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INDEMNIFICATION AGREEMENTS AND ADDITIONAL INSUREDS UNDER PENNSYLVANIA LAW

August, 2010

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Construction contracts, service contracts, property and equipment leases, franchise and distribution agreements, and many other contracts typically contain risk or cost shifting provisions which are intended to transfer liability, the obligation to defend potential claims, or the responsibility of maintaining property or liability insurance coverage from the shoulders of parties having greater bargaining power, or less control over the risks involved (such as owners, landlords, construction managers or general contractors) to those occupying lower positions on the commercial food chain, or having a greater level of control over the potential risks involved (such as tenants, franchisees and subcontractors).

Such risk shifting provisions generally fall into one of two categories, consisting of contractual indemnification provisions and agreements to procure and maintain insurance coverage, the latter often requiring not only that the party upon which the obligation is imposed maintain certain types and amounts of insurance coverage on its own behalf, but that one or more parties be added as additional insureds under those insurance policies.

Although the end result may sometimes be the same, it is critical when either pursuing or defending against such claims to recognize that there are fundamental differences between contractual indemnification claims, claims based upon the breach of insurance procurement provisions, and claims premised upon a party's status as an additional insured, and to have a clear understanding of the issues potentially involved.

This article will attempt to provide a general overview of the basic principles thus far established under Pennsylvania law and, to the extent that issues have not yet been considered by courts in Pennsylvania, to address the law in other jurisdictions.

I. COMMON LAW INDEMNIFICATION

The right to indemnification can arise either pursuant to the terms of a written contract, or at common law.

Where the parties have entered into a written contract which addresses the subject of indemnification, those contractual indemnification provisions are controlling, and common law indemnification principles will not apply to claims falling within their scope. Eazor Express, Inc. v. Barkley, 272 A.2d 893 (Pa. 1971).

At common law, indemnification is an equitable remedy that ultimately shifts the entire responsibility for damages from a party who, solely by operation of law,

has been required to pay a claim because of some legal relationship to the party at fault. The tort liability of a party entitled to indemnification at common law is generally described as being "passive" or "secondary" in comparison to that of the party which owes indemnification, whose conduct is "active" or "primary". City of Wilkes-Barre v. Kaminski Bros., 804 A.2d 89 (Pa.Cmwlth. 2002); Builders Supply Co. v. McCabe,77 A.2d 368 (Pa. 1951).

The concept of a party being liable by operation of law refers to liability which is imposed by rule of law regardless of the party's personal fault or culpability, based upon a relationship with someone else, the most common example being the vicarious liability of an employer for acts committed by its employees in the course of their employment.

Some examples of "primary" vs. "secondary" liability situations in which a claim for indemnification on the part of a party held liable by operation of law might exist would include :

• cases involving a master-servant relationship in which an employer is held vicariously liable for its employee's negligence by operation of law. McCabe, *supra.*

• a principal-agent relationship giving rise to vicarious liability on the principal's part. Vattimo v. Lower Bucks Hospital, 465 A.2d 1231 (Pa. 1951).

• a manufacturer-retailer relationship in which the retailer is held strictly liable by operation of law for a defective product, where it had no hand in creating the defect. Burch v. Sears, Roebuck & Co., 467 A.2d 615 (Pa.Super. 1983).

• a landlord-tenant relationship in which a landlord out of possession is deemed liable for a dangerous condition created by its tenant. Bruder v. Philadelphia, 153 A. 725 (Pa. 1931).

• a situation in which a municipality is held statutorily liable for a condition on the sidewalk of the property owner who is ultimately responsible. McCabe, *supra;* Restifo v. Philadelphia, 617 A.2d 818 (Pa.Cmwlth. 1992).

Unlike the concept of contribution among joint tortfeasors, the distinction between primary and secondary liability has nothing to do with a comparative degrees or percentages of fault, or distinctions between a defendant predominantly responsible for an accident and one whose negligence is relatively minor. In fact, a claim for indemnification at common law will not lie in favor of a party which is not only subject to liability on a secondary basis, but is also guilty of active fault, such as

an employer which is found to have been negligent in its selection or supervision of a negligent employee, or a municipality which is not only secondarily liable for sidewalk defects on private property, but actually created them. *See, e.g.*, Sirianni v. Nugent Brothers, Inc., 506 A.2d 868 (Pa. 1986); Flynn v. City of Chester, 239 A.2d 322 (Pa. 1968); Walton v. Avco Corporation, 610 A.2d 454 (Pa. 1992).

II. CONTRACTUAL INDEMNIFICATION

An indemnification agreement is essentially a contract under which one party (the **indemnitor**) agrees to assume the tort liability of another (the **indemnitee**) in connection with the claims of third parties stemming from the work performed on a particular project, from the services provided pursuant to a contract, from the indemnitor's occupancy or use of particular property, etc. Such agreements generally provide not only for indemnification with respect to any damages owed by the indemnitee, but for its defense costs as well.

There is Pennsylvania authority indicating that such agreements, although typically in writing, may be oral, need not be signed if they are written, and may even be found to exist based solely upon a course of prior dealings between the parties. For example, in Westinghouse Electric Company v. Murphy, Inc., 228 A.2d 656 (Pa. 1967), it was held that a contractor which proceeded with a project without a signed contract and based only upon an unsigned "purchase order" might conceivably be obligated to indemnify the party which hired him based upon evidence relating to the past conduct and course of dealings between the parties, where indemnification clauses had appeared in their previous contracts.

ENFORCEABILITY AND STRICT CONSTRUCTION

Generally speaking, indemnification agreements are enforceable in Pennsylvania.

Although Pennsylvania has what is known as an **anti-indemnification statute**, it is very limited in its scope. The statute only invalidates agreements entered into by owners, contractors or suppliers under which architects, engineers, or surveyors are indemnified for damages or defense costs arising out of (1) their preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving or failing to give instructions or directions, provided that failure or

giving of directions or instructions is the "primary cause" of the damage. 68 P.S. §491.

Unlike some jurisdictions, there is no statutory prohibition with respect to indemnification agreements in connection with construction projects in general.

Although considered contrary to public policy in some states, there is also no general prohibition against indemnification agreements calling for a party to be indemnified for its own acts of negligence under Pennsylvania law.

However, agreements to indemnify another party for liability stemming from its own acts of negligence are disfavored, and are strictly construed against the party which drafted them. Hershey Foods Corp. v. General Electric Service Co., 619 A.2d 285 (Pa.Super. 1992). For a party to obtain indemnification for its own negligent conduct, the Pennsylvania courts have held that the contract must contain **clear and unequivocal language** to that effect. Words of "general import" such as broad contract language calling for indemnification with respect to "***all claims***" or "***any and all liability***", or even language calling for indemnity "***to the fullest extent permitted by law***" are considered legally insufficient to shift liability to the indemnitor for the indemnitee's negligence under the so-called **"Perry-Ruzzi Rule"**. Perry v. Payne, 217 Pa. 252, 66 A. 553 (Pa. 1907); Ruzzi v. Butler Petroleum Co., 527 Pa. 1, 588 A.2d 1 (Pa. 1991). *See also,* Greer v. City of Philadelphia, 568 Pa. 244, 795 A.2d 376 (Pa. 2002), (recently reaffirming those principles). There can be no presumption that one party intended to assume responsibility for the negligent acts of another unless the agreement expresses that intent beyond doubt and by express stipulation. City of Wilkes-Barre v. Kaminski Brothers, Inc., 804 A.2d 89 (Pa.Cmwlth. 2002).

The Perry-Ruzzi Rule applies not only to cases involving personal injury, but to property damage cases as well. Ocean Spray Cranberries, Inc. v. Refrigerated Food Distributors, Inc., 936 A.2d 81 (Pa.Super. 2007).

While there is not a great deal of Pennsylvania case law on the subject, there are some additional limitations upon the effectiveness of indemnification agreements in cases involving certain particularly hazardous activities, or misconduct rising beyond the level of negligence. For example, it has been held that an agreement calling for the indemnification of another party for its own "negligence" will not be construed as calling for indemnification with respect to that party's **"gross negligence"** unless gross negligence is specifically mentioned, and even then, such an agreement *might* be considered contrary to public policy. Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695 (Pa.Super. 2000). This would also presumably the the case were a party to seek indemnification for its intentional misconduct, our courts having previously declared that providing indemnity under insurance contracts with respect to **intentionally injurious**

conduct is contrary to public policy. Germantown Ins. Co. v. Martin, 595 A.2d 1172 (Pa.Super. 1992). It has also been held that a party engaging in the **"ultrahazardous activity"** of blasting, for which it may be held strictly liable by statute in Pennsylvania, will not be permitted to "contract away" its liability by shifting it to another contractor through an indemnification clause. Burgan v. City of Pittsburgh, 115 Pa.Cmwlth. 566, 542 A.2d 583 (1988).

