Application of Indemnity and Additional Insured Provisions in Construction Contracts: Who Ultimately Pays for Personal Injuries to Workers?

Construction sites are fertile grounds for producing multi-party litigation involving both tort and contract claims. On a typical commercial project, numerous prime contractors and subcontractors perform work on the job site, and hundreds of workers with different employers share a common, crowded workplace. When accidents occur, construction workers injured on the site typically file a worker's compensation claim against their employer and then file personal injury actions against the owner and other contractors on the site. The defendants then turn to their respective contracts to shift the burden for personal injury liability to other defendants or the non-party employer. Invariably, the contracts between the owner and prime contractors, and the prime contractors and subcontractors, contain language purporting to impose upon one party the duty to indemnify other parties against personal injury claims and/or to provide other parties with liability insurance against such claims. The complexity and often imprecise language of construction contracts, together with the large number of construction companies and insurance carriers implicated in a serious work-site injury claim, give rise to protracted and complex contract litigation, as defendants and insurers file cross-claims and actions for declaratory judgment to avoid or clarify responsibility.

As one court aptly noted:

> Contractual indemnification and liability insurance coverage issues, arising out of construction contracts, have spawned, and continue to spawn what appears to be a never-ending series of legal disputes between owners, contractors and/or their respective insurance carriers. These disputes (some novel) invariably evolve from the vague, imprecise and ambiguous language which is either ineptly or purposely employed by the parties to such written contracts and insurance agreements, and which provides a fertile field for creative counsel to plow in search of exceptions, exemptions and reasons to deny coverage.[1]

[1] Crespo v. City of New York, No. 23922/99, 2004 WL 737536, at *1 (N.Y.S. 2004).

Working through the contractual maze to determine the ultimate allocation of risk for personal injury liability requires a three-step analysis. First, the construction contracts must be construed to determine whether certain contractors on the site are required to indemnify the owner or other contractors against personal injury claims. Second, the insurance policies issued to each potential indemnitor must be carefully reviewed to determine if the contractor's indemnification obligation is, in turn, covered by an insurance policy. Third, the construction contracts and applicable insurance policies must be construed together to determine which contractors qualify as additional insureds entitled to liability coverage under policies issued to other contractors.

I. INDEMNITY CONTRACTS

Indemnity provisions which shift legal responsibility for injury claims are, of course, like any other contract, in that absent prohibitive legislation the parties are free to contract as they see fit.[2] Accordingly, parties to construction contracts employ varying language to create indemnification obligations. However, there are certain features common to most agreements. First, in the context of construction law, indemnity swims up stream, with subcontractors being required to indemnify prime contractors, owners and other parties in privity with the owner, such as engineers and architects, and prime contractors, in turn, being required to indemnify owners. Second, the drafters of indemnity agreements usually attempt, albeit often ineptly, to define the scope of indemnification by reference to the respective fault of the parties; in other words, the allocation of fault is relied upon in the first instance to trigger indemnification, and then the attribution of fault determines whose negligence is covered by the indemnity agreement. Moreover, through repetition, certain basic patterns of indemnity language have emerged.

[2] Hagerman Constr. Co v. Long Elec. Co., 741 N.E.2d 390, 392 (Ind. Ct. App. 2000), trans denied.

Construction contracts give rise to two entirely different types of indemnity claims: claims for limited indemnification, and claims for complete self-indemnification.[3] Limited indemnity agreements only require contractors to indemnify the owner or other contractors against vicarious liability imputed to them on account of the first contractor's acts or omissions. Indemnity provisions which clearly only require the indemnitor to indemnify the indemnitee against the negligence of the indemnitor are common in construction contracts and generate little controversy.[4] Indeed, under Indiana law, limited indemnity clauses indemnifying only vicarious liability are moot because under Indiana's Comparative Fault Act, defendants in personal injury actions are liable only for their own respective negligence.[5]

Complete self-indemnification clauses, on the other hand, require a contractor to indemnify the owner or other contractors against *their own* negligence. This type of indemnification has sparked considerable controversy and litigation. Both the courts and the legislature in Indiana have established standards for measuring the right of a contractor or owner to indemnification against its own negligence. In Indiana, there is often insufficient case law to resolve critical issues of civil law. However, four key Indiana opinions together provide drafters and litigators sufficient guidelines to distinguish between contracts requiring only limited indemnification and those triggering complete self-indemnification: Moore Heating & Plumbing,

[3] *See* Exide Corporation vs. Millwright Riggers, Inc., 727 N.E.2d 473, 482 (Ind. Ct. App. 2000), coining the expressions "self-indemnification" and "complete indemnity" clauses to describe provisions which require the indemnitor to indemnify the indemnitee against the negligence of both parties' negligence.

[4] Truck Insurance Exchange vs. BRE Properties, Inc., 81 P. 3d 829 (Wash. Ct. App. 2003) is a case interpreting a typical limited indemnification clause providing that:

> …Subcontractor agrees to indemnify and hold harmless Contractor…from and against all claims, damages…arising out of or resulting from the performance, or failure in performance of Subcontractor's Work,…and from any claim…caused by any acts, omissions or negligence of subcontractor…

[5] See IND. CODE § 34-51-2.

