RISK TRANSFER IN CONSTRUCTION: SUBROGATION, INDEMNITY AND ADDITIONAL INSURED PROVISIONS

BY: LAWRENCE T. BOWMAN
DONALD A. WALTZ
ASHLEY VEITENHEIMER
# INDEX

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td><strong>INTRODUCTION</strong></td>
<td>Page 1</td>
</tr>
<tr>
<td>II.</td>
<td><strong>SUBROGATION</strong></td>
<td>Page 21</td>
</tr>
<tr>
<td>III.</td>
<td><strong>WAIVERS OF SUBROGATION IN CONSTRUCTION LOSS CLAIMS</strong></td>
<td>Page 36</td>
</tr>
<tr>
<td>IV.</td>
<td><strong>ADDITIONAL INSURED ISSUES</strong></td>
<td>Page 47</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

The construction industry is the largest single production sector in the United States economy. Construction encompasses a significant percentage of capital expenditures. It employs approximately five percent of the workforce. This is a significant percentage of total employment in the U.S. economy as a whole.

Modern day construction of buildings requires participation by architects, designers, design professionals, engineering professionals, developers/owners, contractors and/or construction managers, subcontractors, and material suppliers.

The legal environment will be dictated in large part by the tasks undertaken by each of the participants from the concept stage through design, construction, and completion of the structure.

LEGAL/CONTRACTUAL RELATIONSHIPS OF THE PARTIES TO A CONSTRUCTION PROJECT

Initially, the owner/developer, by contract, assumes little responsibility for the quality of the construction so long as traditional roles and boundaries are maintained, which distance the owner from design, construction, and supply activities. With the increasing hands-on involvement of owners and developers in the design and delivery process comes additional responsibility for errors and omissions producing damages.
DESIGNER/ARCHITECTS

Architects and engineers of various kinds involved in the design of a structure or building must work within established standards in order to meet their standard of care. The measure of liability is a professional standard of liability, which itself may consist of statutes, regulations, industry standards, product specifications, and the like. The architect and/or design professional is required to comply with this external objective standard of care in designing a building and/or structure. In the event of a failure, the ultimate question to be answered in evaluating liability of the design professional is not simply a question of whether the structure or building designed by the professional failed, but rather whether the design created by the design professional complied with applicable standards.

It should be noted that compliance with applicable standards is frequently viewed as the minimum standard of care, not necessarily that which would absolve the design professional from any or all responsibility under all cases. The issue to be decided in the event of a failure is whether the professional reasonably complied with applicable standards.

The contracts entered into between owners/developers, architects, and design professionals frequently draw upon forms developed by the American Institute of Architects (AIA). AIA forms traditionally have been very effective in
protecting design professionals and frequently circumscribe the duties undertaken by the design professionals rather narrowly.

The standard AIA forms between owner and architect are set forth in the Appendix attached hereto.

**ROLE OF GENERAL CONTRACTORS/BUILDERS**

General contractors, in the traditional model, are required to construct a building or structure in accordance with the contract documents, including the plans and specifications.

The liability of a general contractor in the event of a failure is usually traceable to a material deviation or departure from the design set forth in the contract documents. The ultimate question in a failure case may be whether the failure is due to a poor design, in which case the responsibility rests with the designer or design professional, or conversely, whether the failure is the result of material non-compliance with the design intent set forth in the contract documents. In the latter instance, the liability will be that of the general contractor.

At common law, the general contractor may delegate job performance to a qualified subcontractor without responsibility for a failure on the part of the subcontractor, as long as the general contractor did not retain or exercise control over the work performed by the subcontractor. The basic rule is that when a
failure is due to the act or omission of a qualified independent contractor, there is no automatic responsibility on the part of the person who hired that independent contractor.

Modern practice has changed this to some extent. Modern construction contract documentation frequently includes language to the effect that the general contractor expressly assumes responsibility to the owner for the actions and omissions of subcontractors. It greatly expands the legal responsibility of the general contractor to the owner or an interested third party. The AIA forms between the owner and general contractor typically include language by which the general contractor assumes responsibility for actions and omissions of subcontractors causing damage or injury.

**THE RESPONSIBILITY OF SUBCONTRACTORS**

In the traditional model, the general contractor will select certain subcontractors to perform certain aspects of the work. Trades such as plumbing and electrical contracting require licensing in many states. The general contractor is thus prevented from performing the work, which must be delegated to a qualified (licensed) subcontractor. Not all trades require a license. Even those trades that do not require a license may involve specific subject matter expertise beyond the capability of the general contractor. In the absence of an express
undertaking by which the general contractor agrees to be responsible to the owner or others for the actions and omissions of subcontractors, a failure caused by a subcontractor regarding work performed within the area of the subcontractor's scope of responsibility should not result in the automatic liability of the general contractor or anyone else.

This issue is made more complicated in the modern construction environment by the general contractor's express assumption of liability for the actions and omissions of the subcontractors. Insurance and indemnity obligations complicate the picture even more.

Subcontractors are typically used for site work and underground utilities; foundation; concrete; structural steel framing; masonry; roofing; insulation; exterior walls; windows; flooring systems; conveyance system; mechanical; electrical and plumbing (MEP); and fire protection.

**CHANGES IN THE TRADITIONAL MODEL – THE DESIGN BUILD CONCEPT**

Current construction projects may be performed by integrated design/build teams by which the general contractor and architect are either in partnership or in a relationship with the owner/developer as a joint client or partner.

The use of construction managers for larger projects is prevalent. Construction managers contract with the owner and serve as the owner's agent in
supervising other participants in the construction delivery process. Construction managers may or may not assume the risk of the proper completion of construction. Design professionals, architects, and engineers by contract attempt to limit their role and responsibility. Their real exposure is further limited by the employment of claims-made depleting aggregate or "wasting" liability policies. In many cases, the design professional will be underinsured for the project, and whatever coverage is available will be wasted over time as litigation expenses, including attorney's fees, reduce the insurance limits available to resolve a claim.

Typically, the architect's responsibility for the design ends with the completion of the contract documents, including the plans and specifications. By contract, nonetheless, the architect may assume additional supervisory or construction consulting roles throughout the construction phase of the project. This is a matter of contract between the owner and the architect.

**Material Suppliers/Equipment Rental**

In the modern construction delivery process, equipment and materials are frequently supplied by third parties. Building materials, for example, bricks and stone block, plaster and drywall, electrical supplies, lighting supplies and concrete, and large equipment such as manlifts, cranes, etc. are supplied by rental companies.
CONSTRUCTION FINANCE PICTURE

Construction is accomplished with borrowed funds. Construction lending is a specialty. Construction lenders have differing approaches to the process from hands-on micro-managing to hands-off "let me know when you are finished" funding.

Bonding companies and sureties issue payment and performance bonds, which may be implicated in cases where there is a delay or material non-performance with delivery of the project.

Insurance is available to cover the various risks resulting from the construction process. Various forms of property insurance are available, including builders risk coverage, owner-controlled insurance programs (OCIPs), and contractor-controlled insurance programs (CCIPs). In the typical construction project, care should be taken to allocate the risks in such a manner so as to provide adequate coverage, not duplicative coverage, by which the construction participants incur multiple premium charges for overlapping or duplicative coverage. This is the rationale supporting schemes such as builders risk coverage, OCIPs, and CCIPs.
**Construction Manager "At Risk."** There is the owner, design professional, and construction manager at risk and, below this construction manager, there are multiple subcontractors.
INDEMNIFICATION AND ANTI-INDEMNIFICATION

With money comes power, so it is that the owners, general contractors, and the ones who pay the subcontractors have adopted contractual provisions, which are frequently part of the terms of any bid project by which the subcontractors must assume indemnity obligations.

Under standard indemnification clauses, a general contractor indemnifies the owner or developer, and typically the subcontractors will indemnify the general contractor and/or owner. The indemnification flows downhill – those with the funds are indemnified by those doing the actual work.

Just as typically, contractors may not be in a position to provide liability insurance to insure the value of the property and improvements contemplated by the construction documents. Indemnity obligations running upstream favoring the general contractor and owner/developer run counter to the notion that the owners and developers are in the best position to insure the risk of property damage, provided in the form of a builders risk policy or OCIP, which in most cases waive
subrogation. When the owner insures the property risk, this obviates the need for the subcontractor to provide liability insurance for the value of the improvements to the real estate for the premium, which would then be charged back to the general contractor and/or owner in the form of expenses arising from the construction work. This would result in the owner paying twice for the same coverage, which is afforded through the builders risk or OCIP policy, and then a second time in the form of liability coverage insuring damage to the improvements to the real estate provided by the subcontractor charged back to the general contractor/and or owner as a cost of the construction performed by the subcontractor.

CONSTRUCTION ANTI-INDEMNITY STATUTES

In a majority of the states, statutes have been passed that either preclude or limit the ability of owners and general contractors to require subcontractors to indemnify them for negligent actions and omissions of the owner or general contractor. These statutes counter the unfairness of requiring the subcontractor to accept responsibility for the actions and omissions of the owner or general contractor as a condition of being awarded the work. There are many variations to these anti-indemnity statutes, so each state's law should be consulted.
STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECTS:  
THE ARCHITECT'S RESPONSIBILITY

Article 2, § 2.1 dictates that the Architect "shall provide professional services as set forth in this Agreement." It further provides: "The Architect represents that it is properly licensed in the jurisdiction where the Project is located to provide the services required by this Agreement, or shall cause such services to be performed by appropriately licensed design professionals."