Finally, care must also be taken in determining whether the factual basis or general nature of a particular claim or injury falls within the scope of an indemnification agreement. In Hershey Foods, for example, it was held that a plant owner was not entitled to indemnification from the employer of an electrician who was killed when he sat on a conveyor belt eating a candy bar because the victim was on his lunch break at the time of the incident, and thus the death did not result from or arise out of the performance of the employer's work under the terms of the contract. In Czajhofwski v. City of Phila., 537 F.Supp. 30 (E.D.Pa. 1981), it was similarly held that an injury which occurred when the plaintiff fell in a staircase connecting his work site to the garage did not arise out of his employer's operations within the meaning of an indemnification provision because there was no connection between those operations and the injury. And in Stevens Painton Corp. v. First State Ins. Co., 746 A.2d 649 (Pa.Super. 2000), it was held that a worker's fall did not arise from his employer's operations within the meaning of a contractual indemnification clause when he fell while walking to the bank on personal business and was not engaged in his duties as a pipefitter at the time.

Just as the facts surrounding a claim may not fall within the scope of an indemnification clause which links that obligation to the performance of the indemnitor's work or operations, such a clause may also be too broadly worded to be seen as applying to a particular claim. For example, an indemnification clause requiring that one party indemnify the other with respect to any and all claims of any nature whatsoever was considered insufficiently specific to apply to an employment discrimination claim in El v. SEPTA, 297 F.Supp.2d 758 (E.D.Pa. 2003).

INSUFFICIENT LANGUAGE

Under the Perry-Ruzzi Rule, an agreement broadly calling for indemnification with respect to "***any and all liens, charges, demands, losses, costs including ... legal fees and court costs, causes of action or suits of any kind or nature, judgments, liabilities, and damages of any and every kind or nature whatsoever ... arising by reason of or during the performance of work ... covered by this contract***" was considered inadequate to require indemnification for the indemnitee's own negligence

in City of Pittsburgh v. American Asbestos Control Co., 629 A.2d 265 (Pa.Cmwlth. 1993) because it did not express the intent to indemnify in connection with the indemnitee's own negligence in clear and unequivocal terms.

Similarly, an indemnification clause appearing in a lease was deemed insufficient to shift liability in the case of Ersek v. Springfield Township, 634 A.2d 707 (Pa.Cmwlth. 1993) where it provided for indemnification of the landlord with respect to "***any damage or injury to persons caused by any leak or break in any part of the demised premises or in the pipes or plumbing work of the same or any that may be caused by the acts of any person or persons whether representing the lessor or otherwise***."

A clause calling for one party to indemnify the other with respect to claims "***which are based in whole or in part upon any act or omission of***" the indemnitor was considered insufficient to require indemnification with respect to the other party's own acts of negligence in Ocean Spray, *supra*.

There have been several cases involving language which would normally be considered sufficient to shift liability to an indemnitor for the indemnitee's negligence were it not for the fact that the clause or agreement in question also contained language which was considered inconsistent, rendering the terms ambiguous. For example, the Supreme Court of Pennsylvania held that an indemnification provision calling for indemnification for any injury or damage "***but only to the extent caused in whole or in part by negligent acts or omissions of the subcontractor, and regardless of whether such claim, damage, loss or expense is caused in part by a party indemnified hereunder***" was not sufficient to clearly express an intent on the part of a subcontractor to indemnify other parties for their own negligence. Greer, *supra*. Although the "***regardless of***" language appearing at the end of the clause clearly called for indemnification regardless of whether the indemnitees themselves caused the injury in whole, or in part (see Hershey Foods, below) the effectiveness of that phrase was defeated through the use of seemingly inconsistent language appearing at the start of the same sentence under which the subcontractor agreed to provide indemnification "***only to the extent***" of its own negligence.

Federal courts sitting in Pennsylvania had previously reached the same conclusion when confronted with similar language, holding in one case that an agreement under which a contractor agreed to indemnify a property owner "***against any and all claims ... for property damage ... and personal injury to the extent caused by or arising out of the negligent acts or omissions of [the contractor] whether or not such acts or omissions occur jointly or concurrently with the negligence of [the owner] .. or other third parties***" was not sufficiently specific to require indemnification of the owner for its own joint or concurrent negligence as suggested by the language at the end

of the clause, but instead merely meant that the contractor was responsible to indemnify the owner only for its own proportionate fault, as stated in the beginning. Sun Co., Inc. v. Brown & Root Braun, Inc., 1999 U.S. District LEXIS 13453 (E.D.Pa. 1999). *See also*, Clement v. Consolidated Rail Corp., 963 F.2d 599 (3d Cir. 1992), (holding that the same "*to the extent*" phrase meant that the indemnitee was to be indemnified only to the extent of the indemnitor's share of fault, and not for its own negligence).

SUFFICIENT LANGUAGE

On the other hand, it was held that an agreement to indemnify a party as to all claims ***except*** those for which the indemnitee is "***solely negligent***" was sufficiently specific to call for indemnification with respect to all claims of joint negligence on the part of a fellow defendant, other than those for which the indemnitee was determined to have been 100% liable, in Woodburn v. Consolidation Coal Co., 590 A.2d 1273 (Pa.Super. 1991), *appeal denied*, 600 A.2d 953.

Similarly, it was held that contract language was sufficient to require indemnification for the indemnitee's own negligence in Hershey Foods, *supra*, where the agreement stated that the party in question would be indemnified for any claim "***regardless of whether or not it is caused in part by a party indemnified hereunder***." [As discussed above, that same language is ineffective when combined with conflicting language to the effect that the indemnitor is required to provide indemnification only to the extent of its negligence.]

A clause was deemed sufficient to shift liability from a landlord to a tenant in Szymanski-Gallager v. Chestnut Realty, 597 A.2d 1225 (Pa.Super.1991) where the lease called for indemnification of the landlord regardless of whether the injury "***be caused by or result from the negligence of lessor, his servant or agents or any other person or persons whatever***."

The same conclusion was reached in Hackman v. Moyer Packing Co., 621 A.2d 166 (Pa.Super. 1993), where it was held that a packing company was entitled to be indemnified for its own negligence under the terms of a contract which provided for indemnification in connection with "***any alleged negligence or condition, caused or created, [in] whole or in part, by Moyer Packing Company***."

In line with the foregoing, it was held that an indemnification provision providing that a tree trimming contractor was to indemnify the Philadelphia Electric Company (PECO) with respect to "***any claim***" for bodily injury or death arising out of the

contractor's acts or omissions, "***irrespective of whether [the indemnitee] was concurrently negligent, whether actively or passively ... but excepting where injury or death or persons ... was caused by the sole negligence or willful misconduct of [the indemnitee]***" was sufficient to require that the contractor indemnify the electric company even for its own acts of negligence, provided that PECO was not solely responsible for the accident. Philadelphia Electric Co. v. Nationwide Ins. Co., 721 F.Supp. 740 (E.D.Pa. 1989).

An indemnification clause calling for the indemnification of Bethlehem Steel "***by reason of any act or omission, whether negligent or otherwise, on the part of any of the Bethlehem Companies or any employee, agent or invitee thereof or the condition of the Site or other property of any of the Bethlehem Companies or otherwise***" was also considered sufficient to require indemnification for Bethlehem's own negligence in Bethlehem Steel Corp. v. MATX, Inc., 703 A.2d 39 (Pa.Super. 1997).

"PASS-THROUGH" INDEMNIFICATION PROVISIONS

Some contracts, particularly in the construction field, contain provisions which not only call for indemnification of one of the immediate parties to the agreement, but purportedly also require the indemnitor to assume the indemnitee's own contractual indemnification obligations to other parties. For example, a general contractor will typically enter into an agreement calling for it to indemnify the owner of the project. The general contractor might, in turn, include a provision in its agreement with a subcontractor, requiring not only that the subcontractor indemnify it, but that it also assume responsibility for the general contractor's undertaking to indemnify the owner under its separate contract.

The Supreme Court of Pennsylvania has held that such "pass-through" provisions, while not inherently invalid, are subject to a very narrow construction and are ineffective unless the intent to assume such liability is clearly and specifically stated in the subcontract. A standard incorporation clause, through which a subcontractor merely agrees to assume all of the general contractor's indemnification obligations to third parties under a separate contract, without spelling them out in the subcontract, will not be effective. If a general contractor's obligation to indemnify another party for its negligence is to be effectively "passed through" to its subcontractor, that obligation must be explicitly stated in the subcontract itself. Bernotas v. Super Fresh Food Markets, 581 Pa. 12, 863 A.2d 478 (2004).

FAULTLESS INDEMNITEES

Where an indemnification clause does not contain language which would be considered legally sufficient to require one party to indemnify the other for the latter's own negligence, this does not preclude a claim for reimbursement of legal fees and defense costs on the part of an indemnitee which was allegedly guilty of negligence, but is ultimately determined to have been free of fault.

