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INDEMNIFICATION AGREEMENTS AND ADDITIONAL INSUREDS UNDER PENNSYLVANIA LAW

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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 downstream from parties having greater bargaining power, or less control over the risks involved (such as owners, landlords, construction managers, or general contractors) to those having less bargaining power, or 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.

From the vantage point of a party at the top of the food chain, those risk shifting provisions will often enable it to force those below them, or their insurers, to shoulder the burdens associated with work related losses, and to those beneath them, such provisions are generally accepted with less than a full understanding of their significance, and simply as the price of doing business. How such provisions are viewed by insurers depends upon whom they happen to insure and what side they happen to find themselves on in any given case, with the result that some of the worst decisions from an insurance coverage perspective have actually been created through litigation by one insurer against another. From a business perspective, insurers have little choice other than to offer coverage options which will enable their insureds to comply with their contractual obligations, but they still very often seem surprised to learn that they are paying to defend and indemnify parties from whom they received no premiums, often in cases in which their policyholders had little or no responsibility or involvement.

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 with respect to each.

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 existing 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.Cmwlt. 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.Cmwlt. 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.Cmwlt. 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).

In keeping with the rule of strict construction, it has been held that where a contract contains multiple conflicting indemnification provisions (which happens more often than you might imagine) the court will apply the narrower, or more restrictive of the two. Burlington Coat Factory of Pennsylvania v. Grace Construction Mgt. Co., 126 A.3d 1010 (Pa.Super. 2015); Chester Upland School Dist. v. Edward Maloney, Inc., 901 A.2d 1055 (Pa.Super. 2006).

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 particularly hazardous activities, or misconduct rising beyond the level of mere 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 be 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, in addition to taking the rule of strict construction into account, care must also be taken in determining whether the factual basis, or the general nature of a particular claim or injury falls within the scope of a particular indemnification agreement, most of which somehow require a connection between the performance of the indemnitor’s contracted work and the injury or damage involved. 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.Cmwlt. 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.Cmwlt. 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).

CONTRACTUAL LIABILITIES

As a general rule, an indemnification agreement will not be construed as an assumption of liability for another party’s contractual undertakings, such as the indemnitee’s own agreement to defend and indemnify other parties, unless that intention is stated expressly, unequivocally and beyond doubt. Jacobs Construction v.

NPS Energy Services, 264 F.3d 365 (3d Cir. 2001); Bernotas v. SuperFresh Food Markets, 581 Pa. 12, 863 A.2d 478 (2004). Because indemnification agreements are strictly construed, general references to assuming liability with respect to "any and all claims," or "any and all liabilities" are considered insufficient.

Accordingly, if Company A agreed to indemnify only Company B, and Company B agreed to indemnify Company C, Company A would typically have no obligation to indemnify Company C merely by virtue of its agreement to indemnify Company B.

"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).

CO - INDEMNITORS

While there is no known Pennsylvania law on the subject, several courts in other states have addressed the subject of what happens when several parties have independently agreed to indemnify the same party, and the accepted view appears to be that, where multiple agreements to indemnify the same party are involved, that obligation is one that must be shared by all of the indemnitors on an equal basis. See,

e.g., Karnatz v. Murphy Pacific Corp., 503 P.2d 1145 (Wash.App. 1972), (where two parties each agreed to indemnify a third and neither contract contained any provision for the apportionment of liability, neither indemnitor could be said to have a primary obligation, and each should bear one-half of the cost); Eller v. Metro Industrial Contracting, Inc., 683 N.W.2d 242 (Mich.App. 2004), (where two parties each agreed to defend and indemnify the same defendant, the existence of one such agreement did not serve to extinguish the other, and it was held that the cost of indemnifying the defendant was to be shared equally by both indemnitors).

The implications of this rule in the context of a multi-contractor construction site injury case would be that each contractor having a contractual duty to defend and indemnify the same other party, such as an owner or general contractor, would have a right to contribution by equal shares with all other contractors having the same obligation, provided the injury or damage falls within the scope of each of their indemnification agreements.

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 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); Ferraro v. Turner Construction Co., 30 D.&C.5th 423 (C.P. Phila. 2013), (noting that “before there has been actual payment of damages a claim for indemnity is premature.”).

