The "Additional Insured"

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Confusion sometimes can arise as to whether a party's status as an indemnitee for which contractual liability coverage is purchased by the indemnitor is equivalent to being an additional insured under the indemnitor's liability policy. The two are not equivalent. As an additional insured, one has direct contractual relationship with the insurer. One's status as a contract indemnitee however is different. In this latter case, the insurer's contractual obligations run to its insured, the indemnitor and not directly to the indemnitee.

The contractual provisions used to effect noninsurance risk transfers are hold harmless or indemnity provisions and insurance provisions. Indemnity provisions operate independently from the indemnitor's insurance, which may or may not cover the risks assumed by the indemnitor. Where a named insured (e.g., a contractor) is obligated to indemnify another party (e.g., the project owner), the named insured's contractual liability coverage will respond to this obligation if coverage for the claim is not otherwise precluded by the terms of the policy (e.g., the claim must involve liability for bodily injury or property damage and none of the exclusions may be applicable). However, if the indemnity agreement is not enforceable for some reason, the contractual liability coverage will not respond.

Additional insured status achieves a similar end without relying on the terms of an indemnity clause. It makes the other party (e.g., the owner) an insured in the named insured's (e.g., the contractor's) liability policy, subject to the terms and conditions of the policy and the additional insured endorsement. D. Malecki & J. Gibson, *The Additional Insured Book*, p. 56 (5th Ed. 2004).

I. Reasons for Requiring Additional Insured Status

There are a variety of valid reasons for one party to require another to add it as an additional insured on the other party's liability policies:

- It may reinforce the risk transfer accomplished with indemnity agreements by providing the additional insured with protection in the form of direct rights under the policy.

- Additional insured status provides the additional insured with the right to an immediate defense by the named insured's insurer rather than being indemnified for defense costs at a later date.

- It may allow one party to transfer liability arising from its sole negligence to the other party's insurer. It may prohibit the indemnitor's insurer from subrogating against the indemnitee when a loss is caused by the indemnitee's acts or omissions.

- It may avoid having losses impact the loss history of the additional insured, thus avoiding increased insurance premiums for the additional insured in future years.

- It may substantially increase the limits of insurance available to the additional insured for a given operation or project.

- It may lessen the chance that the additional insured will be forced to sue the indemnitor directly to be made whole following a claim or suit. D. Malecki & J. Gibson, *The Additional Insured Book*, p. 56-57 (5th Ed. 2004)

II. Problems with Additional Insured Status

A variety of potential coverage problems confronts both additional insureds and named insureds. It is the party that adds another to its policy, the named insured) that faces most of the problems rather than the party being added (the additional insured). However, there are also disadvantages for the additional insured.

A. Named Insureds Problems

One of the more commonly voiced disadvantages to named insureds that add others as insureds on their policies is the possible dilation of the named insured's limits of insurance. This is made clear in severability of interest provisions where the policy is said to apply separately to each insured against whom a claim is made or suit is brought except with respect to the policy's limits. When other insureds have access to a named insured's policy, all must share the limits applicable to any occurrences that result in claims against one or more of such insureds. D. Malecki & J. Gibson, *The Additional Insured Book*, p. 107 (5th Ed. 2004).

Another problem with additional insured status, particularly for the named insured's insurer, involves the possibility of conflicts of interest in defending claims. When a lawsuit is brought against both a named insured and an additional insured, often the best defense for one of the parties involves condemnation of the actions of the other party. This can present an insurer charged with defending both parties with severe conflicts of interest. Because of this conflict, the insurer would have to retain separate counsel for the additional insured. In addition, if the legal expenses are within, rather than in addition to, the limits, this additional legal expense can have the effect of diluting the policy's protection. D. Malecki & J. Gibson, The *Additional Insured Book*, p. 109-110 (5th Ed. 2004).

Another possible problem that named insureds face when they provide insured status to others involves providing coverage for liability exposures the named insured does not intend to cover. This problem is due to the fact that most insures use standardized additional insured endorsement forms, that are designed for general use without regard to the desires of the parties to a particular agreement. To provide exactly the right scope of coverage for specific situations, manuscript endorsements must be used. D. Malecki & J. Gibson, *The Additional Insured Book*, p. 110 (5th Ed. 2004).

B. Additional Insured Problems

1. Loss of control over Defense

A disadvantage to additional insureds is the possible loss of control of the defense of claims made against them. Many large organizations that are self-insured take active roles in managing litigation. In most CGL policies, insurers are given the right to control the defense of the claims that they cover. Therefore, an additional insured may benefit from the insurance protection but lose control over the defense of claims made against it.

2. Additional Insured's Policy May be Triggered

The most significant problem for the additional insured is the possibility of its insurer being called on to participate with the named insured's insurance company in defending claims against them as a result of the other insurance clause. One of the reasons for requesting additional insured status is to obtain a certain amount of primary protection as the first recourse under the liability policy of the named insured. For many liability claims, an additional insured is covered by both its own liability policy and those policies in which it is an additional insured. It is the policy wording that will control which policy is primary. If the additional insured and named insured policies have identical other insurance clauses or these policies have conflicting other insurance clauses, litigation is often necessary to determine which policy is primary. D. Malecki & J. Gibson, *The Additional Insured Book*, p. 114 (5th Ed. 2004).