In Mace v. Atlantic Refining & Marketing Corp., 567 Pa. 71, 785 A.2d 491 (2001), it was held by the Pennsylvania Supreme Court that the "Perry-Ruzzi Rule," calling for the strict construction of indemnification agreements, simply does not apply to a post-trial claim for indemnification with respect to defense costs on the part of an indemnitee which had been sued for negligence, but is ultimately exonerated of any fault. The Court reasoned that an indemnitee under such circumstances is no longer seeking indemnification for its own negligent conduct. Specifically, the party seeking indemnification in Mace had been dismissed by summary judgment and had thus been adjudicated to be a non-negligent party.

Accordingly, it should be borne in mind that, even if the language of an indemnification agreement is insufficient to shift liability for the indemnitee's own negligent conduct and a defense tender may properly be rejected on that basis early in the case, such an indemnitee may later be in a position to seek reimbursement of its fees and costs under Mace if it is ultimately determined that the party was not negligent.

WORKERS COMPENSATION IMMUNITY

Under Section 303(b) of the Workers Compensation Act, an injured plaintiff's employer cannot be joined as an additional defendant to its employee's personal injury action by another party in the absence of a written indemnification agreement entered into by the employer prior to the date of the injury. 77 P.S. §481(b).

For joinder of the plaintiff's employer to be permitted in such cases, the indemnification agreement must use language indicating that the employer intends to indemnify the third party against claims on the part of its employees, expressly waiving the employer's immunity through reference to the workers' compensation statute, **or** by specifically referring to claims involving injury to its employees. Again, general language calling for indemnification from the employer with respect to "any and all claims" is insufficient to constitute a waiver of immunity. Bester v. Essex Crane Rental,

619 A.2d 304 (Pa.Super. 1993); Snare v. Ebensberg Power Co., 637 A.2d 296 (Pa.Super. 1994).

In addition to the statutory language indicating that employee injury indemnification agreements must be in writing, the courts have also imposed the requirement that such agreements be **signed before the date of injury**. Pendrak v. Keystone Shipping Co., 300 Pa.Super. 393, 446 A.2d 912 (1982); Apostilides v. Westinghouse Electric Corp., 9 Phila. 638 (1983); McMaster v. Amquip Corp., 2 Pa. D.&C.4th 153 (C.P. Bucks Co. 1989).

Consistent with the Supreme Court's decision in Bernotas with regard to "pass-through" indemnification provisions in general, it has also now been held that language appearing in a contract between a general contractor and owner under which the general contractor has purportedly waived both its statutory workers' compensation immunity and that of its subcontractors cannot be "passed through" to the subcontractors through language simply incorporating the terms of the prime contract - such a waiver must instead be expressed within the subcontract itself. Integrated Product Services v. HMS Interiors, 2005 Phila. Ct. Com. Pl. LEXIS 255 (C.P. Phila. 2005).

COVERAGE FOR INDEMNIFICATION CLAIMS

An insured defendant will ordinarily be entitled to liability coverage in connection with contractual indemnification claims, though this will be dependent upon the policy language involved.

Although it is well established in Pennsylvania that a commercial general liability policy does not apply to claims for breach of contractual undertakings in general, coverage is usually available with respect to written agreements under which an insured has assumed the tort liability of another party. This coverage obligation stems from an exception to what is generally referred to as a "*contractual liability*" exclusion. Such exclusions essentially indicate that coverage does not apply to liability "assumed" by an insured under a contract or agreement (i.e., an indemnification agreement under which an insured has assumed the tort liability of another party). That exclusionary language is then followed by an exception to the exclusion with respect to liability assumed by the insured under what used to be called "incidental contracts" under ISO policy forms, and are now referred to as "insured contracts."

The traditional policy definition of an "incidental contract" or "insured contract," consisted of a listing of several very specific types of contracts starting with

leases of premises, followed by several rarely encountered contracts including easements or license agreements, elevator maintenance agreements, and railroad sidetrack agreements.

However, that narrow listing of "insured contracts" is now typically followed by a broad catch-all category of contracts described in some policies as "*any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party*." In the past, that broad category of contracts relating to the insured's business only appeared where an insured had purchased optional "broad form" contractual liability coverage, but it is now a standard provision in most contemporary standard CGL coverage forms. At the same time, it should be noted that this broad definition of an "insured contract," encompassing all indemnification agreements pertaining to the insured's business, is sometimes eliminated by amendatory endorsements which replace it with the far more restrictive traditional definition, sometimes leaving insureds without coverage to support their contractual indemnification obligations.

The upshot of this is that an insured will usually be covered in connection with claims seeking contractual indemnification, but this will obviously depend on the terms of its policy. *See, e.g.*, Brooks v. Colton, 760 A.2d 393 (Pa.Super. 2000).

AN INDEMNITEE IS NOT AN INSURED

It has been recognized that a contractual indemnitee is not considered a third-party beneficiary of the indemnitor's liability insurance policy, is not an insured under that policy, and has no legal standing to directly sue, or to maintain a bad faith claim against the indemnitor's insurer. Tremco, Inc. v. PMA Insurance Co., 832 A.2d 1120 (Pa.Super. 2003).

CONDITIONAL NATURE OF INDEMNIFICATION CLAIMS

Whether the claim is pursued at common law, or by contract, the duty to indemnify another party is considered a **conditional obligation**, the existence of which simply cannot be determined until the underlying claim has been settled, or tried to verdict, and which does not accrue until payment has actually been made. *See, e.g.*, McClure v. Deerland Corp., 401 Pa.Super. 226, 585 A.2d 19 (1991), (holding that claim for contractual indemnification was premature before underlying claim was resolved by

payment of settlement or judgment, and that, "*the mere expenditure of counsel fees does not constitute the accrual of a cause of action for indemnification*"); F.J. Schindler Equipment Co. v. Raymond Co., 274 Pa.Super. 530, 418 A.2d 533 (1980), (holding that a claim for indemnification before actual payment is made is premature); Kelly v. Thackray Crane Rental, Inc., 874 A.2d 649 (Pa.Super. 2005), (a precautionary cross-claim for contractual indemnification, including a claim for accrued defense costs, was properly dismissed as premature when the underlying claims were still pending); Carson/DePaul/Ramos v. Driscoll/Hunt, 2006 WL 2009047, 2006 Phila. Ct. Com. Pl. LEXIS 278 (C.P. Phila. 2006), (the right to contractual indemnification, including claims for payment of defense costs, is "contingent" upon the outcome of the underlying claim, and any claim for indemnification premised upon an anticipated future loss with respect to still pending claims is premature and must be dismissed - a potential duty to indemnify does not give rise to an immediate duty to defend); Invensys, Inc. v. American Mfg. Corp., 2005 U.S. Dist. LEXIS 3961 (E.D.Pa. 2005).

While there has been some contrary authority suggesting that a claim for defense costs can be pursued while the underlying claim remains pending, it would not appear to be possible to reconcile those cases, most of which were decided by federal courts sitting in Pennsylvania, with the foregoing decisions of our Superior Court, which are considered controlling precedent.

As recognized in McClure, that rule makes perfect sense if one considers the fact that a party seeking indemnification must prove that it was, in fact, liable to the claimant, that the amount of any settlement of the underlying claim was reasonable, and that the injury or damage at issue fell within the scope of the indemnification agreement, none of which can be known before the underlying claim has been tried.

It should, therefore, be possible to deny all defense tenders pursuant to indemnification agreements regardless of the sufficiency of the contract language at issue simply on the basis that they are premature before the underlying claim has been settled or tried.

However, where liability under an indemnification agreement is clear, it is not always advisable to deny an indemnitee's defense tender since the practical consequences of doing so can ultimately serve to increase an insurer's legal expenses considerably, not only because it may ultimately be obliged to reimburse the indemnitee (or its insurer) for legal fees and other defense costs (sometimes at much higher hourly rates than those to which the indemnitor's insurer is accustomed) but because the insurer which is ultimately responsible for the defense of both its own insured and the indemnitee may find that it is funding unnecessary and strategically undesirable battles between the two defendants which might otherwise be reduced, if

not avoided. It is not unheard of, for example, for a co-defendant indemnitee to join forces with a plaintiff in pointing fingers at an insured, if only to establish the indemnitor's negligence in order to bring the plaintiff's claim within the scope of the indemnification agreement during discovery and trial. It should be borne in mind, however, that an insurer which undertakes the defense of an indemnitee cannot always do so through the same defense counsel which is representing its insured due to potential conflicts of interest and that care must be taken by counsel to secure appropriate waivers in such cases.

As discussed elsewhere in these materials, the conditional nature of the duty to indemnify under an indemnification agreement differs significantly from the situation in which an insurer is faced with a defense tender on the part of an additional insured, as to which it owes a duty of good faith, and as to which an immediate defense obligation may be triggered by the factual allegations (as opposed to the actual facts) of the underlying suit.

