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Pushed Beyond the Limits - Reactions to the U.S. Judiciary's Expansion of Additional Insured Coverage

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I. PREAMBLE

Additional insured requirements are among the most important and popular tools utilized by contracting parties as a means of allocating risk of loss through the use of insurance. When coupled with contractual indemnity provisions in an underlying contract, additional insurance provides financial security to the additional insured, and often entitles the additional insured to a number of direct benefits under the named insured's policy. ISO originally intended for additional insured coverage to be limited to vicarious liability. Unfortunately, conflicting court rulings and inconsistent application of additional insured endorsements over the last three decades have greatly expanded the coverage afforded to additional insureds, so that, in some instances, additional insureds are granted coverage even for their sole and/or concurrent negligence. ISO has periodically revised its additional insured endorsements over the past thirty years in response to the judiciary's trend of broad application, to no avail. In a pointed effort to curb the judiciary's seemingly unlimited expansion of additional insured coverage, ISO and individual state legislatures are independently enacting certain mechanisms to confine additional insured coverage to that assumed in a contract and to ensure that counter-parties are prevented from transferring risk for their sole and/or concurrent negligence.

II. INTRODUCTION

Additional insured status on a liability policy is an important bargained-for asset in many types of commercial transactions, including in the construction, oil, gas and energy sectors. In these areas, the contracting parties, as part of their regular business operations, draft the operative subcontract to include a detailed allocation of risks, including, but not limited to, provisions specifying contractual indemnities and additional insurance requirements. For example, in the construction arena, general contractors, and sometimes property owners, typically insist that the subcontractors retained by the general contractor name the general contractor and/or property owner as additional insureds on the subcontractors' liability policies. The subcontractor can fulfill this requirement by purchasing a "blanket" or "scheduled" additional insured endorsement for its liability policy. The additional insurance endorsement becomes a financial "back-up" to the contractual indemnity provisions.

An additional insured is often entitled to direct rights under the named insured's policy, including immediate coverage for defense costs, prevention of subrogation claims, and standing to sue the insurer for breach of contract. By tendering coverage to the named insured's insurer, the additional insured undertakes to prevent his own insurance carrier from being brought into the suit, depletion of his own liability insurance to defend claims, and increased premiums on future policies. In addition, additional insurance may protect a party in the event that the contractual indemnification in the parties' contract is deemed void and unenforceable. Finally, in any conflict arising regarding priority of coverage, the named insured's policy often is deemed to be the primary insurance and the additional insured's policy to be excess.

Despite the many advantages of additional insured status, the law surrounding the scope of additional insured coverage is complex and convoluted because the coverage afforded to a putative additional insured is often determined by the specific terms and conditions of the subject

insurance policy, including any endorsements to that policy, underlying contractual wording, state statutes, and applicable judicial interpretations from individual states. This myriad of factors often results in conflicting or inconsistent court rulings and application of additional insured endorsements.

First, insurers use different types and versions of additional insured endorsement forms, often containing significant differences in wordings. Indeed, while some insurers use "standard" policy forms drafted by the Insurance Services Office ("ISO"), as of July 2009, nearly 300 hundred different non-standard or "manuscript" additional insured endorsements existed in the marketplace.[1] In many cases, manuscript endorsements are purposely drafted to provide narrower coverage than the ISO endorsements, and certain courts have applied a separate line of legal reasoning when interpreting these endorsements.[2]

Second, in recent years courts have trended towards liberal construction of additional insured endorsements, and have granted additional insured coverage even where the additional insured is found to be solely negligent, as long as there is some causal connection between the accident/loss and the work of the named insured.

Third, indemnitees attempt to "insure" their sole or concurrent negligence to indemnitors, where they are not permitted to do so because of a state anti-indemnification statute.

Finally, a number of courts have taken the position that the underlying contract/agreement and the insurance policy are separate contracts, and have held that the scope and validity of the indemnification provisions in the underlying contracts have no impact on the scope and validity of additional insured coverage. Under this reasoning, additional insureds sometimes enjoy broader protection under the insurance policy than that which was bargained for under the contractual indemnification provisions, and may be entitled to additional insured coverage for a loss that was specifically negotiated and ultimately excluded under the terms of an underlying contractual indemnification provision.

In the Spring of 2013, ISO promulgated a new series of additional insured endorsements designed to limit the scope of additional insurance coverage to match underlying contract requirements. State legislatures are also reacting through promulgation of new anti-indemnification legislation, and, in some instances, anti-additional insured legislation. ISO and the state legislatures are attempting to bring counter-parties closer to contract certainty by ensuring that the scope of additional insured coverage is consistent with the agreed upon contractual relationship between the parties (including the additional insured provision and indemnity provisions in the underlying agreement), the wording of the insurance policy, and

[1] Jack P. Gibson and W. Jeffrey Woodward, *Questions and Answers on Additional Insured Issues – Part I*, IRMI Risk & Insurance, July 2009, http://www.irmi.com/expert/articles/2009/gibson07a-insurance-law-additional-insured.aspx (noting that a "complicating factor that has arisen in the past 5 or so years is the advent of nonstandard endorsements that sometimes take drastically different approaches to granting or restricting the coverage provided to an additional insured in a commercial general liability (CGL) policy.").

[2] Joseph P. Postel, *What Does an Additional Insrued Endorsement Cover? (Part II Manuscript Endorsements)*, IRMI Risk & Insurance, October 2000, http://www.irmi.com/expert/articles/2000/postel07.aspx.

state law. Although it will likely take years until the full impact and interpretation of the newly modified ISO endorsements and recently enacted state statutes reveals itself, it is hoped that these mechanisms will curtail what has universally been perceived as an inappropriate expansion of risk transfer through liberal interpretation and application of additional insured endorsements.

