Reconciling Contractual Indemnity and The Additional Insured Obligation:

The Devil is (Always) in the Details

By

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About the Author

Joe Junfola's claims career spans over 43 years, all of which have been spent managing, directly or in a supervisory capacity, commercial and personal lines insurance claims. For the last 29 years, he has specialized in commercial long-term exposure, or continuous property damage, bodily injury, and personal injury claims on a national basis, primarily, but not exclusively, involving construction defect, environmental, toxic tort, and product liability, and design professional liability claims. He frequently collaborates with underwriting professionals to draft and redraft policy language. His experience also includes construction accident claims, particularly third-party-over actions in New York.

Upon retirement from Admiral Insurance Group, an excess and surplus carrier, in July 2019, Joe formed Junfola Claim Consulting, with offices in Norwood, PA and Cape May, NJ.

Joe is a staunch proponent of lifetime professional development as evidenced by his attainment of numerous professional designations. In September 2020, Joe joined the Academy of Insurance as an instructor, creating and delivering webinars.

Effective April 2021, Joe joined the adjunct faculty at Borough of Manhattan Community College – CUNY, Business Management Department, and will be teaching Principles of Risk Management and Insurance and Property and Liability Insurance Principles.

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Joe has published numerous articles and a book, *Construction Defect Claims: A Handbook for Insurance, Risk Management, Construction, & Design Professionals*, December 2014.

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Introduction

George: *Alright. Listen, I gotta get some reading done. You mind if I do this here? I can't concentrate in my apartment.*

Jerry (checking out George's textbook): *Risk management?*

George: *Yeah. Steinbrenner wants everyone in the front office to give a lecture in their area of business expertise.*

Jerry: *Well, what makes them think you're a risk management expert?*

George: *I guess it's on my resume.*[i]

Contracts are ubiquitous in construction projects. Prominent within these contracts are provisions for risk management. For example, and specific to the subject of this paper, financial risk transfer is accomplished by indemnity agreements that are backed by insurance, namely contractual liability and additional insured coverage.

Since the devil is in the details, and the devil apparently likes complications, confusion, and conflict, this paper will attempt a "reconciliation" between the additional insured and the indemnitee. The discussion will be within the context of the Insurance Service Office's Commercial General Liability policy and related endorsements. These forms help facilitate a solid understanding of the concepts of contractual indemnification and the additional insured obligation in other lines of insurance and other types of commercial transactions as well.

A construction contract typically includes an indemnity obligation, insurance requirements in general, and a specific additional insured obligation. A contract may also include exculpatory provisions, liability limitations, and subrogation waivers. These latter three provisions do not transfer financial risk. Rather, they limit or relieve liability.

The additional insured obligation, along with the hold harmless and indemnity obligation, are important financial risk transfer techniques, and they are a vital part of an overall risk management strategy. While different and sometimes conflicting, they can be complementary and together they can accomplish an effective risk transfer. Of course, while characterized by some as a "belt and suspenders" approach to risk management, the devil, again, is always in the details. And the details include contractual language, sometimes poorly drafted, and anti-indemnity statutes that may invalidate additional insured coverage if too closely tied to the indemnity obligation. Add to this the variety of additional insured endorsements, both on a standard and manuscript basis, and the

underlying facts in a particular claim, and there is plenty of potential for conflict in need of some “reconciliation.”

A contractual indemnity claim against the named insured and an additional insured claim by the same party on the named insured’s policy can be confusing and it’s critical to distinguish both.

Some key questions:

What is the difference between an additional insured and indemnitee?

What is the difference between the protection afforded to the additional insured and that afforded to the indemnitee? What are the similarities?

How do these protections interact? Are they complementary or conflicting?

What are the underlying facts?

What is the specific jurisdictional law, i.e., anti-indemnity statues, and what is the impact, if any, on the validity of additional insured coverage?

Let the Games Begin - The Tender

The tender begins the process:

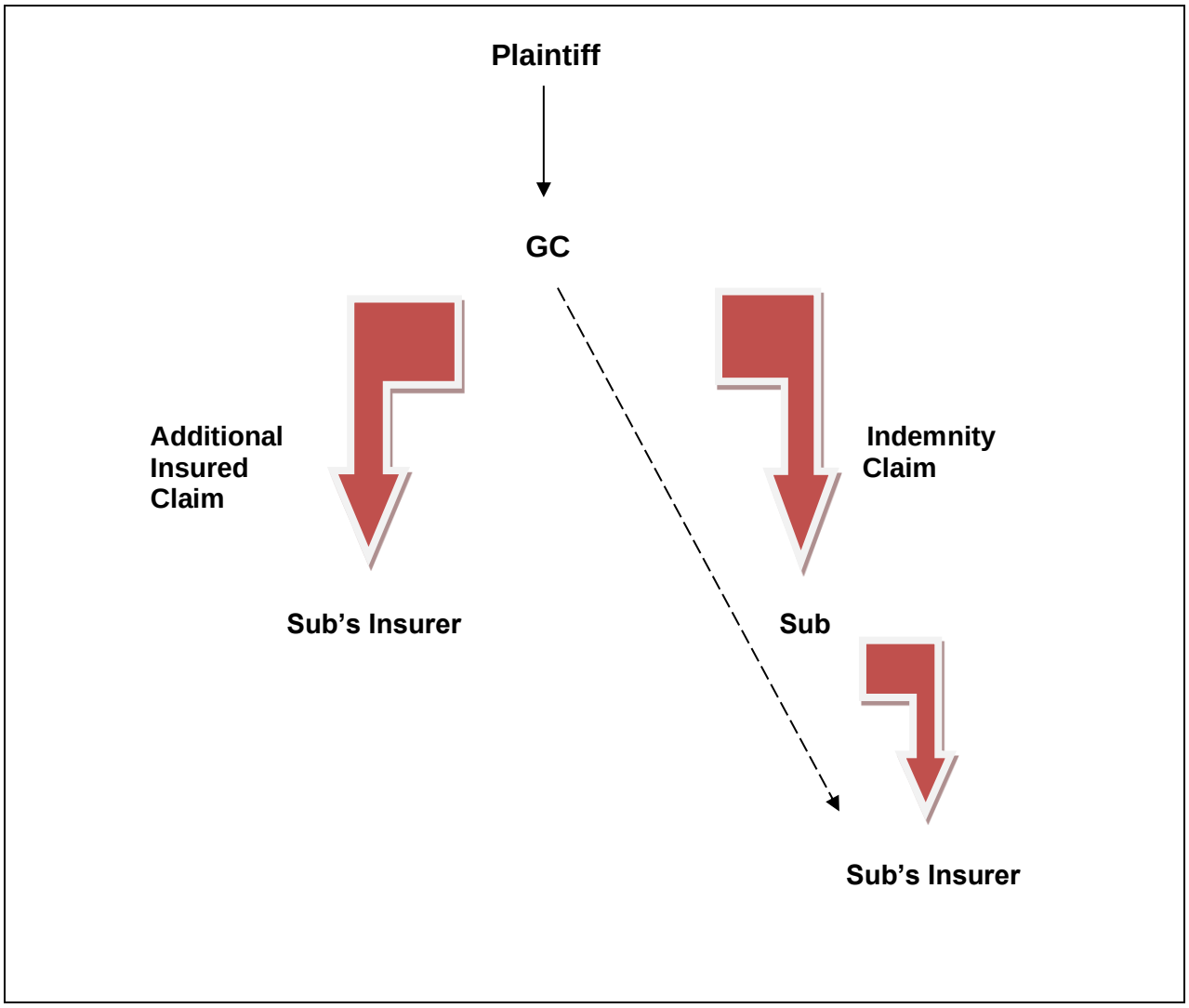

Exhibit A. The Tender

1. Plaintiff sues the general contractor ("GC").
2. GC tenders an additional insured claim to the subcontractor's ("Sub") insurer on Sub's policy.
3. GC tenders to Sub for contractual indemnification based on the indemnity provision in the subcontract.

4. Sub tenders GC's indemnification claim to Sub's insurer.
5. Alternatively, GC tenders additional insured claim and contractual indemnity claim to Sub's insurer.

The thick solid lines in the exhibit indicate direct relationships. For example, the general contractor has a direct relationship as an additional insured with the sub's insurer. The dotted line indicates that the general contractor does not have a direct relationship, as an indemnitee, with the sub's insurer but will benefit from the policy because the sub is covered for its assumption of the tort liability of the general contractor.

You will routinely receive additional insured and contractual indemnitee tenders at the same time. Which coverage applies?

> A commonly asked question is, "When both additional insured and contractual liability coverages are available, which coverage applies to the claim or suit?" The answer is whichever one covers the loss. Insurers cannot pick and choose which coverage they want to invoke so as to eliminate coverage. If both forms of protection are available, the insurer must provide all of the protection possible.[ii]

Contractual Indemnification

> The comedy troupe Monty Python once made the subject of insurance--insurance of all things--the butt of a comedy skit. But we doubt that even comedians of their caliber would try to make "indemnity" the topic of comedy. It is a topic so deadly dull that it makes insurance look interesting.
>
> *Crawford v. Weather Shield Mfg., Inc.,* 136 Cal. App. 4th 304, 313 (Cal. App. 4th Dist. 2006) (review granted)

Contractual indemnification (aka: hold harmless and indemnity) is a non-insurance financial risk transfer technique. In an attempt to allocate financial risk to the appropriate party (who, after all, has most control over the risk in the first place), the risk is transferred or shifted from the indemnitee (e.g., general contractor) to the indemnitor (e.g., subcontractor). The indemnitor agrees to indemnify the indemnitee for certain hazards that produce claims like those for bodily injury and property damage. The indemnitor *assumes* the financial liability of the indemnitee to a third-party. This transfer does not relieve the indemnitee of its liability for damage to the third party; it merely transfers the financial obligation to the indemnitor. If the indemnitor cannot pay, the indemnitee must.

This liability of the indemnitee includes its vicarious liability for the work of the indemnitor and, in many instances, its own independent acts resulting in direct liability (subject to anti-indemnity laws).

There are three basic types of indemnity agreements:

The **broad form** version transfers the entire loss to the indemnitor regardless of which party is at fault. And the indemnitee's sole negligence falls within the parameters of this agreement type.

The **intermediate form** transfers the loss with the exception of the indemnitee's sole negligence. The intermediate form can be of two types: the first obligates the indemnitor to its share of fault only, while the second requires the indemnitor to indemnify all of the loss.[iii]

The **limited form** obligates the indemnitor only to the extent of its fault.

Contractual indemnification is not insurance. However, the agreement is only as good as the indemnitor's ability to pay so insurance is routinely required to back up the agreement.

The following exhibit demonstrates the risk transfer process:

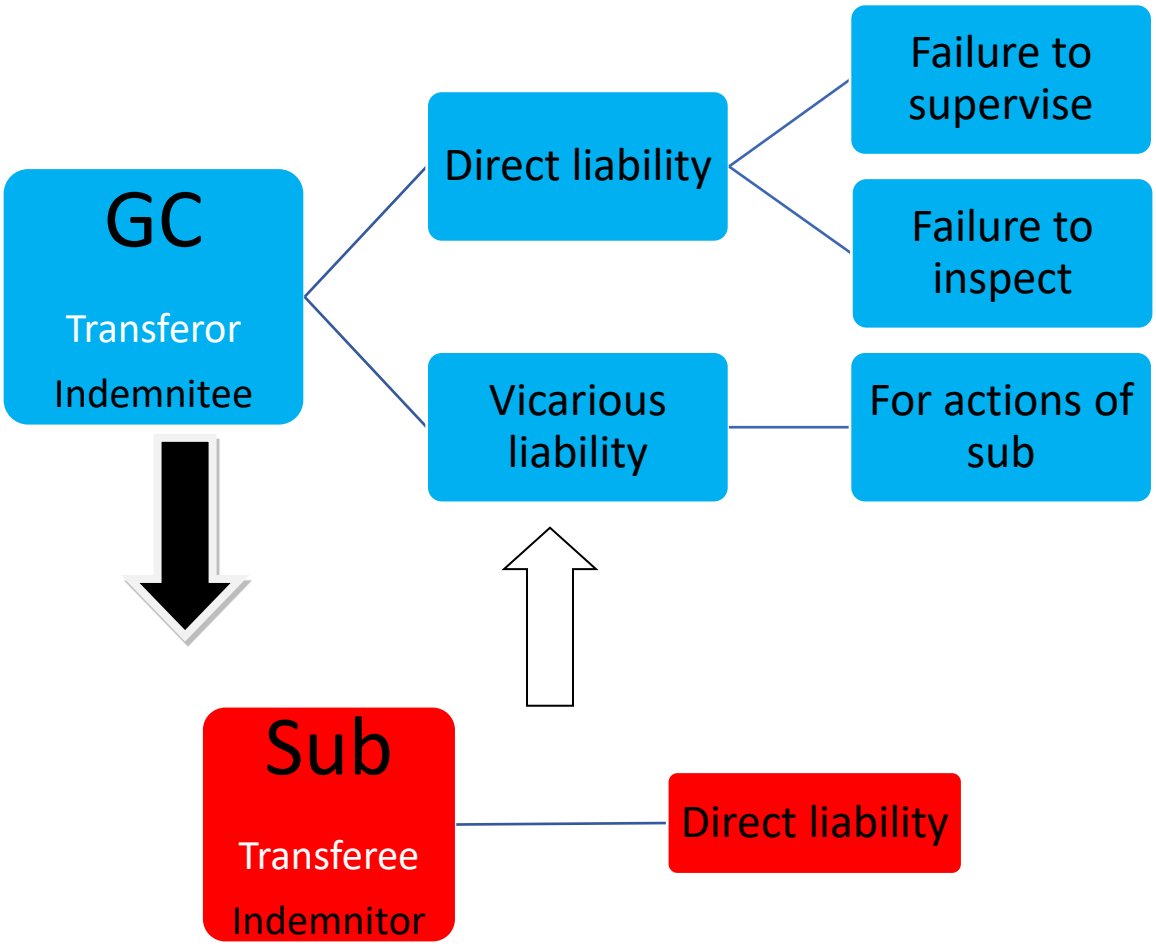

Exhibit B: Risk Transfer

Contractual liability insurance is typically provided by way of an exclusion in the CGL policy:

Exclusion[iv]

> **This insurance does not apply to …**
>
> **"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:**

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

Definition

"Insured contract" means:

…

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another 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 absence of any contract or agreement.

Anti-Indemnity Laws

Considerable regulatory oversight exists with respect to the transfer of financial responsibility for an indemnitee's negligence and public policy in construction contracts. The courts are not enamored with the transfer of the financial consequences of the indemnitee's sole negligence, or even partial negligence. (Also, insurers are increasingly amending the definition of insured contract by endorsement that precludes coverage for the indemnitee's sole negligence.)

> In general, there are two overarching reasons why construction contracts are often singled out for special treatment when it comes to the permissibility of indemnification for an indemnitee's own negligence. First is a concern that a party being indemnified for its own

> negligence will have less incentive to exercise due care in the performance of its work…
>
> The other rationale … is a concern that general contractors, because of unequal bargaining power, can compel their subcontractors to accept such an onerous contractual term as one that requires a party to assume liability for the negligence of others.[v]

In an effort to do an "end around", a general contractor may require a very broad additional insured obligation that covers the GC's liability, direct or vicarious, partial or sole.

However, if the requirement to obtain insurance is determined to be tied to the invalid indemnity agreement, then the obligation to provide such insurance may be invalidated as well by statute. In other words, if it is apparent that the sole reason for the insurance is to fund an indemnity agreement, and the indemnity agreement is unenforceable, so will be the insuring agreement, an important point to keep in mind when drafting such agreements.

For example, consider Colorado's anti-indemnity statute:

> (b) Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.
>
> …
>
> (d) (I) This subsection (6) does not apply to contract clauses that require the indemnitor to purchase, maintain, and carry insurance covering the acts or omissions of the indemnitor, nor shall it apply to contract provisions that require the indemnitor to name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insured coverage provides coverage to the indemnitee for liability due to the acts or omissions of the indemnitor. Any provision in a construction agreement that requires the purchase of additional insured coverage for damage arising out of death or bodily injury to persons or

> damage to property from any acts or omissions that are not caused by the negligence or fault of the party providing such additional insured coverage is void as against public policy.[vi]

Immediate Duty to Defend?

Hold Harmless v. Indemnity

Practically speaking, the terms are used interchangeably. The difference in the terms can be found in the timing of the obligations. In other words, indemnity suggests reimbursement whereas hold-harmless suggests a current obligation to pay the indemnitee's obligation as incurred:

> When the transferee's commitment is to pay these losses on behalf of the transferor…the noninsurance contractual transfer for risk financing is a hold harmless agreement. When the transferee's promise is to *reimburse* the transferor for losses the transferor has incurred and already paid…the noninsurance contractual transfer for risk financing is an indemnity agreement, with transferee…being the indemnitor and the transferor…being the indemnitee.[vii]

The transferor is the indemnitee and the transferee is the indemnitor. A little confusing, but try to think of it in this way: the general contractor wants the subcontractor to have the financial risk for a loss for which the sub is ultimately responsible. The general contractor *transfers* this risk by way of the contract, thus becoming the transferor, and the sub accepts it as the transferee. Because this shifting is now in place, the sub is the indemnitor, i.e., it will indemnify the GC pursuant to the agreement, and the GC is the indemnitee.

So, while the terms, "hold harmless" and "indemnity", are used interchangeably, the difference lies in whether the indemnitee must "pay on behalf of" or "reimburse", thus leading to a controversy over an indemnitor's defense obligation. The controversy involves the timing of the obligation as to defense expenses. In other words, if the indemnitor is required to defend, explicitly provided for in the indemnity agreement, can the indemnitor wait until liability is established; can it wait until the case is over and pay for the defense expenses at the end of the day? Or must the indemnitee pay for the defense as incurred? Must it actively defend?

Crawford v. Weather Shield Mfg., Inc., 136 Cal. App. 4th 304, 2006 (review granted) succinctly explained the issue:

> …the contract uses two different verbs in its first sentence: "Contractor does agree *to indemnify* and save Owner harmless against all claims for damages ... growing out of the execution of the work, *and* at his own expense *to defend* any suit or action brought against Owner founded upon the claim of such damage or loss or theft...." (Italics added.) ...The natural presumption is, then, that in using the verbs "indemnify" and "defend," the subcontract contemplated two different actions from the promisor subcontractor. *Crawford* 304, 330
>
> …
>
> Defense is the rendering of a service *at the time*--the emphasis is on the present tense…
>
> Reimbursement, by contrast, involves an element of retrospection…
>
> It should be immediately apparent that the right to receive a defense is not equal to the right to receive reimbursement and cannot be equated with it. There is a distinct benefit in not having to pony up money immediately.
>
> And in fact, there are indemnity contracts … which frame an obligation to pay attorney fees on behalf of an indemnitee expressly in terms of reimbursement, not a present duty to defend. Indeed, for what it is worth in this context, there are also insurance contracts that provide for duties of reimbursement rather than defense. *Crawford* 304, 332

On July 21, 2008 the Supreme Court of California, in *Crawford v. Weather Shield Mfg., Inc.,* 44 Cal. 4th 541 (Cal. 2008), ruled that when an indemnity provision in a contract requires the indemnitor to defend the **indemnitee** the obligation is immediate and does not depend on an ultimate finding of negligence against the indemnitor. It is important to note at the outset that the decision does not address additional insured status except to explain and reinforce the difference between the duty (of the insurer) to defend an insured and the duty (of the indemnitor) to defend an indemnitee.

