

## Workshop W12

*Wednesday, October 31, 1:30–3:00 p.m. and 3:30–5:00 p.m.*

### ***INDEMNITY AND ADDITIONAL INSURED— WHERE ARE WE HEADED?***

Presented by

Thomas C. Federico  
Partner  
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Indemnity and additional insured endorsements are risk management cornerstones for owners and contractors. In recent years, indemnity-limiting statutes, trade organization pressure, and business forces have come together to restrict the viability of these risk transfer mechanisms. State legislatures and the insurance and construction industries have propelled a trend toward limited or comparative indemnity provisions and fault-based additional insured coverage. This workshop outlines the legal trends in this area with an eye on the future.

- Describes the type of comparative indemnity provisions and limiting additional insured endorsements currently in use and their impact on risk transfer.
- Reviews recent caselaw in this area and demonstrates significant legal trends.

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**Thomas C. Federico**  
**Partner**  
**Morrison Mahoney LLP**

Mr. Federico is presenting Workshop W12, "Indemnity and Additional Insured—Where Are We Headed?" on Wednesday afternoon. He is a partner in the Boston office of Morrison Mahoney LLP and a member of the firm's Executive Committee since 1998.

He specializes in the trial of defense claims in the areas of construction, products, and contracts. He has successfully represented defendants in state and federal courts throughout the Northeast. In addition, he has argued and briefed numerous significant state and federal cases, including: *N. American Site Developers, Inc. v. MRP Site Devel., Inc.*, 63 Mass. App. Ct. 529 (2005); *Fine v. Huygens, DiMella, Shaffer & Assoc.*, 57 Mass. App. Ct. 397 (2003); *Vakil v. Anesthesiology Assoc.*, 51 Mass. App. Ct. 3 (2001); *Ferguson v. Marshall Contractors, Inc.*, 745 A.2d 147 (Rhode Island 2000); *Schultz v. YMCA*, 139 F.3d 286 (1st Cir. 1998); *Harnois v. Quannapowitt Dev.*, 35 Mass. App. Ct. 286 (1993); *Sidney Binder, Inc. v. Jewelers Mutual Ins. Co.*, 28 Mass. App. Ct. 459 (1990); *Commonwealth v. Blood*, 400 Mass. 61 (1987); *Commonwealth v. Young*, 399 Mass. 527 (1987).

He has tried more than 50 cases to a jury and numerous others to a judge. Martindale-Hubbe National Law Directory has awarded Mr. Federico its highest rating of "AV" for legal ability and professional ethics. In addition, *Boston Magazine* recognized him in 2004, 2005, and 2006 in a survey statewide as a "Super Lawyer" in the area of construction litigation. This designation was limited to the top 5 percent of attorneys in the Commonwealth.

Mr. Federico is a member of the American Bar Association (Litigation Section and Construction Practice Section); the Association of Defense Trial Attorneys; the Defense Research Institute (DRI); Associated General Contractors, Massachusetts Bar Association; and the Massachusetts Defense Lawyers Association. He is on the Board of Directors of the Massachusetts Defense Lawyers Association. Mr. Federico is a former Vice-Chair of the Construction Law Committee for the Defense Research Institute. He is also a member of the American Law Firm Association and the AGC of Massachusetts, where he serves on the Safety and Insurance Committees.

Mr. Federico has lectured nationwide and abroad and has published numerous articles and monographs on legal issues confronting the insurance and construction industries.

Mr. Federico is a graduate of Boston College (B.A.) and Suffolk University Law School (J.D.), where he served as an Associate Editor on the *Law Review*.

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## Indemnity and Additional Insured – Where Are We Headed?

Presented By:  
Thomas C. Federico  
Partner  
Morrison Mahoney LLP  
Boston, Massachusetts

Workshop W12



# Overview



- Indemnity Provisions
  - Trend toward comparative fault
  - Strategies for handling claims
- Additional Insured Provisions
  - Trend toward limiting endorsements
    - Coverage to exclude sole negligence of AI
    - Concurrent negligence
- Other Insurance Issues
  - Trend toward allocation based on underlying indemnity
- How to Trigger These Obligations
  - Tender; SJ; DJ; Third-Party Complaint

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# INDEMNITY STATUTES



- 43 states have statutes limiting indemnity agreements in the context of construction contracts
  - All prohibit sole negligence transfers
  - 28 prohibit intermediate transfers
- Do not affect insurance requirements
  - Strengthen AI coverage
- Choice of law provisions critical

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## INDEMNITY STATUTES



- Broad application - “contracts for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work”
  - Do statutes apply to equipment lease agreements?
- Some causal connection required between accident and work performed by subcontractor
- Contract can require negligence trigger

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## M.G.L. c. 149, § 29C



- Indemnification by Subcontractor Provision Void.
  - Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work . . . which requires a **subcontractor** to indemnify **any party** for injury to persons or damage to property **not caused** by the subcontractor or its employees, agents or subcontractors, shall be **void**.
  - Indemnity trigger – causal connection
  - Multiple indemnitors – pick and choose

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## Duty to Defend



- Ferreira v. Beacon Skanska Constr. Corp., 296 F. Supp. 2d 28 (D. Mass. 2003)
  - The sub shall indemnify and defend the contractor from any and all claims . . . caused or **alleged to be caused** in whole or in part by any negligent act or omission of the sub . . . regardless of whether such personal injury or damage is caused in part by a party indemnified hereunder
  - The contractual language required "the sub to assume the defense of any claim against the GC alleging damages in connection with subcontractor's work, without regard to whether such claim was successful."
- Crawford v. Weather Shield Manufacturing, Inc., 136 Cal.App. 4th 304 (2006)
  - Window manufacturer duty to defend regardless of jury finding of no fault
  - Liable only for portion of defense costs "growing out of" the work
- What about comparative clauses? Comparative defense?
  - When do you establish % allocation?
- "Alleged" offend anti-indemnity statute?

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## A201-1997 Clause 3.18



- AIA - A201-1997 General Conditions for the Contract of Construction
  - Clause 3.18 requires indemnify only to the extent caused by the **negligent** acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable
- AGC – intermediate form
- Business environment

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## Comparative Indemnity



- I North American Site Developers, Inc. v. MRP Site Devel., Inc., 63 Mass. App. Ct. 529 (2005)
  - I Facts
  - I To the fullest extent permitted by law, the Sub shall indemnify the Contractor . . . from and against all claims . . . arising out of or resulting from performance of the Sub's Work under this Subcontract **but only to the extent** caused by the negligent acts or omissions of the Sub, . . . regardless of whether or not such claim is caused in part by a party indemnified hereunder.
- I DJ - trial judge concluded full indemnity based on belief that anti-indemnity statute prohibited proportional indemnity
  - I How to trigger defense/indemnity obligations?

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## North American



- I Settled underlying claim
  - I Why?
    - I Full indemnity; negligence on all fronts
- I Appealed DJ order
  - I clear wording of the contract language limited the obligation to the % of liability attributed to MRP's conduct
  - I the anti-indemnity statute did not limit proportional indemnity
- I Appeals Court agreed
  - I "but only to the extent" was a clear expression of intent to restrict indemnity to only those losses caused by its negligent conduct
  - I Proportional indemnity always withstands scrutiny under state's anti-indemnity statute

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## North American



- MRP equitable contribution against NASDI's insurer
  - Factual determination necessary
  - Problems – try plaintiff's case
- Comparative indemnity provisions frustrate burden shifting until after an assessment of fault
- Arbitration provision
- Negligence v. Cause
  - Cause could trigger on SJ

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## Other Cases



- Mautz v. J.P. Patti Company, 688 A.2d 1088 (N.J. Super. Ct. App. Div. 1997)
  - The provision required the sub to indemnify the GC for all claims resulting from the performance of the sub's work "to the extent caused in whole or in part by any negligent act or omission of the subcontractor . . . ."
  - The Court held that the clause was "clear and unambiguous" and required indemnity only to the extent that the claim was caused by the sub's negligence.
  - Sub less likely to accept defense and indemnity
  - Reservation of rights/conflicts

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## Comparative Indemnity



- Fairer allocation of risk but . . .
  - More cases forced to trial
  - Difficult position at trial for defendants
  - Issue when no independent negligence of Indemnitor
    - Plaintiff's negligence attributable to indemnitor but comparative negligence subtracted from verdict
    - Would trigger intermediate form
  - Defense obligation also comparative?

