

## THE EFFECT OF “ADDITIONAL INSURED” ENDORSEMENTS

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### I. Construction of Additional Insured Endorsement Language

- Typical situations where additional insured issues arise.

Owner requires contractor to obtain insurance naming owner as additional insured.

General contractor requires subcontractor to obtain insurance naming general contractor as additional insured.

Lessor requires lessee to obtain insurance naming lessor as an additional insured.

- Examples of additional insured provisions.

Who is an insured is amended to include as an insured the person or organization shown in the Schedule, **but only with respect to liability arising out of your ongoing operations performed for that insured.**

Who is an insured is amended to include as an insured any person or organization, called an additional insured in this endorsement, whom you are required to add as an additional insured on this policy under a written contract or agreement related to your business. The insurance provided to the additional insured is limited as follows: That person or organization is **only an additional insured with respect to liability arising out of premises you own, rent, lease or occupy, or your work for that additional insured.**

- Typical scenario - subcontractor's employee is injured on the job and sues general contractor. General contractor seeks a defense and coverage under the subcontractor's policy as an additional insured.

Issue - Did the additional insured's (general contractor's) liability arise out of the insured's (subcontractor's) work?

Even if the additional insured (general contractor) is solely at fault?

Alabama courts have not directly addressed this issue. However, Alabama courts

are consistent in interpreting the “arising out of” language broadly in other contexts, using a “but for” analysis. Courts in other jurisdictions have applied a similar analysis in the context of additional insureds. In other words, but for the insured (subcontractor) being on site and completing his work, the subcontractor’s employee would not have been injured. Therefore, the injury and resulting liability arose out of the insured’s (subcontractor’s) work, even if the general contractor was solely at fault.

The following are examples of cases from other jurisdictions that follow this reasoning: See Mid Continent Casualty Co. v. Swift Energy Co., 206 F. 3d 487 (5<sup>th</sup> Cir. 2000) (applying Texas law and holding that “for liability to ‘arise out of operations’ of a named insured (subcontractor) it is not necessary for the named insured’s (subcontractor’s) acts to have ‘caused’ the accident; rather it is sufficient that the named insured’s (subcontractor’s) employee was injured while present at the scene in connection with performing the named insured’s (subcontractor’s) business, even if the cause of the injury was the cause of the negligence of the additional insured (general contractor).”); see also Marathon Ashland Pipe Line, LLC v. Maryland Casualty Co., 243 F. 3d 1232 (10<sup>th</sup> Cir. 2001); Saavedra v. Murphy Oil USA, Inc., 930 F. 2d 1104 (5<sup>th</sup> Cir. 1991); Merchants Insurance Company, Inc. v. U.S. Fidelity and Guaranty Company, 143 F. 3d 5 (1<sup>st</sup> Cir. 1998); McIntosh v. Scottsdale Insurance Company, 992 F. 2d 251 (10<sup>th</sup> Cir. 1993); Container Corporation of America v. Maryland Casualty Company, 707 So. 2d 733 (Fla. 1998); Fireman’s Fund Insurance Company v. Arco, 115 Cal. Rptr. 2d, 31-31 (Cal. App. 5<sup>th</sup> Dist. 2001); Baker v. Sears Roebuck and Company, 753 So. 2d 1011, 1015 (La. App. 2000); Liberty Mutual Insurance Company v. Westfield Insurance Company, 703 N.E. 2d 439 (Ill. App. 1<sup>st</sup> Dist. 1998); McCarthy Brothers Company v. Continental Lloyds, 7 S.W. 3d 725, 730 (Tex. App. 1999); Admiral Insurance Company v. Trident NGL, Inc., 988 S.W. 2d 451 (Tex. App. 1999), Structure Tone v. Component Assembly Systems, 275 A.D. 2d 603, 713 NYS 2d 161 (N.Y. App. Div., 2000); Township of Springfield v. Ersek, 660 A. 2d 672 (Pa. Commw. Ct. 1995).

One Alabama case has addressed the “arising out of” language in the context of an exclusion to an additional insured provision. In Industrial Chemical & Fiberglass Corp. v. Hartford Accident & Indemnity Co., 475 So. 2d 472 (Ala. 1985), a chemical distributor (“Industrial Chemical”) sought coverage as an additional insured under a policy issued to a chemical manufacturer (“Reichhold”) by Hartford Accident & Indemnity Co. (“Hartford”). See Industrial Chemical, 475 So. 2d at 474. Industrial Chemical and Reichhold had been sued by the representatives of workers who were burned to death because of a chemical contamination. Id. The policy issued by Hartford to Reichhold contained an Additional Insured Vendor’s Broad Form Modified Endorsement. Id. at 475. The endorsement designated Industrial Chemical as a vendor and additional insured but contained the following limiting language: “The insurance with respect to the vendor does not apply to . . . bodily injury or property damage **arising out of . . . repair operations . . .** Id. (emphasis added).

The United States District Court for the Northern District of Alabama certified the

following two questions to the Alabama Supreme Court:

1. The meaning of the term 'arising out of' as that term is used in paragraph 1(B) of the Additional Insured Vendor's Broad Form Modified endorsement to the Hartford Policy.
2. Whether, in order to establish the availability of the exclusion set forth in paragraph 1(B)3 of the Additional Insured Vendor's Broad Form Modified endorsement to the Hartford Policy for 'bodily injury . . . arising out of . . . repair operations,' it is necessary to show only that the person sustaining bodily injury was engaged in repair operations or whether it is necessary to show that repair operations were the cause of such bodily injury.

