent-A-Car Systems, Inc.*, 2003 WL 1088452 (Wash. 2003) (policy with super-escape clause, i.e., with words "whether primary, excess or contingent" in an escape clause, was excess over policy with excess clause); *USF&G v. Hanover Ins. Co.*, 632 NE2d 402 (Mass. 1994) (policy with super-escape clause is excess over policy with excess clause); *Horace Mann v. Continental Cas. Co.*, 284 S.E.2d 211 (N.C.App. 1981) (policy with super-escape clause is excess over policy with excess clause).

5. How does an extrinsic contract affect the operation of other insurance clauses?

Some courts have been asked to hold that a provision in a contract or lease extrinsic to the policy trumps the other insurance clause in the subcontractor's policy. The courts have generally refused to do so unless either the additional insured has a judgment for indemnity against the named insured, or the policy incorporates and subordinates itself to the lease. **Compare**, e.g., *Phillips Petroleum Co. v. St. Paul Fire & Marine Ins. Co.*, 113 S.W.2d 37 (Tex.App. 2003) (blanket additional insured endorsement's reference to extrinsic contract operates only to identify who is an in-

sured, but does not incorporate other terms of contract into policy coverage); *Travelers Cas. & Sur. Co. v. American Equity Ins. Co.*, 93 Cal.App. 4th 1142, 113 Cal.Rptr.2d 613 (Cal.App. 2001) (indemnity agreement not determinative of other insurance issue in absence of judgment for indemnity against named insured); *Reliance Nat. Indem. Co. v. General Star Indem. Co.*, 72 Cal.App.4th 1063, 85 Cal.Rptr.2d 627 (Cal.App. 1999) (other insurance clauses controlled in absence of judgment for indemnity); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Hartford Ins. Co. of the Midwest*, 677 N.Y.S.2d 105 (N.Y.App. 1998) (equitable contribution action by subcontractor's insurer against general contractor's insurer not precluded by indemnity clause in subcontract agreement; other insurance clause in subcontractor's policy controls); *Mobil Oil Co. v. Maryland Cas. Co.*, 681 N.E.2d 552 (Ill.App. 1997) (additional insured entitled to full limits of policy, even though its contract with policyholder required much lower limits); *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill.App. 1995) (additional insured entitled to coverage for his own negligence, even though his contract with policyholder entitled him only to coverage arising out of policyholder's negligence, because additional insured endorsement provided coverage for additional insured's own negligence); *United States Fidelity & Guaranty Co. v. CNA Ins. Cos.*, 618 N.Y.S. 465 (N.Y.App. 1994) (other insurance clauses—not indemnity agreement—controls in action for equitable contribution between insurers) **with**, *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal.2d 622, 532 P.2d 97 (Cal. 1975) (indemnity provision in contract between named and additional insured trumped other insurance clause in policy, because additional insured had judgment for indemnity against named insured); *J. Walters Constr. Co. v. Gillman Paper Co.*, 620 So.2d 219 (Fla.App. 1993) (following *Rossmoor*); *Truck Ins. Exch. v. Liberty Mutual Ins. Co.*, 428 N.E.2d 1183 (Ill.App. 1981) (indemnity clause in truck lease controlled over other insurance clause in policy, because policy incorporated lease by reference).

A recent trend has emerged, however, where courts have relied on an extrinsic indemnification agreement as a basis for dispensing with traditional policy analysis. For example, two very recent federal cases dispensed with the horizontal exhaustion rule. See, *American Indemnity Lloyds v. Travelers Prop. & Cas. Co.*, 335 F.3d 429 (5th Cir. 2003) (indemnity agreement between general contractor and subcontractor required subcontractor's CGL policy to pay entire loss on behalf of general contractor (an additional insured on the subcontractor's policy), even though other insurance clauses of policies both provided for sharing with other primary policies); *Wal-Mart Stores, Inc. v. R.L.I. Ins. Co.*, 292 F.3d 583 (8th Cir. 2002) (where settlement in products suit was for \$10,000,000, and contract required manufacturer to provide vendor with \$2,000,000 of liability insurance, manufacturer's excess insurer was required to furnish next layer of coverage after manufacturer's \$1,000,000 primary policy was exhausted, without first exhausting the vendor's own primary policy).