III. HISTORY & EVOLUTION OF STANDARD FORM ADDITIONAL INSURED ENDORSEMENTS

As noted above, insurers use both "standard form" additional insured endorsements drafted by ISO as well as individually drafted "manuscript form" additional insured endorsements. ISO is the largest national insurance advisory organization. It has been described as a "non-profit organization that provides rating, statistical, and actuarial policy forms and related services to all American property or casualty insurers."[3] Policy forms developed by ISO are approved by its constituent insurance carriers and then submitted to state agencies for review.[4] Although the basic ISO policy forms often are modified, sometimes extensively, by individual insurers, most insurers are influenced by the terms and conditions of the forms and use the forms for guidance in drafting their respective endorsements.[5]

ISO has developed over thirty (30) standard form endorsements for additional insured coverage, each tailored to a different risk transfer form. ISO has revised these forms numerous times over the last decades in an attempt to address loopholes and/or ambiguities, and to better reflect the insurance industry's intent in providing this additional insured coverage. Below we summarize the evolution of ISO additional insured endorsement form CG 20 10, entitled "Additional Insured—Owners, Lessees Or Contractors—Scheduled Person Or Organization", one of the most prevalent additional insured endorsements in the construction, oil, gas and energy sectors.

A. November 1985 Edition: "Arising Out of"

The November 1985 edition is the original version of ISO additional insured endorsement form CG 20 10. This endorsement form reads:

> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability **arising out of your work** for that insured by or for you. (emphasis added).

Although ISO's original intent was that this endorsement would provide coverage for vicarious liability only, this endorsement, as worded, does not require that the named insured bear any fault in order for the additional insured to obtain coverage. Consequently, a majority of courts began to construe the term "arising out of" so broadly as to grant additional insured

[3] *Golden Eagle Ins. v. Ins. Co. of the West*, 99 Cal. App. 4th 837, 846 fn. 4 (2002) (citation omitted); *see also* The Associated General Contractors of America, *AGC White Paper on Additional Insured Endorsements*, February 2006, http://www.agc.org/galleries/conrm/White%20Paper%20-%20Finalriskmanagement.pdf (noting that ISO "is a group that the insurance industry founded and continues to fund for the purpose of developing standard forms….").
[4] *Pardee Constr. Co. v. Ins. Co. of the West*, 77 Cal. App. 4th 1340, 1359 fn. 15 (2000) (citations omitted).
[5] *Golden Eagle Ins.*, 99 Cal. App. 4th at 846 fn. 4.

coverage for both direct and vicarious liability in connection with the named insured's work, even where the additional insured was solely at fault. This endorsement is generally not available today.[6]

One of the first cases to interpret the "arising out of" language was *Harbor Insurance Company v. Lewis,* 562 F. Supp. 800 (E.D. Pa. 1983). In that case, Harbor Insurance Company ("Harbor") sought a determination of its obligations to Reading Railroad Company ("Reading"), its named insured, in connection with an underlying verdict rendered against both Reading and the City of Philadelphia (the "City"). The underlying claimant alleged that he suffered severe injuries after being run over by a train operated by Reading in an area located near a fence that had been negligently maintained by the City. The City sought a declaration that it was covered as an additional insured on Reading's insurance policy.

The additional insured endorsement at issue in *Harbor* explicitly provided that the policy covered the additional insured "only to the extent of liability resulting from occurrences arising out of the negligence of [Reading]".[7] The City argued that it was covered under this endorsement for *any* liability arising out of Reading's negligence. Harbor, on the other hand, argued that coverage was available only for vicarious liability of additional insureds; in other words, where the additional insured was found liable for the negligence of the named insured.

In analyzing the endorsement, the *Harbor* court relied on expert witness testimony explaining the customary practices of the insurance industry with regard to additional insured endorsements. Through this testimony, the court determined that:

> [i]n the insurance industry, additional insured provisions have a well-established meaning. They are intended to protect parties who are not named insureds from exposure to vicarious liability for acts of the named insured.[8]

The *Harbor* court next addressed the intent of the parties, and found that Harbor intended this endorsement to be a routine endorsement issued to cover additional insureds for vicarious liability that might result from the named insured's acts. Based on the endorsement's language and the intent of the parties, the *Harbor* court held that Harbor did not owe coverage to the City for liability arising from the City's own negligence.

As ISO endorsement form CG 20 10 became more prevalent in the construction sector, sophisticated owners, developers and general contractors began to argue that additional insured coverage was intended to protect them from their own liability as well as vicarious liability imposed on them. Courts subscribed to this approach and liberal interpretation of additional insured endorsements quickly became the majority rule. Indeed, New York, California, Louisiana and Texas are just some of the jurisdictions that broadly interpret the phrase "arising out of." These courts have held that when used "in an additional insured clause, it means

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[6] Craig F. Stanovich, *Additional Insured Endorsements – A Potential Minefield (Part 3),* IRMI Risk & Insurance, March 2006, http://www.irmi.com/expert/articles/2006/stanovich03.aspx.

[7] *Id*.

[8] *Id*.; *see also Northbrook Ins. Co. v. Am. States Ins. Co*., 495 N.W.2d 450, 453 (Minn. Ct. App. 1993) (holding same).

'originating from, incident to, or having connection with.'"[9] A named insured need not be a named defendant in the underlying complaint in order to trigger coverage for an additional insured under an endorsement employing the "arising out of" language, nor does the complaint need to contain explicit allegations of negligence on the part of the named insured.[10] The focus of the inquiry "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained."[11] Indeed, all that is required is "that there be some causal relationship between the injury and the risk for which coverage is provided."[12] One New York court interpreting the phrase "arising out of" went so far as to state that "it is generally the rule that 'any negligence by the additional insured in causing the accident underlying the claim is not material to the application of the additional insured endorsement.'"[13]

This broad construction is especially prevalent in construction cases involving bodily injury. In holding that the additional insured endorsement does not require a negligence trigger, courts in these cases have found a causal relationship between the injury and the risk for which coverage is provided where the injury was sustained by an employee of the named insured/subcontractor while performing the named insured's work under the subcontract.

The California Court of Appeals gave a broad interpretation to the phrase "arising out of" in *Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal. App. 4th 321, 324 (1999). The *Acceptance* court held that the fact that the liability at issue was attributable to the purported additional insured's own negligence was irrelevant where the policy language did not purport to allocate coverage according to fault. In that case, the named insured contracted with Syufy, the owner of a theater, to upgrade the theater's lighting and temperature controls. The contractor requested that its general liability insurer provide additional insured coverage to Syufy. The endorsement provided that Syufy was included as an insured under the policy but only with respect to liability arising out of the contractor's work for Syufy by or for the named insured.

An employee of the contractor was working on the roof of the theater when he decided to take a break. A roof hatch provided the only access to and from the roof. As the employee was

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[9] *Admiral Ins. Co. v. Am. Empire Surplus Lines Ins. Co*., 96 A.D.3d 585 (1st Dep't 2012) (*citing Regal Constr. Corp v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A*., 15 N.Y.3d 34, 38 (2010) (internal citations omitted)).