Inc. v. Huber Hunt & Nichols, Exide Corporation v. Millright Riggers, Inc., Hagerman Construction, Inc. v. Copland, and GKN Co. v. Starnes Trucking, Inc..

A. STANDARDS FOR INTERPRETING INDEMNITY AGREEMENTS

A contract for indemnity is construed in the same manner as any other contract.[6] The goal in interpreting an indemnity contract is to ascertain the intent of the parties.[7] All of the contract provisions must be harmonized so as not to place undue emphasis upon a particular clause or to take language out of context, with words and phrases given their plain and ordinary meaning.[8] The construction of an indemnity clause is a question of law for the court's determination.[9] If an indemnity contract is found to be ambiguous, the contract will be construed against the party that drafted it.[10]

Under Indiana Law, as a matter of public policy, one party may contract to indemnify the other party for the other party's own negligence.[11] However, this may only be done if the indemnitor knowingly and willingly agrees to such indemnification.[12] Such clauses indemnifying the indemnitee's own negligence are strictly construed and will not be held to provide indemnification unless the obligation is stated in clear and unequivocal terms.[13] Indiana courts disfavor these indemnity clauses because "to obligate one party to pay for the negligence

[6] Huffman v. Monroe County Community School Corp., 588 N.E.2d 1264, 1267 (Ind. 1992).

[7] *Id.*

[8] *See Id.*

[9] Babson Brothers Co. v. Tipstar, 446 N.E.2d 11, 16 (Ind. Ct. App. 1983).

[10] *Id.*

[11] Moore Heating & Plumbing, Inc. v. Huber Hunt & Nichols, 583 N.E.2d 142,145 (Ind. Ct. App. 1991).

[12] *Id. See also* Weaver v. American Oil Company, 276 N.E.2d 144 (Ind. 1971).

[13] *Moore Heating & Plumbing, Inc*. 583 N.E.2d at 145.

of another is a harsh burden that no party would likely accept."[14] Furthermore, in 1975, the Indiana legislature enacted a statute specifically rendering as void and unenforceable any construction contract which purports to indemnify the indemnitee against liability for personal injury or property damage arising from its own "sole negligence" or "willful misconduct."[15] Insertion of the modifier "sole" into the statutory language, however, left room for contractors and owners to argue for indemnification against their own negligence.

B. MOORE HEATING & PLUMBING VS. HUBER HUNT & NICHOLS

Moore Heating & Plumbing Inc. vs. Huber Hunt & Nichols, 583 N.E.2d 142 (Ind. Ct. App. 1991), is the leading case on indemnity clauses in construction contracts and established the test for distinguishing between limited and complete indemnification provisions. Huber was the general contractor and Moore subcontracted to perform plumbing and heating work on the project. An employee of Moore was injured on the project site and filed a personal injury claim against Huber, which, in turn, filed an indemnity claim against Moore based on a provision in the parties' contract requiring the subcontractor to indemnify the general contractor

> "…from any and all liability…by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by [subcontractor]…however, [the subcontractor] may not be obligated to indemnify [the general contractor] for the sole negligence or willful misconduct [of the general contractor]…" [16]

The *Moore* court read this language as satisfying the holding in *State Highway Commission v. Thomas* that "the indemnitee's negligence must be specifically, not generally, prescribed." [17] The subcontractor in *Moore* then argued that the statute governing indemnification provisions in

[14] Henthorne v. Legacy Healthcare, Inc., 764 N.E.2d 751, 757 (Ind. Ct. App. 2002).

[15] IND.CODE §26-2-5-1.

[16] Moore Heating & Plumbing Inc. vs. Huber Hunt & Nichols, 583 N.E.2d 142 (Ind. Ct. App. 1991)

[17] State Highway Commission v. Thomas, 346 N.E.2d 252, 260-61 (Ind. Ct. App. 1991).

construction contracts prohibits indemnification against a party's own negligence. The Court, however, held that such an interpretation would read the word "sole" out of the statute and instead held that the statute only prohibits indemnification in cases where the indemnitee, and no other party, is negligent.

Moore established the two-part test followed by Indiana Courts in determining whether an indemnity provision requires indemnification against the indemnitee's own negligence. First, the language must describe negligence as an area of application. It is not necessary that the provision explicitly refer to the term "negligence," as long as it contains the "words and language of negligence."[18] Provisions referencing "acts," "omissions," "wrongful conduct," "duties," and "causation" can fairly be read as relating to the area of negligence.[19] However, as the *Moore* court emphasized, a "finding that negligence is the area of indemnification is insufficient because the provision could apply to the negligence of either party to the agreement or third-parties," and "this is the very reason that indemnity for the indemnitee's own negligence must be specifically, not generally, described."[20] Therefore, the second prong of the *Moore* test requires that the language clearly state that the subject of indemnification is negligence *which is the physical and legal responsibility of the indemnitee.*[21]

C. EXIDE V. MILLRIGHT RIGGERS

The opinion in *Exide Corporation v. Millright Riggers, Inc.* illustrates application of the *Moore* test to traditional indemnification language which does not trigger complete self-indemnification. Exide operated a battery factory and hired two prime contractors to renovate

[18] *Moore*, 583 N.E.2d at 146.