A recent California case held that the scope of coverage for the additional insured would be commensurate with the scope of the indemnity agreement, and not as broad as the additional insured endorsement provided. See, *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.*, 101 Cal.App.4th 1038 (Cal.App. 2002). Casados was injured while doing electrical work for his employer, Sasco Electric, at a rail yard in California. ARB was the general contractor, and Sasco was ARB's subcontractor. Although Casados was doing Sasco's work under the subcontract, his injury was not caused in any way by that work. Rather, ARB was pressure testing a pipe connected to a fuel tank in a completely different area,

when the pipe exploded, causing metal fragments to strike Casados and injure him. Casados filed suit for his injuries against ARB and the railroad, ATSF.

The subcontract required Sasco to name ARB an additional insured on its CGL policy, and to indemnify ARB from any bodily injury claims or suits arising out of Sasco's work, provided that such claims or suits arose from Sasco's acts or omissions. American Dynasty issued a CGL policy to Sasco. The policy included an additional insured endorsement on a CG 20 10-type form, that provided coverage to ARB for "liability arising out of [Sasco's] ongoing operations performed for [ARB]." ARB had its own CGL policy with St. Paul.

St. Paul provided a defense to ATSF and to ARB, and tendered their defense to American Dynasty. American Dynasty declined the tender, and St. Paul paid a total of \$113,000 in defending and settling the Casados suit. St. Paul then filed an action for declaratory relief, seeking reimbursement from American Dynasty. It was undisputed that no act or omission of Sasco caused the injury to the Casados. The trial court entered judgment for St. Paul for the amounts it paid to defend and settle the Casados suit. American Dynasty appealed.

On appeal, the court found that the language in the additional insured endorsement ("arising out of [Sasco's] ongoing operations") was ambiguous, because it could reasonably be construed as "embracing either (1) any liability arising while Sasco was on [the construction site] doing work under the subcontract or (2) liability restricted to that arising, at least in part, from Sasco's actual performance of such work." Instead of resolving that ambiguity against the insurer and in favor of additional insured coverage, however, the court found that it was necessary to construe the endorsement along with the subcontract. Since the subcontract required indemnity only for liability arising from the subcontractor's acts or omissions, concluded the court, the additional insured endorsement could not be read to provide broader coverage.

This decision is difficult to justify. First, the court construed what it found to be an ambiguous policy term in favor of the insurer that drafted it. Second, the court, in looking to the subcontract, ignored the additional insured requirement, which required coverage for the subcontractor's ongoing operations, and instead focused on the indemnity clause, with its more restrictive obligation. But if it was proper to look to the subcontract at all to determine the scope of coverage, surely, the portion of the subcontract that prescribed the scope of additional insured coverage is more specific, and more relevant, than the indemnity clause. Additionally—all other things being equal—when confronted with two clauses providing different types of coverage, a court is supposed to choose the clause that results in broader coverage. Third, the court overlooked the fundamental differences between private-contract indemnity and commercial liability insurance. To import the narrow construction against indemnification for one's own negligence that applies to an indemnity clause into a discussion of additional insured coverage is unprecedented and unwarranted.

I am not the only commentator to criticize this decision. *See also*, John K. DiMungo and Paul E.B. Glad, CALIFORNIA INSURANCE LAW HANDBOOK, § 106 (2003 ed.). Those authors said the following:

The analysis of the *St. Paul* court does a disservice to principals seeking protection from the risks associated with hiring an independent contractor. Prin-

cipals can never be sure that their indemnity clauses will be found enforceable. * * * [I]nsurance is *most* needed when the indemnity obligation fails; yet the effect of the *St. Paul* decision is to limit insurance to indemnifiable claims. This despite the fact the general contractor in *St. Paul* presumably paid in the subcontract price the premium for the additional insured endorsement.