In Texas, the language of the "other insurance" clauses of the insurance contracts determine how liability is to be apportioned between insurers. *See St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206 (5th Cir. 1996). When insurance policies contain competing "other insurance "clauses, the court must examine the policies to determine whether the clauses "conflict or can be harmonized." *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 590 (Tex.1969)(court must consider "whether "whether the two restrictive provisions conflict, and if so, how the conflict should be resolved"); see also 1 Allan D. Windt, Ins. Claims & Disputes §7.1 (4th ed. 2001)(where there are competing other insurance clauses, the first question is "whether the clauses are contradictory").

In *American Indemn. Lloyds v. Travelers Property & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003) (Texas law). AIL sought to recover from TPC all sums that AIL paid in settlement and incurred in defense of a suit against Caddell Construction. Similar to this case, Elite Masonry entered into a subcontract with Caddell that included a valid indemnity agreement wherein Elite assumed liability for Caddell's joint negligence. AIL issued the general liability policy to Elite and TPC issued the CGL policy to Caddell. Caddell was also an additional insured under the AIL policy. The parties did not dispute that the AIL policy's "insured contract" provisions afforded Elite with both indemnity and defense coverage for amounts that Elite might be obligated to Caddell under the indemnity provisions of the subcontract. TPC initially undertook the defense of Caddell, but in October 1998 AIL assumed the defense and indemnity and TPC withdrew. Consequently, AIL settled the lawsuit against Caddell and sought reimbursement from TPC for one half of the funds expended in defense and settlement of the suit against Caddell.

AIL argued that by virtue of the identical "other insurance" clauses in the TPC and AIL policies under which each policy provided primary coverage to Caddell, TPC should pay half of the amount expended to benefit Caddell. The court held otherwise. First the Fifth Circuit recognized the general rule that where each of two liability insurance policies issued by different insurers provides primary coverage to the same insured in respect to the claim in question and contains mutually consistent "other insurance" provisions, the insurer paying more than its share of the claim is ordinarily entitled to recover from the other insurer for the excess paid. *Id*. at 435. However, the court then recognized the exception to that general rule where the indemnity obligation between the parties shifts the entire loss to one particular insurer, namely AIL, notwithstanding the existence of an "other insurance" clause. In other words, the indemnity obligation of one insured has controlling effect over the "other insurance" or similar clauses, particularly where one of the policies, like AIL, covers the indemnity obligation. *Id.* at 436. See also *Pacific Life Ins. Co., Ltd. v. Liberty Mutual Ins. Co.*, 2005 WL 1801602 (M.D. Ala. 2005).

III. Tie In Provisions to Indemnity Provision

The Texas Supreme Court noted in *Urrutia v. Decker,* 992 S.W.2d 440, 442 (Tex.1999) (citing *Goddard v. East Tex. Fire Ins. Co.*, 67 Tex. 69, 1 S.W. 906, 907 (1886)), "Texas law has long provided that a separate contract can be incorporated into an insurance

policy by an explicit reference clearly indicating the parties' intention to include that contract as part of their agreement." One of the purposes of the agreement to procure insurance is to secure the right to indemnity. *See* D. MALECKI, P. LIGEROS AND J. GIBSON, *THE ADDITIONAL INSURED BOOK*, p. 56 (4th 2000). However, unless explicit, the contract terms do not become part of the insurance policy, primarily because the insurer and the insured are the contracting parties to the insurance policy, including the additional insured endorsements. The indemnitee usually has no contractual relationship with the insurer. Thus, it is unlikely that a court would impose upon an insurer an interpretation of an endorsement in line with the scope of an indemnity agreement to which the insurer is not privy, unless explicit provisions tie the indemnity agreement to the agreement to procure insurance.

Texas Courts interpret additional insured coverage according to scope of the indemnity agreement only when the requirement to procure insurance supports the indemnify obligation. The Houston Court of Appeals addressed the issue in *Emery Air Freight Corp. v. General Transportation Systems, Inc.* 933 S.W.2d 312 (Tex. App.–Houston [14th Dist.] 1996, no pet.), GTS contracted with Emery to provide local delivery services in Beaumont, Texas and Lake Charles, Louisiana. The contract, the "Cartage Agreement," provided that GTS would add Emery as an additional insured under its liability insurance policies. However, GTS did not comply with this contractual requirement. Subsequently, an employee of GTS was injured and filed suit against Emery. Emery then filed the Houston action against GTS when it discovered it had not been added to GTS' insurance policies.

The central issue in the *Emery* case was whether the Cartage Agreement required GTS to insure Emery against liability arising from Emery's own negligence. However, Emery made arguments that shed light on Texas courts' view of the relationship between indemnity agreements and additional insured endorsements. Emery argued that GTS' contractual requirement to add Emery as an additional insured shifted the risk of Emery's own negligence to GTS' insurer. The specific language upon which Emery relied is found in clauses 7 and 8 of the Cartgage Agreement:

> 7. Contractor shall obtain and maintain at its own expense insurance in such forms and minimum amounts as set forth below naming Emery as an additional insured. Contractor shall furnish Emery certificates from all insurance carriers showing the dates of expiration, limits of liability thereunder and providing that said insurance will not be modified on less than thirty (30) days' prior written notice to Emery.
>
> Minimum Limits of Insurance:
>
> A.Worker's Compensation – Statutory
>
> B.General Liability Insurance - $1 Million Combined Single Limit
>
> C.Automobile Liability - $1 Million Combined Single Limit
>
> If Contractor fails to obtain and maintain the insurance coverage set forth above, Emery shall have the right, but not the obligation, to obtain and maintain such insurance at Contractor's cost or, at its option, to terminate this Agreement for cause as provided in Section 9 hereof.
>
> 8. Contractor shall be solely responsible and liable for any and all loss, damage or injury of any kind or nature whatever to all persons, whether employees or otherwise, and to all property, including Emery shipments while in the Contractor's custody and control, arising out of or in any way resulting from the provision of services hereunder, and Contractor agrees to defend, indemnify and hold harmless Emery, its agents, servants, and employees from and against any and all loss and expense, including legal costs, arising out of the provision of the services hereunder, by Contractor.

