The Dilemma Presented by the Additional Insured Endorsement in a Commercial General Liability Policy of Insurance Issued to a Contractor: What's an Insurer to Do?

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I. INTRODUCTION

A typical construction contract contains a boiler plate clause providing for the indemnification of the general contractor by the subcontractor for all claims, damages, or losses arising out of the performance of the subcontractor's work. The construction contract also imposes on the subcontractor an obligation to purchase a policy of public liability and/or commercial general liability insurance protecting the general contractor from all claims which may arise out of or result from the subcontractor's operations under the contract. Certificates of such insurance are usually required before the contractor may commence work on the construction project.

In fulfillment of these obligations, the liability policy issued to the subcontractor will contain an "Additional Insured" endorsement specifically identifying the general contractor as an insured under the policy. The Additional Insured endorsement issued varies by insurer but these endorsements generally contain language providing as follows:

> 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.[1]

Although the precise policy language may slightly vary, the intent of the endorsement is to provide insurance coverage for the "additional insured" (i.e. the general contractor) only in those situations where the additional insured may have liability arising out of the named insured's negligence at the construction site. This clause is not meant to indemnify the additional insured for claims arising out of the additional insured's own negligence. However, it is frequently difficult if not impossible to allocate negligence between the general contractor and the subcontractor based upon the allegations of the complaint.

Further complicating any coverage analysis is R.C. 2305.31 and conflicting Ohio case law construing the validity of these types of endorsements. R.C. 2305.31 generally provides that any agreement in a construction contract "...purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and is void." What effect does R.C. 2305.31 have upon the proper interpretation of an Additional Insured endorsement purporting to provide coverage for the indemnitee (i.e. additional insured) whose own culpability is uncertain?

This article will address the practical problems presented to the insurer when confronted with a demand for coverage by an additional insured for an accident at a construction site where such additional insured's involvement in both the construction operation and the accident is unknown when the claim is presented, in light of R.C. 2305.31 and conflicting case law in Ohio. Indeed, the additional insured's culpability for the accident may not be susceptible of such a determination prior to a jury rendering a verdict.

II. INDEMNITY AGREEMENTS IN CONSTRUCTION CONTRACTS ARE VOID UNDER R.C. 2305.31

[1]This policy language comes form ISO Coverage Form CG 2010 03 97. Another form of an Additional Insured endorsement for policies issued to contractors is called "Automatic Additional Insureds – Constructions Contracts". This endorsement redefines "Who Is An Insured" as follows:

> Any person(s) or organization(s) (hereinafter called "Additional Insured") with whom you agreed in a written construction contract to name as an insured is an insured with respect to liability arising out of ongoing operations performed by you or on your behalf on the project specified in the construction contract, including acts or omissions of the Additional Insured in connection with the general supervision of such operations.

See, e.g., ISO Coverage Form CG 7999 (7-87). This Additional Insured endorsement specifically extends coverage to the additional insured for those lawsuits alleging negligence by the additional insured in connection with the general supervision of the construction site. But it is frequently difficult to differentiate between a general contractor's "general supervision" and a general contractor's "specific acts" of negligence.

Revised Code Section 2305.31 prohibits indemnity agreements, in certain specified construction-related contracts, whereby the promisor agrees to indemnify the promisee for damages caused by or resulting from the negligence of the promisee, regardless of whether such negligence is sole or concurrent. *Kendall v. U.S. Dismantling Co.* (1985), 20 Ohio St.3d 61, 485 N.E. 2d 1047. The Ohio Supreme Court has further concluded that a hold harmless provision in such a construction-related contract is enforceable only if the clause as applied will not result in indemnification of a party's own negligence. *Kemmeter v. McDaniel Backhoe Serv.* (2000), 89 Ohio St.3d 409, 732 N.E. 2d 385. These conclusions are based upon the plain reading of R.C. 2305.31 which provides as follows:

> A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnities against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnities is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.

The statutory prohibition against indemnity agreements in construction contracts does not prohibit any person from purchasing insurance for his own protection. But what about purchasing insurance for the protection of another (i.e. an additional insured?). What if a construction contract obligates the Named Insured (a subcontractor) to purchase general liability insurance for the benefit of both the Named Insured and the general contractor as additional insured? Is this contractual duty enforceable under 2305.31? The courts are generally in agreement that a provision in a construction contract requiring the subcontractor to purchase liability insurance naming the general contractor as an additional insured is not prohibited by R.C. 2305.31. See, e.g., *Brzeczek v. Standard Oil Co.* (Lucas County 1982), 4 Ohio App. 3d 209, 447 N.E. 2d 760. However, the court in *Waddell v. LTV Steel Co., Inc. (1997)*, 124 Ohio App.3d 350, 706 N.E. 2d 363, held that a clause in a construction contract requiring the purchase of insurance to cover an indemnity obligation prohibited by R.C. 2305.31 was null and void under the statute.

