INDEMNIFICATION AGREEMENTS AND ADDITIONAL INSUREDS UNDER PENNSYLVANIA LAW

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Construction, maintenance and service contracts, property and equipment leases, franchise and distribution agreements, and many other contracts often contain risk shifting provisions which are intended to transfer liability, the obligation to defend potential claims, or the responsibility of maintaining property or liability insurance coverage, usually from the shoulders of a party having greater bargaining power or less control over the risks involved (such as an owner, landlord, construction manager or general contractor) to those occupying lower rungs on the ladder or a greater level of involvement with the potential risks involved (such as tenants 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 its 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 a more limited extent, where issues have not been considered by courts in Pennsylvania, to address the law in other jurisdictions.

I.INDEMNIFICATION AGREEMENTS

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, which is significant insofar as legal fees would not be recoverable on an indemnification claim at common law.

There is Pennsylvania authority indicating that such agreements, although typically in writing, may be oral, need not be signed if in writing and can even be found to exist based 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.

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, or with respect to indemnification agreements calling for a party to be indemnified for its own acts of negligence.

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).

Perhaps the most frequently encountered issue when dealing with indemnification agreements is that of whether the language is legally sufficient to shift liability to the indemnitor when it appears, or is claimed that the party seeking indemnification is guilty of some degree of fault for the underlying incident. 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 legally insufficient to shift liability to the indemnitor for the indemnitee's negligent acts 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).

INSUFFICIENT LANGUAGE

Thus, 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 determined to be 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***."

There have been a number of 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 agreement contained inconsistent provisions as well. For example, the Supreme Court of Pennsylvania recently 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 insufficient to unambiguously show an intent on the part of a subcontractor to indemnify other parties for their own negligent acts. 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 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 in connection with its own negligence, but merely meant that the contractor was responsible only for its own proportionate fault (a proposition for which the contract was wholly unnecessary). The agreement required that the indemnitee be indemnified only to the extent of the indemnitor's proportionate share of negligence. 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, an agreement to indemnify a party as to all claims ***except*** those in which the indemnitee is "***solely negligent***" is sufficiently specific to call for indemnification with respect to all claims of joint negligence on the part of a fellow defendant, other than those in which the indemnitee is determined to have been 100% liable. 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***."

A clause was deemed sufficient to shift liability in Szymanski-Gallager v. Chestnut Realty, 597 A.2d 1225 (Pa.Super.1991) when a 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***" on account of 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).

"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 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 recently 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

Recent Pennsylvania case law indicates that, regardless of whether an indemnification clause contains language sufficient to require one party to indemnify the other for the latter's own negligent acts, 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 has ultimately been determined to have been free of fault. In Mace v. Atlantic Refining & Marketing Corp., 785 A.2d 491 (Pa. 2001), it was held by a majority of the Supreme Court that the "Perry-Ruzzi" rule is simply inapplicable 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 was 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 ACT 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, this particular 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. 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," consists of a listing of several 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 generally followed by a broad catch-all category of insured contracts described in some policies as that part of "*any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party*." Sometimes that broad category only appears in the policy where an insured has purchased optional "broad form" contractual liability coverage, but it also is present in many contemporary standard CGL coverage forms. This is why many contracts specify that the party providing indemnification maintain "broad form contractual liability coverage."

The upshot of this is that an insured will usually be covered in connection with claims seeking contractual indemnification, though this will 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 direct legal standing to 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

It is generally possible to deny defense tenders regardless of the sufficiency of the contract language at issue simply on the basis that they are premature in light of the conditional nature of the indemnitor's obligations until issues relating to liability and damages have been determined. *See, e.g.*, McClure v. Deerland Corp., 401 Pa.Super. 226, 585 A.2d 19 (1991); Carson/DePaul/Ramos v. Richared Goettle, Inc., 2006 Phila. Ct. Com. Pl. LEXIS 278 (C.P. Phila. 2006), (recognizing that this may render an indemnitor's defense obligation "worthless" in the sense that, once liability has been established, there will be no further need for a defense, though the indemnitor will be obligated to reimburse the indemnitee's defense costs). For that reason, coupled with the fact that many claims are settled by multiple insurers without ever fully addressing issues of indemnification or additional insured status (not to mention the fact that a liability insurer cannot be sued for bad faith by an indemnitee) it might be tempting to routinely deny all defense tenders under indemnification agreements.

As will be discussed elsewhere, this is significantly different from the situation in which an insurer is faced with a defense tender on the part of an additional insured, to which it owes a duty of good faith and as to which its defense obligations may be triggered immediately by the suit allegations.