While there has been some contrary Pennsylvania federal court authority suggesting that a claim for defense costs under a contractual indemnification agreement can be pursued while the underlying claim remains pending, and those cases could be troublesome where a suit is pending in federal court, it would not appear to be possible to reconcile those decisions with those of our state courts.

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 actually 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.

PROVING A RIGHT TO INDEMNIFICATION

A party seeking indemnification must prove that the underlying claim fell within the scope of its indemnification agreement, that the underlying claim was valid against it (i.e., that the indemnitee was, in fact, legally liable to the claimant) that its defense costs were reasonable and necessary, and, where the claim was resolved by way of settlement, that the settlement was reasonable. Ferraro v. Turner Construction Co., 30 Pa.D.&C.5th 423 (C.P. Phila. 2005); McClure, *supra*; Martinique Shoes, Inc. v. New York Progressive Wood Heel Co., 217 A.2d 781 (Pa.Super. 1966). While expert testimony may be admissible on the issues of whether the party seeking indemnification was liable to the claimant and whether a settlement was reasonable, an indemnitee must also produce non-hearsay evidence regarding the facts establishing liability. Ferraro; Ridgeway Court, Inc. v. Canavan Insurance Associates, 501 A.2d 684 (Pa.Super. 1985).

NO LEGAL FEES FOR PURSUIT OF INDEMNIFICATION CLAIM

While an indemnitee may be entitled to recover the reasonable and necessary legal fees and costs incurred in defending the underlying claim falling within the scope of its indemnification agreement, it is not entitled to recover the legal fees and costs which incurred in pursuing the indemnification claim itself. Boiler Engineering and Supply Co. v. General Controls, Inc., 443 Pa. 44, 277 A.2d 812 (1971).

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. Liability for breach of an undertaking to obtain insurance is not limited to the amount of the premium that the plaintiff would have had to pay had it purchased the insurance itself (unless the breaching party provides notice of its failure to procure coverage) but extends to the full amount of the damages sustained as a result of the breach. Hagan Lumber Co. v. Duryea School District, 277 Pa. 345, 121 A. 107 (1923). That is true regardless of whether the party for which the insurance was supposed to be obtained had insurance coverage of its own, and that party's insurer can subrogate against the breaching party for its losses. 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 only for the amount which would have been recoverable had the insurance coverage 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 such a 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 that is contractually 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 insurers 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 could potentially be the insured's only source of liability exposure 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 conferring insured status upon designated entities either by name, or general description (e.g., owners, lessees or contractors) 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 or agreement.

SCOPE OF COVERAGE PROVIDED

Although Pennsylvania law concerning the scope of coverage afforded to additional insureds remains somewhat limited, much of it consisting of federal trial court level opinions which might be considered persuasive, but are not controlling precedent, several fundamental principles have been established.

First, while there is still 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 recent years, contained few limitations upon either the scope, or the amount of liability coverage provided to additional

insureds. It would also be fair to say that much of the language which has been added by the industry in an apparent effort to limit the coverage provided has not had the desired effect.

Regardless of the insurer's subjective intentions, those of its policyholder, 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.

One of the leading Pennsylvania cases on the subject of additional insureds remains that of the Commonwealth Court in Township of Springfield v. Ersek, 660 A.2d 672 (Pa.Cmwlt. 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 - See also, Transport Indemnity Co. v. Home Indemnity Co., 535 F.2d 232 (3d Cir. 1976) and Lafayette College v. Selective Ins. Co., 2007 WL 4275678, 2007 U.S. Dist. LEXIS 8801 (E.D.Pa. 2007);**

(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.**

Coverage Linked To Named Insured’s Work Or Operations

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 which links coverage only to those injuries arising from, or caused by the named insured’s work, or operations.

The language at issue in Ersek conferred insured status, **“but only with respect to liability arising out of operations performed by the named insured.”** Far from having a significantly limiting effect as may 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 regarding the scope of coverage provided to additional insureds under similar policy language extending coverage to injuries or damage arising from, resulting from, or caused by the named insured's work, or operations have included :

- 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).

- General Motors Corp. v. Schneider Logistics, 2008 WL 2785861 (E.D.Pa. 2008), (holding that endorsement covering additional insured for liability "**arising out of your operations**" afforded coverage with respect to work related injury suffered by named insured contractor's employee and stating that such language has been "universally interpreted to cover the additional insured for the additional insured's negligence.").

