

RISK-SHIFTING BY CONTRACT: CONTRACTUAL INDEMNIFICATION AND ADDITIONAL INSURED COVERAGE

Thomas S. Garrett
Harman Claytor Corrigan & Wellman
Richmond, Virginia

Erin L. Webb
Tayman Lane Chaverri LLP
Washington, D.C.

Ezra S. Gollogly
Kramon & Graham, P.A.
Baltimore, Maryland

Courtney E. Alvarez
Lowenstein Sandler LLP
Washington, D.C.

Introduction

A wide variety of contracts contain risk-shifting provisions that require one party to provide contractual indemnification to the other contracting party under certain enumerated circumstances, and to procure insurance and to name the other contracting party as an additional insured under such insurance. Such risk-shifting provisions are found in a variety of contracts, including but not limited to construction contracts, property leases, equipment leases, and vendor agreements. The protections afforded by contractual indemnification and additional insured coverage are, in many respects, duplicative. However, they are separate and distinct contractual rights that complement one another to maximize the protection afforded to the indemnitee/additional insured.¹

Overview of Contractual Indemnification

Contractual indemnification provisions seek to shift the risk of future loss from one party to another. Such provisions obligate the indemnitor to assume certain financial obligations of the indemnitee. Those obligations include paying for losses that the indemnitee has incurred or will

¹ *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co.*, 602 F.3d 677, 683 (5th Cir. 2010) (applying Texas law) (“A contract provision that extends direct insured status as an additional insured is deemed to be separate and independent from the indemnity agreement.”).

incur, and frequently extend to attorneys' fees and defense costs. In the construction context, for example, a general contractor might require each of its subcontractors to "indemnify and hold harmless the general contractor against all claims, damages, loss, and expenses, including but not limited to attorneys' fees and costs, arising out of or resulting from the performance of the subcontractor's work."

Such indemnification agreements are categorized according to the degree of risk assumed by the indemnitor. Broadly speaking there are three such categories: limited; intermediate; and broad. Under limited form indemnification agreements, the indemnitor assumes responsibility for its own negligence but only if it is solely at fault. If the indemnitee is even partially at fault, there is no protection. For example, a subcontractor might agree to indemnify the general contractor against "all third-party claims and damages for bodily injury and property damage arising out of the subcontractor's work to the extent caused by the negligent acts or omissions of the subcontractor."²

Under intermediate form indemnification agreements, the indemnitor assumes responsibility for its sole or partial negligence. If the indemnitee is solely at fault, there is no protection. For example, the subcontractor could agree to indemnify the general contractor against "all third-party claims and damages for bodily injury and property damage arising out of subcontractor's work, whether such injury to persons or damage to property are due or caused to be due by the negligence of general contractor, except for such injury or damage that has been caused by the sole negligence of general contractor."³

² For a discussion of limited form indemnification agreements, see *Oltmans Constr. Co. v. Bayside Interiors, Inc.*, 10 Cal. App. 5th 355, 215 Cal. Rptr. 3d 918 (Ct. App. 2017).

³ This form of indemnification agreement is discussed in *Miller-Davis Co. v. Ahrens Const., Inc.*, 495 Mich. 161, 848 N.W.2d 95 (2014).

Finally, under broad form indemnification agreements, the indemnitor assumes the entire risk of loss regardless of who is at fault. For example, the subcontractor could agree to indemnify the general contractor against "all third-party claims and damages for bodily injury and property damage arising out of subcontractor's work, whether caused by the acts or omissions, including but not limited to the sole negligence, of general contractor."⁴

The enforceability of indemnification agreements turns principally on two issues: whether the indemnification provision is enforceable as a matter of public policy, and whether an "anti-indemnity" statute prohibits or limits the provision. Both issues are highly dependent on the particular body of law at issue. The enforceability of any indemnification provision, therefore, must be carefully researched and analyzed before any final conclusions are drawn.

