TRANSFERRING RISK?
"IT'S NOT PERSONAL. IT'S STRICKTLY BUSINESS."

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Wayne Gretzky said, "You'll always miss 100 percent of the shots you don't take." This sentiment likely will provide little comfort to a business we advise without attempting to control, minimize and/or transfer the risk in taking "the shot" of a particular business transaction. Such transactions provide an opportunity for us as counselors to help our clients with risk allocation. Regardless of the other entity with which our client is transacting business, addressing the issue of risk is imperative. To paraphrase Michael Corleone from The Godfather, attempting to transfer risk is "not personal, it's strictly business." Two methods of risk transfer that we as counselors can discuss with our business clients are indemnity provisions and being made an additional insured.

I. INDEMNITY CLAUSES

Indemnity clauses in contracts transfer risk - or at least are meant to. "Indemnity provisions are among the most significant risk transfer terms. They require one party (the indemnitor) to indemnify another (the indemnitee) for certain losses or liabilities to third parties." Sherilyn Pastor, What's Yours is Mine: Sharing Other People's Insurance, 775 Practicing Law Institute / Litigation 247 (2008). "Though an indemnification clause does not eliminate a party's legal obligations stemming from a bodily injury or property damage loss, it does, if enforceable, make the indemnitor (the person holding the other harmless in a contract) responsible for meeting the financial obligations of the indemnitee (the person held harmless)." Tracy Alan Saxe and Ashley Rose Adams, Walking the Minefield: Navigating Anti-Indemnity Statutes and Maximizing Third-Party Contractual Indemnification for Construction Contracts, 24 John Liner Review 35, 36 (Winter 2011).

A. Indemnity, Hold Harmless and Defense

Is there a distinction between "indemnity" and "hold harmless" obligations? According to Black's Law Dictionary, no. Black's defines "indemnity clause" as:

> A contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur. - Also termed *hold-harmless clause; save-harmless clause*.

Black's Law Dictionary, 784 (8th ed. 2004). Similarly, Black's defines "hold harmless" as:

> To absolve (another party) from any responsibility for damage or other liability arising from a transaction; INDEMNIFY. - Also termed *save-harmless*.

Id. at 749. Both "hold-harmless clause" and "save-harmless clause" reference "INDEMNITY CLAUSE" as their definition. Id. at 749 and 1370. Even etymologically the word "indemnity" derives from the Latin word *indemnis*, meaning "harmless."

However, at least one authority does distinguish between these two terms. "Many indemnification clauses include the words 'hold harmless' which means the indemnitor may not bring a direct action against the indemnitee for the indemnified action." Catheryn A. Andresen, 1 Law and Business of Computer Software § 16:9 (2011).

Does "indemnity" encompass "defense"? Possibly not. "The better practice" is to specify that the indemnitor also owes an obligation to defend the indemnitee. Jonathan M. Stern, A Plea for Clarity in Drafting Contractual Indemnity Provisions, For the Defense 20, 21 (July 2009). Certainly in the insurance context, "[t]he insurer's duty to defend is a distinct obligation from its duty to indemnify, which comes into play prior to the satisfaction of a judgment by the insured or any determination of whether the insurer is actually liable for the loss." 7A Couch on Insurance § 103:4 (2011). Further, there is case law supporting the distinction between these terms. See, e.g., Downs v. Rosenthal Collinsgroup, LLC, 895 N.E. 2d 1057, 1060-61 (Ill. App. Ct. 2008) (the agreement

failed to use "defend," or any similar language and, thus, the court refused to award attorney fees to the indemnitee); McNiff v. Millard Maintenance Service Co., 715 N.E. 2d 247, 252 (Ill. Ct. App. 1999). However, there is authority from the Fifth Circuit Court of Appeals, in addressing an appeal from the Southern District of Alabama, that "indemnifications agreements contemplate payment for attorneys fees incurred in litigation with third parties concerning the matter indemnified against, regardless of whether they say so." E.C. Ernst, Inc. v. Manhattan Construction Co., 551 F. 2d 1026, 1037 (5th Cir. 1977) (citing Miller and Co. v. Louisville and Nashville R.R., 328 F. 2d 73-78 (5th Cir.) cert. denied, 377 U.S. 966 (1964)). "Inclusion of attorneys fees is presumed to have been the intent of the draftor unless the agreement explicitly says otherwise. This rule simply gives affect to the very nature of indemnity, which is to make the party whole." Id.; Alabama Law of Damages § 10:7 (2012) ("When liability does arise, however, it is assumed that the agreement, whether it says so or not, was intended to include attorneys fees."). Nevertheless, it is suggested that careful crafting of indemnity agreements include the obligation to defend. See Alabama Law of Damages at § 10:7 ("This, of course, is normally no problem because the broad language used in the indemnity agreements whereby the indemnitor agrees to 'protect, defend, indemnify and hold harmless . . . from any damages, claims, liabilities, attorneys' fees, or expense whatsoever, or any amount paid in compromise thereof.'").

