RISK ALLOCATION IN THE AIA GENERAL CONDITIONS

Examination of the A201 in Light of Texas Law

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Risk Allocation in the AIA A201 General Conditions
An examination of the A201 in light of Texas law
By William H. Locke, Jr.

CHAPTER 1. INTRODUCTION.

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is allocated in a contract are by the use of representations and warranties

This article examines the following risk allocation provisions in the AIA A201: Chapter 2 - ¶ 3.31 Site Safety Responsibility; Chapter 3 - ¶Claims for Concealed or Unknown Conditions, Chapter 4 - ¶¶ 3.2.1 - 3.2.3 Contractor's Review of Design Documents, Chapter 5 - ¶ 4.3.10 Waivers of Consequential Damages, and Chapters 6 and 7 covering Extraordinary Risks and Risk Shifting Provisions ¶3.18 Indemnity and ¶11.4 Insurance. Chapter 6 includes an extensive explanation of the AIA bodily injury and property damage risk allocation system, the forms developed by Insurance Services Office, Inc. ("**ISO**") for use by its members to address these risks, including commercial general liability ("**CGL**") insurance, workers compensation insurance, and business auto insurance, additional insured endorsements, and builders risk insurance. Chapter 7 explains the special aspects of Texas law that make certain aspects of the AIA risk allocation by indemnity and waiver provisions unenforceable in Texas.

CHAPTER 2. SITE SAFETY.

The following provisions are from the current edition of the AIA General Conditions (1997 Edition) for use with the AIA A101-1997 Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM and the AIA A111-1997 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the COST OF THE WORK PLUS A FEE with a negotiate Guaranteed Maximum Price. On the left hand side are the AIA contract risk allocation provisions. On the right hand side is the Commentary explaining the risk allocation.

AIA A201 - General Conditions of the Contract for Construction

SITE SAFETY	COMMENTARY
3.3.1 SITE SAFETY. **3.3.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. *The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.* If the Contract Documents give specific instructions concerning means ... the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means....If the Contractor determines that such means ... may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means ... without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage. [Emphasis added.]	**3.3.1** places control over all construction "means, methods, techniques, sequences and procedures" on the contractor and, accordingly, sole responsibility for job site safety. In addition to making sure all Work is performed safely, the contractor is allocated the responsibility for coordinating all portions of the Work in such a way as to allow the Work to be safely performed. However, the 1997 revised A201 to permit the owner or architect to give instructions to the contractor on how the Work is to be performed. The 1997 revision to the AIA A201, while expressly shifting to the owner liability for contractually-required instructions, it (1) Places an affirmative obligation on the contractor to (1) evaluate the owner/architect directives for safety concerns; (2) notify the owner and architect of any unsafe means, methods, and techniques so mandated; and (3) develop safe methods, means, and techniques, or suggest changes to the specified instructions to make them safe. (2) Allocates to the contractor liability for the safe performance of the mandated work, if the contractor proceeds according to the contractual instructions without proper objection.

If the contractor is instructed to proceed with the required means, methods, techniques, sequences, or procedures "without acceptance of changes proposed by the contractor, the contractor must do so, but the liability for any resulting loss or damage becomes the sole responsibility of the owner.

Contractor Objections.

This provision in the A201 shifts some of the owner's and architect's liability for third-party claims to the contractor. This provision may subject the contractor's employees to increase risk of injury. Delays may arise as the contractor is forced to wait for clarifying instructions. Contractors may as a result argue for the return of the provision to the pre-1997 state, where liability is allocated to a party to the extent that the party is responsible for the construction methods, means, and techniques.

CHAPTER 3. DIFFERING SITE CONDITIONS.

"**Differing site conditions**" are any on-site subsurface or concealed physical condition that is substantially different from what the contractor reasonably expected and that increases the time and/or money, required to complete the Work.

AIA A201 - General Conditions of the Contract for Construction

DIFFERING SITE CONDITIONS	COMMENTARY
4.3.4 CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.	The A201 provides that the party detecting a differing site condition must promptly notify the other party of this finding before the conditions are disturbed, and no later than 21 days after first observing the condition. The architect is responsible for investigating the situation and determining whether the contractor is entitled to an equitable adjustment of time or money. Such conditions are referred to as "**Type I conditions**" (site conditions are "materially different" from what is indicated in the contract) and "**Type II conditions**" (site conditions are materially different from conditions ordinarily recognized as inherent to the Work called for by the contract). The 21-day period is to allow the owner the opportunity to investigate the situation before the changed condition is disturbed and before additional work is performed. If contractor intends to make a claim for price or time adjustment due to differing site conditions, it is required to give a claims notice *before proceeding to execute the work*, except in the case of an emergency affecting the safety of persons or property. If either the owner or contractor is dissatisfied with the architect's determination of the differing site conditions claim, the A201 provides that the dissatisfied party is required to file its opposition within 21 days of the architect's findings. In the absence of an **4.3.4** type provision, Texas common law would permit a contractor to adjust the price or time only if it could prove owner misrepresentation, deceit, or breach of warranty with respect to site conditions. A **4.3.4** type provision allows the contractor to price the project based on normal conditions without an allowance (a "risk premium") for differing site conditions.
4.3.5 CLAIMS FOR ADDITIONAL COST. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for claims relating to an emergency endangering life or property arising under Paragraph 10.6.	

CHAPTER 4. DESIGN RESPONSIBILITIES.

AIA A201 - General Conditions of the Contract for Construction

DESIGN RESPONSIBILITIES	COMMENTARY
3.2.1 CONTRACTOR'S REVIEW OF DESIGN DOCUMENTS. **3.2.1** Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. *These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents;* however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.	**3.12.10's Circumstances Where Design Responsibility Allocated to Contractor** **3.12.10** provides for design responsibility, and consequent potential design liability, arising out of professional services that are (1) specifically required by the Contract Documents or (2) necessary to carry out the contractor's responsibility for construction means, methods, and techniques. Whereas **3.12.10** of the A201 stipulate that the architect must specify all design and performance criteria, and that the contractor is not responsible for the adequacy of performance or design criteria that are required by the contract documents, **3.2.1-3.2.3** provide that the contractor is required to study and compare the various design components of the contract documents and other owner-furnished information, take field measurements of existing conditions, and to generally plan its work.
3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that *the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional* unless otherwise provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with the applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.	**Reporting Requirements** The A201 places on the contractor the duty to report errors, omissions, or inconsistencies in the architect's design and to notify the architect of any noncompliances with laws, building codes or other regulations. A contractor who knowingly fails to inform the architect of the nonconformity may be forced to pay to correct the errors, inconsistencies, or omissions.
3.2.3 (...) *The Contractor shall not be liable* to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents *unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.* **3.12.10** The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such	**Contractor Objection** Contractors may object to the inclusion of this provision on grounds that it relieves the architect of its responsibility to review submittals independently of review by the contractor. In any event, the potential risk of design liability arising under **3.2** allocated to a contractor should be considered by owner and contractor in the project's insurance specifications.

services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will renew, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

CHAPTER 5. WAIVER OF CONSEQUENTIAL DAMAGES.

"**Damages**" broadly defined encompasses all injury or loss suffered by a person as a result of an act or omission of another person. In construction claims, damages fall into two categories: "**direct damages**" and "**consequential damages**." "**Direct damages**" are typically immediate and arise naturally from the breach of the contract. Direct damages are the most common form of damages incurred by an injured party, either owner, architect, contractor, or subcontractor. Direct damages are incurred when specific project costs increase as a result of a certain event. For example, a project delay may produce direct damages in the form of increased material, rental, and labor costs. Unless waived or prohibited by contract, contracting parties are usually able to recover direct damages. "**Consequential damages**" are more remote than direct damages and may not naturally flow, or be reasonably foreseeable as a result of breach. They have an indirect link to a damage-producing event. Examples of consequential damages are lost profits and harm to a business's reputation. Because consequential damages do not directly flow from the event giving rise to the claim, they are harder to prove and recover. There may not be a bright line between what are direct damages and what are consequential damages.

This provision was not included in earlier editions of the A201. This provision of the 1997 AIA A201 is a mutual waiver by Owner and Contractor of a claim for consequential damages, including consequential damages arising out of or relating to the termination of the contract. This waiver includes the contractor's lost profits and extended home office overhead and the owner's loss of use claim.

This provision states certain types of consequential damages as being "**included**." Without clarification by adding "**but not limited to**" some commentators have argued that the listed consequential damages may be the exclusive damages waived.

AIA A201 - General Conditions of the Contract for Construction

WAIVER OF CONSEQUENTIAL DAMAGES	COMMENTARY
4.3.10 CLAIMS FOR CONSEQUENTIAL DAMAGES. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes: **.1** damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and **.2** damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in the Subparagraph 4.3.10 shall be deemed to preclude	**Deletion of the Waiver from the Contractor's Perspective.** Striking this provision, removes from the contractor the AIA form's protection against liability for consequential damages suffered by the owner if the contractor's work proves faulty. This waiver likely covers practically all liabilities suffered by the owner except the cost to repair or replace defective work. For example without this wavier, the contractor is still exposed to a loss of use claim by the owner arising out a contractor's defective work. Such claim can easily exceed the cost of repair. Retention of the waiver reduces the contractor's uncertainty as to the magnitude of an owner's claim. **Contractor's Revision.** Contractor may seek to delete from the waiver "home office overhead, including salaries of home office employees." In support of this modification, if the contract contains a liquidated damage provision as to claims by the owner against the contractor for failure to complete on time, such liquidated damages include an element of consequential damages incurred by the owner, namely loss of use. A contractor could achieve much the same result by negotiating a per diem

an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

rate to recover its home office expenses as part of its recoverable and compensable delay damages.

Ambiguity in the Provision.

This provision excludes "liquidated **direct** damages." While "liquidated damages" are a common industry term. There is no definition of "liquidated direct damages." Does this somehow mean that "liquidated **consequential** damages" are not waived?

CHAPTER 6. EXTRAORDINARY RISK SHIFTS.

1. Contractual Extraordinary Risk Allocation Provisions.

1.1 Indemnity.

Chapter 7 discusses the concept of Indemnity and the special requirements imposed by Texas to make indemnities covering an Indemnified Person's liability for its own negligence, whether the liabilities are caused in whole by the Indemnified Person's fault due to its negligent acts or omissions or in part by the Indemnified Person's negligent acts or omissions, or if the Indemnified Person's liability arises without fault due to its strict liability.

Indemnity agreements are comprised of the following elements:

(1) the person giving the indemnity (the "**Indemnifying Person**"), the person or persons protected by the indemnity (called herein "**Indemnified Persons**"),

(2) the matters triggering the indemnity (such as a relationship or an event; for example, the Work or Operations of the Indemnifying Person, or the acts or omissions of the Indemnifying Person, the occurrence of an injury or an environmental contamination, or the providing of products and services, or a location such as the Job Site, called herein "**Indemnified Matters**"), and

(3) the liabilities covered by the indemnity (for example, a claim, loss, liability, damage, attorney's fees, court costs, expert witness fees, called herein "**Liabilities**" and to the extent indemnified called "**Indemnified Liabilities**" and to the extent not indemnified "**Excluded Liabilities**").

There are three types of indemnity agreements.

Broad Form Indemnity: Under what is known as "broad form indemnity" the Indemnifying Person agrees to be responsible for any and all Liability arising out of an Indemnified Matter, including Liability that is the result of the sole negligence of the Indemnified Person. Most states, not Texas, prohibit, or severely limit the use of broad form indemnity provision in construction contracts.

Intermediate-Form Indemnity: Under an "intermediate-form indemnity" the Indemnifying Person agrees to be responsible for Liability arising out of Indemnified Matters that is caused by the Indemnifying Person's sole fault or negligence, as well as Liability for which the Indemnifying Person and the Indemnified Person are jointly at fault. Under this form of indemnity the Indemnifying Person is not responsible for liability incurred as a result of the sole fault or negligence of the Indemnified Person.

Comparative (or Limited) Form Indemnity: Under a "comparative-form indemnity" the Indemnifying Person agrees to be responsible for Liability to the extent that the Liability is caused by the Indemnifying Person, but not to the extent that the Liability is caused by the Indemnified Person.

AIA A201 - General Conditions of the Contract for Construction

INDEMNIFICATION

3.18 INDEMNIFICATION.

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph **11.3**, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against **claims**, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of **the Work**, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, **but** only to the extent **caused** in whole or in part by **negligent acts or omissions of the Contractor**, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless** of whether or not such claim, damage, loss or expense is **caused in part** by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph **3.18**.

3.18.2 In claims against any person or entity indemnified under this Paragraph **3.18** by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Paragraph **3.18.1** shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

3.18.3 The obligations of the Contractor under this Paragraph **3.18** shall **not** extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instruction by the Architect, the Architect's

COMMENTARY

[1] AIA's Attempted Broad Form Shift of Risk from Owner to Contractor for Owner's Contributory Negligence is Unenforceable in Texas as Drafted.

The AIA risk management system reflected in the AIA A201 seeks to shift the risk of liabilities [**3.18.1**] "arising out of the Contractor's performance of the Work, if such liabilities are caused in whole or in part by the negligent acts or omissions of the Contractor or by its Subcontractor [or] anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless** of whether or not such claim, damage, loss or expense is **caused** in **part** by a party indemnified hereunder."

Scope of Indemnity

3.18.1 is unclear as to whether the owner's negligence is an Indemnified Liability. Contractor's indemnity is worded both as being limited by "**only** to the extent caused by the negligent acts or omissions of the Contractor" but is also clarified by "**regardless** of whether or not such claim ... is caused in part by a party indemnified hereunder." The issue is whether the contractor's indemnity covers all Liability arising out of resulting from Contractor's performance of the Work, even if the Liability is in part caused by the negligence of the Owner or Architect.