Many states cast a skeptical eye on contractual arrangements that have the effect of exculpating a party from the consequences of its own negligence. This skepticism is motivated by the idea that a party who insists on contractual indemnification often has more bargaining power than its counterpart, and the concern that, depending on the form of the indemnification provision, a party may not be properly incentivized to guard against its own negligence.⁵

Courts in many states have sought to address these concerns by requiring indemnification agreements to be stated in "clear and unequivocal" language.⁶ In addition, some courts require that any intent to indemnify against the indemnitee's own negligence be stated in express terms.⁷

⁴ This form of indemnification agreement is discussed in *Indus. Tile, Inc. v. Stewart*, 388 So. 2d 171 (Ala. 1980).

⁵ See, e.g., Colo. Rev. St. Ann. Section 13-21-111.5(6).

⁶ See, e.g., *Jacobs Constructors, Inc. v. NPS Energy Serv., Inc.*, 264 F.3d 365, 374 (3d Cir. 2001) (Pennsylvania law).

⁷ See, e.g., *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 264 (Fla. 2015).

Again, as these rules demonstrate, the decisions of a particular jurisdiction must be carefully considered when evaluating whether a particular indemnification provision is enforceable.

In addition, a majority of states have enacted statutes that restrict or prohibit indemnification agreements in the construction context.⁸ Consequently, the effect of such statutes must also be taken into account when evaluating indemnification provisions.⁹ North Carolina's anti-indemnity statute, for example, provides:

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees. This section shall not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer, nor shall this section apply to promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee. This section shall not apply to contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1.

N.C. Gen. Stat. Ann. § 22B-1.¹⁰

A number of surveys available on Westlaw or online canvass anti-indemnity statutes applicable to construction agreements.¹¹ According to such surveys:

⁸ Anti-indemnity statutes also exist in the oil and gas industry. *See, e.g., Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992)

⁹ *See, e.g., Uniwest Constr., Inc. v. Amtech Elevator Serv., Inc.*, 699 S.E.2d 223 (Va. 2010) (refusing to enforce indemnity provision set forth in construction contract that could be read to indemnify the indemnitee for its own negligence because it violated the prohibition set forth in Virginia Code Section 11-4.1)

¹⁰ *See also Jackson v. Assoc. Scaffolders & Equip. Co.*, 568 S.E.2d 666 (N.C. Ct. App. 2002) (N.C. Gen Stat. Ann. Section 22B-1 voided enforcement of indemnification provision).

- Seventeen states prohibit broad form indemnification agreements but allow intermediate form indemnification agreements. These states include Alaska, Arizona, Arkansas, California, Georgia, Hawaii, Idaho, Indiana, Maryland, Massachusetts, Michigan, New Jersey, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia.
- Twenty-four states prohibit both broad and intermediate form indemnification agreements. Those states include California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Utah, and Wisconsin.
- Six states and the District of Columbia allow broad form indemnification agreements. Those states include Alabama, Maine, Nevada, North Dakota, Pennsylvania, and Vermont.
- Limited form indemnification agreements are enforceable in every state.

Whenever analyzing anti-indemnity statutes, one must pay careful attention to whether the statute protects only the government by limiting its application to public projects.

Overview of Additional Insured Endorsements

The “additional insured” endorsement does just what its name says: creates another insured party under an insurance contract. An additional insured is generally a party that is doing business with the named insured that requests to be added to the named insured’s policy as

¹¹ See, e.g., § 10:77. Anti-indemnity statutes, 3 Bruner & O'Connor Construction Law § 10:77, August 2017 update; Allen Holt Gwyn, Paul E. Davis, Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law, Constr. Law, Summer 2003; see also [visited 1/15/18] Anti-Indemnity Statutes in the 50 States: 2016, <https://www.asaonline.com/web/upload/Anti-Indemnity%20Statutes%20in%20the%2050%20States%202016.pdf>.

a part of the business relationship. Many types of contracts, particularly construction contracts, require the contracting parties to name one another as additional insureds on the parties' own insurance policies.

If there is coverage for a particular claim, the additional insured will have the right to defense and indemnity under the policy purchased and maintained by the named insured. The duty to provide a defense or to pay defense costs can be critically important in the liability context. The standard additional insured endorsement available in most general liability policies has changed significantly over the years, and the general consensus is that the coverage on the market today is narrower than in the past. Careful attention must be paid to the scope of the "additional insured" language and whether it accomplishes the risk transfer desired.