[10] *See Regal Constr. Corp*., 15 N.Y.3d at 39; *see also W&W Glass Systems, Inc. v. Admiral Ins. Co*., 91 A.D.3D 530, 531 (1st Dep't 2012) (noting that the language in the additional insured endorsement granting coverage does not require a negligence trigger); *see also QBE Ins. Co.,* 934 N.Y.S.3d at 38 (noting that if insurers "intended to limit coverage only to cases where a claimant made express accusations against the named insured, or where the named insured was made a defendant" than the insurers could have done so).

[11] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 103 A.D.3d 473, 474 (1st Dep't 2013) (*citing Regal Constr. Corp.* 15 N.Y.3d at 38).

[12] *Regal Constr. Corp.* 15 N.Y.3d at 38; *see also QBE Ins. Co.,* 934 N.Y.S.2d 36, 39 (NY Supreme Ct., Nassau County 2011) (the Court will "infer a causal nexus whenever it finds a reasonable possibility that liability arose out of, or was caused in whole or in part by operations of a named insured…."); *see also Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd's*, 199 Cal. App. 4th 1038, 1054 fn. 18 (2011) (recognizing that it is "well accepted that 'arising out of' is used in insurance policies to denote a 'minimal causal connection…and generally means that one event has its origin in the other….") (citations omitted); *see also Utica Nat'l Ins. Co. of TX v. Am. Indem. Co.,* 141 S.W.3d 198, 203 (TX 2004) (noting that the Texas Supreme Court has held that "arise out of" simply requires a "'causal connation or relation,' which is interpreted to mean that there is but-for causation, though not necessarily direct or proximate causation.").

[13] *LaFarge Buildings Materials, Inc. v. J. Hall, Ltd.,* 3 A.D.3d 651, 652 (3d Dep't 2004).

climbing down the hatch, the hatch fell and severed one of his fingers. The employee sued Syufy, alleging that his injury was the result of its failure to provide and maintain a safe closing mechanism on the hatch, and its failure to warn him about the hatch's defective condition.[14] Syufy tendered the defense of the action to the contractor's insurer. Although the insurer initially accepted Syufy's tender, it eventually learned that the employee never worked on the hatch, and that Syufy knew for years that the hatch was defective.

The court rejected the insurer's coverage disclaimer. Instead, the court noted that under a "common sense approach" the employee's injury "'clearly 'arose out of' the work that he was performing on the roof" of the theater.[15] The court further noted that: "[t]he relationship between the defective hatch and the job was more than incidental, in that [the employee] could not have done the job without passing through the hatch." [16] Most importantly, the court reasoned that insurance companies commonly issue additional insured endorsements that specifically limit coverage to situations in which the additional insured is faced with vicarious liability for negligent conduct by the named insured.[17]When an insurer chooses not to use such restrictive language, but instead "grants coverage for liability 'arising out of' the named insured's work, the additional insured is covered without regard to whether the injury was caused by the named insured or the additional insured."[18]

The United States Court of Appeals for the Tenth Circuit in *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993) found the term "arising out of" to be "both broad and vague" and ambiguous as to whose negligence was covered and whose negligence was excluded from coverage. In *McIntosh*, a man tripped and fell on the premises of Wichita's convention facilities during an annual festival run by Wichita Festivals, Inc. ("Festivals"). The claimant sued the City of Wichita ("Wichita") in state court alleging that his injuries were caused by Wichita's failure to warn of a dangerous condition. Wichita tendered defense of the suit to the liability insurer of Festivals as an additional insured on Festivals' policy. Festivals' insurer denied coverage.[19] Wichita's general liability carrier accepted the tender. The case was tried on damages only, and judgment was rendered against Wichita for $75,000.

Following the trial, the claimant filed a garnishment action in state court against Festivals' insurer, alleging that the insurer owed additional insured coverage to Wichita for the underlying tort judgment because the additional insured endorsement covered all liability arising out of the festival, including liability based on Wichita's own negligence. The endorsement at issue utilized the "arising out of" language.[20]

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[14] *Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal. App. 4th 321, 324 (1999).
[15] *Id*. at 328.
[16] *Id*.
[17] *Id*. at 330.
[18] *Id.; see also Edwards v. Brambles Equipment Servs., Inc.*, 2002 U.S. Dist. LEXIS 16718 *16 (E.D. La. 2002) (noting that "[i]t is well settled that a limitation on liability, such as 'arising from the insured's operations' or 'arising from insured's work' in an additional insured endorsement will nevertheless provide coverage to an additional insured even if the additional insured is solely negligent'").
[19] *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993).
[20] *Id*. at 254.

The trial court interpreted the phrase "arising out of" to mean arising from the named insured's negligence, thereby excluding coverage for the additional insured's negligence.[21] In other words, the trial court concluded that the plain language of the endorsement unambiguously covered Wichita only to the extent that it was held vicariously liable for Festival's negligence.[22]

Wichita appealed and the Court of Appeals for the Tenth Circuit reversed. The court concluded that the additional insured endorsement covered Wichita for the underlying tort judgment, and noted that the phrase "arising out of" clearly related to causation but its terms are "both broad and vague".[23] The Tenth Circuit went on to note that "[a]t best, the phrase 'but only with respect to liability arising out of" is ambiguous as to whose negligence is covered and whose negligence is excluded from coverage. Because this ambiguous language purports to limit coverage we must construe it narrowly." Accordingly, the court broadly construed the additional insured endorsement, and found it was not limited to only those cases where the additional insured is held vicariously liable for the named insured's negligence.