This indemnity language does not meet either the express negligence test or the fair notice test. As a result it does **not** indemnify the "Owner, Architect, Architect's consultants, and agents and employees of any of them" (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The "regardless of whether ... caused in part by a party indemnified hereunder" does not expressly refer to the negligence, in whole or in part of the Indemnified Persons. *Ethyl Corp. V. Daniel Construction Co.,* 725 S.W.2d 705 (Tex. 1987); *Fisk Electric Co. v. Daniel Construction Co.,* 888 S.W.2d 813 (Tex. 1994).Thus the exclusion from the Contractor's indemnity to the extent the claims are covered by Project Management Protective Liability insurance purchased by the Contractor for the Owner's protection, is irrelevant as the Contractor's indemnity never comes into play.

consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage. . . .

The failure of the indemnity to be enforceable as an indemnification of the Indemnified Person's negligence also results in the indemnity not being enforceable as to the Indemnifying Person's own concurrent negligence. *Ethyl Corp. V. Daniel Construction Co.,* 725 S.W.2d 705 (Tex. 1987); *Monsanto Co. v. Owens-Corning Fiberglass Corp.,* 764 S.W.2d 293 (Tex. App.–Houston [1st Dist.] 1988, no writ).

As such, the indemnity does not overcome the Workers' Comp bar. *Varela v. American Petrofina Co., of Texas,* 658 S.W.2d 561 (Tex. 1983).

[2] AIA's Language Does Not Cover Cost of Defense.

The AIA language does not expressly recite that the Indemnifying Person is to defend the Indemnified Persons and as a result the cost of defense is not covered even though attorney's fees are recited as an Indemnified Liability. Additionally, due to the failure to meet the express negligence test the cost of defense are not covered even if the Indemnified Person is negligent. *Fisk Electric Co. v. Daniel Construction Co.,* 888 S.W.2d 813 (Tex. 1994); *Glendale Construction Services, Inc. V. Accurate Air Systems, Inc.* 902 S.W.2d 536 (Tex. App.–Houston [1st Dist.] 1995, writ denied).

[3] Unnamed Persons are Not Implied to be Indemnified Persons.

Care should be taken in listing all persons who are to be indemnified. For example, the failure to list partners, shareholders, officers, principals and consultants of an Indemnified Person results in their not being indemnified. *Melvin Green, Inc. V. Questor Drilling Corp.,* 946 S.W.2d 907 (Tex. App.–Amarillo 1997, no writ).

[4] AIA Form Does not Expressly List Punitive Damages or Fines as an Indemnified Liability.

[5] AIA Form Does Not Expressly Cover Legal Costs Beyond Attorney's Fees Incurred to Enforce Indemnity.

The failure of the AIA form to cover the Indemnified Persons' legal costs (copying, filing fees, courier fees) in enforcing the indemnity may result in such costs not being an Indemnified Liability. *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.–Dallas 1999, no writ).

[6] AIA Form Fails to Address Settlement Rights.

The AIA form fails to address settlement. This may result in the loss of indemnity upon settlement of the liability. *MAN GHH Logistics GMBH v. Emscor, Inc.,* 858 S.W.2d 41 (Tex. App.–Houston]14th Dist.] 1993, no writ); *Liberty Steel Co. V. Guardian Title Co. Of Houston, Inc.* 713 S.W.3d 358 (Tex. App.–Dallas 1986, no writ). This may result in the loss of an Indemnified Person's attorney's fees upon settlement. *Humana Hospital Corp. V. American Medical Systems, Inc.*, 785 S.W.2d 144 (Tex. 1990).

[7] The AIA Form Fails to Include as an Indemnified Matter Strict Liability of an Indemnified Person.

The failure expressly to indemnify the Indemnified Person for liability imposed on it due to strict liability in tort, statutory environmental liability, or strict products liability results in these types of liabilities not being indemnified. *Houston Lighting & Power Co. V. Atchison, Topeka & Santa Fe Railway Co.,* 890 S.W.2d 455 (Tex. 1994); *Fina, Inc. V. ARCO*, 200 F.3d 266 (5th Cir. 2000); *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App.–Houston [1st Dist.] 1974), *aff'd*, 530 S.W.2d 794 (Tex. 1975); *Dorchester Gas corp. v. American Petrofina, Inc.* 710 S.W.2d 541 (Tex. 1986); *Arthur's Garage v. Racal-Chubb,* 997 S.W.2d 803 (Tex. App.–Dallas 1999, no writ).

[8] The AIA Form Does Not Contain a Mutual Indemnity by Owner of Contractor for Owner's Comparative Share of Negligence.

The AIA form does not contain a mutual indemnity by Owner of Contractor. The AIA risk management system seeks to pass to the Contractor through the Contractor's indemnity liability for injuries caused by the joint negligence of Contractor and the Indemnified Persons (*i.e.,* the Owner, Architect, Architect's consultants, and agents and employees of any of them). Also, the failure of the AIA form to have a mutual indemnity by the Owner of the Contractor results in the Worker's Comp. Bar preventing recovery by Contractor against Owner for Owner's share of negligence for injuries to Owner's employees. *Varela v. American Petrofina Co. Of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983).

HAZARDOUS MATERIALS

10.3 HAZARDOUS MATERIALS.

10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop work in the affected area and report the condition to the Owner and Architect in writing.

10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, **arising out of** or resulting from performance of the **Work** in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph **10.3.1** and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

....

10.5 If, **without negligence** on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

....

COMMENTARY

"**Hazardous substances**" are broadly defined in **10.3.1** as a material or substance encountered on the site that presents the "risk of bodily injury or death." If a contractor identifies a hazardous substance on site "for which reasonable precautions" would be inadequate to prevent foreseeable injury, the contractor is required to suspend operations in the affected area and report the condition to the owner and architect in writing. Work can resume in that area only after the hazardous substance is rendered harmless. If a material delay results, the contractor is entitled to a time and price adjustment.

Indemnity

A201 ostensibly requires the owner to indemnify contractor, architect and subcontractors for claims or damages arising out of or related to the presence of hazardous substances on site, including costs of removal, containment, and injury, except for such liabilities that arise for hazardous substances brought to the site by the contractor.

AIA's Attempted Broad Form Shift of Risk from Contractor to Owner of Contractor's Contributory Negligence Due to Hazardous Materials at Owner's Premises is Unenforceable in Texas as Drafted.

A similar malady exists as to the indemnity contained in **10.3.3**, which is an indemnity by the Owner of the Contractor as to claims against the "Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them ... provided that such damage, ... is not due to the sole negligence of a party seeking indemnity." This indemnity language does **not** meet either the express negligence test or the fair notice test.

As a result it does not indemnify the "Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them" (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The phrase "provided that such damage, ... is not due to the sole negligence of a party seeking indemnity" does not expressly indemnify the Indemnified Persons for hazardous materials liability arising out of either the concurrent negligence of the Indemnified Persons or their non-negligent strict liability.

The reiteration in Paragraph **10.5** of the **10.3.3** indemnity by the Owner is also subject to the same maladies; it is neither conspicuous and does not expressly state that the Contractor is being indemnified for its strict liability.

Contractor Objections

10.5 places the following limits on the owner's indemnity: (1) it excludes liabilities occurring if the contractor is negligent thereby excluding from the indemnity cases where the owner and contractor are "**concurrently negligent**" and (2) it excludes liabilities from owner's indemnity where they are not "**solely**" the result of Contractor's performance of the Work (leading to disputes as to what is meant by "solely.").

1.2 Insurance.

LIABILITY INSURANCE	COMMENTARY
11.1 CONTRACTOR'S LIABILITY INSURANCE	**No Requirement Imposed on Contractor to Purchase CGL Insurance to Protect Owner or to List Owner as AI on Contractor's CGL.**
11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the **Contractor** from claims set forth below which may arise out of or result from the Contractors **operations** under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:	The liability insurance coverage being provided by Contractor pursuant to Paragraph **11.1** protects the Contractor against liability for liabilities "which may arise out of or result from the Contractor's operations...."
.1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable tot he Work to be performed;	**Since AIA's 3.18.1 is Unenforceable in Texas to Indemnify Owner for its Negligence, AIA's 11.1.1.8 is Requirement for Contractor to Provide Contractual Liability Insurance Protection is Irrelevant and Ineffective.**
.2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;	This provision does not directly protect the Owner, except to the extent of the protection afforded by Clause **11.1.1.8** which protects the Contractor for "claims involving contractual liability insurance applicable to the Contractor' obligations under Paragraph **3.18**." Clause **11.1.1.8** is not direct insurance in favor of the Indemnified Persons. It is indirect protection to the extent that the **3.18** indemnity is effective. Since **3.18** is not enforceable in Texas, an issue exists as to whether the "assumed liability on an insured contract" coverage under the Contractor's CGL policy will provide the Indemnified Persons any protection.
.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractors's employees;	
.4 claims for damages insured by personal injury liability coverage;	
.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;	
.6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;	
.7 claims for bodily injury or property damage arising out of completed operations; and	**AIA Form Does Not Impose Requirement on Owner to Maintain Liability Insurance or Require Owner to Have its Other Contractors Maintain Insurance.**
.8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph **3.18**.	**Need Copy of AI Endorsement**
11.1.2 The insurance required by Subparagraph **11.1.1** shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.	This provision should be modified to provide that a copy of the AI endorsements are to be furnished to the AI prior to commencement of Work.

11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph **11.1** shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire initial at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph **9.10.2**. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

11.2 OWNERS'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's **usual** liability insurance.

11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

11.3.1 Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's **vicarious liability** for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall **not** be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses **11.1.1.2** through **11.1.1.5**.

11.3.2 To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

AIA Insurance Provisions Place upon Owner the Obligation to Carry Liability Insurance to Protect Owner Against Injuries Arising out of Contractor's Work or Operations Caused by Owner's Contributory Negligence.

Paragraph **11.3** provides the Owner with an option at the Owner's expense to require the Contractor to purchase Project Management Liability insurance for the "Owner's, Contractor's and Architect's **vicarious liability** for construction operations under the Contract."

AIA Provisions Prohibit Owner from Requiring Contractor to Name Owner as an AI on Contractor's CGL Policy.

Subparagraph **11.3.1** provides that "Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner." Subparagraph **11.3.3** provides that the "Owner shall **not require** the Contractor to include the Owner, Architect or other persons or entities as **additional insureds**."

Thus, the AIA system contemplates that the most common form of risk shifting device will **not** be employed to protect the Indemnified Persons for the very risk that were attempted to be shifted to the Contractor under the indemnity in Paragraph **3.18**, the risk of liability for concurrently negligently caused liabilities.

A common method of protecting the Owner from the risk of liability arising out of its concurrent negligence is to require the Contractor to have its insurance company list the Owner and the other Indemnified Persons as additional insureds under an ISO Additional Insured Endorsement, such as an ISO CG 20 10 Additional Insured - Owners, Lessees or Contractors – Scheduled Person or Organization (See **Chapter 6 Form 2.2**) or an ISO CG 20 26 Additional Insured - Designated Person or Organization (See **Chapter 6 Form 2.4**).

11.3.3 The Owner shall **not** require the Contractor to include the Owner, Architect or other persons or entitles as additional insureds on the Contractor's Liability Insurance coverage under Paragraph **11.1**.

11.4 PROPERTY INSURANCE

11.4.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph **9.10** or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph **11.4** to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project.

.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

.2 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

11.4.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverage required by this Paragraph **11.4**. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or

Completed Operations Risk Coverage

Additional insured status as to liabilities arising after final completion of a contractor's work may be endorsed on to the contractor's CGL policy by ISO CG 20 37. Additional Insured - Owners, Lessees or Contractors – Completed Operations (See **Chapter 6 Form 2.5**). See the Commentary following each of these forms.

allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

1.3 Waivers of Subrogation.

WAIVERS	COMMENTARY
11.4.7 Waivers of Subrogation. The Owner and Contractor **waive** all rights against (1) **each other** and any of their **subcontractors**, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors, agents and employees described in Article **6**, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils or other causes of loss to the extent **covered by property insurance** obtained pursuant to this Paragraph **11.4** or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article **6**, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of **indemnification**, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.	**Both a Covenant to Obtain a Waiver of Subrogation from Insurance Carriers and a Release of Claims by Owner and Contractor for Losses Covered by Property Insurance.** The "waiver of subrogation" provision contained in Subparagraph **11.4.7** is both a covenant requiring the Owner and the Contractor to cause their insurance companies to endorse their property insurance policies to **waive** subrogation against the Owner and Contractor and a **release** of claims for "damages caused by fire or other perils or other causes of loss to the extent covered by property insurance obtained pursuant to Paragraph **11.4** or other property insurance applicable to the Work." **Unfortunately the Release of Claims is Unenforceable in Texas as Drafted.** This provision is neither conspicuous nor express as to the negligence of the parties and as such an issue exists as to its enforceability as a release and waiver. **Unfortunately for Contractor the Release of Claims Does Not Extend to Insured Losses Beyond the Scope of the Work - Collateral Damage.** The waiver of recovery and subrogation is "*to the extent covered by property insurance obtained pursuant to this Paragraph **11.4** or other property insurance applicable to the Work*." These waivers are not broad enough to cover property losses to property other than the Work, for example where the "owner" under the construction contract is a tenant doing tenant improvements, the waiver does not extend to losses to the tenant's FF&E or property beyond the Work site, such as other portions of the Leased Premises; and, for example, where the Work being done for the owner is only as to a portion of an owner's facility, the waiver of recovery does not extend to property losses outside the Work covered by insurance.

Unfortunately for Contractor the AIA Provision is Limited to Property Losses Occurring Prior to Project Completion.

The waiver as drafted in the AIA form is also limited by the time period of construction and will not cover the Releasing Party's property losses arising after Work completion but attributable to the "Released Party's" work.

Post Project Completion Losses.

Care should be taken by the parties in coordinating the indemnity, the insurance and the waiver of subrogation provisions to avoid the failure to address a timing of loss issue (*e.g.*, broad indemnity covering post Work liabilities, but failure to insure the loss under a completed operations endorsement, or by failure of the waiver of subrogation provision to extend to post-Work completion losses paid by the owner's insurance.

Effect of AIA's Limiting Waiver of Subrogation to Property Insurance Claims is to Permit Contractor's CGL Carrier to Subrogate Against Owner for Claims Paid by Carrier Despite Contractor's Indemnity Since Contractor's Indemnity Unenforceable.