The Insurance Services Office ("ISO") publishes the basic and most commonly used form for commercial general liability ("CGL") policies in the United States, including endorsements like the additional insured endorsement. The standard ISO form is periodically updated with various wording changes. From its first appearance around 1985 until the most recent ISO CGL revision in 2013, the most common additional insured endorsement from ISO¹² has undergone significant changes. At each revision, the new language has been contested by insureds and insurers in court, with differing results.

There are three basic types of commonly used additional insured endorsements. The first, using ISO numbers starting in CG 20 10, is called "Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization." It contemplates that a Schedule will be attached to the insurance policy that lists all of the additional insureds that have been added. As

¹² There are dozens of variations of the additional insured endorsement. This article examines the most commonly used in the construction context.

discussed below, these types of additional insured endorsements first became prevalent in or around 1985. This form was significantly revised by ISO in 1993, 2001, 2004, and 2013.

Second, using ISO numbers starting in CG 20 33, is the “blanket” additional insured endorsement. Introduced in approximately 1997, this provision sought to give insureds the option to avoid the administrative burden involved in scheduling each additional insured. This form was revised by ISO in 2001, 2004, and 2013.

Finally, the most recent type of common ISO additional insured endorsement is for “completed operations.” As discussed below, starting in approximately 2001, ISO revised the standard additional insured endorsement in an effort to limit coverage to “ongoing operations.” At the same time, it introduced another endorsement that would add coverage for operations that had been completed: the CG 20 37 form. This form was revised in 2004 and 2013.¹³

In 1985, one of the first additional insured endorsements read:

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability **arising out of “your work”** for that insured by or for you.¹⁴

Named insureds, additional insureds, and insurers battled in the courts concerning the meaning of “arising out of” and when an additional insured’s liability could be said to “arise out of” the named insured’s work.¹⁵

In 1993, ISO revised the most common additional insured endorsement to read:

¹³ Both the “blanket” and “completed operations” variations track the “Schedule” endorsements in most other major respects.

¹⁴ ISO “Additional Insured- Owners, Lessees or Contractors” Form CG 20 10 11 85.

¹⁵ *See, e.g., Ins. Co. of N. Am. v. Liberty Mut. Ins. Co.*, No. 94 CIV. 637 (LLS), 1994 WL 150818, at *2 (S.D.N.Y. Apr. 19, 1994) (“In New York, insurance coverage procured by a contractor for its principal is not limited to vicarious liability (i.e., the subcontractor’s insurance of the contractor against the risk of the contractor being held liable for the fault of the subcontractor) unless otherwise stated in the policy.”).

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability **arising out of your ongoing operations performed for that insured.**¹⁶

The new phrase “ongoing operations” resulted in litigation, which continues to the present day, over when operations could be said to no longer be “ongoing” but “completed” for the purposes of additional insured coverage.¹⁷

In 1997, ISO introduced the “blanket” additional insured endorsement, which stated:

Section II—Who Is An Insured is amended to include as an 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 arising out of your ongoing operations performed for that insured. A person’s or organizations status as an insured under this endorsement ends when your operations for that insured are completed.¹⁸

This became an alternative to “schedules” of additional insureds, but also gave rise to disputes over the meaning of “agreed in writing”; in particular, whether this provision required a direct writing between named insured and additional insured to provide coverage, or a larger general or subcontractor agreement was sufficient.¹⁹

¹⁶ See ISO “Additional Insured- Owners, Lessees or Contractors” Form CG 20 10 10 93 (emphasis added).