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## Incorporation/Flow Down Clauses

- Sub agrees to be bound to the GC by the terms of the hereinbefore described plans, specifications, and Addenda, and to assume to the GC all the obligations and responsibilities that the GC by those documents assumes to the Owner.
- Public Construction contracts
- General contract provisions v. subcontract provisions

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## Incorporation Clauses



- Rush v. Norfolk Elec. Co., Mass. App. Ct. (Oct. 2007)
  - Plaintiff v. GC and Sub v. Sub v. Sub-sub
  - Sub's insurer assumed defense and indemnity of GC
  - Indemnity claims – severed (advisable; GC may not want it)
    - If not severed – jury verdict form unclear
  - Jury found both GC and sub 37.5% negligent while the plaintiff 25% negligent
  - Damages \$1.15 million; that amount then reduced
  - Trial judge denied indemnity claims

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## Incorporation Clauses



- Rush v. Norfolk Elec.
  - GC - controlling indemnity one in general contract not one in subcontract
    - Indemnity for any damages arising out of the work and caused by any **negligent** act or omission of Sub or any of its subcontractors or employees regardless of whether the damages were caused in part by GC.
  - Direct subcontract agreement
    - Sub to indemnify GC from all liabilities for personal injuries arising out of or in consequence of the performance of Sub "**but only to the extent** caused in whole or in part by the acts or omissions of the Subcontractor, its subcontractors, anyone directly or indirectly employed by it, or anyone for whose acts it may be liable."

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## Incorporation Clauses



### I Rush v. Norfolk Elec.

- I Differences
  - I General contract - negligent act on the part of sub
  - I Subcontract - causal connection between the injury and the sub's work
  - I General contract - broad form indemnity and obligated Sub to indemnify GC in full
  - I Subcontract - comparative indemnity and obligated Sub to indemnify GC "only to the extent" that a negligent act or omission of Sub caused the loss.
    - I Claim severed and no assessment of fault

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## Incorporation Clauses



### I Rush v. Norfolk Elec.

- I GC sought to enforce the indemnity in the general contract in order to recover the full amount of the judgment.
- I GC argued that clauses not in conflict and therefore it could choose
  - I Negligent trigger v. causal connection
- I Court found clauses in conflict
  - I The general contract applied to all of the work performed on the project and was drafted to reflect the needs and desires of the owner while the subcontract focused on the work of one particular trade and was influenced by the needs and desires of the GC
- I Where the clause in the subcontract was more limited and specific in its coverage, the "conflicting clause" rule dictated that this clause controls.

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## Incorporation Clauses



- Rush v. Norfolk Elec.
  - Phrase “to the extent caused in whole or in part” limited the indemnity obligation to losses caused by the Sub.
  - Sub's proportional contribution to GC's loss was equal to the percentage of negligence of the plaintiff as found by the jury, or 25%. (No independent negligence.)
  - No indemnity due where GC had incurred no loss with respect to that 25% contributory negligence
  - Indemnity claim of the real party in interest, sub's insurer.
    - Right of Subrogation
    - Sub had no right of indemnity against other Sub. Thus, the insurer would be limited to recovery of only that part of the judgment it paid on behalf of GC not that paid on behalf of Sub.

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## Insurance Coverage for Indemnity Claims

- For indemnity agreements, as long as the risk is assumed in an “insured contract” and involves the kind of injury or damage covered by the CGL policy the named insured has coverage for that contractually assumed liability
- New endorsement CG 24 26 – introduces a limitation on coverage for sole negligence

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## CG 24 26



- Insured Contracts definition now provides contractual liability coverage to contracts in which the insured assumes the tort liability of another party to pay for bodily injury or property damage to a third person **provided that the bodily injury or property damage is caused, in whole or in part, by you or those acting on your behalf**
- Intended to eliminate coverage for the insured's assumption of liability arising out of the other party's sole negligence
- What about Owner/GC? GC/Equipment Supplier? Sub/Equipment Supplier?

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## Indemnity Provisions in Lease Agreements

- Typical scenario
  - Equipment leases (e.g., cranes, platform scaffolding, aerial devices)
  - Employee of Sub injured using equipment
  - Suit against equipment lessor and GC or sub who leased equipment
  - Competing indemnity claims
    - Battle of the forms
    - Master Contract

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## Cases



- *S&F Concrete Contractors, Inc. v. Strickland Systems, Inc.*, 1995 WL 808874 (Mass. Super. Ct.)
  - Court focused on nature of the services provided under the contract.
  - Under the terms of the Agreement, the lessor was simply to provide equipment to the contractor as well as related technical services for the use of said equipment at the construction project.
  - Therefore, not fall under the type of contract for construction contemplated by §29C.
    - not "for or in connection with a contract for construction" within the meaning of the statute.
  - Legislative purpose of indemnity-limiting statutes
    - Give subs some relief to practice of assuming broad indemnity obligations as part of doing business
  - Broad form indemnity was enforceable

## Cases



- *Aetna Casualty & Surety Co. v. Marion Equipment Co.*, 894 P.2d 664 (1995)
  - Indemnity claim by GC (lessee) against hoist lessor pursuant to indemnity provision in lease agreement
  - Court concluded that the equipment lease was subject to Alaska's anti-indemnity statute
    - Statute applied to indemnity provisions "contained in, collateral to, or affecting a construction contract"
    - the hoist was designated by the terms of the lease for use in the construction of a mall
    - the lease obligated the lessor to be bound by the terms of the contract between the lessee and the mall developers in any way applicable to the lease.

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## Cases



- Statute will apply if such a result would induce careful inspection and use of the leased equipment.
  - Here the indemnitee was the GC and a party to the construction contract
  - Consistent with the legislative goal of increasing safety at construction sites
  - Other key factor - insurer was attempting to seek indemnity for an injury that resulted from the lessee/indemnitee's wilful misconduct and sole negligence

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## Indiana



### ■ *McMunn v. Hertz Equipment Rental Corporation*, 79 F.2d 88 (1986)

- Construction contractor leased bobcat loader
- Lessor did not know what the lessee was going to do with the loader and did not know the lessee was in the construction business.
- Lessor sought indemnification under the lease
- Statute not apply
  - Non-specialized equipment
  - No basis for thinking that the equipment would be used in construction
- Not significantly advance construction safety

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## Additional Insured Endorsements

- Contractually required
- Not impacted by indemnity-limiting statutes
- Old form endorsement
  - Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your work (CG 20 10 11 85)

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## Additional Insured Endorsements

- Coverage to AI that “arises out of” the named insured operations
- Arising out of consistently interpreted to extend coverage even to AI’s liability for its own negligence
  - As long as negligence has some causal connection to the work
    - Merchants Ins. Co. v. USF&G, 143 F. 3d 5 (1st Cir. 1998)
    - Vitton Constr. Co. v. Pacific Ins. Co., 1 Cal. Rptr. 3d 1 (Cal. App. 2003) (fact that accident not attributable in any way to named insured’s negligence irrelevant where “arising out of” did not purport to restrict coverage according to fault)

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## Current versions



- Blanket Endorsements
- Eliminated “arising out of” and replace it with the phrase “caused, in whole or in part, by”
- Any practical difference between liability “arising out of” or “caused by”
  - Merchants Ins. Co. v. USF&G, 143 F. 3d 5 (1st Cir. 1998) (“arising out of” broader than “caused by”)
  - Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779 (1996) (“no meaningful distinction” between two phrases; interpreted indemnity language)

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## Current Versions



- Injury or damage under the new endorsements must be “caused by” the named insured’s ongoing operations and the named insured’s “acts or omissions” in the performance of those operations
  - Different result in Merchants
- Limits coverage for the AI’s sole negligence
- Further exclusionary language – “This insurance does not apply to BI arising out of any act or omission of the AI other than the general supervision by the AI of the named insured’s operations performed for the AI.”