[19] *Moore*, 583 N.E. 2d at 144.

[20] *Moore*, 583 N.E. 2d at 146.

[21] *Id.*

the factory and a third to repair machinery. Employees of two separate contractors were injured while performing work on Exide's premises and filed personal injury claims against the owner. Exide, in turn, filed indemnity claims against the contractors. The owner/contractor agreements contained identical indemnity provisions providing that:

> …[C]ontractor…releases Exide and agrees to indemnify, defend with counsel satisfactory to Exide and hold harmless Exide and its officers and employees from any and against any and all liability, claims, actions, suits, losses, cost and expenses (including without limitation attorneys' fees), fines or penalties which may arise in any way, directly or indirectly, from contractor, its employees, subcontractors and their employees, third persons or the government, and from entry onto the site or any other Exide property…[22]

The *Exide* court found that this language satisfied the first prong of the *Moore* test requiring indemnity language to describe negligence as the area of application. While the term "negligence" was not contained within the clause, the court noted that the clause discussed liability, claims and suits, and it contemplated losses, fines and expenses caused by the contractors. The court held that these terms, in context, are the "language of negligence and demonstrate that the clause applies to acts of negligence."[23] However, the court found that the indemnity clause failed the second prong of the Moore test requiring language which clearly states that the subject of indemnification is negligence which is the physical and legal responsibility of the indemnitee, concluding that:

> …[T]he clause explicitly indemnifies Exide for the acts of the contractors and their employees, subcontractors and their employees, third persons, and the government, *but it does not explicitly state that the contractors must indemnify Exide for its negligent acts*. The clause contains no clear statement that would give the contractors notice of the harsh burden that complete indemnification imposes. Consequently, the indemnification clause does not require the contractors to indemnify Exide for its own negligence…[24] (emphasis added)

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[22] *Exide*, 727 N.E.2d at 479.

[23] *Exide*, 727 N.E. 2d at 480.

[24] *Exide*, 727 N.E.2d at 480.

D. HAGERMAN CONSTRUCTION V. LONG

In successive opinions interpreting the contract used by Haggerman Construction, Inc., the Indiana Court of Appeals reviewed and eventually clarified the indemnification obligations created by a form contract commonly used in the construction industry. Parties to construction contracts commonly execute a form contract prepared by the American Institute of Architects ("AIA") known as AIA Document A401 *Standard Form of Agreement Between Contractor and Subcontractor,* 1987 edition ("AIA A401"). Paragraph 4.6.1 of AIA A401 states:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect…from and against claims, damages, losses and expenses…arising out of or resulting from performance of Subcontractor's Work under this Subcontract, providing that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death…***but only to the extent caused in whole or in part by negligent acts or omissions of the subcontractor…regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder***.[25] (emphasis added)

Relying on the *Moore* decision and emphasizing the phrase "regardless of whether or not such claim, damage, or loss…is caused in part by a party indemnified hereunder", contractors have consistently argued that AIA A401 requires subcontractors to indemnify contractors against their own negligence, unless the contractor's "sole" negligence caused the worker's injuries. Subcontractors, on the other hand, relying on the phrase "only to the extent caused in whole or part" by a negligent act, or omission of the subcontractor have argued that the duty to indemnify general contractors is limited to cases where the contractor is held vicariously liable for the subcontractor's negligence; therefore, because Indiana's Comparative Fault Act provides that defendants in personal injury actions are liable only for their own negligence, the indemnity

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[25] Hagerman Construction, Inc. vs. Copeland, 697 N.E.2d 948, 961 (Ind. Ct. App. 1998).

provision is moot under Indiana law. Indeed, numerous decisions from other jurisdictions have adopted this comparative fault interpretation of AIA A401.[26]

Until 1998, no Indiana appellate court had interpreted AIA A401's indemnity provision. The 1998 opinion in *Hagerman Construction, Inc. vs. Copland* threatened to turn the construction industry upside down by interpreting AIA A401 as requiring subcontractors to indemnify contractors against their own negligence.[27] In response to a wrongful death action against Hagerman Construction, the general contractor filed an indemnity cross-claim against its sub, Crown-Corr, based on the parties' AIA A401 subcontract. In reviewing Hagerman's argument that a jury instruction erroneously provided Hagerman with indemnity from Crown-Corr only if found to be "responsible" for Crown-Corr's negligence, the *Hagerman* court found that "Crown-Corr's contract required it to indemnify Hagerman if Crown-Corr was negligent to any degree, even one percent, regardless of whether Hagerman was also negligent, even ninety-nine percent." The *Hagerman* court further held that "this provision appears to provide for indemnification for Hagerman's own negligence."[28] However, because the jury assigned one hundred percent of the fault for the incident to Hagerman, the court's interpretation of the indemnification provision was *dicta.*