¹⁷ See, e.g., *Town of Fort Ann v. Liberty Mut. Ins. Co.*, 69 A.D.3d 1261, 1263, 893 N.Y.S.2d 682, 685 (2010) (stating that New York courts interpret the phrase “ongoing operations” broadly; holding that operations were still ongoing, because even though major construction of the dam in question had ended one to two months before it failed, it had not been inspected by the engineer and could not be considered “complete”: “In light of the nature of the project, such inspection was not merely a minor after-the-fact detail.”); *Tri-Star Theme Builders, Inc. v. OneBeacon Ins. Co.*, 426 F. App’x 506, 511 (9th Cir. 2011) (Arizona law) (“The ongoing operations clause, which appears in the ‘Who Is An Insured’ section, however, addresses ‘only the type of activity ... from which the ... liability must arise in order to be covered, not when the injury or damage must occur.’”) (citing 3 Daven Lowhurst et al., *New Appleman Insurance Law Practice Guide* 30A–66 (Jeffrey E. Thomas et al. eds., 2011)).

¹⁸ See ISO “Additional Insured – Owners, Lessees or Contractors” Form CG 20 10 03 97.

¹⁹ See, e.g., *Cincinnati Ins. Co. v. Harleysville Ins. Co.*, No. 16-3929-CV, 2017 WL 4417604, at *2 (2d Cir. Oct. 4, 2017) (“Kimmel did not enter into a contract with UR and so there is no contractual privity between Kimmel and UR. Hence, the district court erred in concluding that the Privity

In 2001, ISO released another significant revision to the most common “additional insured” endorsement.

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

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

This insurance **does not apply** to “bodily injury” or “property damage” **occurring after:**

1. **All work**, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) **to be** performed by or on behalf of the additional insured(s) at the location of the covered **operations has been completed;** or
2. That portion of **“your 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.²⁰

This was a clear attempt to limit coverage to ongoing operations only, and for this reason an accompanying “completed operations” additional insured endorsement was also offered.²¹

The 2004 ISO revision saw further changes to the “additional insured” 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 . . . **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.²²

Endorsement, when considered in light of the Mauro–Kimmel Subcontract, confers ‘Additional Insured’ status on UR.”).

²⁰ See ISO “Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization” Form CG 20 10 10 01 (emphasis added). The CG 20 33 10 01 form contained similar changes. See ISO “Additional Insured - Owners, Lessees or Contractors – Automatic Status When Required In Construction Agreement With You” Form CG 20 33 10 01.

²¹ See ISO “Additional Insured - Owners, Lessees or Contractors – Completed Operations” Form CG 20 37 10 01.

Replacing the “arising out of” language with the “caused by” language caused some courts to hold that these endorsements covered only claims alleging the named insured’s negligence, and not claims limited to the additional insured’s own negligence.²³ Not all courts agreed with this interpretation.²⁴

The most recent revision of the standard ISO CGL form, in 2013, made significant changes to the “additional insured” endorsement.

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

1. Your acts or omissions; or
 2. The acts or omissions of those acting on your behalf;
- in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured **only applies to the extent permitted by law**; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured **will not be broader than that which you are required by the contract or agreement to provide** for such additional insured.

* * *

²² ISO “Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization” Form CG 20 10 07 04. The corresponding “blanket” and “completed operations” endorsements were also updated to reflect the new language. *See* ISO “Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required In Construction Agreement With You” Form CG 20 33 07 04; ISO “Additional Insured - Owners, Lessees or Contractors – Completed Operations” Form CG 20 37 07 04.

²³ *See, e.g., Schafer v. Paragano*, 2010 WL 624108 (N.J. Super Ct. App. Div. Feb. 24, 2010) (“The additional insured endorsement issued by Harleysville clearly states that Paragano is covered only as to liability caused by the acts or omissions of K & D Builders. It provides coverage for a claim asserted against Paragano for vicarious liability; it does not provide coverage for a claim against Paragano for its own direct negligence. Coverage for such claims rests with Paragano’s own liability insurer, not K & D’s.”).

²⁴ *See, e.g., Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 323, 184 P.3d 390, 392 (2008) (finding endorsement ambiguous and reading in favor of coverage for insured).

C. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations; whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.²⁵

The first major change limits additional insured coverage to “the extent permitted by law.” As discussed above, state anti-indemnity statutes may impact the scope of coverage under this form.