Just last year, the Louisiana Court of Appeals for the Fourth Circuit commented on the judiciary's trend of broad interpretation of additional insured endorsements. In *Jones v. Capitol Enterprises, Inc*., 89 So. 3d 474 (La.App. 4 Cir. 2012), the Court noted that "[w]hile the insurance industry believed that this coverage would extend no further than instances where the additional insured is vicariously liable for the wrongs of the named insured, many courts have interpreted the language as providing a broader coverage grant.'"[24] In so doing, the court recognized that "'[c]ourts have been reluctant to narrowly construe the phrase 'arising out of' employed in additional insured endorsements" and that under this majority view "a 'fault-based interpretation of this kind of additional insured endorsement no longer prevails.'"[25]

B. October 1993 Edition: "Ongoing Operations"

Another issue with ISO Form CG 20 10 (11/85) was that courts often held that the term "your work" did not conclusively limit the time frame of the additional insured coverage to the time of the ongoing operations of the named insured. As such, courts granted additional insured coverage to the scheduled entity not only for liability arising during the named insured's ongoing operations, but also for "completed operations", *i.e.,* coverage for claims arising during the policy period but after the named insured's work has been completed. In October of 1993, ISO attempted to narrow the scope of coverage available under CG 20 10 (11/85), the original additional insured endorsement, by replacing the words "your work" with "your ongoing operations". ISO revised endorsement CG 20 10 to read:

> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability **arising out of your ongoing operations** performed for that insured. (emphasis added).

[21] *Id*.
[22] *Id*.
[23] *Id*. at 255.
[24] *Jones v. Capitol Enterprises, Inc*., 89 So. 3d 474, 486 (La.App. 4 Cir. 2012).
[25] *Id*.

The endorsement continued to utilize the broad "arising out of" language so that additional insured coverage remained available for claims arising out of the named insured's work regardless of cause, and, arguably, for an additional insured's sole negligence.

The attempt by ISO to limit additional insured coverage to liability arising during a named insured's "ongoing operations" is frustrated because the phrase "ongoing operations" is interpreted differently in different jurisdictions. Several courts broadly interpret the phrase "ongoing operations"[26] to mean more than "actions currently in progress'" and "active work."[27] For example, New York courts tend to interpret "ongoing operations" as including "injuries occurring prior to completion of work, not just those occurring while active work is being done."[28]

In *Town of Fort Ann v. Liberty Mutual Ins. Co*., 69 A.D.3d 1261 (3d Dep't 2010), defendant Kubricky Construction Corporation ("Kubricky") was hired to reconstruct a dam that was owned by the Town of Fort Ann ("the town"). The written contract between Kubricky and the town required Kubricky to maintain additional insured coverage for the town until the town accepted the completed project. Following the failure of the dam, the town sought additional insurance coverage from Kubricky's insurer Liberty Mutual. Liberty Mutual argued that coverage was available under its additional insured endorsement only so long as Kubricky had ongoing operations at the project. Liberty further argued that major construction by Kubricky had ended one to two months prior to the dam's failure. The court disagreed and held that the town properly established that it was an additional insured. Because the contract required an inspection of the project by the engineer before Kubricky's work was considered completed, and because such inspection had not yet taken place, the court found that operations were ongoing. The court explained that "[w]ork may be considered as ongoing during a short lapse of time necessary to conduct tests designed to assure proper performance where such testing is an essential element of the work by the insured."

In *Perez v. New York City Housing Authority*, 302 A.D.2d 222 (1st Dep't 2003), the court found that an injury arose out of "ongoing operations" despite the fact that the contractor was not actively testing or installing a valve at the time of injury, because the accident occurred after the replacement of valves, but before the testing was completed. The court stated "[u]nder any plain meaning of the word, the contractor's work was 'ongoing' as long as the tests designed to assure proper performance remained undone."[29] Similarly, in *One Beacon Insurance v. Travelers Property Casualty Company*, 51 A.D.3d 1198 (3d Dep't 2008), an insurer argued against a finding of additional insured coverage where the named insured/subcontractor was not actually working on the project at the precise time of the accident. The court acknowledged that the additional insured endorsement extended coverage to liability arising out of "ongoing operations" and noted that the existence of additional insured coverage for the putative additional

[26] *Town of Fort Ann v. Liberty Mutual Ins. Co*., 689 A.D.3d 1261, 1262-63 (3d Dep't 2010).
[27] *Wausau Underwriters Ins. Co. v. Cincinnati Ins. Co*., 198 Fed. Appx. 148 (2d Cir. 2006).
[28] *Liberty Mut. Fire Ins. Co. v. TAP Electrical Contr. Serv., Inc.,* 475 F. Supp. 2d 400 *27-28 (S.D.N.Y. 2007); *see id*. at *22 (rejecting the insurer's implication that any occurrence taking place when action is not being taken cannot be covered under the terms of the relevant endorsement).
[29] *Id.*

insureds as to the underlying accident depended on the time of the accident. Although there was evidence that the deck had been constructed and was in use before the accident, deposition testimony that indicated that work remained to be done on the deck led the court to find a question of fact as to coverage.

Louisiana courts also broadly interpret the "ongoing operations" limitation found in additional insured endorsements. In *Fleniken v. Entergy Corp*., 790 So. 2d 64 (La.App. 1 Cir. 2001), the insurer argued that the purported additional insured was not covered under the policy because the named insured was not performing any operations for the purported additional insured at the time of the accident. The court rejected the insurer's argument as too restrictive. The court noted that the claimant was injured while inspecting the named insured's trailer to determine whether it had been sufficiently cleaned. Because of the direct relationship between the employee's performance of his inspection duties, and the named insured's use of the purported additional insured premises, the court found that the potential additional insured's liability arose out of ongoing operations for the named insured.

At least one California court has found the phrase "ongoing operations" to be ambiguous, and therefore refused to place a temporal limitation on coverage. In *McMillin Construction Services, L.P. v. Arch Specialty Insurance Company*, 2012 U.S. Dist. LEXIS 8339 (S.D. Cal. Jan. 25, 2012), the purported additional insured sought coverage for claims in an underlying construction defect action. The insurer denied additional insured coverage, and moved for partial summary judgment on the basis that the policy's additional insured endorsement explicitly required that the named insured be engaged in "ongoing operations" for the additional insured. The insurer argued that the named insured's operations were not ongoing at the time the claim was made. In opposition, the purported additional insured and the named insured both argued that coverage existed because the claim at issue "arose out of" the named insured's operations, regardless of the timing of those operations.

The court agreed with the additional insured. In so holding, the court relied on a Ninth Circuit unpublished decision in *Tri-Star Theme Builders, Inc. v. OneBeacon Insurance Company*, 426 Fed. Appx. 507, 2011 U.S. App. LEXIS 7467 (9th Cir. 2011). In *Tri-Star,* the Ninth Circuit addressed a similarly worded additional insured endorsement. Applying Arizona law, the Ninth Circuit found the "ongoing operations" language ambiguous as to whether there was a temporal limitation on coverage. Although the language could be construed as imposing a temporal limitation, as contended by the insurer, the language could also be construed as addressing merely the type of activity from which liability must arise in order to afford additional insured coverage. Such ambiguity resulted in the *Tri-Star* court ruling in favor of the insured. Finding the unpublished *Tri-Star* case persuasive, the *McMillin* court held that the additional insured endorsement at issue was ambiguous and the insurer was not entitled to summary judgment.