The insurer's broad duty to defend an **additional insured** depends on the potential for coverage whereas the duty to indemnify exists only if there is actual coverage. In other words, in the case of indemnity it must be demonstrated that the loss is covered. In addition, the defense duty continues until the lawsuit is resolved or when it is conclusively determined that the potential for coverage no longer exists.

Instructive principles can be gleaned from *Crawford*:

Principle 1: The insurer's duty to defend an insured is separate and distinct from the indemnitor's duty to defend and indemnitee.

Principle 2: The indemnitor's duty to actively and immediately defend the indemnitee, and to what extent, or to reimburse depends on the language of the indemnity agreement.

Principle 3: Focus must be on specific contractual language to determine rights and obligations.

Principle 4: Unless the indemnity agreement provides otherwise, the indemnitor has a statutory duty to defend the indemnitee.

The Additional Insured

Coverage for an additional insured has been the subject of much litigation and some legislative action. At one time, the coverage was almost a "throw-in" with no or insufficient commensurate (with the risk being underwritten) premium.

In California, the *Presley* decision reveals just how much this "throw-in" can cost since defense coverage is typically unlimited and can, in some instances, be much more valuable than indemnity coverage.

Presley Homes, Inc. v. American States Insurance Company, 90 Cal. App. 4th 571, (Cal. App. 4th Dist. 2001), deals with the extent of the duty to defend an additional insured in California. The Court held that the defense obligation is complete regardless of the extent of the named insured's exposure:

> …by agreeing to pay a share of plaintiff's defense costs, defendant effectively admitted it owed a duty to provide plaintiff with a defense. Its efforts…to limit its defense obligation to the portion attributable to Link's and Sunrise's potential exposure, and the delay in providing a defense while the parties attempted to reach a mutually acceptable percentage, highlights the very reason the … Supreme Court requires an insurer to provide a complete defense even where the underlying lawsuit includes both covered and uncovered claims. *Presley* 571, 576-577

As to the additional insured, *Presley* is clear and requires a complete defense. However, it does not preclude equitable contribution among the defending carriers (more later).

Additional insured coverage has several advantages. It reinforces contractual indemnity by providing the additional insured with direct rights to the named insured's policy; the insurer's duty to defend is immediate and complete; defense costs are generally in addition to the policy limits; and the additional insured coverage takes priority (or should) over the additional insured's own policy, the cornerstone of the risk transfer mechanism.

Blanket v. Scheduled Endorsements

Scheduled endorsements specifically name the party entitled to coverage. Blanket endorsements, on the other hand, automatically provide coverage to parties that the insured is required by contract or agreement to name as an additional insured. Blanket

endorsements are administratively convenient especially if the named insured engages in many projects and makes contracts containing additional insured obligations.

"As Required by Contract" – Privity, Duration, Limits

Attention must be paid to exactly what is required by contract. For example, duration of the obligation is often included, limits may be specified (and sometimes the limits are less than those available to the named insured), coverage for the additional insured is to be primary, and there may be a general provision in the endorsement itself that specifies that no broader coverage is provided than is required by contract. Barring any other coverage issues, coverage available to the additional insured is determined by the requirements in the construction contract.

Despite some standardization, insurance requirements in construction contracts vary as to both language and location in the contracts. Here are a few actual samples:

> ***"****Subcontractor shall procure and maintain in force for the duration of the Work…Comprehensive General Liability Insurance… Comprehensive General Liability Insurance…Contractor, Owner and Architect shall be named as additional insureds."*
>
> *"Subcontractor…shall obtain the following insurance, which…shall be maintained at all times during the term of this Agreement and for a reasonable time hereafter…The Commercial General Liability policies…shall contain endorsements naming the Contractor…as additional insured(s); shall provide for severability of interests…"*
>
> ***"****Contractor shall obtain, pay for and keep in full force and effect until final completion and acceptance of the Work, the following insurance…and that… Builder…named by separate endorsement as additional insured."*
>
> ***"****Contractor shall obtain and maintain in full force and effect…the following insurance…*
>
> *(a) Comprehensive or Commercial General Liability…Builder shall be named as additional insured.*
>
> *All of the insurance…shall be maintained in effect at all times during all the work performed…until such work has been accepted by Builder. In addition…insurance shall be maintained continuously until ten years from completion of the Subcontractor's work and acceptance…by Builder…"*

Additional insured obligations may extend upstream past the immediate party that is in privity of contract. For example, the contract between the NI sub and the GC may require the NI sub to name the owner and architect as additional insureds as well.

Attention must be paid to whether the putative additional insured is a signatory to the contract. A recent case in New York illustrates the issue. In *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 2018 NY Slip Op 02117, the issue was whether a non-signatory to the construction contract was entitled to additional insured coverage even if it was included as an additional insured on a certificate of insurance that was attached to the contract.

The insurance policy provided:

> "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization *with whom* you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you." (Emphasis added). *Gilbane* 2

The Court ruled that the operative language in the decision was “with whom”. In other words, the only additional insured obligation extended to the signatory to the contract:

> Here, the endorsement would have the meaning Gilbane JV desires if the word "with" had been omitted. Omitting "with," the phrase would read: ". . . any person or organization whom you have agreed by written contract to add. . .", and Gilbane JV's position would have merit. But Samson and Liberty included that preposition in the contract between them, and we must give it its ordinary meaning. Here, the "with" can only mean that the written contract must be "with" the additional insured. Gilbane JV proposes other wordings that, in its view, would more clearly require the existence of a written contract between Samson and an additional insured, but those formulations are no clearer and, in any event, the endorsement's meaning is plain and unambiguous. *Gilbane* 2

Currently, ISO offers additional insured endorsements that afford coverage to parties in contractual privity with the named insured and other parties not in privity but to whom the named insured is contractually obligated to arrange for such coverage.

Certificates of Insurance

The indemnitee relies on the indemnitor to arrange for proper coverage to satisfy the insurance requirements provision in a contract.

The Certificate of Insurance ("COI") **ideally** confirms that insurance requirements have been met. Certificates do provide some evidence that certain types of policies are in place on the date the certificate is issued and that these policies have the limits and policy periods shown.

