I. Introduction

These materials were prepared to present a general overview of indemnity law in various states. The materials were prepared by Oregon lawyers using Oregon law as the exemplar[1]. When appropriate, other states' laws have been summarized. These materials are not intended to present a comprehensive summary of every state's law. Likewise, these materials are not intended to be, and should not be used as a substitute for, specific legal advice. The authors recommend that questions be addressed to the attorney of your choice in the state in which your dispute arises.

II. Indemnity Issues Between Parties

Indemnity shifts the burden of loss, "…to one who ought, in equity, to bear it." *Burton v. Mackey*, 104 Or. App. 361, 801 P.2d 865 (1990) (citing *General Ins. Co. v. P.S. Lord*, 258 Or. 332, 336, 482 P.2d 709 (1971)). The right to indemnity can be established contractually or impliedly through common law. The standard principles of contract law govern the interpretation of contractual indemnity agreements. However, common law indemnity has been characterized as quasi-contractual and equitable in nature. *Owings v. Rose*, 262 Or. 247, 262, 497 P.2d 1183 (1972) (citing *Kennedy v. Colt*, 216 Or. 647, 653-654, 399 P.2d 450 (1959); *Case v. McKinnis*, 107 Or. 223, 256, 213 P. 422 (1923); and *Durbin v. Kuney & Sayres*, 19 Or. 71, 73, 23 P. 661 (1890)).

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a. Common Law

The Restatement (Second) Torts, §886B, describes the implied duty to indemnify as follows: If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability. Simply stated, it has been said that the implied duty to indemnify is, "…based upon the law's notion of what is fair and proper as between the parties." *Mas v. Two Bridges Associates by Nat. Kinney Corp.*, 75 N.Y.2d 680, 690, 554 N.E.2d 1257 (1990).

The traditional elements of common law indemnity are well established in Oregon. The party seeking indemnity must prove that:

a. it has discharged a legal obligation owed to a third party;

b. the defendant was also liable to the third party; and

c. as between the plaintiff and the defendant, the obligation ought to be discharged by the defendant.

Fulton Ins. Co. v. White Motor Corp., 261 Or. 206, 210, 493 P.2d 138 (1972) (*overruled in part on other grounds) Waddill v. Anchor Hocking, Inc.,* 330 Or. 376, 8 P.3d 200 (2000).

There are two general approaches to common law indemnity: (1) The Oregon model, in which the indemnitor's fault is active, while the indemnitee's fault is secondary or passive; (2) an alternative model, where the indemnitee must be completely free of liability.

- In Michigan, the right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses. *Lakeside Oakland Dev., L.C. v. H & J Beef Co.*, 249 Mich. App. 517, 531, 644 N.W.2d 765 (2002). But common-law indemnification does not apply where the underlying complaint alleges active, rather than passive, liability. *Id.* It has long been held in Michigan that the party seeking indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence. *Provencal v. Parker, 66 Mich. App. 431, 239 N.W.2d 623 (1976)*. If a party breaches a direct duty owed to another and this breach is the proximate cause of the other party's injury, that is active negligence. Where the active negligence is attributable solely to another and the liability arises by operation of law, that is passive negligence. *Langley v. Harris Corp.,* 413 Mich. 592, 597-598, 321 N.W.2d 662 (1982). To determine whether the indemnitee was “actively” or “passively” negligent, the court examines the primary plaintiff's complaint. If the complaint alleges active negligence, as opposed to derivative liability, the defendant is not entitled to common-law indemnity. *Peeples v. Detroit*, 99 Mich. App. 285, 293, 297 N.W.2d 839 (1980).
- North Carolina: The right to common law indemnity "between defendants arises when liability is imposed upon one defendant for the other's tortious conduct through operation of law, as for example, through the doctrine of

respondeat superior. Indemnity is not permitted when the defendants are in pari delicto, that is, when both defendants breach substantially equal duties owed to the plaintiff." *Bridgestone/Firestone Inc. v. Ogden Plaint Maintenance Co.*, 144 N.C. App. 503, 508, 548 S.E.2d 807, 811 (2001).

- Minnesota: Minnesota recognizes two types of contractual indemnity clauses; 1) indemnity against a loss, where one party agrees to reimburse another in the event of a particular loss not within the control of either contracting parties; and 2) indemnity against liability, where one contracting party agrees to protect the other contracting party in the event that a third person sues the protecting contracting party. Minnesota begins with the general concept that indemnity clauses which seek indemnification for one's own negligence are not favored and will not be enforced unless the intention is expressed in "clear and unequivocal terms." *Yang v. Voyagaire Houseboats, Inc.*, 711 N.W.2d 783 (Minn. 2005). Minnesota does allow, however, indemnification clauses for one's own negligence.

i. Discharge of a Legal Obligation

As stated above, to support a claim for indemnity a putative indemnitee must have discharged a legal obligation owed to a third party; a debt which should have been borne by the putative indemnitor. Under Oregon law, common-law claims for indemnity require actual discharge of a common obligation before a cause of action accrues. *Ore-Ida Foods v. Indian Head*, 290 Or. 909, 920, 627 P.2d 469 (1981). However, this debt need not have been

actually discharged if the claim for indemnity is brought in the form of a cross-claim for indemnification.