Article 2, § 2.2 sets forth the applicable standard of care as follows: "The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project."

Article 3, § 3.6.1 of the Agreement sets forth the specific obligations of the Architect during the concept stage, the design stage, and the construction phase:

The Architect shall advise and consult with the Owner during the Construction Phase Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor's failure to
perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.

In Article 4, there are provisions for supplemental and additional services to be provided by the Architect. These include site visits, inspections, etc. identified in § 4.2.3.

Under the AIA Contract between the Owner and Architect, the Owner assumes responsibility to provide information and documentation to the Architect upon which the Architect may justifiably rely.

**STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR**

The contractor's job, in essence, is to perform the work defined in the contract documents in compliance with the directives contained in the contract documents, including plans, specifications, drawings, graphics, etc. The obligation of the contractor is succinctly summarized in Article 2, "The Work of the Contract":

The Contractor shall fully execute the Work described in the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others.

Article 3 goes further, "Relationship of the Parties":

-12-
The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish and approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents.

The Doctrine of Substantial Completion. This doctrine is designed to afford an equitable remedy to the contractor to avoid a forfeiture when a contractor has "substantially performed" the duties undertaken by the contractor pursuant to the contract documents. Any deficiencies or incomplete work are deducted from the contract sum to be awarded to the contractor. The contractor is equitably paid based upon the value of the work contributed to the project.

STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR

According to the AIA contract formulation, the subcontract documents consist of the agreement between the contractor and the subcontractor, as well as the prime contract (between the Owner and the Contractor), as well as other contract documents. See Art. 1, § 1.1 – "The Subcontract Documents."
The AIA form dictates that subcontract documents shall not be construed to create a contractual relationship of any kind between the architect and the subcontractor; between the owner and the subcontractor; or between any persons or entities other than the contractor and subcontractor. See Art. 1, § 1.5.

The AIA Document A201™-2017 (General Conditions of the Contract for Construction) applies to a subcontract unless eliminated. See Art. 2, "Mutual Rights and Responsibilities."

The Subcontractors Indemnity set forth in Article 4, §4.7, "Indemnification," states:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's Consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any 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), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's sub-subcontractors, 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 otherwise reduce other rights or obligations of indemnity
which would otherwise exist as to a party or person described in this Section 4.7.

Thus, the indemnity obligations flow downhill from owner to contractor to subcontractor.

The additional insured obligations are provided in Section 12.1.6:

To the fullest extent permitted by law, the Subcontractor shall cause its commercial general liability coverage to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor and Owner as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions for which loss occurs during the Subcontractor's completed operations. The additional insured coverage shall be primary and non-contributory to any of the Contractor's and Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured coverage shall be no less than provided by the Insurance Services Office, Inc. (ISO) CG 20 10 07 04, CG 20 37 07 04, and with respect to the Architect and the Architect's consultants, CG 20 32 07 04.

This language obligates the subcontractor and the subcontractor's CGL insurance carrier to provide CGL coverage to the owner, the contractor, and the architect.

As will be explained in detail later, this provides a redundant, duplicative layer of coverage insuring damage to the building, both during the course of construction and following the completion of construction.
As a counter to this, under the builders risk and OCIPs, the owner undertakes an obligation to insure property damage risk of loss and further agrees to have its property insurance carrier waive subrogation. This results in the positioning of one carrier insuring the property loss against risks occasioned by the participation in the project of the owner, architect, contractor, and subcontractors. It also avoids redundant coverages and duplicative premium charges for what is, in effect, coverage for the same risk of loss.

AIA Contractor Forms routinely require mutual waivers of subrogation:

The Contractor and Subcontractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other, and (2) the Owner, the Architect, the Architect's consultants, and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees for damages caused by fire or other causes of loss to the extent those losses are covered by property insurance provided under the Prime Contract or other property insurance applicable to the Work or to the property at or adjacent to the Project site, except such rights as they may have to proceeds of such insurance held by the Owner as a fiduciary.

See Art. 12, § 12.5.

The purpose of the waiver of subrogation provision is to provide a source of indemnity in the form of a property insurance policy covering the work for the project and the interest of all participants in the project. The corresponding waiver
of subrogation, in turn, prevents the property insurance carrier from then bringing a subrogation claim against a responsible party or person for the damages, which are the subject of the insurance indemnity payment.

AIA DOCUMENT A2-1TM-2017
(GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION)

The A201 form provides a generic platform of terms and conditions applicable to the contracts in a construction project. It defines the contract documents, the contract, the work, the project, and the drawings in similar terms. It reiterates in large part the specific provisions found within the contract documents pertinent to various participants in the project.

As it respects the contractor, the general terms provide: "The Contractor shall perform the Work in accordance with the Contract Documents." See § 3.1.2. The general conditions are very comprehensive and have specific guidance for all aspects of the construction project. Under commercial construction projects, all or a part make reference to an A201 form. It is generally used as the boiler plate for construction contracts in this day and age in North America. While experienced and substantial contracting entities may employ their own forms, their forms in large part resemble the terms and conditions set forth in the A201 form.

The A201 general conditions of the contract for construction do not specify or direct what kind of insurance will be provided, but they do provide that there
will be a mutual comprehensive waiver of subrogation. *See* § 11.3.1, which pertains to all parties in the construction project.
II. **Subrogation in Construction Cases**

Many subrogation claims arise from accidents occurring during the course of or arising from construction. The first issue one confronts in construction claims is to identify all insureds and additional insureds under the same policy. Many construction projects are insured through OCIPs, and many builders risk policies attempt to name all significant participants in the construction project, including architects and engineers, the general contractor, the owner, and sub-contractors.

It is well established that one may not subrogate against an insured under the same property policy.

So, the first issue in connection with a subrogation investigation arising from a construction project is to identify the entire cast of characters who are insured under the insurance policy, which inquiry may reveal whether a viable subrogation claim exists with respect to the parties who are not insured under the same property policy.

**Claims Against Design Professionals**

Oftentimes, the reason a failure occurs may be due to deficiencies in the contract documents for a construction project, which were authored by a design professional, including an architect, civil engineer, structural engineer, electrical engineer, and so on.
Claims brought against design professionals for damage to "the Work" (a defined term in the construction documents) must begin with a thorough and precise analysis of the wording of the contract, including all terms and conditions by which the design professional offers services in connection with the design of the structure involved in the loss. Frequently, design professionals subcontract specific portions of the design to other design professionals. The importance here is to gather all contracts, terms, conditions, and specifications to ensure that the acts and omissions of all designers involved in the project, pertinent to the cause of the loss, are reviewed.

The terms and conditions of contracts involving design professionals frequently contain waivers of subrogation. (See the "Waiver of Subrogation" section for the evolution of the waiver of subrogation language in the standard AIA contractual forms).

After all contractual terms and conditions are scrutinized to identify the names of all insureds, the terms and conditions should be reviewed to ascertain the identity of the professional design services being offered by the design professional, as well as to identify any potential defenses to a claim based upon an alleged act or omission of the design professional. Chief among the defenses may be that the claim is the subject of a waiver of subrogation. AIA waivers are
discussed at length in a previous section of this handbook.

**THE STANDARD OF CARE**

Claims against design professionals for property damage arising from design and construction projects resemble claims against medical professionals in many respects. In many states, such as Texas, laws have been adopted that require a "Certificate of Merit" to be attached to the initial pleading in which a competent design professional, practicing a similar specialty, opines that the design services rendered contain actions and omissions that constitute a material departure from the applicable standard of care. The wording of the Certificate of Merit statutes require scrutiny.

The purpose of the Certificate of Merit is to weed out meritless claims. Unfortunately, in states such as Texas, litigation over the contents and "merits" of the Certificate of Merit has become a cottage industry, a sideshow resulting in delay and expense in litigation involving claims against design professionals.

In order to avoid costly and time-consuming litigation over the Certificate of Merit, one may consider filing the claim against the design professional in federal court if there is diversity of citizenship and if the amount in controversy exceeds $75,000.00. The "Certificate of Merit" requirement is a procedural failure that does not transport into federal court pleading requirements.
The issue, nonetheless, is whether the design professional's performance fell outside the requirements of the applicable standard of care as identified by a comparable, competent expert.

Whether the claim against the design professional sounds in contract or in tort, the issue will probably boil down to whether the design professional's work product complied with the applicable standard of care. The standard of care must be specifically identified in the Certificate of Merit and should be the subject of competent pleading and proof.

The mere fact that a "failure" or a "loss" occurred does not equate to proof that fulfills the burden of proof in a case against a design professional. What must be measured and met is the standard of care applicable to the work performed by the design professional and whether the design professional's work constituted a material departure from the applicable standard of care.