In construction defect claims, COIs routinely accompany additional insured and/or contractual indemnity tenders. During the normal course of business, at the time a construction contract is made, the general contractor will typically require a COI from the subcontractor and usually the sub's insurance agent provides it. The COI typically includes policy information important to the general contractor such as named insured, names of insurers, types of coverage, policy periods, limits, and other basic information.

In other words, the COI provides the general contractor with confirmation that the subcontractor is insured, and what the basic terms of the policy are. But the COI only provides information at the point in time that it is issued. It is a snapshot. Whether this information is accurate is another matter. It is not infrequent that an insurance agent will provide information on a COI and attachments that do not comport with the policy nor the insurer's records, a disappointing revelation to the certificate holder and a prolific source of coverage disputes.

Furthermore, the COI is not a contract and should not amend or change the policy in any way, explicitly stating so in the form of a disclaimer.

Most courts interpret the disclaimers in standard ACORD certificates to mean that the certificate was not intended as an operative legal document making changes in policy terms, and that certificate holders generally do not have a right to rely on the information stated in the certificate. The certificate is not the contract, the policy is. However, the disclaimer is proving not to be bulletproof, at least in Washington.

In T-Mobile USA Inc. v. Selective Insurance Co. of America, Slip. Op. No. 96500-5, 2019 WL 5076647 (Wash. Oct. 10, 2019), the Washington Supreme Court, on a certified question from the Ninth Circuit, held that despite the disclaimer, Selective's agent, under apparent authority, bound Selective to cover T-Mobile USA as an additional insured even though T-Mobile USA was not a signatory to the construction contract that contained the additional insured obligation.

Selective's named insured contracted with T-Mobile Northeast, not T-Mobile USA, for the construction of a cell tower and the former was required to be an additional insured on the policy. Initially, T-Mobile USA was named as the defendant in a subsequent construction defect lawsuit. Since T-Mobile USA was not a signatory to the construction contract and, therefore, not an automatic additional insured, Selective denied coverage.

Significantly, the COI identified “T-Mobile USA Inc., its Subsidiaries and Affiliates” as the additional insureds. The agent, Selective’s “authorized representative”, repeated this practice over a period of seven years. T-Mobile USA approved the form of the policy and was aware that the COI identified it as the additional insured notwithstanding it not being a signatory to the subcontract (Selective presumably was aware of it as well).

While the disclaimer was clear, the representation by the agent, with apparent authority from Selective, trumped the disclaimer, requiring Selective to cover T-Mobile USA as an additional insured even though it did not make the contract with the named insured (as required by the endorsement).

The take-away is that a certificate of insurance disclaimer is not bulletproof. Accuracy matters. At one extreme is susceptibility to administrative errors and at the other extreme, outright fraud.

“Arising out of” v. “caused by”

Language, in insurance policies at least, matters. There is an important distinction to be made between “arising out of” and “caused by”. “Arising out of” is much broader and simply requires a nexus, or connection, barely minimal in some jurisdictions, between the damage/injury and the work. Mere presence at the construction site may qualify.

In 2004, ISO introduced major changes to the additional insured endorsements that were attempts to require at least some causation on part of the named insured and exclude the sole negligence of the additional insured.

“Caused by” requires acts or omissions of the named insured. The damage must have been caused, in whole or in part, by the named insured’s work. The additional insured can be a partial cause but not the sole cause.

But what does “caused by” mean?

There is a difference between legal causation, for which there is legal culpability on the actor, and causal actions for which there may be no legal liability. The named insured’s act could have caused an injury or damage, cause-in-fact, in the context of sequential cause and its effect(s), but the named insured may have no legal liability; in other words, the named insured’s action(s) was not a proximate cause.

While the named insured may have no legal liability, it is possible that the additional insured is legally liable. The key question, then, in the more recent versions of the additional insured endorsements is whether they provide coverage for the additional insured that has legal liability because the named insured, for which it is vicariously liable, caused an injury or damage but was not itself legally liable.

New York’s Appellate Division addressed this issue on August 11, 2015.

In 2009, Burlington Insurance Company's named insured's, Breaking Solutions, equipment was being operated by an employee of the NYC Transit Authority (additional insured) during excavation in the Brooklyn subway. An explosion occurred resulting in injury due to the equipment contacting a live electrical cable below concrete. The additional insured was responsible for providing a warning or shutting down the power. It did neither. So, while the named insured's equipment contacting the live wire caused the explosion, the named insured was not the legal cause of the explosion. The additional insured admitted liability in an internal memorandum.

The question was whether the additional insured was covered on the Burlington policy even though Breaking Solutions was not legally liable for the injury, and the additional insured was. In other words, did the "caused by" language in the additional insured endorsement mean legal causation?

The Appellate Division responded that causation without legal liability was enough to trigger the additional insured obligation:

> …NYCTA and MTA are additional insureds under the subject policy for purposes of a loss that was "caused, in whole or in part," by an "act[] or omission[]" of the named insured, even though the named insured's causal "act[]" was not negligent. It is undisputed that Kenny's injury was causally connected to an "act[]" of the named insured, specifically, the Breaking Solutions excavator's disturbance of the buried electrical cable, which triggered the explosion that led to Kenny's fall. While it is true that, because NYCTA had not warned the Breaking Solutions' operator of the cable's presence, Breaking Solutions' "act[]" did not constitute negligence, this does not change the fact that the act of triggering the explosion, faultless though it was on Breaking Solutions' part, was a cause of Kenny's injury. The language of the relevant endorsement, on its face, defines the additional insured coverage afforded in terms of whether the loss was "caused by" the named insured's "acts or omissions," without regard to whether those "acts or omissions" constituted negligence or were otherwise actionable. *Burlington Ins. Co. v NYC Tr. Auth.*, 2015 N.Y. App. Div. LEXIS 6349, 13-14 (N.Y. App. Div. 1st Dep't Aug. 11, 2015)

However, on June 6, 2017 the Court of Appeals reversed, holding that proximate or legal causation is required for coverage as an additional insured. *The Burlington Insurance Company v. NYC Transit Authority,* 2017 NY Slip Op 04384.

The interpretation of causation has particular, and quite interesting, relevance to third-party-over suits. Assume the subcontractor's employee is injured on the job. He can't recover from his employer given the worker's compensation exclusive remedy. He then sues the general contractor which turns the claim over to the subcontractor pursuant to the contractual indemnity provision in the subcontract, and to the sub's insurance company as an additional insured on the sub's policy.

If causation in the additional insured endorsement means legal liability, and the general contractor has vicarious liability for the subcontractor which has immunity, how can any additional insured claim ever succeed? On the other hand, a causation without legal liability interpretation, cause in fact, should enable the additional insured claim to succeed, but what about the fundamental duty of the insurer to the insured in the Insuring Agreement? "We will pay those sums that the insured becomes **legally obligated** to pay as damages." The "insured" includes additional insureds.