III. INSURANCE PROCUREMENT AGREEMENTS

Where one party has agreed to obtain liability insurance coverage on behalf of another party, but fails to do so, he is liable to the other party as if he were an insurer. Hagan Lumber Co. v. Duryea School District, 277 Pa. 345, 121 A. 107 (1923); Borough of Wilkinsburg v. Trumball-Denton Joint Venture, 390 Pa.Super. 580, 568 A.2d 1325 (1990). A party which has breached an agreement to procure insurance coverage is liable for the amount which would have been recoverable had the insurance policy in question been obtained. Laventhal & Horwath v. Dependable Insurance Associates, 396 Pa.Super. 553, 579 A.2d 388 (1990).

Unlike the situation with respect to claims based upon written indemnification agreements, which are typically covered by a CGL policy, an insured's alleged breach of an agreement to procure and maintain insurance coverage on another party's behalf is **not covered** by his liability policy, courts generally reasoning that such breach of contract claims do not involve "damages" for "bodily injury" or "property damage" caused by an "occurrence" within the scope of the CGL policy insuring agreement. *See, e.g.*, Giancristoforo v. Mission Gas & Oil Products, 776 F.Supp. 1037 (E.D.Pa. 1991); Aetna v. Spancrete of Illinois, 726 F.Supp. 204 (N.D.Ill. 1989); Office Structures v. Home Ins. Co., 503 A.2d 193 (Del. 1985); Pyles v. PMA Ins. Co., 600 A.2d 1174 (Md.App. 1992); Musgrove v. The Southland Corp., 898 F.2d 1041 (5th Cir. 1990). Any coverage afforded

through the exception to the "contractual liability" exclusion of a CGL policy applies only to tort liability assumed by insureds under indemnification agreements. It does not apply to breach of contract claims in general. Brooks v. Colton, 760 A.2d 393 (Pa.Super. 2000).

Because an insurer must defend an entire suit even if only some of the claims asserted are potentially covered under Pennsylvania law, claims premised upon an insured's alleged breach of an agreement to maintain insurance coverage on another party's behalf are frequently combined with other claims, such as cross-claims for contribution or indemnity at common law, or contractual indemnification claims, so insurers will often be forced to defend claims based upon an insured's alleged breach of an insurance procurement contract subject to a reservation of rights, even though there is no potential duty to indemnify as to that aspect of the case. It is extremely important for an insurer in such cases to issue a timely reservation of rights on that issue since it is entirely possible that the uncovered breach of contract claim may be the insured's only real source of liability in the case.

IV. ADDITIONAL INSUREDS

An additional insured might be defined as a person or entity that is neither a named insured, nor qualified as an insured under the "Who Is An Insured" provisions of an insurance policy, but for which the named insured's policy affords insured status by endorsement.

This can be accomplished through endorsements either conferring insured status upon designated entities by name or description, or on a "blanket" basis using language which broadly applies to any person or entity for which the policyholder has agreed to procure coverage under a contract (most endorsements requiring that the contract be in writing).

SCOPE OF COVERAGE PROVIDED

Although Pennsylvania law concerning the scope of coverage afforded to additional insureds is rather limited, several fundamental principles have been established.

First, while there remains considerable folklore to the effect that additional

insureds enjoy some sort of an inferior status under the policy and are only intended to be covered in connection with vicarious liability arising from the negligence of the named insured, that is simply not true as a general proposition under the terms of most additional insured endorsements which, until relatively recently, contained few limitations upon the scope of coverage provided to additional insureds.

Regardless of the insurer's subjective intentions, or those of the party seeking insured status for that matter, it is the intent which is expressed by the language of the insurance contract itself which controls under general principles of insurance policy construction. *See, e.g.,* Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563 (1983).

Typically, additional insured endorsements modify the "Who Is An Insured" provisions of a liability policy to add the party in question as an "***insured***". That is, the additional insured is an insured, just like any other insured on the policy, except to the extent that the endorsement provides otherwise through limiting language as to the scope or amount of coverage provided, its duration, any additional exclusions specifically applicable solely to the additional insured, or provisions addressing the subject of how the coverage provided relates to other insurance coverage which might be available to the additional insured.

Such endorsements often contain no language restricting the additional insured's coverage to vicarious liability based upon the named insured's actions, no language aimed at avoiding coverage in situations where the additional insured is solely liable, no language limiting the amount of coverage provided to the policy limits specified in the insured's underlying contract, few or no exclusions beyond those appearing in the liability policy itself, and no language addressing the subject of how the coverage provided interacts with any insurance coverage maintained by or otherwise available to the additional insured under its own policies, or that which might be available to an additional insured who also happens to be an additional insured under other insurance contracts.

The leading Pennsylvania case on the subject of additional insureds is that of the Commonwealth Court in Township of Springfield v. Ersek, 660 A.2d 672 (Pa.Cmwlth. 1995), *appeal denied*, 544 Pa. 640, 675 A.2d 1254 (1996), in which it was recognized that:

> (1) whatever the understandings, assumptions or intentions of the insurer, its policyholder, or the additional insured might have been, **the scope of coverage provided to an additional insured is governed by the terms of the endorsement itself**;

(2) although an underlying contract between the policyholder and the additional insured may contain language relating to nature, amount, or primary status of the coverage to be provided, **underlying contract language is not controlling as to the insurer's obligations,** since the insurer was not a party to that contract;

(3) **an additional insured will be covered for its own independent acts of negligence, like any other insured, unless the additional insured endorsement states otherwise;**

(4) unlike indemnification agreements, which are strictly construed against a party seeking indemnification for its own negligent conduct, additional insured endorsements, like any other insuring agreement, will be **broadly interpreted and construed against the insurer** to the extent they are ambiguous; and

(5) language appearing in an additional insured endorsement merely indicating that coverage is provided only with respect to liability ***"arising out of "*** the named insured's work or operations requires only ***"but for"*** causation between the actions of the named insured and the additional insured's liability - **it does not require that the named insured be guilty of negligence, or that the named insured's actions be the proximate or legal cause of the injury.**

The Ersek case provides a good illustration of the approach which has been taken in Pennsylvania (and in most other states) of broadly interpreting additional insured endorsement language, such as language indicating that the additional insured qualifies as an insured "***but only with respect to liability arising out of operations performed by the named insured***." Far from having a significantly limiting effect as might have been intended, that language has been construed as requiring only "*but for*," as opposed to "*proximate*" causation between the named insured's work or operations and the injury involved. Such language does not require a showing that the policyholder was itself guilty of negligence, or confine the scope of coverage to vicarious or secondary liability on the part of the additional insured.

In Ersek, the named insured was a golf pro shop which leased space for its business at a country club owned by Springfield Township. An employee of the pro shop was injured when he fell from the stairs leading from the shop to the parking lot. The court readily concluded that the employee would not have been injured "***but for***" the pro shop's operations on the premises and that the township qualified as an insured under the policy since the "***arising out of***" language of the endorsement merely

required that the injury be "***causally connected with, not proximately caused by***" the policyholder's operations. In other words, the mere presence of the named insured's injured employee on the premises of the additional insured was a sufficient causal connection to give rise to coverage under the endorsement.

Other Pennsylvania cases taking a similarly broad view of the scope of coverage provided to additional insureds have included : Maryland Cas. Co. v. Regis Ins.Co., 1997 U.S. Dist. LEXIS 4359 (E.D.Pa. 1997), (language affording coverage to additional insured "***but only with respect to liability...as the result of an alleged act or omission of the Named Insured or its employees***" was ambiguous as to whether the named insured's act or omission need be negligent, did not mean that the named insured had to be guilty of any negligence, and did not mean that the additional insured was covered only for vicarious liability); Philadelphia Electric Co. v. Nationwide Mut. Ins. Co., 721 F.Supp. 740 (E.D.Pa. 1989), (coverage must be provided to an additional insured electric company for its own acts of negligence under endorsement granting coverage "***for any work performed***" by the policyholder in connection with the bodily injury claim of one of the policyholder's employees who had allegedly been electrocuted while trimming trees due to the sole negligence of the electric company, the court concluding that the policy language afforded coverage for all liability arising in connection with the work, including the electric company's own negligence and stating that, had the insurer wished to provide coverage only for vicarious liability stemming from the named insured's negligence, it should have chosen different language); Pennsylvania Turnpike Commission v. Transcontinental Ins. Co., 1995 U.S. Dist. LEXIS 11089 (E.D.Pa. 1995), (holding that endorsement granting coverage to additional insured "***but only with respect to liability arising out of your [i.e., the named insured's] work***" covered additional insured for its own negligence, rejecting insurer's contention that the policy only provided coverage for the acts or omissions of the named insured, noting that the only limitation under the endorsement would be a case in which the additional insured's liability was "unrelated" to the work performed).

The same "but for" causation approach has consistently been followed when interpreting additional insured endorsements in other states as well. For example, as in the Ersek case, other courts have consistently held that the presence of a named insured's employee at a work site creates a sufficient causal nexus to establish that the employee's injury arose out of the named insured's work or operations. Merchants Ins. Co. v. U.S.F.&G. Co., 143 F.3d 5 (1st Cir. 1998); Florida Power & Light Co. v. Penn America Ins. Co., 654 So.2d 276 (Fla.App. 1995).