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## Limiting Endorsement



- **L.J. Dodd Constr., Inc. v. Federated**, No.: 2-05-0934 (Ill. App. Div. 2d Dist. May 16, 2006)
  - GC not entitled to coverage under sub’s policy for liability arising from the general contractor’s “sole negligence.”
  - No duty to defend where underlying complaint failed to allege that the GC’s liability arose out of the named insured’s ongoing operations for it.
  - Notwithstanding the general contractor’s contention that the injured employee would not have been at the site “but for” the subcontractor’s ongoing operations for the general contractor, the Appellate Court declared that not only should the duty to defend not arise from unpleaded facts but in this case there could be no coverage since the actual facts pleaded solely sought recovery on the basis of the GC’s negligence.
  - Comparative negligence
  - Third-party complaint

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## Limiting Endorsement



- Pekin Ins. Co. v. Roger H. Beu, 2007 Ill. App. Lexis 981 (September 6, 2007)
  - Injured employee v. GC and GC AI on sub's policy
  - Homeowner added as an AI under GC's policy
    - Homeowner an AI "only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation"
    - Employee sub injured and sued Homeowner and GC
    - Homeowner tendered defense to Pekin. Pekin denied duty to defend where complaint alleged liability based on homeowner's own negligence
    - Court found no duty to defend since the allegations were not based **solely** on the acts or omissions of the named insured, but were also predicated on the AI's alleged independent acts of negligence

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## Limiting Endorsement



- State Auto. Mut. Ins. Co. v. Habitat Constr. Co., 2007 Ill. App. Lexis 981 (Sept. 6, 2007)
  - AI endorsement – any organization you are required to name as an AI on this policy under a written contract. That organization is only an AI with respect to liability arising out of "your work" for that insured for or by you
  - Policy only requires that liability arise out of the sub's work for the GC
  - Allegations of failure to supervise and inspect sufficient to trigger

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## Limiting Endorsements



- American Country Ins. Co. v. James McHugh Constr. Co., 344 Ill. App. 3d 960 (2003)
  - Typical role of GC – control project schedule and oversee project specs
    - Not means and methods
  - Scaffolding erected by GC
  - Plaintiff allegations – failure to warn of danger; failure to properly inspect; failure to provide adequate safeguards
  - Sub not sued as third party
  - DJ action by sub’s insurer

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## Limiting Endorsements



- AI endorsement limited coverage to acts or omissions in connection with the insured’s work for the AI and excluded coverage for injury arising out of any act or omission of the AI or any of their employees
- No duty to defend where no possibility that GC (McHugh) could be found liable based upon the conduct of the named insured
  - Complaint alleged only direct negligence against McHugh
  - Third-party claim make a difference?
  - What about comparative negligence of plaintiff?
- What was underlying indemnity?

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## Limiting Endorsement



- National Union Fire Ins. Co. v. R. Olson Constr., 329 Ill. App. 3d 228 (2002)
  - Contractor included as an AI but only with respect to liability arising out of the sub's ongoing operations performed for the Contractor
  - Endorsement specified that coverage shall not apply to any liability resulting from the AI's own negligence or the negligence of its employees
  - No duty to defend where all of the allegations in the underlying complaint were for AI's own negligence and not for sub's negligence
  - No issue of imputed or vicarious liability
  - Court refused to look to third-party complaint

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## Limiting AI Endorsement

- Maryland Casualty Co. v. Nationwide Ins. Co., 65 Cal. App. 4th 21 (Cal. App. 1998); 81 Cal. App. 4th 1082 (Cal. App. 2000)
  - A non-ISO endorsement
  - GC an additional insured, but "only to the extent that [the GC] is held liable for your acts or omissions arising out of and in the course of operations performed for [the GC]"
  - equitable contribution applies to apportion costs among insurers who share the same level of liability on the same risk as to the same insured.

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## Limiting Endorsement

- Garcia v. Federal Ins. Co., No. 06-2524 (Fla. October 25, 2007)
  - On a certified question from the Eleventh Circuit, the Florida Supreme Court has ruled in that where a liability policy extended coverage to “any other person or organization because of the acts or omissions” of the named insured, the rights of additional insureds were limited to claims of vicarious liability and did not extend to independent acts of negligence on the part of the putative additional insured.

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## Other Insurance Issues



- Primary
  - Do CGL policies coordinate with Other Insurance Clauses
  - Pro-rata contribution
  - Conflicting OI clauses
  - AI's policy states that its policy is excess if covered as an AI
- Umbrella/Excess Policies

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## Other Insurance Issues



- Allocation issues
  - Previously focus on interpretation of policy wordings of AI endorsements and OI clauses
  - Choice of law considerations
    - Mutually repugnant OI clauses
      - Illinois - clauses disregarded and equal apportionment ordered
      - Virginia – clauses disregarded and each insurer pays same proportion as its limits bear to the total amount of available coverage
  - Recent trend is toward interpretation of policy obligations in light of overall contracting intent.

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## Recent Trend



- Should enforceable indemnity agreements determine the allocation of liability in an insurance dispute
- An indemnity agreement between the insureds or a contract with an indemnity clause may shift an entire loss to a particular insurer notwithstanding the existence of an Other Insurance clause in its policy

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## Wal-Mart v. RLI, 292 F.3d 583 (8th Cir. 2002)

- Sales agreement between Cheyenne and Wal-Mart
  - Indemnity agreement – Cheyenne to indemnify Wal-Mart for any liability arising from Wal-Mart’s sale of the lamps
- Lamp malfunctioned, injured plaintiff sued Wal-Mart and Cheyenne
- Cheyenne had \$1 million primary insurance (St. Paul) and \$10 million in excess (RLI)
  - Vendor agreement required Cheyenne to obtain \$2 million
  - Wal-Mart a covered insured under both policies
  - RLI – apply only in excess of other insurance
- Wal-Mart \$10 million (Nat’l Union)
- Underlying suit settled for \$11 million (St. Paul and RLI)

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## Wal-Mart v. RLI



- Wal-Mart and Nat’l Union brought a DJ; RLI counterclaimed
- Without considering the indemnity agreement, the Nat’l Union policy would apply
- Court looked to the indemnity agreement in assessing the relative obligations of the insureds
  - “the indemnity agreement controls the outcome, not the other insurance clauses”
  - Courts should assess whether the factual circumstances create a relationship between the indemnity agreement and the insurance allocation issues
- Court held that neither Nat’l Union nor Wal-Mart was liable for the \$10 million remainder