This Subparagraph **11.4.7** does not address either a waiver of claims by the Owner and Contractor for liabilities to the extent covered by liability insurance provided by a party to protect the other or a waiver of subrogation by the liability insurance issuers. Thus, although the Contractor indemnifies the Indemnified Persons under Paragraph **3.18**, its liability insurance issuer which has paid the claim has not released its right to subrogate to the Contractor's claim against the Owner *et al*.

2. Standard Industry Additional Insured Forms.

2.1 ISO Additional Insured Endorsements.

A commonly employed risk transfer technique is to require an insured (the "**named insured**") to arrange for its insurance to cover another party in a transaction (the "**party to be protected**") as an additional insured ("**AI**"). Coverage may be accomplished by two methods: by endorsement to the named insured's CGL insurance issued upon request of the insured or automatically without endorsement through the inclusion in the CGL policy at the time of its issuance of a provision naming certain classes of persons as automatic additional insureds (called a "**blanket AI provision**"). In either case the additional insured is an "**insured**" but not a "**named insured**." There is no such thing as an "**additional named insured**." Sometimes this blanket AI provision is as broad as providing coverage to any person required in a contract with the insured to be listed as an additional insured.

There are four nationwide insurance advisory organizations that develop standard insurance forms. Insurance Services Office, Inc. ("**ISO**") is the largest national insurance advisory organization. Additional insured endorsements can be divided into two categories: endorsement forms promulgated by the Insurance Services Office, Inc. and all other endorsement forms (which other types of forms are referred to in the insurance industry as "**manuscripted**" forms).

ISO forms are considered to be the industry's "standard" forms. ISO forms are identified by a two-letter prefix identifying the type of coverage, four digits identifying the form category and individual form number, and four digits identifying the edition date by month and year. For example, the CG 20 10 03 97 AI Endorsement form is made up of "CG" to indicate that this is a CGL form; "20" indicates the category of CGL endorsement that this form belongs to (an AI endorsement form); "10" is the number assigned to this particular CGL AI Endorsement; and "03 97" indicates that this form is the March 1997 edition of the CG 20 10. ISO has promulgated 33 forms of AI endorsements, each tailored to a different risk transfer.

AI endorsements furnish coverage to an AI for tort liability "arising out of" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes. An AI endorsement is equivalent to an insurance policy written for the AI. The strongest rationale for this request is the perceived fairness of making the named insured's insurance carrier responsible for the increased exposure to loss created for the AI due to the named insured's operations, work or control of the premises. Issuance of AI endorsements is routine and inexpensive (typically $150 per AI) as compared to the premium that would be charged by the insurer to issue a separate policy to cover the exposure of the party to be protected. The risk of liabilities arising out of the work, operations or premises has been factored into the named insured's premium.

Additional insured status affords the AI protection against vicarious liability arising out of the named insured's acts or omissions and, depending on the language of the party's insurance covenant, coverage for the AI's own negligence. As such, it supplements the protection afforded by the named insured's indemnity.

Filling in the Blanks on an AI Endorsement.

Designating the Additional Insureds.

AI coverage is extended only to the persons whose name is filled in the form. AI coverage does not extend to unnamed persons or categories. Therefore, it is important to be accurate and comprehensive. The following is an example of a list of AIs to be designated as AIs in an AI endorsement to a Tenant's CGL policy.

> **Name of Person or Organization:** (a) ___(Building Owner)__, and its successors and assigns as owner of the Property, and its directors and employees, (b) _(Property Manager), (c) (Parking Garage Operator), and (d) (Building Owner's Lender).

Blanket AI provisions are subject to the same frailty. Unnamed classes of persons are not covered. For example, the blanket AI provision may state that it extends AI coverage to the Building Owner as landlord, but fail to include any of the other persons and entities listed above. In such cases, the Building Owner should not rely on the blanket AI provision and require an AI endorsement completed as set out above.

Describing the Premises.

Some AI endorsements provide for designation of the **"premises"** as to which AI coverage is extended to the AI. In such cases, care should be exercised in describing the "premises." For example, ISO form CG 20 11 Additional Insured – Managers and Lessors of Premises attached to this Chapter 6 as **2.4** provides for designation of the premises as follows:

> **Designation of Premises (Part Leased to You):** _____ .["You" refers to the named insured.]

Recommend that the blank be completed by listing the street address of the property and not be completed by inserting the Suite number.

List of ISO Additional Insured Endorsements.

The following is a listing of all of the ISO Additional Insured Endorsements-Category 20.

Additional Insured–Club Members	CG 20 02
Additional Insured–Concessionaires Trading Under Your Name	CG 20 03
Additional Insured–Condominium Unit Owners	CG 20 04
Additional Insured–Controlling Interest	CG 20 05
Additional Insured–Engineers, Architects or Surveyors	CG 20 07
Additional Insured–Users of Golfmobiles	CG 20 08
Additional Insured–Owners/Lessees/Contractors (A)	CG 20 09
Additional Insured–Owners/Lessees/Contractors (B)	CG 20 10
Additional Insured–Managers or Lessors of Premises	CG 20 11
Additional Insured–State or Political Subdivisions–Permits	CG 20 12
Additional Insured–State or Political Subdivisions–Permits Relating to Premises	CG 20 13
Additional Insured–Users of Teams, Draft or Saddle Animals	CG 20 14
Additional Insured–Vendors	CG 20 15
Additional Insured–Townhouse Associations	CG 20 17
Additional Insured–Mortgagee, Assignee or Receiver	CG 20 18
Additional Insured–Charitable Institutions	CG 20 20
Additional Insured–Volunteers	CG 20 21
Additional Insured–Church Members, Officers and Volunteer Workers	CG 20 22
Additional Insured–Executors, Administrators, Trustees/Beneficiaries	CG 20 23
Additional Insured–Owners or Other Interests from Whom Land Has Been Leased	CG 20 24
Additional Insured–Elective or Appointive Executive Officers of Public Corporations	CG 20 25
Additional Insured–Designated Person or Organization	CG 20 26
Additional Insured–Co-owner of Premises	CG 20 27
Additional Insured–Lessor of Leased Equipment	CG 20 28
Additional Insured–Grantor of Franchise	CG 20 29
Additional Insured–Oil/Gas Operations–Non-Operator, Working Interests	CG 20 30
Additional Insured–Engineers, Architects or Surveyors Not Engaged by the Named Insured	CG 20 32
Additional Insured–Owners, Lessees or Contractors–Automatic Status When Required in Construction Agreement with You	CG 20 33
Additional Insured–Lessor of Leased Equipment–Automatic Status When Required in Lease Agreement with You	CG 20 34

Additional Insured–Grantor of Licenses–Automatic Status When Required by Licensor	CG 20 35
Additional Insured–Grantor of Licenses	CG 20 36
Additional Insured–Owners, Lessees or Contractors–Completed Operations	CG 20 37

ISO AI Endorsements

The following are 4 of the 33 ISO AI Endorsement forms. I have highlighted certain terms in **bold italics** and have underlined certain clauses in order to alert you to terms and clauses that have special meanings or that limit coverage. These terms and clauses are discussed in the Commentary following each form. Additionally, footnotes are inserted to provide keys to the completion and interpretation of the forms.

2.2 ISO's CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:_____.[1]

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" ***caused in whole or in part***, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ***ongoing operations*** for the additional insured(s) at the locations designated above.

B. With respect to the insurance afforded to these additional insureds, the following exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All ***work***, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered ***operations*** has been ***completed***; or

2. That portion of "your [2] ***work***" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 10 03 04 Copyright, ISO Properties, Inc., 2004 Page 1 of 1 **[Emphasis added]**

[1] Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – e.g., officers, directors, and employees of the persons or entities specifically designated as additional insureds.

[2] "Your" = named insured.

[3] This is the "completed operations" exclusion to AI coverage. In order to extend AI coverage to liabilities occurring after either of the events set out in Exclusions **(1)** or **(2)**, an additional AI endorsement needs

to be endorsed on to the CGL policy covering "products and completed operations" liabilities. See **Chapter 6 Form 2.5** ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations for this type of endorsement.

Commentary on ISO's CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization

AI's Negligence, Excluding AI's Sole Negligence, Covered as to NI's Operations

CG 20 10 as recently revised (in 2004) to eliminate coverage for the additional insured's sole negligence. Additionally, the 2004 revision requires that in order for the liability to be covered by the named insured's CGL policy, the liability must have been **caused in whole or in part** by the acts or omissions of the named insured. The pre-2004 version of the CG 20 10 extended coverage for the additional insured for all liabilities "arising out of" the named insured's operations. See discussion at Chapter 7 **3.3.1 - 3.3.2**.

It is not yet clear whether the change of the CG 20 10 to "caused by the acts or omissions of the named insured" will be interpreted by the courts differently than the prior coverage for liabilities "arising out of the named insured's operations." Liabilities can still be "caused by" the named insured's acts or omissions, yet the liability arise out of the sole negligence of the additional insured or the concurrent negligence of the additional insured and persons other than the named insured!

Completed Operations Risk Excluded

Liabilities **occurring after** completion of work are not covered.

Perhaps because CG 20 10 does not reference coverage for the "acts or omissions of the additional insured," this endorsement occasionally has been viewed as providing coverage only for the additional inured's vicarious liability in connection with the acts or omissions of the named insured.

CG 20 10 has undergone changes from coverage for liabilities "arising out of the work" of the named insured in the November 1985 version (CG 20 10 11 85), to "arising out of the operations" of the named insured in the October 1993 version (CG 20 10 10 93), the March 1997 version (CG 20 10 03 97), and the October 1997 version (CG 20 10 10 01). ISO made this change to clarify that this particular form of additional insured endorsement is intended to only cover liabilities arising out of the named insured's "ongoing operations" as opposed to liabilities arising out of operations that have been completed. The ISO CG 20 10 11 85 additional insured endorsement form was construed in *Pardee Constr. Co. v. Insurance Co. of the West*, 92 Cal. Rptr.2d 443 (Cal.App. 2000) to cover an additional insured contractor's liabilities (in this particular case its sole negligence) arising 4 years after the completion of the work of the named insured subcontractor.

While the phrases "your work" and "your ongoing operations" have important meanings in the context of determining coverage of liabilities arising out of injuries occurring after the named insured's operations have been completed, there is no significant difference between them as respects determining the scope of coverage prior to completion of operations. Coverage for liabilities arising after completion of the named insured's operations, but attributable to the named insured's or the additional insured's acts or omissions prior to completion may be added by use of ISO CG 20 37 10 01 Additional Insured endorsement covering liabilities arising out of the "products and completed operations" hazard.

2.3 ISO's CG 20 11 10 96 Additional Insured – Managers and Lessors of Premises.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED –
MANAGERS OR LESSORS OF PREMISES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of **Premises** (Part Leased to You [1]): _____.

2. Name of Person or Organization (Additional Insured): _____.[1]

3. Additional Premium: _____.

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability ***arising out of*** the ownership, maintenance or use of that **part** of the **premises** leased to you [2] and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you [2] cease to be a tenant in that **premises**.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule [2].

CG 20 11 01 94 Copyright, Insurance Services Office, Inc., 1994 Page 1 of 1 [***Emphasis added***]

[1] Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – e.g., officers, directors, and employees of the persons or entities specifically designated as additional insureds. [2] "you" = the named insured.

[3] "Premises" = "part leased to You." See discussion at Section **2.2.4** as to risk that "premises" may be narrowly defined in lease resulting in no coverage for AI as to Injuries occurring outside of the premises (*e.g.,* in Common Areas, Common Facilities or in adjacent sidewalks, driveways and easements).

Commentary on ISO's CG 20 11 01 96 Additional Insured – Managers and Lessors of Premises.

This endorsement contains two significant carve outs. The first is for liabilities that "take place after (the tenant) ceases to be a tenant in that premises." This carve out excludes coverage for liabilities that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy. The second carve out is for alterations, new construction or demolition operations "by or on behalf of the (additional insured–*e.g.,* the landlord). This carve out excludes protection for liabilities associated with construction activities. If the tenant will be engaged in any construction activities (*e.g.,* tenant improvements), then another endorsement form should be used.

2.4 ISO's CG 20 26 (2004) Additional Insured – Designated Person or Organization.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED–DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: _____ .[1]

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" ***caused, in whole or in part***, by your [2] acts or omissions or the acts or omissions of those acting on your behalf:

A. In the performance of your [2] ***ongoing*** operations; or

B. In connection with your [2] *premises* [3] ***owned by*** or ***rented to*** you. [2]

CG 20 26 Copyright, Insurance Services Office, Inc., 2004 Page 1 of 1 **[Emphasis added]**

[1] Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – *e.g.*, officers, directors, and employees of the persons or entities specifically designated as additional insureds. [2] "You"and "your" = the named insured.

[3] "Premises" may limit the AI's coverage to Injuries occurring in the boundaries of the leased premises as defined in the lease and as a result may not extend to Injuries occurring in Common Areas, Common Facilities or easements. See Section **2.2.4** of the Article.

Commentary on ISO's CG 20 26 (2004) Additional Insured – Designated Person or Organization.

This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability "caused in whole or in part, by your (the named insured's) **acts or omissions in the performance of your** (the named insured's) **ongoing operations**" or "**premises owned by or rented to you** (the named insured)." This endorsement form was promulgated for the purpose of adding as insureds to CGL policies persons and entities for which no other specific additional insured endorsement is published by ISO. The form however is used for many situations where an additional insured has required this form due to its broad coverage. This AI endorsement form was modified in 2004 in connection with the modifications to the CG 20 10 to change the trigger for coverage from liabilities "**arising out of**" the named insured's ongoing operations to liabilities "**caused in whole or in part by the acts or omissions of**" the named insured.

See discussion at Chapter 7 **3.3.1 - 3.3.2**.

It is not yet clear whether the change of the CG 20 26 to "caused by the acts or omissions of the named insured" will be interpreted by the courts differently than the prior coverage for liabilities "arising out of the

named insured's operations." Liabilities can still be "caused by" the named insured's acts or omissions, yet the liability arise out of the sole negligence of the additional insured or the concurrent negligence of the additional insured and persons other than the named insured!