> To require a defendant who raises an indemnity cross-claim to plead and prove actual discharge of a judgment before the judgment is entered against the defendant raising it would contravene the purpose and destroy the usefulness of the cross-claim rule.

Kahn v. Weldin, 60 Or.App. 365, 371, 653 P.2d 1268 (1982). Therefore, because ORCP 22 B(2) states that a cross-claim "… may include a claim that the defendant against whom it is asserted is liable, *or may be liable*, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff," actual discharge of the debt is not a necessary prerequisite. It is important to note that this does nothing to alter the requirement of actual discharge if the claim for indemnity is brought outside the parameters of a cross-claim.

ii. Common Liability

A claim for indemnity requires a common duty resulting in a common liability to a third-party. In *Safeco Ins. Co. of America v. Russell*, 170 Or.App. 636, 13 P.3d 519 (2000), Waltermire, who was insured by Safeco, was in a car accident with Russell, who was uninsured. Safeco refused to pay Waltermire's damages claimed under the uninsured motorist provision of his policy. Waltermire sued Safeco and won. Five years later, Safeco sued Russell for indemnification (Safeco missed the statute of limitations to sue Russell under their right of subrogation). The trial court granted Russell's motion to dismiss because Safeco and Russell did not owe a common duty to Waltermire.

The Oregon Court of Appeals upheld the trial court's ruling based on the Oregon Supreme Court's adoption of the Restatement of the Law of Restitution § 76 in two earlier cases, *Citizens Ins. v. Signal Ins. Co.*, 261 Or. 294, 297-98, 493 P.2d 46 (1972) and *Fulton Ins. Co. v. White Motor Corp.,* 261 Or. 206, 210, 493 P.2d 138 (1972). The *Safeco* court stated "it is not enough that the parties are each liable to the plaintiff's insureds. In order to trigger a right of indemnity, their liability must also depend on a common duty." *Safeco*, 170 Or.App. at 640.

The key to the court's holding was the difference between Safeco's and Russell's duties to Waltermire. Safeco owed a contractual duty to provide coverage to Waltermire while Russell owed a tort duty of reasonable care. The court held that "the differences in the nature of the duties that the parties owed to plaintiff's insureds prevent us from concluding that, as between them, defendant should bear the ultimate loss at issue in this case." *Id*. at 643.

Safeco does not explicitly say how similar is similar enough for two parties' duties to be considered a common duty. In *Safeco*, the court held that a tort duty and a contract duty were too dissimilar to find a common obligation which could give rise to indemnity. However, in *Abney-Revard, Inc. v. Associated Materials Incorporated*, Not Reported in F.Supp.2d, 2007 WL 1467302 (D. Or. 2007), the court found that sufficient similarity for a common duty where two parties each owe contractual duties to indemnify a third party, both contracts use similar indemnification language, and those similar duties arise out of the same operative facts.

iii. Primary vs. Secondary or Active vs. Passive

To meet the third requirement of common law indemnity, that as between the plaintiff and the defendant, the obligation ought to be discharged by the defendant, the party seeking indemnity (the indemnitee) must show that its liability was secondary, while the other party's (the indemnitor) liability was primary. Stated differently, the indemnitee's liability must be based on passive conduct, while the indemnitor's liability must be based on active conduct. *Fulton Ins. Co.*, 261 Or. at 210. As stated in *Piehl v. Dalles General Hospital*,

> "The basis for indemnity between tortfeasors involves the equitable distribution of responsibility, and there can be no all-encompassing rule. Prosser, The Law of Torts 313 (4th ed. 1971), has the following to say:
>
> > Out of all this, it is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. It has been said that it is permitted only where the indemnitor has owed a duty of his own to the indemnitee; that it is based on a 'great difference' in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is the complete answer, and, as is so often the case in the law of torts, no one explanation can be found which will cover all of the cases. Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct.

Piehl, 280 Or. 613, 620-621, 571 P.2d 149 (1977) (footnotes omitted). While a passive-active analysis may be based upon an inconveniently vague notion of equity, *see*, *e.g.*, *Maurmann v. Del Morrow Construction, Inc.*, 182 Or. App. 171,

188-189, 48 P.3d 135 (2002), it is clear that if the parties stand *in pari delicto*, there can be no claim for indemnification. *Star Mountain Ranch v. Paramore*, 98 Or. App. 606, 780 P.2d 758 (1989). This topic will be discussed more thoroughly through case analysis in the next section.

b. Contractual

The rule in most jurisdictions, regardless of whether indemnity is based upon an implied or an express agreement, is that when a claim is made against an indemnitee for which he is entitled to indemnification, the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against such claim, regardless of whether the indemnitee is ultimately held not liable. *St. Paul Fire & Marine v. Crosetti Bros., Inc.*, 256 Or. 576, 579, 475 P.2d 69 (1970) A promise to hold a party harmless from claims imposes a duty to defend the party from those claims. *Northwestern Pac. Indem. v. Junction City Water Dist.*, 295 Or. 553, 556 n 3, 668 P.2d 1206 (1983), *on rehearing* 296 Or. 365, 677 P.2d 671 (1984) (it is well settled that an indemnitor defendant has an obligation to defend the indemnitee or to pay the costs of defense).

