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## “ADDITIONAL INSURED” COVERAGE

People often get hurt on construction sites. What begins as bodily injury claim against a subcontractor, by an employee of another subcontractor or an employee of the owner, or a passer-by, can quickly become a complicated coverage case, because the subcontractor listed the contractor as a Named Insured. You might, for example, insure a subcontractor. A person has been injured on the worksite, and you receive a letter like this:

It is my understanding that the general contractor did not self-perform any of the relevant construction activities on this project, so that any liability arising out of the project is attributable to the actions of your insured. Accordingly, the g.c. and its carrier are looking to you to defend and indemnify them, and reimburse them for their defense costs to date.

Status as an “Additional Insured (also “AI” herein) is not created by the subcontractor’s insurance agent simply providing the g.c. a “Certificate of Insurance.” AI status may be created by (a) a policy endorsement which specifically names the Additional Insured , or (b) an automatic AI endorsement which provides that if the subcontractor contracts to name the g.c. as an AI, the g.c. is automatically named an AI.

An additional insured (“AI” herein) thereby becomes a “named insured” (“NI” herein). *Marathon Pipeline Co. v. Maryland Casualty*, 5 F.Supp. 2d 1252 (1998). Whether there are any limitations on the AI’s status will depend on the specific language of the endorsement. That particular endorsement form states the following:

A. 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 organization’s status as an insured under this endorsement ends when your operations for that insured are completed.

The endorsement contains several limiting terms:

- “only”
- “with respect to liability”
- “arising out of”
- “Your ongoing operations”
- “performed for that insured.”

Use of the word “only” suggests that it is intended to be limited in nature. It is limited to certain “liability.”

“Arising out of” has been analyzed by the Supreme Court of North Carolina in a case involving whether a gunshot injury resulting from transporting a rifle in a pick-up truck was “arising out of” use of the truck. (We have found no North Carolina state court appellate case specifically involving a construction contract additional insured.)

The North Carolina Supreme Court, in *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 539 (1986), defined “arising out of” as follows:

The words “arising out of” are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than “caused by.” They are ordinarily understood to mean . . . “incident to” or “having connection with” the use of the automobile . . . . (Citations omitted.)

The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the use and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile. (Citations omitted.)

*Fidelity & Casualty Co. of N.Y. v. N.C. Farm Bureau Mutual Insurance Co.*, 16 N.C. App. 194, 198-99, 192 S.E.2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972) stated:

In short, the test for determining whether an automobile liability policy provides coverage for an accident is . . . whether there is a causal connection . . . .

That decision is consistent with earlier North Carolina analysis of “arising out of” in a workers’ comp. case (“arising out of and in the course and scope of employment”), *Plemmons v. White’s Service, Inc.*, 213 N.C. 148 (1938), which stated the following:

It has been said that the term “arising out of employment” is broad and comprehensive and perhaps not capable of precise definition. It must be

interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between injury and the employment. *Chambers v. Oil Co.*, 199 N.C. 28, 153 S.E. 594; *Harden v. Furniture Co.*, *supra*; *Canter v. Board of Ed.*, 201 N.C. 836, 160 S.E. 924; *Walker v. Wilkins*, 212 N.C. 627, 194 S.E. 89.

In *Hunt v. State*, *supra*, *Adams, J.*, said: “Arising out of” means arising out of the work the employee is to do or out of the services he is to perform. The risk must be incidental to the employment.” *Harden v. Furniture Co.*, *supra*; *Chambers v. Oil Co.*, *supra*; *Beavers v. Power Co.*, *supra*; *Bain v. Mfg. Co.*, 203 N.C. 466, 166 S.E. 301.

“Ongoing operations” has been defined in an “additional insured case.” *Marathon Ashland Pipe Line v. Maryland Cas. Co.*, 243 F.3d 1232 (10<sup>th</sup> Cir. 2001), as follows:

The dictionary defines “ongoing,” when used as an adjective, as “that [which] is going on; that [which] is actually in progress.” *Webster’s Third New International Dictionary* (Unabridged 2000) at 1576. “Operations” is defined as “a doing or performing especially of action.” *Id.* at 1581. The common and ordinary meaning of this phrase is that a company’s “ongoing operation” is simply those things that the company does, as opposed to the meaning suggested by Maryland Casualty which would limit “ongoing operations” to mean only the core or most prominent operations that a company might undertake.