C. October 2001 Edition: "Ongoing Operations" Further Defined

In October 2001, ISO further attempted to clarify the meaning of "ongoing operations" as used in its CG 20 10 additional insured endorsement by adding the following two exclusions:

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

(1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been competed; or

(2) that portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

The 2001 endorsement continues to utilize the "arising out of" language, and therefore, arguably, provides broad additional insured coverage. But this endorsement depletes additional insured coverage for completed operations and provides coverage only for claims that arise during the actual construction process by limiting the term of the additional insured coverage to the time period during which the named insured is actually performing operations, and to make clear that no coverage is intended for completed operations.

D. July 2004 Edition: "Caused By"

The judiciary's continued broad application of the "arising out of" language, in direct contrast to the original intent of ISO, became routine, and forced ISO to make additional, and more explicit, changes to the wording of ISO Form CG 20 10. In July 2004, ISO replaced the phrase "arising out of" in CG 20 10 with the phrase "caused in whole or in part by" acts or omissions of the named insured. ISO hoped this modification would curtail the judiciary's trend of expansive interpretation of the endorsement. The revised endorsement read:

Section II – 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 for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

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

ISO's July 2004 revision removes coverage for the additional insured's sole negligence, and adds a fault requirement for the named insured.

ISO explained the reasoning behind the amendment in a 2004 webinar:

> Because the phrase "arising out of" has been interpreted broadly by the Courts and many others, we have revised several additional insured endorsements to replace the phrase with "caused by." We believe this will provide a more narrow interpretation. In addition, we have also revised the endorsements to provide an additional insured with coverage for vicarious or contributory negligence only. In other words, the additional insured will only have coverage for acts or omissions for which the named insured is totally or partially at fault; thereby negating any coverage for the additional insured's sole negligence.[30]

Some uncertainty remains, however, with regard to ISO's July 2004 revision and, specifically, its requirement that the injury be caused at least in part by an act or omission of the named insured. As a practical matter, a complaint will need to allege some negligence on the part of the named insured to trigger coverage for the additional insured under either endorsement, and, arguably, the absence of fault on behalf of the named insured results in a finding of no coverage for the additional insured. However, an issue arises where coverage is sought for claims brought against an additional insured by an injured employee of the named insured. The claims of the injured employee usually lack allegations of negligence or fault on the part of the named insured because the named insured's legal obligations to the injured party will be addressed by the Workers' Compensation system, which does not operate on the basis of allegations of fault, and, in any event, bars an injured employee from bringing a subsequent claim against its employer (often the named insured).

For example, courts within the State of New York interpret the phrase "caused by" differently. The New York Appellate Division, First Department held in *W&W Glass Systems, Inc. v. Admiral Ins. Co*., 91 A.D.3D 530 (1st Dep't 2012) that "the phrase 'caused by your ongoing operations performed for that insured', does not materially differ from the general phrase 'arising out of'."[31] In contrast, a New York federal court recently held in *National Union Fire Insurance Company of Pittsburgh, PA v. XL Insurance America, Inc.*, 2013 U.S. Dist. LEXIS 68467 *21 (S.D.N.Y. 2013) that "caused by" is "narrower" than "arising out of" and requires a showing that the named insured's operations "proximately caused" the bodily injury for which indemnity was sought.[32]

The *National Union* court adopted the reasoning of the United States District Court for the Eastern District of Pennsylvania in *Dale Corporation v. Cumberland Mutual Fire Insurance Company*, 2010 U.S. Dist. LEXIS 127126 (E.D. Pa. 2010) which held that "caused by", as used in an additional insured endorsement, requires a showing that the named insured's actions were a

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[30] Revisions to the Additional Insured Endorsements – Web on Air seminar – April 15, 2004 with presenter Rob Beiderman, www.ISO.com

[31] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co.,* 103 A.D.3d 473 (1st Dep't 2013); *see also W&W Glass Systems, Inc. v. Admiral Ins. Co*., 91 A.D.3D 530 (1st Dep't 2012) (rejecting the insurers' argument that the 'caused by' language in the policy is 'narrower' than the arising out of language); *see also QBE Ins. Corp. v. ADJO Contr. Corp.*, 934 N.Y.S.2d 36 (NY Supreme Court, Nassau Cty 2011)(holding that the phrase "'caused in whole or in part'" does not materially alter the general phrase, 'arising out of'" and that "[t]herefore, the analytical approach to these policies will not vary from the analysis undertaken for those policies which contain the more common, 'arising out of your ongoing operations' language.").

[32] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. XL Ins. Am., Inc.,* 2013 U.S. Dist. LEXIS 68467 *21 (S.D.N.Y. 2013).

proximate cause of the occurrence.[33] In interpreting the phrase "caused by, in whole or in part", the *Dale* court recounted the history of the ISO forms and recognized that ISO replaced "arising out of" with "caused by" in response to the breadth of courts' interpretations of the former phrase, and in an attempt to require some causation on the part of the named insured before the additional insured endorsement is triggered.[34] Indeed, the *Dale* court noted:

> The 2004 revisions are a belated acknowledgment [sic] that the "arising out of" language simply did not accomplish the scope of coverage intended by the industry. Many courts interpreted "arising out of" to be a simple causation test, and therefore, afforded direct primary coverage to the additional insured. The ISO hopes that by substituting "caused by" for "arising out of," a narrower coverage interpretation will be afforded.[35]

After careful review of the form's history, both dictionary definitions, and case law suggesting a similar approach to proximate cause, the *Dale* court held that "caused by" required "proximate cause".[36]

The *National Union* court cited to the *W&W Glass* decision, and noted that the juxtaposition of the *Dale* decision and the *W&W Glass* decisions make clear that the phrase "caused by" does not disclose a singular meaning.[37]