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## Wal-Mart v. RLI



- I “Examination of the relationships between the parties has convinced us that Cheyenne intended to and did make a valid promise to indemnify Wal-Mart for claims arising from the halogen lamps and that RLI provided liability insurance to Cheyenne that covers both the [underlying] settlement and Cheyenne’s indemnification obligation”
- I “Consideration of the indemnity agreement reflects the intention of [and relationship between] the parties and does not unfairly prejudice the insurers”
- I Otherwise circuitous litigation – Wal-Mart could sue to enforce indemnity to recover; Cheyenne would then look to RLI
  - I National Union could bring a subrogated claim

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## St. Paul Mercury v. Frontier Pacific, 111 Cal. App.4<sup>th</sup> 1234 (2003)

- I Sub leased crane from Crane Co.
  - I Sub’s employee killed when beam fell from crane
  - I Lease crane only; negligent maintenance of crane; crane defective
  - I Indemnity – “any claims in any way caused by Sub’s use of crane”
  - I AI endorsement
    - I coverage for injury resulting from Sub’s use of the crane
    - I excluded coverage that results from any act of Lessor other than the general supervision of the work performed for Lessor by Sub
  - I Meaning of policy must be considered in the overall context of construction contract between named insured and additional insured
  - I Endorsement and indemnity provision covered Lessor only for liability arising from Sub’s negligence
  - I Case remanded for trial on allocation of fault

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## St. Paul Fire & Marine v. AISLIC, 365 F.3d 230 (4<sup>th</sup> Cir. 2004)

- Food poisoning at Virginia resort.
- Allocation dispute among policies issued to owner and manager of resort.
- Fourth Circuit not resolve allocation dispute based on “other insurance” clauses.
- Focus instead on what owner and manager intended vis a vis indemnification.

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## Other Cases



- **Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc., 49 Tex. Sup. J. 589 (2006)**
  - ATOFINA – Triple S contract required Triple S to indemnify except to the extent loss caused by concurrent or sole negligence of ATOFINA
    - Triple S also agreed to name ATOFINA as an AI on both CGL and excess policies
  - AI endorsement to primary excluded coverage for sole negligence
  - Excess policy 2 definitions of who is an insured
    - No broader than underlying – excluded coverage for sole negligence
    - Only with respect to operations performed by Triple S

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## Other Cases



### ■ Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc., 49 Tex. Sup. J. 589 (2006)

- Court - excess policy excludes coverage for ATOFINA's sole negligence
- Salient inquiry – not indemnity or insurance requirements in underlying contract but what coverage excess policy actually provided
- Case remanded for a determination of underlying liability issues – was accident caused by ATOFINA's sole negligence

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## Is All AI Coverage Primary?

### ■ Pecker Ironworks v. Travelers, 99 N.Y.2d 391 (2003), and BP Air Conditioning Corp. v. One Beacon Ins., 33 A.D.3d 116 (1<sup>st</sup> Dept. 2006)

- Co-insurer argued that an insured's coverage as an AI is always primary regardless of whether OI clause purported to provide excess coverage only

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**I Pecker**

- | GC sought AI coverage under a sub’s policy with Travelers
  - | AI endorsement – extended coverage to any entity for which sub had agreed in a written contract to provide coverage; that coverage is excess unless sub agreed for this insurance to apply as primary or contributory
- | Contract – sub to name GC as AI
  - | Travelers – not a written contract to apply on a primary or contributory basis and hence not trigger an obligation to provide primary coverage
  - | GC – agreement to provide AI coverage deemed to require procurement of primary AI coverage unless expressly stated to the contrary



**I Pecker**

- | Court – Traveler’s policy was primary
  - | AI endorsement – specified that coverage for AIs was excess unless sub had agreed in a written contract for this insurance to apply on a primary or contributory basis
  - | Underlying contract stated only that sub had to provide coverage for GC as an AI.
  - | Term AI is a recognized and well-understood term that means “an entity enjoying the same protection as the named insured”
  - | Accordingly, where sub agreed to name GC as an AI without limitation, the sub was obligated to provide the same coverage it enjoyed as a named insured
  - | Imposition of primary coverage dependent on (1) interpreting the underlying contract to require primary coverage; and (2) applying that interpretation to the OI provision of the AI endorsement



## I Pecker

- I If AI endorsement had not incorporated the underlying contract – e.g., stated that “this coverage is excess” – the terms of the underlying contract should not have impacted coverage
- I Court only found that the Travelers policy was primary and did not rule whether GC’s own carrier might also be primary

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- I BP Air Conditioning Corp. v. One Beacon Ins., 33 A.D.3d 116 (1<sup>st</sup> Dept. 2006)
  - I At issue was whether One Beacon’s AI coverage of BP was primary to BP’s own direct coverage.
  - I Court stated broadly that Pecker establishes that BP’s coverage under its own policy is excess to BP’s coverage under the One Beacon policy even though the policies and their respective OI provisions were not part of the record
  - I AI coverage always primary
- I BP Air Conditioning Corp. v. One Beacon Ins., 8 N.Y.3d 708, 840 N.Y.S.2d 302 (2007)
  - I The Court concluded that the Appellate Division had erred in finding that One Beacon’s AI coverage was primary and BP’s coverage under its own policy excess
  - I Basis – relevant parties and policies are not before the court, therefore no determination of priority of coverage can be made

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## Insurer's Duty to Defend an AI

- BP Air Conditioning Corp. v. One Beacon Ins., 8 N.Y.3d 708, 840 N.Y.S.2d 302 (2007)
  - Issue – whether liability must be determined before an AI is entitled to a defense
  - One Beacon argued that the AI endorsement created a “condition precedent” to the triggering of AI coverage and therefore it must be shown that the cause of the injury arose out of the named insured’s work
  - Court – standard for determining issue same as that for named insured
  - Because there was a “possibility” that the injuries arose out of the named insured’s ongoing operations, One Beacon was obligated to provide BP with a defense
  - Court noted the broad indemnity protection in the purchase order between BP and the named insured and the “reasonable expectation” of the ordinary business person

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## Priority of Liability Policies

- An insurer’s duties are defined by what it contracted to do, not by what the insured contracted to do
- In the AI context, the extent to which an underlying agreement might impact coverage priority depends upon the extent, if any, to which the relevant endorsement is by its own terms contingent upon the terms of that underlying agreement
  - Blanket endorsement always tie in underlying contract
- But see Wal-Mart
- More reservation of rights

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## Impact of Underlying Indemnity

- Payton Constr. Co. v. Acadia Ins. Co. (Mass. Superior Court October 2007)
  - OI clauses in both policies stated that insurance was primary and that it would share equally the amount of the loss
  - Subcontract required sub to name Payton as an AI and that the coverage was to be as broad as the coverage for the named insured subcontractor. Further, it shall apply as primary and non-contributing insurance

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## Impact of Underlying Indemnity

- Payton
  - If Acadia pays only pro-rata contribution the sub would be in breach of the subcontract agreement to provide primary non-contributing insurance
  - The contractual indemnity coverage in Acadia's policy provided indemnity coverage for any amounts the named insured might be obligated to pay under the indemnity clause in the subcontract, including attorneys fees and costs
  - Court ignored the application of the OI clauses that would have required an equal sharing because such a contribution of equal shares would "effectively negate" the underlying indemnity agreement

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## I Payton

- I If the general rule of contribution were followed, Payton's insurer, through its right of subrogation, could sue the sub under the indemnification agreement to collect the amount that it had paid under Payton's primary policy.
- I Rather than trigger the need for a second lawsuit, the Court required Acadia to pay the entirety of the losses when the named insured had an obligation to pay these losses through the indemnification agreement

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## I The rationale for this exception is to give effect to the insureds' indemnity agreement.