B. Types of Indemnity Clauses

What is the level or degree of risk / liability transfer allowed via an indemnity clause? The answer to that question depends on the state law governing the interpretation of the clause.

There are three basic types of indemnity clauses - each with a different degree of risk transfer: (1) limited indemnity provisions; (2) intermediate indemnity provisions; and (3) broad form

indemnity provisions. See Walking the Minefield at 36. As the name suggests, limited indemnity clauses provide the least protection to an indemnitee. In such clauses, the indemnitor protects the indemnitee only for the risk arising out of the indemnitor's own negligence. "All states allow limited indemnity provisions under which the indemnitor promises to indemnify the indemnitee for the indemnitor's negligence." Id. Pursuant to such limited indemnity clauses, "[e]ssentially, the indemnitee can only receive indemnification if the indemnitor was 100 percent negligent." Id.

With intermediate indemnity clauses, the indemnitor assumes the risk for the indemnitee's concurrent negligence, i.e., when both parties have contributed to the loss. This type of indemnity "is available on a sliding scale based on specific percentages of negligence," and exists in two forms: (1) full indemnification; and (2) partial indemnification. Id. at 37. "Full indemnification is when the indemnitor will indemnify the indemnitee for the indemnitee's negligence if the injury was not caused solely by the indemnitee." Id. States that allow full concurrent indemnity agreements include California, Iowa, Indiana, Massachusetts, Maryland, South Carolina, Tennessee, Texas and Virginia. Id. at 45 n. 2. "Partial indemnification is when the indemnitor promises to indemnify only to the percentage of negligence caused by the indemnitor itself." Such clauses contemplate a cap on the amount of indemnification available, e.g., if the subcontractor was only 25% responsible for the underlying loss and the indemnified general contractor was 75%, the contractor may only be indemnified for 25% of the damages. Id. at 37. Jurisdictions allowing such indemnification include Arkansas, Connecticut, Delaware, Florida, North Carolina, Ohio and Oklahoma. Id. at 37 n. 3.

The most beneficial indemnity provision, from the indemnitee's perspective, is broad form indemnity. "Under a broad form indemnity provision, the third-party indemnitor assumes the entire risk of loss, regardless of whether or not the loss is due to the sole negligence of the indemnitee." Id. at 37. A majority of states will not enforce broad form indemnity. Id.

Alabama is not one of those states. Of course, it is true that the general rule in Alabama is that a joint tortfeasor is not entitled to indemnity from another. Alabama Law of Damages § 10:6 (2012); see Humana Medical Corp. v. Bagby Elevator Co., 653 So. 2d 972, 974 (Ala. 1995). However, "Alabama law recognizes the ability of parties to enter into valid indemnity agreements that allow an indemnitee to recover from the indemnitor *even for claims resulting solely from the negligence of the indemnitee*." Holcim (US), Inc. v. Ohio Cas. Ins. Co., 38 So. 3d 722, 728 (Ala. 2009); see Cochrane Roofing & Metal Co. v. Callahan, 472 So. 2d 1005, 1008 (Ala. 1985) ("[I]ndemnity provisions in construction contracts are valid in Alabama."). As held by the Alabama Supreme Court in Industrial Tile, Inc. v. Stewart, 388 So. 2d 171 (Ala. 1980):

> The court has, for many years, held that as between private parties, indemnity contracts are enforceable if the contract clearly indicates an intention to indemnify against the consequences of the indemnitee's negligence, and such provision was clearly understood by the indemnitor, and there is not shown to be evidence of a disproportionate bargaining position in favor of the indemnitee.