An indemnitor's duty to defend under a hold harmless agreement is the same as a liability insurer's duty to defend its insured. *St. Paul Fire & Marine v. Crosetti Bros., Inc.*, 256 Or. 576, 580, 475 P.2d 69 (1970). There, Crosetti contracted with the Port of Portland to perform janitorial services at the airport and agreed to indemnify the Port for liability from all claims by reason of the company's operations. An individual fell and sued both Crosetti Brothers and the Port. Crosetti Brothers denied the Port's tender of the defense of the claim. The

Port's insurer defended the Port. The parties settled the lawsuit before trial. Crosetti Brothers paid the entire settlement. The Port's insurer then sought to recover its defense costs from Crosetti Brothers.

Crosetti Brothers noted that the passenger had alleged independent conduct by the Port (the passenger had alleged that the Port was negligent because of the type of floor used by the Port). This conduct did not fall within the scope of the contractor's indemnity obligation. Crosetti Brothers argued it had no duty to defend the Port, because the passenger could have recovered against the Port on a basis for which Crosetti Brothers was not responsible under the indemnity contract.

The Oregon Supreme Court rejected that argument. The court held that an indemnitor must defend the indemnitee if the complaint, without amendment, may impose liability for conduct covered by the indemnity agreement. The court found Crosetti Brothers liable to pay all the Port's defense costs, even those costs incurred defending allegations that were not within the scope of the indemnity obligation.

In reaching this conclusion, the court held that a non-insurer indemnitor has the same obligations as an insurer:

> The defendant in the present case is not an insurer; however, because the defendant has a duty to defend or pay the cost of defense if the claim is covered by the indemnity agreement, the defendant's obligation should be identical to that of an insurer.

Id. at 580.

A liability insurer's duty to defend is well established. An insurer must defend the entire claim, even if only some of the injured party's claims fall within

the scope of the indemnity agreement -- the insurance policy -- while other claims fall outside its scope. *Farris v. U.S. Fidelity & Guar.*, 273 Or. 628, 635-36, 542 P.2d 1031 (1975). Whether a claim falls within the scope of a defense obligation is a question of law. *Laminated Wood Products Co. v. Pedersen*, 76 Or. App. 662, 668, 711 P.2d 165 (1985). To determine the duty to defend, the court compares the allegations of the underlying complaint to the language of the policy or hold harmless agreement. *Crosetti Bros.*, 256 Or. at 580; *Abrams v. General Star Indem.*, 335 Or. 392, 67 P.3d 931 (2003).

The duty to defend and the duty to indemnify are entirely separate contractual obligations, measured by separate and distinct standards. *Holloway v. Republic Indem. Co. of America*, 201 Or. App. 376, 119 P.3d 239 (2005) *rev'd on other grounds,* 341 Or. 642, 147 P.3d 329 (2006); *Abrams v. General Star Indemnity Co.*, 335 Or. 392, 67 P.3d 931 (2003). That statement is true as to all contractual indemnity provisions, not just insurance contracts. *Crosetti Bros.*, 256 Or. at 580-81.

Indemnity provisions, when they appear in agreements having a primary purpose other than indemnity itself, are viewed as realistic attempts to allocate business risks among the parties and should be given reasonable construction. *Cook v. Southern Pac. Transp. Co.*, 50 Or. App. 547, 551, 623 P.2d 1125 (1981).

A different rule has developed where the indemnitee seeks to obtain indemnity protection against liabilities arising from its own sole negligence, from one who is not at fault. Indemnity may still be available in that situation, provided that the indemnitee's conduct is not wanton or criminal in nature.

Waggoner v. Oregon Auto Ins. Co., 270 Or. 93, 97, 526 P.2d 578 (1974). However, such contracts are construed against coverage of losses caused by the indemnitee's own negligence. *See*, *e.g.*, *Sears, Roebuck & Co. v. Montgomery Elevator Co.*, 63 Or. App. 769, 773, 665 P.2d 1265 (1983). Thus, to have an enforceable right to indemnity in that circumstance, the contract must set forth, in a clear and unambiguous manner, that that is what the parties have agreed to do.

In *Southern Pac. Co. v. Layman*, 173 Or. 275, 145 P.2d 295 (1944), the railroad allowed Layman, a farmer, to construct, maintain and use a private crossing over its track. The parties' agreement called for Layman to indemnify the railroad for any loss resulting from the use of the crossing. Years after Layman sold the property, the railroad negligently damaged a combine on the crossing. The railroad settled and sought indemnity from Layman.