Ongoing Operations

It may be used in construction contexts as an endorsement to provide additional insured coverage to an owner on a contractor's CGL policy, to an owner on a tenant's CGL policy, to a tenant on an owner's CGL policy, and to a tenant on a contractor's CGL policy. If the insurer is willing, it can provide an acceptable method of including completed operations coverage for an additional insured who requires such coverage. Otherwise, completed operations coverage can be added by use of ISO CG 20 37. See ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations at **Chapter 6 Form 2.5** below.

In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy.

This endorsement form does not contain carve outs for the "**acts or omissions**" of the additional insured and is not limited to "ongoing" operations.

2.5 ISO's CG 20 37 (2004) Additional Insured – Owners, Lessees or Contractors - Completed Operations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: _____ [1]

Location and Description of Completed Operations: _____ [2]

Additional Premium: $_____.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" **caused in whole or in part**, by "your [3] ***work***" at the location designated and described in the schedule of this endorsement performed for that additional insured [4] and included in the "***products-completed operations* hazard**".

CG 20 37 Copyright, ISO Properties, Inc. 2004 Page 1 of 1 (***Emphasis Added***)

[1] (Insert names of additional insureds required by lease or construction contract to be protected – owner, lessee or contractor; lender; managing agent; and other contractors; and insert categories of unnamed persons to be protected – *e.g.,* officers, directors, and employees of the persons or entities specifically designated as additional insureds.)

[2] (Insert general description of construction location - *e.g.,* street address and construction project).

[3] "You" = the named insured.

[4] "that insured" = the additional insured.

Commentary on ISO's CG 20 37 (2004) AI Endorsement.

This endorsement makes designated persons (*e.g.*, owners, lessees or contractors) additional insureds on an insured contractor's or insured subcontractor's CGL policy. This endorsement provides coverage to the additional insured "owner, lessee or contractor" for liabilities caused in whole or in part by the named-insured contractor's "***work***" ***occurring after completion*** of the insured contractor's or insured subcontractor's work. This endorsement was introduced in 2001 by ISO to provide a standard means of extending the additional insured coverage of endorsement CG 20 10 to completed operations claims. This coverage is extended to locations designated and designated operations.

2.6 AIG - AI Endorsement –Construction and Lease – Exclusion for AI's Negligence.

The following is an additional insured endorsement issued by American Indemnity Group (**AIG**). Coverage for the AI's negligence was litigated in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) in which the 6th Circuit applied Texas law. The holding in this case emphasizes why it is important to obtain and read the additional insured endorsement form and not to rely either upon a statement in the certificate of insurance that a party to be protected is an AI for liabilities arising out of the work of the named insured or upon a general statement in the contract that a party to be protected is to be listed as an additional insured on the named insured's CGL policy. The court held that the AI endorsement issued by AIG meant exactly what it said, "the negligence of the additional insured is **excluded**!" The court held that the certificate of insurance listing the contractor as an AI and the construction contract provision requiring that the contractor be listed as an AI did not expressly provide that the additional insured was to be covered for its negligence.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: _____.

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability ***arising out of*** your [1] ***operations*** or ***premises owned by*** or ***rented to*** you. [1]

It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities ***arising out of*** their [2] ***operations*** performed by or for the named insured,[1] but ***excluding*** any negligent acts committed by such additional insured. [2]

[1] "You" = the named insured.

[2] "Their" = additional insured.

Commentary on AIG's Manuscripted AI Endorsement

The language in the ISO and the AIG endorsements are very similar, in that each specifies (1) a covered relationship: the ownership or use by or the rental to the named insured of premises (ISO form and AIG form); and (2) a covered activity: the named insured's operations (ISO form) and the additional insured's operations (AIG form). But note that the AIG endorsement limits the additional insured's protection under the named insured's CGL policy by excluding from coverage liabilities arising out of "any negligent acts committed by the additional insured." The AIG exclusion effectively eliminates from insurance coverage all liabilities for which the additional insured would wish to be listed as an additional insured on the named insured's policy!

2.7. Bituminous - Blanket AI Endorsement - Construction – Exclusion for AI's Negligence.

BITUMINOUS FIRE & MARINE INSURANCE
CONTRACTORS EXTENDED LIABILITY COVERAGE - GL-2785-TX (07/00)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

It is agreed that the provisions listed below apply only upon the entry of an ⊠ in the box next to the caption of such provision.

A. ⊠ Partnership and Joint Venture Extension
B. ⊠ Blanket Additional Insureds - Construction Contracts
C. ⊠ Blanket Waiver of Subrogation
D. ⊠ Unintentional Failure to Disclose Hazards
E. ⊠ Broadened Mobile Equipment
F. ⊠ Personal Injury - Contractual Coverage
G. ⊠ Nonemployment Discrimination
H. ⊠ Liquor Liability
I. ⊠ Broadened Conditions
J. ⊠ Blanket Additional Insureds - Equipment Leases

....

B. BLANKET ADDITIONAL INSUREDS - CONSTRUCTION CONTRACTS

Section II - WHO IS AN INSURED is amended by adding the following:

7. Any person or organization for whom you [1] are performing operations if you and such person or organization have agreed in a written contract or written agreement executed prior to any loss that such person or organization will be added as an additional insured on your policy up to the limits of liability required by such contract or agreement with respect to liability ***resulting from***:

a. "your [1] ***work***" for the additional insured(s), or

b. actions or omissions of the additional insured(s) in connection with their [2] ***general supervision*** of "your [1] ***work***."

With respect to the insurance afforded these additional insureds, the following additional provisions apply: ....

b. Additional Exclusions. This insurance does not apply to: [3]

(1) "Bodily injury" or "property damage" for which the additional insured(s) are obligated to pay damages ***by reason of the assumption of liability*** in a contract or agreement. This exclusion does not apply to liability for damages that the additional insured(s) would have in the absence of the contract or agreement.

(2) "Bodily injury" or "property damage" ***occurring after***:

(a) All work on the project(s) (other than service, maintenance, or repairs) to be performed by or on behalf of the additional insured(s) has been completed; or

(b) That portion of "your [1] work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

(3) "Bodily injury" or "property damage" ***arising out of any act or omission of the additional insured***(s) or any of their employees, ***other than*** the ***general supervision*** of work performed for the additional insured(s) by you. [1]

(4) "Property damage" to:

(a) Property owned, used or occupied by or rented to the additional insured(s):

(b) Property in the care, custody, or control of the additional insured(s) or over which the additional insured(s) are for any purpose exercising physical control; or

(c) "Your [1] work" for the additional insured(s)

(5) "Bodily injury", "property damage" or "personal and advertising injury":

(a) Arising out of the rendering or failure to render any professional services by you [1] or by any additional insured, but only with respect to either or both of the following operations:

(i) Providing engineering, architectural or surveying services to others in your [1] or the additional insureds capacity as an engineer, architect or surveyor, and

(ii) Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with work you [1] or an additional insured performs.

(b) Subject to paragraph **(c)** below, professional services include:

(i) The preparing, approving or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and

(ii) Supervisory or inspection activities performed as part of any related architectural or engineering activities.

> **(c)** Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you [1] in connection with your operations as a construction contractor.
>
> Any coverage provided herein will be ***excess*** over any other valid and collectable insurance available to the additional insured(s) whether primary, excess, contingent or on any other basis unless you [1] have agreed in a written contract or written agreement that this insurance will be primary.
> This insurance will be ***noncontributory*** only if so stated in a written contract or written agreement. ....

[1] "You" = the named insured contractor or subcontractor. [2] "Their" = additional insured contractor or owner.

[3] **b(1)** is an exclusion for liabilities assumed (taken on by indemnity) by the named insured caused by the additional insured's negligence.

b(2) is an exclusion for the "**completed operations hazard**," liabilities incurred by the additional insured (the additional insured's negligence) occurring after completion of all work by or on behalf of the additional insured or after completion of the named insured's work.

b(3) is an exclusion for the AI's negligence other than liability of the AI due to its general supervision of the named insured's work for the AI.

b(4) is an exclusion for property damage to the additional insured's property even if due to the named insured's negligence. The AI is relegated to its property insurance.

Commentary on Bituminous's Blanket AI Endorsement

1. Who is the AI? The blanket automatic additional insured provision contained in this Endorsement as **B II 7** designates as the additional insured "any person for whom you are performing operations." In cases where the named insured contractor is performing services for an AI tenant, the building owner (landlord) and the employees, officers, directors, successors and assigns of the building owner and of the tenant would not be covered. In such case additional endorsements are required to extend coverage to persons other than the tenant.

2. Whose Negligence is Covered? Provision **B II 7b (3)** of this form of blanket additional insured endorsement carves out of the additional insured coverage liabilities "arising out of any act or omission of the additional insured ... other than the **general supervision** of work performed for the additional insured ...." This carve-out effectively guts protection for the additional insured. In order for the additional insureds to have protection for their sole or contributory negligence, this policy must be endorsed to extend coverage to liabilities arising out of the acts or omissions of the additional insureds, whether or not caused by the negligence of the additional insured.

3. Contribution or Non-Contribution by AI's CGL Insurance? Note that the blanket additional insured endorsement provides that the insurance afforded thereby to the additional insured will be "**excess**" over the additional insured's "other insurance" unless the contract between the contractor and the additional insured requires this coverage to be primary. Also, note that the blanket additional insured endorsement provides that the insurance coverage afforded to the blanket additional insured endorsement will be "**noncontributory**" unless the contract between the named insured and the additional insured requires the coverage to be contributory. "Noncontributory" means that even if the contract requires the named insured's coverage of the additional insured to be primary, the named insured's carrier will not contribute to cover a loss to the extent the additional insured's policy covers the liability. The contract between the named

insured and the additional insured should be drafted to provide that the named insured's CGL policy will not be excess of the AI's CGL policy, but will be primary with the AI's CGL being excess and noncontributory.

3. "Fair Forms" and Commentary.

Coverage if AI Not More Negligent Than NI.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Additional Insured – Exclusion if Additional Insured Not More Negligent than Insured

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Name of Person or Organization (Additional Insured): _____ *

2. Additional Premium: $_____.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

Section II - Who Is An Insured is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your [1] behalf:

A. In the performance of your ongoing operations for the additional insured; or

B. In connection with your [1] premises owned by or rented to you [1].

There is no coverage for "bodily injury", "property damage" or "personal and advertising injury" arising out of the sole negligence of an additional insured or if said injury or damage is caused by the contributory negligence of the additional insured or by those acting on behalf of those acting on behalf of the additional insured if that insured's percentage share of all insureds' negligence is 51% or greater.

Page 1 of 1

This endorsement form is not a standard ISO endorsement. It has been "manuscripted" to shift insurance the risk of insured loss as between the NI and the AI to the party who is most negligent. However, in addition to this endorsement language, the AI's CGL policy must be amended to provide that its coverage is excess to the coverage afforded by the above AI endorsement and non-contributory with the NI's insurance. Otherwise, the AI could find itself in the position of being covered under the above AI endorsement in a case where the AI was less negligent than the NI, but the AI's insurance being called on to contribute pro rata with the NI's insurance to cover the Insured Injury.

CHAPTER 7. EXTRAORDINARY RISK SHIFTS - TEXAS LAW.

Risk shifting provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity, exculpation, release and limitation of liability provisions.

This chapter examines how liability insurance can be used to protect an indemnifying party through coverage for its contractually assumed liabilities and to protect an indemnified party by being an additional insured on the indemnifying party's liability insurance. Generally, the indemnifying party is required by the indemnified party to carry commercial general liability ("**CGL**") insurance naming the indemnified party as an additional insured on the indemnifying party's CGL policy. In such case, the indemnifying party is the "**named insured**" and the indemnified party is the "**additional insured**." In this article the indemnifying party and the named insured are sometimes referred to in this article as the "**protecting party**" and the indemnified party and the additional insured are sometimes referred to as the "**protected party**." Insurance is also a form of indemnity. However, Texas courts on public policy grounds construe the same "arising out of" indemnity triggering language used in both types of indemnity strictly against coverage of an indemnified party's negligence by a contract and broadly in favor of coverage of an additional insured's negligence in additional insured endorsements issued pursuant to the same contract. Indemnity agreements are strictly construed in favor of the indemnifying party. *Safeco Ins. Co. of America v. Gaubert*, 829 S.W.2d 274, 281 (Tex.App.–Dallas, 1992, *writ den'd*). By contrast, insurance polices are strictly construed in favor of coverage. *See, e.g., Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987); *National Union Fire Ins. Co. of Pittsburgh, Penn. v. Kasler*, 906 F.2d 196, 198 (5th Cir. 1990).

1. Indemnity.

1.1 Terminology.

"**Indemnity**" is, "*I agree to be liable for your wrongs.*" Indemnity is a shifting of the risk of a loss from a liable person to another. It is like insurance between the parties. *Russell v. Lemons,* 205 S.W.2d 629, 631 (Tex.Civ.App–Amarillo 1947, *writ ref'd n.r.e.*). Sometimes, an indemnity provision is no more than a restatement of existing duties, "*I will indemnify you for my wrongs*;" "*You will indemnify me for your wrongs*." Care should be taken in crafting the scope of and exclusions from the liabilities indemnified, such as providing for the defense of the indemnified party by the indemnifying party ("indemnify, **defend**, and hold harmless"), settlement authority, and choice of laws applicable.

1.2 Requirements for Enforceability.

The Texas Supreme Court has imposed certain contract drafting requirements in order for a negligent party to shift its liability to another person. Johnston, *Settlement and the Express Negligence Rule*, TEX. B.J. 14 (Jan. 1995); Scheer, *Model Contractual Indemnity Provisions Effective to Protect an Indemnitee Against His Own Negligence or Other Fault*, TEX. B.J. 602 (June 1987); Reynolds, *Contracts of Indemnity in Texas*, TEX. B.J. 297 (Ap. 1980); *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993); Greer and Collier, *The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas after Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SOUTH TEX. L. REV. 243 (1994); and Holcomb, *The Validity and Effectiveness of Pre-Injury Releases of Gross Negligence in Texas*, 50 BAYLOR L. REV. 233 (1998).