Direct Liability v. Vicarious Liability

A source of controversy and litigation is whether the additional insured GC is covered for the vicarious liability it has for its sub's negligence only or whether it can also be covered for its own direct liability. *Arguably*, it is the vicarious liability only that should be covered. After all, the additional insured should have its own insurance for its direct liability.

Contractors sometimes use their own employees to do some of the work at a project. Often, they hire subcontractors who are independent contractors. They are not employees. While, practically speaking, there may be some element of control, the independent subcontractor is not an employee of the contractor, and the sub is responsible for the results.

So those who hire independent contractors generally are not vicariously liable for the actions of the independent contractor. The *Independent Contractor Rule* holds that an employer is not liable for the physical harm to another caused by the independent contractor. Contrast an agency relationship, e.g., employer – employee, in which the principal is vicariously liable for the acts, errors, or omissions of the agent while in the scope of the agency, and the employer – independent contractor relationship, in which the employer does not have control over the means and methods of construction.

What is noteworthy about the Independent Contractor Rule are the numerous exceptions that have evolved over the years, to the point where the exceptions not only prove the rule, they have almost become the rule.

According to the Restatement of the Law, Second, Torts, an employer can be liable for the actions of the independent contractor in the following general ways:

- Negligent selection and supervision of the independent contractor, and negligent instructions

- Duties that cannot be delegated
- Work that is peculiar or inherently dangerous

(For a more detailed explanation, the rule and its exceptions can be found in the Restatement, §§409 – 429.[viii])

In addition, typically the general contractor is liable for the subcontractor's work because of a contractual obligation to the owner or developer.

Depending on the specific endorsement, the additional insured endorsement could specifically provide coverage for the additional insured's vicarious liability only. Or it may provide for coverage for the additional insured as long as the named insured caused the loss in whole or in part (and even if the additional insured is partially directly negligent.) Or the endorsement may provide coverage even if the named insured did not cause the loss in part (if connected to an unlawful indemnity agreement in an anti-indemnity law jurisdiction, the endorsement may be invalidated – see Anti-Indemnity Laws).

Ongoing Operations v. Completed Operations

While "ongoing operations" is not defined in the policy it can be deduced from the definition of "completed operations". The "products-completed operations hazard" includes:

> **a. …all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:**
>
> **…**
>
> **(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:**
>
> **(a) When all of the work called for in your contract has been completed.**
>
> **(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.**
>
> **(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.**

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Ongoing operations, then, includes "work that has not yet been completed or abandoned." The following ISO additional insured endorsements address ongoing operations and completed operations (italics added):

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:

…

in the performance of *your ongoing operations* for the additional insured…"

A. Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom you *are performing operations* when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part…
…

in the performance of your *ongoing operations* for the additional insured.

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 location designated and described in the schedule of this endorsement performed for that additional insured and included in the *"products-completed operations hazard".*

Prior to the 2004 ISO revisions of the additional insured endorsements (20-10), a question arose as to whether "liability for…property damage…caused…in the performance of your ongoing operations" precludes coverage for any property damage

that occurs after the work is completed. If the liability is caused in the performance of ongoing operations, does it matter when the property damage occurs?

The following excerpt from a federal court case (**subsequently vacated**), *Valley Insurance Company, et al. v. Wellington Cheswick, LLC, et al*., *2006 U.S. Dist. LEXIS 81049,* illustrates the argument:

> The dictionary defines "ongoing" as "being actually in process; continuously moving forward…"Operations" is defined as…"performance of a practical work or of something involving the practical application of principles or processes."…Thus, the common and ordinary meaning of this phrase is simply those things that the company does. … Accordingly, the Court agrees with plaintiffs that the only reasonable conclusion here is that the Wellington entities' alleged liability for property damage arises from the ongoing operations performed by the subcontractors. While the property damage may not have occurred during those ongoing operations, the alleged liability did… *Valley* 81049, 19 – 20

In contrast, on August 9, 2007, the Court of Appeals, Division Three, in Colorado addressed this issue and cited *Valley.* In *Weitz Company, LLC v. MidCentury Insurance Company*, 181 P.3d 309, the Court affirmed the motion for summary judgment granted to the insurer, and the writ of certiorari was denied.

> The endorsements…insures the additional insureds, "but only with respect to liability arising out of [the subcontractor's] ongoing operations performed for that insured." …
>
> At the outset, "only" is a term of limitation. Neither "ongoing operations" nor "completed operations" is defined in the policy. However, "ongoing" is generally defined as "that [which] is going on…that [which] is actually in process…that [which] is continuously moving forward."
>
> By contrast, "complete" is generally defined as "[b]rought to an end or to a final or intended condition; concluded; completed; as, the edifice is…*complete."*
>
> "Operation" is generally defined as "a doing or performing esp. of action: WORK, DEED." … The term "operations" as used in the policy is the plural of "operation." *Weitz* 309, 313

> In our view, the policy is unambiguous as to the extent of the coverage available to the additional insured. The term "completed operations" as used in the policy extends that coverage to the subcontractor or named insured, and the term "ongoing operations" used in conjunction with "only" in the endorsement limits the coverage provided to the general contractor or additional insured. The use of different terms in the policy signals that those terms should be afforded different meanings… Therefore, we disagree with the general contractor's assertion that "ongoing operations" used in the endorsement to limit coverage…has the same meaning as "completed operations" used elsewhere in the policy. *Weitz* 309, 313 – 314
>
> …
>
> Thus, we conclude that under the plain and ordinary meaning of "arising out of your ongoing operations" the endorsement to the policy does not cover "…operations," and the insurer has no duty to defend or indemnify the general contractor under the circumstances here. *Weitz* 309, 315

ISO endorsements CG 20 10 07 04 and CG 20 33 07 04, predecessors to the 2013 editions, resolved the issue (as endorsements often do in response to court rulings) by including language that precludes coverage for any property damage that occurs after the named insured's work has been completed or put to its intended use.

Separation of Interests (Severability of Interests)

If you were to go through the December 2004 edition of ISO's CGL policy you would find in excess of 200 references to such words and phrases as "you", "your", "any insured", "the insured", etc. The exact terminology and phrasing are consequential.