The court found for Layman, holding that the indemnity clause did not apply. The court noted that the loss was due to the railroad's sole negligence and was unrelated to anything that Layman did. The language of the indemnity clause was intended to cover losses arising out of Layman's failure to properly build or maintain the crossing. The court did not believe that Layman agreed to assume a risk wholly unrelated to his obligations under the contract, when the only privilege afforded him was the opportunity to cross the tracks.

In *Southern Pac. Co. v. Morrison-Knudsen Co.*, 216 Or. 398, 338 P.2d 665 (1959), the railroad and a joint venture (referred to in the opinion as "Industry") entered into an industrial spur track agreement. The agreement

provided that Industry could install and maintain an unloading bunker, in a manner satisfactory to the railroad. Industry agreed to indemnify the railroad from liability "resulting . . . from the presence of the bunker." *Id*. at 401. The bunker failed to provide the mandated clearances which, along with actions by the railroad, resulted in an injury. The trial court found both the railroad and Industry were negligent.

The court began its indemnity analysis by observing that the liability resulted from the use of the bunker. The court enforced the indemnity clause as written. It said that *Southern Pac. Co. v. Layman* focused upon three factors: (1) the relative status of the parties, particularly financial; (2) the relative scope of the privilege accorded the indemnitor, Layman; and (3) the degree of additional liability assumed by the railroad by reason of Layman's privilege. The court distinguished *Southern Pac. Co. v. Layman*, pointing out that *Morrison-Knudsen* involved a large construction company, instead of an individual farmer; the spur accommodated only Industry and was critical to its success whereas the farmer did not depend upon the crossing and others used it; and adding the spur greatly extended the railroad's risk, whereas adding the crossing hardly altered the railroad's risk at all. *Id*. at 413-14. The court concluded that the indemnity provision must be construed to include those instances when the railroad was partially at fault. There would be no use for the clause, if the clause only applied when the railroad was fault free.

In *Cook v. Southern Pac. Transp. Co.*, 50 Or. App. 547, 549, 623 P.2d 1125 (1981), Cannon contracted to demolish and salvage an abandoned railroad

station. Cannon paid the railroad $100 for the right to demolish the station and keep any salvage, which was expected to net $1500. Cannon agreed to indemnify the railroad from any liability arising out of the work. The crew stacked debris alongside a loading dock. A third party tried to pull a plank from the stack, but left it protruding over the tracks. The plaintiff caught his leg between the plank and the train and was injured.

The court set forth its task -- to construe the language of the provision in a manner that reasonably allocates the risks arising out of the contractual relationship, in light of the overall agreement. The court concluded that it only needed to address the *Layman* factors if: (1) the language, construed broadly, results in liability to the indemnitor which far exceeds the expected profits from the contract; (2) liability arises from acts or conditions beyond the indemnitor's control; and (3) the agreement fails to allocate specifically the particular risk from which the liability arises.

Apparently focusing on the second listed factor, the court concluded that it was unlikely that Cannon would agree to hold the railroad harmless for the acts of strangers, whom he could not control. The court then applied the *Layman* factors and reversed the summary judgment in favor of the railroad. The court observed that Cannon was an individual of limited means. He had a limited privilege to remove the station. The risk to the railroad was not changed very much, because the railroad always faced the risk of liability based upon an act of a third party. Cannon's acts did not alter that risk.

In *Blanchfill v. Better Builds, Inc.*, 160 Or. App. 527, 982 P.2d 53 (1999), Better Builds manufactured exercise equipment and leased it to CGF. The lease payments totaled $28,702 over a three-year period. Upon termination of the lease, CGF could purchase the equipment for $100. CGF agreed to indemnify Better Builds for liability that arose from the use of the equipment.

Plaintiff was injured using the exercise equipment and sued Better Builds for strict liability and negligence. In turn, Better Builds filed a third-party complaint against CGF seeking common law contribution and contractual indemnity. The jury found that CGF was 45% at fault, Better Builds was 45% at fault, and plaintiff was 10% at fault. The trial court held that Better Builds was not entitled to contractual indemnity.

The appellate court reviewed the factors listed in the previous cases. It noted that the first and second *Cook* factors were, in many ways, particularized expressions of the second and third *Layman* factors. The court then concluded that the first step was to determine if the indemnification language specifically allocated the particular risk. If so, the court would apply the language as written. If not, the court would consider the following combined factors in determining the scope and application of the indemnity language:

- The parties' relative status, including their financial strength, their sophistication and appreciation of potential risks, and the dynamics of their bargaining, particularly whether the indemnification language was specifically negotiated.

- The extent to which the putative indemnitor's activities exposed the putative indemnitee to new or different liability, both generally and with respect to the particular risk -- and, conversely, the extent to which the particular liability arose from circumstances, including the indemnitee's conduct, that were beyond the indemnitor's control.

- The putative indemnitor's reasonably anticipated benefit ("privilege" or "profit") under the agreement versus its concomitant potential exposure to liability for the indemnitee's conduct. *Id*. at 540.