Arising out of” is broader than “caused by.” In *Mid-Continental Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5<sup>th</sup> Cir. 2000), the court noted the weight of case law as follows:

The majority view of these cases is that for liability to “arise out of operations” of a named insured it is not necessary for the named insured’s acts to have “caused” the accident; rather, it is sufficient that the named insured’s employee was injured while present at the scene in connection with performing the named insured’s business... .

“Performed for that insured” requires that the “ongoing operations” not be unrelated to the NI’s contract with the proposed AI.

In some jurisdictions, an injury can be “arising out of” the operations of the original insured simply because its workmen were on the site at the time. Moreover, the “liberal interpretation,” of additional insured coverage, described as “fast becoming the majority rule,” holds that there is coverage even if the “cause of the injury was the negligence of the additional insured.” *Marathon Ins.*, *supra*.

No North Carolina appellate court has addressed this specific issue, but that there are a number of cases nationwide dealing with this issue, most of which have held that the coverage is not limited to vicarious liability despite what we might otherwise have thought about the effect of the language of the endorsement.

*Marathon Ashland Pipe Line v. Maryland Cas. Co.*, 243 F.3d 1232 (10<sup>th</sup> Cir. 2001), a Wyoming case, involved a policy which policy stated, "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," "this policy language does not limit coverage to the additional insured's vicarious liability." That case involved a contractor and a steel erection subcontractor. The Court held that the AI "endorsement provision . . . provides coverage for an additional insured's liability arising out of its own negligence.")

*Mid-Continent Cas. Co. v. Swift Energy Co.*, a Texas case, 206 F.3d 487, 496 (5th Cir. 2000) involved an "additional insured" endorsement that additional insureds are included as insureds "only with respect to liability arising out of [Air Equipment's] ongoing operations performed for that insured." The court held that the additional insured "is covered as an additional insured under the Policy even though Air Equipment [NI] was not negligent," because "injuries 'arose out of' Equipment's operations.")

*Travelers Cas. & Sur. Co. v. Elkins Constructors, Inc.*, 2000 U.S. Dist. LEXIS 7746 (D. Ind. 2000) involved a policy which states "WHO IS 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," and "WHO IS 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 work' for that insured by or for you." The court held that "the majority of courts to have considered the issue construe such provisions (which rely on language very similar to, or identical to, the language used in the additional insured provisions in the . . . policies) broadly, encompassing coverage to extend to liability beyond merely the additional insured's vicarious liability for the actions of the named insured."

*Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 185 (Minn. App. 2001) involved a policy which stated "WHO IS AN INSURED is amended to include: 2.e. The person or organization shown in the Schedule but only with respect to liability arising out of your ongoing operations performed for that insured, HEREINAFTER REFERRED TO AS ADDITIONAL INSURED." The court rejected the insurer's argument that "'arising out of [NI's] ongoing operations performed for [AI's]' limits its liability to cover only cases in which Comm-Tech is primarily liable and Birtcher is vicariously liable for any fault of Comm-Tech," and finding coverage where "'there is a causal connection between Klitzke's injuries and Comm-Tech's ongoing operations: but for Comm-Tech's operations, Klitzke would not have been injured.")

*Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App 1999) noted the majority view for similar AI provisions, that "it is not necessary for the named insured's acts to have 'caused' the accident; rather, it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured."

On the other hand, a couple of courts have addressed this provision and held that it provides coverage for the AI only for the AI's vicarious liability, arising from the NI's work.

Two of those favorable decisions are from Illinois and Missouri, and there is a decision from the U.S. District Court for the Western District of North Carolina, which upheld the limitation to vicarious liability. The Illinois and Missouri cases follow.