The reasoning of *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.*, *supra*, was echoed in *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.*, 4 Cal.Rptr.3d 416 (Cal.App. 2003). Bigge Crane & Rigging Co. rented a crane to Schuff Steel Co. As required by the lease agreement, Schuff named Bigge an additional insured on its CGL policy. This was done by means of a CG 20 10-type endorsement that provided coverage to Bigge for liability arising out of Schuff's work **performed for Bigge**. Cvitkovich, a Schuff employee, was killed when a load fell on him from the crane while operated by another Schuff employee. Cvitkovich's estate and two other Schuff employees sued Bigge for their injuries. These suits were settled, and the insurers subsequently filed declaratory litigation to sort out who was ultimately responsible for those settlements.

The court held that *St. Paul's* CG 20 10 endorsement was ambiguous in context because Schuff performed no work for Bigge, but rather for the general contractor and the owner. Rather than resolving the ambiguity against *St. Paul*, the court resorted to rules of construction and extrinsic evidence. The court held that since the endorsement was issued to satisfy Schuff's obligation under its crane lease with Bigge, since the certificate issued by the producer referred to the lease, and since the endorsement was a blanket endorsement that applied only if an extrinsic contract existed requiring coverage (such as the lease), the construction of the endorsement should be informed by the provisions of the lease, most particularly the indemnification clause. Since the lease provided for Schuff to indemnify Bigge only for Schuff's negligent acts, yet Bigge was sued for its own negligent acts, neither the lease nor the endorsement should be construed to afford coverage to Bigge for the settlements, said the court, except for any portion of those settlements paid on Bigge's behalf that reflected not its own negligence, but rather its liability under joint and several liability rules for Schuff's negligence. The court remanded the case for an allocation of fault between Schuff and Bigge, holding that *St. Paul* would be the primary insurer for any portion of the settlement attributable to Schuff's negligence, and that Bigge's own insurer, *Frontier*, would be primary for the remainder.

In addition to the conceptual flaws in this decision, which were discussed above with respect to *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.*, this decision creates obvious practical impediments to collecting on additional insured coverage. If a fault allocation trial is going to be required, that will have a chilling effect on settlements, because carriers in *Frontier's* position may simply decide that it is not worth the risk of paying large sums to settle a case and then face a difficult and expensive trial to recover those sums from other insurers. Those insurers may simply take cases to trial in order to obtain fault allocations from the jury. *Frontier* brought all of these concerns to the court's attention, but they did not sway the court.

Bucking this trend is *Atofina Petrochemicals, Inc. v. Evanston Ins. Co.*, 104 S.W.3d 247 (Tex.App. 2003), in which the court rejected the insurer's attempt to limit its obligations to the scope of the indemnity clause in its named insured's subcontract with the additional insured. The court explained as follows:

As we interpret the Triple S / ATOFINA contract, Triple S agreed to obtain insurance for ATOFINA, but the agreement to purchase insurance was not limited to insuring only the indemnity obligation. If a party agrees to provide liability insurance coverage for another solely to support an indemnity obligation, the insurance requirement is limited to the indemnity liability. But where the additional insured provision stands separately from the indemnity provision, and is essentially a free-standing insurance purchasing requirement, the scope of the insurance requirement is not limited by the indemnity clause.

The contractual requirement that the insurance to be obtained by Triple S include insurance coverage for the indemnity obligation does not exclude other excess insurance coverage. In this context the word "including" means "as a part of," or "in addition to." Here, "include" is a term of enlargement. See BLACK'S LAW DICTIONARY 763 (6th Ed.1990). We conclude the insurance purchasing requirement clause in the Triple S / ATOFINA contract was not merely in support of the indemnity provision, but rather required Triple S to provide insurance for ATOFINA to the extent Triple S had insurance coverage; the indemnity insurance requirement was in addition to, not exclusive of, other coverage under the excess policy. Because ATOFINA required by contract that Triple S name ATOFINA as an additional insured on Triple S's comprehensive liability and excess liability policies, and because Evanston's policy defines an insured as including a person or organization for whom Triple S agreed to provide insurance, ATOFINA is an insured under the Evanston policy, and the scope of the policy is not limited by the indemnity agreement in the Triple S / ATOFINA contract.