The court observed that both parties were small and relatively unsophisticated. The court noted that CGF's lease and use of the exercise equipment did not expose Better Builds to a different risk. Better Builds manufactured equipment, which exposed it to liability based upon product defect. That risk was always present; the lease did not alter the risk. Finally, while both parties had access to the equipment, CGF had no control over the design of the product. The court held that the factors did not favor indemnity, so it affirmed the trial court's judgment in favor of CGF.

One justice dissented. He argued there was no principled reason to disturb risk allocations made by two parties of relatively equal bargaining power. Turning to the application of the "factors," he believed that the equality of bargaining power favored enforcement of the lease as written. He also thought that CGF obtained a considerable privilege from the contract -- the ability to obtain the equipment necessary to run its business.

- Michigan: An indemnity contract is construed in the same manner as other contracts. *DaimlerChrysler Corp. v G-Tech Professional Staffing, Inc.*, 260 Mich. App. 183, 185, 678 N.W.2d 647 (2003). An indemnity contract will be construed strictly against the drafting party and the indemnitee. *Triple E Produce Corp. v. Mastronardi Produce, Ltd.*, 209 Mich. App. 165, 172, 530 N.W.2d 772 (1995). However, the principle of construing an indemnity contract against the drafter, like any other

contract, only applies where (1) an ambiguity exists and (2) all other means of construing the ambiguity have been exhausted. *Klapp v. United Insurance*, 468 Mich. 459, 470-474, 663 N.W.2d 447 (2003). An unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument." *DaimlerChrysle*r, *supra* at 185. The court will interpret the indemnity provision to provide a reasonable meaning to all of its terms. *MSI Construction Managers, Inc. v Corvo Iron Works, Inc.*, 208 Mich. App. 340, 343, 527 N.W.2d 79 (1995). The indemnity provision should be construed to effectuate the intentions of the parties. This may be determined by the language of the provision, the situation of the parties, and the circumstances surrounding the making of the contract. *Triple E Produce Corp.*, *supra* at 172. A broad indemnification provision may be interpreted to protect an indemnitee against its own negligence if that intent can be found in other language of the contract, the circumstances surrounding the contract, or from the purposes sought to be accomplished by the parties. *Sherman v. DeMaria Building Co., Inc.*, 203 Mich. App. 593, 597; 513 N.W.2d 187 (1994).

c. Statutory Prohibitions

In Oregon, ORS 30.140 governs indemnification provisions in construction contracts:

> **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 for damage arising out of 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.

(3) As used in this section, "construction agreement" means any written agreement for the construction, alteration, repair, improvement or maintenance of any building, highway, road excavation or other structure, project, development or improvement attached to real estate including moving, demolition or tunneling in connection therewith. Without limiting those agreements that are not construction agreements, a "construction agreement" does not include:

(a) Any real property lease or rental agreement between a landlord and tenant whether or not any provision of the lease or rental agreement relates to or involves construction, alteration, repair, improvement or maintenance as long as the predominant purpose of the lease or rental agreement is not construction, alteration, repair, improvement or maintenance of real property; or

(b) Any personal property lease or rental agreement.

(4) No provision of this section shall be construed to apply to a "railroad" as defined in ORS 824.200. [1973 c.570 §§1,2; 1987 c.774 §25; 1995 c.704 §1; 1997 c.858 §1]

The Oregon Supreme Court in *Walsh Constr. Co. v. Mutual of Enumclaw*, 338 Or. 1, 104 P.3d 1146 (2005), held that an agreement requiring a subcontractor to procure "Additional Insured" (AI) insurance covering a general contractor for the general contractor's own fault is void. 338 Or. at p. 5-10. There is no dispute that an insurer providing AI coverage is relieved of the obligation to defend or indemnify under such circumstances. *Id*. *Walsh* did not address whether ORS 30.140 relieves an AI insurer of the duty to defend or indemnify where the additional insured is seeking coverage for vicarious liability or liability arising from the fault of the named insured, e.g., the subcontractor. At

least one court has found that Walsh is not an obstacle to finding that ORS 30.140(2) applies when there is evidence of fault by the subcontractor. *Hoffman Construction Company of Oregon, v. Travelers Indemnity Insurance Company*, Not Reported in F.Supp.2d, 2005 WL 3689487 (D. Or. 2005).

- Michigan: MCL 691.991 provides that an indemnity agreement in a construction contract is “void and unenforceable” if the indemnitee is seeking indemnification for damages arising from the indemnitee's “sole negligence.” The statute provides, in part:

  > “A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable...”

- North Carolina: Most contractual indemnity provisions in North Carolina (specifically, those that relate to "the design, planning, construction, alternation, repair or maintenance of a building, structure, highway, road, appurtenance or appliance) are controlled by N.C. Gen. St. § 22B-1. Under that statute, indemnity agreements that "purport to indemnify a promisee from damages arising from negligence of the promisor" are valid and enforceable, while agreements that seek "to indemnify the promisee from its own negligence" are void as a matter of law. *Bridgestone/Firestone Inc.*, *supra* 144 N.C. App. at 508, 548 S.E.2d at 811.