In a second case involving Hagerman Construction, *Hagerman Construction Corp. vs. Long Electric Company,* the Indiana Court of Appeals was finally required to squarely address the issue of whether AIA A401 requires subcontractors to indemnify contractors against their

[26] *See, e.g.*, Braegelmann v. Horton Development Co., 371 N.W.2d 644 (Minn. Ct. App. 1985) (ruling that the indemnification provision creates a comparative indemnity and, therefore, the general contractor is not contractually entitled to indemnification from the subcontractor to the extent that the damages were caused by the general contractor's own negligence).

[27] Hagerman Construction, Inc. v. Copeland, 697 N.E.2d 948 (Ind. Ct. App. 1998).

[28] *Hagerman*, 697 N.E.2d at 962.

own negligence.[29] The *Long* court correctly denounced the contract interpretation in *Copland* as *dicta,* and then closed the door opened by that opinion. The parties agreed that if Hagerman were found to be "solely responsible" for the injured worker's damages, then Long would not be required to indemnify Hagerman. Hagerman, however, argued that the language providing indemnity to "the fullest extent provided by the law and regardless of whether such claim, loss or expenses caused in part by a party indemnified hereunder" required Long to indemnify Hagerman for its own negligence. Long, on the other hand, contended that the phrase "but only to the extent caused in whole or in part by negligence acts or omissions of the subcontractor" limited the scope of indemnification to those losses caused by the subcontractor's negligence. The *Long* court easily found that the terms of AIA 401 satisfied the first prong of the *Moore* test because numerous words constituted the language of negligence and "clearly and unequivocally demonstrate that the indemnification clause applies to negligence."[30]

However, the court found that the indemnity language failed the second prong of the *Moore* test. In *Long,* the indemnity language of AIA 401 required a closer analysis during application of the second prong of the *Moore* test than the indemnification clause interpreted by the *Exide* court. In interpreting AIA 401, the *Long* court had to reconcile and harmonize several phrases with substantive implications. First, the court relied upon the limiting phrase "but only to the extent" to find against complete self indemnification, concluding that:

> The indemnification clause does not expressly state, in clear and unequivocal terms, that it applies to indemnify Hagerman for its own negligence. The clause explicitly indemnifies Hagerman for the acts of a sub-contractor, Long, and its sub-subcontractors, employees and anyone for whom it may be liable, but it does not explicitly state that Long must indemnify Hagerman for its own negligent acts. Further, the phrase "but only to the extent" clearly limits Long's obligation to indemnify Hagerman only to the extent that Long, its subcontractors,

[29] Hagerman Construction Corp. vs. Long Electric Company, 741 N.E. 390 (Ind. Ct. App. 2000).

[30] Long, 741 N.E.2d at 393.

> employees, and anyone for whom it may be liable are negligent. Otherwise, the clause contains no clear statement that would give the contractors notice of the harsh burden that complete indemnification would impose.[31]

The *Long* court next harmonized the phrases of the clause, finding that the phrase "to the fullest extent permitted by law" and the phrase "regardless of whether or not such claim, damage, loss or expenses caused in part by a party indemnified hereunder" did not contradict a finding that the clause, interpreted as a whole, does not require complete self-indemnification. The court found that the first phrase simply preserved Hagerman's rights under the law to the extent that it was found vicariously liable for Long's negligence. Moreover, the court ruled that the phrase "regardless of whether or not such claim…is caused in part by a party indemnified hereunder" simply required that Long may not disregard its duty to indemnify Hagerman for Long's negligence merely because Hagerman may also be negligent.[32]

E. GKN VS. STARNES TRUCKING

GKN Co. vs. Starnes Trucking, Inc. is a recent Indiana decision interpreting language very similar to AIA 401, with the notable exception being the omission of the limiting phrase "but only to the extent." Omission of this key phrase lead the *GKN* court to require the sub-contractor to indemnity the general contractor against the general contractor's own negligence.[33] GKN was a general contractor on a highway construction project and contracted with Starnes Trucking. When a Starnes employee filed a personal injury action against GKN, GKN sought indemnity from Starnes based on clause providing that:

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[31] *Long,* 741 N.E.2d at 393-94.

[32] *Long,* 741 N.E.2d at 394.

[33] GKN Co. vs. Starnes Trucking, Inc., 798 N.E.2d 548 (Ind. Ct. App. 2003).