- I "To hold otherwise would render the indemnity contract between the insureds completely ineffectual and would obviously not be a correct result, for it is the parties' rights and liabilities to each other which determine the insurance coverage; the insurance coverage does not define the parties' rights and liabilities one to the other." Chubb Ins. Co. of Canada v. MidContinent Cas. Co., 982 F. Supp. 435, 438 (S.D. Miss. 1997).

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# **Comparative Indemnity and Limiting Additional Insured Endorsements – An Equitable Approach Or An Invitation For Litigation**

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The last 10-15 years has seen a trend toward comparative indemnity agreements and fault driven additional insured endorsements. Although a fairer approach to the allocation of risk among the policyholders and their respective insurers, this trend has engendered disagreements in assessing allocation. Moreover, the further trend of courts interpreting additional insured policy obligations in light of overall contracting intent in combination with the movement toward a comparative allocation of risk further complicates any risk analysis between competing interests.

## **I. Proportional or Comparative Indemnity**

When additional insured endorsements, by their own terms, depend on the existence of a written contract between the named insured and the additional insured, the contract's significance in determining the objectively reasonable expectations of the additional insured becomes paramount.

Recent modifications to indemnity provisions in standard form contracts have created confusion as to whether the indemnity obligation created is a proportional one. A proportional or comparative fault form requires the indemnitor to indemnify the indemnitee "only to the extent of" his own fault. Comparative indemnity can lead to disagreements between the parties as to the extent of the comparative obligation and the ultimate allocation of risk. The result is increased litigation.

In North American Site Developers, Inc. v. MRP Site Development, Inc., the Appeals Court held that an indemnity provision in a subcontract agreement was a proportional indemnity provision and that G.L. c. 149, §29C, the Massachusetts indemnity limiting statute, does not prohibit proportional indemnity.

On or about April 11, 1998, Scott Duclos, an employee of MRP was injured at a construction project (the demolition of the Old Boston Garden) when a cable on a crane that was owned, operated, and maintained by NASDI came loose and struck him causing personal injuries. Duclos brought an action in negligence action against Morse (the general contractor) and NASDI (the direct demolition subcontractor) alleging that his injuries and damages were the result of the negligence of both defendants. NASDI filed a Third-Party Complaint against MRP for defense and indemnification pursuant to

the terms of the subcontract agreement between MRP and NASDI. The NASDI-MRP Subcontract contained an indemnification clause that obligated MRP to indemnify NASDI against any claims, damages, losses and expenses arising out of the performance of MRP's work, "**but only to the extent** caused in whole or in part by the negligent or willful acts or omissions of [MRP](emphasis added)."

While the Duclos action was pending, NASDI filed a separate action seeking a declaration that NASDI was entitled to a defense and indemnity under the MRP subcontract. Ruling on the motion, the trial judge concluded that MRP was obligated to defend and indemnify NASDI fully in the Duclos action. The judge reasoned that Mass. G.L. c. 149, § 29C prohibited proportional indemnity.

In seeking a reversal of the judgment on appeal, MRP argued that the clear wording of the indemnity clause limited MRP's indemnity obligation to the percentage of liability attributed to MRP's conduct and that Mass. G.L. c. 149, §29C, did not preclude proportional indemnity. The Appeals Court accepted MRP's argument that the prefatory phrase "but only to the extent" was a clear expression of intent to restrict its indemnity obligation to "only" those losses caused by its negligent conduct. Moreover, the Court rejected the argument that Mass. G.L. c. 149, §29C prohibited proportional indemnity. The only prohibition set out in section 29C is against indemnity agreements that require a subcontractor to indemnify any party for a loss it in no way caused, in whole or in part. Indeed, any indemnity provision that requires proportional indemnity will always withstand scrutiny under section 29C because the subcontractor under that type of indemnity provision is only required to indemnify to the extent that it caused the injury. If the subcontractor was not a cause of the injury there would be no indemnity under the clause and no violation of section 29C.

It is noteworthy that the clause required a finding of negligence to trigger the indemnity obligation. Section 29C does not require a finding of negligence. The statute requires only a causal connection between the injury or damage and the loss. However, if the parties require a higher standard to trigger the indemnity obligation, then that is the standard that will apply. The statute only sets the minimum threshold.

If the purpose of an indemnity provision is to shift to a subcontractor responsibility, and the insurance burdens, for claims connected with the subcontractor's work, a proportional indemnity obligation in practice delays or even frustrates this purpose. The fact that the ultimate allocation of responsibility, in practice, must await a determination by a factfinder (judge, jury, or arbitrator) prevents a shift of responsibility only until after the parties have incurred significant costs assessing fault. In the end, this process benefits the party bringing the claim.

The majority of courts that have interpreted similar language have held it to create a comparative indemnity obligation. In MSI Constr. Managers, Inc. v. Corvo Iron Works, Inc., 527 N.W.2d 79 (1995), the Court of Appeals of Michigan was asked to interpret an indemnity clause that used the phrase: “to the extent caused in whole or in part by any negligent act or omission of the Subcontractor”. The Court held that this phrase required the subcontractor to indemnify the contractor, but only to the extent of the subcontractor’s negligence. A jury had found the general contractor 65% negligent and the subcontractor 35% negligent for the plaintiff’s injuries. The Court of Appeals instructed the trial court to enter an order requiring the general contractor to pay 65% and the subcontractor the remaining 35% of the judgment to the plaintiff. The subcontractor was not required to indemnify the general contractor for its own negligence.

Similarly, in Mautz v. J.P. Patti Company, 688 A.2d 1088 (N.J. Super. Ct. App. Div. 1997), the New Jersey Appellate Court concluded that under a similar indemnity provision, a duty to indemnify should be applied comparatively among the indemnitor and the indemnitee. The provision required the indemnitor, a subcontractor, to indemnify the indemnitee, a general contractor, for claims, damages, losses and expenses resulting from the performance of the subcontractor’s work “to the extent caused in whole or in part by any negligent act or omission of the subcontractor . . . .” Id. at 1091. The Court held that the clause was “clear and unambiguous” and required the subcontractor to indemnify the general contractor, but only to the extent that the claim is caused by the subcontractor’s negligence. Id. at 1092.

The New Jersey Court agreed with the interpretation by a Minnesota Court of Appeals of an identical indemnity provision in a construction accident case. The Minnesota court observed,

[t]he additional phrase, ‘to the extent caused,’ however, suggests a ‘comparative negligence’ construction under which each party is accountable ‘to the extent’ their negligence contributes to the injury . . . . Under the terms of this indemnification clause, the general contractor is not contractually entitled to indemnification from the subcontractor to the extent the damages were caused by the general contractor’s own negligence. Braegelmann v. Horizon Development Co., 371 N.W.2d 644, 646-47 (Minn.Ct.App. 1985).

The New Jersey Court termed the interpretation of the clause a “‘comparative negligence’ analogy.” Id. at 1093.

Other courts have interpreted such comparative negligence language in indemnity provisions in the same manner. See, e.g., Brown v. Boyer-Washington Blvd. Assoc., 856 P.2d 352 (Utah 1993) (subcontractor required to indemnify general contractor for claim arising out of its negligence, but only to the extent caused in whole or in part by negligent acts or omissions of subcontractor); Hagerman Constr. Corp. v. Long Electric Co., 741 N.E.2d 390 (Ind.App. 2000) (the clause “but only to the extent” clearly limits to the subcontractor’s obligation to indemnify the general contractor to the extent it is negligent); Dillard v. Shaughnessy, Fickel and Scott Architects, Inc., 884 S.W.2d 722 (Missouri Ct. App. 1994) (in interpreting language “to the extent caused in whole or in part,” the court determined that the general contractor was required to indemnify the owner and architect only for that portion of fault which was ascribed to the general contractor or the subcontractors).