1.2.1 Fair Notice.

The concept of fair notice was introduced into Texas indemnity law in 1963 by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963). The fair notice requirement focuses on the appearance and placement of the provision as opposed to its "content." The supreme court in *Spence* reasoned that

> [t]he obvious purpose of this rule is to prevent injustice. A contracting party should be upon *fair notice* that under his agreement and through no fault of his own, a large and ruinous award of damages may be assessed against him solely by reason of negligence attributable to the opposite contracting party. *Id.* at 634.

1.2.2 Express Negligence.

In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement. In *Ethyl*, the court observed

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that true intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine. The express negligence test replaced the "clear and unequivocal" test of *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co. Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972).

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law. *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994). The indemnity must expressly state that it indemnifies the indemnified person for liabilities caused in whole or in part by its negligence and not leave it to inference. For instance, "x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by the gross negligence or willful misconduct of y" will not be enforced to indemnify y for loss caused by its negligence. *Adams v. Spring Valley Const. Co.,* 728 S.W.2d 412 (Tex.App.–Dallas 1987, *writ ref'd n.r.e.*); *Linden-Alimak, Inc. v. McDonald,* 745 S.W.2d (Tex.App.–Ft. Worth 1988, *writ denied*); *Glendale Constructors, Inc. v. Accurate Air Systems, Inc.,* 902 S.W.2d 536 (Tex.App.–Houston [1st Dist.] 1995, *writ denied*); *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex.App.–San Antonio 1989, *no writ*); *Texas Utilities Electric Co. v. Babcock & Wilcox*, 893 S.W.2d 739 (Tex.App.–Texarkana 1995, *no writ*).

1.2.3 Overcoming the Worker's Compensation Bar.

Unless there is an enforceable written indemnity covering an employer's negligence, a landlord, tenant, and contractor can find itself liable to an employer's injured employee, not only for its own portion of the negligently caused injury but also for the proportionate part attributable to the employer's negligence without the ability to claim back against the employer for contribution. *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983). The Workers' Compensation Act bars contribution actions by third parties unless the employer has executed before the injury a written indemnity agreement for injuries to its employees arising out of the employer's negligence. Texas Workers' Compensation Act, TEX. LABOR. CODE ANN. § 417.004 (Vernon 1996). *See Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990).

1.2.4 Comparative Indemnity.

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did not protect an "indemnified" party either for its negligence or the indemnifying party negligence for injuries caused to the indemnifying party's employee:

> Contractor (Daniel) shall indemnify and hold Owner (Ethyl) harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, subcontractors and agents or licensees.

Id. at 708. The court termed this claim as one for "**comparative indemnity**." The court held that

the indemnity provision did not meet the express negligence test in this respect. The court stated

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein.

1.2.5 Releases, Waivers, Exculpations and Disclaimers.

In 1993 the Texas Supreme Court in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) extended the fair notice principle and the express negligence doctrine to releases. This principle is likely to be extended to waivers, exculpations and disclaimers seeking to exclude liability for one's own negligence, being merely a release worded in a different format. *See generally Hart v. Traders & General Ins. Co.,* 189 S.W.2d 493, 494 (Tex. 1945).

1.2.6 Strict Liability.

In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex.1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a protected party's strict liability to expressly state that it covers such strict liability.

2. Insurance.

There are two insurance methods to effectuate protection: directly, (1) either by purchasing a CGL policy naming the protected party as the named insured or by the protecting party causing its insurer to list the protected party as an additional insured on the protecting party's CGL policy; and (2) indirectly, by the protecting party insuring its contractually assumed liability (its indemnity).

2.1 Contractually Assumed Liability Insurance: Coverage for the Protecting Party.

2.1.1 Exception to an Exclusion.

Most but not all CGL policies cover the protecting party for liability for "Bodily Injury" and "Property Damage" arising under an "insured contract" (sometimes referred to as "**contractually assumed liability insurance**"). Coverage is accomplished through the addition to the CGL Policy of an **exception to an exclusion** from coverage. Standard form CGL policies (ISO CG 00 01) provide as to "Coverage A" the following exceptions to the exclusion from coverage of contractually assumed liability.

Coverage A under standard form CGL policies is for loss arising out of "Bodily Injury" or "Property Damage." "Bodily Injury" is in such policies defined as "bodily injury, sickness or disease sustained by a person, including death resulting form any of these at any time." "Property Damage" in such policies is defined as "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." The exception to exclusion from Coverage A reads

> This **insurance does not apply to** "Bodily Injury" or "Property Damage" for which the insured is obligated to pay damages by reason of the **assumption liability in a contract** or agreement. This **exclusion does not apply to liability** for damages:
>
> 1. **assumed in** a contract or agreement that is an "**Insured Contract**", provided the "Bodily Injury" or "Property Damage" occurs subsequent to the execution of the contract or agreement; or
>
> 2. that the insured would have in the absence of the contract or agreement. (Emphasis added)

An "**Insured Contract**" is defined in the standard ISO CGL policy form as including

that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you **assume the tort liability** of another party to pay for "Bodily Injury" or "Property Damage" to a third person or organization [**2004 endorsement CG 24 26: , *provided the 'bodily injury' or "property damage" is caused, in whole or in part, by you or by those acting on your behalf***]. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Emphasis added)

Note that ISO has proposed the italicized language for inclusion in CGL policies by an endorsement CG 24 26. This introduces into the "insured contract" definition a "contributory negligence" condition equivalent to the one contained in the newly filed additional insured endorsements discussed below in Section **3.3.2**. Inclusion of this type language into a CGL policy effectively eliminates coverage for the NI's indemnification of a third party for its sole negligence. Care therefore must be taken by NI's in coordinating and negotiating the terms of its CGL policy and indemnity agreements. It is possible for a NI to be "uncovered" in such circumstances for an indemnity of another party's sole negligence. If this is coupled with an exclusion from AI coverage for an AI's sole negligence, the NI may find itself acting as the insurer or in breach of its covenants to protect the AI/indemnified party!

A similar exception to the exclusions from Coverage B (coverage for "Personal and Advertising Injury") is generally not contained in standard form CGL policies. Thus, in such cases, the named insured's liability policy will not protect it against its contractually assumed liability for Personal and Advertising Injury, unless it obtains a special endorsement to its policy adding an exception to the exclusion in Coverage B. "Personal and Advertising Injury" is defined in Coverage B to standard CGL policies as "injury, including consequential bodily injury, arising out of one or more of the following offenses:

(i) false arrest, detention or imprisonment; (ii) malicious prosecution; (iii) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (iv) oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's good, products or services; (v) oral or written publication of material that violates a person's right of privacy; (vi) the use of another's advertising idea in your "advertisement'; or (vii) infringing upon another's copyright, trade dress or slogan in your "advertisement."

2.1.2 Coverage for Named Insured as Indemnifying Party.

.1 Indemnified Party not the Insured.

Contractually assumed liability insurance does not make the indemnified-protected party an insured under the policy. *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.*, 8 Cal. App. 4th 338, 10 Cal. Rptr.2d 165 (1992); *Jefferson v. Sinclair Ref.g Co.*, 10 N.Y.2d 422, 223 N.Y.S2d 863, 179 N.E.2d 706 (1961); *Davis Constructors & Engineers, Inc. v. Hartford Accident & Indemnity Co.*, 308 F. Supp. 792 (M.D. Ala. 1968); and *Hartford Ins. Group v. Royal-Globe Co.*, 21 Ariz. App. 224, 517 P.2d 1117 (1974). Instead it expands coverage for the named insured. *See e.g., Gibson & Associates, Inc. v. Home Ins. Co.*, 966 F.Supp. 468, 475-77 (N.D.Tex. 1997).

.2 Defense Covered Only if an Indemnified Liability.

CGL policies will place conditions precedent that must be satisfied by an indemnified person prior to providing it defense under the indemnifying person's CGL policy. For example, the ISO CGL standard policy form provides

If we defend an insured against a "suit" and an indemnitee of the insured is also named as a part to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the indemnitee has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, **has also been assumed** by the insured in the same "insured contract"; (Emphasis added)

2.1.3 Named Insured Not Insured for all Contractually Assumed Liabilities.

.1 Indemnifying Party and Indemnified Parties Must be Defendants in Same Suit.

The insured contract provisions of ISO's CG 00 01 requires as a condition to providing the indemnitee a defense under the contractually assumed liability coverage that the indemnitee and the named insured-indemnitor are parties to the same suit. An example of a common suit in which this is not the case is suit by an injured employee of the indemnifying party against the indemnified party.

.2 Policy Limits and Exclusions Still Apply.

Contractual liability insurance does not expand the scope of the liability policy beyond the coverage provided, nor does it extend the limits of liability. Coverage is limited by the policy's other exclusions (*e.g.*, pollution liability, insured's breach of contract, and breach of product warranty). Contractual liability insurance does not insure the performance of the business aspects of the contract. *Musgrove v. Southland Corp.*, 898 F.2d 1041 (5th Cir. 1990). The court held

> Contractual liability has a definite meaning. It is coverage of the insured's contractual assumption of the liability of another party. It typically is in the form of an indemnity agreement.... The assumption by contract of the liability of another is distinct conceptually from the breach of one's contract with another.... Liability on the part of the insured for the former is triggered by contractual performance; for the latter liability is triggered by contractual breach....CITGO (the owner) concedes that LCE (the contractor) made no indemnification agreement applicable to the loss herein; rather, it complains of LCE's breach of contract. LCE's contractual liability insurance is thus not applicable. LCE did not insure its commitment to secure insurance coverage for CITGO. *Id.* at 1044.

Under the 1996 and later editions of the standard ISO form CGL policy, the cost to defend an indemnitee under the indemnitor's CGL policy will be provided within the limit of the proceeds available under the policy as opposed to being on top of the limits as a supplementary payment, unless the indemnitee complies with a lengthy list of conditions precedent.

.3 Limited by Scope of Indemnity.

An issue exists as to whether contractual liability coverage under a protecting party's CGL insurance extends to a protected party's negligence if the "insured contract" indemnity is expressly limited to the protecting party's negligence or expressly excludes the protected party's negligence. *Office Structures, Inc., v. Home Ins. Co.*, 503 A.2d 193 (Del. 1985); *but see United National Ins. Co. v. Dunbar & Sullivan Dredging Co.*, 953 F.2d 334 (7th Cir. 1992).

.4 Special Exclusions.

Contractually assumed liability coverage covers "bodily injury" and "property damage" but not "personal injury or advertising injury" liability, which is defined as including false arrest, libel, slander, and copyright infringement.

.5 No Coverage for Indemnified Person's Sole Negligence.

Until recently, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for its indemnitee's sole negligence. ISO has recently issued an endorsement, CG 24 26 06 04, which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnitee. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence.

2.2 Additional Insurance: Coverage for the Protected Party.

2.2.1 Purpose.

Another commonly employed risk transfer technique is to require the protecting party to arrange for its insurance to cover the protected party as an additional insured. An additional insured endorsement is equivalent to an insurance policy written for the additional insured. The strongest rationale for this request is the perceived fairness of making the protecting party's insurance carrier responsible for the increased exposure to loss created for the additional insured due to the protecting party's operations, work or control of the premises. Issuance of additional insured endorsements is routine and inexpensive as compared to a separate policy being issued to cover the exposure of the party to be protected. The risk of loss has been factored into the named insured's premium.

An additional insured designation seeks to achieve the following results: It provides a limited form of primary coverage for the additional insured. It may remove the possibility of subrogation against the additional insured for covered liabilities. It provides the additional insured with direct policy rights within the primary insured's policy, including separate defense cost coverage for claims involving the additional insured. It provides a "safety net" should the indemnity provision be unenforceable or otherwise be deficient. Additional insured endorsements generally do not carve out from the coverage afforded the additional insured loss due to "Personal and Advertising Injury." In these circumstances, protection for the protected party's Personal and Advertising Injury is covered whereas without specific endorsement to the named insured's CGL Coverage B, the named insured's indemnity for such liabilities is not reinsured and the named insured not carving out this type of liability is uninsured as to its contractually assumed liability. Additionally, additional insured status may automatically entitle the additional insured to the named insured's excess liability or umbrella coverage because such policies frequently cover all insureds (including the additional insureds) under the primary liability policy.

There are important considerations for a protected party to remember when evaluating whether to forgo a contractual indemnity by the protecting party and to rely solely on being an additional insured on the protecting party's CGL policy. The policy may be canceled with or without the protected party's knowledge; the insurer may become insolvent; and the additional insured's coverage under the protecting party's CGL policy is subject to the policy's limits and exclusions from coverage.

2.2.2 Automatic Coverage or by Endorsement.

Coverage may be accomplished (1) by endorsement of the protecting party's CGL insurance or (2) through blanket additional insured provisions in the CGL policy, which provide automatic additional insured status for persons that a named insured is obligated by contract to provide such coverage.

2.2.3 Endorsements: ISO or Manuscripted Forms.

Additional insured endorsements can be divided into two categories: endorsement forms promulgated by the Insurance Services Office, Inc. ("**ISO**") and all other endorsement forms (referred to in the insurance industry as "**manuscripted**" forms). There are four nationwide insurance advisory organizations that develop standard insurance forms. ISO is the largest national insurance advisory organization. Its forms are considered to be the industry's "standard" forms. 1 CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions §XIII, p. XIII.B.2 (International Risk Management Institute, Inc. 2003).

ISO forms are identified by a two-letter prefix identifying the type of coverage, four digits identifying the form category and individual form number, and four digits identifying the edition date

by month and year. For example, the CG 20 10 03 97 additional insured endorsement form is made up of "**CG**" to indicate that this is a CGL form; "**20**" indicates the category of CGL endorsement that this form belongs to, an additional insured endorsement; "**10**" is the number assigned to this particular CGL additional insured endorsement; and "**03 97**" indicates that this form is the March 1997 edition of the CG 20 10.