- Mega Constr. Corp. v. Quincy Mut. Fire Ins. Co., 42 F.Supp.3d 645 (E.D.Pa. 2012), (holding that additional insured endorsement stating that coverage was provided for injury "**arising out of your ongoing operations**" afforded coverage to general contractor for job site injuries suffered by named insured subcontractor's employee, rejecting insurer's arguments that endorsement did not cover additional insured for its own independent acts of negligence, or covered additional insured only for vicarious liability premised upon the negligence of the named insured).

- Selective Ins. Co. of South Carolina v. Lower Providence Twp., 2013 WL 3213348 (E.D.Pa. 2013), (holding that endorsement extending coverage to additional insured property owner with respect to injury "**caused, in whole or in part, by**" named insured's

"ongoing operations" applied to bodily injury claim of named insured's employee who was injured while working at the job site, reasoning that all that was required was that the named insured's ongoing operations "play some role" in causing the injury, and rejecting insurer's contention that coverage is afforded only where an injury is proximately caused by the negligence of the named insured.)

The same "but for" causation approach has consistently been followed when interpreting similarly worded additional insured endorsements in other states as well. As in the Ersek case, other courts have consistently held that the presence of a named insured's employee working at a job 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 federal court decision in which it was held that no coverage need be afforded to an additional insured in the face of similar policy language is 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’.”

Coverage Linked To Named Insured’s Acts Or Omissions

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 at least 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, at least in those cases in which the named insured is

included among the original defendants and is claimed to be guilty of negligence.

That being said, the current state of Pennsylvania case law considering such policy language is somewhat conflicting, confused and uncertain.

In one of the earlier decisions to consider such policy language, Maryland Cas. Co. v. Regis Ins. Co., 1997 WL 164268 (E.D.Pa. 1997), it was held that an additional insured endorsement applicable only to liability "***as the result of an alleged act or omission of the Named Insured or its employees***" did not confine the scope of coverage to an additional insured's liability imposed as a direct result of the named insured's negligence. In so holding, the District Court first rejected the insurer's contention that the phrase "as the result of" is narrower than the phrase "arising out of" concluding that both required only "but for" causation between the liability sought to be imposed against the additional insured and the named insured's acts or omissions. Next, it rejected the insurer's argument that the phrase "act or omission" necessarily referred to a *negligent* act or omission. The court then rejected the insurer's position that the language limited coverage to the additional insured's vicarious liability for the negligence of the named insured, reasoning that if the insurer had wanted to accomplish that, it should have said so.

However, the same court more recently held that similar policy language (ISO CG 20 33 07 04) confining coverage to an additional insured's liability for injury "***caused, in whole or in part, by***" the "***acts or omissions***" of the named insured or those acting on its behalf called for a proximate cause standard, requiring a showing that the named insured's acts or omissions were a proximate cause of the injury to trigger coverage. Dale v. Cumberland Mut. Fire Ins. Co., 2010 WL 4909600 (E.D.Pa. 2010). The court then went on to hold that, because the allegations of the complaint that was filed against the additional insured "did not in any way implicate" the named insured, which was not a party to the suit, there were no allegations which would trigger a defense obligation under the terms of the endorsement. Relying upon Pennsylvania's strict "four-corners" rule under which an insurer's defense obligations are governed solely by the factual allegations appearing in the complaint filed against the party seeking coverage, the court also refused to consider the fact that negligence allegations had been made against the named insured in both a separate, but consolidated lawsuit, and in the additional insured's joinder complaint against the named insured.

In a "Non-Precedential Decision" consistent with Dale, the Superior Court of Pennsylvania later addressed the scope of the coverage provided by a similar endorsement in Burchick Constr. Co. v. Harleysville, 2014 WL 10965436 (Pa.Super. 2014), providing in part that an additional insured was "**covered only for such damages which are caused, in whole or in part, by the acts or omissions of the 'Named Insured'**

or those acting on behalf of the ‘Named Insured’.” In the underlying complaint filed against the additional insured by the named insured’s injured employee (in which the named insured was not included as a defendant given its worker’s compensation immunity) there were no allegations of negligence on the part of the named insured. Like the District Court in Dale, the Superior Court held that because there were no allegations of negligence aimed at the named insured, the complaint did not give rise to a duty to defend under the additional insured endorsement based upon the “four corners” rule, refusing to look beyond the complaint allegations despite any resulting inequities.