The court in Holcim quoted Industrial Tile in finding:

> This rule includes the enforcement of a valid indemnity agreement that requires an indemnitor to indemnify an indemnitee for the indemnitee's own wrongdoing: "[I]f the parties knowingly, evenhandedly, and for valid consideration, intelligently entered into an agreement whereby one party agrees to indemnify the other, including indemnity against indemnitee's own wrongs, if expressed in clear and unequivocal language, then such agreements will be upheld."

38 So. 3d at 727-28. Further, no special relationship between the contracting parties is required for such an indemnity agreement to be enforced. Helton v. Brent Belcher Properties, Ltd., 64 So. 3d 25, 32 (Ala. Civ. App. 2010) (In rejecting an argument that control of property is necessary for the enforcement of an indemnity agreement, the court held that "[a]n indemnity agreement need not be premised upon any kind of special relationship other than a contractual agreement.").

There is a limit to Alabama's acceptance of broad indemnity agreements. "Agreements that purport to indemnify another for the other's intentional conduct are void as a matter of public policy." Price-Williams Associates, Inc. v. Nelson, 631 So. 2d 1016, 1019 (Ala. 1994); see City of Montgomery v. JYD Intern., Inc., 534 So.2d 592, 594 (Ala.1988); Pruet v. Dugger-Holmes & Associates, 276 Ala. 403, 162 So.2d 613 (1964).

C. Interpretation of Indemnity Clauses

As a backdrop to interpreting indemnity clauses, public policy issues may be implicated. "Most jurisdictions in the United States have some form of an 'anti-indemnity' statute." A Plea for Clarity at 21. Further, "agreements tending to erode common-law liability or relieving the contracting parties from penalties imposed for their improper conduct are not favored." 8 Williston on Contracts § 19:19 (4th ed. 2012). Broad indemnity agreements, even in states in which those agreements are enforceable, are strictly construed. See, e.g., Cremona v. R.S. Bacon Veneer Co., 433 F. 3d 617, 620 (8th Cir. 2006) ("[Broad] indemnification contracts ... are construed more strictly than other contracts."); Roundtree v. New Orleans Aviation Bd,, 844 So. 2d 1091, 1096 (La. Ct. App. 2003); State Farm Mut. Ins. Co. v. Koshy, 995 A. 2d 651, 668 (Me. 2010).

Courts have articulated several interpretive principles applicable to indemnity agreements in Alabama:

1. "Under long-standing Alabama law, contracts 'should be construed as written,' ... and that policy generally applies to indemnity contracts." Holcim, 38 So. 3d at 728;

2. An indemnity provision "is ambiguous if it is reasonably susceptible of more than one meaning." FabArc Steel Supply, Inc. v. Composite Construction Systems, Inc., 914 So. 2d 344, 357 (Ala. 2005);

3. "'If the court determines that the terms [of the indemnity agreement] are ambiguous (susceptible of more than one reasonable meaning), then the court must use established rules of contract construction to resolve the ambiguity.'" Id. (quoting Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000));

4. "'If all other rules of contract construction fail to resolve the ambiguity, then, under the rule of *contra proferentem*, any ambiguity must be construed against the drafter of the contract." Id.; see Royal Ins. Co. v. Whitaker Contracting Corp., 242 F. 3d 1035, 1042 (11th Cir. 2001) ("Ambiguous language in an indemnity agreement is construed against the drafter.");

5. However, "'[w]here both parties to a contract are sophisticated business persons advised by counsel and the contract is the product of negotiations at arm's length between the parties, we find no reason to automatically construe ambiguities in the contract against the drafter.'" Lloyd Noland Foundation, Inc. v. Tenet Healthcare Corp., 277 Fed. Appx. 923, 927 (11th Cir. 2008);

6. "When one seeks indemnification from another for damages that were caused by his own negligence, strict construction of the indemnity agreement against the contractor is particularly appropriate." Craig Construction Co. v. Hendrix, 568 So. 2d 752, 757 (Ala. 1990);

7. "[T]he burden of proof is on the indemnitee to establish the requirements [for broad form indemnity] before the indemnitee is entitled to indemnification under such an agreement." Royal Ins. Co. v. Whitaker Contracting Corp., 824 So. 2d 747, 752 (Ala. 2002).

