Case Study

Oregon: Additional Insured Endorsements

Walsh v. Mutual of Enumclaw: the Aftermath

— *by* **Jack Levy**

The case of *Walsh v. Mutual of Enumclaw*, 338 Or. 1, (2005) has caused a great commotion in the insurance and construction industries on the issue of whether additional insured endorsements (AIs) are enforceable, especially in job-site injury claims. AIs are typically required in subcontracts on construction projects. In the typical scenario, the subcontractor is required to give an AI to the general contractor to insure against claims for damages related to the subcontractor's fault. The *Walsh* case involved an AI that the Oregon Supreme Court held was void and not enforceable under ORS 30.140, a law limiting the scope of indemnity agreements.

Two recent Oregon federal court cases address *Walsh*, but come out with the opposite result, holding that AIs are enforceable. The case of *Tudor Insurance*, like the *Walsh* case itself, involved a job-site injury claim. The case of *MW Builders* involved construction defect claims. Both cases are now being used by lawyers to combat the result of *Walsh*. Although *Tudor Insurance* and *MW Builders* are technically not "binding legal authority" in Oregon state courts, they may be considered "persuasive authority." These cases leave more room for lawyers to do what they do best - argue.

Walsh involved a lawsuit by a subcontractor's (Rust Drywall) injured employee against a general contractor (Walsh) for failing to maintain a safe workplace. The injured employee could not sue Rust because of the workers compensation laws. Mutual of Enumclaw, Rust's insurance company, provided Walsh with an AI. Walsh settled the injured employee's claim and then sued Mutual of Enumclaw to recover money paid to defend and settle the claim. The court essentially held that a provision in a subcontract that required the sub to name the general as an AI under the sub's insurance policy was void under ORS 30.140. The court held that the statute prohibited AIs by which one party was obligated to insure against claims arising from the other person's fault.

ORS 30.140 at subsection (1) basically states that a provision in a construction contract is void if it requires a person (the "indemnitor"), or the indemnitor's surety or insurer, to indemnify another person (the "indemnitee") against liability caused by the negligence of the indemnitee. However, subsection (2) of the statute creates an exception, specifically allowing indemnity provisions for the fault of the indemnitor. It was undisputed between the parties in *Walsh* that the exception in subsection (2) did not apply. In other words, *Walsh* only dealt with ORS 30.140 subsection (1).

In *Tudor Ins. Co. v. Howard S. Wright Const. Co*., 2005 WL 425464 (D.Or. 2005), as in *Walsh*, the subcontractor's injured employee sued the general contractor. The employee's lawsuit alleged that the general contractor was negligent, for failing to insure "that the job site was safe and that all its subcontractors were in compliance with all applicable safety standards." The court held that this allegation was ambiguous enough to implicate the subcontractor's fault and that under well-established Oregon law any ambiguity in the complaint must be resolved in favor of the insured:

> "Under ORS 30.140(1), the 'additional insured' provision in [subcontractor's] policy with Tudor would be void if [general contractor] were solely liable for [employee's] injuries. However, under ORS 30.140(2), Tudor would be obligated to indemnify [general contractor] for [employee's] injuries if the injuries 'arise[s] out of the fault of [subcontractor], or the fault of [subcontractor's] agents, representatives or subcontractors.' … [T]he 'fault' referenced in ORS 30.140(2) does not require that the subcontractor actually be liable for 'concurrent negligence' in the technical sense of the term, but only that the subcontractor played a role in causing the accident."

One might view the employee's allegation to mean what it plainly says: that the general

contractor was negligent. But the reason for the court's decision may be summed up in the opinion's concluding remark: "Any other result would amount to punishing the insured, and awarding a windfall to the insurance company, for a claimant's inopportunely worded complaint." It looks like the court had an end goal in mind, and found itself an "ambiguity" to get there. This decision proves the rule that "an ambiguity is in the eyes of the beholding judge."

The case of *MW Builders v. Safeco*, 2004 WL 2058390 (D.Or. 2004) is more straightforward. *MW Builders* was an EIFS construction defect case in which the general contractor sued the EIFS applicator subcontractor's insurer, Safeco, for coverage under an AI. The complaint in the *MW Builders* case clearly alleged that the subcontractor's work was at fault for the damages. Nonetheless, Safeco argued that the AI provision in the subcontract and the AI actually issued to MW Builders were unenforceable under ORS 30.140 and *Walsh*. The court disagreed with Safeco, holding that the general could claim AI coverage for damages arising from the sub's, but not its own, fault.

In the end, the confusion over whether and when AIs apply will continue to cause uncertainty, which invariably translates into more legal disputes. In 2005, Senate Bill 154 was introduced in the Oregon Legislature to overturn the effect of *Walsh*, but legislative insiders report that the bill is dead in committee. However this issue is ultimately resolved – and it should be resolved – contractors and insurers will do much better business if they have predictability in the law. ❖

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