More to the point, it must be shown that the work performed by the building contractor and sub-contractors materially complied with the tasks set forth in the contract documents as drafted by the design professional. If there is a material departure from the design intent as set forth in the contract documents drawn by the design professional, the design professional is not to blame for the failure. Under those circumstances, attention must be directed to the errors and omissions
of the building contractors on the basis that they materially departed from the design intent as set forth in the contract documents.

In most cases, the question of whether the failure is an error and omission committed by a design professional or whether the failure results from a material departure from the design intent as set forth in the contract documents is the issue. It is possible to have failures that are the result of combined errors and omissions of the design professionals and the building contractors. But more frequently, it is either a design failure or a failure of the building contractors to carry out the design intent faithfully. It is important to realize this and to attempt to discern at the outset what kind of failure is involved. The best source of information may be the design professional who, in the event of a failure, will be the first to point out departures from the intent set forth in the contract documents.

In some states the act of sealing the design documents with the engineer's seal is an act of significance in terms of the ultimate liability of the design professional to the one suffering a loss for a building failure. In some states, the act of sealing the plans constitutes a representation by conduct that the design complies with the applicable standard of care. The laws of the particular state should be researched on this point.
CLAIMS BY THIRD PARTIES AGAINST DESIGN PROFESSIONALS

Frequently, the one owning, possessing, and controlling the structure that fails, which is the subject of a claim against the design professional, is not the original contracting party who entered into the design contract with the design professional. In such cases, and where the damage is predominately damage to the Work itself, there may be a question as to whether the third party, perhaps a subsequent purchaser of the building, has standing to make a claim against the design professional, even though the purported plaintiff is not in contractual privity with the design professional. The design professional may assert a defense that no public duty is owed to third parties who are strangers to the contract between the design professional and the original contracting party.

In such cases, arguments have been made that the contract documents and the sealing of plans may constitute actionable misrepresentations involving the assumption of a public duty owed by the design professional to the injured third parties. Design professionals may also raise the Economic Loss Doctrine when the damage is confined to the structure they designed (the "Work") by arguing that the only claim that can be made against him would be based in contract, and only the persons in privity possess the right to make that claim.

At issue, then, in claims involving third parties, such as subsequent
purchasers of the building against design professionals, will be whether, in the state in which the failure occurred, the claim may be made against a design professional by one not in contractual privity with the design professional based upon a tort or a misrepresentation theory. There are cases recognizing a public duty on the part of design professionals to third parties on the basis of actual misrepresentations contained in the contract documents and achieved by the signing or sealing of plans, by which it is alleged that the design professional represented that the work was performed in accordance with the design intent as set forth in the contract documents and that the building was safe from harm.

The ultimate issue is whether the design professional undertakes a public duty to someone other than the person who hired him and who is in privity with him in the event of a failure to the subject matter of the Work performed pursuant to the contract documents. This is a developing issue, and one should consult the case law in the state in which the failure occurred for further guidance.

**Diminishing Aggregate Coverages**

One sad fact of life involving claims against design professionals is that most are insured for professional errors and omissions coverages with policies that may have inadequate limits, large deductibles, and, worse, involve the subject of wasting due to the expenditure of funds for the defense, including attorney's fees
and costs incurred in the defense of the professional liability claim. It is important at the outset of a claim involving a design professional to ascertain the applicable limits to know whether the policy is a "wasting policy" or what is also referred to as a "diminishing aggregate" policy. Another feature of these policies is that the aggregate limit may be diminished or wasted due to the pendency of other claims. This makes setting forth a demand for the extent of policy limits a tricky matter at the very least, and competent subrogation counsel should be consulted at the inception when faced with claims against design professionals insured with wasting or diminishing aggregate policies.

**Claims Against Building Contractors**

If the subrogated claim involves damage to a structure that is the subject of a contract between a general contractor and a building owner or developer, one must begin the analysis by carefully reviewing the terms and conditions of the contract. Important to this inquiry is to identify the **scope** of the construction undertaking pursuant to the contract to determine whether there has been a material departure from the design intent set forth by the design professional in the contract documents; whether that departure is the efficient or proximate cause of the loss; and whether any contractual defenses (such as a waiver of subrogation) may apply to the subrogation claim.
When damage is done to the structure that was the subject of the construction contract or warranty, the Economic Loss Doctrine will apply in most states and will relegate the claims to contract claims against the general contractor in privity with the owner or developer who hired him. There is no direct contract claim, nor is there privity of contract, between the owner/developer and the sub-contractors of the general contractor. Again, because of the application of the Economic Loss Doctrine, it may be questionable at best whether a negligence claim may be brought against the sub-contractors whose actions or omissions may have caused or contributed to the cause of the loss. The law of the state where the loss occurred or as chosen in the contract documents should be consulted on this issue.

If possible, the initial focus of a claim for actions and omissions leading to a construction failure should be on the general contractor, and, in connection with resolving the claim with the general contractor, obtaining an assignment of the general contractor's claims against non-contributing sub-contractors is advisable. The law of the state in which the loss occurred should be consulted for the advisability and efficiency of this strategy, but in states which permit it, this is usually the best strategy.

While the Economic Loss Doctrine may limit the claim against the general
contractor to a breach of contract or warranty claim, tort claims may be available for damage to property other than the Work that was the subject of the construction contract. It is most important to study the scope of work and the standard or level of responsibility set forth in the document. AIA forms are frequently used, and many manuscript forms are derivatives of AIA standard forms.

The AIA A-201 form contains the general terms and conditions for construction. In many respects this document expands the common law responsibility of general contractors for defects and failures occurring during the course of construction. For example, the AIA A-201 form contains an express assumption of responsibility on the part of the general contractor for actions and omissions of subcontractors. This assumption of responsibility by contract will provide the basis for a common-law indemnity claim against the subcontractor in the event the general contractor is able to consummate a settlement of the claims with the owner or developer of the building.

At common law, assuming the general contractor has exercised due diligence in the hiring and supervision of the subcontractor, the general contractor does not share tort responsibility with a subcontractor where the failure occurred due to errors and omissions by the subcontractor acting within the course and scope of the subcontractor's work. It is not a case of vicarious liability. Rather,
there must be some actionable error and omission on the part of the general contractor in order for the general contractor to be responsible, in tort, for the errors and omissions committed by a subcontractor.

The result may be different in contract as in the example of the AIA A-201 form, where the general contractor expressly by contract assumes responsibility for the errors and omissions of subcontractors. This constitutes a substantial expansion of the general contractor's responsibility for errors and omissions committed by subcontractors during the course and scope of their work. The point here is that there may be profound differences in the liability of the general contractor depending on whether the claim is in tort or contract when the underlying act or omission is committed by a subcontractor.

As an example, if a licensed electrical subcontractor commits an error by wiring a junction box wrong and causes a fire, (except for contractual and warrantied claims that may be brought by the building owner or the general contractor) the general contractor may not be responsible at common law in tort for errors and omissions committed by the licensed electrical subcontractor within the course and scope of that contractor's Work. The general contractor does not have an electrical license, presumably. The general contractor is not competent to supervise the means and methods employed by the electrical subcontractor in the
course and scope of his work. It would be unreasonable for the general contractor to behave in that fashion. One could even argue that the general contractor is not permitted to practice electrical contracting without an appropriate license. Accordingly, in the absence of an express contractual provision or warranty by which the general contractor assumes responsibility to the owner for errors and omissions committed by the electrical subcontractor during the course and scope of the subcontractor's work, there would no independent liability for the alleged failure to supervise the electrical subcontractor's performance.

**INSURANCE COVERAGE FOR BUILDING DEFECTS**

A hot topic in CGL insurance coverage is whether the damage to "Work" is covered under the contractor's CGL coverage. In *Lamar Homes v. Mid-Continent Casualty*, the Texas Supreme Court held that there would be coverage for accidents involving property damage without restriction as to whether the damage occurred to the "Work" or to other property.¹ This is a rapidly developing field, and the response of the liability insurance carriers has been to draft explicit endorsements restricting coverage in ways so as to eliminate it for damage to the Work. This is an issue that should be researched at the inception of any subrogation claim so as to understand fully whether the claim will be covered under any CGL coverage afforded in favor of the general contractor.
ISSUES, EVIDENCE AND THE BURDEN OF PROOF

The clearest example of a good and supportable claim against a general contractor is where the plaintiff can show that there was a material departure from the design intent set forth in the contract documents, which caused the loss. For example, suppose a roofing contractor fails to install primary or excess drains on the roof of sufficient capacity and narrows the openings of the drains so as to restrict the flow of water through the drains. As a result, water ponds on the roof during a rain storm to the extent that the load-bearing capacity of the roof structure is overcome, and a roof collapse ensues. The evidence in such a case will be directed to showing that the restriction in the openings of the drains by the general contractor constituted a material deviation from the design intent set forth in the contract documents, which is directly related to the cause of the roof collapse due to the weight of ponded water.