The Holcim decision also contains a very important clarification regarding the evidence that a court can review in analyzing an indemnity agreement. In that case, the Alabama Supreme Court addressed two questions certified from the Eleventh Circuit Court of Appeals. The second question asked by the Eleventh Circuit was: "'Whether, under Alabama law, a court may look behind (or beyond) the pleadings (in particular, the complaint) of an underlying tort action in determining the

application of an indemnification provision between an indemnitor and indemnitee?'" 38 So. 3d at 729. The court answered that question in the affirmative. Id. at 730. The indemnity agreement in Holcim did "not specify or restrict the burden to prove liability for indemnification, [rather] [s]uch liability is controlled by the terms freely agreed upon by the parties in their contract and the general law governing adherence to contractual responsibility." Id. As such, the court held that a trial court is not restricted to the complaint in determining liability under an indemnity clause but it can also look "to the underlying facts shown by admissible evidence" in construing such a clause. Id.[1]

This holding is a significant departure from how some courts analyze indemnity provisions by limiting analysis just to the allegations in an underlying complaint - just as might be done in the interpretation of the duty to defend created by an insurance policy. See A Plea for Clarity at 22. With this principle of a more limited construction, Attorney Stern in his 2009 article in For the Defense suggests that "[i]f the intent is to have the actual facts control the obligation to provide a defense, spell it out in the contract," e.g., draft the agreement to include defending, indemnifying and holding harmless for loss "'resulting *or allegedly resulting* from'" the indemnitor's acts. Id. at 22 and 69.

[1]The Eleventh Circuit applied these answers from the Alabama Supreme Court and reversed summary judgment and remanded the case back to federal court in Mobile. Specifically, the Eleventh Circuit found that the subject indemnity clause was susceptible to two reasonably plausible interpretations and, therefore, was ambiguous such that "the facts now come into play." Ohio Cas. Ins. Co. v. Holcim (US), Inc., 589 F. 3d 161 (11th Cir. 2009).

D. Insurance Coverage for Indemnity Agreements

"Indemnification clauses only have value if the business assuming the obligation actually has the financial means to satisfy it." What's Yours is Mine at 251. Therefore, indemnitees frequently contractually obligate the indemnitor to purchase certain types and amounts of insurance. "A contractual obligation to indemnify is distinct from a contractual obligation to procure." Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co., 629 So. 2d 633, 639 (Ala. 1993). Article 37 of the General Conditions section (section C-8) of the form construction contract promulgated by the State of Alabama's Building Commission has a fairly standard list of those coverages in the construction context. See http://bc.alabama.gov/contContractDoc.htm .

This insurance obligation has given rise to the practice of requiring proof of insurance purchased by the indemnitor. Such proof often takes the form of a Certificate of Insurance evidencing the types and limits of particular coverages available to the indemnitor. The Certificate of Insurance alone does not provide insurance to the indemnitee or make the indemnitee an insured under the indemintor's policy(ies). In fact, the ACORD Certificate of Liability Insurance Form specifically states that:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THIS CERTIFICATE HOLDER.

Even if the contract contains insurance requirements, and even if proof of those coverages is supplied, the question becomes does the liability policy issued to the indemnitor provide coverage if it fails to abide by its indemnity obligations and the indemnitee asserts claims against the indemnitor based on that failure? The answer, of course, depends on the specific language of the

subject policy.[2] "In any risk transfer analysis, it is crucial that insurance coverage be obtained for the scope of the indemnity given, the goal being to have co-extensive insurance coverage for indemnification obligations." Walking the Minefield at 40.

The ISO form CGL policy excludes coverage for "bodily injury" or "property damage" "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." On its face, this exclusion would clearly bar coverage for indemnity-based claims against indemnitors. However, there usually are two exceptions to this exclusion. The exclusion does not apply in the indemnity context if: (1) the insured would be liable in the absence of the indemnity agreement; or (2) the indemnity agreement falls within the policy's definition of "insured contract." See Andrew Reidy and Seth Lamden, Protecting a General Contractor from Liability Caused by a Subcontractor, The Brief 21, 23 (Spring 2008).