North Carolina courts have taken two distinct approaches in interpreting N.C.G.S. § 22B-1. In one line of cases, courts have enforced otherwise invalid indemnity contracts by severing the violating provision (the red-line approach). See *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 644 S.E.2d 16, 20-21 (N.C. Ct. App. 2007); *Bridgestone/Firestone, Inc.*, *supra*, 144 N.C. App. at 506-09, 548 S.E.2d at 810-12 (2001); *Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315-16, 385 S.E.2d 553, 555 (1989). In another group of cases, courts have taken a harder line and simply voided the contracts (the hard-line approach). See *Pennsylvania Nat'l Mut. Ins. Co. v. Associated Scaffolders & Equip. Co.*, Inc., 157 N.C. App. 555, 556-8, 579 S.E.2d 404, 405-06 (2003); *Jackson v. Associated Scaffolders & Equip. Co., Inc.*, 152 N.C. App. 687, 689-92, 568 S.E.2d 666, 668-69 (2002); *Miller Brewing Co. v. Morgan Mech. Contractors, Inc.*, 90 N.C. App. 310, 314-18, 368 S.E.2d 438, 440-42 (1988).

- Minnesota: Construction litigation in Minnesota has a specific statute that restricts a building contractor's ability to shift its own fault to subcontractors. Precluding it is MSA § 337.02 (2004). However, in an unreported case, *Howard Homes, Inc. v. Keeler Stucco, Inc.*, 2007 WL 4234628 (Minn. App. 2007), indemnity for the fault of only the subcontractor is permitted.

III. Additional Insured Endorsement

Indemnity provisions operate independently from insurance. In theory, when there is a valid indemnity agreement, the indemnitor's insurer will cover the claim if not otherwise subject to exclusion. However, circumstances may result in the indemnity agreement being found void. In that case, additional insured status may result in coverage without relying on the indemnity agreement.

a. Additional Insured Status

In the construction industry, it is common for general contractors to require subcontractors to name the general as an additional insured on the subcontractor's commercial general liability policy. This creates a direct route to the subcontractor's insurance coverage without having to rely on the indemnity agreement. Generally speaking, absent specific language to the contrary, "…the additional insured's interest in the policy is regarded as coextensive with that of the named insured." Couch on Insurance Third Edition, December 2007, § 126:7 (internal citations omitted). In this vein, it is well settled that the rights of a named insured under a policy of insurance inure to all additional insureds under that policy. *National Auto. & Casualty Ins. Co. v. California Casualty Ins. Co.*, 139 Cal.App.3d 336, 188 Cal.Rptr. 670 (1983) citing *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group,* 76 Cal.App.3d 1031, 1041-42, 143 Cal.Rptr. 415 (1978). Therefore, the additional insured enjoys the full benefit and protection of the policy while simultaneously subject to all policy exclusions. *See*, *e.g.*, *Morris v. Aetna Life Ins. Co*., 160 Ga. App. 484, 287 S.E.2d 388 (1981) (citing *Ericson v. Hill*, 109 Ga. App. 759, 137 S.E.2d 374 (1964) ("Upon choosing to invoke

coverage, an additional insured is bound by the terms of the policy and any restrictions imposed by the policy terms."); *Smith v. State Farm Mut. Auto. Ins. Co*., 5 Cal. App. 4th 1104, 7 Cal.Rptr.2d 131 (1992) ("Insurer owes duty of good faith and fair dealing to additional insureds as well as to named insureds…"); *Del Bello v. General Acc. Ins. Co.,* 185 A.D.2d 691, 692, 585 N.Y.S.2d 918 (1992), quoting Rubin, Dictionary of Insurance Terms 7 (Barron's 1987) ('Additional insured' is a recognized term in insurance contracts, with an understanding crucial to our conclusion in this case. As cases have recognized, the 'well-understood meaning' of the term is 'an entity enjoying the same protection as the named insured')).

b. Coverage Issues Raised by Additional Insured Endorsement

i. Interpretation of "arising out of" in CG 20 10

The CG 20 10 additional insured endorsements previously afforded coverage to the additional insured, "but only with respect to liability arising out of the [named insured's] work." Joseph P. Postel, Additional Insured Coverage Under Commerical General Liability Insurance Policies (November 17, 2003) (Unpublished manuscript presented at the International Risk Management Institute Construction Risk Conference), at http://www.irmi.com/Conferences/Crc/Handouts/Crc23/Crt/AddlInsuredCovUnderCglPolicies.pdf). No Oregon courts have specifically construed "arising out of" in the context of additional insured coverage or with respect to CG 20 10. The majority approach has been for courts to construe this "arising out of" language in a broad sense of causation such that the named insured's fault was insignificant

to the coverage determination and only a minimal connection between the named insured's operations and the additional insured's liability was necessary in order to satisfy the "arising out of" language. *Fireman's Fund Ins. Companies v. Atlantic Richfield Co.*, 94 Cal.App.4th 842, 115 Cal.Rptr.2d 26 (Cal.App. 5 Dist., 2001). Therefore, proximate cause is not the relevant inquiry in the determination to provide coverage for the additional insured.

