

Additional Insured Endorsements in Construction Contracts Held Unenforceable

— by Julie E. Dutton

Over the past year, we have been exploring the methods and means by which contractors attempt to pass liability on to others, especially to subcontractors. This is usually done when a general contractor who is sued by a building owner brings an indemnity claim against his subcontractors. As has been pointed out before, indemnity can be based on either a written contract between the parties, or it can be based in equity. This article will briefly explore the permissibility and limitations of construction contract obligations requiring subcontractors to obtain and provide additional insured endorsements indemnifying general contractors. On September 10, 2003, the Oregon Court of Appeals found that a contract provision between a general contractor and his subcontractor that required the subcontractor to indemnify the general contractor through the use of an additional insured endorsement was void under ORS 30.140. Walsh Const. Co. v. Mutual of Enumclaw, 189 Or. App. 400, 76 P.2d 164 (2003).

In the Walsh case, plaintiff was a general contractor who entered into a subcontract with a drywall installer on a remodeling job. The subcontract required the subcontractor to procure liability insurance naming the general contractor and its agents as additional insureds on the policy. The subcontractor purchased and maintained the required additional insured endorsement naming the general contractor, the owner and the general contractor's agents and employees on a \$2 million per occurrence policy. During the construction work, one of the subcontractor's employees was injured. The employee made a claim against the general contractor. The general contractor tendered the defense of the claim to the subcontractor's

insurer, Mutual of Enumclaw, as an additional insured under the subcontractor's policy. Mutual of Enumclaw denied the tender. The general contractor then settled with the subcontractor's employee and sued Mutual of Enumclaw for breach of its duty to defend and indemnify under the additional insured endorsement.

Mutual of Enumclaw argued that ORS 30.140(1) voids construction agreements that require "a person or that person's ... insurer to indemnify another." Id. at 166. It further maintained that because the insurer is not a party to a construction contract the only "plausible reference for the statutory prohibition is to 'additional insured' arrangements...." Id. Such additional insured endorsements (or arrangements), in effect, require the subcontractor's insurer to indemnify the general contractor for the general contractor's own negligence and, therefore, such agreements are void under the statute. The court agreed. Id. at 167.

In order to come to this conclusion, the Court of Appeals reviewed the legislative history and the evolution of ORS 30.140 since its original enactment in 1973. As originally enacted, the statute allowed indemnification agreements for the negligence of a general contractor in the design, performance or inspection of the work that was subject to the agreement only if the general contractor obtained insurance to protect the subcontractor; and any obligation to indemnify was limited to the amount of the insurance procured. Id. ORS 30.140 was then amended in 1987. While the statute continued to allow indemnification agreements as limited under the 1973 provisions,

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the statute created a further limitation that voided indemnification agreements that required a “person or that person’s surety or insurer to indemnify another against liability for damage ... caused by the sole negligence of the indemnitee...” *Id.* In other words, a general contractor could not require a subcontractor to indemnify the general for damages caused solely by the general’s own negligence. See Montgomery Elevator Co. v. Tuality Community Hospital, Inc., 101 Or. App. 299, 790 P.2d 1148 (1990) (*holding* that agreement to procure insurance is not the same as agreement to indemnify, which is void under the applicable statute); see also Hays v. Centennial Floors, Inc., et al., 133 Or. App. 689, 893 P.2d 564 (1995) (*finding* that to the extent indemnity agreement in contract required subcontractor to indemnify owner for owner’s own negligence, contract provision was void).

Then, in 1995, ORS 30.140 was again amended to its current version. The statute provides, in pertinent part:

30.140 Certain indemnification provisions in construction agreement void. (1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person’s surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.

(2) This section does not affect any provision in a construction agreement that requires a person or that person’s surety or insurer to indemnify another against liability arising out of the death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor’s agents, representatives or subcontractors.”

The Walsh court asserted that the 1995 amendments essentially turned the statute upside down, changing it from a statute that allowed an entire “universe of *permissible* indemnification provisions,” to one that allows only for an exception. Walsh at 168. That exception is that a subcontractor may still be required to indemnify others for damage caused by that subcontractor’s own fault. Ultimately, the court held that ORS 30.140 not only prohibits indemnity agreements between general contractors and its subcontractors, but it also prohibits “additional insurance” arrangements by which one party is obligated to procure insurance for losses arising in whole or in part from the other’s fault.” *Id.* at 166. In other words, there is now case law that stands for the proposition that additional insured endorsements that indemnify a general contractor for the general’s own negligence are probably unenforceable under the statute.

When this article was submitted, the time for filing a petition for review to the Oregon Supreme Court had not yet expired. Accordingly, it is uncertain whether the Appellate Court’s decision will hold up under further scrutiny. ❖

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