Courts have interpreted the indemnity obligations under the contractor's insurance policy to afford coverage to the additional insured for only that liability arising out of the Named Insured's work. The courts have reasoned that if the policy were construed to extend coverage to the additional insured for its own negligence then it would be contrary to the public policy as set forth in R.C. 2305.31. See, e.g., *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.* (Cuyahoga 1997), 121 Ohio App. 3d 147, 699 N.E. 2d 127. However, the Cuyahoga County Court of Appeals in *Stickovich v. Cleveland* (Cuyahoga 2001), 143 Ohio App.3d 13, 2001-Ohio-4117, 757 N.E. 2d 50, criticized its own decision in *Buckeye Union*, characterized *Buckeye Union* as the "minority rule" and concluded that *Buckeye Union* was a significant departure from eighty years of history distinguishing indemnity agreements from liability insurance contracts and twenty years of interpreting R.C. 2305.31. Although the dissent pointed out that the majority's decision "is *dicta* in its purest form," the *Stickovich* decision nevertheless provides support for the argument that an insurance policy may permissibly provide coverage for the additional insured's own negligence in a construction-related project without violating the public policy embodied in R.C. 2305.31.

III. THE CONFLICTING CASE LAW

Ohio courts are not in agreement as to the insurance company's obligations toward its "additional insured" in cases involving liability claims at a construction site. Consider the following case decisions.

A. Ohio Law Supporting The Conclusion That An "Additional Insured" Endorsement Provides Coverage For Only the Vicarious Liability Of An Additional Insured Arising Out Of The Named Insured's Operations

Various courts in Ohio have concluded that an "Additional Insured" endorsement provides coverage, but only for the vicarious liability of the additional insured for the tortious actions of the named insured. *See, e.g., Buckeye Union, supra*, 121 Ohio App. 3d at 151; *Davis v. LTV Steel Co.* (1998), 128 Ohio App. 3d 733, 716 N.E.2d 766 review denied (1998), 83 Ohio St. 3d 1475, 701 N.E.2d 382.

In *Davis*, LTV entered into a contract with Shafer Commercial and Industrial Services ("Shafer"), an independent contractor, whereby Shafer was to perform industrial cleaning at an LTV coke plant in Warren, Ohio. Specifically, Shafer contracted to use high-pressure water hoses to clean two tar sump pumps and to vacuum out the tar sump. While two Shafer employees were engaged in the cleaning process, an LTV process engineer at the plant directed a Shafer employee, Daniel Davis, to shut off a valve on a siphon. Mr. Davis attempted to comply with the engineer's instructions, but while walking toward the steam siphon he fell into an open dike siphon sump and injured himself. Another Shafer employee was injured when he ran over to provide assistance.

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In the contract between Shafer and LTV, there was an indemnification clause by which Shafer agreed to defend and indemnify LTV against most claims arising out of the performance of the industrial cleaning work. In addition, Shafer also agreed to purchase comprehensive general liability insurance naming LTV as an additional insured. At the time of the accident, Shafer was insured under a commercial general liability policy issued by Motorists Mutual Insurance Company. Pursuant to this policy, LTV was declared to be an additional insured.

The Shafer employees filed personal injury actions against LTV. Motorists intervened seeking a declaratory judgment that LTV was not entitled to coverage under the general liability policy issued by Motorists to Shafer. The additional insured endorsement issued by Motorists provided as follows:

> "WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to *liability arising out of your operations or premises owned by or rented to you.*" (Emphasis added).

The trial court determined that Motorists had no duty to defend LTV, nor was LTV entitled to coverage as an additional insured under the policy.

The Trumbull County Court of Appeals affirmed, holding:

> LTV argues that the language of the additional-insured endorsement should be construed broadly so that LTV was protected from all liability arising out of or connected to the operations of Shafer, regardless of whether the liability was attributable to the negligence of LTV, Shafer, a third party, or some combination thereof. We disagree with this interpretation of the additional-insured endorsement.
>
> The plain language of the endorsement extended coverage to LTV only with respect to liability arising out of Shafer's operations or premises owned by or rented to Shafer. The phrase "arising out of your operations" in the endorsement was intended to protect LTV from any liability for the negligence of Shafer's employees who would be performing the industrial cleaning at the LTV plant. See, *e.g.*, *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.* (1997), 121 Ohio App.3d 147, 151-152, 699 N.E.2d 127, 130-131. In other words, the purpose of the additional-insured endorsement was to protect the additional insured (i.e., LTV) from being vicariously liable for the tortious acts of the named insured (i.e., Shafer). (Emphasis added).

Id. at 736-737, 716 N.E. 2d at 769.

A similar conclusion was reached by the court in *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.* (1997), 121 Ohio App. 2d 147, 699 N.E.2d 127. The additional insured clause of the policy at issue in *Buckeye Union*, stated, "**WHO IS INSURED** (Section II) is amended to include as an insured the person or organization shown in the schedule [Snaveley Company, Inc.] *but only with respect to liability arising out of "your work" for that insured or by you.*" The court in *Buckeye Union* held as a matter of law that "the additional-insured clause of the policy could only cover Snaveley for liability arising from Zavarella's work for Snaveley." *Id.* at 151.

In *Buckeye Union*, Snaveley Company, Inc. a general contractor on an apartment construction job, subcontracted various portions of the work to Zavarella Brothers Construction Company. The subcontract required the subcontractor (Zavarella) to submit a certificate of insurance evidencing comprehensive general liability coverage with Snaveley named as an additional insured on the policy. Zavarella also agreed to indemnify and save harmless the general contractor Snaveley, "from any claim, legal action, damages, liabilities and expenses in connection with the loss of life, bodily injury, or personal injury, or property damage arising from any omission, act, or activity by the subcontractor in accordance with the performance required under the terms of the contract between the general contractor and the subcontractor...."