104 S.W.3d at 250.

C. Targeted Tenders

Frustration with other insurance clauses in subcontractors' policies has led to the formulation of a novel doctrine in Illinois that is not unlike Alexander the Great's method of untying the Gordian knot. The doctrine, variously called "targeted tender," or "the right of election," basically provides that notwithstanding the other insurance clause in the subcontractor's policy, the additional insured general contractor can "target" the subcontractor's policy to pay the whole loss by simply writing a letter that says so.

This concept was first recognized in *Institute of London Underwriters v. Hartford Fire Ins. Co.*, 599 N.E.2d 1311 (Ill.App. 1992), where the court framed the issue (and resolved it) as follows:

[W]here two insurance policies potentially apply to a loss, may an insured elect which of its insurers is to defend and indemnify the claim by tendering its defense to one insurer and not the other and thereby foreclose the settling insurer from obtaining contribution from the non-settling insurer. The trial court found that it could.
* * * We affirm.

The Illinois Supreme Court gave the "targeted tender" doctrine its imprimatur in *John Burns Constr. Co. v. Indiana Ins. Co.*, 727 N.E.2d 211 (Ill. 2000). The key to the decision is the meaning of the word "available," which is contained in the other insurance clause of the ISO CGL coverage form. Both the 1993 and the 1998 versions of the CG 00 01 form,

at Section IV, Commercial General Liability Conditions, 4. Other Insurance, use the word “available” in the same way:

If other valid and collectible insurance is **available** to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

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

(Emphasis supplied.) The *John Burns* court reasoned that in order for the general contractor’s own insurance to be **available**, it would have to have been invoked by the insured, i.e., the general contractor. It is important to note that this does not mean that a mere failure to tender the general contractor’s defense to his own carrier makes that insurance unavailable, or, put another way, it is not true that until the insured tenders his defense to the carrier, that carrier’s insurance is unavailable. The Illinois Supreme Court made that clear in *Cincinnati Cos. v. West American Ins. Co.*, 701 N.E.2d 499 (Ill. 1998), where the court held that mere notice was sufficient to trigger a policy, regardless of whether a tender had been made to the carrier. But the *Cincinnati* court attached an important proviso to that pronouncement: *provided the insured has not knowingly foregone the insurer’s assistance.*

So the rule emerging from these two cases is now clear: so long as the insured has not *knowingly foregone* his own insurer’s assistance, his own insurance is **available**, i.e., reachable by means of the other insurance clause in the subcontractor’s policy, so long as the general contractor’s carrier had notice. But if he has knowingly foregone his own insurer’s assistance, then his policy is unavailable, and the subcontractor’s “other insurance” clause will not apply.

Some insurers attempted to undo *London Underwriters* by adding manuscript language to their Duties in the Event of Occurrence, Claim or Suit clauses, requiring the insured to tender to all other insurers. The only published case so far involving this language is *American Country Ins. Co. v. Kraemer Bros., Inc.*, *supra*, 699 N.E.2d 1056 (Ill.App. 1998). The manuscript language in that case required, in addition to providing prompt notice of any occurrence, claim or suit, and cooperating with the insurer, that the insured:

Promptly tender the defense of any claim made or “suit” to any other insurer which also has **available** insurance for a loss which we cover under Coverage A or Coverage B of this coverage part.

But the court in that case decided only that public policy does not disfavor the clause. The court did not decide whether the clause can be construed as requiring the insured to tender his defense to his own insurer. In light of the discussion in *John Burns* of the term “available,” it seems unlikely that the clause could be so construed. Note, also, that the ISO CGL policy Duties in the Event of Occurrence, Claim or Suit clause does *not* require an additional insured to tender his defense and indemnification to his own insurer. See, *Employers Ins. of Wausau v. James McHugh Constr. Co.*, 144 F.3d 1097 (7th Cir. 1998).