The Houston Court of Appeals relied on two previous Texas Supreme Court decisions in its analysis. In *Fireman's Fund Insurance Company v. Commercial Standard Insurance Company,* 490 S.W.2d 818 (Tex. 1972) the contract at issue had a liability insurance clause that required the contractor to obtain liability insurance to "protect the owner . . . against all

liabilities, claims, or demands for injuries or damages to any person or property growing out of the performance of work under this specification." *Id.* at 821. In the same contract, another clause indemnified the owner from claims arising from performance of the contract, excluding those claims arising out of the owner's negligence. The Supreme Court addressed whether the language of the insurance clause reflected an intention for the contractor to carry insurance covering the owner's negligent acts. The court first noted that the above-quoted language was "insufficient to clearly indicate an intention to protect the contractor-indemnitee against liability for damages caused solely by the latter's own negligence." *Id.* at 822. The court then carefully considered all the other relevant provisions of the contract and held:

> While the meaning of the contract provisions relating to liability insurance are not clear, the most reasonable construction is that they were to assure performance of the indemnification agreement as entered into by the parties. Such provisions are often required to guard against the insolvency of the indemnitor, and they should not be considered as evidence of intent to broaden the contractual indemnity obligation.

Id. at 823.

The *Emery* court also relied upon *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794 (Tex. 1992). In *Getty*, the insurance and indemnity provisions fell within the same contractual clause. The insurance provision required the seller to carry liability insurance to protect the purchaser and the indemnity provision required the seller to indemnify the purchaser from claims "arising out of or incident to the performance or the terms of this order. . . ." *Id.* at 796-97. The *Getty* court distinguished Fireman's Fund based upon the difference in the two contracts. The indemnity provision in *Getty* contained an internal provision for insurance to support it, while the agreement to procure insurance required the extension of coverage "whether or not required [by the other provisions of the contract]." *Id.* at 804. Based upon this distinction from the *Fireman's Fund* contract, the Supreme Court held the insurance provision did not support the indemnity provision, but was instead a free-standing obligation. *Id.* at 804-06.

In *Emery*, the Houston Court of Appeals applied a two-step analysis: (1) whether the indemnity clause satisfies the express negligence rule as set out in *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987) and (2) whether the insurance clause supports the indemnity clause or stands alone, representing an independent obligation. In so doing, the court held that the two clauses in the Cartage Agreement resembled those in the Fireman's Fund contract more closely than those in the Getty Oil contract. The court found that the Cartage Agreement did not meet the express negligence test. The court concluded that neither the indemnity clause nor the insurance clause expressly covered negligence.

The court held that the most reasonable construction of the insurance provisions in the Cartage Agreement "is that they were to ensure performance of the indemnity agreement as entered into by the parties." *Emery*, 933 S.W.2d at 315. In effect, the Houston Court of Appeals held the indemnity clause and insurance clause were interrelated, such that the agreement to procure insurance was determined by the scope (or validity) of the indemnity agreement.

The Texas Supreme Court has held that an "additional insured" provision which does not support an indemnity agreement is not prohibited by the TOAIA. *Getty Oil Co. v. Insurance Company of North America*, 845 S.W.2d 794, 804 (Tex. 1992); *Certain Underwriters at Lloyd's London v. Oryx Energy Co.*, 142 F.3d 255 (5th Cir. 1998); *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000). This means that even if the indemnity agreement is invalid under the TOAIA, there could be coverage for the indemnitee as an additional insured.

In *Certain Underwriters at Lloyd's London v. Oryx Energy Co.*, 142 F.3d 255 (5th Cir. 1998) the court applying Texas law held that the TOAIA did not reach an additional insured provision even if the underlying indemnity contract, which expressly required that Oryx be named as an **"**additional insured…to the extent of the indemnity**,"** was invalid. This court rejected any limitation on the additional insured coverage based on whether the indemnity agreement was unenforceable under the reasoning that "there is no justification for an argument that Texas courts would engraft a limit on coverage to match the Texas law defense as if the suit were only to enforce the indemnity itself." *Id.* at 258. Also, in *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000)(applying Texas law) the court relied upon *Getty* and *Oryx* in holding that the subject indemnity agreement that required the indemnitor to "name Company [indemnitee] an additional insured, for liabilities and indemnities assumed by Contractor**"** was sufficient to impose the

duty to procure insurance whether or not the indemnity agreement was valid under Texas law.