Questions arise from time to time as to the type and quantity of evidence necessary to prove that a general contractor is at fault for a loss. In contract and warranty, as set forth above, it is useful to show that the contractor did not build the structure in accordance with the contract documents. A departure from the terms of the contract is material if in fact it caused or contributed to the cause of the loss. Tort claims may be brought for personal injuries and property damage to
other property – the standard may be a failure to exercise reasonable care measured in terms of a building code or health and safety code violations for a failure to perform the work in a good and workmanlike manner. Many states have adopted the implied warranty of performing construction work or repairs in a good and workmanlike manner. This implied warranty implies an adherence to industry standards. Evidence may be admissible to show what the standard is and how the contractor's work failed to comply with the standard. Moreover, many states have laws imputing an implied warranty of compliance with building codes and ordinances. Oftentimes the applicable building code or standard is considered the minimum requirement for safe or adequate performance. Failure to comply with building codes or health and safety ordinances may be considered as a basis to impose a finding of negligence per se. In such cases, establishing that there was a failure to comply with building codes or an ordinance pertaining to health and safety may be considered as proof of the negligence itself.

Whether the case is brought in contract or in tort may have an effect on the type of evidence that is admissible to prove liability. The law of the state in which the action is pending should be consulted to see the extent to which matters, such as a failure to comply with the building code or industry practice, are admissible in the context of breach of contract. The simple point is that evidence that might be
admissible in the tort action may not be admissible evidence in the breach of contract action over the same defect. Care should be taken at the outset to make sure that the right evidence is being adduced to support the claim which is being made.
III. **WAIVERS OF SUBROGATION IN CONSTRUCTION LOSS CLAIMS**

Waivers of subrogation are not new to construction contracts. But like everything else, their content and application are fluid, requiring a correct analysis to determine how form contracts may be applied or interpreted in any given case. Admittedly, it is not the most interesting of subjects. As the California Court of Appeals aptly stated in a recent decision, the analysis of subrogation waivers in form construction contracts "is far from enthralling: they demand an almost microscopic examination of dry, lengthy contract documents. As we embark on the resolution of these issues, then, we think it only fair to suggest that the reader might want to be sitting in a comfortable chair, with a cup of strong coffee nearby."²

Historically, it was common for a construction contract to require an owner to obtain insurance, usually a builders risk policy, to cover potential damages during a construction project. Correspondingly, it was also common for the same contract to contain a mutual waiver of subrogation for any losses paid by the required policy. The theoretical basis for this arrangement was to allow parties to avoid construction delays caused by potential disputes as to who was responsible to pay for losses occurring during construction. In its simplest form, it was a means by which the parties could expressly shift the risks involved in the project.
The theoretical basis is all but lost in the broader language found in form construction contracts of today. This language potentially subjects parties to waivers of subrogation broader than ever intended or expected or can leave parties at the mercy of the court's interpretation where ambiguity exists. For this reason, it is imperative for parties seeking subrogation for construction losses to identify the relevant language in the applicable contract, understand how courts may interpret the waiver, and determine whether the language affects their ability to recover. Counsel may also use this analysis to advise their clients, who may enter into or represent parties to form construction contracts.

**E V O L U T I O N  O F  A I A  C O N S T R U C T I O N  F O R M  C O N T R A C T S**

Construction loss waiver of subrogation issues frequently revolve around interpretation of contract forms drafted by the AIA. The most commonly used forms incorporate the AIA A201 form, entitled "General Conditions of the Contract for Construction." AIA A201 requires the owner to procure insurance coverage covering the construction project. The form also contains a mutual waiver of subrogation applicable to any losses reimbursed by the required insurance coverage.

The language contained in the A201 form has changed over time. The pre-1987 A201 contained both "temporal" and "spatial" limitations to the applicability
of the waivers. The temporal limitation typically precluded application of the waivers in the AIA forms to damages that occurred after construction was complete. The spatial limitation typically precluded application of the waiver to damages that occurred to existing "non-Work" property. *S.D.D.W. Co. v. Brisk Waterproofing Co., Inc.* is a good example of a situation where the court refused to apply the waiver to damage to "non-work" property.³ There, the court held that damage to the interior of an apartment building was not barred by the standard AIA waiver when the "work" was to the exterior of the building and a parking garage. Both the temporal and spatial limitation made sense in the context of the theoretical basis for obtaining builder's risk policies and corresponding waivers of subrogation. The rationale for this was that after construction is complete, there is no longer "the Work" to delay or the need for insurance covering it. Also, the parties did not typically wish to shift the risks for damages beyond the constructed property itself. Courts, therefore, routinely refused to apply the waivers to damage to pre-existing property or to damages occurring after the construction was completed and accepted by the owner.

In 1987, the AIA expanded the scope of the waivers in AIA document A201–1987 by modifying the definition of "Work" to include "the construction and services required by the Contract Documents, *whether completed or partially*
completed…” This expansion of the definition of "Work" all but erased a "temporal" argument that the waiver of subrogation should be limited to damages occurring only during construction.

The AIA also took other steps to curb the "temporal" limitation. Subrogating plaintiffs had routinely argued that the waiver did not apply if the loss was not reimbursed by the insurance coverage required by the construction contract. The AIA addressed this issue by providing that the waiver applies not only to losses reimbursed by coverage obtained via the requirement in the contract, but also to damage reimbursed by other property insurance purchased by the owner. A201 section 11.3.7 now provides: "The Owner and Contractor waive all rights… for damages caused by fire and other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or the other insurance applicable to the Work…”

These two changes, acting in tandem, arguably extend the waiver to damages that occur to the completed construction. If a construction defect causes damage years after the construction is complete and is paid for by the owner's property insurance, the waiver may nonetheless apply because the damage was to the "Work" (even though completed) and that damage was covered by "other property insurance applicable to the work."
The obvious intent of these provisions is to extend the waiver to post-construction losses. To confirm this intent, A201 section 11.3.5 was also modified to include a "completed project insurance clause." That section states:

…if after the final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other causes of loss covered by the separate property insurance.

Beyond the broadening of the temporal-based language, the AIA also took steps to curb the "spatial" limitation by extending the scope of the waiver to pre-existing, non-work property. A201 subparagraph 11.3.5 states:

If during the Project construction period the Owner insures property, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project…the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance.

This language extends the waiver to cover damage to adjacent property (and to a building's contents), even though that damage is not part of the "Work" and may not have been covered damage under the builders risk policy.
RECENT CASE LAW

Two recent cases are illustrative regarding the expansive language of the waiver under A201 and potential court interpretations of the language affecting both the temporal and spatial limitations in the AIA waivers of subrogation.

THE TEMPORAL LIMITATION

A 2010 Maryland Court of Appeals case, *John L. Mattingly v. Hartford Underwriters Ins. Co.*, construed the temporal limitation of AIA subrogation waivers.\(^5\) There, an owner of a building hired several contractors to construct a restaurant. A fire caused substantial damage to the building over a year after it was completed. The owner’s insurer, Hartford, filed suit alleging that two electrical contractors were responsible for the fire.

Notably, the AIA form contract involved in the *Mattingly* case was not A201. Rather, it was the 1997 version of AIA document A107. This form contained the expansive language regarding the waiver outlined above but did not include the completed project insurance clause. The contractors contended that document A107 unambiguously waived subrogation with regard to damages occurring after construction because the contract defined the “Work” as the construction, "whether completed or partially completed." The AIA form also
included the waiver for damages reimbursed by "other property insurance applicable to the work."

The *Mattingly* court viewed the issue as whether the language "other property insurance applicable to the work" encompassed the property insurance secured by the owner after construction was complete. The *Mattingly* court agreed with Hartford that the contract was ambiguous as to whether the waiver applied to post-construction losses. Absent the completed project insurance clause contained in form A201, the *Mattingly* court believed that AIA A107 was ambiguous as to whether the parties intended the waiver to apply to post-construction damages. The court held that the definition of the "Work" could reasonably be subject to two interpretations and was thus ambiguous, noting:

In the first sentence of the definition, the phrase "construction and services required by the contract" clearly refers to the construction period. The next phrase, "whether completed or partially completed," however, could yield a different understanding because it could refer reasonably to the completed restaurant.

The second sentence of the definition, which states, "[t]he Work may constitute the whole or a part of the project," also could be construed to modify the prior phrase to include all actions necessary to constitute performance under the contract. On the other hand, this phrase could be interpreted reasonably to refer to the completed Arby's restaurant.
As a result, the waivers of subrogation clause, including "other property insurance applicable to the Work," may refer reasonably to "other property insurance applicable" to the ongoing construction, or, "other property insurance applicable" to the completed Arby's. Thus, the waivers of subrogation clause, in which the words "the Work" are prominent, is internally inconsistent, and, ergo, ambiguous, as also recognized by our colleagues on the intermediate appellate court.6

The contractors cited several cases applying waivers of subrogation in AIA construction contracts to post-construction losses.7 The court distinguished those cases because they construed AIA A201 form, which contained the "completed project insurance" clause.8 The Mattingly court held that in the absence of such a provision, the contract was ambiguous as to whether it intended the waiver of subrogation to extend to damages reimbursed by insurance purchased by the owner after completion of the project. The court remanded the case to develop the record with extrinsic evidence as to whether the parties intended the waiver of subrogation to cover the completed construction.