On the other hand, in another more recent “Non-Precedential Decision”, another panel of the Superior Court did look beyond the complaint allegations under similar circumstances, and improperly considered those appearing in the additional insured’s joinder complaint against the named insured in Peerless Indemnity Co. v. Cincinnati Ins. Co., 2015 WL 7283385 (Pa.Super. 2015). Although the underlying complaint claimed that the additional insured was solely liable for the plaintiff’s injuries, which the court held would not trigger a duty to defend the additional insured either under an endorsement conferring coverage for injury “*caused in whole, or in part*” by the acts or omissions of the named insured or those acting on its behalf, or another granting coverage with respect to liability for injury “*caused by your work*,” the court went on to hold that a defense obligation was triggered by the allegations of the additional insured’s own joinder complaint against the named insured in which the additional insured had itself averred that the named insured was liable for the plaintiff’s injuries.

The situation has been further clouded by the Third Circuit’s more recent published decision in Ramara, Inc. v. Westfield Ins. Co., 2016 WL 624801 (3d Cir. 2016) involving a personal injury suit against a parking garage owner on the part of the employee of a subcontractor who was injured on the premises while performing repairs. The garage owner was to be included as an additional insured under the subcontractor’s liability policy, which contained a blanket endorsement conferring such status only with respect to liability for injury “caused, in whole or in part” by the “acts or omissions” of the named insured or those acting on its behalf.

Relying upon Dale, the insurer in Ramara argued that no coverage is afforded to an additional insured unless it is explicitly alleged that the named insured proximately caused the plaintiff’s injuries, and because there were no such allegations, it had no duty to defend.

The insured took the position that the named insured’s conduct need only have been a “but for” cause of the plaintiff’s injuries rather than a “proximate” cause as argued by the insurer, and that the underlying complaint allegations were sufficient to

trigger a defense obligation under either causation standard.

The Court of Appeals held that the complaint allegations were sufficient to trigger a duty to defend under either a "but for," or a "proximate" cause standard, and that the insured was also correct in its argument that only a "but for" standard applied. In concluding that the complaint allegations were sufficient to trigger a duty to defend even under the more stringent of those standards, despite any direct allegation of negligence on the part of the named insured, the court appears to have equated allegations that the additional insured property owner acted through its "agents, servants and/or employees" with a claim that it acted through its "contractors" or "subcontractors" of which the named insured was one, concluding that those allegations raised at least the potential that the named insured's conduct was cause of the plaintiff's injuries. The court also liberally construed the plaintiff's complaint allegations to the effect that the property owner was negligent in selecting or supervising its contractors or subcontractors as supporting a possible conclusion that the plaintiff's injuries were caused, in whole or in part, by the acts or omissions of the named insured subcontractor.

Although the court paid lip service to the importance of Pennsylvania's "four corners" rule in determining an insurer's duty to defend based solely upon the factual allegations of a plaintiff's complaint, it also suggested that an insurer must also consider the limitations imposed by the workers' compensation statute upon the type of claims which can be brought by injured employees (i.e., they cannot sue their employers for negligence) and take those limitations into account when interpreting the allegations of a complaint for coverage purposes, citing a Montana decision for the proposition that *"an insurer cannot bury its head in the sand and disclaim any knowledge of coverage-triggering facts."* That Montana decision, incidentally, held that an insurer must look beyond the allegations of a complaint which does not state a covered claim on its face in order to consider extrinsic information which might trigger a duty to defend, an approach directly at odds with that taken by the Pennsylvania courts. Revelation Industries, Inc. v. St. Paul Fire & Marine Ins. Co., 206 P.3d 919 (Mont. 2009).

Ramara has since been followed in at least one federal trial level decision, Old Republic Gen. Ins. Co. v. Scottsdale Ins. Co., 2016 WL 1237349 (W.D.Pa. 2016) in which it was held that an insurer had a duty to defend an additional insured under the same policy language despite the absence of any allegations of negligence on the part of the named insured. In that case, the plaintiff was employed by subcontractor D.H. Steel, which was required to include the general contractor, E.E. Austin, under its contract on a construction project. The plaintiff sued only the general contractor for his work related injury, so the complaint did not expressly aver that his subcontractor employer was negligent. Citing Ramara, the court held that the complaint nevertheless triggered

coverage because, in accusing the general contractor of negligently supervising its subcontractors, that allegation would, "by implication" constitute an averment that the named insured employer's negligent acts caused the injury.