In *Evanston Ins. Co. v. Atofina Petrochemicals, Inc.*, ___ S.W.3d ___, 2006 WL 1195330 (Tex.2006), the Texas Supreme Court was faced with question of the extent of coverage of an insurance provision to a contract, and whether the additional insured provisions of the policy obtained were broad enough to indemnify Atofina for its own acts of negligence. In examination of the insurance provision in the contract, the court refused to support the analysis of the appellate court, which found that the terms of the contract dictated the insurance clause was not merely in support of the indemnity provision, but further required the contractor to provide Atofina insurance to the extent the contractor had insurance coverage, and that the indemnity obligation was in addition to, rather than exclusive of, other coverage. In its analysis, the Texas Supreme Court found that "the salient inquiry is not what the insurance purchasing agreement required [contractor] to do for Atofina, but rather what coverage the Evanston policy actually provided. *Id*. at *3. The court declared it unnecessary to consider the terms of the indemnity agreement, as the terms of the actual policy controlled the extent of coverage. *Id*.

Even as recently as last year, courts have continued to view additional insured provisions in contracts in a liberal light. In *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co.*, 2007 U.S. Dist. LEXIS 2191 (Jan. 11, 2007), the U.S. District Court for the Southern District of Texas ruled that an invalid indemnity agreement would not affect a tenant's obligation under a rental contract to obtain and keep in force certain insurance and to name the landlord as additional insured. *Id*. at *19. In reaching its findings, the court relied upon the Fifth Circuit's reasoning and conclusions in *Oryx* and *Mid-Continent*. *Id*. at *18-19. The court recognized that the indemnity agreement in the pertinent rental contract did not meet the requirements of the express negligence doctrine and was therefore invalid. *Id*. at *19. However, while the court observed that the insurance and indemnity provisions of the rental contract did not make reference to the other, thereby supporting its finding that the additional insured obligation was distinct and separate from the by its language, the court seemed to indicate that a determination of such "separate" nature of the additional insured might not have depended upon whether the clauses referenced each other, and that the possibility existed that the provision would have been separate even with a reference. ("Nonetheless, the contract's requirement for [Tenant] to obtain and keep in force certain insurance and to name [Landlord] as an additional insured is valid and enforceable under the Fifth Circuit's holding that 'there is no justification…[to] engraft a limit on coverage to match the Texas law defense as if the suit were only to enforce the indemnity itself.' [quoting *Oryx*, 142 F.3d at 258.] This conclusion is all the more compelling here, where the separate insurance and indemnity clauses do not reference each other...[and are] separate obligations in the Lease Agreement." 2007 U.S. Dist. LEXIS at *19-20.).

IV. Entity is added to Policy as an Additional Insured usually by endorsement

When an agreement requires that one party obtain general liability insurance and name the other party to the contract as an additional insured, the first question, therefore, is how an entity is added to the named insured's policy as an additional insured.

Additional insured status to the named insured's general liability insurance policy is typically conferred by way of endorsement. There are several different types and the edition date of each endorsement sometimes plays a critical role.

The nature of the coverage as an Additional Insured depends upon the endorsement used to provide the coverage. The most frequently used standard ISO endorsements to the general liability type policies are CG 2010 and CG 2033. These endorsements can be written to provide additional insured coverage on either a "scheduled" basis, where the additional insured is listed either on the endorsement itself or on the declarations page, or on a "blanket" basis, where the additional insured is determined by whether a written contract requires that such insurance be procured. These forms afford good examples of the various interpretations of the standard ISO terminology and the issues arising out of its usage.

1. <u>1997 Version</u>

The March 1997 version of the ISO CG 2010 endorsement provides as follows:

> ADDITIONAL INSURED-OWNERS, LESSEES OR CONTRACTORS
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL
>
> LIABILITY COVERAGE PART
>
> SCHEDULE

Name of Person or Organization:

> Any person or organization, trustee, estate or government entity to whom or to which the Named Insured is obligated, by virtue of written contract to provide Insurance, Such As Is Afforded By This Policy.
>
> Who Is An Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

a. **Written Contract Requirement**

A provision in a construction contract will not be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured. *Trapani v. 10 Arial Way Assoc.*, 301 A. 2d 644, 647 (N.Y. App. Div. 2003).

The Texas Supreme Court has opined on the written contract requirement of blanket additional insured endorsements in *ATOFINA Petrochemicals, Inc. v. Continental Cas. Co.*, 185 S.W.3d 440 (Tex.,2005). The facts are as follows. An A & B employee, Larry Don Wisdom, was injured unloading steel for A & B on Fina's property. When Wisdom sued Fina and others for negligence, Fina requested coverage and a defense as an additional insured under A & B's comprehensive general liability policy. Because A & B was generally required to add the premises owner to its liability coverage when working at various sites, the liability policy contained an additional insured endorsement as follows:

> IF YOU ARE REQUIRED TO ADD ANOTHER PERSON OR ORGANIZATION AS AN ADDITIONAL INSURED ON THIS POLICY UNDER A WRITTEN CONTRACT OR AGREEMENT CURRENTLY IN EFFECT, OR BECOMING EFFECTIVE DURING THE TERM OF THE POLICY, AND A CERTIFICATE OF INSURANCE LISTING THAT PERSON, OR ORGANIZATION, AS AN ADDITIONAL INSURED HAS BEEN ISSUED, THEN WHO IS AN INSURED (SECTION II) IS AMENDED TO INCLUDE AS AN INSURED THAT PERSON, OR ORGANIZATION (CALLED "ADDITIONAL INSURED").

Id. at 421-422.

On August 12, 1997, A & B submitted to Fina a written construction proposal, which included a commitment to provide insurance to Fina as the premises owner. The proposal stated:

> A & B Builders, Inc. is pleased to offer our proposal to furnish labor, tools, material (not furnished by Fina), equipment, insurance and supervision to complete steel erection for the [Administration-Laboratory Building and Locker Room].