However, where the liability situation is clear, it is not always advisable to deny an indemnitee's defense tender since the practical consequences of doing so, rather than undertaking the indemnitee's defense 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.

II. 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).

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 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 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 joined with other claims, such as cross-claims for contribution of 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.

III. 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).

While Pennsylvania law addressing the terms and scope of coverage afforded to additional insureds remains somewhat limited, several fundamental principles have been established.

SCOPE OF COVERAGE PROVIDED

First, while there is considerable folklore on the subject, such as the notion 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 language of most additional insured endorsements. 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 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 and amount of coverage provided, its duration, any additional exclusions specifically applicable to the additional insured, and/or provisions addressing the subject of how the coverage provided relates to other insurance coverage 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 remains the Commonwealth Court's decision 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 indicating that coverage is provided only with respect to liability **"*arising out of*"** the named insured's work or operations requires only **"*but for*"** , not proximate 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.

The Ersek case provides a good illustration of the approach which has been taken in Pennsylvania (which appears to be consistently taken by other courts as well) in broadly interpreting typical 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, that language was construed as requiring only "*but for*" as opposed to "*proximate"* causation between the named insured's work or operations and the injury involved and the court held that the language did not require a showing that the policyholder was itself guilty of negligence.

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 named insured 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 adopting 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), (holding that 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***" did not mean that the named insured had to be guilty of any negligence, or 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), (holding that 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 likewise 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 the named insured's operation of the festival.

One Pennsylvania case in which it was held that no coverage need be afforded to an additional insured is the unpublished trial level federal court decision in Time Warner Entertainment v. Travelers Casualty & Surety Co., 1998 U.S. Dist. LEXIS 19460 (E.D.Pa. 1998), which at least recognized that there is a limit to 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.

A more recent example of a case 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.'"

While not addressed in any Pennsylvania cases, there are certainly variations in the language of additional insured endorsements which are likely to be effective in limiting the scope of the coverage provided to additional insureds to situations in which the

additional insured is simply vicariously liable for the negligence of the named insured, rather than situations in which the additional insured is independently negligent. Some endorsements take the direct approach of providing that additional insureds are afforded coverage only with respect to claims of vicarious liability arising from the work or operations of the named insured.

One variation offered by ISO in reaction to case law interpreting prior forms as providing coverage with respect to an additional insured's sole negligence has been endorsement language granting 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 the performance of its operations for the additional insured. In some forms, that language is followed by an exclusion with respect to claims arising from the sole negligence of the additional insured. That language should certainly serve to eliminate coverage for additional insureds in connection with claims as to which they are solely liable, but was not intended and does not appear to eliminate coverage for all negligence on the part of additional insureds, who 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 insurers' defense obligations in most cases.

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 notion that an insurer must defend an entire suit when any single claim is potentially 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) it was held that the subcontractor's insurer still 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).

The simple fact of the matter is that the courts have essentially invited insurers to change their policy language if it is not their intent to afford coverage with respect to the negligent acts of additional insureds or to limit the coverage to claims of vicarious liability and that, for the most part, this has not occurred to any great extent.

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. For example, some endorsements contain 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 unambiguously 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 since the phrase "*the insured*" would be viewed as referring only to the insured seeking coverage. 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 one exception, 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*."

Accordingly, the PMA decision has been roundly criticized in subsequent cases, but with the exception of a single decision to the contrary from our Superior Court in Luko v. Lloyd's London, 393 Pa.Super. 165, 573 A.2d 1139 (1990), *appeal denied*, 584 A.2d 319 (Pa. 1990), in which that court tried unconvincingly to "distinguish" PMA, our courts have thus far considered themselves "constrained to adhere" to the Supreme Court's decision in PMA as binding precedent, upholding denials of coverage to additional insureds in cases involving injuries suffered by a named insured's employees. Roosevelt's, Inc. v. Zurich American Ins. Co., 2005 Phila. Ct. Com. Pl. LEXIS 226 (C.P. Phila. 2005); Brown & Root Braun, Inc. v. Bogan, Inc., 2002 U.S.App. LEXIS 27347 (3d Cir. 2002); North Wales Water Authority v. Aetna Life and Casualty, 1996 U.S. Dist. LEXIS 15997 (E.D.Pa. 1996); Northbrook Ins. Co. v. Kuljian Corp., 690 F.2d 368 (3d Cir. 1982).