It is key to review the definition of "insured contract" from the indemnitor's policy. "The effect of the exclusion is that unless a contract is specifically covered [as an 'insured contract'], an insurer is not liable for damages assumed under a contract." Alabama Liability Ins. Handbook § 10.02 (2008). The Alabama Supreme Court held as much in Townsend Ford v. Auto Owners Ins. Co., 656 So. 2d 360 (Ala. 1995). "The 'contractual exclusion' excludes all liability for damages the insured might be obligated to pay 'by reason of the assumption of liability in a contract or agreement' unless it is under one of the specific types of contracts that are included in the definition of 'insured contract.'" 656 So. 2d at 364.

Some liability policies include the following in the list of "insured contracts":

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[2]The importance of reviewing the particular policy at issue cannot be overstated. It should not be assumed certain exclusions are present, or that endorsements providing coverage absent.

> That part of any other part of any other contractor agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.

Pursuant to this definition of "insured contract," an indemnity agreement between parties may be considered an "insured contract" and, thus, excepted from the contractual liability exclusion. The analysis though of whether this exception applies necessarily entails defining "tort liability." Some cases construe "tort liability" to mean only negligence claims. See Hankins v. Peakin Ins. Co., 713 N.E. 2d 1244, 1248-49 (Ill. Ct. App. 1999) (holding that "tort liability" is indeed limited only to negligence and thereby determined that the exception did not apply to an indemnity agreement in which the indemnitor failed to agree to indemnify for its own negligence); American Economy Ins. Co. v. Texas Inst., Inc., 2006 WL 616017 (N.D. Tex. March 9, 2006); Energy Corporation of America v. Vituminous Cas. Corp., 2008 WL 313948 (S.D. W.V. Feb. 4, 2008). There is conflicting authority on this issue in that other courts have determined that "tort liability" is not limited just to negligence. See John Deere Ins. Co. v. DeSmet Ins. Co., 650 N.W. 2d 601, 607 (Iowa 2002). Still other courts have decided to wait until the underlying case is settled or a judgment is entered before ruling on the question of whether the indemnitor is liable to the indemnitee for "tort liability" such that the exception would apply. See KBS, Inc. v. Great American Ins. Co., 2006 WL 3538985 (E.D. Va. Dec. 7, 2006).

Judge Butler from the United States District Court of the Southern District of Alabama dealt with coverage for an owner's claim for indemnity against a contractor in U.S. Fidelity & Guaranty Ins. Co. v. St. Paul Fire & Marine Ins. Co., 1996 U.S. Dist. LEXIS 12814 (S.D. Ala. Aug. 29, 1996). In that case, BE&K agreed to indemnity International Paper for "'any and all damage or injury of any kind or nature (including resulting death) to all persons employed by [BE&K].'" One of BE&K's workers died in an on-the-job accident while performing construction work, and his estate sued

International Paper. In a battle between USF&G and St. Paul, St. Paul's policy contained a contractual liability exclusion but excepted "covered contracts" from that exclusion. Under St. Paul's policy, a "covered contract" included agreements in which BE&K "assumed the liability" of another "if such contract or agreement: [1] is related to your business; and [2] is made before the bodily injury or property damage happens." Judge Butler described this as "a gaping exception" to the contractual liability exclusion, and determined that the indemnity agreement indeed was a "covered contract." The judge then went on to analyze the enforceability of the indemnity agreement and held that St. Paul's policy, despite the contractual liability exclusion, applied to provide coverage for International Paper's costs in defending and settling the underlying wrongful death action.

II. ADDITIONAL INSUREDS

With the uncertainty of the enforcement of indemnity obligations and the coverage questions created even if the indemnity provision is valid, contractual indemnity often simply does not provide sufficient protection for the indemnitor. Although not failsafe, being an additional insured typically provides greater protection than simply being an indemnitee.

A. Additional Insured versus Indemnification

An indemnity clause does not make the indemnitee a direct party to the indemnitor's insurance policy; rather, any benefits to the indemnitee are limited to the contract itself. Further, as mentioned above, liability coverage for a breach of indemnity clause is subject to the contractual liability exclusion and the definition of "insured contract" in the indemnitor's policy. On the other hand, an additional insured is actually party to the separate insurance policy and, "[a]ccordingly, the

additional insured enjoys the full benefits of the policy" and its "interest in the policy is regarded as coextensive with that of the named insured." 9 Couch on Ins. § 126:7 (2011).