Separation Of Insureds

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

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

Our focus here is on part b. It is important to remember that the additional insured must be treated independently from the named insured, that their interests are several and not collective. This means that the focus of policy provisions like exclusions should be applied based on who is actually looking for coverage and the specific language, and that a denial of coverage to one insured may not necessarily prove fatal to another insured. The preamble to the policy begins with some definitions that must be understood:

> **Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.**
>
> **The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.**
>
> ***Other words and phrases that appear in quotation marks have special meaning.* Refer to Section V –Definitions**.

An additional insured becomes an insured on the policy. "You" and "your" are reserved for the named insured. "An insured", "the insured", and "any insured" include the additional insured. It is very important to pay attention to the adjective that modifies the term "insured". And while the additional insured must be treated as a separate insured, the analysis of coverage must include the language of the specific additional insured endorsement as well.

For example,

> The practical consequence of this language, as interpreted by a majority of the courts, is that CGL references to "the insured" are to be construed very differently from other references to "an insured" or "any insured." Specifically within the context of policy exclusions, for example, "the insured" means the insured who is looking for coverage—in the language of the Separation of Insureds condition, the insured "against whom claim is made or suit is brought." For example, an exclusion of damage to "property in the care, custody or control of the insured" [emphasis added] only limits coverage for the insured who actually has care, custody, or control of the damaged property. If another insured were to be held liable for the same damage, the exclusion would not apply to that other insured.[ix]

Also, the preamble states that other words and phrases in quotation marks have *special meanings* like “your work” and “your product” in the definitions section of the policy.

Priority of Coverage

If the named insured general contractor is also an additional insured on its sub’s policy, which policy responds first? The general contractors? The subs? Or do both concurrently apply?

Recall that the purpose for the inclusion of additional insured provisions (and contractual indemnity) is to facilitate risk transfer and ultimate financing of the loss. The GC intends that the sub and its insurer pay defense and indemnity if the sub is responsible for the loss. In other words, the sub’s insurance should be primary.

When analyzing the priority of coverage, the subcontract, the named insured’s (GC) policy, and the sub’s policy must be examined. An effective transfer of risk to the sub by the general contractor will require, in writing, that the sub name the GC an additional insured on the sub’s policy, along with broad terms and sufficient limits, and that the sub’s policy should be primary. The GC’s policy should include an Other Insurance condition clause that clearly specifies that if the GC named insured is covered as an additional insured on another policy, then the GC’s policy is excess over that other insurance. The sub’s policy may also include an endorsement specifying that the sub’s policy, as to the additional insured, is primary and non-contributing. Both provisions follow:

Other Insurance Condition

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

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies…

b. Excess Insurance

(1) This insurance is excess over:

…

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

Primary and Noncontributory – Other Insurance Condition

> **This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:**
>
> **(1) The additional insured is a Named Insured under such other insurance; and**
>
> **(2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.**

There is well-established precedent in the case of *competing or conflicting* other insurance clauses. Such clauses are "mutually repugnant" and these "escape clauses" should be nullified requiring the carriers to both contribute. While this is valid when the conditions are *competing or conflicting* it shouldn't be if the conditions are *complimentary*.

For example, assume both the general contractor and subcontractor's policies contain the same other insurance conditions. Further assume that the subcontract requires that the subcontractor name the GC as an additional insured on the sub's policy. The sub's policy is primary.

The GC's policy other insurance clause clearly states that the policy is excess over any primary insurance available to the GC in which the GC is added as an additional insured. Further support is available if the sub's policy contains a primary/non-contributing endorsement. And the fundamental risk transfer intent in the contract is fulfilled.

On February 26, 2018, the 10th Circuit reinforced the priority of coverage. First Mercury Insurance Company insured the subcontractor and Cincinnati Insurance Company's named insured was an additional insured on the First Mercury policy:

> According to First Mercury, the provision in the Cincinnati policy irreconcilably conflicts with the provision in the First Mercury policy as to which policy is primary and how financial obligations are apportioned. First Mercury contends that when such a conflict occurs, New Mexico requires…the insurers to "contribute on a pro-rata basis determined by their respective [policy] limit[s]." …
>
> First Mercury's argument fails at its inception, however, because the provisions in the two insurance policies are not in conflict. Each policy makes clear that First Mercury is the

primary insurer and that Cincinnati is an excess insurer. The Cincinnati Policy states:

b. Excess Insurance

This insurance is excess over:

. . .

(2) *Any other primary insurance available to the insured* [Bingham] covering liability for damages arising out of the premises or operations, or the products and completed operations, *for which the insured [Bingham] has been added as an additional insured by attachment of an endorsement*.

(3) Any other insurance:

(a) Whether primary, excess, contingent or on any other basis, except when such Insurance is written specifically to be excess over this insurance . . .

First Mercury's "Primary and Non-Contributing Insurance" endorsement, which completely replaces the policy's "Other Insurance" section, does not conflict with Cincinnati's excess insurer status. Rather, that endorsement provides it will follow a contribution-by-equal-share approach if permitted by all other insurance policies "unless the insured is required by written contract signed by both parties, to provide insurance that is primary and noncontributory" and "[w]here required by a written contract signed by both parties, this insurance will be primary & noncontributing only when and to the extent as required by that contract." The subcontract agreement between High Desert and Bingham provided just such a requirement, stating: "The insurance policies. . .shall be endorsed to add [Bingham], the Owner and their parent companies, subsidiaries and affiliated companies as additional insureds on a *primary and non-contributory basis* . . .The insurance carried by [High Desert] naming [Bingham] and the Owner as additional insureds *shall be primary* over any insurance policies carried by [Bingham] and the Owner."

…

The combination of the First Mercury Policy and the subcontract agreement make the First Mercury Policy primary over the Cincinnati Policy. The Cincinnati Policy is

> expressly excess over any policy in which Bingham is named as an additional insured. Because the subcontract agreement requires the policy procured by High Desert to be primary and non-contributory, the district court correctly held that the First Mercury Policy is the primary policy.
>
> *First Mercury Ins. Co. v. Cincinnati Ins. Co.*, Nos. 17-2006, 17-2010, 2018 U.S. App. LEXIS 4929, at *30-33 (10th Cir. Feb. 26, 2018)

The additional insured/indemnitee intends for the indemnitor's policy to apply first in any claim. A question arises as to whether the intent includes all of the indemnitor's coverage, primary **and excess**, to apply before the additional insured/indemnitee's coverage kicks in.

Two conceptual forces merge here. First, the additional insured/indemnitee wants the indemnitor to pay first. Second, excess coverage should apply only until all primary insurance that is available exhausts.

While there is some argument that "primary" can be used in its generic sense and means that the named insured's CGL and excess/umbrella pays first followed by the additional insured's, it is my opinion that "primary" as used in the Other Insurance Condition refers to primary insurance, i.e., CGL, in the insurance sense, and doesn't include excess insurance.