The Mattingly case clearly indicates that the "temporal" limitation is challengeable but not dead. Even if parties use a form AIA contract, that does not necessarily mean that the waiver of subrogation will be applied to post-construction losses. Rather, depending on their intention, each party needs to
evaluate whether the AIA form adequately expresses their intent and whether a "completed project insurance" clause is needed to eliminate ambiguity.

THE SPATIAL LIMITATION

In *Westfield Ins. Group v. Affinia Dev., LLC*, the Ohio Court of Appeals addressed the spatial limitation of AIA waivers of subrogation and eventually followed the so-called "majority rule," applying a waiver of subrogation broadly to cover "non-Work" property.\(^9\) There, the owner of a building and several contractors entered into an AIA A101-2007 form contract for the renovation of a three-story building. The A101 form incorporated by reference the expanded waiver language contained in A201 outlined above.

The contractors were to complete the renovations to the building floor-by-floor. After the first floor was complete and the contractors were working on the second story, a fire damaged the entire structure. The owner had a pre-existing property policy issued by Westfield. Westfield paid over $100,000 for the damage and attempted to subrogate against the contractors.

Westfield argued the spatial limitation, claiming that the waiver did not apply to the damages to the third floor because that was "non-Work" property. This issue was a matter of first impression in Ohio, so the Ohio Court of Appeals examined case law from other jurisdictions. The court identified two prevalent
approaches to the issue. One was the so-called majority approach, which focuses on the insurance covering the loss. If insurance obtained by the owner covered the loss, the waiver applied regardless of whether the damage was "non-Work" property. On the other hand, the minority approach focused on the damages and refused to apply the waiver to "non-Work" property.\textsuperscript{10}

The \textit{Westfield} court held that the language of A201 illustrated the parties’ intent that the waiver apply to any damages reimbursed by any insurance procured by the owner. The \textit{Westfield} court also believed the majority approach was in line with the purpose of a builders risk policy and waiver of subrogation, i.e. avoiding litigation and focusing on completion of the project. The \textit{Westfield} court reasoned that because the contract defined the waived claims by the source of the insurance proceeds, rather than by the property damaged, whether the damage was to "Work" or "non-Work" property was irrelevant. The \textit{Westfield} court relied directly upon the language broadened by the AIA to weaken the "spatial" argument. The court found that the language of A201 stating, "[i]f during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the project… the owner shall waive all rights…” indicated that the parties intended to extend the waiver to any losses covered by insurance procured by the owner.\textsuperscript{11}
The *Westfield* court's approach to this issue comports with the literal interpretation of the contract, as intended by the AIA. However, it is difficult to justify from either a fairness basis or in the context of the theoretical basis for such agreements. There is also little, if any, rationale for extending the waiver to such losses, other than to protect the contractor. It seems doubtful that there was ever any real intent on the part of the owner to waive subrogation as to damage to the owner's existing property, particularly when the owner entered into a form A101 contract and only incorporated the onerous A201 language by reference. Nonetheless, the *Westfield* decision exemplifies that courts are willing to apply waivers of subrogation well beyond the "work in progress" if, by an objective interpretation of the contract language, it appears that the parties intended to shift the risk of loss to insurance procured by the owner.

**CONCLUSION**

Expansion of AIA waivers of subrogation can greatly affect and limit subrogation claims in the construction field. As illustrated by the *Mattingly* decision, the temporal limitation of early waivers has been weakened, but some courts may find ambiguity where the intent of the parties is unclear. The *Westfield* case illustrates a broad application of the AIA waiver of subrogation, far beyond the theoretical basis for keeping construction projects on track. The ultimate
conclusion is that waivers of subrogation, as provided for in AIA forms, could have a substantial impact on damages suffered in any aspect of the construction project and greatly impact any efforts to subrogate against the responsible party. Parties seeking to subrogate in cases involving AIA form contracts should be aware of how courts may interpret contractual language and enforce the waiver in their cases.

IV. ADDITIONAL INSURED ISSUES

Additional insured coverage is a commercial risk transfer that is imposed upon those with lesser bargaining power. Purchasers of services ordinarily have commercial bargaining power over the vendors vying to perform those services. The purchaser can therefore require the vendor to provide insurance coverage as part of the bargain for the vendor to be awarded the contract. That is the reason many states have adopted so called "anti-indemnity" statutes to protect vendors from the sometimes burdensome commercial realities of being required to provide insurance to various purchasers of service.

Additional insured requirements predominate in two areas:

- Construction Contracts
- Service Contracts

In construction contracts, the additional insured requirements generally flow "upstream" from subcontractors to the general contractor and to the owner.
General contractors are generally required to provide coverage for the owner for any claims either "arising from" the contractor's work or "damages" that are "caused by" an act or omission of the contractor. The subcontractor typically is required to provide additional insured coverage for the general contractor along similar lines. This permits the owner and the general contractor to transfer risks "downstream" to the subcontractor.

One of the primary reasons for such commercial risk transfer is workers' compensation immunity that is typically granted to employers in most states. In both the construction and service contract settings, if an employee is injured, he will most likely not be able to sue his employer, but he will instead sue those parties who are "upstream" because they are not protected by the workers' compensation immunity. If an employee of a subcontractor is injured, he will generally try to bring suit against the general contractor or the owner, alleging some negligence on their part. Likewise, if a cleaning person is injured, she is likely to bring some cause of action against the owner of the facility where she is working, alleging premises liability on the part of the owner. Additional insured obligations afford these "upstream" parties with insurance protection for such claims. The specter of injury to an employee, who must look for parties to sue
other than his employer, is certainly a strong motivating factor for the use of commercial risk transfer mechanisms.

Although indemnification provisions and additional insured requirements often go hand-in-hand in contracts, they are two separate and distinct requirements. The indemnification provision imposes a direct obligation on the "indemnitor" to reimburse the "indemnitee" for damages sustained by the indemnitee. Indemnity agreements may require indemnification for any claims "arising from" the indemnitor's work or can have more restrictive requirements, limiting such indemnification to damages caused by the negligence of the indemnitor.

The indemnification obligation is directly against the contracting party itself, not its insurance carrier. The standard CGL policy does provide insurance coverage to the indemnitor/named insured for such an indemnification obligation. The standard CGL policy also includes a contractual liability exclusion. There is, however, an exception to that exclusion for an "insured contract" under circumstances where the indemnitor/named insured assumes financial responsibility for the tort liability of the indemnitee.

An important limitation to this coverage is that the defense costs of the indemnitee most often erode the policy limits because they are viewed as "damages" that are subject to the policy limit. Equally important, contractual
indemnification obligations are often heavily restricted by state common law or by statute. Many states have adopted rules that either greatly restrict or eliminate an indemnitor's obligation to indemnify for the consequences of the indemnitee's own negligence.

The additional insured obligation imposes a direct relationship between the liability insurer for the named insured and the additional insured. The additional insured becomes an "insured" under the policy and has direct rights against the insurer. These direct rights include a defense obligation because the insurance coverage afforded to the additional insured is most often the same as that afforded to the named insured. The additional insured is entitled to coverage for the costs of defense, which costs do not erode the policy limits.

Even when the indemnification obligation is not enforceable as a result of some common law or statutory restriction, the additional insured obligation is nonetheless enforceable, unless the contract specifically states that the additional insured obligation is dependent upon the enforceability of the indemnification provision. The indemnitee/additional insured will most often depend upon the additional insured coverage because it does not have to be concerned about common law or statutory restrictions on that coverage and, moreover, the additional insured will be entitled to recover defense costs.
HOW IS ADDITIONAL INURED STATUS CREATED?

Additional insured status is created in one of two ways. The additional insured can actually be "named" as an additional insured on the policy by an endorsement. The other more common method for additional insured status to be created is by virtue of a blanket endorsement. The blanket endorsement provides that additional insured status is created "where required by written contract." By including a blanket additional insured endorsement, the named insured is not required to identify each entity with whom it is has agreed to provide additional insured coverage. While this allows for greater ease of "adding" an additional insured, it also divests the insurer of control over the risks that are being assumed. The insurer will often (1) have no idea as to when or for how many additional insureds the named insured has agreed to provide insurance coverage and (2) have limited ability to gauge the magnitude of the risk being assumed by any particular contract that creates additional insured status.

The promulgation by the Insurance Services Office ("ISO") of a number of restrictive endorsements beginning in 2004 and later in 2013 permitted insurers to control the degree of risk that was being assumed by additional insured endorsements, but it also created many corresponding problems for policy holders and their agents/brokers. These additional insured forms differ radically from the
traditional blanket additional insured form, which is either silent as to any restrictions that would serve to limit the trigger of coverage or merely states that the claim must "arise from" the named insured's work.

The endorsements in question impose a variety of restrictions. However, the main restrictions can be summarized as follows:

**Limitations to ongoing or completed operations.** Ongoing operations are any operations that are not "completed operations." "Completed operations" pertain to occurrences that happen after the named insured has completed its work on the project. Endorsements can provide coverage only for "ongoing operations," coverage only for "completed operations," or coverage for both. To the extent a policy might not cover "completed operations," it greatly limits coverage to only those occurrences that take place while the named insured is actually performing its contractual duties. This restriction can be very significant in the construction context because "construction defects" typically manifest "damage" that occurs after the named insured completes its work.