ISO has promulgated 33 forms of additional insured endorsements, each tailored to a different risk transfer, including CG 20 09 03 97 Additional Insured–Owners, Lessees or Contractors–Scheduled Person or Organization (for Use When Contractual Liability Coverage is Not Provided to You Under this Policy); CG 20 10 10 01–Additional Insured–Owners, Lessees or Contractors– Schedule Person or Organization; and CG 20 26 11 85–Additional Insured–Designated Person or Organization.

2.2.4 Covered Liabilities.

Additional insured endorsements furnish coverage to an additional insured for liabilities "**arising out of**" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes.

.1 Ongoing Operations.

ISO form CG 20 10 is ISO's standard endorsement for use in adding a project owner as an insured to a general contractor's CGL policy or a general contractor to a subcontractor's CGL policy (See **Chapter 6 Form 2.2** CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization). CG 20 10 provides coverage for the additional insured's liabilities arising out of the "**ongoing operations**" of the named insured. CG 20 10 has undergone changes from coverage for liabilities "*arising out of the work*" of the named insured in the November 1985 version (CG 20 10 11 85), to "*arising out of the ongoing operations*" of the named insured in the October 1993 version (CG 20 10 10 93), the March 1997 version (CG 20 10 03 97), and the October 2001 version (CG 20 10 10 01). ISO made this change to clarify that this particular form of additional insured endorsement is intended to cover liabilities arising out of the "ongoing operations" of the named insured as opposed to liabilities arising out of operations that have been completed. The October 2001 revision added an express exclusion from coverage for liabilities "*occurring after ... all work ... has been completed*" to further emphasize the "ongoing" operations requirement.

.2 Completed Operations.

The ISO CG 20 10 11 85 additional insured endorsement ("arising out of your work") was construed in *Pardee Constr. Co. v. Insurance Co. of the West*, 92 Cal. Rptr.2d 443 (Cal.App. 2000) to cover an additional insured contractor's liabilities arising out of the completed operations of its named insured subcontractor. In *Pardee* the CGL policy and additional insured endorsement were issued 4 years after completion of the subcontractor's work on the project in question and were held to cover injuries arising out of the earlier work of the subcontractor. The wording of the additional insured endorsement must be examined to determine if complete operations coverage is included (*e.g.,* by not limiting coverage to "*ongoing*" operations or by not expressly excluding coverage for completed operations). If completed operations coverage is desired and coverage is not afforded by the proffered endorsement form, coverage may be effected either by manuscripting the endorsement to extend to completed operations or by adding the coverage by a completed operations endorsement. ISO CG 20 26 Additional Insured–Designated Person or Organization endorsement (see **Chapter 6 Form 2.4** CG 20 26 Additional Insured–Designated Person or Organization) covers liabilities "*arising out of operations*" and thus is not limited by an "ongoing" qualifier; this form also does not contain an express exclusion for coverage of liabilities "*arising after completion of work*." ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations (see **Chapter 6 Form 2.5** CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations) is designed to cover completed operations liabilities, first by stating that it covers liabilities "*arising out of your* (the named insured's) *work*" and stating that the liabilities covered are those liabilities arising out of the work that are "*included in the products-completed operations hazard.*"

.3 Premises.

There are two ISO endorsements used primarily to add as an additional insured the owner of premises or land leased to the named insured, CG 20 11 Additional Insured – Managers or Lessors of

Premises and CG 20 24 Additional Insured – Owners or Other Interests from Land Has Been Leased. (See **Chapter 6 Form 2.3** for CG 20 11 Additional Insured – Managers or Lessors of Premises). ISO AI endorsement adds designated persons as AIs as to designated "premises" and covers the AI's liability

> arising out of the ownership, maintenance or use of that part of the **premises** leased to you (the named insured) and **shown in the Schedule** subject to the following additional exclusions: ... Any "occurrence" which takes place after you cease to be a tenant in that premises. (and) Structural alterations, new construction or demolition operations performed by or on behalf of the (AI)....

An almost identical ISO endorsement is CG 20 24 11 85 Additional Insured – Owners or Other Interests from Land Has Been Leased. The sole and obvious difference being "land" versus "premises." The most common factually litigated scenario regarding these endorsements involves injuries occurring "**outside**" the "**part**" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is effected if the schedule designates more or less than the "part of the premises" leased to the NI.

Cases Finding No Coverage.

For example, in *General Accident, Fire and Life Assurance Corp. v. Travelers Ins. Co.,* 556 N.Y.2d 76 (1990), the court held that the AI endorsement did not cover a claim brought by the NI's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant NI's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the location ("the premises") where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility. See *Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.* 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N.Y.App. Div. Lexis 13316 (2003)–injury occurred to a HVAC repairman who was injured while walking on roof of landlord's multi-tenant retail center to get to HVAC unit that tenant was obligated to maintain pursuant to lease of a retail space in the center. The AI endorsement form was an ISO CG 20 11 Additional Insured – Managers and Lessors of Premises (**Chapter 6 Form 2.3**). The injury neither occurred in the retail space leased to tenant or on the roof directly above the space. See also *Rensselaer Polytechnic Inst. v. Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991)–stating that court was not persuaded that a duty to indemnify existed by the argument that although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co. V. Admon Realty, Inc.,* 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)–finding no duty to indemnity where the cause of the damage occurred outside the leased premises; *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)-AI endorsement held not to cover injuries occurring in alley behind NI's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center); *USF&G v. Drazic,* 877 S.W.2d 140 (Mo. 1994)-AI not covered for injuries to NI tenant's employee who slipped and was injured on an icy parking lot.

Cases Finding Coverage.

An earlier New York case, *J. P. Realty Trust v. Public Serv.,* 476 N.Y.S.2d 325 (1984), found coverage for the AI for an injury occurring to the NI's employee injured while using a freight elevator. The AI endorsement designated landlord's entire building as "that part leased to the insured;" however, the lease designated only two floors of the building as leased to the tenant as the "premises." The lease provided tenant use of the freight elevator. This court looked to the intent of the parties and construed the AI endorsement broadly in favor of coverage. Similarly, the court in *Harrah's Atlantic Inc. v. Harleysville Ins. Co.*, 288 N. J. Super. 152, 671 A.2d 1122 (1996) found coverage for the AI landlord for an injury occurring outside the premises leased to tenant (employee of NI tenant injured crossing street separating landlord's parking garage and landlord's building which housed tenant's retail space). The court noted

> However, the requirement that there be a causal link or connection between the accident and the leased premises does not mean that there must be any degree of physical proximity between the leased premises and the scene of the accident. The two concepts are quire different. Thus, we would expect the outcome in the *Franklin* case to have been the same had the tenant's business guest fell on the building's exterior steps even if they were some distance from the luncheonette. This so because the negotiating for such an endorsement in a lease the landlord is simply attempting to ensure against the risk of liability generated by the business about to be conducted by the tenant, and place the cost of insuring that risk on the tenant.

Franklin Mut. Ins. v. Security Indem. Ins., 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). Also see *ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)–court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The AI endorsement was issued on an inapplicable form as it provided AI coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the NI was a garage operator. The court noted that NI's CGL policy provided coverage to the NI for garage operations including "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations ...[; and] all operations necessary or incidental to a garage business." The court reasoned that "without traversing the sidewalk for access to and from the garage, there could be no use at all of the garage as a parking facility." *Id.* at 176. In *University of California Press v. G. A. Insurance Co. of New York*, 1995 U.S. Dist. Lexis 21442, 1995 WL 591307 (E.D.N.Y. 1995), the property damage and actual injury occurred within the leased premises. Books stored within the leased premises were damaged by leaking water from a sprinkler system malfunction one floor above the leased premises. The court found the language of the insurance agreement to be ambiguous and unclear as to whether

> the term "arising out of" referred to where the breach took place, where the accident occurred or where the damage occurred.

Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp. v. Northbrook Property & Casualty Insurance Co.,* 938 F.Supp. 555 (D. Minn. 1996), *aff'd*, No. 97–1197, 1997 U.S. App. Lexis 34146 (8th Cir. 1997) upheld coverage for an additional insured landlord which leased a hog-processing facility to the employer (Quality Pork Products, "QPP") of a person who was killed using a machine designed and manufactured by Hormel, installed on the premises, and leased to QPP by Hormel. The Northbrook insurance policy AI endorsement covered losses "arising out of the ownership, maintenance or use, of the leased premiss." The court held that the machine was so intertwined with the facility's operations as to make injuries flowing from it attributable to the "ownership, maintenance, or use" of the facility. The machine was bolted to the floor walls and was "unambiguously part of the premises." How far some courts will extend AI coverage is illustrated by *SFH, Inc. v. Millard Refrigerated Services, Inc.*, 339 F.3d 738 (8th Cir. 2003). The warehouse lease required the lessee to carry CGL insurance and the lessor and its manager as AIs. Coverage was affected through a blanket AI endorsement covering all AIs required by NI's contracts to be covered. The AI language was identical to the ISO CG 20 11 coverage as to "liability arising out of the ownership, maintenance or use of that part of the premises leased to you." The lessee's property was destroyed by a fire at the warehouse. It was determined that the one of the manager's employees had disabled the sprinkler system. The court found in favor of coverage, stating

> Construing the "arising out of" language broadly, we conclude that [the warehouse manager's] liability arose out of its maintenance of the leased premises. the fire started within the portion of the warehouse leased by [the lessee] and injured [the lessee's] property located in the leased premises. [The lessee's] loss was caused, or significantly increased, by the conduct of the [manager's] employee

who shut off the water to the building's sprinkler system.

3. Additional Insured's Covered Liabilities.

3.1 Negligence.

3.1.1 Its Vicarious Liability for Named Insured's Negligence.

Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. An additional's insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors* (1996); and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. *See* the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that AI coverage is not limited to coverage of the AI's vicarious liability for the NI's negligence, or even to cases where the NI is concurrently negligent with the AI.

3.1.2 Its Own Negligence.

Depending on the language of the protecting party's insurance, the protected party may be covered for its own negligence, whether or not the protecting party is negligent. *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App. [1st Dist.] 1999, *writ den'd*); and *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App.-Austin [3rd Dist.] 1999, *no writ*). As such, it supplements the protection afforded by the protecting party's indemnity.

3.2 Interpretation of Additional Insurance Covenants.

3.2.1 Express Negligence Test Not Applicable to Insurance Covenant.

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), *cert. den'd*, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring the protected party (Getty) to be listed as an additional insured on the protecting party's (NL Industries') liability policies. In *Getty* the injuries arose out of Getty's sole negligence; the indemnity provision excluded indemnity for Getty's negligence; the insurance covenant was silent as to whether the insurance was or was not to cover injuries due to Getty's negligence; the insurance covenant in the contract provided for NL Industries to maintain commercial general liability insurance and for such insurance was to "*extend to and protect Getty*." The court found that there was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies (*e.g.,* through an automatic blanket insured provision).

3.2.2 Rules for Interpretation.

If an additional insured endorsement is silent or ambiguous as to coverage of an additional insured's negligence, courts may look to the protecting party's indemnity language, other language in the contract, custom and practice, the language of the additional insured endorsement and certificate of insurance to interpret the endorsement's coverage.

.1 Ambiguous Insurance Covenant Look to Scope of Indemnity Clause.

In *Emery Air Freight Corp. v. General Transport Systems, Inc.*, 933 S.W.2d 312 (Tex. App.--Houston [14th Dist.] 1996, *no writ*), the Houston Court of Appeals found that the protecting party's failure to cause its insurance carrier to endorse its CGL policy to add the protected party as an additional insured did not breach the protecting party's insurance covenant when the injury arose out of the protected party's sole negligence. The insurance covenant and indemnity clause read as follows:

> Contractor (General Transport) shall obtain and maintain at its own expense insurance in such forms and minimum amounts as set forth below naming Emery as an additional insured. ... General Liability Insurance – $1,000,000. ....
>
> Contractor shall be solely responsible and liable for any and all loss, damage or injury of any kind or nature whatever to all persons, whether employees or otherwise, ... arising out of or in any way resulting from the provisions of services hereunder, and Contractor agrees to defend, indemnify and hold harmless Emery ... against any and all loss ... arising out of the provision of the services hereunder, by Contractor.

The court held that the contract between the parties did **not** require the protecting party to provide the protected party with insurance covering the protected party's **sole negligence**. *Id.* at 315. The court of appeals noted that the Texas Supreme Court had twice previously, in *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794 (Tex. 1992) and *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972) dealt with the interaction of an indemnity clause and an insurance clause in a contract. Based on these cases, the court of appeals concluded it was required to undertake a two-step analysis. The court is to (1) first, determine if the indemnity clause expressly requires the protecting party to indemnify the protected party for the protected party's negligence; and (2) secondly, determine if the indemnity and the insurance clauses are stand alone covenants or whether the insurance covenant is supportive of and limited by the scope of the indemnity clause. *Emery Air Freight Corp. v. General Transport Systems, Inc.*, 933 S.W.2d 312 (Tex. App.–Houston [14th Dist.] 1996, *no writ*).

The court held that even though Emery was to be listed as an additional insured on GTS's liability insurance policy, the "'most reasonable construction' of the insurance provisions in the parties' contract 'is that they were to assure the performance of the indemnity agreement as entered into by the parties.'" *Id.* at 314.

The court based this determination on the following factors: (1) the indemnity provision did not have an internal provision requiring insurance to support the indemnity distinct from other provisions for insurance in the agreement; (2) the insurance covenant did not require coverage of the protected party's negligence "*whether or not required*" by other clauses in the contract; and (3) the insurance covenant did not expressly cover the protected party's negligence.