For example, in Connecticut, for liability to attach "for an accident or an injury to be said to 'arise out of' [an occurrence or offence], it is sufficient to show only that the accident or injury 'was connected with,' 'had its origins in,' 'grew out of,' 'flowed from,' or 'was incident to' [that occurrence or offence], in order to meet the requirement that there be a causal relationship between the accident or injury and [that occurrence or offence]." *QSP, Inc. v. Aetna Casualty & Surety Co.*, 256 Conn. 343, 374, 773 A.2d 906 (2001) (commercial general liability insurance and excess insurance).

The October 1993 and March 1997 CG 20 10 forms replaced the old "arising out of" language with "but only with respect to liability arising out of your ongoing operations performed for that insured." Joseph P. Postel, Additional Insured Coverage Under Commerical General Liability Insurance Policies (November 17, 2003). The result is the claim in question must be caused by the acts or omissions of the named insured or its subcontractors. *Id.* Thus, coverage may be eliminated for the additional insured's sole negligence. *Id.* However, if a non-negligent act of the subcontractor partially "caused" the accident, there still could be coverage for an accident caused solely by the

negligence of the additional insured. *Id.* With the new CG 20 10 form, the dispositive coverage consideration appears to be whether the third party's claim(s) against the additional insured contractor were based on the contractor's individual fault or whether the named insured subcontractor is also alleged to be at fault and liable to an injured party.

ii. Whether the Additional Insured is Covered by its Own Negligence

a. Oregon[2]

The most recent Oregon case commenting on the *Walsh* rule rejected the argument that the additional insured may not obtain indemnity. *Richardson v. Howard S. Wright Construction Co.*, 2007 WL 1467411 (D.Or. 2007). In *Richardson*, Wright was the general contractor for repair/remodeling work at a high school and subcontracted with named insured employer Herbst for painting services. The Wright/Herbst subcontract contained an indemnity provision requiring Herbst to obtain liability insurance for Wright and required Herbst to name Wright as an additional insured. Herbst's employee, Richardson, fell from scaffolding at the high school and applied for and received workers' compensation benefits from Herbst's insurer. Richardson then filed suit against Wright in circuit court for negligence and violations of ELA.

The court rejected American States' argument that the indemnity provision was void under ORS 30.140(1) because it required Herbst to indemnify Wright

[2] See discussion above in Section I. c. Statutory Prohibitions (The Oregon Supreme Court in *Walsh Constr. Co.*, *supra*, held that an agreement requiring a subcontractor to procure "Additional Insured" insurance covering a general contractor for the general contractor's own fault is void).

for injuries caused in whole or in part by Wright's negligence. The Court reasoned the indemnity provisions of the subcontract limited Herbst's duty to indemnify to injuries due to its sole negligence or the extent of its concurrent negligence based on the additional insurance requirement. The indemnity language of that subcontract clearly limited indemnity to only Herbst's negligence or comparative fault. The court found the language consistent with ORS 30.140. ORS 30.140(2) was not an issue in this matter as the parties agreed that provision did not apply because there was no possible fault by Herbst for Richardson's injuries.

b. The majority rule

The majority rule from California cases considering additional insured endorsements, interpret the phrase "liability arising out of" such that the "additional insured is covered without regard to whether the injury was caused by the named insured or the additional insured." *Acceptance Ins. Co. v. Syufy Enterprise*s, 69 Cal.App.4th 321, 330, 81 Cal.Rptr.2d 557 (1999). California courts interpret the phrase "arising out of" broadly to require only minimal causal connection and contends this standard requires more than "but for" causation or "mere presence." *Fireman's Fund Ins. Companies v. Atlantic Richfield Co.*, 94 Cal.App.4th 842, 115 Cal.Rptr.2d 26 (2001). The *Fireman's Fund* court explained:

> Furthermore, California courts have consistently given a broad interpretation to the terms 'arising out of' or 'arising from' in various kinds of insurance provisions. It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental

relationship. *Syufy, supra*, 69 Cal.App.4th at pp. 328-329, 81 Cal.Rptr.2d 557.

In *Syufy*, the accident occurred while the employee of the named insured was leaving work to take his wife to the airport, not while he was performing a work-related task. The insurance company argued there was no coverage because (1) the event causing the injury, i.e., the falling hatch, occurred after the employee stopped working and was leaving the jobsite and (2) the named insured performed no work on the roof hatch. The court held the "minimal causal connection or incidental relationship" was established because the injured employee of the named insured was performing work on a roof and had to pass through the defective hatch, the only access to the roof, to get to and from the work. *Syufy*, *supra*, 69 Cal.App.4th at 328, 81 Cal.Rptr.2d 557; *accord Daily News, L.P. v. OCS Security, Inc.,* 280 A.D.2d 576, 720 N.Y.S.2d 797 (2001) (liability of Daily News, the additional insured, to a visitor to its building arose out of work of the named insured security firm; while leaving for his lunch break, the employee of security firm struck the visitor with an elevator door).