Another leading decision on the issue of the scope of coverage provided under an additional insured endorsement conferring insured status for liability "arising out of" the named insured's operations (and one which has been cited with approval in several

Pennsylvania cases) is the Kansas case of McIntosh v. Scottsdale Ins. Co., 992 F.2d 251 (10th Cir. 1993), involving injuries suffered by a spectator at a city festival in Wichita, who leaped over a wall in his haste to find a toilet. The company running the festival named the city as an additional insured on its policy under an endorsement conferring such status with respect to liability arising out of the named insured's operations. The Court of Appeals held that such language did not confine coverage only to situations in which the policyholder was negligent, but instead afforded coverage to the city as an additional insured even though it was stipulated that the city was entirely at fault, merely because the injury arose from and would not have occurred but for the named insured's operation of the festival.

There are, however, at least some limitations upon the extent to which that "but for" causation approach will be followed. One Pennsylvania case in which it was held that no coverage need be afforded to an additional insured in the face of similar policy language is the unpublished trial-level federal court decision in Time Warner Entertainment v. Travelers Casualty & Surety Co., 1998 WL 800319, 1998 U.S. Dist. LEXIS 19460 (E.D.Pa. 1998), recognizing that there is some logical limit to the application of "but for" causation in determining whether an additional insured's liability arises from the named insured's work.

Briefly, that case involved an injury to one of the named insured's employees which occurred away from the site at which the policyholder was performing its construction work. The employee had been turned away from the construction site for lack of a hard hat. He went to a different facility operated by the additional insured to get a hard hat not because of the contract, but because it was convenient and he knew the people there, thinking he could borrow a hard hat from one of them. He then fell while climbing some shelving on which the hats were stored.

The Time Warner court upheld a denial of coverage to the additional insured, concluding that it was a mere fortuity that the employee had chosen to get a hat at its facility rather than going home and that his injuries did not arise from the work performed by his employer for the additional insured. In reaching that result, the court recognized that the policy language limiting coverage to liability arising from the policyholder's work was meant to have at least some limiting effect and was intended to prevent an additional insured from "enjoying blanket coverage under the policy for liability unrelated to the work." Although "but for" causation between the named insured's work and the additional insured's liability is sufficient to trigger coverage, the court stated that such causation is "not without limitation" and that "every incidental factor" which arguably contributes to an accident is not "but for" causation in a legal sense.

Another example of a situation in which a court concluded that the limits of causation were being stretched too far is the unpublished decision of the U.S. Court of Appeals for the Third Circuit in Meridian Mutual Ins. Co. v. Continental Business Center, 174 Fed.Appx. 104 (3d Cir. 2006). That declaratory judgment action arose from seventeen consolidated lawsuits filed by numerous industrial complex tenants against the owner of the complex, claiming that the owner was guilty of negligence in violating various fire and building codes and in failing to provide adequate fire protection, allowing the fire, which began on the opposite side of the Schuylkill River, to spread throughout the complex.

One of the tenants, Little Souls, Inc., maintained a general liability policy under which the owner qualified as an additional insured as required by its lease. The endorsement confined the coverage provided to claims "arising out of" real property which the insured either owned, rented, leased or occupied. There was apparently no allegation in any of the underlying lawsuits or any evidence that the property leased by Little Souls had anything to do with the fire, or more specifically, the damage caused to other tenants.

In holding that the tenant's insurer had no duty to defend or indemnify the owner, the Court of Appeals stated: "We agree with the District Court that Continental has failed to allege any connection, let alone causation, between the real property rented by Little Souls and the fire or the resulting damage. For example, Continental does not point to any underlying complaint alleging that the fire arose or spread due to the property rented by Little Souls. Continental presents no evidence that 'but for' Little Souls the fire would not have occurred or spread.... Consequently, as the District Court held, 'the argument that a fire starting on the other side of the Schuylkill River and eventually spreading across the river to the Little Souls property 'arose out of' that property is totally devoid of any arguable merit.'"

"FAULT BASED" ENDORSEMENTS

While not addressed in any published Pennsylvania cases, there are several varieties of **"fault based"** additional insured endorsements which are likely to be effective in limiting the scope of coverage to situations in which the named insured is at least partially, if not entirely at fault, or in precluding coverage with respect to the additional insured's own acts of negligence, or in situations in which the additional insured is solely at fault.

Some additional insured endorsements afford insured status only with respect to

injury or damage "*caused in whole, or in part*", by the acts or omissions of the named insured, or those acting on its behalf. In some forms, that language is followed by an exclusion with respect to claims arising from the sole negligence of the additional insured, further underscoring the intent. The intended effect of such language is to eliminate coverage with respect to claims premised upon the sole negligence of the additional insured, while providing coverage even for the additional insured's own negligence so long as the named insured is at least partially at fault.

Such endorsements have generally been considered clear and unambiguous in defeating coverage with respect to claims in which it is claimed that an additional insured is solely at fault. This is a scenario which frequently occurs in cases involving injury to the named insured's employees - because the named insured is immune from tort liability under the workers' compensation statute, it will not be included as a defendant and there will be no allegations of negligence on the part of the named insured. *See, e.g.,* The Clark Construction Group v. Modern Mosaic, Ltd., 2000 U.S. Dist. LEXIS 22922 (D.Md. 2000), (no coverage owed to additional insured general contractor in connection with injury claim by subcontractor's employee, where no claim was asserted against the victim's employer and the endorsement granted coverage only for injury "*caused in whole or in part by the negligent acts or omissions*" of the named insured); American Country Ins. Co. v. McHugh Construction Co., 801 N.E.2d 1031 (Ill.App. 2003), (same result); American Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co., 2006 U.S. Dist. LEXIS 33556 (S.D.Tex. 2006), (such endorsements should be interpreted to provide coverage in situations in which both the named insured and the additional insured are guilty of joint and concurrent negligence).

Although such language should certainly serve to eliminate coverage for additional insureds in connection with claims as to which they are solely liable, it was not intended and does not appear to eliminate coverage for all negligence on the part of additional insureds, who would remain entitled to coverage for concurrent negligence and are denied coverage only in those cases in which they are solely liable for the injury or damage involved. Nor would that language likely have a significant impact upon an insurer's defense obligations in most cases, or at least in those cases in which the named insured is included among the original defendants and is claimed to be guilty of negligence.

Other "fault based" endorsements afford coverage to additional insureds on an even more limited basis, providing that the additional insured is covered only for injury resulting from the acts or omissions of the named insured, which is usually interpreted as covering only an additional insured's vicarious liability stemming from the policyholder's negligence. To the extent that such policy language has been addressed in the courts, it has generally been considered clear and unambiguous in providing

coverage to additional insureds only for vicarious liability and not their own independent acts of negligence. *See, e.g,* Lafayette College v. Selective Ins. Co., 2007 U.S. Dist. LEXIS 88001, 2007 WL 4275678 (E.D.Pa. 2007), (endorsement affording coverage "*only ... with respect to liability caused by your [the named insured's] acts or omissions*" applied only to claims of vicarious liability derived from the named insured's negligence); Ohio Casualty Ins. Co. v. Madison County, 2005 U.S. Dist. LEXIS 11789 (S.D.Ill. 2005), (endorsement limiting the scope of coverage with the phrase "*but only as respects negligent acts or omissions of the Named Insured*" did not cover additional insured in suit to which named insured was not a party and where there were no allegations in the plaintiff's complaint that the named insured was negligent); Garcia v. Federal Ins. Co., 969 So.2d 288 (Fla. 2007), (language limiting coverage to "*liability because of acts or omissions*" of the named insured did not extend to claims premised upon the additional insured's own negligence); Boise Cascade Corp. v. Reliance National Indemnity Co., 129 F.Supp.2d 41 (D.Me. 2001), (no coverage for additional insured under endorsement defining coverage as being "*limited to their liability for the conduct of the named insured*" in suit to which named insured was not a party and in which there were no allegations of negligence against the policyholder in the complaint); National Union Fire Ins. Co. v. Nationwide Ins. Co., 82 Cal.Rptr.2d 16 (Cal.App. 1999), (endorsement granting coverage to additional insured only to the extent it is "*held liable for*" the named insured's acts or omissions applied to vicarious liability only); Liberty Mutual Ins. Co. v. Capeletti Bros., Inc., 699 So.2d 736 (Fla.App. 1997), (same result where endorsement applied only to "*liability arising out of*" the named insured's work); Village of Hoffman Estates v. Cincinnati Ins. Co., 670 N.E.2d 874 (Ill.App. 1996), (same result where endorsement conferred coverage upon additional insured only for "*liability incurred solely as a result of some act or omission*" of the named insured).