> [Starnes] shall indemnify and hold harmless the Owner, the Architect Engineer and [GKN]…from and against all claims, damages, causes of action, losses and expenses, including attorney's fees, arising out of or resulting from the performance of the work, provided that such claim, damage, loss or expense (1) is attributable to bodily injury…and (2) is caused in whole or in part by any negligent act or omission of [Starnes] or any of his subcontractor's [sic], and anyone directly or indirectly employed by any of them or for anyone for his acts, any of them may be liable, *regardless of whether it is caused in part by a party indemnified hereunder*.[34]

As is *Exide* and *Hagerman*, the *GKN* court found that the clause easily survived the first step of the *Moore* analysis by containing "the language of negligence" clearly indicating that negligence was an area of application.[35] In applying the second prong of *Moore*, the Court emphasized that unlike the language scrutinized in *Hagerman*, the indemnity clause in GKN's contract did not contain the limiting phrase "but only to the extent" which clearly "limited Long's obligation to indemnify Hagerman only to the extent that Long…[was] negligent."[36] Thus, the *GKN* court emphasized the enabling phrase "regardless of whether it is caused in part by a party indemnified hereunder" in holding that the language triggered complete self-indemnification, requiring Starnes to indemnify GKN for GKN's own negligence. Interestingly, in finding that the clause "clearly and unequivocally operated to alert Starnes to the burden it undertook," the court emphasized extrinsic evidence showing that Starnes was experienced in contract law and "should have recognized the burden to which it agreed in the Sub-contractor Agreement."[37]

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[34] *GKN*, 798 N.E.2d at 550.

[35] *Id.* at 554.

[36] *Id.* at 555.

[37] *Id.*

II. INSURED CONTRACT COVERAGE

After determining that a construction contract requires a contractor to indemnify the owner or other contractors against personal injury claims, the next step is to determine whether the indemnification obligation is covered by the indemnitor's liability policy.

General Commercial Liability ("GCL") policies commonly carried by contractors exclude from coverage any liability for bodily injury "which the insured is obligated to pay damages by reason of the assumption of liability in a contract."[38] However, this broad exclusion does not apply to liability assumed in a contract which qualifies as an "insured contract." Standard CGL terms define "insured contract" as:

> …[T]hat part of any contract or agreement pertaining to your business…under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.[39]

Provisions in construction contracts requiring subcontractors to indemnify general contractors, and general contractors to indemnify owners, against personal injury claims satisfy the language of the standard GCL policies defining an insured contract. Thus, courts generally recognize that a contractor's indemnification obligation created by a construction contract is covered by the contractor's insurance policy as an insured contract.[40]

In cases involving complete self-indemnification provisions, it is clear that the subcontractor's insurance carrier must defend and indemnify the general contractor against

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[38] GA 101 04 92, Insurance Services Office, Inc. forms, 1982, 1988.

[39] Truck Insurance Exch. v. BRE Properties, Inc., 81 P. 3d 929, 934 (Wash. Ct. App. 2003)

[40] *See* West Bend Mut. Ins. Co. v. Mulligan Masonry Co., 786 N.E. 2nd 1078 (Ill. App. Ct. 2003); John Deere Ins. Co. v. Dee Smet Ins. Co., 650 N.W. 2nd 601 (Iowa 2002); Truck Insurance, 81 Pacific 3rd 929 (Wash. Ct. App. 2003).

personal injury claims.[41] On the other hand, with limited indemnification, the actual obligations of the insurance carrier are not as clear. In jurisdictions, or cases, where a contractor is held vicariously liable for a subcontractor's negligence, then insured contract coverage obligates the subcontractor's insurer to defend and indemnify the general contractor against personal injury claims.[42] On the other hand, in comparative fault cases where the general contractor cannot be held vicariously liable, the insurer should not be required to defend and indemnify the general contractor against personal injury claims because the provision is moot, with the insured having no duty to indemnify the general contractor.

However, the insurer retains the duty to defend the subcontractor against an indemnity claim bought by the general contractor because the subcontractor would be entitled to a defense against the claim under insured contract coverage. In other words, both the subcontractor and insurer could defend the claim on the grounds that the limited indemnity clause does not entitle the general contractor to indemnification under Indiana law, but if the court held otherwise, the subcontractor's indemnification obligation would be covered as insured contract.

III. DUTY TO PROVIDE INSURANCE

In addition to, and distinct from indemnification agreements, parties to construction contracts often agree that one party will procure insurance for both parties. Unlike indemnity clauses that shift the risk of loss to one party, insurance clauses benefit both parties by shifting the risk of loss to an insurer. In essence, the parties agree beforehand that should an injury

[41] Insurers have taken the position that the typical exclusion for bodily injury to "an employee" excludes coverage for general contractors under a subcontractor's policy when the subcontractor employs the tort claimant. However, typical GCL policies contain severability language, which entitles each insured to read the policy as if it applies only to that insured. Hence, the bodily injury exclusion will not exclude coverage to a general contractor for claims brought by the insured subcontractor's employee. *See* Truck Insurance, 81 Pacific 3rd 929.

[42] *See id*.

occur, neither of them shall be responsible. Instead, one party assumes the contractual burden of obtaining insurance in advance.