## **II. Fault Based Additional Insured Endorsements**

The new additional insured endorsements have moved from language providing coverage with respect to liability “arising out of” to that of liability for injury “caused by” “your acts or omissions”. These endorsements are intended to have a narrowing effect. Courts interpreting the “arising out of” language have consistently interpreted that language to extend coverage to the additional insured’s sole negligence. See Merchants Ins. Co. v. USF&G, 143 F.3d 5 (1<sup>st</sup> Cir. 1998); see also Structure Tone v. Component Assembly Systems, 713 N.Y.S.2d 161 (N.Y.App. 2000); Mid-Continent Cas. Co. v. Swift Energy Co., 206 F.3d 487, 498-500 (5<sup>th</sup> Cir. 2000); Acceptance Ins. Co. v. Syufy, 69 Cal. App. 4<sup>th</sup> 321 (1999); McIntosh v. Scottsdale Ins. Co., 992 F.2d 251, 254-255 (10<sup>th</sup> Cir. 1993). The new language providing coverage for liability “caused by” the acts or omissions of the named insured in the performance of its operations effectively narrows the scope of the endorsement. The language, although stopping short just of requiring a finding of negligence, requires an act or omission on the part of the named insured to trigger coverage. See Consolidation Coal Co. v Liberty Mut. Ins. Co., 406 F. Supp. 1292 (W.D. Pa. 1976)(additional insured endorsement providing coverage “but only with respect to acts or omissions in connection with the named insured’s operations” limited coverage to situations where it was the named insured’s negligence that exposed the additional insured to liability).

An example of a limiting endorsement is shown in the case of Maryland Casualty Co. v. Nationwide Ins. Co., 65 Cal.App. 4<sup>th</sup> 21, 28 (Cal. App. 1998). In that case, two subcontractors, in fulfillment of their contractual obligation to name the GC as an additional insured and that the additional insured coverage be sole primary and not contributing with the GC’s own CGL coverage, obtained a policy from Nationwide. Each Nationwide policy contained a non-ISO endorsement making the GC an additional insured, but “only to the extent that [the GC] is held liable for your acts or omissions

arising out of and in the course of operations performed for [the GC]." One sub's endorsement also provided, in typewritten language: "Coverage provided to the additional insured under this endorsement is primary, but only with respect to acts or omissions of the named insured. Any other insurance maintained by the additional insured is deemed to be excess."

The GC was sued for construction defects, and tendered its defense to its own insurers, and to all of the subcontractors' insurers. The GC's insurers, Maryland and AIG, ultimately paid all of the defense costs. All of the subcontractors' insurers, but Nationwide, admitted a duty to reimburse and settled with Maryland and AIG.

Maryland and AIG filed suit against Nationwide which resulted in a judgment for Nationwide. On appeal, the court reversed and held that Nationwide had a duty to defend. Maryland Casualty Co. v Nationwide Ins. Co., 65 Cal App 4th 21 (Cal App 1998). On remand, Maryland and AIG sought reimbursement from Nationwide of all of their defense costs, on an equitable subrogation theory. The court entered judgment against Nationwide for all of the defense costs, and Nationwide appealed. Nationwide contended that Maryland and AIG were entitled only to a portion of their defense costs from Nationwide, under an equitable contribution theory.

On appeal, the court again reversed the trial court, holding that Maryland and AIG were entitled only to a portion of their defense costs from Nationwide, not all of them, on an equitable contribution theory. Maryland Casualty Co. v Nationwide Ins. Co., 81 Cal App 4th 1082 (Cal App 2000). The court noted that equitable contribution applies to apportion costs among insurers who share the same level of liability on the same risk as to the same insured. Id. at 1089.

The court noted that the typewritten sole, primary language reiterated the vicarious liability limitation of the GC's additional insured coverage, and therefore, it would be illogical and inequitable to ignore that limitation in apportioning defense costs. The court held that despite Nationwide's duty to defend the entire complaint, Maryland and AIG had a "parallel duty" to defend the entire complaint—despite the typewritten sole primary language in the West Coast endorsement. Because their coverage was broader than Nationwide's; it potentially encompassed allegations not covered by Nationwide's policy, such as the GC's direct (as opposed to vicarious) liability, or its vicarious liability for the acts or omissions of other subcontractors.

The court reversed the judgment in favor of Maryland and AIG, and remanded the case for the purpose of determining how to equitably apportion the defense costs between Maryland and AIG on the one hand, and Nationwide on the other.

### III. When the Twain Meet

In St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co., et al, 11 Cal. App. 4<sup>th</sup> 1234 (2003), the California Court of Appeals was confronted with an allocation dispute between insurers. Bigge Crane leased a crane to Schuff Steel. Schuff Steel was a subcontractor on a construction project and needed the crane to place steel beams. In the lease agreement, Schuff Steel agreed to indemnify Bigge Crane for claims for personal injury “in any way caused by Schuff Steel . . . occasioned by the use” of the crane. The lease agreement also obligated Schuff Steel to obtain liability insurance to protect Bigge from “such liability and risk of loss” and to “furnish additional insured endorsements making such coverages primary to all other coverages”. Id. at 1238-1239. Schuff Steel was insured by St. Paul. The St. Paul policy contained two additional insured endorsements: (1) additional insured protection for any organization you are required to obtain such coverage for but only for covered injury or damage that results from Schuff’s use of the crane and excluding coverage for act or omission of Bigge other than general supervision; and (2) additional insured coverage for Bigge “only with respect to liability arising out of [Schuff’s] operations performed for [Bigge]”.

An employee of Schuff Steel was killed when a steel beam from the Bigge crane fell and struck him. The decedent’s family brought suit against Bigge alleging negligent inspection and maintenance and that the crane was defective. St. Paul settled the case with a contribution from the primary for Schuff. St. Paul then filed suit for equitable contribution seeking a reallocation of the settlement among the insurers.

The court found that the two endorsements were ambiguous. Moreover, the court determined that the additional insured endorsements, by their own terms, depended on the existence of a written contract. Thus, the contract between Schuff Steel and Bigge was significant in a determination of the objectively reasonable expectations of Bigge. The court found that Bigge would have no reasonable expectation to transfer risk for its own negligent acts where the contractual indemnity provision only extended to losses caused by Schuff, not caused by Bigge’s negligence. Thus, the court found that the St. Paul policy would be primary but only to the extent of liability caused by the negligence of Schuff, while Bigge’s primary policy would be primary to the extent of negligence of Bigge. The court remanded the case for a determination of the relative degrees of fault of Schuff and Bigge. Id. 1246-1247.

Other cases:

Hartford Casualty Ins. Co. v. Mt. Hawley Ins. Co., 123 Cal. App. 4<sup>th</sup> 278 (2004)(allocation dispute between primary insurers underlying indemnity agreement governed relative obligation to general contractor in litigation from claims on a construction site)

St. Paul Fire & Marine v. AISLIC, 365 F.3d 230 (4<sup>th</sup> Cir. 2004)(allocation dispute resolved based on underlying indemnity agreement between owner of resort and manager for claim arising out of food poisoning at resort).