**"Sole Negligence."** The traditional blanket additional insured endorsement covered the sole negligence of the additional insured, so long as the claim "arose from" the named insured's work. An example is where the named insured subcontractor is hired to place a pile of dirt beside a road. A motorcyclist hits the
pile of dirt and sues the general contractor because the general contractor selected where to place the dirt pile. This claim "arises from" the named insured's work because there is a casual connection between the named insured's work and the accident, even though the named insured was not negligent.

The traditional blanket additional insured endorsement provided coverage for such a claim, even though the only claim of negligence is against the additional insured based upon the additional insured's "sole negligence." Some endorsements now provide that they do not apply to the additional insured's "sole negligence."

**Restricting coverage to that afforded by the contract.** Typically, once an additional insured qualifies as an additional insured for a claim under an insurance policy, that additional insured will be entitled to all coverages afforded by the policy. The general rule is that unless the insurance policy incorporates by reference restrictions on coverage set forth in the underlying contract, those restrictions cannot modify or limit the coverage afforded to the additional insured.

For example, if the named insured agrees by contract to afford $1M in coverage to the additional insured, but the policy itself provides $10M in coverage, the full insurance policy limits should be available. Similarly, if the named insured agrees to provide coverage only for ongoing operations, but the policy provides coverage for both ongoing and completed operations, the additional insured may
be afforded coverage for completed operations, even though such coverage was not contractually required.

To counteract this unintended expansion of coverage to the additional insured, certain endorsements include provisions that the coverage afforded by the policy shall not be broader than that contractually required. Such a provision serves to restrict coverage to that required by the contract creating the additional insured status.

**Issues Created by Restrictive Additional Insured Endorsements**

Restrictive additional insured endorsements have led to litigation. That is because underlying contracts historically employed to create additional insured status merely state that the contracting party is to be named as an "additional insured" on the named insured's policy. The named insured will often simply pass along a request to its broker that its policy include a blanket additional insured endorsement. However, the insurer may then issue an endorsement that has restrictions.

The named insured will seldom review the policy, and even if it does, it will not recognize the restrictions in the additional insured endorsement. And because the additional insured will seldom *even see* a copy of the actual policy or a copy of the restrictive endorsement, the named insured and the additional insured may both
believe that the blanket additional insured endorsement provides full coverage to
the additional insured.

This is compounded by certificates of insurance. The broker will often issue
a certificate of insurance that states that the additional insured is covered pursuant
to a "blanket" endorsement. The certificate will not identify the restrictions set
forth in the endorsement. When one of the restrictions results in a declination of
coverage, the additional insured will not have received the coverage for which it
contracted. The additional insured will often then bring a claim against the named
insured for breach of contract. The named insured will typically then file suit
against its broker for procuring a policy that includes the restrictive endorsement.
This is a very common fact pattern.

**WHEN IS A WRITING SUFFICIENT TO CREATE ADDITIONAL INSURED STATUS?**

It is typically simple to determine whether a party qualifies as an additional
insured under a blanket additional insured endorsement. The typical blanket
additional insured endorsement requires only that the additional insured be
designated by virtue of a "written contract." However, there are some situations
where additional insured status can be debated despite there being no "written
contract" to trigger the coverage.
**Websites.** One problematic issue relates to websites. With more frequency, a general contractor may refer a subcontractor to a website that dictates the insurance requirements for a job. That website may require the subcontractor to acknowledge that it will designate the contractor as an additional insured and also may require the subcontractor to obtain a certificate of insurance stating that the contractor has been named as an additional insured on the subcontractor's policy.

The issue then becomes whether direction to the website is sufficient to make the additional insured requirement part of a "written contract." If the website is specifically referenced in the contract and the contract states that the subcontractor will comply with the insurance requirements dictated by the website, the additional insured requirement will probably be sufficient to invoke the blanket additional insured endorsement. For example, Texas law holds that if the intent of the parties is to incorporate another document by reference, it is sufficient to incorporate the requirements of the other document. In *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, the owner of maritime barges issued work orders to a contractor stating that the work would be performed according to certain terms and conditions stated on the contractor's website. Those terms and conditions included an indemnity obligation and also an additional insured obligation. The subcontractor never visited the website. The court nonetheless held that because
the work order (which formed the contract) specifically incorporated the terms and conditions of the website, the website terms created additional insured and indemnity obligations.

What if the website is not referenced in the contract? For example, what if the contract is silent as to insurance, but the contractor is verbally directed to a website? That is probably not a sufficient "writing" to create the additional insured requirement. In *Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos.*, the court held that merely because the parties were directed to a website as part of their contract negotiations, that was insufficient to invoke a forum selection clause set forth on that website.13 Following that reasoning, unless the contract specifically states that website insurance requirements are incorporated by reference into the contract, those requirements will probably not be viewed as part of the contract, and an additional insured requirement stated on the website will be insufficient to create additional insured status under the policy.

**Certificates of Insurance.** Likewise, certificates of insurance, in and of themselves, ordinarily do not create additional insured status. Certificates of insurance are only evidence of insurance. If the certificate of insurance states that it does not control coverage under the policy, the certificate of insurance cannot enlarge coverage offered under the policy. For example, if there is no "written"
additional insured requirement, the fact that the subcontractor's broker may issue a certificate of insurance will most likely be insufficient to create additional insured status.

One case from Illinois is directly on point. In *Clarendon Amer. Ins. v. Aurgus Sec. Sys., Inc.*, the contract stated that "[a]ll insurance that may from time to time be required shall be obtained in such a manner as the parties hereto agree." The contract said nothing else regarding an additional insured requirement. The subcontractor obtained a certificate of insurance from its broker indicating that the general contractor was an additional insured. The court nonetheless held that this was insufficient to create additional insured status under the subcontractor's policy because "the contract did not discuss any obligation undertaken by the subcontractor to provide insurance."

However, the rule that a certificate of insurance does not create additional insured status can of course be modified by the policy. For example, the "Contractors' Commercial General Liability Broadened Endorsement," GA-233-02-07, provides for automatic additional insured status when required by written contract or agreement or when there is "an oral agreement or contract where a certificate of insurance showing that person or organization as an additional insured has been issued."
IS THERE REALLY A DUTY TO DEFEND THE ADDITIONAL INSURED?

Determining that the defendant qualifies as an additional insured by virtue of a written contract is only the first step in the inquiry. The claim must also trigger the specific additional insured coverage for there to be a duty to defend. The duty to defend typically must be determined from the face of the complaint.

DUTY TO DEFEND WHEN THE CLAIM MUST MERELY ARISE OUT OF THE NAMED INSURED'S WORK

If the claim must merely "arise out of" the named insured's work to implicate additional insured coverage, the complaint must only allege a "but for" causal connection between the named insured's work and the claim against the additional insured to impose a defense obligation.\textsuperscript{15} The pre-2004 ISO additional insured endorsement utilizes the "arising out of" language, which courts generally interpret broadly to only require a "minimal causal connection between the acts of the named insured and the additional insured."\textsuperscript{16} At least one commentator has suggested that "there is no question under the 2001 'arising out of' language that the [additional insured] is covered even for its sole negligence as long as liability can be tied in some way to the named insured's operations."\textsuperscript{17}

An interesting argument arises in a situation where the damage is to the named insured's work and is not caused by the named insured's work. For example, if a complaint alleges that concrete buckled because the soils beneath the concrete
were not adequately compacted, does the claim "arise out of" the concrete subcontractor's work? In such a complaint, the claim does not allege damage *resulting from or arising out of* that work, so as to trigger the additional insured coverage under the subcontractor's policy. Moreover, this interpretation is in line with the purpose of the additional insured coverage, which is to provide coverage when the insured's work *causes* damage, not when some other work causes damage to the named insured's work. This argument has not been addressed by the courts, but it should be advanced in the appropriate situation.

What about when the complaint alleges facts implicating the subcontractor/named insured's scope of work, but does not specifically name the subcontractor? Does that invoke a duty to defend?

There are two sides to the issue. First, under the "eight corners" rule, the insurer need not look beyond the scope of the pleadings when deciding the duty to defend. The insurer could therefore argue that given that the subcontractor is not named, the complaint does not trigger any duty to defend because it does not implicate work performed by that subcontractor.

On the other hand, the additional insured will argue that the mere fact that the complaint implicates the subcontractor's work should trigger the duty to
defend. The problem with that argument is that the insurer must look beyond the pleadings to confirm that the claim arises from the subcontractor's work.

That issue was addressed in a decision from the Court of Appeals of Dallas County, *Global Sun Pools v. Burlington Ins. Co.* In that case, the general contractor, Global, had a pool built on the plaintiff's property. The pool was constructed by a subcontractor, Simmons. Simmons was the named insured, and Global was an additional insured with respect to liability arising out of the operations of Simmons. The petition alleged defects in the pool that caused the plaintiff's injuries, but it stated only that Global "sent its builders to construct the pool and deck." The court held that this allegation was sufficient to plead that the claim arose from Simmons' work, even though Simmons was not mentioned. The court interpreted the duty to defend liberally and held that "resolving all doubts in the insured's favor, we conclude the language in the petition and the insurance policy create the potential for a case under the complaint within coverage of the policy." 