Parties incorporate a variety of duty to insure clauses into construction contracts. Agreements to provide insurance can be limited to insuring only one party, e.g., "Subcontractor agrees to provide insurance naming the Owner as a co-insured", or numerous parties, e.g., "Subcontractor agrees to provide insurance naming as co-insureds, the Owner, Architect, Engineer, Developer, Contractor, etc." A typical duty to procure provision provides that:

> Contractor shall at its own expense provide evidence of insurance reasonably satisfactory to Owner, and naming Owner as a co-insured, with respect to any liability which may accrue from or during the work performed by Contractor.[43]

A. STANDARDS FOR INTERPRETING DUTY TO INSURE PROVISIONS

In analyzing duty to insure clauses, it is important to bear in mind that such clauses are interpreted differently from indemnification clauses:

> As a matter of interpretation, indemnification agreements that require one party to compensate the other party for the other party's own negligence are construed much more strictly than insurance agreements. A stricter reading is given to such indemnification clauses because indemnification for another party's own negligence is a harsh burden that a party would not likely accept.[44]

An agreement to insure differs from an agreement to indemnify in that, with an agreement to insure, the risk of loss is not intended to be shifted to one of the parties, but instead to an insurance company.[45] Therefore, standard rules of contract interpretation

[43] *See, e.g.*, Exide Corp. v. Millwright Riggers, Inc., 727 N.E.2d 473 (Ind. Ct. App. 2000).

[44] Exide, 727 N.E.2d at 482.

[45] *Id.*

apply to duty to insure agreements, rather than the strict construction given to self-indemnification clauses.[46]

The placement of the duty to insure language within the construction contract is critical to its interpretation. If the duty to insure provision is placed within the section of the contract containing an indemnification clause, than an issue may arise as to whether the duty to procure is limited to obtaining insured contract coverage for the indemnification obligation. On the other hand, as the *Exide* court noted, if the insurance provision and the indemnification provision appear in separate sections of the contracts, then a reasonable interpretation is that the indemnity clause and duty to insure clause create separate and unrelated duties. Thus, while the indemnification clause may not trigger complete self-indemnification, the separate duty to insure clause may require the sub-contractor to procure insurance to cover personal injury claims brought against the contractor or owner, regardless of any duty to indemnify.[47]

The party that agrees to provide insurance to another becomes, in essence, that party's insurer to the extent of the agreement to purchase insurance.[48] Failure to procure insurance as agreed to gives rise to an action for breach of contract, with the measure of damages being the cost of defense and indemnification against the personal injury claim.[49]

A contractor may fulfill its contractual duty to procure insurance to the benefit of other parties by having the parties specifically listed as an insured or co-insured on a

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[46] *Id.*

[47] *See* Exide, 727 N.E.2d at 482.

[48] LeMaster Steel Erectors, Inc. vs. Reliance Ins. Co., 546 N.E.2d 313, 317 (Ind. Ct. App. 1989).

[49] *See* Exide, 727 N.E.2d at 483.

liability policy or by obtaining a policy with an automatic additional insured endorsement by which the party qualifies for coverage based on its relationship with the named insured.[50] Determination of whether a party is an "additional insured" differs from determination of whether an indemnity contract is covered by a liability policy as "an insured contract" in that only the policy language is considered in determining additional insured coverage.[51]

B. DEFINING THE SCOPE OF ADDITIONAL INSURED COVERAGE

Additional insured provisions in liability policies vary, but all clauses somehow limit the coverage afforded to the additional insured to the project involving the named insured—otherwise the carrier would become the general comprehensive insurer for the additional insured.[52] A typical additional insured endorsement to a GCL policy ties coverage to the named insured's operations by providing that the contractor or owner are

[50] When contractors or owners qualify as an additional insured under another party's liability policy, an issue arises regarding the method of contribution between their own insurer and the carrier providing additional insurance. Some courts have held that a party qualifying for additional insured coverage may select the policy under which it seeks coverage. In such cases, the additional insured's own liability policy would not be implicated, and the policy providing additional insurance would cover the entire loss. *See* David F. McGonigle, *A Policy Holder's Right to Select Coverage Despite "Other Insurance" Clauses*, 3 J. INS. COVERAGE 90, Summer 2000, for an excellent discussion regarding the right to select which policy will apply. However, in most cases, multiple insurers will both contribute to coverage depending on the language of the "other insurance provisions" contained in the policies. *See* Deanna L. Johnson, *A Primer on Applying Insurance Policy Language to Additional Insureds in the Construction Industry in California*, 3 J. INS. COVERAGE 41, Autumn 2000, for a general discussion regarding the application of other insurance provisions in the construction industry.

[51] Mid-Continent Cas. Co. v. Swift Energy Co., 206 F.3d. 487 (5th Cir. 2000).