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 language referring to a written agreement means precisely 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 immediate defense allegations based upon the suit allegations.

PRIORITY OF COVERAGE

While many claims professionals and attorneys often seem to assume that any coverage afforded to an additional insured is automatically primary to that which might be available from their own policies and make their tenders accordingly, demanding that the carrier providing such coverage assume full and primary responsibility its additional insured's defense, 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 concurrent basis.

This is largely an issue of competing policy draftsmanship, and while this may not be a particularly healthy approach from an industry perspective and may subject policyholders to potential litigation in those cases in which they have agreed to provide coverage to additional insureds on a primary basis, some insurers might be tempted to consider 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.

In many cases, this issue is not directly addressed in the additional insured endorsement itself (leaving the parties to resort to the "Other Insurance" clause of the CGL Coverage Form) or in the additional insured's own policy. While this question as to the priority of coverage is sometimes addressed in the underlying contract between the policyholder and the additional insured, any language in the underlying contract as to whose policy is to apply on a primary basis should be considered irrelevant, unless that agreement is expressly incorporated into the additional insured endorsement itself. In that regard, it has generally been held that 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 the past decade for the additional insured's own CGL policy to contain in its "Other Insurance" clause (or by endorsement) a provision 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.

At the same time, however, some additional insured endorsements themselves contain competing excess clauses, indicating, for example, that the coverage afforded to the additional insured is excess to any other insurance coverage available to that party. Some endorsements provide some further measure of protection to their policyholders from breach of insurance procurement contract claims by stating that the coverage afforded to additional insureds is excess *unless* the named insured's underlying contract expressly requires that its coverage be primary.

What would likely occur in a case involving competing and mutually irreconcilable excess clauses between the additional insured's own policy and that appearing in any 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 would be disregarded and the two policies would be deemed to apply on a joint and concurrent basis, consistent with the approach 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 not uncommon for a policyholder to fail to satisfy its contractual obligation to add another person or entity as an additional insured under its policy, giving rise to an uninsured breach of contract claim as previously discussed, particularly where the policy does not contain a "blanket" additional insured endorsement automatically granting insured status to other parties where required by a written contract.

Nor is it unheard of for the policyholder to take the appropriate steps to add someone as an additional insured on its policy and to obtain a certificate of insurance from its agent or broker to that effect, only to learn later that the policy was not, in fact, endorsed by the insurer to reflect that change. Should it turn out that the agent issued such a certificate without the insurer's knowledge or authority, or that the company simply failed to issue an endorsement to the policy consistent with the certificate, an insurer which denies coverage may be faced with a claim of promissory estoppel premised upon the insurance certificate and allegations that the insurer is bound by the agent's issuance of the certificate with its actual or apparent authority.

Although there appears to be no controlling Pennsylvania law on this question to date, some courts in other states have held that an insurer is estopped from denying coverage to a party claiming status as an additional insured based upon an agent's issuance of a certificate of insurance representing that such coverage was provided. Others have rejected such claims as a matter of law, holding that such claims cannot be based upon certificates of insurance, regardless of whether the issuing agent had actual or apparent authority to bind the carrier, because the certificates contain language which would seem to prevent anyone from reasonably relying upon them.

This subject is addressed (from the perspective of an additional insured or perhaps a policyholder concerned with a potential breach of contract claim) in a publication from the International Risk Management Institute entitled, "The Additional Insured Book", 2d ed., 1994, in which it is aptly 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 universal acceptance in the courts by any means, but its observation that the outcome in such cases is unpredictable appears to be accurate.

The lack of consistency in the courts' treatment of this issue is illustrated by two seemingly opposing lines of legal authority in New York. One line of cases has held that an insurer's obligations are determined solely by the terms of its policy and that certificates purportedly granting additional insured status to parties who do not enjoy that status under the insurance contract itself cannot bind the insurer as a matter of law. *See, e.g.,* 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). However, another line of New York decisions has reached the opposite conclusion, holding that the issuance of a certificate indicating that the certificate holder is an additional insured is binding on the insurer, at least where the agent is acting under an agency agreement with the insurer, or with the insurer's "apparent authority". *See,* Bucon v. PMA Ins. Co., 547 N.Y.S.2d 925 (App.Div. 1989); Niagra Mohawk Power Corp. v. Skibeck Pipeline Co., 705 N.Y.S.2d 459 (App.Div. 2000); Lenox Realty v. Excelsior Ins. Co., 679 N.Y.S.2d 749 (App.Div. 1998), appeal denied, 93 N.Y.2d 807 (1999).