The second modification provides that coverage under the insurance policy will not be broader than specified in the separate contract between the insured and the additional insured. In *In Re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), a similar additional insured provision in a drilling contract required one party to name the other “as additional insured in each of [the named insured’s] policies, except Workers’ Compensation for liabilities assumed by [the named insured] under the terms of [the drilling] Contract.” (emphasis added). The court held that the contractual limitation would also be applied to the extent of coverage. “Because Transocean did not assume liability for subsurface pollution, Transocean was not ‘obliged’ to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, BP lacks status as an ‘Insured’ for the same.” *Id.* at 467.

²⁵ See ISO “Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization” Form CG 20 10 04 13 (emphasis added). See also ISO “Additional Insured - Owners, Lessees or Contractors – Completed Operations” Form CG 20 33 04 13; ISO “Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required In Construction Agreement With You” CG 20 37 04 13.

Common Distinctions and Coverage Implications Involving Risk-Shifting Provisions

As noted, although contractual indemnification and additional insured risk-shifting provisions are often duplicative, they are separate and distinct risk-shifting mechanisms. This section highlights a number of the common distinctions between these risk-shifting provisions.

Foremost, as already noted above, many states restrict of the scope of permissible contractual indemnification in certain contracts, including in particular construction contracts.²⁶ Notably, however, a handful of such anti-indemnification statutes also regulate the scope of permissible additional insured coverage.²⁷ Similarly, the obligation to defend is markedly different. In the insurance context, an insurer's duty to defend is broader than the duty to indemnify and is generally determined at the outset of the underlying action based upon a comparison of the policy language and the complaint.²⁸ In the indemnification context, the indemnitor's obligation to defend an indemnitee is typically co-extensive with the indemnification obligation such that the obligation to defend, in many instances, may not be resolved until the conclusion of the matter.²⁹

²⁶ See, e.g., *Uniwest Constr., Inc. v. Amtech Elevator Serv., Inc.*, 699 S.E.2d 223 (Va. 2010); *Pruitt v. Genie Indus., Inc.*, 2013 WL 485966 (E.D. Ky. Feb. 6, 2013).

²⁷ See, e.g., *Higby Crane Serv., LLC v. Nat'l Helium, LLC*, 703 Fed. Appx. 687 (10th Cir. 2017).

²⁸ See, e.g., *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660, 675-76 (3d Cir. 2016) (injury caused by acts or omissions of agents, contractors or subcontractors sufficient to trigger duty to defend additional insured); *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 112 F. Supp. 3d 1160, 166-67 (D. Or. 2015) (allegations that plaintiff was following direction from his employer was sufficient to trigger duty to defend); *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 794 F. Supp. 2d 242, 257-58 (D. Me. 2011) (allegations supported potential finding that named insured was partially at fault such that insurer owed duty to defend the general contractor as an additional insured.).

²⁹ *Willbros RPI, Inc. v. Continental Cas. Co.*, 601 F.3d 306, 313 (5th Cir. 2010) (Texas law); compare *Lette v. Severtal Sparrows Point, LLC*, 2010 WL 457513 (D. Md. Feb. 3, 2010) (explaining that, although the subcontractor owed a duty to defend, the duty to reimburse defense costs was premature because the duty to defend did not extend to liability based on the indemnitee's own negligence such that the defense costs must be apportioned).

The additional insured coverage and the scope of contractual indemnification are also typically subject to differing rules of contract interpretation. Additional insured coverage is often construed broadly in favor of the additional insured pursuant to general principles of insurance law. Many courts therefore hold that additional insured coverage “arising out of” the named insured’s operations requires an insurer to indemnify the additional insured for claims involving the additional insured’s own negligence.³⁰ By contrast, many courts narrowly construe an indemnification obligation such that there will be no obligation to indemnify the indemnitee for its own negligence unless the contract clearly and unequivocally states that intent.³¹

In addition, the scope of coverage afforded under a liability policy is limited by numerous additional terms, provisions, conditions, and exclusions that are typically not present in the contractual indemnification context. For example, the indemnification provision may require indemnity for a loss otherwise excluded under the additional insured coverage afforded to the indemnitee.³²

The contractual indemnification and additional insured coverage obligations also implicate separate and distinct rights under the named insured/indemnitor’s policy. Additional insured coverage is protection afforded under the named insured’s policy directly to the additional insured as a third party beneficiary. By contrast, contractual indemnification concerns

³⁰ See, e.g., *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 184 P.3d 390 (Nev. 2008) (interpreting “arising out of” language to encompass the additional insured’s own negligence); but see *Mathy Constr. Co. v. West Bend Mut. Ins. Co.*, 2010 WL 653100 at *5-6 (Wis. Ct. App. Feb. 25, 2010).