While the Ramara decision will be controlling precedent in federal trial courts sitting in Pennsylvania where it will be followed unless or until our Supreme Court holds otherwise, it is obviously not controlling precedent in our state courts for what that is worth.

Coverage Confined To Vicarious Liability

There are many additional variations with regard to the language of additional insured endorsements, and several of those have been interpreted as effectively confining the scope of the coverage provided to claims premised upon the negligent conduct of the named insured, though it cannot necessarily be assumed that they would ultimately be interpreted in that way in Pennsylvania. 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 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); 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).

Coverage Confined To General Supervision

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 has been 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).

Coverage Expressly Excluded For Negligence Of Additional Insured

One additional means by which an insurer might avoid affording coverage with respect to an additional insured's own negligent conduct might be to include an explicit exclusion to that effect, as was illustrated by one of the policy endorsements at issue in Peerless Indemnity Ins. Co. v. Cincinnati Ins. Co., 2015 WL 7283385 (Pa.Super. 2015). That endorsement began with a broad grant of coverage with respect to liability for injury or damage "*caused by 'your work' performed for that additional insured,*" but then went on to expressly exclude coverage under the next paragraph of the endorsement, stating that the insurance "*does not apply*" to injury or damage "**arising out of any act or omission on the part of the additional insured or the additional insured's employees.**" The Superior Court did not appear to have any difficulty invoking that coverage limitation in that "Non-Precedential Decision", holding that the plain language of the endorsement "*excludes from coverage bodily injury caused by the negligence of Wyatt*" [the additional insured] and that, to put it succinctly, "*Wyatt is an additional insured ... only when it is liable for injury caused by Franklin.*"

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 out 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 litigated issue for many years in Pennsylvania was the question of whether an additional insured is entitled to liability coverage with respect to injuries suffered by a named insured’s employees, the question being whether such coverage is barred by the **“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”*** (in contrast to the language ***“any insured”***) is generally viewed as referring only to the specific insured against whom the claim has been made and whose rights under the policy are at issue. 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 a few exceptions, Pennsylvania’s state and federal courts

consistently (and often reluctantly) held otherwise for many years, based upon the Supreme Court's 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 issue has now been laid to rest by the Supreme Court's May, 2015 decision in Mutual Benefit Insurance Co. v. Politsopoulos, 115 A.3d 844 (Pa. 2015) in which it was held that such an exclusion applies only to the party who employed the injured employee.

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 so-called "blanket" additional insured endorsement might automatically confer insured status upon any person or organization for whom the policyholder is performing operations when required by a written contract or agreement.

The U.S. Court of Appeals for the Third Circuit recently considered the meaning of the phrase "written contract or agreement" under Pennsylvania law in Quincy Mut. Fire Ins. Co. v. Imperium Ins. Co., 2016 WL 767177 (3d Cir. 2016) and in doing so, rejected one insurer's contention that the phrase was ambiguous, and should be construed as including oral agreements because the language could reasonably be interpreted as meaning "written contract or *oral* agreement." Citing case law from several other jurisdictions, the Third Circuit held that the term "written" was plainly intended to modify both "contract" *and* "agreement."

In the Indiana case of Liberty Insurance Corp. v. Ferguson Steel Co., 812 N.E.2d 228 (Ind.App. 2004), it was held 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 recognizing that an insurer has a right to protect itself against exposures based upon informal agreements between contractors by requiring that they be in writing.

Along similar lines, another court has held that the appearance of insurance procurement requirements in bid documents (indicating that the named insured contractor was required to name the New York City School Construction Authority as an additional insured) did not constitute a written contract or agreement for purposes of

an additional insured endorsement conferring coverage where the named insured agreed to do so "in writing in a contract or agreement." Illinois National Ins. Co. v. American Alternative Ins. Corp., 872 N.Y.S.2d 26 (N.Y.App. 2009).

More recently, another New York court held that the agreement in writing requirement was not satisfied where the construction contract containing the insurance procurement requirement had not been signed by either party, and the work authorization form had only been signed by one of them at the time of the accident. Cusumano v. Extell Rock, LLC, 927 N.Y.S.2d 627 (N.Y.App. 2011).