On the same day, Fina orally accepted the proposal and created purchase requisitions referencing purchase order numbers for the job in accordance with the proposal. Fina's representative faxed the purchase requisitions to A & B before A & B started work. Also on August 12, A & B's representative immediately requested a certificate of insurance naming Fina as an additional insured from an authorized representative in A & B's parent company's insurance department. Based on Fina's oral acceptance of the proposal and faxed copies of the purchase requisitions, A & B began work at Fina's site on August 14. The certificate of insurance issued on August 18. Hard copies of Fina's purchase orders, which purported to "contain[ ] the entire agreement between the parties hereto" and did not mention insurance, subsequently issued August 22 and 25.

Wisdom was injured on the first day of the job. Coverage litigation ensured and the trial court rendered partial summary judgment, holding Fina was an additional insured under the blanket additional insured endorsement in the liability policy and coverage for Fina as an additional insured was not barred by an exclusion in the policy. The court of appeals reversed and rendered judgment that Fina take nothing, holding Fina was not an additional insured, and, alternatively, if Fina were an additional insured, an exclusion in the policy barred Fina's claims.

The Supreme Court held that Fina was an additional insured because Fina orally accepted A & B's written proposal on August 12; thus, as of that date, A & B and Fina had a written contract that required A & B to provide insurance covering the Fina property. *Id.* at 422-423. Continental argued A & B's agreement to furnish insurance to Fina was not sufficiently definite to

create additional insured status for Fina. The Supreme Court held contrary and reasoned that although it did not specify the type of insurance coverage or policy limits, the construction contract that stated A & B's obligation to "furnish ... insurance" contained all of the material terms of the contract. Also, the Supreme Court relied upon evidence presented by Fina in the trial court that Fina and A & B had worked together before and that A & B understood Fina required that it be named an additional insured on A & B's policy for any work A & B did for Fina, as was standard practice in the industry and of Fina and A & B. Because Fina and A & B had a standing requirement that Fina was to be added to A & B's existing policy, the coverage and policy limits were provided by the Continental policy. The Supreme Court rejected Continental's argument that the purchase orders issued on August 22 and 25 supersede the commitment to furnish insurance in the initial written proposal. The purchase orders do not override the original insurance commitment because the orders are consistent with the original construction contract. Even if the purchase orders superseded the August 12 agreement, the orders do not affect the coverage question, which looks only at August 14, the date of the accident. As of that date, Fina and A & B were performing under a written construction contract that included an obligation to furnish insurance. *Id.* at 444.

"Ongoing Operations"

The CG 2010 endorsement extends coverage to the additional insured only for liability that results directly from the named insured's ongoing operations.

The case law interpreting this endorsement generally finds that if the injury or damage was incurred in the course of operations, then the additional insured is entitled to coverage under the endorsement. For example, in *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 2006 WL 1843350, *1 (N.Y.A.D. 1 Dept.) (N.Y.A.D. 1 Dept.,2006) Henegan Construction Company, Inc. (Henegan), a general contractor, hired plaintiff BP Air Conditioning Corp. (BP) as HVAC subcontractor for a construction project at One World Trade Center (the Project). BP, in turn, subcontracted the HVAC-related steamfitting work for the Project to Alfa Piping Corp. (Alfa). The purchase order representing the agreement between BP and Alfa required Alfa to obtain "Comprehensive General Liability Insurance (including contractual liability) and automobile insurance in amounts of not less than $4,000,000 combined single limit, naming [BP] additional insured, all policies to provide for 30 day notice to [BP] prior to cancellation or material modification." As required by Alfa's agreement with BP, Alfa's CGL policy for the relevant period included an additional insured endorsement providing in pertinent part as follows:

> "Who is An Insured (Section II) is amended to include as an 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 arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed."

The court held that Beacon is obligated to defend BP in the Cosentino Action because Cosentino's amended complaint alleges that his injuries were caused by the negligence of, among other defendants, Alfa, BP's subcontractor and the subject policy's named insured. Thus, the court reasoned there is a "reasonable possibility" that the Cosentino Action will result in a judgment against BP that is covered by the Beacon policy because if BP is ultimately held liable to Cosentino, such liability would "aris[e] out of [Alfa's] ongoing operations performed for [BP]" to the extent the fact finder in the Cosentino Action determines that Alfa's negligence in the course of its work as a BP subcontractor was a contributing cause of Cosentino's injuries. The court made no mention of the fact Alfa's work for BP may have been completed.

One commentator states about the CG 2010 endorsement:

> Although intent was to restrict coverage of this endorsement to ongoing operations, it was possible in some fact patterns to argue that coverage still applied after work had been completed. To fix this potential problem, ISO again revised the endorsement in 2001.

Donald S. Malecki and Arthur L. Flitner, *CGL: Commercial General Liability*, p. 172 (8th Ed. 2005). This comment suggests that the restriction on additional insured coverage to ongoing operations is clear enough that no additional insured coverage is available once the work is completed. The revised 2010 endorsement excludes "bodily injury" or "property damage" occurring after all work has been completed or put to its intended use.

This language specifically excludes damage that occurs after operations are completed. Donald S. Malecki, Pete Ligeros, and Jack P. Gibson, *The Additional Insured Book*, p. 182 (4th Ed. 2000).

b. **"Arising Out of"**

Texas law interprets the CG 2010 additional insured endorsement to provide coverage to the additional insured, even for the additional insured's own negligence, so long as there is a causal connection between the named insured's work and the additional insured's liability for damages. That causal connection does not require negligence on the part of the named insured.