Several jurisdictions seem to follow the same approach. *See Allianz Ins. Co. v. Goldcoast Partners, Inc.,* 684 So.2d 336 (11th Dist. 1996) – manufacturer's agreement to provide insurance to franchisees as additional insureds did not require coverage beyond manufacturer's own liability where manufacturer had no duty to indemnify franchisee for franchisee's own negligence; *Transcontinental Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh,* 662 N.E.2d 500 (Ill. 1996) – agreement to procure insurance to the extent of indemnitor's agreement to assume indemnitee's negligence held void under Illinois Indemnification Act and thus, no coverage was available to indemnitee as additional insured; *Shaeed v. Chicago Transit Auth.,* 484 N.E.2d 542 (Ill. 1985) – insurance clause and contract required that subcontractor maintain insurance "insuring all subcontractor's indemnity obligations," court rendered insurance provision unenforceable because it sought insurance against an invalid agreement to indemnity; *Posey v. Union Carbide Corp.*, 507 F.Supp 39 (M. D. Tenn. 1980) – agreement to indemnity owner from any claims for bodily injury sustained on premises resulting from construction work along with agreement to procure insurance to the same effect held unenforceable by virtue of an invalid indemnity agreement. On the other hand, courts have ruled that an invalid and unenforceable indemnity agreement does not necessarily render coverage for an additional insured null and void. *See Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh,* 44 Cal. App.4th 1633, 52 Cal. Rptr.2d 580 (Cal. 1996); *Bosio v. Branigar Org., Inc.*, 154 Ill. App.3d 611, 506 N.E.2d 996 (2nd Dist. 1987); *McAbee Constr. Co. v. Georgia Craft Co.,* 343 S.E.2d 513 (Ga.App. 1986); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.,* 225 Cal. App. 740 (1986) – agreement to procure insurance for additional insured's sole negligence held enforceable despite state statute prohibiting risk transfers for sole liability.

.2 Ambiguous Insurance Policy Construed in Favor of Coverage.

Cases Disregarding Exclusions of Negligence in Indemnity and Silence in Insurance Covenant in Construing Ambiguous AI Endorsement in Favor of Coverage of AI's Negligence.

Attempts by a protecting party's insurer to limit its additional insured coverage under an issued additional insured endorsement have been rejected in other jurisdictions even though the insurance covenant or indemnity in the contract between the named insured and the additional insured addressed only the negligence of the named insured. *J. A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. App. 1995) - the court declined to limit the coverage of an issued additional insured endorsement to the coverage required by the contract between the protecting party and the protected party; *also see Mobil Oil Co. v. Maryland Cas. Co.*, 681 N.E. 552 (Ill.App. 1997), court refused to limit additional insured to limits specified in contract between protecting party and the additional insured/protected party where protecting party's CGL policy limits exceed contracted for amount.

Cases Construing Ambiguous AI Endorsement in Favor of AI Coverage for its Negligence.

In *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993), the federal court of appeals held that under Kansas law an additional insured endorsement did not limit the policy's coverage to cases where the additional insured is held vicariously liable for the named insured's negligence. In this case, the AI endorsement stated that the AI was included as an insured

> but only with respect to liability arising out of operations performed by or on behalf of the named insured for the (additional) insured.

Applying rules of contract construction, the court held that at best, the phrase "but only with respect to liability arising out of operations" is ambiguous as to whose negligence is covered and whose negligence is excluded.

The court held in favor of a broad construction of coverage of the AI's own negligence since the insurance carrier crafted the language. This case involved a suit by a patron at a festival held on city property where the injured patron sued the city alleging the city failed to warn the patron of a dangerous condition. The patron fell over a retaining wall that separated the festival grounds on the city's property from an underground parking garage on the city's property. The city tendered defense to the named insured festival operator's insurance carrier on whose policy the city was an AI. The carrier declined defense arguing that the AI endorsement provided coverage only for the city's vicarious liability for the acts and operations performed by the named insured, not for the city's own negligence. The court found coverage as long as the AI's negligence had a close and direct connection with the named insured's operations.

> Although a remote connection between (the named insured's) operations and the plaintiff's injuries would not suffice (to establish coverage for the additional insured) ... we conclude that the facts of this case clearly demonstrate the requisite causal connection. It is undisputed that (the plaintiff) was injured while walking from a dance sponsored by (the named insured) to the portable toilets set up by (the named insured). Under these circumstances, a reasonable insured in (the additional insured's) position would understand that (the plaintiff's) injuries, and (the additional insured's) liability, **"arose out of"** (the named insured's) operations.

3.2.3 Interpretation of Additional Insured Endorsements.

.1 Liabilities Arising Out of Named Insured's Operations or Work.

Liability Did Not Arise Out of Named Insured's Operations.

In 1992 a court of appeals in *Granite Construction Co., Inc. v. Bituminous Ins. Cos.*, 832 S.W.2d 427 (Tex.App.-Amarillo 1992, *no writ*) found that the additional insured endorsement to the protecting party's CGL policy (Brown's CGL policy) did not cover the negligence of the additional insured (Granite Construction), but only the negligence of the named insured (Brown). Granite Construction had agreed by contract to load Brown's trucks and Brown's responsibility was to haul the asphalt after the trucks were loaded. Granite Construction was named as an additional insured on Brown's CGL

policy. The additional insured endorsement provided coverage for liability "**arising out of operations performed for such insured** (the additional insured, Granite Construction) **by or on behalf of the named insured** (Brown)." Brown's injured employee alleged that Granite Construction had negligently loaded the truck. Granite Construction sought coverage under the additional insured endorsement, contending that Brown's employee's injuries "arose out of the **work**" done under Granite Construction's contract with Brown, and thus arose out of the "**operations**" performed for Granite Construction by Brown. The court disagreed, holding that the claim against Granite Construction "arose out of Granite Construction's loading operations" and not out of "operations performed by Brown," the only operations for which Granite Construction was insured as an additional insured. Under the *Granite Construction* court's view of additional insured coverage, the additional insured is covered only for its vicarious liability for the acts and omissions of the named insured, but not for its own acts or omissions.

Following the analysis of *Granite Construction*, the Northern District of Texas in *Northern Ins. Co. of N.Y. v. Austin Commercial, Inc. and Am. Airlines, Inc.,* 908 F. Supp. 436 (N. D. Tex. 1995) held in a "liability arising out of 'your **work**'" AI endorsement case where the named insured's employee was injured by the negligence of the AI that additional insurance protection is not triggered to cover the additional insured's contributory negligence absent joint negligence on the part of the named insured. One rationale for the *Granite Construction* and *Austin Commercial* decisions, although not stated by the courts, is that a named insured's CGL insurance is not an insurance product designed to cover injuries to employees of the named insured, but is designed to cover the named insured and the additional insured for liabilities arising out of injuries to third parties.

Majority View: Additional Insured's Liability Covered if Causally Connected to Named Insured's Work or Operations even if Named Insured is Not Negligent – "Arises Out Of" Broadly Construed Against Insurer.

The *Granite Construction* court's rationale was subsequently rejected by a California court construing the same additional insured language. A California court in *Acceptance Ins. Co. v. Syufy Enterprises*, 81 Cal.Rptr.2d 557, 562 (Cal.App. 1999) expressly rejected the rationale of *Granite* stating

> We disagree with the Texas approach. It is inconsistent with the ordinary broad meaning of "**arising out of**," which as noted above has been regularly applied by California courts in insurance cases. This inconsistency leads to tortured results. In *Granite Construction*, the negligent loading of the named insured's truck caused no injury (and no liability) until the named insured's employee began hauling the load, in the course of which the truck overturned. It is difficult to understand how the driver's claim did not arise out of the hauling operation in the most direct way, unless one assumes that fault is a predicate for coverage. We do not believe such an assumption is justified by the policy term "liability arising out of operations."

Since the California case rejecting *Granite Construction*, state court of appeals and federal courts in Texas have issued a string of decisions distinguishing or abandoning *Granite Construction* and adopting the majority view from California and other jurisdictions. In 1999 a mere two months after the California case, a Texas court of appeals in *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App. [1st Dist.] 1999, *writ den'd*). considered the breadth of "**arising out of**" in the context of an ISO CG 20 10-type additional insured endorsement covering liabilities arising out of the "**operations**" of the named insured. In *Admiral*, K-D Oilfield Services a company hired to service an oil and gas facility named the facility's owner, Trident NGL, as an additional insured for liability arising out of the service company's "operations." While one of the service company's (the named insured's) employees was unloading tools on the premises of the additional insured, the additional insured's compressor exploded. The servicing company's injured employee sued the facility's owner, Trident NGL, and the owner sought a declaration that it was covered as an additional insured.

The parties agreed that the named insured contractor (K-D Oilfield Services) was free from fault and did nothing to cause the explosion. The court of appeals followed what it considered to be the "**majority view**" construing similar endorsements:

> [F]or liability to "arise out of operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured.... We hold that, because the accident in this case occurred to a KD employee while the employee was on the premises for the purpose of performing preventive maintenance on the compressor that exploded, the alleged liability for the employee's injuries "arose out of KD's operations," and, therefore, was covered by the "additional insured" provision. *Admiral* at 455.

Later in 1999 the Third Court of Appeals followed the rationale of *Admiral* in *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App.-Austin [3rd Dist.] 1999, *no writ*) and held that an additional insured's negligence is covered by an additional insured endorsement covering liabilities "*arising out of* (*the named insured's*) **work**." The endorsement form was the "11 85 " version of the ISO CG 20 10 additional insured endorsement. The insurance company argued that "*arising out of*" means only those liabilities coming *directly* from the negligence of the protecting party (in this case, Crouch, the contractor), and coverage could not arise in a case where only the protected party (in this case, McCarthy, the additional insured owner) was negligent. The court of appeals, however, found that coverage occurs where there is a "**causal connection**" between the liability and the named insured's work, even though only the additional insured is negligent. The *McCarthy* court described the coverage trigger as follows:

> As he was walking down this incline to go to the equipment trailer, Wilson "fell on the muddy, slippery surface." These allegations show that walking down the incline to get tools to perform its job was an integral part of Crouch's work for McCarthy. Thus, the accident occurred while Wilson was on the construction site for the purpose of carrying out Crouch's contract with McCarthy. There was more than a mere locational relationship between the injury and Wilson's presence on the site. Wilson's injury occurred while he was carrying out a necessary part of his job for Crouch. Therefore, there is a causal connection between Wilson's injury and Crouch's performance of its work for McCarthy and the liability "arose out of" Crouch's work for McCarthy." ... The insurance companies offer a competing interpretation for the phrase "arising out of" that they claim is equally reasonable and thus creates an ambiguity. Their interpretation would limit the interpretation of "arising out of" to mean coming directly from; *i.e.*, for liability to arise out of Crouch's work for McCarthy, the liability must stem *directly* from Crouch's negligence and cannot extend to negligence caused solely by McCarthy. Post-*Lindsey*, however, such a restrictive interpretation no longer appears reasonable in Texas and cannot be used to create ambiguity. However, were we to consider the phrase "arising out of" ambiguous, we would apply the familiar rules that construe the policy against the insurer and reach the same result. *Id.* at 730. [Reference to *Lindsey* is to *Mid-Century Ins. Co. v. Lindsey,* 997 S.W.2d 153, 156 (Tex. 1999) which broadly construed the term “arising out of” to mean a causal connection in construing coverage under an auto liability insurance policy as covering accidental discharge of a shot gun in pick up.]

In 2001 the Dallas Court of Appeals in *Highland Park v. Trinity Universal Ins. Co.*, 36 S.W.3d 916 (Ct.App. [5th Dist.] Dallas, 2001, *no writ*) also was called upon to construe an "*arising out of ‘your* **work**’" additional insured endorsement. Based on *McCarthy* and *Admiral*, the court found that the additional insured endorsement covered the additional insured’s, Highland Park's, negligence because the injury to the named insured’s employee arose out of the named insured’s work on the additional insured's premises, even though Highland Park was solely negligent.

In 2000 the Fifth Circuit in two cases involving Mid-Continent Casualty Co. and different panels followed *Admiral* as opposed to *Granite Construction*. The first panel of the Fifth Circuit in *Mid-Continent Casualty Co. v. Chevron Pipe Line*, 205 F.3d 222 (5th Cir. 2000) construed an ISO CG 20 10 11 85 "*arising out of your work*" additional insured endorsement as covering injuries to a named insured's employee

negligently caused by the additional insured. The court appears to have been willing to make a distinction between protection afforded to an additional insured on the basis of whether the injury arose out of the "operations" or the "work" of the protecting party. The court found that

> The Mid-Continent endorsement and those in *Granite Construction* and *Admiral* are not identical. Mid-Continent uses "liability arising out of 'your (Power Machinery, Inc.'s) **work**'", defined by the policy as the named insured's [PMI's] work or operations, while the *Granite Construction* and *Admiral* endorsements, respectively, used "liability arising out of operations performed ... by or on behalf of the named insured", ... and "liability arising out of the named insured's operations" *Admiral*, 988 S.W.2d at 454 (emphasis added). On the other hand, the pertinent language in the two additional insured endorsements at issue in *McCarthy* is identical to that in Mid-Continent's. *See McCarthy*, 7 S.W.3d at 727 n. 4. .... To the extent that there is a conflict in the approach taken by *Granite* and *Admiral* in interpreting the endorsement, *e.g.*, fault-based versus activity-based, we agree with CPL(Chevron Pipe Line) that our affirming the coverage-for-CPL-ruling does not require us to resolve such conflict. We are persuaded that, in the light of *Granite Construction's* focus on the word "*operations*" in the endorsement, which it considered in conjunction with the parties' division of operations in its services contract, there is *no* need here to reach the same non-coverage holding. First, the word "operations" does *not* appear in the Mid-Continent endorsement; rather, it uses "your work", which, per its policy definition as *work or operations*, may indicate that broader coverage was intended; second, the underlying services contract does *not* divide responsibilities between CPL and PMI *vis-a-vis* PMI's work; and finally, based on the finding in the Fant action that PMI controlled Fant's work at CPL, his injury, at least in part, "arose out of" PMI's work for CPL.

The second panel in *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) struggled with the issue of whether an injury arising out of operations performed by a subcontractor for its contractor were covered by an additional insured endorsement to the subcontractor's CGL policy covering injuries arising out of operations for the additional insured premises owner. The additional insured endorsement to Air Equipment's policy provided that it covered

> any person or organization for whom the named insured (Air Equipment) has agreed by written 'insured contract' to designate as an additional insured ... but only with respect to liability "*arising out of your ongoing **operations** for that insured.*"

Given the absence of language in the policy excluding from its coverage liabilities arising solely from the additional insured's negligence or excluding operations performed for another contractor while on the additional insured's premises, the court held that the policy would be broadly construed in favor of coverage for the additional insured. The court reasoned that a subcontractor's operations for its contractor are operations for the owner as well.