While the *John Burns* case is a nice arrow for the general contractor to have in his quiver, it is questionable whether any court outside Illinois will follow this case. There is at least some case law from other jurisdictions subscribing to the view that the right of equitable contribution among insurers is absolute, and the insured can do nothing to impair it. See, e.g., *Tops Markets, Inc. v. Maryland Casualty Co.*, 700 N.Y.S.2d 325 (N.Y.App. 1999) (owner's self-insured retention did not preclude contractor's insurer, which settled claim by contractor's employee against owner, from obtaining equitable contribution from owner's carrier); *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, supra, 65 Cal.App. 4th 1279, 77 Cal.Rptr.2d 296 (Cal.App. 1998) (insured's release of non-settling insurer did not bar settling insurer from obtaining equitable contribution). Courts subscribing to the "absolute right" approach are very unlikely to go along with *John Burns*.

D. Problems created by self-insurance

Problems can result when the general contractor is an additional insured on an insurance instrument that constitutes less than full risk transfer. That is, where the subcontractor has a deductible, self-insured retention ("SIR"), or is self-insured.

In *USX Corp. v. Liberty Mutual Ins. Co.*, 645 N.E.2d 396 (Ill.App. 1994), the parties attempted risk transfer by using the subcontractor's self-insurance program instead of commercial insurance. Originally, the subcontract agreement between Turner Constr. Co. and USX required USX to name Turner an additional insured on USX's CGL policy. That requirement was modified, however, after USX represented that it self-insured its own risks, including public liability risks. In exchange for USX's promise to include Turner within USX's self-insurance program, the parties deleted the requirement that USX purchase commercial insurance. After Turner was sued by an injured USX employee, USX initially undertook Turner's defense, but then filed a declaratory judgment action, alleging that the self-insurance agreement constituted a void promise by USX to indemnify Turner for Turner's own negligence, in violation of Illinois' anti-indemnity statute for construction contracts. The trial court granted summary judgment to USX, and Turner and Liberty appealed.

The Appellate Court affirmed. The court first noted that under Illinois' anti-indemnity statute, "[t]he rule is clear that while contracts to indemnify a party for the negligence of the indemnitee are void, contracts to procure insurance to cover the negligence of such third parties are valid and enforceable." The court held that USX's promise to self-insure Turner's liability was a void promise to indemnify, not a valid contract to procure insurance. The court saw no *conceptual* difference between a promise to indemnify and a promise to self-insure, only a semantic one. The court also took note of numerous out-of-state decisions holding that self-insurance is not "other insurance" for purposes of other insurance analysis. The court concluded that if it condoned USX's promise in this case, "there would be little if anything left of the prohibition" in the anti-indemnity statute. For a discussion of this topic, see J. Berkeley and R. Unikel, *Obligations of a Self-Insured to Provide Benefits for Others*, FOR THE DEFENSE, December 1994 (Defense Research Institute). See also, J. Berkeley, *Self-Insurance Survey*, CGL REPORTER (IRMI), 1995, 1996, 1997 and 1999.

Some courts have confronted the converse situation, where the *additional insured* is self-insured. Under the majority rule, the other insurance clause in the subcontractor's policy will not apply, because self-insurance does not constitute "other insurance." *Commonwealth Edison Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 752 N.E.2d 555 (Ill.App. 2001); *Citgo Petroleum Corp. v. Yeargin, Inc.*, 690 So.2d 154, 170 (La.App. 1997). *Accord, Aetna Cas. & Surety Co. v. James J. Benes & Assoc.*, 593 N.E.2d 1087 (Ill.App. 1992) (sewer contractor's CGL insurer, which defended and settled claim against additional insured municipality, not entitled to equitable contribution from municipality's

intergovernmental self-insurance pool). *But see, Tops Markets, Inc. v. Maryland Casualty Co.*, 700 N.Y.S.2d 325 (N.Y.App. 1999) (owner's self-insured retention did not preclude contractor's insurer, which settled claim by contractor's employee against owner, from obtaining equitable contribution from owner's carrier).