*Nat'l Union Fire Ins. Co. v. R. Olson Constr. Contrs., Inc.*, 329 Ill. App. 3d 228, 235 (Ill. App. 2002) (where policy states that it 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,” the endorsement “limit[s] coverage to liability solely and specifically resulting from the conduct of the named insured,” and “Coverage for the additional insured requires that the liability must arise out of Meyer's [NI's] operations, but that coverage is specifically limited in that it does not apply to any liability resulting from Olson's [AI's] own negligence. There is no issue of strict or imputed liability applicable here, and the limited coverage is neither illusory nor void as against public policy.”; there is no coverage because “All of the allegations against Olson are for its own negligence and not for Meyer's negligence. The complaint does not allege that Olson was somehow strictly liable or vicariously liable for Meyer's conduct.”)

*G.E. Tignall & Co. v. Reliance Nat'l Ins. Co.*, 102 F. Supp. 2d 300, 305 (D. Md. 2000) (where amendment stated that policy “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,” “policy limiting additional insured coverage to liability arising out of the named insured's work does not cover Tignall for its own negligent acts.”).

In *St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co.*, 187 F. Supp. 2d 584, 587-588 (W.D.N.C. 2000), the GC (Hardin) hired an HVAC sub-contractor (J&A Mechanical), who in turn hired a secondary sub-contractor for duct work (Herin). An employee of Herin (a Mr. Durham) fell from a scaffolding and sustained major injuries. J&A Mechanical was insured by Travelers, and Herin was insured by Hartford. Pursuant to contract, Herin was required to provide coverage for J&A Mechanical as an additional insured on its Hartford CGL policy. Further, pursuant to contract, J&A was required to defend and indemnify Hardin.

There were two cases, which we call St. Paul I and St. Paul II. In the first case, the insurer for J&A Mechanical, Travelers, had a policy which stated the following:

This endorsement modifies insurance provided under the following:

#### Commercial General Liability Coverage Part

1. WHO IS AN INSURED (Section II) is amended to include any person or organization you are required by written contract to include as an insured, but only with respect to liability arising out of "your work." This coverage does not include liability arising out of the independent acts or omissions of such person or organization. The written contract must be executed prior to the occurrence of any loss... .”

(Note: Emphasis supplied; the Harleysville endorsement does not have the sentence underlined above.)

Hardin (and its insurers) argued that the Travelers policy provided coverage for Hardin (because J&A agreed to indemnify Hardin). The court agreed that Hardin was an “insured” under the policy, finding that the contractual duty of J&A to defend and indemnify Hardin was tantamount to a duty to include Hardin as an insured. (This holding is peculiar, but is not relevant to our issue.) “Hardin is therefore an additional insured under J&A Mechanical's policy with Travelers.”

The statement that the general contractor is insured "only with respect to liability arising out of [the subcontractor's] work," when interpreted strictly in accordance with defendant's argument, creates a problematic situation in which coverage is defined in terms of liability. While an insurance company's duty to pay is typically measured by the facts determined and liability established at trial, an insurance company's duty to defend is assessed before trial and before liability is established. As noted earlier, the duty to defend is, in fact, broader than the duty to pay. The insuring agreement in the Travelers policy underscores this point in its assertion that Travelers has "the right and duty to defend any "suit" seeking [the damages Travelers may ultimately be obligated to pay]." When an insurance company undertakes the obligation to defend an insured, that undertaking is not contingent upon the existence of liability on the part of the insured.

To construe the policy's language in accord with governing law regarding the duty to defend, and to give effect to the language of the Durham complaint and the insuring agreement, the additional insured endorsement in the Travelers policy must be read to require a duty to defend where the "alleged liability" arises from the subcontractor's work, but not where the "alleged liability" arises from the independent acts of the additional insured. The court agrees with defendant that, to give meaning to the "independent acts" provision of the endorsement, the court must construe the "arising out of [the subcontractor's work]" provision as one providing coverage in cases where the alleged liability is vicarious. The court must therefore analyze the complaint in an attempt to determine whether the alleged liability arises from the subcontractor's work, i.e., whether Durham seeks to hold the Hardin plaintiffs liable for J&A Mechanical's acts or failure to act.