In both *McCarthy Brothers Company v. Continental Lloyds Insurance Company*, and *Admiral Insurance Company v. Trident NGL, Inc.*, the courts concluded that the additional insured endorsements covered the additional insured for claims involving injuries to employees of the named insured. See *McCarthy Bros. Co., v. Continental Lloyds Ins. Co.*, 7 S.W.3d 725 (Tex.App.—Austin 1999, no pet.); Admiral *Ins. Co. v. Trident NGL, Inc*., 988 S.W.2d 451 (Tex.App.—Houston [1st Dist.] 1999, pet. denied); See also *St. Paul Ins. Co. v. Texas Dept. of Transp.*, 999 S.W.2d 881, 886 (Tex.App.—Austin 1999, pet. denied) (additional-insured endorsement provides coverage for damage that "results from" Abrams' work for TxDOT or TxDOT's supervision of that work; to be covered, the claim need only arise out of Abrams' work or TxDOT's supervision).

In *McCarthy*, the McCarthy Brothers Company was sued by an employee of a subcontractor, Crouch, for negligence arising out of a duty it owed him as a business invitee. Crouch's employee was injured as he walked down a slippery incline. Walking down the incline to get tools to perform Crouch's work was an integral part of its work for McCarthy. McCarthy was an additional named insured on a general liability policy issued to Crouch as the named insured. The endorsement insured McCarthy "only with respect to liability arising out of 'your work' for that insured by or for you." The court noted the employee's injury occurred while he was on the construction site for the purpose of carrying out Crouch's work for McCarthy. Thus, the court held, there was a causal connection between the injury and Crouch's performance of its work for McCarthy; accordingly, McCarthy's liability for the injury "arose out of" Crouch's work for McCarthy. 7 S.W.3d at 730.

Trident NGL involved a similar "additional insured endorsement" that restricted coverage for the additional insured to liability arising out of the named insured's operations. *Admiral Ins. Co. v. Trident NG*L, Inc., 988 S.W.2d at 454. Trident also involved an injury to an employee of the named insured occurring on "premises of the additional named insured." In *Trident*, the court followed the rule of a majority of courts around the country, that it was sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of injury was the additional insured's negligence. *Id.* at 454-55. See *General Agents Ins. Co. v. Arredondo*, 52 S.W.3d 762, 767 (Tex.App.—San Antonio 2001, pet. denied) (for injuries to "arise out of" a contractor's or subcontractor's operations, they need not be caused by an act of the contractor or subcontractor; all that is required is a causal connection); *Admiral Ins. Co. v. Trident NGL, Inc*., 988 S.W.2d 451, 454-55 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (holding "arising out of" in the context of an "additional insured" endorsement does not require that named insured's act caused accident). The Fifth Circuit has recognized that the phrase "arising out of" is "understood to mean 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.' " *American States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir.1998) (quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co*., 189 F.2d 374, 378 (5th Cir.1951)). Thus, "a claim need only bear an 'incidental relationship' to the excluded injury for the policy's exclusion to apply." *Cf. Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156-57 (Tex.1999) ("For liability to 'arise out of' the use of a motor vehicle, a causal connection or relation must exist between the accident or injury and the use of the motor vehicle.").

In *Highland Park Shopping Village v. Trinity Universal Insurance Company*, 36 S.W.3d 916, 917-18 (Tex. App.—Dallas 2001, no pet.), the Dallas Court of Appeals held that an injury to the employee of a contractor, the named insured, as he returned to his car in a Man-Lift occurred while he was on premises to do the work of his employer and arose out of the named insured's work. Thus, the landowners were additional insureds, even though the employee alleged negligence only by the landowners.

The interesting aspect of about Highland Park is that the employee was not even actually working at the time he incurred an injury. He had completed his work and used the Man Lift to get to his car parked outside the garage so that he could leave the premises. These Texas cases demonstrate the court's willingness to interpret the terms "arising out of" broadly and with little actual causal connection between the named insured's work and the injury or damage.

A recent decision from a Texas court in *Evanston Ins. Co. v. Atofina Petrochemicals, Inc.*, ___ S.W.3d ___, 2006 WL 1195330 (Tex.2006), ATOFINA

sought insurance coverage as an additional insured under a policy issued to Triple S by Evanston. The liability policy included as additional insured the following:

> A person or organization for whom you have agreed to provide insurance as is afforded by the policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you.

The court rejected the argument that the subject injury did not arise out of Triple S' operations because the evidence showed that the death actually occurred while the Triple S employee was performing work for Triple S on the project for ATOFINA.

The CG 2010 endorsement is interpreted very broadly, requiring only a tenuous causal connection between the named insured's work and the additional insured's liability for damages.

2. 2010 Endorsement – 2004 Version

> The 2004 version of CG 2010 is a "fault-based" additional insured endorsement that reads in part as follows:
>
> **Section II – Who Is An Insured**
>
> is amended to include as an additional insured any person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and/or advertising injury" caused, in whole or in part, by:
>
> Your acts or omissions; or The acts or omissions of those acting on your behalf in performance of your ongoing operations for the additional insured(s) at the locations designated above.