As previously stated, the level of risk potentially transferred through an indemnity agreement (whether limited, immediate or broad) varies from state to state. Being designated as an additional insured can avoid having to debate whether the underlying indemnity agreement is enforceable.

An additional insured typically is provided defense coverage through the lower tier contractor's insurance policy. Although depending on the language of the policy, the cost of defense usually is in addition to the indemnity limit of the policy. Parsing language from the indemnity agreement as to whether a defense is owed by the indemnitor is not necessary for an additional insured. In other words, defense coverage may be provided to the additional insured regardless of whether the indemnity provision clearly requires such protection.

Of course, there is an advantage to the lower tier contractor in that the risk assumed from the upper tier contractor is passed along, at least to some degree, to an insurance carrier. The risk transferred can include both defense and indemnity obligations. However, disadvantages for the additional insured construct may include higher premiums for the named insured, higher contract price passed on by the lower tier contractor to the upper tier, and perhaps underwriting uncertainty as to renewal of the lower tier contractor's insurance.

B. Types of Additional Insured Endorsements

Coverage for additional insureds may be accomplished through two general types of endorsements: (1) a specific endorsement listing the entity or person to be insured; and (2) a blanket additional insured endorsement that covers a limited category of entities / individuals without identifying the putative additional insured(s) by name. 9 Couch on Ins. § 126:7 (2011). Like

reviewing an indemnitor's policy concerning the contractual liability exclusion and the "insured contract" definition, it is imperative that the potential additional insured review the endorsement added to the subject policy. The ISO has several different additional insured endorsements and many insurers use manuscript endorsements. The language of each endorsement determines the nature and scope of coverage that the policy will provide to the additional insured.

The Associated General Contractors of America prepared a white paper on additional insured endorsements in February 2006. It can be accessed at http://www.agc.org/cs/additional_insured_endorsements. Although a bit dated, this paper provides an excellent analysis of the evolution of the ISO additional insured endorsements. The chart produced by the AGC is attached. Endorsements CG 20 10 07 04, CG 20 37 07 04 and CG 20 33 07 04, reflecting changes made in 2004, are also attached.[3]

Just as with the named insured in a policy, it is important that the endorsement properly identify the individual or entity to be designated as an additional insured. "[C]overage will not be extended to protect individuals and entities not within the intended scope of an endorsement." 9 Couch on Ins. § 126:7 (2011). Care must be given also with regard to any Certificate of Insurance. As mentioned above, a certificate alone is not enough to create coverage. "The additional insured should require both a certificate of insurance and a policy including the endorsement naming the third party an additional insured, since the certificate alone will not ensure coverage, if, for example, the policy is not endorsed." Id.; see Alabama Electric Cooperative, Inc. v. Bailey's Construction Co., 950 So. 2d 280, 286 (Ala. 2006) (holding that in light of the limiting language in a certificate of insurance, a property owner could not have reasonably relied on representations that the owner was

[3]Depending on the breadth of the endorsement and the state law that governs the interpretation of the policy, a state's anti-indemnity statute may still apply to preclude enforcement of the endorsement. See Colo. Rev. Stat. § 13-21-111.5; Kan. Stat. Ann. § 16-121.

an additional insured). The language in a certificate of insurance, however, is certainly still important. In fact, "[a]ccepting a certificate of insurance which does not reference the additional insured status without objection may be a waiver of the procurement obligation." Id. at § 126:7; see Stone Building Co. v. Star Electrical Contractors, Inc., 796 So. 2d 1076, 1089 (Ala. 2001) (A contractor waived the requirement that the subcontractor add the contractor as an additional insured since the contractor received and accepted, without reservation, a certificate of insurance that did not list the contractor as an insured.).

C. Additional Insured Cases from Alabama

Several state and federal courts in Alabama have addressed additional insured issues. Summaries of a few of those cases are below.