IV. STATE ANTI-INDEMNITY STATUTES

By way of background, at least 45 states have enacted anti-indemnity statutes defining the scope of legal liability that one party may transfer to another in a contract.[38] These statutes vary in scope and in the type of contracts to which they apply, but generally bar agreements calling for the indemnitor to indemnify the indemnitee for damages or liabilities solely or partially caused by the indemnitee's own negligence.[39] Generally, there are three types of indemnity clauses: broad, intermediate and limited.[40]

Broad indemnity agreements indemnify an indemnitee for *any* loss arising from the project, including loss caused by the indemnitee's sole or concurrent negligence. Intermediate form indemnity agreements indemnify the indemnitee for the entire loss associated with a project when responsibility for some of the loss can be placed on the indemnitor, *i.e.,* any damages resulting in whole or in part from the indemnitee's negligence.[41] Limited form indemnity

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[33] *Dale Corp. v. Cumberland Mutual Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 127126 (E.D. Pa. 2010).
[34] *Id*. at *20-21.
[35] *Id*. at *16 (citation omitted).
[36] *Id*. at *21.
[37] *Id*. at *20; *see also id*. at *21 (noting that the court in *W&W Glass* did not, like the Ninth Court, carefully parse the contractual language at issue).
[38] Paul Primavera, *Evolving AI Endorsement Interpretations Create More Headaches For Contractors*, The National Underwriter Company Property and Casualty 360, Issues No. 7, February 23, 2009.
[39] Julian D. Ehrlich, *The Looming Death of Additional Insured Status*, N.Y. Law Journal, Sept. 25, 2012.
[40] *See* Mark M. Bell, *Indemnity and Additional Insured Requirements: Why Am I Demanding Them, Why do Others Want Them, and What Does It all Mean*, International Risk Management Institute, Inc. (May 2013), http://www.irmi.com/expert/articles/2013/bell05-construction-liability.aspx.
[41] *Id*.

agreements require the indemnitor to indemnify the indemnitee only for losses directly attributable to the indemnitee's own negligence.[42] A majority of states have enacted legislation prohibiting broad form indemnity agreements.[43] Some states have taken the further step of declaring intermediate form indemnity agreements to be void.

In recent years, conflicts have arisen where one party attempts to circumvent anti-indemnity statutes through the inclusion of an additional insurance procurement provision in the subcontract whereby that party is named as an additional insured for the other party's liability. The indemnitee will insist that the indemnitor furnish a certificate of liability insurance confirming the indemnitee's status as an additional insured on the indemnitor's policy.[44] The indemnitee will then argue he is entitled to full indemnification from the indemnitor's insurers, notwithstanding that he is not entitled to such benefits because of an applicable anti-indemnification statute.[45]

Anti-indemnity statutes by themselves do not affect the enforceability of insurance procurement provisions, and appear to render insurance policies wholly exempt from their purview. Indeed, a number of courts in states with anti-indemnification statutes, have upheld additional insured coverage even with respect to the additional insured's sole (and/or concurrent) negligence by construing the terms of the insurance policy as encompassing and covering the additional insured's negligence, essentially creating a coverage "loophole." The best example of this to date is the Fifth Circuit Court of Appeal's decision in *In re: Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013), discussed below.

V. DEEPWATER HORIZON

The United States Court of Appeals for the Fifth Circuit's decision in *In re: Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013) addressed the extent to which an insurer's coverage obligations to a putative additional insured are tied to the contractual indemnity owed by its named insured to that same putative additional insured. Applying Texas law, the *Deepwater Horizon* court held that only the additional insured provision in the insurance policy at issue, and not the indemnity provisions of the contract at issue, controlled the extent to which coverage was available for the putative additional insured. In so holding, the Fifth Circuit effectively extended additional insured coverage beyond the scope of liabilities assumed in the underlying contract between the named insured and the putative additional insured, and judicially granted stand-alone coverage to a party that had made a conscious decision not to purchase coverage for its own protection. The *Deepwater Horizon* decision sent shock-waves through the insurance industry as it exemplifies the uncertainties surrounding contractual indemnification and additional insured status.

By way of background, in 1998, Transocean Holdings, Inc. ("Transocean"), the owner of a semi-submersible, mobile offshore drilling unit named Deepwater Horizon, contracted with BP for BP to perform exploratory drilling activities at the Macondo Well (the "Drilling Contract").

[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.

The Drilling Contract defined BP and Transocean's respective obligations, including the liabilities assumed by each. Transocean assumed responsibility for pollution-related liabilities that originated from above-surface oil pollution, while BP assumed liability for all other types of oil pollution not assumed by Transocean, including sub-surface oil pollution. The Drilling Contract also contained an insurance provision which, *inter alia*, required Transocean to maintain certain types of insurance coverage, including minimum levels of coverage, for the benefit of BP. Specifically, Transocean was to name BP as an additional insured on its policies "for liabilities assumed by [Transocean] under the terms of this Contract." Transocean thereafter obtained $50 million of first layer coverage and an additional $700 million of excess liability coverage from various excess liability insurers, including Certain Underwriters at Lloyd's London. On April 20, 2010, an explosion occurred on the *Deepwater Horizon*, taking the lives of eleven people and causing millions of gallons of oil to spill into the Gulf of Mexico. On May 14, 2010, BP notified Transocean's primary and excess insurers of certain pollution-related liabilities it faced relating to the incident, and coverage litigation commenced shortly thereafter.

The United States District Court for the District of Louisiana in *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, 2011 U.S. Dist. LEXIS 131693 (E.D. La. Nov. 15, 2011) held in the first instance that Transocean's insurers did not owe BP additional insured coverage for pollution-related liabilities resulting from the *Deepwater Horizon* incident. Applying Texas law, the District Court found that the insurers' additional insured obligations to BP were limited by the terms of the Drilling Contract and that Transocean was obligated to provide additional insured coverage to BP only for those liabilities assumed by Transocean in the Drilling Contract. Because Transocean did not assume liability for sub-surface oil spills, the District Court held that BP was not an additional insured for the losses at issue.

The Fifth Circuit Court of Appeals reversed the District Court. Applying Texas law, the Fifth Circuit held that only the additional insured provision in the insurance policy at issue, and not the indemnity provisions of the Drilling Contract, controlled the extent to which coverage was available for BP as the putative additional insured. Accordingly, the Fifth Circuit agreed with BP that a determination of any rights or obligations of BP or Transocean to one another under any provisions of the Drilling Contract was unnecessary because Texas law makes clear that "only the…policy itself may establish limits on the extent to which an additional insured is covered" so long as the additional insured provision is separate from the indemnity provisions in the underlying services contract. Thus, even though the Drilling Contract specified that BP was to be an additional insured under Transocean's policies *only* for liabilities specifically assumed in the Drilling Contract, the Fifth Circuit held that it was bound to look only to the policy itself to determine whether BP was entitled to coverage.