In accordance with the agreement, Zavarella submitted a certificate of insurance indicating that it had purchased the insurance and named Snaveley as an additional insured. While on the job, one of Zavarella's employees suffered severe injuries in a fall and brought an action against Snaveley, setting forth causes of action sounding in negligence. Snavely requested that Zavarella's insurance company (American Economy Insurance Company) provide a defense but after receiving several refusals to defend, Snaveley's own insurer, Buckeye Union, defended the case and ultimately settled with the employee for $725,000. Thereafter, Buckeye Union commenced an action against American Economy Insurance seeking indemnity for the amount of the settlement and $21,000 in attorney fees.

The Cuyahoga County Court of Appeals affirmed summary judgment in favor of American Economy holding as follows:

> If we were to read the additional-insured clauses as permitting Snaveley to be insured against its own negligence, it would run counter to the public policy set forth in R.C. 2305.31.

Buckeye Union, 121 Ohio App. 3d at 151, 699 N.E.2d at 130. The court further reasoned as follows:

> Snaveley doubtless thought that the additional-insured language would do indirectly what R.C. 2305.31 directly prohibits. Although we find that the additional-insured provision of the policy does not provide the type of coverage Snaveley intended, this failure does not void the provisions of the subcontracting agreement that required Zavarella to name Snaveley as an additional insured. Snaveley received what it had asked for, although it may not have received what it wanted.

Id. Accord, *Liberty Mut. Ins. Group v. Travelers Prop. Cas.*, 2002-Ohio-4280 (the additional insured endorsement contained specific language that "[t]his coverage does not include liability arising out of the independent acts or omissions of such person or organization.")

Other states are in agreement with the aforementioned Ohio law. For example, in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Nationwide Ins. Co.* (1999), 69 Cal. App. 4th 709, 82 Cal.Rptr. 2d 16, the court held that because the additional insured was solely at fault for the accident and the additional insured's negligence did not arise out of the general supervision of the named insured's work, neither the named insured nor its liability insurer were required to indemnify the additional insured either as an indemnitee or as an additional insured for its settlement of an underlying lawsuit. The court observed that its interpretation of the additional insured endorsement furthered the state's interest in preventing construction-related accidents. A broader interpretation of the additional insured endorsement would create a situation in which the additional insured has "no motivation or incentive ... to exercise a high standard of care." *Id.* at 721. *See also, Marathon Pipeline Co. v. Maryland Cas. Co.* (D.Wyo. 1998), 5 F. Supp. 2d 1252; *Liberty Mut. Ins. Co. v. Capeletti* (Fla. App. 1997), 699 So.2d 736, 738, (holding that the defendant would be covered as an additional insured for any vicarious liability based on acts or omissions of the named insured, but that the plain meaning of an additional insured endorsement does not provide the additional insured coverage for its own acts of negligence).

B. The *Waddell* Decision: Holding That a Contractual Obligation to Purchase Insurance Coverage to Protect an Additional Insured from Liability Arising Out of His Own Negligence at a Construction Site Is Void Pursuant to R.C. 2305.31.

In *Waddell v. LTV Steel Co., Inc.* (1997), 124 Ohio App. 3d 350, 706 N.E. 2d 363, RCR, Inc. contracted with LTV Steel Co., Inc. to perform routine maintenance on the kilns located at LTV's Grand River, Ohio plant. The contract was performed pursuant to the provisions of a purchase order which provided that RCR agreed to indemnify LTV against liability arising from personal injuries sustained by RCR, its employees, or any other party arising out of RCR's performance of the contract, and to indemnify LTV for legal costs and attorney fees. The purchase order further provided that if any of LTV's employees participated in RCR's work by operating LTV equipment, they and the equipment would be deemed, at the time, employees of RCR and equipment in RCR's sole custody and control. Finally, the purchase order required RCR to purchase public liability insurance.

On July 26, 1991, Waddell, an employee of RCR, was injured when he fell from a dumpster which Richard Rigby, an LTV employee, had lifted above the floor with a forklift. Thereafter, Waddell and his wife filed suit against LTV and Rigby seeking damages for defendants' negligence. LTV and Rigby subsequently filed a third-party complaint against RCR seeking, *inter alia*, indemnity pursuant to the terms of the purchase order.

The trial court granted RCR's motion for directed verdict and dismissed the third-party complaint holding that the indemnity agreement in the construction contract was void under R.C. 2305.31. The *Waddell* court further held that any clause in a contract which obligates the promisor to purchase a liability insurance policy that insures the promisee against the promisee's own negligence is also in violation of R.C. 2305.31. The court reasoned that its conclusion:

> "comports with the broad language of R.C. 2305.31, which unambiguously states that any "agreement * * * in connection with or collateral to" a construction contract, that purports "to indemnify the promisee" for damages resulting from that promisee's own negligence, is void as against public policy."

Waddell, supra, at 360, 706 N.E. 2d at 360. *See, also, Buckeye Union, Ins. Co. v. Zavarella Bros. Constr. Co.* (1997), 121 Ohio App. 3d 147, 699 N.E.2d 127.