#### IV. Is Separate Defense Counsel Required

The additional insured was entitled to its own separate defense counsel in the following cases:

Consolidated Rail Corp. v. Hartford Acc. & Indem. Co., 676 F. Supp. 82 (D. Pa 1987) the insurer had issued a Railroad Protective Liability Policy to Consolidated Rail Corporation (Conrail); and a contractor doing work for Conrail was listed an additional insured. The contractor admitted damaging a Conrail crossing gate, so as to dislodge a signal light. The light struck and injured a Conrail employee. The employee brought a FELA claim against Conrail, which later cross-complained against the contractor as a third-party defendant. One of the issues in the underlying personal injury action was the allocation of liability between the named insured and additional insured. The court noted that “[i]t is not unusual for an insurance carrier to insure opposing interests in a particular case.” *Id.* at 86. Where the insurer had the duty to provide competent counsel to represent both insureds’ interests, “[o]ne appropriate resolution is for the insurer to obtain separate, independent counsel for each of its insureds, or to pay the costs incurred by an insured in hiring counsel.” *Id.*

First Ins. Co. v. State, 66 Haw., 413, 665 P.2d 648 (Haw., 1983). Separate defense counsel was required for the named insured and additional insured both sued in an underlying personal injury action because “a potential conflict between the interests of the [additional insured] and [named insured] is apparent.” The contractor was building a public highway and was required to name the State of Hawaii as an additional insured. After the highway was opened, there was a two-car accident resulting in the death of one of the drivers. The heirs filed an action against the contractor and the state. The insurer had retained separate defense counsel for the named insured (contractor) and the additional insured (State). After defending both insureds against the underlying action, the insurer brought a declaratory relief claim against the additional insured for the defense fees and judgment it had paid for the underlying action. The court, after concluding that the insurer owed the additional insured a duty to defend the entire action,

held “[w]here the interests of such codefendants do not coincide, the insurer is required to provide separate counsel by selecting independent outside counsel for each insured.” The insurer contended that its defense obligation to the additional insured was limited because the policy provided “coverage to the [additional insured] with respect to any liability ‘arising out of’ [the named insured’s] operations ...” but the policy also excluded coverage for claims “‘arising out of any act or omission of the additional insured or any of his employees, other than general supervision of work performed for the additional insured by the named insured.’” *Id.*, at 413, 424. See, also, Presley Homes Presley Homes, Inc. v. American States Ins. Co., (2001) 90 Cal.App.4th 571 (holding that insurer owes additional insured defense against entire action, even though potential coverage only limited to liability arising from the named insured’s acts or omissions.)

Spindle v. Chubb/Pacific Indem. Group, 89 Cal.App.3d 706 (1979). Two doctors were insured under separate policies issued by Chubb/Pacific Indemnity Group and for different limits. Chubb retained one law firm to defend both doctors. The court rejected one doctor’s claims that separate counsel were required because the two doctors had different maximum amounts of insurance protection and their respective potentials for liability differed. “The difference in the personal exposure of the two insureds resulting from the difference in their maximum coverage, by itself and without more, creates no actual conflict of interest between them in the matter of their joint representation.... Similarly, the difference in the potential for liability of the two insureds, standing alone, does not necessarily result in an actual conflict of interest between them so far as their joint defense is concerned.” *Id.*, at 713. See also, Lehto v. Allstate Ins. Co. 31 Cal.App.4th 60 (1994)(court rejected a bad faith claim based on the insurer’s failure to appoint separate counsel to defend the named insured and his teenage son, even though there was a potential conflict of interest because the father might be separately liable to the underlying claimant on a negligent entrustment theory).

Industrial Indem. Co. v. Great American Ins. Co. 73 Cal.App.3d 529 (1977). An employee of one of the insured's subcontractors was killed on the job. The employee's heirs sued, among others, the insured, and the city which had contracted to have the insured do the work. The insurance policy named the city as an additional insured, but the policy had an exclusion, which only applied to the additional insured city, for “‘active, independent negligent conduct.’” The insurer retained one counsel to defend both the contractor and the city. About two months before trial, defense counsel acquired knowledge the city was actively negligent and, on the eve of trial, he sent a reservation of rights letter to the city and hired independent counsel to represent it. The court held that the city was entitled to separate defense counsel because the defense attorney was “bound to investigate all conceivable bases on which City might be liable . . . These might run the gamut from active negligence on the part of a City employee . . . to wholly vicarious liability for the acts or omissions of (Contractor).” *Id.* at 535. The insurer settled

the underlying case and then sued the city and its other insurer in declaratory relief for reimbursement, using the same counsel it had retained to defend the third party suit.

## V. Other Insurance Clause Ignored

The general rule is that where each of two liability insurance policies issued by different insurers provides primary coverage to the same insured in respect to the claim in question and contains mutually consistent "other insurance" provisions similar to those in the policies here, the insurer paying more than its share of the claim is entitled to recover from the other insurer for the excess so paid. See, e.g., American Indemnity Lloyds v. Travelers Property & Casualty, 335 F.3d 429, 435-436 (5<sup>th</sup> Cir. 2003); Employers Casualty Company v. Employers Commercial Union Insurance Co., 632 F.2d 1215, 1218 (5<sup>th</sup> Cir. 1981). The reasoning is that such recovery is not based on the theory that the separate policies create any contract between the two insurance companies issuing them to a common insured, nor upon common law contribution, but rather upon conventional or equitable subrogation to the rights of the common insured against the nonpaying insurer. See Employers Casualty Co. v. Transport Ins. Co., 444 S.W.2d 606, 610, 12 Tex. Sup. Ct. J. 560 (Tex. 1969).

However, the foregoing general rule is subject to an equally widely recognized exception for cases in which the policy of the insurer seeking to invoke the "other insurance" clauses also covers another insured who is liable to indemnify the insured in the policy of the other insurer. See, e.g., American Indemnity Lloyds v. Travelers Property & Casualty, 335 F.3d 429, 435-436 (5<sup>th</sup> Cir. 2003); Federal Ins. Co. v. Gulf Ins. Co., 162 S.W.3d 160, 164 (Mo. Ct. App. 2005) Thus, "an indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy.") Federal Ins. Co. v. Gulf Ins. Co., 162 S.W.3d 160, 164 (Mo. Ct. App. 2005), quoting 15 Couch on Insurance (3rd Ed. 1999; Russ & Segalla) § 219.1 at 219-7. See J. Walters Constr., Inc. v. Gilman Paper Co., 620 So. 2d 219, 221 (Fla. App. 1 Dist. 1993).

"Most, if not all, jurisdictions to have faced the question of whether an indemnification agreement could relieve particular insurers of an obligation to pay, without resort to a separate action to enforce the indemnification agreement, have answered in the affirmative." St. Paul Fire Ins v. Am Intern Spec Lines, 365 F.3d 263, 272 (4<sup>th</sup> Cir. 2004). These cases give "controlling effect to the indemnity obligation of one insured to the other insured over 'other insurance' or similar clauses in the policies of the insurers, particularly where one of the policies covers the indemnity obligation." American Indem., 335 F.3d at 436. See also Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583, 587 (8<sup>th</sup> Cir. 2000); Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal.3d 622, 119 Cal.Rptr. 449, 532 P.2d 97 (Cal. 1975); Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co., 123 Cal. App. 4<sup>th</sup> 278, 20 Cal.Rptr. 3d 128 (Cal. Ct. App. 2004); J. Walters Constr., Inc. v. Gilman Paper

Co., 620 So. 2d at 221; Chubb Ins. Co. of Canada v. MidContinent Cas. Co., 982 F. Supp. 435, 438 (S.D. Miss. 1997).