Another approach which has been taken by insurers with some success in attempting to avoid providing coverage to additional insureds for their own acts of negligence has been to limit the scope of the additional insured's insured status to claims arising from its "general supervision" of the named insured's work, or to include exclusionary language barring coverage to additional insureds for their own acts or omissions other than in connection with the ***"general supervision"*** of the named insured's work. Courts in several states appear to have interpreted that language as providing coverage only for claims of vicarious liability. *See, e.g.,* First Ins. Co. of Hawaii v. State of Hawaii, 665 P.2d 648 (Haw. 1983); Liberty Mutual Ins. Co v. Capeletti Bros., 699 So.2d 736 (Fla.App. 1997); National Union Fire Ins. Co. of Pittsburgh v. Nationwide Mutual Ins. Co.., 82 Cal.Rptr.2d 16 (Cal.App. 1999).

There is, however, some authority to the contrary, at least one court holding that the phrase "*general supervision*" is ambiguous and thus includes an additional insured's independent acts of negligence. Southwestern Bell Telephone Co. v. The Western Cas.

& Surety Co., 269 F.Supp. 315 (E.D.Mo. 1967).

Consistent with the generally accepted concept that an insurer must defend an entire suit when any single claim potentially falls within the coverage of its policy, where an additional insured was sued for both its independent negligence in connection with its failure to keep the job site free of debris (for which it was not covered in the face of such policy language) and for its negligent supervision of the named insured subcontractor's work (for which it was covered) it was held that the subcontractor's insurer had a duty to defend the entire suit. Bovis Lend Lease LMB v. National Fire Ins. Co. of Pittsburgh, 2004 U.S. Dist. LEXIS 5352 (S.D.NY 2004).

ONGOING vs. COMPLETED OPERATIONS

In addition to issues relating to whether, or to what extent an additional insured is entitled to coverage for its own negligent conduct, some additional insured endorsements contain language limiting the duration of time for which coverage is provided.

This is often accomplished through language to the effect that the additional insured is included as an insured on the policy "***but only with respect to liability arising our of your ongoing operations performed for that insured***." The courts appear to have uniformly interpreted the phrase "***ongoing operations***" as providing coverage only for injury or damage occurring while the named insured is still conducting its operations, and as not providing coverage with respect to so-called "*completed operations*" claims involving injury or damage occurring after the named insured's work has been completed, or put to its intended use. *See, e.g.*, Pardee Construction Co. v. Insurance Co. of the West, 92 Cal.Rptr.2d 443 (Cal.App. 2000); KBL Cable Services of the Southwest v. Liberty Mutual Fire Ins. Co., 2004 Minn. App. LEXIS 1294 (Minn.App. 2004); MW Builders v. Safeco Ins. Co. of America, 2004 U.S. Dist. LEXIS 18866 (D.Or. 2004); Mikula v. Miller Brewing Co., 701 N.W.2d 613 (Wis.App. 2005).

INJURIES TO EMPLOYEES

One frequently recurring topic which has received some unusual treatment under Pennsylvania law involves the question of whether an additional insured is entitled to liability coverage in connection with bodily injury claims on the part of the named insured's employees. This is not an issue of workers' compensation immunity, but is

instead concerned with the question of whether coverage is barred with respect to such claims under what is commonly known as an **"Employer's Liability"** exclusion, typically indicating that the insurance does not apply to "*bodily injury to an employee of the insured.*"

Most courts have held that such exclusions would not apply to additional insureds in cases involving injury to employees of the named insured because the phrase "*the insured*" would be viewed as referring only to the specific insured whose rights are at issue. Thus, because an injured employee of the named insured is not an employee of the additional insured, the exclusionary language would not apply to the additional insured. *See, e.g.,* Erdo v. Torcon Construction Co., 275 N.J.Super. 117, 645 A.2d 806 (App.Div. 1994); Sacharko v. Center Equities Ltd. Partnership, 479 A.2d 1219 (Conn.App. 1984); Diamond International Corp. v. Allstate Ins. Co., 712 F.2d 1498 (1st Cir. 1983).

However, with some exceptions, Pennsylvania's state and federal courts have consistently held otherwise, relying upon the Supreme Court's forty-year-old decision in PMA Ins. Co. v. Aetna Casualty and Surety Co., 426 Pa. 453, 233 A.2d 548 (1967). In that case, it was held that an Employer's Liability exclusion barring coverage with respect to bodily injury to an employee of "the insured" applied to defeat coverage not only to the named insured employer of the injured party, but also to an additional insured which did not employ the plaintiff.

That holding is not only at odds with the law in nearly every other jurisdiction to consider the question, but is actually contrary to several other Pennsylvania cases in which our courts have consistently considered the phrase "*the insured*" when appearing in policy exclusions as referring only to the particular insured seeking coverage, in contrast to the meaning of the phrase "*any insured*", which would operate to bar coverage to all insureds if it applied to any one of them. In short, the Court in PMA construed the language "*the insured*" as if it instead said "*any insured.*"

Although the PMA decision has been routinely criticized in subsequent cases, the Pennsylvania courts have nonetheless recognized in several cases that it remains binding precedent and must be followed. *See, e.g.,* Roosevelt's, Inc. v. Zurich American Ins. Co., 2005 Phila. Ct. Com. Pl. LEXIS 226; Brown & Root Braun, Inc. v. Bogan, Inc., 2002 U.S.App. LEXIS 27347 (3d Cir. 2002); NVR, Inc. v. Selective Ins. Co., 2007 U.S. Dist. LEXIS 66915 (E.D.Pa. 2007).

While the Supreme Court has never revisited and reversed its decision in PMA, the Superior Court has attempted to avoid that decision on several occasions by factually distinguishing it in several cases in which it has held that an Employer's Liability exclusion barring coverage for injury to employees of "*the*" insured does not bar

coverage to an additional insured which did not itself employ the injured party. *See, e.g.*, Luko v. Lloyd's London, 393 Pa.Super. 165, 573 A.2d 1139 (1990), *appeal denied*, 584 A.2d 319 (Pa. 1990); Atlantic States Ins. Co. v. Northeast Networking Systems, Inc., 893 A.2d 741 (Pa.Super. 2006).

THE WRITTEN CONTRACT REQUIREMENT

Many additional insured endorsements make reference to the named insured having entered into a contract or agreement under which it is required to provide coverage for the additional insured. For example, a "blanket" additional insured endorsement might confer insured status upon any person or organization for whom the policyholder is performing operations if the two "*have agreed in a written contract or written agreement executed prior to any loss that such person or organization will be added as an additional insured.*"

While there appears to be little case law addressing the "written contract" issue, at least one court has boldly stated the obvious, holding that the language means what it says. In Liberty Insurance Corp. v. Ferguson Steel Co., 812 N.E.2d 228 (Ind.App. 2004), it was held that policy language referring to a written agreement means just that, and that neither an unsigned written agreement, nor an oral agreement, nor a prior course of dealings between the parties will trigger coverage under such an endorsement, the court reasoning that an insurer has a right to protect itself against responsibility based upon informal agreements between contractors by requiring that they be in writing.

RIGHTS OF ADDITIONAL INSUREDS

Under typical additional insured endorsement language, an additional insured is afforded status as an "insured" through modification of the Commercial General Liability Coverage Form, just like any other "insured" under the policy and subject to all of the policy provisions *except* to the extent that the endorsement in question says otherwise.

Accordingly, the liability insurer which has conferred insured status upon that party should not, as is frequently done, engage in what might be characterized as stonewalling tactics when a tender is made, refuse to acknowledge communications from additional insureds, offer legally unfounded grounds (or none at all) for denials of coverage, or refuse to provide them with copies of the insurance policy involved,

particularly in a jurisdiction such as Pennsylvania, where there exists a cause of action for "bad faith."

While there is scant Pennsylvania authority on this topic, there would seem to be little question but that an additional insured, as an "insured" under the policy, would have legal standing to maintain an action under Pennsylvania's bad faith statute (which confers that right upon "the insured") and this concept appears to have been at least implicitly recognized in one trial level case. Rouse Philadelphia, Inc. v. OneBeacon Ins. Co., 2005 Phila. Ct. Com. Pl. LEXIS 440 (C.P. Phila. 2005), (holding that, because a plaintiff who claimed additional insured status under policy did not, in fact, qualify as an additional insured, it could not maintain an action for bad faith).

There is also case law from other jurisdictions (which would likely be followed in Pennsylvania) indicating that an additional insured is entitled to receive a copy of the insurance policy under which it qualifies as an insured upon request. Sears v. Rose, 134 N.J. 326, 348 (1993); Edwards v. Prudential, 357 N.J.Super. 196 (App.Div. 2003).

At the same time, an additional insured's rights are subject to the terms and limitations of the insurance policy. It has been said that the naming of additional insureds does not extend the nature of the coverage provided, but merely gives to others the same protection afforded to the principle insured. Wyner v. North American Specialty Ins. Co., 78 F.3d 752 (1st Cir. 1996).

While this is something of an overstatement since the scope of the coverage afforded to additional insureds can obviously be limited by the terms of the policy or endorsement, it has also been said that additional insureds "***are entitled to the same coverage as the named insured***," and that an additional insured "***has the same rights under a policy as the named insured, including the right to test the limits and validity of the policy's provisions.***" Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.P.A., 2000 Phila. Ct. Com. Pl. LEXIS 79 (C.P. Phila. 2000). In other words, it should be assumed that an additional insured (unlike an insured's contractual indemnitee) has standing to sue an insurer for breach of contract, declaratory relief and bad faith.