Transocean and its insurers petitioned the Fifth Circuit for a rehearing *en banc* (a review by all the judges of the court). On August 29, 2013, the Fifth Circuit Court of Appeals unanimously withdrew its March 1, 2013 decision, and certified two questions of Texas State Law to the Supreme Court of Texas. The first question surrounds the scope of BP's coverage as an additional insured and turns on whether the precedent Texas Supreme Court case law relied on by the Fifth Circuit compels a finding that BP is covered for the damages at issue because the language of the umbrella policies alone determines the extent of BP's coverage as an additional

insured so long as the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"; or whether the indemnity clauses in the Drilling Contract effectively limit BP's coverage. The second question certified to the Texas Supreme court is whether under Texas State law, the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract.

In its certification to the Texas Supreme Court, the Fifth Circuit noted that *Deepwater Horizon* involves important and determinative questions of Texas State law as to which there is no controlling Texas Supreme Court precedent, The Fifth Circuit further noted that where state law governs issues such as those outlined above, policy factors are better gauged by the highest court of the state than by a federal court. The Supreme Court of Texas accepted the certification and we await a decision.

VI. REACTIONS TO COURTS' BROADENING OF THE SCOPE OF ADDITIONAL INSURED COVERAGE

A. ISO Response

Effective April 1, 2013, ISO revised twenty-four additional insured endorsements as part of its overall revisions to the standard commercial general liability policy. The revised ISO endorsements generally attempt to tie, and thereby limit and/or reduce, the scope of additional insured coverage to match the underlying contractual requirements.

Coverage is Provided "To the Extent Permitted By Law"

The ISO modification of its additional insured endorsements includes language explicitly stating that the insurance afforded to the additional insured "only applies to the extent permitted by law". For example, ISO revised its "Additional Insured—Owners, Lessees Or Contractors—Scheduled Person Or Organization" endorsement (Form CG 20 10 04 13) to read:

> **A.** **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.
>
> However:
>
> 1. **The insurance afforded to such additional insured only applies to the extent permitted by law[.]**

(emphasis added)

Although the precise reason for ISO's modification is not specified in any of the endorsements, there are two possible reasons for ISO's addition of the phrase "to the extent permitted by law." First, ISO may be attempting to address circumstances in which courts interpret ISO's post-2004 language as providing for broader coverage than is allowed by specific state anti-indemnification statutes, *e.g.*, where a state anti-indemnification statute prohibits the transfer of *any* liability. Under that scenario, additional insured coverage under this revised endorsement would be limited to vicarious liability arising solely out of the named insured's acts or omissions. Second, ISO may be attempting to address legislation, in those states that have expanded their anti-indemnification statutes to also void contractual provisions seeking to transfer risk via additional insured coverage, without the need for state-specific endorsements (discussed in more detail below).[46]

Notably, the April 2013 revision leaves intact the "caused in whole or in part" language, so that, arguably, the additional insured continues to be entitled to coverage for its own liability, provided that the named insured's (or someone acting on its behalf) played at least some part, however trivial, in causing the injury/damage at issue. As it relates to contractual indemnity, this language allows an indemnitee to maintain additional insured coverage for its own negligence, even though the state anti-indemnification law might prohibit the transfer of any of the indemnitee' s negligence through contractual indemnification.

In the construction context, the addition of this clause appears to be ISO's attempt to address those circumstances in which: (a) a general contractor requires a subcontractor to both contractually indemnify it and procure additional insurance coverage for it; (b) the general contractor subsequently bears sole liability for a workplace accident or other loss; (c) a state anti-indemnification statute prevents that general contractor from obtaining contractual indemnity but is silent as to additional insured coverage – even with respect to the additional insured's sole negligence; and (d) the general contractor, therefore is entitled to broader coverage than is allowed under the state's specific anti-indemnification law.

Coverage "Will Not Be Broader Than" The Contract Requires

ISO also modified certain of its additional insured endorsements to include language stating that if the additional insured coverage is required by a contract or agreement, the insurance afforded to the additional insured "will not be broader than" the coverage that the insured is "required by the contract or agreement to provide". For example, ISO revised its endorsement "Additional Insured – Owners, Lessees, or Contractors – Completed Operations (Form CG 20 37 04 13) to read as follows:

> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the

[46] Roberta D. Anderson, *Determining the Scope of "Additional Insured" Coverage: Recent ISO CGL Insurance Form Revisions Merit Close Attention by Contracting Parties*, K&L Gates Insurance Coverage Alert, May 9, 2013, http://www.klgates.com/determining-the-scope-of-additional-insured-coverage-recent-iso-cgl-insurance-form-revisions-merit-close-attention-by-contracting-parties-05-09-2013.

> location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".
> However:
> ****
> **2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured**.
>
> (emphasis added)

At least one commentator has noted that ISO's revision appears to "incorporate into the insurance policy any express limits on additional insured coverage that the parties have specified in the contract, *e.g.*, where the contract specifies that the additional insured coverage will only extend to vicarious liability."[47] For example, if a policy contains language stating that if the additional insured coverage is required by a contract or agreement, the insurance afforded to the additional insured "will not be broader than" the coverage that the insured is "required by the contract or agreement to provide", a court may be forced to look beyond the policy to determine if there were any underlying contracts between the named insured and the additional insured, and, if so, what those contracts or agreements required in terms of coverage. In the event that those contracts or agreements contain limited insurance procurement provisions and/or provisions cross-referencing any indemnity provisions in the same contracts or agreements, a court would likely have to recognize such limitations under this endorsement.

Limits Are the Lesser of the Contract Requirement or the Policy Declarations

A third modification made by ISO is its inclusion of language stating that the most the insurer will pay on behalf of the additional insured is either (i) the amount required by the contract or agreement, or (ii) the applicable limits of insurance shown in the policy's declarations, whichever is less. For example, ISO's endorsement entitled "Additional Insured – Designated Person or Organization" (Form CG 20 26 04 013) now reads:

> B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits of Insurance**:
>
> If coverage provided to the additional insured is required by a contract or agreement, **the most we will pay on behalf of the additional insured is the amount of insurance:**
>
> **1. Required by the contract or agreement; or**
>
> **2. Available under the applicable Limits of Insurance shown in the Declarations;**
>
> **whichever is less.**

[47] *Id*.