The rationale for this exception is to give effect to the insureds' indemnity agreement. "To hold otherwise would render the indemnity contract between the insureds completely ineffectual and would obviously not be a correct result, for it is the parties' rights and liabilities to each other which determine the insurance coverage; the insurance coverage does not define the parties' rights and liabilities one to the other." Chubb Ins. Co. of Canada v. MidContinent Cas. Co., 982 F. Supp. at 438. To apply the "other insurance" provisions to reduce the indemnitor's insurer's liability "would serve to abrogate the indemnity agreement between" the indemnitor and indemnitee owner. J. Walters Constr., Inc. v. Gilman Paper Co., 620 So. 2d at 221. "To apportion the loss in this case pursuant to the other insurance clauses would effectively negate the indemnity agreement and impose liability on [owner's insurer] when [owner] bargained with [contractor] to avoid that very result as part of the consideration for the construction agreement." Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal.3d at 634. Courts should consider obligations under an indemnity agreement before allocating responsibility for the settlement liability according to the terms of the relevant policies. St. Paul Fire Ins v. Am Intern Spec Lines, 365 F.3d at 277.

In J. Walters Const. Inc. v. Gilman Paper Co., 620 So. 2d 219 (Fla. App. 1993), Walters contracted with Gilman to perform construction work at a Gilman plant. The contract provided that Walters would hold Gilman harmless from any claims for injury arising from the work and would procure liability insurance covering Gilman in respect to the work. Walters procured insurance with CNA in which Walters was named insured and Gilman was an additional insured. Gilman also procured its own policy written by Liberty Mutual. An employee of Walters was injured on the job and sued Gilman, which settled and sued to recover from CNA the entire amount paid in settlement. Both the CNA and the Liberty Mutual policies covered Gilman in respect to the employee's suit and "both policies" had similar "other insurance" clauses "to the effect that if other coverage is available, then coverage for only half of the claim will be provided." Id. at 220-21 & n.1 . The court, applying Georgia law, held that CNA was obligated for the entire amount paid in settlement of the Walters employee's suit against Gilman, and Liberty Mutual did not have to share any part of that, because "to apply the 'other insurance' provisions to reduce CNA's liability would serve to abrogate the indemnity agreement between Walters and Gilman" and the agreement "that Walters would hold Gilman harmless and that Walters would secure insurance" reflected "their mutual intent to have any claim arising out of the contracted work paid exclusively by the insurance procured by Walters, without contribution by Gilman's insurer, Liberty Mutual. Id. at 221.

In Rossmoor Sanitation Inc. v. Pylon Inc., 119 Ca1.Rptr. 449, 13 Cal. 3rd 622, 532 P.2d 97 (Cal. 1975) Pylon had contracted with Rossmoor to construct a pump station and sewer lines for Rossmoor. In the contract Pylon agreed to indemnify Rossmoor for all claims for damages arising out of the work, including attorneys' fees and expenses

incurred in defending damage suits, and Pylon also agreed to obtain liability insurance for itself and to name Rossmoor as an additional insured. Pylon procured insurance with U.S. Fire covering Pylon and designating Rossmoor as an additional insured. Rossmoor also had independent coverage under a policy (which did not cover Pylon) previously issued by its own insured, INA. The U.S. Fire and INA policies each purported to provide Rossmoor primary coverage, and each had identical other insurance clauses providing for apportionment of loss if the insured has other insurance covering the claim. Two Pylon employees were injured while performing work under the contract and sued Rossmoor. INA paid the resulting judgment against Rossmoor and bore the costs of defense. Thereafter, Rossmoor sued Pylon and U.S. Fire seeking indemnity; "U.S. Fire cross-complained against INA, seeking an apportionment of the sums between the carriers pursuant to the 'other insurance' clauses." Id., 532 P.2d at 99. The trial court, relying on the construction contract's provisions, ruled that "as the U.S. Fire policy was part of the consideration for the job, it provided primary coverage to Rossmoor; that the INA policy was merely excess; and that neither Pylon nor U.S. Fire was entitled to any benefits or setoffs by reason of the INA coverage." Id. (emphasis added).

The California Supreme Court affirmed. It held that the identical "other insurance" clauses in the U.S. Fire and INA policies, which each purported to provide Rossmoor primary coverage, did not control or relieve U.S. Fire of the obligation to fully reimburse INA for the entire amount of the judgment in underlying suit. The court stated:

It appears that both INA and U.S. Fire calculated and accepted premiums with knowledge that they might be called upon to satisfy a full judgment. There is no evidence that either company knew there was or would be other insurance when they issued the policies. The fact that there is other insurance is a mere fortuitous circumstance. We view one factor as compelling, however: to apportion the loss in this case pursuant to the other insurance clauses would effectively negate the indemnity agreement and impose liability on INA when Rossmoor bargained with Pylon to avoid that very result as part of the consideration for the construction agreement. We therefore conclude that the rights of indemnity and subrogation must control, and are persuaded the trial court was correct in finding that because the U.S. Fire policy was part of the consideration for the construction job, it must be viewed as primary insurance under the facts of this case and that INA was subrogated to the rights of Rossmoor.

Id. at 104-05 (emphasis added).

In Forisso v. Mello Constr., 2007 Mass. Super. Lexus 80 (Mass. Super. Ct. 2007), Quinn Brothers had agreed to defend and indemnify Mello Construction against all claims “arising out of” the performance of the work provided that any such claim is caused in whole or in part by any negligent act or omission. Quinn Brothers also agreed to provide to name Mello as an additional insured on a primary non-contributing basis. The plaintiff, an employee of Quinn Brothers, was injured on the jobsite using a ladder owned and provided by Quinn Brothers. The plaintiff brought suit against Mello Construction alleging that the ladder was defective and caused him to fall. Acadia Insurance Company, the insurer for Mello Construction was a fourth-party defendant in the case and sought summary judgment against Quinn Brothers and its insurer, Hanover Insurance Company, for defense. The Court allowed the motion of the fourth-party defendant, Acadia Insurance Co., and ordered that Quinn Brothers and its insurer, Hanover Insurance Co., had a duty to defend Mello Construction based on the duty to defend in the subcontract and the allegations in the complaint and the other facts known to Quinn Brothers and Hanover. The Court also noted that Hanover had a duty to defend Mello on the additional basis that Mello was an additional insured under Quinn Brothers’ policy with Hanover. The subcontract between Mello and Quinn Brothers stated that Quinn Brothers was to provide additional insured coverage to Mello on a primary non-contributing basis. Although the other insurance provisions in Hanover’s policy and Acadia’s policy were identical, the court ignored that the “other insurance” provisions and declared that Hanover’s policy was primary and non-contributing based on the underlying defense and indemnity obligations in the subcontract.

## **VI. Equitable Contribution**

“Equitable contribution is . . . the right to recover . . . from a co-obligor who shares such liability with the party seeking contribution. In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others.” Truck Ins. Exchange v. Unigard Insurance Co., 79 Cal. App. 4th 966, 974 (2000). “The right of equitable contribution does not arise out of an express contract or agreement between the parties to indemnify each other. Rather, it is based upon equitable principles that imply a contract between the parties to contribute ratably toward the discharge of a common obligation.” Ohio Cas. Ins. Co. v. State Farm Fire and Cas. Co., 262 Va. 238, 546 S.E.2d 421, 423 (2001). “Thus[,] where two or more persons are liable to pay a claim and one or more of them pays the whole of it, or more than his or her share, the one so paying may generally recover from the others the ratable proportion of the claim that each ought to pay.” Ohio Cas. Ins. Co., 262 Va. 238, 546 S.E.2d at 423, citing Midwest Mut. Ins. Co. v. Aetna Cas. and Sur. Co., 216 Va. 926, 929, 223 S.E.2d 901 (1976) (internal quotations omitted). As this Court has recognized, “[w]hether one calls it equitable contribution or equitable subrogation, there must be an equitable principle that permits one co-insurer to seek contribution from another co-insurer who has violated its coverage obligations, and left the “good” co-insurer holding the bag.” United States Fire Insurance Company et al. v. Peerless Insurance Company, 14 Mass. L. Rep. 121 (2002) (Gants, J.) (citations omitted)