DUTY TO DEFEND ADDITIONAL INSUREDS

It should also be understood that the general rules governing an insurer's defense obligations will apply in the case of additional insureds in the same way they apply to any other insured.

For example, an insurer has a duty to defend in Pennsylvania if the factual allegations of a complaint state a claim which is potentially covered under the policy, with any doubts or ambiguities being resolved in favor of the insured. Accordingly, if a complaint asserts a variety of allegations or multiple liability theories against the additional insured and any one of them would potentially fall within the scope of the additional insured endorsement, and if the applicability of an exclusion is not apparent on the face of the complaint, the insurer would almost certainly be deemed to have a duty to defend the additional insured and would face the same consequences should it fail to assume that duty as would result if any other insured were involved.

Here lies an important distinction between the rights of additional insureds and contractual indemnitees. While common law or contractual indemnification is a conditional obligation in the sense that the indemnitee's rights may not ripen until liability has been determined as previously discussed, that is not the approach to be taken with regard to additional insureds, to whom a liability insurer may owe an immediate defense obligation based solely upon the suit allegations.

PRIORITY OF COVERAGE

People sometimes assume that any coverage afforded to an additional insured is automatically primary to that which might be available under its own liability policy. While that is often true if the tendering party's own policy contains language rendering its coverage excess to any policy on which it has been added as additional insured, and if the additional insured endorsement contains no competing excess clause, that is not necessarily the case.

The fact that coverage must be provided pursuant to an additional insured endorsement does not necessarily yield the conclusion that such coverage is applicable on a primary and exclusive basis. It is entirely possible that multiple insurers may have a joint and concurrent obligation with respect to both defense and indemnification of the same additional insured, as is sometimes the case with claims arising from large construction projects, and in some cases, the additional insured's own coverage might apply on a primary, or at least a concurrent basis. For this reason, it is important to obtain and review copies of all potentially applicable policies before an insurer accepts the responsibility of defending an additional insured on a primary and exclusive basis.

This is largely an issue of competing policy draftsmanship, and while this may subject policyholders to potential litigation in those cases in which they have agreed to provide coverage to additional insureds on a primary basis, insurers might well be tempted to consider the simple step of adding excess clauses to all of their additional

insured endorsements as a method of avoiding primary coverage obligations, or at least requiring that other insurers participate at the same level by negating their excess clauses. This can be accomplished without increasing the named insured's liability exposure if the excess clause in the additional insured endorsement provides that the coverage is excess *unless* the named insured has agreed that it must apply on a primary basis in its underlying contract with the additional insured - quite often, insurance procurement provisions are completely silent on the subject.

Although the priority of coverage is sometimes addressed in the underlying contract between the policyholder and additional insured, any language in the underlying contract as to whose policy is to apply on a primary basis should not control the insurers' obligations, unless the contract terms are expressly incorporated into the additional insured endorsement itself. An insurer's obligations to an additional insured are determined solely by the terms of its insurance policy and not by the terms of any underlying contract to which it was not a party. Ersek, *supra* ; Transport Indemnity Co. v. Home Indemnity Co., 535 F.2d 232 (3d Cir. 1976); Travelers Indem. Co. v. American & Foreign Ins. Co., 730 N.Y.S.2d 231 (App.Div. 2001).

The relationship between potentially applicable insurance policies in this context has only recently begun to be addressed in policy language. It has become increasingly common in recent years for the additional insured's own CGL policy to include language indicating that the coverage provided by that policy is excess over any available policy of insurance under which the insured has been added as an additional insured pursuant to a contract or agreement. While there is currently no Pennsylvania case law on this point, such policy language has consistently been given effect in other jurisdictions and there is no reason to believe that a Pennsylvania court would hold otherwise. *See, e.g.*, Transamerica Ins. Group v. Turner Constr. Co., 601 N.E.2d 473 (Mass.App. 1992); U.S. Fire Ins. Co. v. Aetna Life and Casualty, 684 N.E.2d 956 (Ill.App. 1997), *appeal denied*, 690 N.E.2d 1388 (Ill. 1998); St.Paul Fire & Marine Ins. Co. v. Hanover Ins. Co., 2000 U.S. Dist. LEXIS 21792 (E.D.N.C. 2000); Tishman Constr. Co. of New York v. American Mfrs. Mut. Ins. Co., 2002 N.Y.App. Div. LEXIS 10601 (NYApp. 2002). Where the additional insured's own policy contains such an excess clause *and* there is no competing excess language in the additional insured endorsement, there would appear to be no real question but that the carrier providing coverage to the additional insured will be obliged to do so on a primary basis under Pennsylvania law.

As noted previously, some additional insured endorsements do contain competing excess clauses, and what would most likely occur in a case involving conflicting excess clauses in the additional insured's own policy and the policy under which it has been added as an additional insured is that a court would consider them mutually repugnant, with the result that both excess clauses would be disregarded and the two policies would

be deemed to apply on a joint and concurrent basis, consistent with the approach which has generally been taken in other types of cases. *See, e.g.,* Hoffmaster v.Harleysville Mut. Ins. Co., 657 A.2d 1274 (Pa.Super. 1995); Fireman's Fund Ins. Co. v. Empire Fire & Marine Ins. Co., 152 F.Supp.2d 687 (E.D.Pa. 2000).

CERTIFICATES OF INSURANCE

It is common practice for an insurance agent or broker to issue a certificate of insurance to a party which has contracted with the insured not only to verify that the insured is maintaining its own commercial liability, auto and/or workers' compensation coverage as specified in its contract, but also to verify that the certificate holder has been included as an additional insured.

On occasion, such certificates are issued when the policies do not, in fact, confer that insured status either by designating the party or parties involved as additional insureds by name, or on a "blanket" basis.

When this occurs, an insurer which denies coverage may be faced with a claim of *promissory estoppel* premised upon the issuance of an inaccurate certificate by the insurer's actual or ostensible agent and the certificate holder's claim that it reasonably relied upon the certificate to its detriment.

This subject was addressed (from the perspective of an additional insured) in a publication from the International Risk Management Institute entitled, "The Additional Insured Book", 2d ed., 1994, in which the problem is described as the "fictitious insured syndrome":

> **Fictitious Insureds or Insurance**
>
> Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent....
>
> Sometimes this problem stems from a lack of communication. The insurance agent, for example, may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.

> This, of course, is really a matter of principal-agency liability and should not detrimentally affect the certificate holder....
>
> The insurance company maintains that it does not matter what the certificate says, it is what the policy states that counts. When such circumstances go before the courts, the outcomes are unpredictable.

The International Risk Management Institute's view that this situation simply presents a matter of principal-agent liability and should not detrimentally affect the certificate holder is not one which has gained wide acceptance in the courts, but its observation that the outcome in such cases is unpredictable appears to be accurate.

There is no controlling Pennsylvania appellate precedent on the subject and the courts in other jurisdictions are divided, a majority of them rejecting such claims of promissory estoppel primarily on the basis that certificates of insurance contain so many warnings and disclaimers that no one could reasonably rely upon them as a matter of law, while other courts have held that insurers must afford coverage when the certificates have been issued by an agent which has an agency agreement with the insurer, or even where there is only an apparent agency relationship between the two, despite certificate language stating that it cannot modify the terms of the policy, indicating that the certificate confers no rights upon the certificate holder, and telling the certificate holder that it must refer to the actual policy.

Among the authorities holding that an insurer's obligations are determined solely by the terms of its policy and that certificates of insurance purportedly granting additional insured status to parties who do not qualify as such cannot bind the insurer as a matter of law are the following : American Country Ins. Co. v. Kraemer Bros., 699 N.E.2d 1056 (Ill.App. 1998); Modern Builders, Inc. v. Alden-Conger Public School Dist., 2005 U.S. Dist. LEXIS 18736 (D.Minn. 2005); TIG Ins. Co. v. Sedgwick James, 184 F.Supp.2d 591 (S.D.Tex. 2001), *affirmed,* 276 F.3d 754 (5th Cir. 2002); Cermak v. Great West Casualty Co., 2 P.3d 1047 (Wyo. 2000); Bituminous Casualty Corp. v. Aetna Life and Casualty Co., 1998 U.S. Dist. LEXIS 23161 (S.D.W.Va. 1998); Alabama Electric Co-op v. Bailey's Construction Co., 950 So.2d 280 (Ala. 2006); American Ref-Fuel v. Resource Recycling, 671 N.Y.S.2d 93 (App.Div. 1998); Buccini v. 1568 Broadway Assoc., 673 N.Y.S.2d 398 (App.Div. 1998); St. George v. W.J. Barney Corp., 706 N.Y.S.2d 24 (App.Div. 2000); Benderson Dev. Co., Inc. v. Transcontinental Ins. Co., 813 N.Y.S.2d 646 (Sp. Ct. Erie Co. 2006); MW Builders, Inc. v. Safeco Ins. Co. of America, 2004 WL 2058390 (D.Or. 2004).