Durham's complaint broadly alleges negligence against Durham's employer (Herin), J&A Mechanical, and the Hardin plaintiffs, among others. After performing some of the HVAC work that he had been hired to complete, Durham fell headfirst into an unguarded concrete pool while descending from scaffolding onto a one-foot space between the scaffolding and the pool, the surface of which was bumpy, uneven, and littered with debris. The allegations in the complaint describe numerous instances of fault and omission on the part of each and every defendant, and the complaint specifically alleges joint and several liability of the defendants. The complaint does not, at any point, mention vicarious liability, nor does the complaint assert in lay terms that Durham seeks to hold Hardin liable for J&A Mechanical's negligent acts. Thus, it would appear that

Hardin's liability, as alleged in the complaint, does not arise out of J&A Mechanical's work but rather, out of its own independent acts and omissions, alleged in detail in Durham's complaint

The court then addressed whether the complaint alleged a claim for vicarious liability, stating:

North Carolina courts have "long recognized that a general contractor is not liable for injuries sustained by a subcontractor's employees. . . . North Carolina law provides that a general contractor does not have a duty to furnish a subcontractor or the subcontractor's employees with a safe place in which to work. . . . Instead, it is the duty of the subcontractor to provide himself and his employees with a safe place to work and, also, to provide proper safeguards against the dangers of the work." North Carolina courts recognize three exceptions to the rule that general contractors are not subject to liability when their subcontractors have been negligent: 1) situations where the general contractor/employer retains control over the manner and method of the subcontractor's substantive work; 2) situations where the work is deemed to be inherently dangerous; and 3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor.

The court then went through a protracted analysis of North Carolina law regarding these exceptions, and concluded that they did not apply. ("The inherently dangerous activity exception to the general rule of no-liability does not constitute a form of vicarious liability"). It then concluded:

In short, the insurance that J&A Mechanical provided to Hardin at Hardin's request, in its most basic form, merely insures Hardin against liability arising from the subcontractor's work. Because the Travelers policy provides coverage for Hardin only for liability arising out of J&A Mechanical's work and not for Hardin's independent acts, and because this court reads the Durham complaint as one asserting liability based upon the independent acts of the Hardin plaintiffs, among others, Hardin has not asserted a claim that comes within the parameters of the Travelers policy, and Travelers does not have a duty to defend in the Durham action currently pending in the Superior Court.

In a case which we refer to as "*St. Paul II*," however, involving a different party's policy in the same accident, the same court was faced with a policy which did not have the exact language in *St. Paul I*.

In *St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co.*, 2000 U.S. Dist. LEXIS 21792, 13-14 (W.D.N.C. 2000), the court addressed the issue of whether the Hartford policy issued to Herin provided coverage to J&A. The policy provided that the following were additional insureds:

Any person or organization with whom you [Herin] agreed, because of written contract or agreement or permit, to provide insurance such as is afforded under this Business

Liability Coverage Form, but only with respect to your operations, "your work" or facilities owned or used by you.

Pursuant to contract, Herin was required to provide insurance for J&A. The court first noted that the AI provision in the Hartford policy was different from the AI provision in the Travelers policy in *St. Paul I*. All it said was "... with respect to your operations." The court concluded that language should be construed broadly, and is not limited to situations where the AI is vicariously liable. The court held as follows:

The analyses provided by the courts [from other jurisdictions with similar provisions] show that Hartford's proposed interpretation of the policy language at issue, limiting coverage to vicarious liability, is not the only reasonable interpretation of that language. Indeed, the construction offered by the foregoing courts is equally plausible. Because Durham was employed by Herin at the time of his injury, performing work for Herin as required by J&A Mechanical, it is not unreasonable to conclude that coverage is applicable because J&A Mechanical is insured "with respect to" Herin's work. At the very least, the court must conclude that the policy language at issue is ambiguous. ... Consequently, the court must construe the language against the insurer, Hartford, and in favor of the insured, J&A Mechanical, and hold that Hartford did have a duty to defend J&A Mechanical in this case based on the potentiality that the facts alleged by Durham would be covered by the Hartford policy.