[52] The listing of additional insureds on a certificate does not, in itself, constitute coverage or legal duties, but rather the terms of the policy control coverage. Erie Ins. Exch. v. Gosnell, 230 A.2d. 467 (Md. 1967); American Hardware Mut. Ins. Co. v. EIM, Inc., 995 at F2d. 132 (4th Cir. 1989). There are a variety of exclusions specifically applied to additional insured coverage. Most notably, policies issued in Indiana will often contain a "sole negligence" exclusion, which mirrors the statutory prohibition against indemnifying a contractor for its sole negligence. Thus, a carrier will often defend an additional insured under a reservation of rights in order to refuse indemnity if no party other than the additional insured is found to be negligent.

additional insureds "but only with respect to liability arising out of your ongoing operations performed for that additional insured by you or own your behalf."[53]

Of course, the proper interpretation of this modifier has been extensively litigated to define the scope of coverage for additional insureds. Application of the phrase raises three issues: (1) Whether the particular activities of the named insured are sufficiently related to the tort plaintiff's injuries so that any liability would arise from the "ongoing operations" of the named insured; (2) whether the phrase "liability arising out of …operations performed for" limits coverage to those instances where the additional insured is vicariously liable for the negligence of the insured; and (3) whether the phrase "performed for" requires privity of contract.

1. CAUSAL CONNECTION BETWEEN INJURIES AND OPERATIONS

Several cases have addressed the issue of whether the particular activities of the named insured are sufficiently related to the tort plaintiff's injuries so that any liability would arise from the "ongoing operations" of the named insured. In *Pro Con Construction, Inc. v. Acadia Insurance Co.*, the court noted that the "ongoing operations need not have been the proximate cause of the injuries but the causal connection between the two must be more than tenuous." [54] The *Pro Con* court ruled that there must be "some causal nexus between the named insured's "ongoing operations" and the injuries of the tort plaintiff before coverage under the additional insured endorsement is triggered.[55] The court held that an injury to an employee of the named insured during an on-site break was insufficiently connected to the named insured to be arising

[53] Andrew L. Youngquist, Inc. v. Cincinnati Ins., 625 N.W.2d 178 (Minn. Ct. App. 2001).

[54] 794 A.2d 108, 110 (N.H. App. Ct. 2002).

[55] *Id.*

from ongoing operations.[56] However, courts have generally given the phrase a broad interpretation so that any connection between the injuries and the named insured will suffice. For example, in *Acceptance Insurance Co. v. Syufy Enterprises*,[57] the court held that an injury to an employee of named insured when leaving work to "take his wife to the airport" was sufficiently connected to trigger additional insured coverage.

While most cases interpreting the phrase "ongoing operations" deal with an underlying case in which the tort plaintiff was an employee of the named insured, there are a few cases that apply the "causal nexus" test to third-party plaintiffs. In *K-Mart Corporation v. Clean Sweep, Inc.*,[58] Clean Sweep contracted with K-Mart to remove snow from the store's parking lot. Clean Sweep's liability policy named K-Mart as an additional insured for any liability arising out of Clean Sweep's "ongoing operations performed for" K-Mart. Several hours after Clean Sweep cleared the parking lot, a patron fell and suffered injuries. The Court held that the connection between the injuries and the activities of Clean Sweep were sufficiently connected so that liability arose from Clean Sweep's ongoing operations.[59]

Similarly, in *McIntosh v. Scottsdale Insurance Co.*,[60] Wichita Festival, Inc.'s policy insured the city as an additional insured, "but only with respect to liability arising out of the ongoing operations" of Wichita Festivals. A patron of the festival was injured when falling from a concrete ledge. Even though the city stipulated that it was 100% at fault for the incident, the

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[56] Pro Con, 794 A.2d at 472.

[57] 81 Cal Rptr.2d 557 (Ca. Ct. App. 1999). *See also* Paolangeli v. Cornell Univ., 723 N.Y.S.2d 835, 840 (noting that there must simply be "some substantial relation to the activities contemplated by the subcontractor's duties").

[58] No. C9-97-703, 1997 W.L. 666088 (Min. App. 1997).

[59] *Id.* at *1.

[60] 992 F.2d 251 (10th Cir. 1993).

Court ruled that there was a sufficient connection between the activities of Wichita Festivals and the injuries so that the City's liability arose from the "ongoing operations" of Wichita Festival.

2. ADDITIONAL INSURED COVERAGE FOR INDEPENDENT NEGLIGENCE

Numerous courts have been called upon to decide whether the modifying phrase "liability arising out of…operations performed for" limits coverage to those instances in which the additional insured is vicariously liable, with the majority view being that vicarious liability is not required and the additional insured is covered against its own independent negligence.

Insurers have argued that the typical language found in additional insured endorsements covers the additional insured only for vicarious liability derivative of the wrongful conduct of the named insured. In *Andrew L. Youngquist, Inc. v. Cincinnati Insurance*,[61] the Minnesota Court of Appeals rejected this argument, finding that the policy did cover the independent negligence of the additional insured. There, the insurer took the position that the endorsement language "arising out of… ongoing operations performed for [additional insured]" limits liability coverage to cases in which the named insured is primarily liable and the additional insured is vicariously liable for fault of the named insured.[62] The court, however, found that there was coverage for the additional insured regardless of fault allocation, as long as there is a "causal connection" between the injuries and the named insured's ongoing operations.