Note that the previous "arising out of" language has now been replaced with the "caused in whole or in part" language. It is expected that the language "caused in whole or in part" will be interpreted to preclude coverage to the additional insured in situations where the additional insured is solely negligent. Furthermore, the language requires some act or omission on the part of the named insured, not simply a tenuous causal connection. The only requirement is that the named insured's acts or omissions to be at least some minimal causative factor in the bodily injury and/or property damage. Absent any fault of the named insured, there will be coverage for the additional insured. See *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976).

3. CG 2033 Endorsement

The 2002 version of the ISO GL2033 limits coverage for the additional insured to the sole negligence of the named insured. The endorsement reads:

> **A. Section II – Who Is An Insured** is amended to include as an 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. **But regardless of the terms and provisions of such contract or agreement or other provisions of this policy, such person or organization is an additional insured only with respect to liability directly related to your sole negligence and directly related to your ongoing operations performed for that additional insured under such contract or agreement**. A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

This particular endorsement limits coverage to the additional insured in several respects. First, the additional insured coverage is limited to the additional insured's liability directly related to the named insured's sole negligence. This means that the additional insured's coverage is only for vicarious liability, not direct negligence, of the additional insured. Second, the additional insured's coverage is limited to ongoing operations of the insured under contract or agreement. There is no coverage for the additional insured for liability for damages that occur after the operations of the named insured are complete.

Several courts have identified the struggle to enforce additional insured coverage under similar limiting endorsements. In *Transport International Pool, Inc. D/B/A GE Capital Modular Space v. The Continental Ins. Co., et al*, 166 S.W.3d 781 (Tex. App.—Fort Worth 2005, no pet.) policy provided that the additional insured endorsement "does not apply to

'bodily injury'…arising out of the sole negligence of such…organization." GE argued that additional insured coverage was not negated because Vratsinas was responsible for the duties that gave rise to Plaintiff's alleged injuries. However, the court noted that in the underlying lawsuit against GE, the plaintiff alleged that GE "furnished and set up" the trailer and "negligently and carelessly failed to property anchor and tie the trailer down…" The court held that giving the pleadings the most liberal interpretation, these allegations do not suggest anything other than the conclusion that Plaintiff's injuries resulted from GE's failure to property secure the trailer. The Plaintiff did not allege any other acts of negligence or omissions from any other persons or organizations. The court refused to consider the matters of Vratsinas duties under the lease agreement with GE because they were outside the policy and the pleadings. Because Doolin, Plaintiff, only alleged that GE's conduct led to his injuries, and because the court looked only to the policy and the pleadings, the court concluded that coverage under the additional insured endorsement did not apply because the policy excluded coverage for GE's sole negligence.

4. Manuscript Endorsements

It is not unusual for insurers to include manuscript additional insured endorsements. Often, the purpose of these endorsements is to make clear the intent not to insure the additional insured for its own negligence. A case in point is *Atofina Petrochemicals, Inc. v. Continental Cas. Co.*, 185 S.W.3d 440 (Tex. 2005) where the liability policy included the following manuscript additional insured endorsement:

- THAT PERSON, OR ORGANIZATION, IS ONLY AN ADDITIONAL INSURED FOR ITS LIABILITY ARISING OUT OF PREMISES "YOU" OWN, RENT, LEASE OR OCCUPY OR FOR "YOUR WORK" FOR OR ON BEHALF OF THE ADDITIONAL INSURED; AND

- THE INSURANCE AFFORDED THE ADDITIONAL INSURED UNDER THIS ENDORSEMENT DOES NOT APPLY TO … ANY LIABILITY ARISING OUT OF ANY ACT, ERROR OR OMISSION OF THE ADDITIONAL INSURED, OR ANY OF ITS EMPLOYEES.

In *Atofina,* the Supreme Court adopted Fina's interpretation of the endorsement, which interpreted paragraph 2 to exclude only Fina's sole negligence, in contrast to Continental's argument that the exclusion bars all coverage when any negligence on the part of the premises owner is pleaded, unless the owner's responsibility is based solely upon vicarious liability for the acts of the contractor. The court held that Continental's interpretation would render coverage under the additional insured endorsement largely illusory. The court further noted that the pleadings in the underlying action contained factual allegations of injuries caused by A&B's negligence while working at Fina's facility, so that Fina could not be solely negligent

V. Certificates of Insurance

When a party requires the other party to procure additional insured insurance, the parties often also require that a certificate of insurance be issued by the insured's agent to confirm coverage. Sometimes the certificate will indicate that the policy contains an additional insured endorsement when, in reality, no such endorsement is attached to the policy. In other cases, the certificate may be silent as to the existence of additional insured coverage, without notice to either of the parties to the contract or the insurance agent.

Generally, the certificate of insurance plays no part in determining the actual coverage afforded to the additional insured. For example, the certificate of insurance may identify one party as an additional insured, but unless the named insured's policy is endorsed to that effect, it provides no additional insured coverage. *See Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991) (stating majority rule that standard ACORD certificate does not alter terms of policy*); Empire Fire & Marine Ins. Co. v. Bell*, 64 Cal. Rptr. 2d 749 (1997); *Pekin Ins. Co. v. American Country Ins. Co.*, 572 N.E.2d 1112 (Ill. Ct. App. 1991) (Certificate of Insurance that stated general contractor was a named insured where policy expressly excluded coverage if subcontractor was to perform roofing work, afforded no coverage because certificate of insurance was not part of the policy; and therefore no conflict arose between the certificate and the policy language); *Trapani v. 10 Arial Way Associates,* 301 A. 2d 644, 647 (N.Y. App. Div. 2003) (a Certificate of Insurance which expressly states that it is "a matter of information only and confers no rights upon the certificate holder" is insufficient, by itself, to show that additional insured coverage has been purchased); but see *Niagara Mohawk Power Corp. v. Skibeck Pipeline Co.*, 270 A. 2d 867 (2000) (where agent preparing the certificate of insurance, which showed the "additional insured" coverage, was deemed an "agent" of the insurer, additional insured coverage afforded, even though it was omitted through clerical error by the agent from the policy itself).