³¹ See, e.g., *Heat & Power Corp. v. Air Products & Chem., Inc.*, 578 A.2d 584 (Md. 1990) (“contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or other unequivocal terms”); *District of Columbia v. Royal*, 465 A.2d 367 (D.C. 1983).

³² *Chet Morrison Contr., LLC v. One Beacon Am. Ins. Co.*, 132 F. Supp. 2d 825, 832-33 (E.D. La. 2015) (owned property exclusion barred coverage for additional insured coverage for damage to the named insured’s property); see also *Scottsdale Ins. Co. v. Somerville Fidelco Assoc., LP*, Case No. 07-2763, 2010 WL 624891 at *7 (D.N.J. Feb. 22, 2010).

the “insured contract” coverage afforded to the named insured/indemnitor for its liability to the indemnitee.³³ Most courts therefore hold that the “insured contract” provisions of a policy do not entitle an indemnitee to obtain coverage directly under the named insured’s policy for the indemnitee’s liability to the claimant.³⁴ An insurer will therefore typically owes no direct duty to defend an indemnitee pursuant to the “insured contract” provisions of a liability policy.³⁵ Notably, however, some standard ISO policy forms may provide a defense to the indemnitee, provided certain specific enumerated conditions are met.³⁶

Also notable is that the additional insured coverage afforded under the named insured’s policy may be broader than the scope of “insured contract” coverage afforded to the named insured for its contractual indemnification obligation to the additional insured/indemnitee. For example, the “insured contract” coverage afforded to the named insured is often limited to “tort liability” assumed by the named insured and may not indemnify the named insured for the assumption of, among other things, contractual liabilities.³⁷ Similarly, the defense coverage afforded to an additional insured will typically be in addition to the limits of coverage afforded under the named insured’s policy, while coverage for the indemnitee’s defense costs under the “insured contract” provisions is usually deemed to be damages and will erode the limits of available coverage.³⁸

³³ Liability assumed pursuant to an “insured contract” is a common exception to the contractual liability exclusion. *See, e.g.* ISO Form CG 00 01 10 01.

³⁴ *See, e.g., Alliance Syndicate, Inc. v. Parsec, Inc.*, 741 N.E.2d 1039, 1044-46 (Ill. App. Ct. 2000).

³⁵ *See Alex Robertson Co. v. Imperial Cas. & Indem. Co.*, 10 Cal.Rptr.2d 165 (Cal. Ct. App. 1992); *but see Marlin v. Wetzel County Bd. Of Ed.*, 569 S.E.2d 462, 468-69 (W. Va. 1998).

³⁶ *See, e.g.*, ISO Form CG 00 01 12 04.

³⁷ *United States Fidelity & Guaranty Co. v. Continental Cas. Co.*, 120 S.W.3d 556, 561-62 (Ark. 2003).

³⁸ *See* Insurance Services Form CG 00 01 10 01 at 2 of 16 (deeming reasonable attorney’s fees and necessary litigation expenses to be damages because of “bodily injury” or “property damage”).

Conclusion

Contractual indemnification and additional insured provisions are commonly-employed mechanisms for shifting risk as part of the contracting process. Such risk-shifting provisions are often duplicative. However, as the foregoing plainly demonstrates, contractual indemnification and additional insured coverage are separate and distinct contractual rights. An additional insured, indemnitee should therefore always consider making two separate tenders – one to the indemnitor for contractual indemnification, and one to the indemnitor’s insurer for additional insured coverage – in order to maximize the potential for shifting liability for a resulting claim.