Those jurisdictions which have adopted the view that the issuance of a certificate of insurance will not support a claim of additional insured status under an estoppel theory have based their decisions in large measure upon the numerous disclaimers which appear on the face of the certificates themselves, seemingly precluding any claim of reasonable reliance on the part of the certificate holder. For example, the commonly used Acord

25 certificate contains language on the front to the effect that the certificate is issued as a matter of information only, does not amend or extend the coverage provided by the listed policies, and confers no rights upon the certificate holder, while the reverse side of that form contains additional language indicating that, if the certificate holder is an additional insured, "the policy(ies) must be endorsed," and stating that the certificate "does not confer rights to the certificate holder in lieu of such endorsement(s)." In addition to the New York authorities cited above, those cases holding that additional insured status cannot be created by estoppel premised upon a certificate of insurance include American Country Ins. Co. v. Kraemer Bros., 699 N.E.2d 1056 (Ill.App. 1998); Modern Builders, Inc. v. Alden-Conger Public Schl. 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 Cas. Co., 2 P.3d 1047 (Wyo. 2000); Bituminous Cas. Corp. v. Aetna Life and Cas. Co., 1998 U.S. Dist. LEXIS 23161 (S.D.W.Va. 1998); Alabama Elec. Coop, Inc. v. Bailey's Constr. Co., 950 So.2d 280 (Ala. 2006).

On the other hand, several courts have held otherwise. In addition to the New York cases cited previously, the cases permitting estoppel claims to be maintained on the basis of insurance certificates include Sumitomo Marine & Fire Ins. Co. v. Southern Guaranty Ins. Co. of Ga., 337 F.Supp.2d 1339 (N.D.Ga. 2004) and Marlin v. Wetzel Co. Bd. of Ed., 569 S.E.2d 462 (W.Va. 2002).

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 Phila. Ct. Com. Pl. LEXIS 459 (December 6, 2006) in which the court *seems* 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. Regarding the certificate issue, however, the decision would appear to dismiss the idea of basing a claim of insured status upon an insurance certificate which contained language clearly indicating that the terms of the insurance policy were 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 support for the proposition that additional insured status cannot be predicated solely upon a certificate of insurance under Pennsylvania law.

COVERAGE EXCEEDING UNDERLYING CONTRACT REQUIREMENTS

What if the policyholder enters into a contract requiring that it maintain liability coverage of $100,000 on behalf of an additional insured, but its policy instead has a limit of $1 million?

Unless an additional insured endorsement contains language limiting the amount of coverage provided to that specified or required under the terms of the named insured's underlying contract, a liability insurer with higher policy limits may find itself providing coverage to additional insureds to the full extent of its policy limits, even if its policyholder agreed to provide coverage in a lesser amount, creating an unexpected windfall to the additional insured.

While there is no controlling Pennsylvania precedent on this issue, that appears to be the result which has been reached in other jurisdictions and that result is entirely consistent with Pennsylvania law to the effect that an insurer's coverage obligations to additional insureds are determined from the terms of its policy and endorsement, rather than by reference to the terms of its named insured's underlying contract. *See, e.g.*, Forest Oil Corp. v. Strata Energy, 929 F.2d 1039 (5th Cir. 1991), (additional insured was entitled to full liability limit of $1 million when underlying contract required named insured to provide "limits of not less than $100,000" and additional insured endorsement contained no language limiting the amount of coverage provided to that required in the

underlying contract).

UNEXPECTED EXCESS/UMBRELLA COVERAGE

Can an additional insured reasonably argue that it is entitled not only to coverage under the policyholder's primary commercial liability policy as specified in their underlying contract, but also under the named insured's umbrella policy if no provision for such coverage was made 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 confers insured status upon anyone who qualifies as an insured under the terms of the primary, underlying policy and contains no language confining the limits available to the additional insured to those required by its contract.

Such a result would be consistent with the New York decision in 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, but the 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, holding that the additional insured qualified as an insured under the terms of both policies and rejecting the insurer's contention that the umbrella policy was inapplicable because its insured's underlying contract made no mention of requiring excess coverage.

The same result was reached in the case of 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 insured under the underlying policy, the court appears to have held that the additional insured was entitled to the limits available under both policies.

Additional insureds have enjoyed less success in their efforts to obtain unbargained for coverage under excess or umbrella policies where they have not automatically qualified as insureds under the policy language involved and, as noted previously, this is one of those issues which requires close examination of the policy language and to some extent the underlying contract language as well.