Finally, the court in *Waddell* concluded that <u>any insurance policy</u> purchased by RCR to indemnify LTV for its own negligence also <u>would have been void as against public policy</u>. The court's opinion reads as follows in relevant part:

> In our case, the relevant indemnification clauses required RCR to purchase liability insurance policies, covering the liabilities it allegedly assumed in Section 12 to indemnify and save LTV and its employees harmless from any loss, whether or not such loss was "[d]ue to the sole or joint negligence" of LTV or its employees. Since such insurance policies could have constituted agreements in connection with or collateral to a construction contract and would have purported to indemnify LTV for its own negligence, <u>these policies would have been void as against public policy</u>. Accordingly, the sections

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> requiring the purchase of such policies are violative of R.C. 2305.31.
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> Furthermore, having already concluded that RCR is immune from LTV's and Rigby's indemnity and contribution action, it becomes irrelevant whether RCR did or did not purchase the insurance policies. In essence, the indemnification clauses required RCR to purchase the insurance policies "*as required to cover liabilities assumed in clause 12.*" Since we have found that the indemnification clauses contained therein were void, it follows that RCR never assumed the liabilities stated in § 12, *supra*, and therefore, was not required to purchase the insurance policies.

Id. at 360-361 (Emphases added).

C. The *Stickovich* Decision: Holding That a Contractual Obligation to Purchase Insurance Coverage to Protect an Additional Insured From Liability Arising From His Own Negligence at a Construction Site is Valid Under R.C. 2305.31

Complicating any legal analysis is the more recent decision of the Cuyahoga County Court of Appeals in *Stickovich v. Cleveland*, 143 Ohio App.3d 13, 2001-Ohio-4117, 757 N.E. 2d 50 review denied, 93 Ohio St.3d 1497. The decision in *Stickovich* is apparently contrary to the court's previous holding in *Waddell*. The court in *Stickovich* held, albeit in *dicta*, that purchasing liability insurance coverage protecting an Additional Insured from his own negligence on a construction site does not violate Ohio public policy, and the obtaining of such insurance is permitted under the last sentence of R.C. 2305.31, reasoning that, "[t]he Ohio Supreme Court has never applied [the public policy rationale of] R.C. 2305.31 to liability insurance contracts." 143 Ohio App. 3d at 30, 757 N.E. 2d at 63.

It is particularly interesting to note that the court in *Stickovich* does not even mention the *Waddell* decision. Indeed, the court observed that Commercial Union "relies on a single case [the *Buckeye Union* decision] which it cited for the first time in its Second Motion for Reconsideration below." *Id.* at 30. Thus, it would appear as though the *Stickovich* court was not even aware of its previous pronouncement in *Waddell* or the various other Ohio Appellate Court decisions supporting the insurance company's position. The *Stickovich* decision is particularly relevant to this discussion because the Cuyahoga County Court of Appeals held that Commercial Union was obligated to defend its "Additional Insured" regardless of allegations that the Additional Insured's own negligence was the proximate cause of the accident. Specifically, the court held that:

> [s]imply stated, an allegation of negligence against an additional insured in a complaint does not categorically preclude an insurer's duty to defend or pay under a liability insurance contract.

Id. at 36, 757 N.E. 2d at 68.

In *Stickovich* the court attacked its own decision in *Buckeye Union Ins. Co. v. Zavarella Bros. Contsr. Co.* (Cuyahoga 1997), 121 Ohio App. 3d 147, 699 N.E. 2d 127, and whether the "arising out of your work" language in the additional insured endorsement had to be construed so as not to afford indemnity for an additional insured's own negligence. In *Stickovich*, the court noted that:

> Since *Zaverella* was issued, the case has had a checkered history: To date, two cases have cited it in split opinions with dissents, and a federal magistrate declined to follow it because of its failure to distinguish liability from indemnity. As noted above, however, the Sixth Circuit, holding that the federal court should abstain from the dispute, vacated the magistrate's opinion and left the disagreement for the Ohio state courts to resolve. The Zavarella opinion is more opaque than the language of R.C. 2305.31 which it interprets and contains few of the underlying facts, so it is not helpful in understanding how to apply R.C. 2305.31 to the facts of a particular case. If read and applied as Commercial Union and the dissent suggest, *Zavarella* may have been wrongly decided, but, in any event, is readily distinguishable for the case at bar.

Id. at 31, 757 N.E. 2d at 64. The court in *Stickovich* suggested that the phrase "arising out of" in the additional insured provisions of subcontractors' policies should be read very broadly. The court recognized that:

> We are required to construe and apply the terms of the liability insurance contract in light of the pleadings and evidence in the case. The liability insurance contract, through the additional insured endorsement, provides coverage for liability arising out of your [ICC's] work. Commercial Union did not draft the endorsement to contain any express exclusion or limitation for allegations of negligence made against the additional insured.