The cases permitting promissory estoppel claims to proceed against insurers based upon certificates of insurance include the following: Sumitomo Marine & Fire Ins.

Co. v. Southern Guaranty Ins. Co. of Georgia, 337 F.Supp.2d 1339 (N.D.Ga. 2004); Martin v. Wetzel Co. Bd. of Education, 569 S.E.2d 462 (W.Va. 2002); Sevenson Environmental Services, Inc. v. Sirius American Ins. Co., 902 N.Y.S.2d 279 (App.Div. 2010); Niagra Mohawk Power Corp. v. Skibeck Pipeline Co., 705 N.Y.S.2d 459 (App.Div. 2000); American Casualty Co. of Reading v. Krieger, 181 F.3d 1113 (9th Cir. 1999).

The only Pennsylvania case which seems to have considered this question is the trial-level decision of the Court of Common Pleas of Philadelphia in The Bedwell Co. v. D. Allen Bros., Inc., 2006 WL 3692592, 2006 Phila. Ct. Com. Pl. LEXIS 459 (December 6, 2006) in which the court appears to have rejected the notion that additional insured status can be premised solely upon a certificate of insurance, though it declined to enter summary judgment for the insurer on that issue due to outstanding issues of material fact as to whether the party in question qualified as an additional insured under the terms of a "blanket" additional insured endorsement which it considered ambiguous under the circumstances of the case.

While not controlling precedent, the Bedwell decision would seem to dismiss the notion of basing a claim of insured status upon an insurance certificate which contains language clearly indicating that it confers no rights upon the certificate holder and that the terms of the insurance policy itself are controlling:

> Allen Brothers purchased a primary insurance policy from Harleysville for claims made during the scope of the project. The certificate of insurance identifies the following as additional insureds under the policy: ...SCHOOL DISTRICT OF PHILADELPHIA ... ITS CONSULTANTS AND ARCHITECTS ARE INCLUDED AS ADDITIONAL INSUREDS. Since Synterra/Turner is the School District of Philadelphia's consultant, Synterra/Turner argues that it is an additional insured by virtue of its identification on the certificate of insurance. **In this instance, the identification of an entity on a certificate of insurance is not evidence that coverage exists for the entity as an additional insured. The specific certificate of insurance issued by Harleysville contains a disclaimer which states "the certificate was issued as a matter of information and confers no rights upon the certificate holder." .... Furthermore, the certificate of insurance states, "it does not amend, extend or alter the coverage afforded by the policy." .... Hence, it is the language of the underlying policy which governs Synterra/Turner's status as an additional insured.**

As noted previously, the results in such cases are unpredictable, however, the Bedwell decision would provide at least some persuasive support for the proposition that additional insured status cannot be predicated solely upon a certificate of insurance

under Pennsylvania law.

COVERAGE INCONSISTENT WITH UNDERLYING CONTRACT REQUIREMENTS

It is not at all unusual for an additional insured endorsement to provide coverage which either exceeds, or fails to provide that specified in the insurance procurement provisions of the policyholder's contract with the additional insured. All sorts of discrepancies might exist, but those most often encountered involve such things as the identities of the additional insureds, the limits of the coverage provided, whether the coverage is primary, excess, or concurrent with that maintained by the additional insured, and the extent to which the additional insured is covered for its own negligence, or for completed operations.

This can either result in the insurer providing more coverage than that which was actually specified in its insured's underlying contract with the additional insured, or in the policy providing less coverage than that specified, which is probably more often the case. Either way, it is important to understand that the insurer's coverage obligations are controlled by the terms of its policy and the additional insured endorsement, and cannot be altered or extended by the terms of its named insured's contract, to which the insurer was not a party. Ersek, *supra;* Transport Indemnity Co. v. Home Indemnity Co., 535 F.2d 232 (3d Cir. 1976); Lafayette College v. Selective Ins. Co., 2007 U.S. Dist. LEXIS 88001 (E.D.Pa. 2007); Forest Oil Corp. v. Strata Energy, 929 F.2d 1039 (5th Cir. 1991).

Both the risk of providing more coverage than that which the named insured was actually obligated to maintain and the insured's potential exposure for obtaining less than the specified coverage can be limited to some extent through the use of policy language which specifically references or incorporates the requirements of the named insured's underlying contract. For example, some endorsements indicate that the coverage provided to additional insureds is excess over any other available insurance *unless* the named insured is obligated to provide such coverage on a primary basis. Another example aimed at avoiding a windfall to the additional insured or its insurance carrier would be endorsement language capping the limit of liability coverage provided to additional insureds to the minimum amounts specified in the underlying contract.

UNEXPECTED EXCESS/UMBRELLA COVERAGE

Can an additional insured successfully argue that it is entitled not only to

coverage under the policyholder's primary liability policy as required by contract, but also under the named insured's umbrella policy even if such coverage was not specified in their agreement?

The answer to that question would seem to be, it depends. There is no Pennsylvania law on this issue and the results in cases decided in other jurisdictions appear to be mixed and highly dependent upon the language of the underlying contract, the primary policy and the umbrella policy involved.

It should at least be recognized, however, that an umbrella policy may also be implicated under such circumstances, particularly where that policy broadly confers insured status upon anyone who qualifies as an insured under the terms of the underlying policy and the policies contain no language confining the types or limits of coverage available to those required by the underlying contract.

That was the result in the New York case of Old Republic Ins. Co. v. Concast, Inc., 588 F.Supp. 616 (S.D.NY 1984) in which the named insured product manufacturer agreed to provide coverage to the product designer by adding it as an additional insured on its primary commercial liability policy. The underlying contract between the two apparently made no mention of the necessity of providing umbrella coverage and was silent as to the amount of coverage required. In the absence of any language regarding this issue in the parties' contract, the primary liability policy, or the umbrella policy, the court held that the additional insured was entitled to coverage up to the limits of *both* policies, noting that the additional insured qualified as an insured under the terms of each policy and rejecting the insurer's contention that the umbrella policy was inapplicable because its insured's underlying contract made no mention of requiring such coverage.

The same result was reached in Valentine v. Aetna Ins. Co., 564 F.2d 292 (9th Cir. 1997), in which the named insured agreed to provide additional insured coverage to another party in an amount "not less than $300,000." The policyholder actually maintained both a primary liability policy with a $1 million limit and an excess policy with an additional limit of $2 million, and the additional insured apparently enjoyed insured status under the terms of both policies. The Court of Appeals held that the underlying contract requirement "set a floor, not a ceiling for coverage" and in the absence of policy language confining the insurer's obligations to those required of its insured in the underlying contract, coupled with umbrella policy language granting insured status to anyone who qualified as an insured under the underlying policy, it was held that the additional insured was entitled to the limits available under both.

V. INDEMNITEE vs. ADDITIONAL INSURED STATUS

Whether it is better to be a contractual indemnitee, or an additional insured will vary with the circumstances of each case and the terms on which coverage is afforded.

One advantage to obtaining additional insured status is the fact that a liability insurer may have an immediate obligation to defend a pending lawsuit based upon the plaintiff's complaint allegations, whereas a claim for indemnification (including a claim for incurred or future defense costs) is ultimately dependent upon the actual facts and does not ripen under Pennsylvania law until the underlying action has either been settled, or tried, with the result that an indemnitee (or more likely, its insurer) may be forced to defend the litigation if its tender is denied, and seek reimbursement for the expenses at a later date. Another potential advantage to obtaining such coverage is the fact that the insurer providing it owes a duty of good faith to additional insureds, providing some possible leverage to a party seeking coverage which is lacking where indemnification agreements are involved. Furthermore, while indemnification agreements are strictly construed against the party seeking protection, the opposite is true when a party seeks coverage as an additional insured because any ambiguities in insurance policies will be construed in favor of the party seeking coverage. Finally, bearing in mind that a large number of indemnification agreements are not properly drafted, or on rare occasions, their terms are actually negotiated to the point that they are insufficient to effectively shift liability to another party for one's own misdeeds, there are times when obtaining coverage as an additional insured is the only effective means of transferring financial responsibility to someone else.

On the other hand, a party seeking coverage as an additional insured may be confronted with limitations upon the scope of the protection afforded which may not exist under a properly drafted indemnification clause, such as a possible lack of coverage for completed operations, or for the tendering party's own negligence. Because it is relatively rare for an additional insured to obtain a copy of the policy before a claim is asserted, those coverage limitations are usually unknown until after a tender has been made and the insurer has either denied it (and offered a reason for its position) or issued a reservation of rights. There may also be issues relating to the priority of coverage between the policy affording additional insured status and the additional insured's own coverage, which would not be a concern with respect to claims falling within the scope of an indemnification agreement.

In short, it is best to obtain both forms of protection and for tenders to be made to the indemnitor and its liability insurer on both grounds whenever possible.