**Duty to Defend When the Claim Must Be Caused by an Act or Omission of the Named Insured**

In early 2004, the ISO replaced "arising out of" with "caused in whole or in part" by the "acts or omissions" of the named insured or those acting on its
behalf. The ISO Circular in March 2004 explained the reasoning behind this change:

Because the phrase "arising out of" has been interpreted broadly by some courts, we are revising several of the additional insured endorsements to add specific language to provide an additional insured with coverage for their vicarious or contributory negligence only. The additional insured will only have coverage for bodily injury, property damage or personal and advertising injury that is caused in whole or in part by the acts or omissions of either the named insured or those acting on behalf of the named insured. A major effect of that wording will be to prevent any alleged coverage for the additional insured's sole negligence.

This language requires some act or omission on the part of the named insured, not simply a tenuous causal connection. The only requirement is that the named insured's acts or omissions be at least some minimal causative factor in the bodily injury and/or property damage. Absent any fault of the named insured, there will be no coverage for the additional insured.

This can create problematic issues regarding the duty to defend compared to the duty to indemnify. In Gilbane Bldg. Co. v. Admiral Ins. Co., an employee of a contractor was injured on a jobsite and brought suit against the owner only. There, the policy provided that the owner was an additional insured only when the bodily injury or property damage was "caused by" an act or omission of the named insured or someone acting on its behalf. The Gilbane court recognized that Texas
courts construe "caused by" as requiring proximate causation. The petition did not allege that the injury was "caused by" an act or omission of the named insured, and it did not trigger the duty to defend. Nonetheless, the court found that there was a duty to indemnify. The jury found that the employee himself was contributorily negligent in causing the accident. Given that the employee was someone acting on behalf of the contractor, the accident was caused at least in whole or in part by an act or omission of the contractor, and therefore, the duty to indemnify was triggered.

**WHEN THE ADDITIONAL INSURED MUST BE SUED AS A RESULT OF THE NAMED INSURED'S "FAULT" BEFORE COVERAGE APPLIES**

The analysis becomes more difficult in situations where, by virtue of the contract creating the additional insured status, the policy, or an anti-indemnity act, the claim against the additional insured must be caused by the fault of the named insured, which is being imputed to the additional insured, in order to trigger a duty to defend.

One case exemplifies this analysis. In *Indian Harbor Ins. Co. v. Valley Forge Ins. Group*, the issue was whether the complaint alleged that the general contractor was vicariously liable for the conduct of a subcontractor. The owner of the facility sued the contractor and a subcontractor for defects in a concrete slab. The owner alleged that the subcontractor drove a truck onto the slab before the slab
was properly cured, thereby causing it to crack. The contractor claimed that the allegations against the subcontractor were sufficient to invoke the duty to defend by the subcontractor's insurer. The policy at issue was a business auto policy and provided coverage for "anyone liable for the conduct of an insured described above, but only to the extent of that liability." The court held that this definition created insurance coverage for anyone who was alleged to be vicariously liable for the conduct of the subcontractor. The duty to defend, therefore, turned on whether the complaint pleaded a vicarious liability claim.

The complaint alleged only that the contractor was "to have supervised, scheduled and organized all contractors and subcontractors" and was contractually obligated "to supervise the delivery of American/Vulcan's steel to the site" but failed to do so by "permitting materials to be brought upon an uncured concrete slab." The plaintiff also alleged that the contractor "failed to reasonably advise others of the curing period for the concrete slab" and "failed to take reasonable steps to protect the slab from use or intrusions during its curative period." The court held those were allegations of direct negligence and not allegations that imputed acts or omissions of the subcontractor to the contractor. As such, the court also recognized that a general contractor can only be held vicariously liable for physical harm caused by an independent contractor if the general contractor
controls the details or methods of the independent contractor's work. The court held that the complaint did not trigger a duty to defend.

The *Indian Harbor* case stands for the proposition that if the duty to defend is dependent upon the additional insured being sued for liability imputed from the named insured, allegations of direct or independent liability against the additional insured will not be sufficient to trigger a duty to defend, *even when the petition alleges concurrent negligence of the subcontractor* and *even when the claim arises out of the subcontractor's work*.

If (A) the contract creating the additional insured status, (B) the policy, or (C) an anti-indemnity act limits additional insured coverage to claims of imputed or vicarious liability from the subcontractor, the insurer must closely examine the petition to determine whether claims of imputed liability are alleged. Claims of direct negligence against the additional insured (such as negligent supervision claims) may not be sufficient to create a duty to defend.

**THE DUTY TO DEFEND WHEN THE COMPLAINT ALLEGES THE CLAIM ARISES ONLY IN PART FROM THE NAMED INSURED'S WORK**

One of the more complicated issues concerning additional insured coverage is the duty to defend when the claim arises in part from the named insured's work and in part from either the work of the additional insured or of other contractors, who also afford additional insured coverages. Assume, for example, a situation
where a general contractor/developer builds a single family home. When the home is completed, moisture problems are discovered on the windows. Moisture collects, dripping onto the hardwood floors, and damaging them. Experts determine that the cause of the problem is twofold: the developer installed improper windows, and the HVAC subcontractor improperly installed the air conditioning units. A complaint is filed that alleges those two defects.

This leads to the question: Is the insurer for the HVAC subcontractor obligated to defend the entire claim, even though the HVAC problem is only a minor contributing cause to the moisture problems?

Unfortunately, the answer appears to be "yes." In jurisdictions that require an insurer to defend the entire claim if any portion of the claim triggers coverage, the "other insurance" provisions will likely control.

Because no subcontractor installed the windows, there is no additional insured coverage triggered as to the windows. The developer's CGL policy contains the standard provision that it is excess to any insurance provided to the developer as an additional insured on another policy. The HVAC subcontractor's policy provides that any additional insured coverage it offers is primary where required by written contract. The HVAC subcontractor's insurer is therefore primary and must defend the entire claim.
Another all too common issue is when multiple additional insured coverages are triggered. For example, if a building is constructed that includes multiple defects, and a single complaint is filed that alleges each of those multiple defects, numerous additional insured coverages may be triggered. If the general contractor simply picks one subcontractor and demands a defense, is the insurer for that subcontractor required to defend the entire claim? Again, unfortunately, the answer is generally "yes." Although the insurer for the subcontractor designated to provide coverage for the entire claim has a right to proceed against other subcontractors for allocation of defense costs, that insurer may not disclaim an obligation to defend simply because the general contractor has chosen not to force other insurers for other subcontractors to also participate in that defense.

Generally, to prevail on a claim for contribution, a party must demonstrate that "several insurers share a common obligation or burden and that the insurer seeking contribution has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden." In *Continental Cas. Co. v. N. Amer. Capacity Ins. Co.*, the Fifth Circuit found three insurers all had a primary duty to provide a complete defense to their insured and confirmed the district court's decision to prorate the defense costs equally among the insurers. In
so holding, the court explained that "[w]hen, from the point of view of the insured, she has coverage from either one of two policies but for the other, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provisions." If the policies conflict, "the court may ignore the 'offending provisions' and look to the remainder of the policies to determine which policy should provide coverage." If both policies provide coverage, and priority is uncertain, liability is prorated between the insurers.

An issue can arise, however, when the general contractor's insurance policy may be co-primary with the insurance policies provided by the subcontractors. In the typical scenario, the standard "other insurance" provision in the general contractor's policy provides that it is excess when the general contractor is added by endorsement as an additional insured to another's policy. The typical policy also provides, with regard to the subcontractor, that it is primary. Therefore, in the typical scenario, the fact that the subcontractor must defend the claim (and therefore defend the entire claim) is based upon those "other insurance" provisions.

But what happens when the "other insurance" provisions do not line up that way such that the general contractor's policy is co-primary to that of one or more of the subcontractors? In that situation, the general contractor's policy must be
situated no differently than the insurance policies provided to the subcontractors. The general contractor's policy, being co-primary, may have a defense obligation, and the insurer may be obligated to defend the "entire claim." There is no case law on that particular issue, but conceptually, insurers for subcontractors have an argument that the insurer for the general contractor is just as obligated to share in the defense as is any other insurance carrier for any other subcontractor.

Section 151.102 of the Texas Insurance Code, known as the Texas Anti-Indemnity Act, provides as follows:

Except as provided by Section 151.103, a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.

Based on the bold and italicized language above, an argument could be made that the Act curtails the defense obligation to only those claims arising from an insured’s own negligence. In other words, even though an insurer, once its duty to defend is triggered, must supply a full defense to the insured, the Act’s language
arguably limits this obligation to that portion of the claim that is based on that subcontractor’s fault, not those arising from the other subcontractors’ negligence. While this argument flies in the face of the argument that, if the duty to defend is triggered, it is as to the "entire claim," the Anti-Indemnity Act is remedial legislation, and a court could rule that it modifies long-standing case law.