Id. at 35, 757 N.E. 2d at 68. The court discussed two cases in which an additional insured endorsement was construed to afford

coverage where the complaint alleged negligence on the part of the additional insured, i.e., *Lewis v. Ohio Edison* (Jan. 9, 1991), Mahoning App. No. 89 CA 150, 1991 Ohio App. LEXIS 85 and *Washington Cty. A.&M. Assoc. v. T.H.E. Insurance Co.* (Dec. 22, 1992), Washington App. Nos. 92CA4 and 92CA13, 1992 Ohio App. LEXIS 6535. *Id.* The court concluded that:

> The term arising out of in a liability insurance policy affords very broad coverage. This court has held that arising out of means flowing from or having its origin in. *E.g., Nationwide Mut. Fire Ins. Co. v. Turner* (1986), 29 Ohio App.3d 73, 77, 503 N.E.2d 212 (holding that the shooting of a family member by an insane person fell within the homeowner's insurance coverage for injuries arising out of the use of real property.) The term arising out of has also been defined to mean originating from, growing out of, flowing from. *E.g., Nationwide Ins. Co. v. Auto-Owners Mut. Ins. Co.* (1987), 37 Ohio App.3d 199, 202, 525 N.E.2d 508 (holding that the unloading of firearm before entering a vehicle was covered by both the homeowner's and automobile insurance policies because the injury from discharge of the weapon arose out of the use of personal property and out of the use of the vehicle.) The term arising out of does not require that the conduct be the proximate cause of the injury, only that it be causally related. Under the circumstances, Commercial Union has not shown the trial court erred by concluding it had a duty to defend or to conditionally pay any damages in the case at bar.

Id. at 37, 757 N.E.2d at 69.

D. Reconciling Ohio Case Law Construing The Validity Of Additional Insured Endorsements

In *Toledo Edison Co. v. ABC Supply Co.* (C.A.6, 2002), 46 Fed. Appx. 757, 762 the court recognized that, "[w]hen considering similar 'arising out of' language, Ohio courts have held that such provisions do not provide indemnification for the additional insured's own negligence." The court cited *Davis v. LTV Steel Co.* (1998), 128 Ohio App.3d 733, 716 N.E.2d 766 and explained that:

> Although the Davis court cited to *Buckeye Union Ins. Co. v. Zavarella Bros. Const. Co.*, 121 Ohio App.3d 147, 699 N.E.2d 127 (Ohio Ct. App. 1997), a case that is in tension with some prior Ohio decisions as to the applicability of §2305.31 to insurance policies, the interpretation of the policy at issue was based primarily on the plain language of the policy, not on §2305.31's restrictions. ("The plain language of the endorsement extended coverage to LTV only with respect to liability arising out of Shafer's operations ... The phrase 'arising out of your operations' was intended to protect LTV from any liability for the negligence of Shafer's employees who would be performing the industrial cleaning at the LTV plant.") Thus, we believe that an Ohio court would interpret the language at issue here as excluding coverage for Toledo Edison's own negligence, regardless of the applicability of §2305.31.

Toledo Edison Co. at fn. 5.

A careful reading of Stickovich reveals that the matter was *not* decided in favor of the additional insured on the basis that the phrase "arising out of" in the additional insured provisions of subcontractors' policies should be read very broadly and/or to cover an additional insured for the additional insured's own active negligence. Rather, the *Stickovich* court ruled in favor of the additional insured because the facts of its case were distinguishable from those in *Zavarella*. The *Stickovich* court observed, *inter alia*, that:

> — "there were no claims of negligence against the contractor [named insured], and no other parties were involved in the *Zavarella* litigation to indicate that anyone other than the additional insured was negligent and caused the injury"; and
>
> — "*Zavarella* did not hold that a mere allegation of negligence defeats an insurer's duty to defend an insured."

Id. at 31, 757 N.E. 2d at 64.

The *Stickovich* court, citing *Kemmeter v. McDaniel Backhoe Serv.* (2000), 89 Ohio St.3d 409, 732 N.E.2d 385, recognized that "the mere assertion of a negligence claim is not sufficient to preclude coverage." *Id.* at 35, 757 N.E.2d at 67. The court explained, "[e]ven if a construction indemnity agreement facially violated R.C. 2305.31, *id.* at 413, recovery was nevertheless permissible if the injury arose out of activities within the contractor's contractual control." *Id.* In *Stickovich*, the court found that:

> In the case at bar, Cleveland [the additional insured] contracted for a completed product, namely, the bridge. ICC [the named insured] was an independent contractor free to select the tools and methods to complete its task. Cleveland did not control or specify the manner of performance by ICC or its employees. Cleveland did not control ICC's selection of an uninsulated crane, did not control ICC's selection of an unlicensed operator, did not control ICC's location of the crane, and did not control ICC's operation of the crane in knowing violation of safety regulations. See Cleveland

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> Codified Ordinance Sections 185.23, 185.24, and 185.25; Contract Paragraphs B-8, B-9, B-10, and C-5.

Id. The court held that "even if coverage were limited to exclude Cleveland's own negligence, Commercial Union has not shown the trial court construed its endorsement to provide coverage for actionable negligence by Cleveland, which caused the workers' negligence." *Id.* at 36, 757 N.E.2d at 68.

The court also explained, "[i]t is well established ... that insurers are required to provide a defense when the allegations are arguably or potentially within the policy coverage or when there is doubt as to whether they state a theory of recovery within the scope of the policy." *Id.* at 37, 757 N.E.2d at 69. Accordingly, the court rejected Commercial Union's argument that it was not liable to pay its $1.3 million settlement:

> Instead of proceeding to the scheduled bench trial, when the matter could be determined once and for all, ... Commercial Union exercised its exclusive contractual right to control and settle the litigation on the eve of trial without proof of the workers' claims or damages against any of the parties. Under the circumstances, after thoroughly reviewing the record, we find that (1) Commercial Union did not satisfy its burden of proving its affirmative defense that its insurance contract violated public policy, and (2) the record does not show that its settlement was outside the scope of its liability insurance coverage or improperly covered injury or damages proximately caused by actionable negligence of Cleveland [the additional insured].