[61] 625 N.W.2d 178 (Minn. Ct. App. 2001).

[62] *Id.* at 183.

On the other hand, in *G.E. Tignall & Co., Inc. v. Reliance National Insurance Co.*,[63] the Court held that phrase "ongoing operations performed for" did not cover an additional insured "for its own negligent acts," but rather only extended coverage to vicarious liability predicated upon the named insured's negligence. However, the opinion in *Reliance National* represents an extreme minority view. The overwhelming weight of authority holds that the endorsement language does insure additional insured's against their own negligence independent from any fault of the named insured.[64]

3. PRIVITY OF CONTRACT

On a typical commercial project the owner will enter into contracts with several contractors, engineers and architects, which in turn, enter into subcontracts. Subcontractors are often required to name not only their contractor as an additional insured but also the owner and its privies. Thus, an issue often arises as to whether the phrase "performed for" requires the additional insured to have a contract with the named insured. There are no Indiana cases addressing this specific issue, and case law from other jurisdiction is sparse.

However, the opinion in *Mid-Continent Casualty Company v. Swift Energy Company*[65] is helpful. There, the court decided a case in which the party seeking coverage as an additional

[63] 102 F.Supp.2d 300 (Md. Ct. App. 2000).

[64] *See* Mid-Continent Cas. Co. v. Swift Energy Co., 206 F.3d. 487 (5th Cir. 2000) (noting that majority view holds that it is not necessary for the named insured's acts to have caused the incident, but rather it is sufficient that there is some connection, even if the cause of the injury was the negligence of the additional insured); Fireman's Fund Ins. Co. v. Atlantic Richfield Co., 115 Cal. Rptr.2d 26 (Cal. Ct. App. 2001) (noting that majority view holds that only a causal connection is required by the phrase "liability arising out of work or operations" and provision not limited to vicarious liability); American State's Ins. Co. v. Liberty Mut. Ins. Co., 683 N.E.2d 510 (Ill. App. Ct. 1997); Suffolk Constr. Co. v. Royal & Sunalliance Ins. Co., No. 011240, 2002 WL 391345 (Mass. Super. 2002) (holding that endorsement language covers additional insured for independent negligence); K-Mart Corp. v. Clean Sweep, Inc., No. C9-97-703, 1997 W.L. 666088 (Min. App. 1997) (rejecting claim that coverage limited to vicarious liability); Admiral Ins. Co. v. Trident, NGL, Inc. 988 S.W.2d 451 (Tex. Ct. App. 2000) (holding that coverage not limited to instances in which a named insured was negligent but rather covers all claims with a "cause in fact" relationship to the named insured's operations).

[65] 206 F.3rd 487 (5th Cir. 2000)

insured did not have a contract with the named insured and, consequently, the insurer denied coverage on the grounds that the named insured did not perform operations for the party seeking coverage. The additional insured endorsement in *Swift* provided that the organization listed in the schedule was an additional insured "but only with respect to liability arising out of your ongoing operations performed for that insured."[66] Swift Energy owned and operated an oil field and hired Flourny Drilling Company to drill wells. Flourny Drilling, in turn, hired Air Equipment to install a casing in a well. Air Equipment's contract required it to name Swift and Flourny Drilling as additional insureds. Mid-Continental Casualty insured Air Equipment. An employee of Air Equipment was injured at the site, and filed a personal injury action against Swift and Flourny Drilling. Both defendants tendered their defense to Mid-Continental. Mid-Continental, among other things, argued that at the time of the accident, Air Equipment was working for Flourny Drilling, not Swift, with which it had no contract. Hence, Swift did not qualify as an additional insured because Air Equipment was not performing operations for it.

The court rejected Mid-Continental's argument on two grounds. First, the court found that although it contracted with Flourny Drilling, Air Equipment ultimately performed to benefit Swift because "Flourny was merely Swift's subcontractor, such that all of Flourny's operations were performed on Swift's premises for Swift's benefit."[67] Therefore, the court reasoned that Air Equipment's operations were "performed for" Swift.

IV. CONCLUSION

Determining the ultimate allocation of risk for work site injuries requires a three-step analysis. First, construction contracts must be carefully reviewed to determine whether certain parties are required to indemnify the owner or other contractors against personal injury claims;

[66] *Id.* at 491

[67] *Id.* at 501.

moreover, the indemnification language must be construed according to the guidelines set forth in *Moore*, *Exide*, *Haggerman* and *GKN* to determine whether a provision requires limited indemnification for vicarious liability or complete self-indemnification. Second, the insurance policies carried by the indemnitor must be reviewed to determine if the contractor's indemnification obligation is, in turn, covered by a liability policy as an insured contract. Third, both the construction contracts and applicable insurance policies must be construed together to determine whether owners and contractors qualify as additional insureds entitled to coverage under policies issued to other policies; and case law must be reviewed to determine whether under the circumstances of the particular case, a personal injury claim is sufficiently connected to the operations of the named insured to qualify the party as an additional insured.

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