Each of these Fifth Circuit cases involved the ISO CG 20 10 additional insured endorsement form. The court found in each case that the employment relationship between the named insured and the injured plaintiff suing the additional insured satisfied the condition for coverage.

.2 Injuries to Named Insured's Employees Arise Out of Named Insured's Operations.

Courts in some jurisdictions have found that where the injured person to whom the additional insured is liable is the employee of the named insured, the additional insured's liability arises out of the named insured's operations as a matter of law by virtue of the employment. *Liberty Mutual Ins. Co. v. Westfield Ins. Co.*, 703 N.E.2d 439 (Ill. App. 1998); *Township of Springfield v. Ersek*, 660 A.2d 675 (Pa.App. 1995); and *Florida Power & Light Co. v. Penn. America Ins. Co.*, 654 So.2d 276 (Fla. App. 1995).

.3 Coverage for Acts or Omissions of Named Insured May Not Be as

Broad as Work or Operations.

Other courts have found no coverage for an additional insured's negligence, if the additional insured endorsement covers "liability arising out of the named insured's acts or omissions" without reference to the named insured's work or operations. *Harbor Ins. Co. v. Lewis*, 562 F. Supp. 800 (E.D. Pa. 1983); *Consolidation Coal Co. v. Liberty Mutual Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976).

4. Certificate of Insurance Disregarded in Construing AI Coverage.

Certificates of insurance are merely informational and not controlling in interpreting AI coverage. The court in *Jones Constr. Co. v. Hartford Fire Ins. Co.,* 269 Ill. App. 3d 148, 645 N.E.2d 980 (1995) held that a certificate of insurance limiting coverage to the extent of a named insured's negligence did not control interpretation of an the AI Endorsement and interpreted the AI endorsement as covering the AI's sole negligence.

5. "Resulting from" Limits Coverage to Concurrent Negligence of NI and AI.

Cases in many jurisdictions have recognized a clear distinction between the use of "arising out of" and "resulting from" language in AI endorsements. *See e.g., State Farm Fire and Cas. Co. v. Thomas,* 1986 WL 9001 (Tenn. App. 1986). However, "arising from" is identical to "arising out of." *Redball Motor Freight, Inc. v. Employers Mut. Liab. Ins. of Wis.,* 189 F.2d 374, 378 (5th Cir. 1951); *Schmidt v. Utilities, Inc.*, 182 S.W.2d 1818 (Mo. 1944). Annot. 89 A.L.R.2d 150, 154 (1963).

3.3 Express Exclusion of Additional Insured's Negligence.

3.3.1 Must Examine the Endorsement.

The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) in which the 6th Circuit applied Texas law, emphasizes why it is important to read the additional insured endorsement and not to rely either upon a statement in the certificate of insurance that a protected party is an additional insured for liabilities arising out of the work of the protecting party or upon a general statement in the contract that a protected party is to be listed as an additional insured on the protecting party's CGL policy. The court held that the additional insured endorsement meant exactly what it said, "*the negligence of the additional insured is excluded*," and that the certificate of insurance stating that the protected party was an additional insured and the contractual provision in the contract between the parties that the protected party be listed as an additional insured did not provide that the additional insured was to be covered for its negligence. The additional insured endorsement was a manuscripted endorsement issued by American Indemnity Group ("**AIG**"). Interestingly, AIG paid its policy limits to settle the case, despite its exclusion for the additional insured's negligence. AIG sought contribution from the excess insurer, but failed as the excess insurance was a following form policy and the court found no coverage under AIG's endorsement. The following is the AIG additional insured endorsement:

> It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities arising out of their operations performed by or for the named insured, but excluding any negligent acts committed by such additional insureds.

See **Chapter 6 Form 2.6** for AI Endorsement issued by AIG and **Chapter 6 Form 2.7** [Par. B IIb(3)] for Blanket AI Endorsement issued by Bituminous Coal, each of which expressly exclude coverage for AI's negligence.

3.3.2 2004 Revision to ISO Forms.

Recently, ISO issued revisions to its AI Endorsements, including the CG 20 10, 20 26 and 20 37 (attached hereto as **Chapter 6 Forms 2.2, 2.4 and 2.5**) to eliminate coverage for an AI's sole negligence. For example, the CG 20 10 form will exclude coverage for liabilities attributable to the AI's sole negligence as follows:

> **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organizations shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your (the named insured's) acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the locations(s) designated above.

The 2004 revision seeks to limit the trigger for AI coverage to occurrences caused by the sole or partial negligence of the NI.

3.3.3 Manuscript AI Endorsement to Limit Coverage to Indemnified Liabilities.

One approach parties have used is have the protecting party's insurer issue a manuscripted AI endorsement that is limited to insurable indemnified liabilities. In *Certainteed Corp. v. Employers Ins. of Wausau,* 939 F. Supp. 826 (D. Kan. 1996). In *Certainteed* the AI endorsement issued by Wausau was a blanket automatic insured provision in the CGL policy it issued to its named insured contractor. This provision provided as follows:

> Section Two–Who Is an Insured:
>
> 5. Any person or organization ... for which you have agreed by written contract to procure .... liability insurance, but only for liability arising out of operations performed by you or on your behalf, provided that: ... (b) The insurance afforded to any person ... as an insured under this Paragraph 5 shall include only the insurance that is required to be provided by the terms of such agreement to procure insurance, and then only to the extent that such insurance is included within the scope of this policy.

The insurance provision of the construction contract, required the protecting party (the named insured contractor providing construction services to the plant owner) to provide insurance coverage for all "liability assumed" by the protecting party. The construction contract contained an indemnity agreement whereby the protecting party indemnified the protected party (the additional insured plant owner) for its negligence except if due to its sole negligence. The court construed the blanket addition insured provision as covering the additional insured's liability for injuries jointly caused by the protected party and by another contractor (a construction manager) to an employee of the named insured. The court thus held that the scope of the AI coverage was the same as the scope of the insurance that the NI was to procure to protect the NI on its indemnity.

3.4 Liability for Failure to List Other Party as Additional Insured.

A party that breaches its contractual obligation to list the other party as an additional insured is liable for all damages that would have fallen within the protection of the additional insured endorsement. The court in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d. 119 (Tex.App.-Houston [14th Dist.] 2000, *writ denied*) found that Coastal failed to list Crown as an additional insured on Coastal's Trucker's Policy and was liable to Crown for the $4,816,549.28 judgment obtained by an employee of Coastal that was injured on Crown's premises. The insurance covenant did not refer to an additional insured designation but required Coastal to obtain insurance "**protecting**" Crown. The insurance covenant in Coastal Transport reads as follows:

> Carrier agrees to purchase at Carrier's cost ... Comprehensive General Liability Insurance including care, custody and control coverage and liability assumed with $1,000,000 limit per occurrence for bodily injury and property damage combined. .... Such insurance shall ... fully extend to, defend and protect Crown.

4. Protected Party's "Other Insurance".

4.1 All Policies Are "Primary" and "Contributing" Unless Amended.

The use of additional insured status as a risk transfer device is aimed at procuring insurance

protection under the protecting party's policy rather than the protected party having to rely upon its own policy. By definition, a party that carries its own liability insurance and is also an additional insured under another's liability policy has multiple coverages which fall under the general heading of "other insurance." A protected party must verify that any "other insurance" coverage to which it has access does not provide it is primary and contributory with the additional insurance coverage provided by the protecting party's CGL policy. Assuming both the protecting party's CGL policy and the protected party's CGL policy are standard form policies, then both parties' policies will declare themselves to be "**primary**" insurance and require any "other" insurance which the insured has access to contribute proportionately unless some modification is effected to eliminate this dual coverage, either by amendment to the protected party's policy or to the protecting party's policy, or both.

The following is the standard "other insurance" provisions in the standard ISO CGL policy and is likely the provision in both the protecting party's CGL policy and the protected party's CGL policy:

> 3. Other Insurance.
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the **other insurance** is also primary. Then we will share with all that other insurance by the method described in c. below....
>
> c. Method of Sharing
>
> If all the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.
>
> If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of al insurers.

4.2 Endorsing Named Insured's Policy to be Primary Not the Solution.

4.2.1 Primary vs. Sole Contributing.

Note that endorsing the protecting party's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969); and *Texas Employers Ins. v. Underwriting Members*, 836 F.Supp. 398, 404 (S.D.Tex. 1993). Endorsing the protecting party's policy to be primary does not address the

other insurance clause contained in the named insured's policy, which unamended provides for proportionate payment based on the limits of the additional insured's primary policy. This may be addressed by endorsing the named insured's policy to be the sole contributing policy even if the AI has primary coverage.

4.2.2 Endorsing the AI's Policy to Be Excess Coverage.

The protected party should amend its own policy to provide that it is excess coverage to the insurance available to it as an additional insured under the protecting party's CGL policy and that in such case it is not primary and contributing as "other insurance".

4.2.3 Providing both Indemnity Insurance and Additional Insured Insurance.

.1 1st Tier Policy.

In *American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co.*, 335 F.3d 429 (5th Cir. 2003), the Fifth Circuit dealt with the interplay between a protecting party's (Elite Masonry, the subcontractor's) CGL policy and a protected party's (Caddell, the general contractor's) CGL policy, where the protected party was also an additional insured on the protecting party's policy and the protecting party's CGL policy contained contractually assumed liability insurance supporting the protecting party's indemnity of the protected party's concurrent negligence. American Indemnity Lloyds (AIL), the CGL insurer of the protecting party and the insurer of the protected party by additional insured coverage of the indemnified protected party, sued Travelers, for contribution. The Fifth Circuit noted that, as AIL contended, the general rule is that where two liability policies issued by different carriers provide coverage to the same insured (Caddell), and both contain an "other" insurance clause that provides for sharing with other primary policies, the two insurers share the loss, and if one paid it and the other did not, the paying insurer may recover contribution form the non-paying insurer. AIL issued a CGL policy to Elite containing a blanket additional insured endorsement. Caddell was the named insured on a CGL policy issued by Travelers. Both the Travelers and AIL policies contained the ISO CG 0001 coverage form, pre-1998 version, which provided for sharing with other primary policies. AIL settled the suit brought by an injured employee of Elite that sued Caddell. AIL sought contribution from Travelers as both policies insured Caddell and both policies provided for sharing with other primary policies.

However, the court held there is an exception to this general rule where the insurer seeking contribution also insures the obligation of its named insured to indemnify the additional insured for the loss. *Id.* at 435-36, *citing Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002). *Also see* 15 COUCH ON INSURANCE (3rd Ed. 1999; Russ & Segalla) § 219.1 at 219-7 stating

> [a]n indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an "other insurance" clause in its policy.

To allow AIL to obtain contribution from Travelers would only result in Travelers, as Caddell's subrogee, asserting Caddell's right to be indemnified by Elite Masonry, and AIL. *Id.* at 433 citing in Footnote 4: *Rushing v. Int. Aviation Underwriters*, 604 S.W.2d 239, 243-44 (Tex.Civ.App.–Dallas 1980, *writ ref. n.r.e.*); *General Star Indem. Co. v. Vesta Fire Ins. Co.*, 173 F.3d 946, 949-50 (5th Cir. 1999); and *Sharp v. Johnson Bros. Co.*, 917 F.2d 885, 890 (5th Cir. 1990).

Texas courts have not yet been faced with determining whether an indemnity provision acts as an agreement establishing priorities between a protecting and protected parties' CGL insurance. It has been held in other jurisdictions that a protecting party's indemnity has the effect of making the additional insurance coverage primary without rights of contribution from the additional insured's other insurance. *Rossmoor Sanitation Inc. v. Pylon Inc.*, 119 Cal.Rptr. 449, 13 Cal.3d 622, 532 P.2d 97 (Cal. 1975), *J. Walters Const. Inc. v. Gilman Paper Co.*, 620 So.2d 219 (Fla.App. 1993), and *Aetna Ins. Co. v. Fidelity & Cas. Co. of New York*, 483 F.2d 471 (5th Cir. 1973) discussed in *American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co.*, 335 F.3d 429, 438 (5th Cir. 2003).

.2 Umbrella Policy.

One court has found that the combination of indemnity, contractually assumed liability insurance and additional insurance coverage in an excess liability policy is an exception to the "other insurance" provision in the excess policy preventing contribution from the additional insured's other available primary insurance, even though the excess policy provided it was excess to unscheduled insurance of the additional insured. *Wal-Mart Stores Inc. v. RLI Ins. Co.*, 292 F.3d 583, 588 (8th Cir. 2002).

5. Conclusion

Unfortunately, although additional insured covenants are the most common risk management technique, they are also the most commonly misunderstood, even by professionals in the field–risk managers, insurance agents, lawyers and courts that are called on to interpret them. The most common error is for the party's insurance covenant to fail to specify the terms of coverage and exclusions from coverage to be contained in the additional insured endorsement. For example, a landlord may specify in its lease that the tenant and the tenant's contractors will cause each of their CGL insurers to list the landlord and its management company and contractors as additional insureds on the tenant's and the tenant's contractors' CGL policies. A tenant may specify in its contract with its tenant-finish out contractor that the contractor shall cause its CGL insurer to list the tenant, its landlord, and the landlord's lender, management company and contractors as additional insureds on the tenant-finish out contractor's CGL policy. The tenant's contractor may specify in its subcontract that the subcontractors list the contractor as an additional insured on the subcontractors' CGL policies. In each of these cases, the person desiring protection as an additional insured has left it up to the other party's insurance carrier to define the scope of the coverage to be provided. This is equivalent to letting the fox determine how, when, and if to protect the chicken! This mistake has been made because there is no commonly accepted definition of what it is to be an "additional insured." When a party fails to specify more than it be listed generically as an "additional insured," it has opened the door to the other party's insurer picking a form that effectively eliminates coverage for the additional insured.