In FabArc Steel Supply, Inc. v. Composite Construction Systems, Inc., 914 So. 2d 344 (Ala. 2005), a subcontract between FabArc and Composite Construction required the subcontractor to name FabArc as an additional insured. According to FabArc, that contractual obligation specified that Composite Construction's insurance had to be primary coverage such that FabArc's own policy would be excess. Although FabArc was designated as an additional insured, Composite Construction's carrier contended that its coverage was not primary. In a third party complaint (arising out of an underlying wrongful death claim against FabArc), FabArc asserted that Composite Construction breached the construction contract by not appropriately adding FabArc to its policy in such a way so as to make that coverage primary. The trial court granted summary judgment in favor of Composite Construction but the Alabama Supreme Court reversed determining that fact issues existed with respect to the scope of Composite Construction's obligation under the contract, i.e.,

whether FabArc had to be an additional insured with primary, as opposed to excess, coverage through Composite Construction's policy.

Another primary versus excess dispute was addressed in Colony Ins. Co. v. Georgia-Pacific, LLC, 27 So. 3d 1210 (Ala. 2009). The CGL carrier for a roofing contractor filed a declaratory judgment action against the property owner and the owner's carrier concerning priority of coverage. Based on a comparison of the "other insurance" sections of the carriers' policies, the court affirmed that the contractor's insurer was primary.

Judge Albritton's opinion in Pennsylvania Nat'l Mut. Cas. Ins. Co. v. All State Construction, Inc., 761 F. Supp. 2d 1306 (M. D. Ala. 2011), highlights how important it is for the putative additional insured to review the lower tier contractor's insurance policy and to make sure that the additional insured is designated correctly. The subcontractor's liability policy contained very specific language as to who was insured under the policy. An employee of the subcontractor was injured while on a construction project. The general contractor for the project was a joint venture between All State Construction and JCJ General Contractors designated as "'Allstate / JCJ, a Joint Venture'" in the subcontract. Although All State was indeed designated as an additional insured under the subcontractor's policy with Penn National, the Joint Venture was not. Since the underlying claim arose out of the Joint Venture's project, not All State's, the judge granted the carrier's motion for summary judgment finding that the Joint Venture was not owed defense coverage.

In Industrial Chemical & Fiberglass Corp. v. Hartford Accident & Indemn. Co., 475 So. 2d 472 (Ala. 1985), two men were killed while repairing cracks in the floor of a storage tank. The men died when chemicals they were using for the repairs erupted into flames. Reichold Chemicals manufactured the chemicals and Industrial Chemical distributed them. Industrial Chemical sought

coverage for the underlying wrongful death claims from Reichold's insurer. Industrial Chemical was designated as an additional insured within an endorsement to Reichold's entitled "Additional Insured Vendor's Broad Form Modified." In answering questions certified from the federal court, the Alabama Supreme Court focused on the specific language of the endorsement that excluded coverage for the additional insured if the underlying injury arose out of "repair operations." The court found that the exclusionary language in the endorsement related to repair of the product itself - not the repairs being made to the storage tank and thus did not apply.

The court dealt with the interplay between an additional insured endorsement and a professional services exclusion in United States Fidelity and Guar. Co. v. Armstrong, 479 So. 2d 1164 (Ala. 1985). Wainwright Engineering Company was involved in designing and constructing a new sewer system for the City of Samson. Wainwright was designated as an additional insured under the city's liability policy. That policy contained a professional services exclusion. During the construction of the system, raw sewage overflowed onto an individual's property. Wainwright was sued by that property owner for which it sought coverage through the city's policy. The carrier argued that the professional services exclusion barred coverage for the engineering company. However, Wainwright not only provided professional functions for the project but it also was the liaison between the general contractor and the city, and there were no allegations in the underlying case asserting that Wainwright violated professional duties. Therefore, the court found that the exclusion did not apply and the city's carrier owed coverage.

Is a failure to designate an entity as an additional insured, in violation of an underlying agreement, an "occurrence" giving rise to "bodily injury" or "property damage"? According to Reliance Ins. Co. v. Wyatt, 540 So. 2d 688 (Ala. 1988), no. "We conclude that no coverage exists for the breach of contract, because the breach did not constitute an 'occurrence' that resulted in

bodily injury or property damage under the definitions within the policy, which was necessary to bring such claim within the policy coverage." 540 So. 2d at 691.

In Doster Construction Co. v. Marathon Electrical Contractors, Inc., 32 So. 3d 1277 (Ala. 2009), the issue was not whether the subcontractor appropriately designated the general contractor as an additional insured for an underlying personal injury action - it did and the subcontractor's carrier defended and indemnified the general contractor. Rather, the question was whether the subcontractor was obligated to procure insurance for the general contractor that would cover a cross-claim from another subcontractor. The court reviewed the construction contract and ruled that the insurance procurement clause was not broad enough to require insurance for "liabilities to another Doster subcontractor Doster might contractually assume."