Owners and contractors have fared better when faced with self-insured retentions, although their risk transfer plans were nonetheless thwarted at least in part. In *Tidewater Equipment Co., Inc. v. Reliance Ins. Co.*, 650 F.2d 503 (4th Cir. 1981), which involved first party property insurance, Tidewater leased a construction crane to Keystone Steel Construction Co., under a contract requiring Keystone to insure the crane, which it did by adding the crane to its policy with Reliance, and naming Tidewater an additional insured. The crane tipped over and was damaged, and although Reliance paid for the repair, it refused to pay the first \$25,000, because Keystone was self-insured up to that amount. The court held that "Tidewater's right against Reliance is as an additional insured under the insurance contract between Keystone and Reliance, and as such is limited by the terms and conditions of that contract." Thus, "[t]o the extent that Keystone failed to insure the crane, it became the insurer." *Id.* at 506. Also holding the named insured responsible for the deductible were *Hernandez v. Badger Equipment Constr. Co.*, 28 Cal.App. 4th 1791, 34 Cal.Rptr.2d 732 (Cal.App. 1994); *Transp. Indem. Co. v. Carolina Cas. Co.*, 652 P.2d 134, 145-46 (Ariz.App. 1982); *Aetna Cas. & Surety Co. v. Market Ins. Co.*, 296 So.2d 555, 557-58 (Fla.App. 1974); *Hartford Acc. & Indem. Co. v. U.S. Natural Resources, Inc.*, 897 F.Supp. 466 (D.Or. 1995). This is apparently the majority rule. *See*, Mark W. Flory and Angela Lui Walsh, KNOW THY SELF-INSURANCE (AND THY PRIMARY AND EXCESS INSURANCE), 36 Tort & Ins.L.J. 1005, 1011 (Summer 2001).

The outcome often turns on the particular language employed in the SIR provision. For example, in *American National Fire Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2003 WL 22070507 (Ill.App. 2003), the court held that the SIR did not apply to the additional insured, because the SIR provision used "you," rather than "the insured." In contrast, in *Power Authority of the State of New York v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 762 N.Y.S.2d 586 (N.Y.App. 2003), the court held that an SIR did apply to an additional insured, because the language employed encompassed additional insureds. However, in *Phillips Petroleum Co. v. St. Paul Fire & Marine Ins. Co.*, 113 S.W.2d 37 (Tex.App. 2003), the court held that a fronting endorsement that provided for no further duty to defend upon exhaustion of the fronted policy limit, by payment of either defense or settlement costs, applied to the additional insured, even though the endorsement limited its application to "you."

Sometimes, the general contractor will be an additional insured on two or more subcontractors' policies, one of which has an SIR. The rule in such cases is that the additional insured coverage under one of the subcontractors' policies can be used to satisfy the SIR under the other. *See, The Vons Cos. v. United States Fire Ins. Co.*, 78 Cal.App.4th 52, 92 Cal.Rptr.2d 597 (Cal.App. 2000); *Chedville v. Insurance Co. of North America*, 664 So.2d 1310 (La.App. 1995); *Home Ins. Co. v. Certain Underwriters at Lloyd's*, 729 F.2d 1132 (7th Cir. 1984).

E. The "Injury To An Employee" Exclusion and the "Separation of Insureds" Clause

Some insurers have relied on the CGL exclusion for "injury to an employee of the insured" to deny coverage to an additional insured being sued by an employee of the named insured. This position is incorrect, however, because the exclusion's purpose is to exclude coverage for an insured being sued by *his own employee*. In reaching this conclusion,

courts have usually grounded their analysis on the Separation of Insureds clause of the ISO CG 00 01 form, which provides as follows:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

The following cases have relied on the separation clause to hold that the injury to an employee exclusion does not bar coverage for a claim against an additional insured by an employee of the named insured: *The Atchison, Topeka and Santa Fe Rwy. Co. v. St. Paul Surplus Lines Ins. Co.*, 767 N.E.2d 827 (Ill.App. 2002); *Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378 (5th Cir. 1998); *Cyprus Plateau Mining Corp. v. Commonwealth Ins. Co.*, 972 F.Supp. 1379 (D.Utah 1997); *Sacharko v. Center Equities L.P.*, 479 A.2d 1219 (Conn.App. 1984).