There are only four Texas cases interpreting the above-referenced provision of the Anti-Indemnity Act, and none of them address the above-referenced argument. However, if one dissects the language of the statute, there may be some validity to the argument. After simplifying the provision, it reads as follows: "The indemnity provision is void and unenforceable to the extent it requires a subcontractor-indemnitor to defend a party against a claim caused by the general contractor-indemnitee’s negligence or the negligence of any third party under the general contractor-indemnitee’s control, other than the subcontractor-indemnitor or its agent, employee, or subcontractor." Reading the provision in this way renders the argument potentially successful and, without instruction from the courts as to the language’s interpretation, it is unknown how a court may rule.

**Exhaustion of Limits**

Assuming the duty to defend is triggered as to both the named insured and the additional insured, exhaustion of the policy limits on behalf of one may serve
to terminate the duty to defend and indemnify the other. The standard form CGL policy provides that "our right and duty to defend ends when we have used up the applicable limit of insurance in payment of judgments or settlements...." The question then becomes whether the insurer's duty to defend may be terminated by settlements that exhaust applicable policy limits, but the insurer does not settle all claims against the insured and the additional insured. Given that the policy limit is typically a single limit regardless of the number of insureds against whom suit is brought, the common policy "fund" may be exhausted by payment of a settlement on behalf of one insured, leaving the other insured with no available insurance and no further defense from the insurer.

The circumstances under which the insurer can or should exhaust limits depends greatly upon the facts of the case and the law of the governing jurisdiction. Be aware that choice of law on this issue may be a complicated analysis. Choice of law for interpretation of the insurance policy is typically governed by the jurisdiction where the named insured resides because the contract was delivered in that jurisdiction. However, additional insured issues can potentially involve three different jurisdictions: (A) the jurisdiction where the named insured is domiciled; (B) the jurisdiction where the additional insured is domiciled; and (C) the jurisdiction where the suit is brought. When determining
the insurer's "good faith" duties towards the additional insured, it is possible that either the jurisdiction where the additional insured is domiciled or the jurisdiction where the action is pending may govern the insurer's obligations.

The obligation to defend a suit on behalf of both a named insured and an additional insured may be particularly burdensome. Many times, defense expenditures may be greater than policy limits and therefore may be costlier than the indemnification obligation itself. This is particularly true when the insurer involved is the primary insurer only with minimal limits. For example, in complicated litigation where the primary limits are $1M to $2M, the defense of both the named insured and an additional insured may cost more than the limits afforded by the policy itself.

This leads to a substantial incentive on the part of the insurer to exhaust so as to avoid this expensive defense obligation. By the nature of such claims, the reasonable settlement value of the claim will often exceed the primary policy limits. When the insurer lacks sufficient limits to settle the claim against both the named insured and the additional insured, the temptation may be to exhaust policy limits by settling on behalf of one of the insureds, leaving the other insured with no primary coverage but eliminating the defense obligation to both the named insured and the additional insured by virtue of the exhaustion. If the motivation of the
insurer is to intentionally exhaust so as to avoid future defense obligations by virtue of that exhaustion, that will be seen as a violation of the duties owed to the insured against whom claims have not been settled.29

The overarching issue is whether the insurer may settle a suit against either the named insured or the additional insured that does not resolve claims against the remaining insured. The general rule is that a liability insurer has discretion to settle whenever and with whomever it chooses, provided it does not act in bad faith.30

A difficult situation arises where the plaintiff has made a policy limits demand against one insured but not the other insured. Generally, an insurer can settle less than all claims even if that settlement exhausts policy limits such that the insured and other claimants are left without coverage under the policy.31 However, states view this issue differently. For simplicity purposes, these views will be referred to as the "Excess" Perspective and the "Reasonableness" Perspective.

"Excess" Perspective. In some states, such as Texas, courts hold that the insurer's duty to settle in the face of a policy limits demand must be viewed independently as to each insured. This is because the insurer would be faced with a "Hobson's choice" of either risking an excess verdict and extra-contractual liability ("Stowers" liability) if: (1) it fails to accept a demand within policy limits or (2) if the insured who would be left "bare" by the exhaustion of those limits
could bring a claim of bad faith by virtue of the settlement.\textsuperscript{32} In \textit{Texas Farmers Ins. Co. v. Soriano}, the Texas Supreme Court noted:

When faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter a reasonable settlement with one of several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims. Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly.\textsuperscript{33}

The exceptions to this rule are that the insurer may not accept the policy limits demand if doing so would be "unreasonable" (in other words, the settlement value of the claim is not truly in excess of policy limits) or if the insurer has previously rejected a policy limits demand against the insured who will be left without coverage by virtue of the settlement.\textsuperscript{34} This rule provides the insurer protection in that the insurer will not be faced with potential bad faith liability if it acts "reasonably in setting a claim with exposure in excess of policy limits," and it also protects the insureds in that the insurer is not permitted to act "unreasonably" by exhausting limits to settle a claim that should not be settled.

In \textit{Travelers Indem. Co. v. Citgo Petroleum Corp.}, the Fifth Circuit expanded the \textit{Soriano} analysis to address claims against \textit{multiple insureds}, as opposed to the situation involved in \textit{Soriano}, which involved \textit{multiple claims}
against one insured. There, the court held that the insurer was free to settle suits against one insured, and leave the other insured without coverage, if the claim against the settling insured could reasonably result in excess exposure. The Citgo Petroleum court stated that "an insurer is free to settle suits with one of its insureds without being hindered by potential liability to co-insured parties….

"Reasonableness" Perspective. Other jurisdictions address this issue quite differently. Florida, for example, imposes a more nebulous test. Farinas v. Fla. Farm Bureau Gen. Ins. Co. requires the insurer to use the available insurance proceeds in a manner most reasonable towards both insureds, not favoring one insured over another. Whether the insurer acted in good faith is for the jury to decide. The court noted:

We now answer the three questions posed for resolution by this opinion. First, Farm Bureau's good faith duty to the insured requires it to fully investigate all claims arising from a multiple claim accident, keep the insured informed of the claim resolution process, and minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement. This does not mean that Farm Bureau has no discretion in how it elects to settle claims, and may even choose to settle certain claims to the exclusions of others, provided this decision is reasonable and in keeping with its good faith duty. Second, whether Farm Bureau has met its good faith duty and undertaken a reasonable claims settlement strategy are questions for a jury to decide. Consequently, in answer to the third question, there are many factual issues for the jury to resolve, including whether Farm
Bureau's quick settlement with three of the possible claimants was reasonable, whether Farm Bureau's rejection of global and other settlement options contemplated the best interests of the insured, whether Farm Bureau adequately investigated the facts of all of the claims, and whether Farm Bureau properly rejected advice of legal counsel and suggested settlement strategies proposed by Farm Bureau employees.

In some jurisdictions that follow a Farinas-type rule, it will be much more difficult to resolve claims against two insureds if the claims against both insureds are in excess of policy limits. The insurer must carefully consider how best to use the insurance proceeds towards resolving the claims against the various parties.

**RULES OF EXHAUSTION**

1. Do not settle to avoid a defense obligation.
2. Conduct a careful choice-of-law analysis as to which state law will govern the insurer's decision to settle.
3. Carefully document the pros and cons of the settlement towards the insured to later demonstrate that the settlement was reasonable.
4. Do not favor one insured over another.

---

1 242 S.W.3d 1 (Tex. 2007).
4 See Town of Silverton v. Phoenix Heat Source Sys., Inc., 948 P.2d 9 (Colo. Ct. App. 1997) (holding that damage to roof of town hall that occurred a year after construction was complete was nonetheless barred by the AIA waiver because such damage was reimbursed by "other property insurance applicable to the work").

6 Id.


8 Mattingly, 999 A.2d at 1076.


11 Id. at 144.

12 648 F.3d 258 (5th Cir. 2011).

13 409 S.W.3d 181 (Tex. App.—Dallas, 2013, no pet.).


16 See https://www.irmi.com/articles/expert-commentary/additional-insured-issues-2016/.


The *Global Sun* case is an unpublished Dallas Court of Appeals opinion. Nonetheless, the opinion was cited by the Fifth Circuit Court of Appeals in *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365 (5th Cir. 2008), for the proposition that if the complaint states facts indicating the claim arose from the named insured's work, that is sufficient to invoke the duty to defend the additional insureds.

*Id.*


664 F.3d 589 (5th Cir. 2011).

535 F.3d 359 (5th Cir. 2008).


*Id.*

*Id.*

*See In re East 51st St. Crane Collapse Litig.*, 84 A.D.3d 512 (N.Y. 1st Dept. 2011); *Maguire v. Ohio Cas. Co.*, 602 A.2d 893, 895 (Pa. Super. 1992). But see *Mid-Century Ins. Co. v. Childs*, 15 S.W.3d 187 (Tex. App.—Texarkana 2000, no pet.) (trial court held that insurer acted improperly in settling less than all claims when it did so to avoid defense obligations, although reversed on appeal when the settlements were found to be reasonable.)

*In re Sept. 11 Prop. Damage Litig.*, 650 F.3d. 145, 151 (2nd Cir. 2011).


33 Id.

34 Id.

35 166 F.3d 761, 764-65 (5th Cir. 1999).