Id. at 40, 757 N.E.2d at 71.

Furthermore, the Sixth Circuit in *Toledo Edison Co.* observed that the portion of the *Stickovich* opinion which suggested that the phrase "arising out of" in additional insured provisions of subcontractors' policies should be read very broadly was *dicta*:

> [T]hat portion of the *Stickovich* opinion was *dicta*, as pointed out by the dissent in that case, and does not undermine the holding in *Davis* that such phrases are meant to insure a general contractor only against claims of vicarious liability for the subcontractor's negligence. Moreover, the complaint in that case alleged negligence that clearly arose out of the operations of the subcontractor. See *Stickovich*, 757 N.E.2d at 69. Here, the complaint made several generalized allegations against Toledo Edison, such as constructing and energizing the lines in an unsafe manner, and failing to inspect the lines. Unlike the allegations in *Stickovich*, these claims had nothing to do with the subcontractor's (here, Asplundh's) operations. Finally, we note the majority in *Stickovich* relied on cases construing "arising out of" language in unrelated insurance contexts, such as homeowner's insurance and automobile insurance policies, without addressing *Davis*, which interpreted an additional insured provision of a commercial general liability contract — a much more relevant insurance context.

Toledo Edison Co. at fn. 6.

To further complicate matters, a different panel of the Cuyahoga County Court of Appeals in *Liberty Mut. Ins. Group v. Travelers Property Casualty*, 2002-Ohio-4280, recently embraced its previous decision in *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co., supra* – the decision that the Court in *Stickovich* had claimed to be wrongly decided just one year earlier. Further, the court in *Liberty Mut. Ins. Group* specifically rejected the broad *dicta* of the *Stickovich* decision in holding that the additional insured had erroneously relied on *Stickovich* in its claim for coverage:

> First, it is noted that *Stickovich* was decided on the narrow issue of "waiver" as the contractor never raised the issue of application of R.C. 2305.31. Secondly, in *Stickovich*, the political subdivision was seeking additional insured status pursuant to the requirements of R.C. 2744.08(A)(1), while in the instant matter, neither Liberty [Turner's own insurer] nor Turner [the additional insured] are political subdivisions. Last, the political subdivision had not been actively involved in the conduct leading to the injury claim, while Turner was sued for its direct and active involvement in causing the underlying injuries. Moreover, quoting Judge Michael J. Corrigan, dissenting, in *Stickovich*:
>
> > The holding of the majority opinion is very narrow: Commercial Union waived the right to assert the affirmative defense of illegality because it did not raise the defense in its answer to the city's third party complaint.
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> > I also disagree with all the majority opinion beyond the section

> entitled "Waiver". I am compelled to point out that the majority's discussion is dicta in its purest form, being wholly unnecessary to the very narrow point of law — the waiver issue — that forms the basis of the majority's resolution of the case.
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> This court is inclined to agree with Judge Corrigan. The extraneous discussion of issues outside the narrow point of law — the waiver issue — was wholly unnecessary and had no bearing on reaching the ultimate conclusion. As such, we find no reason to stray from the established precedent set forth in *Zavarella, Waddell*, and *Davis*; as *Stickovich* was decided on the narrow issue of "waiver," it has no bearing on our decision herein.

Id. at ¶21-25. The court concluded that:

> Simply, R.C. 2305.31 does expressly allow a person to purchase insurance from an insurance company for his/her own protection, but the statute does not allow for the purchase of insurance by one for another's own negligence. The statute does not provide for the promisor to obtain coverage for the protection of the promisee against the promisee's own negligent conduct. To rule in favor of the appellant's position would circumvent established precedent and the clear reading of R.C. 2305.31.

Id. at ¶26. It is submitted that the Cuyahoga County Court of Appeals was correct in retreating from its previous position in Stickovich.

At about the same time the Cuyahoga County Court of Appeals was re-examining *Stickovich*, the Montgomery County Court of Appeals rendered its decision in *Danis Building Construction Co. v. Employers Fire Ins. Co.*, 2002-Ohio-6374, at ¶40. The court in *Danis* adopted the decision of a federal magistrate[2] which distinguished *Zavarella*, as did the *Stickovich* Court, on the ground that "the general contractor sought coverage for job site activities at most peripherally connected to the subcontractor's work" while in *Danis Building Construction Co.* "the work being performed by [the additional insured's] employee was an essential part of the [named insured's] subcontract." *Id.* at ¶31. Neither the Montgomery County Court of Appeals nor the magistrate's decision, however, cited *Stickovich* or, more importantly, declared that the phrase "arising out of" in additional insured provisions of subcontractors' policies should be read very broadly and/or to cover an additional insured for the additional insured's own active negligence. The magistrate's decision adopted by the Montgomery County Court of Appeals explained that:

> The situation presented by this case comes precisely within an exception or distinction recognized by the [*Zavarella*] court. That court recognized the difference between an indemnity clause and an additional insured clause and noted that under the latter coverage would be available only with respect to liability arising out of the subcontractor's work. But that is precisely what we have here: if [the additional insured] is liable at all, it is with respect to what it did in assisting [the named insured] at [the named insured's] request in performing [the named insured's] subcontract. As additional insureds, Danis and King come within the insurance exception in Ohio Revised Code §2305.31 recognized in *Brzeczek v. Standard Oil Co.* (Lucas County, 1982), 4 Ohio App.3d 209, 4 Ohio B. 313, 447 N.E.2d 760. In that decision, the court adopted the following language from the court of appeals of New York:
>
> > "... A distinction must be drawn between contractual provisions which seek to exempt a party from liability to persons who have been injured or whose property has been damaged and contractual provisions, such as those involved in this suit, which in effect simply require one of the parties to the contract to provide insurance for all the parties."
>
> 4 Ohio App.3d at 212, quoting *Bd. of Edn. v. Valden Associates, Inc.* (1979), 46 N.Y.2d 653, 416 N.Y.S.2d 202, 389 N.E.2d 798. The Ohio Statute in question embodies the same public policy as the New York statute in suit there. Nothing in this interpretation undermines the Ohio public policy. Indeed to the extent the policy seeks to provide that there will be compensation for injured construction workers, this interpretation furthers that policy.

Id. at ¶31-33. But is this a correct analysis of the public policy underlying R.C. 2305.31?

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[2]The declaratory judgement action filed in federal court was subsequently reversed by the Sixth Circuit Court of Appeals and eventually dismissed for lack of jurisdiction.

What's an Insurer to Do?

...Continued from page 15

The *Valden Associates* case upon which the Montgomery County Court of Appeals relied involved the validity of certain provisions contained in a construction contract which required the owner to provide "fire, extended coverage, vandalism and malicious mischief insurance upon the entire structure on which the work of the Contract is to be done and upon the materials, in or adjacent thereto and intended for use thereon, to One Hundred Percent of the insurable value thereof." It is also provided that "[the] Owner, Contractor, and all subcontractors waive all rights, each against the others, for damages caused by fire or other perils covered by insurance provided for under the terms of the Contract Documents, except such rights as they may have to the proceeds of insurance." The owner did make provision for the required insurance, and during the course of the project a fire broke out, allegedly due to the negligence of the contractor or the subcontractors, causing damage to the building. The insurer paid the owner its damages pursuant to the policy, and then an action was commenced against the contractor and subcontractors, in which the owner was the named plaintiff but the actual plaintiff in interest was the insurer as a subrogee. The New York Court of Appeals merely held that, "[a] provision waiving all rights to recover for those same injuries other than from the proceeds of the insurance policy does not constitute a violation of the statute" and that "[a]bsent any indication of overreaching or unconscionability such provisions violate neither Section 5-323 of the General Obligations law nor any other public policy...." 46 N.Y.2d at 657. The *per curium* opinion of the Court of Appeals of New York in *Valden Associates* does not address the legislative history of Section 5-323 of the General Obligations Law, which renders void and unenforceable any agreement whereby a contractor attempts to exculpate himself from liability to others arising from his negligence in the construction of real property." The Court did not even address the legislative history of Section 5-323 or appellant's argument that this statutory provision "shows a strong legislative concern with safety." It is submitted that the proper interpretation of the Additional Insured endorsement for work related injuries on a construction site must take into account the public policy served by statutes prohibiting indemnity agreements in construction contracts. This public policy is to promote work-place safety and to prevent injuries at a construction site, not to provide compensation for injured construction workers.

E. Ohio Public Policy

The Cuyahoga County Court of Appeals in *Stickovich* correctly stated that the "purpose of R.C. 2305.31 is to protect workers' safety and contractors from being compelled to assume liability for the negligence of others." *Stickovich, supra*, 143 Ohio App. 3d at 28, 757 N.E. 2d at 58. This statute was designed to make sure that inherently dangerous construction sites are as safe as possible by making the owner, general contractor, and all subcontractors responsible for their own conduct. The statute specifically allows a contractor to purchase insurance "for his own protection." By implication, a contractor is precluded from the purchase of insurance for the protection of another for the other party's negligence at the construction site.

In this fashion, the risk of loss remains with the negligent party through higher insurance premiums. If the risk of loss could be shifted to innocent contractors through the use of boilerplate construction contract indemnity agreements, then there would be no incentive for the owner or general contractor to provide a safe place to work. The Ohio General Assembly did not enact R.C. 2305.31 to make sure that there would be compensation for workers injured on construction sites. Rather, the purpose of this statute was to hold contractors accountable for their own negligence so that construction sites would be a safer place to work thereby having fewer accidents in the first place.

The court in *Stickovich* correctly stated that the purpose of R.C. 2305.31 is to promote workers' safety by preventing the risk of loss from being shifted from the culpable parties. But then the court erroneously concluded that this purpose is not harmed,

> By permitting the standard commercial liability insurance from which an independent third-party insurer is paid a premium to accept the risk of loss. Injured workers are compensated and contractors do not bear the harsh burden of bearing the cost of others' negligence. This common sense reading of R.C. 2305.31 is also consistent with the purpose of insurance law.