Indeed, the most common type of suit against an additional insured, at least in the construction setting, is by an injured employee of the named insured. For that reason, some insurers using non-ISO forms have excluded coverage for bodily injury to an employee of **an insured** or **any insured** (as opposed to **the insured**, as found in the ISO CG 00 01 coverage form). A number of New York cases have held that this language is effective to exclude coverage where the additional insured is being sued by an employee of the named insured. *Hayner Hoyt Corp. v. Utica First Ins. Co.*, 760 N.Y.S.2d 706 (N.Y.App. 2003); *Moleon v. Kreisler Borg Florman General Constr. Co.*, 758 N.Y.S.2d 621 (N.Y.App. 2003); *Consolidated Edison Co. of New York v. United Coastal Ins. Co.*, 628 N.Y.S.2d 637 (N.Y.App. 1995). These cases, however, failed to analyze the application of the "Separation of Insureds" provision, which should create coverage even when the exclusion uses **an insured** or **any insured**, because reading the injury to an employee of the insured exclusion along with the separation clause creates an ambiguity that should be resolved in favor of coverage. A federal court in New York that did analyze the separation clause concluded that the exclusion did not apply to a suit against the additional insured by an employee of the named insured. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 2003 WL 2006621 (S.D.N.Y. 2003).

Illinois cases have rejected the contention that the use of "any insured" in the injury to an employee exclusion negates the separation clause. In *Atchison, Topeka and Santa Fe Rwy. Co. v. St. Paul Surplus Lines Ins. Co.*, *supra*, 767 N.E.2d 827 (Ill.App. 2002), the court, without explanation other than a vague reference to "the intent of the provisions," said: "we find any distinction between the use of the term 'the insured' and 'a protected person' to be insignificant." In *Cook v. Country Mut. Ins. Co.*, 466 N.E.2d 587 (Ill.App. 1984), the court disposed of the insurer's contention that "the insured" and "an insured" should be treated differently by simply saying, "[w]e are not impressed with this tenuous argument." The court said that if the insurer had intended the exclusion to apply to one insured if the injured person was employed by another insured, the insurer could have stated this "more clearly."

Many other cases have taken up the question of how the separation of insureds clause affects the application of other ISO exclusions that use "an insured" or "any insured," e.g., the CGL "use of an auto" exclusion, with differing results. A majority gives effect to the words "any insured" so as to render the exclusion applicable in spite of the separation clause. See, *Bituminous Casualty Corp. v. Maxey*, 110 S.W.3d 203 (Tex.App. 2003) (col-

lecting cases). But there a number of decisions holding that the separation clause does negate the use of “any insured” in an exclusion. *See, West American Ins. Co. v. AV&S*, 145 F.3d 1224 (10th Cir. 1998) (collecting cases).

F. May An Insurer Exhaust Its Limits On Behalf Of The Named Insured And Leave The Additional Insured Without Coverage?

The additional insured shares the policy’s limits with the named insured; he does not enjoy a separate set of limits. When faced with large losses, the insurer is faced with a dilemma. It may be possible to settle the named insured’s liability by paying the policy limits. But doing so would leave the additional insured exposed. On the other hand, making the limits equally available to the named and additional insureds may leave them both exposed to excess liability. May the insurer prefer the named insured over the additional insured in this situation?

The courts have given mixed answers. Those courts that have held that the insurer must not prefer one insured over the other include *Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789 (7th Cir. 2001), *Western Alliance Ins. Co. v. Northern Ins. Co. of New York*, 176 F.3d 825 (5th Cir. 1999), and *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, *supra*, 44 Cal.App.4th 1633, 52 Cal.Rptr.2d 580 (Cal.App. 1996). Courts holding that the insurer may exhaust its limits on behalf of the named insured and owe nothing to the additional insured include *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761 (5th Cir. 1999), *Millers Mut. Ins. Assoc. of Illinois v. Shell Oil Co.*, 959 S.W.2d 864 (Mo.App. 1998), and *Country Mutual Ins. Co. v. Anderson*, 628 N.E.2d 499 (Ill.App. 1993). For a good discussion of this difficult issue, *see*, R. Steven Rawls, *Blind Man’s Bluff: Settling Claims In Excess Of Policy Limits Against Multiple Insureds*, CGL REPORTER (IRMI), Fall 1997.