However, as is often the case, some courts have not taken such a literal and predictable approach to the issue.

It has been held, for example, that an unsigned purchase order was sufficient to qualify as an agreement "in writing in a contract or agreement" in order to confer insured status upon the party that issued it to the named insured, at least where evidence indicated that the parties intended to be bound by it. LMIII Realty, LLC v. Gemini Ins. Co., 935 N.Y.S.2d 412 (N.Y.App. 2011).

Similarly, in Six Flags, Inc. v. Steadfast Ins. Co., 474 F.Supp.2d 201 (D.Mass. 2007), it was held that the manufacturer of a water ride had "agreed in writing in a contract or agreement" to add the amusement park as an additional insured merely by communicating its acceptance of that responsibility by initialing the terms appearing in a faxed letter from the amusement park which included liability insurance procurement provisions, despite the fact that there was no written agreement between the parties with respect to the work itself, and the insurance provisions were never incorporated within such a contract.

And in Naylor v. Navigators Ins. Co., 2013 WL 990943 (S.D.Calif. 2013) it was held that a contractor qualified as an additional insured under a blanket endorsement conferring such status where "agreed in writing in a contract or agreement" where there was no contract as such, but it was argued that the required agreement existed in the form of a letter and a facsimile reply. The contractor seeking additional insured coverage had sent a letter to its subcontractors, requesting that they forward, among other things, copies of their general liability policies "naming Naylor Construction and 1320 Summit Avenue, LLC as additional insured," as a requirement to being allowed to work on a future project. In response to that letter, the named insured's insurance agent faxed a certificate of insurance and an additional insured endorsement to the contractor. The District Court held that the word "agreement" has a wider meaning than the term "contract," and that such an exchange of correspondence could manifest an agreement to include the contractor as an additional insured, satisfying the written

agreement requirement.

In sum, while the language at issue seems clear enough, and our courts can generally be expected to give effect to all policy terms and to interpret them in accordance with their plain meaning, there is scant Pennsylvania case law on the subject, and the existence of inconsistent case law in several jurisdictions may suggest that the answer is not be as simple as it would seem.

THE EXECUTION REQUIREMENT

Some blanket additional endorsements conferring insured status based upon the existence of a written contract or agreement also contain language indicating that the contract or agreement to add another party as an additional insured must have been "executed" prior to the loss.

That language has also been addressed inconsistently in several states, with some courts holding that the language refers to the signing of the contract or agreement, while others have held that the term "executed" is ambiguous, and can either mean signed (as one might assume) or simply that a contract has been fully performed, or that there has been an offer, an acceptance and payment of some consideration (the essential elements of a contract). See, e.g., Suffolk Construction Co. v. Illinois Union Ins. Co., 951 N.E.2d 944 (Mass. 2011); Evanston Ins. Co. v. Westchester Surplus Lines Ins. Co., 546 F.Supp.2d 1134 (W.D.Wash. 2008).

This is not a requirement under most additional insured endorsements, and it has been held that the question of whether a contract or agreement has been signed does not matter where the endorsement contains nothing more than a requirement that there be an agreement in writing. 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., 634 F.3d 112 (2d Cir. 2011).

THE DIRECT CONTRACTUAL RELATIONSHIP REQUIREMENT

Some additional insured endorsements conferring insured status based upon written contract requirements also contain language indicating that the agreement must be a direct one between the named insured and the party seeking additional insured status. One example of this would be language stating that the definition of "insured" is amended to include any person or organization *"with whom the named insured agrees in a written contract or agreement to provide insurance."* Another variation refers to contracts or agreements *"with such person or organization."*

Read literally, both versions would appear to require that there be a direct

contractual relationship between the party seeking additional insured status and the named insured on the policy, and while there appears to be no current Pennsylvania authority on point, a number of courts have so held. *See, e.g., Westfield Ins. Co. v. FCL Builders*, 948 N.E.2d 115 (Ill.App. 2011), (holding that such language "explicitly and unambiguously requires" a direct written contract or agreement between the named insured and the putative additional insured); *Deutsche Bank Trust Co. Americas v. Royal Surplus Lines Ins. Co.*, 2012 WL 2898478 (Del.Super. 2012), (such language "expressly required a contract directly between the named insured and the additional insured."); *Brooklyn Hospital Center v. OneBeacon Insurance*, 799 N.Y.S.2d 158 (N.Y.App. 2004); *Zoological Society of Buffalo v. Carvedrock, LLC*, 2014 WL 3748545 (W.D.N.Y. 2014); *Venable v. Hilcorp Energy Co.*, 2010 WL 1817757 (E.D.La. 2010).