Id. The court's "common sense" reading of R.C. 2305.31 is both inconsistent with the statute and reflects a fundamental misunderstanding of insurance. As one commentator explained,

> "[i]n the ordinary insurance relationship, the insured is . . . deterred from engaging in risky activity by the notion that an accident or occurrence will result in the insurer raising its premiums. [But] the additional insured is insulated against this prospect by the fact that it is not responsible for premium payments to the insurer and is unaffected by the raising of premiums. . . . [T]here is no motivation or incentive for the additional insured to exercise a high standard of care."

Mehta, *Additional Insured Status in Construction Contracts and Moral Hazard* (1996), 3 Conn. Ins. L.J. 169, 186-187, footnotes omitted, cited by *National Union Fire Ins. Co. of Pittsburgh, PA v. Nationwide Ins. Co.* (1999), 69 Cal. App. 4th 709, 720, 82 Cal. Rptr. 2d 16, 19-20. While R.C. 2305.31 may not directly affect the validity of Additional Insured endorsements (which serve distinctly different purposes than contractual indemnity provisions) it still reflects

policy considerations that apply to how broadly courts may construe them. Accordingly, any interpretation of an additional insured endorsement that would protect the additional insured from his own negligence at a construction site would run afoul of the public policy considerations set forth in R.C. 2305.31.[3]

IV. THE DUTY TO DEFEND

The *Stickovich* decision suggests that an insurance company must always defend the additional insured even if plaintiff's complaint alleges active and independent negligence by an additional insured in a construction-related project. However, it is still well established Ohio law that the allegations in the pleadings determine whether a general liability insurer has a duty to defend. See, e.g., *Sharonville v. Am. Emp. Ins. Co.*,158 Ohio App.3d 576, 2004-Ohio-4664 at 20. If the complaint specifically alleges independent acts of negligence by the additional insured at a construction site then the insurer should not be required to provide a defense regardless of the *dicta* found in the *Stickovich* decision. Consider the following cases:

— In *Toledo Edison Co., supra* at 763, the court explained that:

> Here, the complaint made several generalized allegations against Toledo Edison, such as constructing and energizing the lines in an unsafe manner, and failing to properly inspect the lines. Unlike the allegations against the general contractor in *Stickovich*, these claims have nothing to do with the subcontractor's (here, Asphlundh's) [tree-trimming] operations.

— In *Davis, supra* at 737, the court explained that:

> The evidence adduced during discovery was uncontroverted that the dike siphon sump into which Davis and Booker fell was located in an area of the industrial plant that was under the exclusive control of LTV [the asserted additional insured] on the day of the accident. There is no serious issue that the closing of the valve in question was not contemplated as part of Shafer's [the named insured's] duties pursuant to its contract with LTV. Further, the need to close the valve on the day of the accident was coincidental to the cleaning services being performed by Shafer's employees. There was no dispute that LTV hired Shafer to clean and vacuum the tar sump and its pumps; Shafer did not contract to do anything related to the dike siphon sump.

In each case, it was clear from the pleadings that plaintiff's claims against the additional insured arose from the negligence of the additional insured and were not related to the Named Insured's obligations at the work site. Thus, there is no coverage under the Additional Insured endorsement for the construction site accidents.

V. CONCLUSION

Ohio courts have struggled with the proper interpretation of the "Additional Insured" endorsement found in General Liability policies issued to contractors. In interpreting the endorsement, most courts have concluded that the additional insured clause may not extend coverage to the additional insured for his own negligence as this would run counter to the public policy set forth in R.C. 2305.31. The Ohio Supreme Court in *Kendell, supra*, 20 Ohio St.3d 61 held that R.C. 2305.31 prohibits indemnity agreements in construction related contracts whereby the promisor agrees to indemnify the promisee for damages caused by or resulting from the negligence of the promisee, "regardless of whether such negligence is sole or concurrent." Thus, some courts have concluded that the terms of the additional insured endorsement provide coverage for only the Named Insured's passive, secondary, or vicarious liability to the primary liability of the Named Insured. See, e.g., *Buckeye Union, supra*, 121 Ohio App.3d 147; *Liberty Mutual Insurance, supra*, 2000-Ohio-4280. This would seem to be the proper interpretation of the Additional Insured endorsement when read *in pari materia* with R.C. 2305.31. However, this issue has never been addressed by the Ohio Supreme Court and an additional insured could certainly argue that it is at least entitled to a defense until such time as fault is determined by a jury.

An immediate and thorough pre-suit investigation must be made of any construction related accident. In most cases, an insurer will be able to determine whether the accident was within the scope of its Named Insured's contractual duties at the construction project. In some cases, however, it may be necessary to hire separate counsel for the additional insured and then intervene in the underlying action to propound interrogatories to the jury to determine whether the additional insured's liability is merely passive, secondary and vicarious to the liability of its Named Insured.

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[3]In California, there is a statutory prohibition against allowing an indemnitor to hold harmless an indemnitee for the indemnitee's sole negligence in construction contracts. Civ. Code, §272. In Ohio, however, the Ohio Supreme Court in *Kendall v. U.S. Dismantling Co.* (1985), 20 Ohio St. 3d 61, 485 N.E.2d 1047 concluded that R.C. 2305.31 prohibits indemnity agreements in construction related contracts for even concurrent negligence. This would suggest an even more restrictive interpretation of the Additional Insured endorsement to effectuate the public policy embodied in R.C. 2305.31.