Id. at 476.

Hartford argued that the exclusion to the Additional Insured endorsement precluded coverage because the injuries arose out of repair operations. Id. at 475. Industrial Chemical argued that the "arising out of repair operations" phrase should be interpreted to require a showing that the repair operations caused the bodily injury. Id. at 476. The Alabama Supreme Court, on its own initiative, questioned whether repair operations had actually even been performed. Id. Nevertheless, the Court held as follows with regard to whether the injuries arose out of repair operations:

If we assume that facts are produced which bring the exclusion into operation, that is, facts showing a repair operation performed upon the product itself, then we would hold that in order to exclude coverage, Hartford **must prove that the repair operation was the cause of the bodily injury** suffered by the employees.

Id. at 477 (emphasis added).

## II. Effect of Other Insurance Clauses

- Most often, the additional insured (general contractor) has its own liability insurance.
- Some additional insured provisions provide that the insurance is excess over any other insurance available to the additional insured unless a contract specifically requires that the insurance be primary.
- If the contract between the parties requiring the insurance is silent as to whether it shall be primary, then the policy terms control.

- If the additional insured provision provides that it shall be excess and the additional insured's own liability coverage provides that it shall be excess, then those policy terms are deemed "mutually repugnant" and liability must be prorated between those two policies in proportion to each policy's share of the total applicable coverage. See Horace Mann Insurance Company vs. United International Insurance Company, 762 F. Supp. 1470 (M.D. Ala. 1990), aff'd without opinion at 932 F. 2d 1443 (11<sup>th</sup> Cir 1991) (citing State Farm Mutual Auto Ins. Co. v. General Mutual Insurance Co., 210 So. 2d 688 (Alabama 1968)).

### III. What about the Indemnity Agreement?

Most contracts requiring a subcontractor to maintain insurance also require the subcontractor to indemnify and hold harmless the general contractor, sometimes even for the general contractor's sole negligence. Alabama law allows one to contract for indemnity for its own negligence, if expressed in clear and unequivocal language. See Brown Mechanical Contractors, Inc. v. Centennial Insurance Company, 431 So. 2d 932, 945 (Ala. 1983).

There is an argument that the subcontractor's insurer, if it provides coverage for the subcontractor's indemnity obligations, is responsible for the entire loss, and the general contractor's own insurance coverage is not implicated, or at least is excess to the indemnitor's policy. Courts in other jurisdictions have held that where a subcontractor/indemnitor has assumed an indemnity obligation, its insurance is primary, even though the general contractor's/indemnitee's policy would otherwise be primary or share pro rata with the subcontractor's policy. See J.Walters Constr., Inc. v. Gilman Paper Co., 620 So 2d 219 (Fla. App. 1993); American Indemnity Lloyds v. Travler's Property and Casualty Ins., 335 F. 3d 429 (5<sup>th</sup> Cir. 2003) (applying Texas law); Continental Casualty Co. v. Auto Owner's Ins. Co., 238 F. 3d 941 (8<sup>th</sup> Cir. 2000) (applying Minnesota law); Wal Mart Stores, Inc. v. RLI Ins. Co., 292 F. 3d 583 (8<sup>th</sup> Cir. 2002) (applying Arkansas law); Chubb Ins. Co. v. Mid-Continent Cas. Co. of N.Y., 982 F. Supp. 435 (S.D. Miss. 1997); Aetna Ins. Co. v. Fidelity and Casualty Co. of N.Y., 483 F 2d 471 (5<sup>th</sup> Cir. 1973); Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3<sup>rd</sup> 622, 532 P. 2d 97, 119 Cal. Rptr. 449 (Cal. 1975).

However, some courts do not agree with this line of reasoning. See Reliance National Indemnity Company v. General Star Indemnity Company, 72 Cal. App. 4<sup>th</sup> 1063 (Cal. App. 1999) (refusing to establish a general rule that a contractual indemnification agreement between and insured and a third party takes precedence over well-established general rules of primary and excess coverage in an action between insurers); Sun Co., Inc. v. Brown & Root Braun, Inc., 2001 U.S. Dist. LEXIS 9 (E.D. Pa. Jan. 4, 2001) (holding that "a contract between an insured and the additional insured, where the insurance company is not a party, cannot expand the duties of the insurance company").

### IV. The New Additional Insured Endorsement

ISO issued a new form in 2000 titled "Blanket Additional Insured-Construction

Contracts-Vicarious Liability.” This endorsement purports to preclude coverage for liability that is based upon the additional insured’s actions. Specifically, the endorsement has the following limitation:

This insurance does not apply to any “bodily injury” or “property damage” resulting from any act or omission, or willful misconduct of the additional insured shown in the Schedule, whether the sole or a contributing cause of the loss. The coverage afforded to the additional insured is limited solely to the additional insured’s “vicarious liability” that is a specific and direct result of your conduct.

“Vicarious liability” as used in this endorsement means liability that is imposed on the additional insured solely by virtue of its relationship with you, and not due to any act or omission of the additional insured.

Thus, this new endorsement seeks to provide coverage to an additional insured only when the additional insured’s liability is based on injury or damage that is caused by the named insured. This language is much more narrow than the previous additional insured’s endorsements. The Courts have not yet addressed or interpreted this new and more limited additional insured endorsement.