Allocation of Coverage

So how is allocation or apportionment accomplished when additional insured coverage is available from several policies and insurers?

Assuming property damage occurs on a single date, the carriers will be guided by the other insurance conditions in their policies as to sharing, i.e., on an equal shares or limits basis. We'll refer to this as a "concurrent other insurance" approach.

But how about in a continuous damage scenario? In a claim in which property damage occurs over an extended period of time involving multiple periods and multiple policies, how is apportionment or allocation accomplished? Is allocation based on the other insurance conditions in the policies or do principles of equitable contribution kick in? This can be called a "continuous other insurance" approach.

Recall that *Presley* recognizes equitable contribution among additional insured carriers in a construction defect case. By its very nature "equitable contribution" suggests that that what is equitable depends on the facts and the jurisdiction.

To further complicate matters, is there a different approach to be applied in a continuous other insurance situation between the duties to defend and indemnify. For instance, the duty to defend is broader than the duty to indemnify. Furthermore, if the insurer has a duty to defend, it is complete, immediate, and total. Given these criteria, it would seem prudent to allocate defense equally to each policy that is triggered.

The duty to indemnify, on the other hand, depends the property damage actually being covered. An allocation could depend on, first, the extent to which a specific sub contributed to the loss, and second, shared by the this sub's carriers on a time-on-risk, or some other equitable basis.

Allocation in continuous damage claims, like CD claims, refers to the process of allocating indemnity and defense costs to more than one "period" of time, generally corresponding to primary and excess policy periods, and uninsured periods. Calculating equitable allocation depends on jurisdiction, policy language and type, damage characteristics, and causation. Defense allocation can differ from indemnity allocation in the same claim primarily due to the different obligations underlying each duty. Ultimately, however, it will be up to a court.

Various allocation methods and hybrids are in use and determining the appropriate allocation is fact- and jurisdiction-sensitive. While not the subject of this paper, the following brief descriptions of the various approaches deserve mention.

Joint and Several aka All Sums

An insurer's obligation is joint and several if its policy is triggered. The original "all sums" language in the insuring agreement obligates the insurer to respond in full. This language has since been replaced by "those sums."

Pro Rata

This approach recognizes that the insurer should only be responsible for the PD occurring during its policy period.

Methodology

Generally, the approach, i.e., pro-rata or joint and several, will determine which calculation method is used and whether the insured will participate in bare years.

Equal Shares

The joint and several approach is conducive to an equal share allocation among policies triggered, without any contribution from the insured in bare years. Some practitioners interpret equal shares to mean that each insurer must share equally regardless of the number of policies in play. For example, Insurer A has nine policies, Insurer B, one. Each insurer shares on a 50% basis, i.e., two insurers, two shares. An alternate interpretation is that each **policy** participates equally, e.g., Insurer A pays 9X and Insurer B pays 1X, each of the ten policies sharing equally.

Time-On-Risk

In a pro rata approach, the specific policy period be compared to the total triggered period and the loss is then shared based on the proportion of the specified period compared to the total period. The insured is responsible for bare years depending on the reason for lack of insurance, i.e., voluntary or involuntary, and whether the jurisdiction permits it. Furthermore, defense and indemnity may be treated differently.

Time-On-Risk Times Limits

Limits of liability are factored in, the premise being that there is a greater assumption of liability by the policy with higher limits. While justifiable in a concurrent loss situation (provided for in the other insurance condition), in a continuous loss case such an approach fails to recognize the fundamental premise that it is PD, and the amount of such PD, occurring during the policy period that is covered for which the insurer should pay. The limits are relevant only to the extent that the amount of covered PD is finite. To include limits in a pro rata calculation creates the inequitable result of one insurer paying more than another when their time on risk is the same, and the PD is assumed to have occurred equally over a specified period of time.

Tier Approach

The Tier Approach, often used in CD claims, allocates defense and indemnity based on the extent to which a particular trade has contributed to the loss.

Conclusion

Contractual indemnification backed by contractual liability coverage and the additional insured obligation are vital risk management techniques. While different concepts they are linked and, ideally, are complementary. But, as is often the case, this "belt and suspenders" approach suggests a comprehensive approach to risk management that may also pose a conflict, for example, by anti-indemnity laws.

The following exhibit is a simple "compare and contrast". But, remember, the devil is always in the details.

Additional Insured	**Indemnitee**
Direct rights under policy	No direct rights under policy
Rights governed by insurance policy	Rights governed by indemnity provision
Obligation to pay rests with insurer	Obligation to pay rests with indemnitor
(Typically) defense in addition to limits	(Typically) defense within limits.[x]
Immediate duty to defend. (Pay as you go.)	Indemnification.[xi] (Reimbursement or pay as you go.) But see *Crawford*.

Exhibit C: Additional Insured v. Indemnitee

Endnotes

[i] http://www.seinfeldscripts.com/TheFatigues.html; retrieved on March 10, 2018.
[ii]Donald S. Malecki, CPCU, Jack P. Gibson, CPCU, CLU, ARM, Pete Ligeros, JD, The Additional Insured Book, 5th ed. (Dallas, Tx., International Risk Management Institute 2004).
[iii] Gary Wickert, You Break It, You Buy It: Understanding Anti-Indemnity Statutes, retrieved on April 9, 2014 from http://www.claimsjournal.com/news/national/2014/04/03/246663.htm.
[iv] All policy language in this paper is from various editions of the Insurance Services Office, Inc. forms and endorsements.
[v] Randy Maniloff and Jeffrey Stempel, General Liability Insurance Coverage/Key Issues in Every State (New York, NY, Oxford University Press, Inc. 2011) pp. 249 – 250.
[vi] C.R.S. 13-21-111.5, http://www.lexisnexis.com/hottopics/colorado/; retrieved on March 15, 2018.
[vii] George L. Head and Kwok-Sze Richard Wong, Risk Management for Public Entities, 1st ed. (Malvern, PA: American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America, 1999, Fourth Printing April 2006) 14.
[viii] Restatement of the Law, Second, Torts, Chapter 15 – Liability of an Employer of an Independent Contractor, The American Law Institute, 1965.
[ix] Jeff Woodward, What Does "Separation of Insureds" Mean – Part 2 August 2002 (http://www.irmi.com/Expert/Articles/2002/Woodward08.aspx).
[x] Exception: indemnitee coverage in Supplementary Payments Provision.
[xi] Exception: indemnitee coverage in Supplementary Payments Provision.