However, it should be noted that several other courts have rejected that argument and essentially disregarded the policy language in holding that it does not require that there be a direct contractual relationship or agreement between the policyholder and the party seeking coverage. *See, e.g., ProCon, Inc. v. Interstate Fire & Cas. Co.*, 794 F.Supp.2d 242 (D.Me. 2011); *Millis Development Co. v. America First Lloyd's Ins. Co.*, 809 F.Supp.2d 616 (S.D.Tex. 2011); *First Mercury Ins. Co. v. Shawmut Woodworking & Supply Co.*, 48 F.Supp.3d 158 (D.Conn. 2014); *Liberty Mut. Fire Ins. Co. v. Zurich American Ins. Co.*, 2016 WL 452157 (S.D.N.Y. 2016).

The resolution of this issue in Pennsylvania could have a significant impact in any case in which the policyholder has agreed to procure additional insured coverage for parties other than those with which it has contracted directly, a common example being a subcontractor's agreement to insure not only the general contractor with which it has a direct contractual relationship, but also its affiliates or employees, the owner or developer of the property involved, or other parties with which it has no privity of contract. If such policy language is given effect, this would obviously work to the benefit of those insurers seeking to deny coverage to additional insureds, to the detriment of those insurers seeking to shift liability downstream to other carriers, and very likely to the detriment of their policyholders, who may be confronted with claims on the part of the non-contracting parties which they agreed to insure for breach of their insurance procurement obligations.

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 limited 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 INSURED

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 conflicting 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 description, 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.

There is currently no known Pennsylvania appellate court precedent on the subject, and the courts in other jurisdictions are divided, with 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 a smaller number of 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, that the certificate confers no rights upon the certificate holder, and that the certificate does not alter the terms of the 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).

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).

Current Pennsylvania trial court level authority on the subject adheres to the majority view, holding that a claim of additional insured status cannot be premised solely upon a certificate of insurance, a document which contains so many disclaimers that no one could reasonably rely upon it.

One such decision is that 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 rejected the notion that additional insured status can be premised solely upon a certificate of insurance which contained language clearly indicating both that it conferred 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 INSURED. 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.

There have been similar holdings from federal courts in Pennsylvania including NGM Ins. Co. v. Stoltzfus Construction, LLC, 2011 WL 397667 (M.D.Pa. 2011), (noting that certificate of insurance was not proof that party was entitled to additional insured status because it stated that it was issued “as a matter of information only and confers no rights upon the certificate holder”) and Quincy Mut. Fire Ins. Co. v. Imperium Ins. Co., 2016 WL 767177 (E.D.Pa. 2016), (holding that representation of additional insured status in certificate of insurance which stated that it was issued as a matter of information only and that it did not modify the terms of the policy was “without effect”).

COVERAGE INCONSISTENT WITH UNDERLYING CONTRACT REQUIREMENTS

It is not at all unusual for an additional insured endorsement to provide coverage which either exceeds, or perhaps more commonly fails to provide that specified in the insurance procurement provisions of the policyholder’s contract with the additional insured. All sorts of discrepancies might potentially 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 disconnect between the insurance procurement requirements of insureds’ contracts and the terms on which coverage is actually provided to additional insureds can obviously 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, potentially exposing the policyholder to a breach of contract claim.

Either way, it is very important to understand that the insurer’s coverage obligations are controlled by the terms of its insurance contract, and cannot be interpreted, 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 contractually 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. Comcast, 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.

If you have the good fortune to be on the favorable end of such risk shifting provisions, it is important that you recognize the distinctions between them and direct any tenders in writing to the appropriate parties including the other contracting party's liability insurer where additional insured status is involved.

If you find yourself on the wrong end of such provisions, it is critical to examine each exposure separately, to remember that an indemnification claim may be premature, and to bear in mind that there may be a current defense obligation if the complaint filed against the party seeking insured status states a claim potentially falling within the scope of the additional insured endorsement.