Applying Texas law, the federal court followed this majority rule most recently in *TIG Insurance Company v. Sedgwick James of Washington,* 184 F. Supp.2d 591 (S.D.Tex. 2001). In that case, the court held that a certificate, which stated it was issued "as a matter of information only" and does not purport to

"amend, extend, or alter" the terms of any insurance policies listed therein, did not provide additional insured coverage where the policy at issue did not include an additional insured endorsement. Relying upon uncontroverted Texas precedent, the court recognized that a certificate of insurance cannot create coverage where none exists. *Id*. at 597 (citing *Wann v. Metropolitan Life Ins. Co.*, 41 S.W.2d 50, 52 (Tex. Comm'n 1931)(noting that certificate of insurance does "not constitute the complete contract of insurance" and must be construed in connection with underlying insurance policy); *RNA Invest., Inc. v. Employers Ins. of Wausau*, 2000 WL 1708918 (Tex.App.-Dallas 2000) (unpublished opinion) (certificates of insurance in and of themselves do not create insurance coverage); *C & W Well Service, Inc. v. Sebasta*, 1994 WL 95680, at *7 (Tex.App.-Houston [14th Dist.] 1994) (unpublished opinion) (citing Granite and noting insurance coverage is that provided by policy, not certificate of insurance); *CIGNA Ins. Co. of Texas v. Jones*, 850 S.W.2d 687 (Tex.App.-Corpus Christi 1993, no writ) (certificate of insurance does not extend the terms of the insurance policies certified therein); *Granite Construction Co., Inc. v. Bituminous Ins. Co.*, 832 S.W.2d 427 (Tex.App.-Amarillo 1992, no writ*); Boyd v. Travelers Ins. Co.*, 421 S.W.2d 929 (Tex.Civ.App.-Houston [14th Dist.] 1967, writ ref'd n.r.e.). This is the law whether or not the certificate holder chose to review the subject policy to insure that additional insured coverage was endorsed. *Id*. at 598.

In *Atofina Petrochemicals, Inc. v. Continental Cas. Co.*, 185 S.W.3d 440 (Tex. 2005) the Texas Supreme Court recognized that issuance of a certificate of insurance does not affect a party's status as an additional insured. The certificate issued in this case stated that it "IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS."

VI. Duties To An Additional Insured

In *Crocker v. National Union Fire Insurance Company of Pittsburgh, PA.*, 466 F.3d 347 (5th Cir. 2006) the Fifth Circuit certified the following questions to the Texas Supreme Court:

(1) Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage?

(2) If the above question is answered in the affirmative, what is the extent or proper measure of the insurer's duty to inform the additional insured, and what is the extent or measure of any duty on the part of the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions?

(3) Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?

In this case, Crocker sued Morris and Morris' former employer, Emeritus, for injuries suffered when Crocker was struck by a swinging door allegedly pushed by Morris acting in the course and scope of his employment at a nursing home where Crocker resided, owned by Emeritus. Because Morris was an employee of Emeritus, he was an additional insured under the terms of the National Union policy issued to Emeritus. National Union provided a defense for Emeritus, but not Morris because Morris failed to tender the suit papers to National Union or otherwise inform it of the suit. After judgments were final in the action against Emeritus and Morris, Crocker sued National Union as a third-party beneficiary of the liability policy. It was undisputed that there was coverage for the claims against Emeritus and Morris and that National Union knew or should have known that Morris had been served in the lawsuit. It was also undisputed that Morris did not know that he was an additional insured under the policy and therefore, did not forward the suit papers to National Union. It was also undisputed that National Union did not inform Morris that he was an additional insured.

In Crocker's suit against National Union, National Union argued that Crocker, who stood in Morris' shoes, could not recover under Texas Law as National Union's duty to defend Morris was never triggered because Morris did not forward the suit papers to National Union or otherwise notify National Union of the suit and did not ask National Union to defend him. Crocker argued that National Union was not prejudiced by Morris' failure to forward the suit papers because National Union was aware of the lawsuit against Emeritus and Morris. The district court agreed with Crocker. The Fifth Circuit certified the questions to the Texas Supreme Court.

CONCLUSION

Where a named insured is obligated to indemnify another party, the named insured's contractual liability coverage will respond to this obligation if coverage for the claim is not otherwise precluded by the terms of the policy. However, if the

indemnity agreement is not enforceable the contractual liability coverage will not respond. Additional insured status achieves a similar end without relying on the terms of an indemnity clause. It makes the other party an insured on the named insured's liability policy, subject to the terms and conditions of the policy and the additional insured endorsement. One of the advantages of being added as additional insured to another party's policy is that the additional insured is provided with protection in the form of direct rights under that policy. However, because of the exclusions and limitations often included in additional insured endorsements, additional insured status does not always provide the additional insured with coverage for all types of liability it might incur.