> This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations

(emphasis added)

This modification thwarts an additional insured's ability to gain access to the named insured's full limits of liability where the underlying contract or agreement requires that the named insured provide an amount less than the policy's limits or where the declarations of the policy show a lesser amount.

B. Legislative Response

Individual state legislatures have also reacted to the judiciary's trend of expanding additional insured coverage. Certain states that already have anti-indemnification legislation, including Montana, Kansas, Oklahoma and Ohio, have taken the further step of enacting anti-additional insured legislation which creates dual restrictions on a subcontractor's ability to indemnify and insure the general contractor for the general contractor's own negligence.[48] Following this trend, Texas and California enacted statutes that became effective earlier this year.[49] Indeed, despite continued argument that contractual indemnification provisions and additional insurance procurement provisions are separate and distinct risk transfer tools, the legislators and courts have linked anti-indemnity statutes to also apply to potentially broadly worded additional insured endorsements. This additional insured prohibition is a growing trend spear-headed by subcontractor trade associations throughout the county.[50]

These statutes typically deem unenforceable insurance procurement provisions that attempt to cover risks that are otherwise barred by the jurisdiction's anti-indemnity statutes. Essentially, this means that owners and general contractors can no longer require subcontractors to: (a) indemnify them for the owner or general contractor's own negligence or concurrent negligence, or (b) provide additional insured coverage for the owner or general contractor's own negligence or concurrent negligence. By way of example, the Texas Insurance Code provision reads:

> § 151.102 AGREEMENT VOID AND UNENFORCEABLE. Except as provided by Section 151.103, a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach

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[48] *See* TEX. INS. CODE § 151.104 (2013); COLO. REV. STAT. § 13-21-111.5(6) (2013); KAN. STAT. ANN. § 16-121(c) (2012) (applying only to indemnification provisions and additional insured provisions entered into after January 1, 2009); MONT. CODE ANN. § 28-2-2111 (2012) ; N.M. STAT. ANN. § 56-7-1 (LexisNexis 2013); OKLA STAT. § 15-221(b); OR REV. STAT. § 30.140 (2012); UTAH CODE ANN. § 13-8-1 (2013); LA. REV. STAT. ANN. § 9:2780.1 (2012); CAL CIV. CODE § 2782.05(a) (2013).

[49] TEX. INS. CODE § 151.104 (2013); CAL CIV. CODE § 2782.05(a) (2013).

[50] *See* The Associated General Contractors of America, *AGC White Paper on Additional Insured Endorsements*, February 2006, p. 5, http://www.agc.org/galleries/conrm/White%20Paper%20-%20Finalriskmanagement.pdf .

> of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.
>
> § 151.103 EXCEPTION FOR EMPLOYEE CLAIM. Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent or its subcontractor of any tier.
>
> § 151.104 UNENFORCEABLE ADDITIONAL INSURANCE PROVISION. (a) except as provided by Subsection (b), a provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provisions within an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an agreement to indemnify, hold harmless, or defend.

Although case law interpreting anti-indemnification and anti-additional insured legislation is sparse, the courts that have addressed the issue have upheld the application of the respective statutes to both anti-indemnity and anti-additional insured provisions. The Supreme Court of Oregon in *Walsh Construction Co. v. Mutual of Enumclaw*, 338 Ore. 1 (2005) held that ORS § 30.140, which prohibits construction agreements requiring a person, or that person's insurer, to indemnify another party against liability caused in whole or in part by the indemnitee's negligence, also extends to additional insured endorsements. In so holding, the Supreme Court affirmed the rulings of both the trial court and the Court of Appeals on the issue and referred to that part of the Court of Appeals decision which stated:

> [w]hether the shifting allocation of risk is accomplished directly, *e.g.,* by requiring the subcontractor itself to indemnify the contractors for damages caused by the contractors own negligence, or indirectly, *e.g.,* by requiring the subcontractor to purchase additional insurance covering the contractor for the contractor's own negligence, the ultimate -- and [in this respect] statutorily forbidden -- end is the same.

The Oregon Supreme Court agreed with the Court of Appeal's conclusion and held that the additional insured provision was void.

The Utah Court of Appeals in *Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co*., 27 P.3d 594 (Utah 2001) similarly declared that the plain meaning of its anti-indemnification, anti-additional insured statute voided agreements requiring one party in a construction contract to personally insure against liability stemming from the other party's negligence. In that case, Transcontinental, the insurer, argued that the named insured "was statutorily prohibited from purchasing any sort of insurance policy which would insure the additional insured from its own negligence." Indeed, Utah Code § 13-8-1(2) explicitly provides: "Except as provided in section (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable". The issue was whether the insurance provision in the subcontract constituted an unenforceable indemnification provision. The court noted that that the insurance provision required the named insured to procure insurance and to name Meadow Valley as an additional insured. The court held that because nothing in the

provision required the named insured to personally insure or indemnify Meadow Valley for liability arising out of Meadow Valley's own negligence, the insurance provision did not, on its face, violate Utah Code § 13-8-1(2). In so holding, the *Meadow Valley* court implied that the statute would be violated only if the provision had required that the named insured agree to personally insure or indemnify Meadow Valley for liability arising out of Meadow Valley's own negligence.

The aforesaid holdings from the Oregon Supreme Court and the Utah Court of Appeals indicate that it may not be too unrealistic to expect that other courts will similarly rule to uphold anti-indemnification and anti-additional insured legislation.

VII. CONCLUSION

Through its interpretation and broad application of ISO's standard form additional insured endorsements, the United States judiciary has expanded the scope of additional insured coverage far beyond that which ISO intended. In response to the courts' expansive interpretations, ISO has made periodic revisions to the wordings of its additional insured endorsements. Most recently, ISO amended 24 of its 30 additional insured endorsements. In addition, state legislatures have enacted legislation to reign in coverage for those parties who seek to transfer their risk and obtain additional insurance for their sole or concurrent negligence, where such risk is prohibited by the state's anti-indemnification laws. Although it will take some time until we see the results of ISO's April 2013 revisions, and the newly enacted state legislation, the general expectation is that these changes will bring parties closer to contract certainty.