Evolution of the Standard Form of Additional Insured Endorsement 1985-2004

CG 20 10 11 85	CG 20 10 03 97	CG 20 10 10 01	CG 20 37 10 01	CG 20 10 07 04	CG 20 37 7 04
• 1985 version of the additional insured endorsement • Provides the "additional" insured with coverage for liability arising out of the "named" insured's work for the "additional" insured • Provides coverage not only while the "named" insured's work is in progress but for the "named" insured's completed operations. • Meets a contractual that project owners frequently impose on their general contractors – namely, that the general contractor provide the project owner with additional insured coverage for claims against the project owner arising out of the completed work • Regularly used until three years ago	• 1997 version of the additional insured endorsement • Provides the "additional" insured with coverage only for liability arising out of the "named insured's" ongoing operations • Intended to limit the term of the "additional" insured's insurance coverage to the time period during which the "named" insured is actually performing operations • Intended to deny coverage for completed operations	• 2001 version of the additional insured endorsement • Provides the "additional" insured with coverage only for liability arising out of the "named" insured's ongoing operations • Expressly excludes injuries or damages suffered after (1) the "named" insured's work at the site of the covered operations has been completed, or (2) the relevant portion of "named" insured's work has been put to its intended use • Intended to limit the term of the "additional" insured's insurance coverage to the time period during which the "named" insured is actually performing operations • Intended to deny coverage for completed operations • Adopted in conjunction with CG 20 37 10 01, a new standard form endorsement that will, if used in conjunction with this form, provide coverage similar to the CG 20 10 11 85	• New standard form of endorsement for completed operations, adopted in 2001 • Provides "additional" insured with coverage for the "products-completed operations hazard" arising out of the "named" insured's work • Only applies to completed operations • No coverage for premises or operations • When used in conjunction with CG 20 10 10 01, provides coverage similar to CG 20 10 11 85	• 2004 version of the additional insured endorsement • Provides the "additional" insured with coverage only for liability caused in whole or in part by the acts or omissions of either (1) the "named" insured or (2) someone acting on behalf of the "named" insured • Also limits coverage to ongoing operations for the "additional" insured • Express excludes injuries or damages suffered after (1) the "named" insured's work at the site of the covered operations has been completed, or (2) the relevant portion of "named" insured's work has been put to its intended use • Intended to limit the coverage provided to the "additional" insured to liability caused at least in part by the "named" insured's ongoing operations • Intended to eliminate coverage for the "additional" insured's sole negligence	• 2004 version of the completed operations endorsement • Provides the "additional" insured with coverage for the "products-completed operations hazard" caused in whole or in part by the acts or omissions of either (1) the "named" insured or (2) someone acting on behalf of the "named" insured • Intended to limit the coverage provided to the "additional" insured to liability caused at least in part by the "named" insured's completed operations • Not Intended to provide coverage for the "additional" insured's sole negligence • When used in conjunction with CG 20 10 07 04, meets typical contract requirements to provide additional insured coverage for both ongoing and completed operations.

* *Note:* Where the two parties are the project owner and the general contractor, the owner would be the "additional" insured and the general contractor would be the "named" insured. Where the two parties are the general contractor and one of its subcontractors, the "additional" insured would be general contractor and the "named" insured would be the subcontractor

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

R E V I S E D

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

~~**SCHEDULE**~~

~~Name of Person or Organization:~~

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

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

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

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

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

~~2. Exclusions~~

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

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

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

R E V I S E D

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location And Description Of Completed Operations
~~Location And Description of Completed Operations:~~	
~~Additional Premium:~~	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

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

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" ~~arising out of~~caused, in whole or in part, by:

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

in the performance of your ongoing operations for the additional insured ~~performed for that insured.~~

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

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

~~2. Exclusions~~

This insurance does not apply to:

a1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

~~(1)~~a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; ~~and~~or

~~(2)~~b. Supervisory, inspection, architectural or engineering activities.

~~b~~2. "Bodily injury" or "property damage" occurring after:

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

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

R E V I S E D