Similarly, courts applying Texas law recently have joined the majority view and determined that the casual connection required by the phrase "liability arising out of" work or operations is satisfied when the employee of the named insured was injured (1) while present at the worksite and (2) in connection with performing the named insured's business. *See, Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 498-500 (5th Cir.2000); *McCarthy Bros. Co. v. Continental Lloyds,* 7 S.W.3d 725, 730 (Tex.App.1999) (more than a mere presence existed because employee was carrying out a necessary part of his job

for the named insured); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 454 (Tex.App.1999).

In *Marathon Ashland Pipe Line v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001), the court applied Wyoming law to a clause which provided the additional insured with coverage " 'only with respect to liability arising out of [the named insured's] ongoing operations performed for that [additional] insured.' " *Id.* at 1237. The named insured provided temporary workers to Marathon, the additional insured, for Marathon's use to perform general roustabout work. *Id.* at 1238. One of the workers, Berg, lost a leg when the front-loader he was using to mow a steep incline overturned. The Tenth Circuit concluded that under Wyoming law, "'arising out of' language as used in insurance contracts carries a 'natural consequence' level of causation." *Id*. at 1239. It then applied that test for causation to the facts of the case. "We are persuaded that [the named insured's] act of hiring and paying Mr. Berg at Marathon's request and then sending him out to work under Marathon's sole direction and control was an ongoing operation out of which Mr. Berg's injuries were a natural consequence." *Id.*

In Iowa, "arising out of" has been construed to mean "originating from, growing out of, or flowing from, and require[s] only that there be some causal relationship between injury and risk for which coverage is provided." *Kalell v. Mutual Fire & Auto. Ins. Co.*, 471 N.W.2d 865, 867 (Iowa 1991). In *Gabes Construction Co., Inc. v. United Capitol Insurance Co.*, 539 N.W.2d 144 (Iowa 1995), the court resolved a coverage dispute in favor of a general contractor

Gabes Construction Co. In *Gabes*, a third party motorist who was injured by a motor vehicle abandoned by the named insured subcontractor near the work site. The endorsement at issue listed general contractor Gabes as an insured "but only for liability which arises out of your work for that insured by or for you." *Id.* The parties agreed that this policy language provided coverage to Gabes only for liability arising out of work performed by subcontractor Sovde Brothers, Inc. *Id. at 147.* The accident occurred at the construction site during the course of Sovde's work. The motorist alleged Gabe "is liable for the negligence of Defendant Sovde Brothers, Inc." in various particulars. *Id.* The court held that Gabe's liability arose out of Sovde's work and was within the coverage extended by the endorsement. *Id.*

The cases that comprise the majority view specifically reject an interpretation that limits the phrase "liability arising out of" to cover only vicarious liability of the additional insured. *Fireman's Fund Ins. Companies v. Atlantic Richfield Co.*, 94 Cal.App.4th at 853. For example, in *Marathon Ashland Pipe Line v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001), the Tenth Circuit rejected the insurance company's position that the endorsement applied only when the named insured was negligent and the additional insured was no more than vicariously liable. The Tenth Circuit observed that it had interpreted an endorsement with identical language under Kansas law and held an additional insured's liability arising out of its own negligence was covered. *Id*., at 1240; *accord*, *Meadow Valley Cont. v. Transcontinental Ins.* 27 P.3d 594, 597-598 (Utah App.2001).

- In *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000), the Sixth Circuit, applying Texas law, found the following endorsement, specially negotiated between the parties, was effective to limit the owner's liability to the extent of the general contractor's negligence:

> "IT IS AGREED THAT ADDITIONAL INSUREDS ARE COVERED UNDER THIS POLICY AS REQUIRED BY WRITTEN CONTRACT, BUT ONLY WITH RESPECT TO LIABILITIES ARISING OUT OF THEIR OPERATIONS PERFORMED BY OR FOR THE NAMED INSURED, BUT EXCLUDING ANY NEGLIGENT ACTS COMMITTED BY SUCH ADDITIONAL INSURED."

c. The minority rule

A minority of courts take the narrow view and bar coverage for the additional insureds own negligence. Joseph P. Postel, Additional Insured Coverage Under Commercial General Liability Insurance Policies (November 17, 2003). The jurisdictions expressing a minority view include Ohio (*Brzecezek v.Standard Oil Co.*, 447 N.E.2d 760, 764 (Ohio App. 1982) (despite the validity of contracts to procure additional insured coverage), Maryland (*G.E. Tingall & Co., Inc. v. Reliance Nat'l Ins. Co.*, 102 F.Supp.2d 300 (D.Md. 2000) (CG 20 10 endorsement), and the District of Columbia (*Washington Sports and Entertainment, Inc. v. United Coastal Ins. Co.*, 7 F.Supp.2d 1 (DDC 1998)(arising out of language is an explicit limitation of the policy's coverage to vicarious liability).

iii. Does the Additional Insured Endorsement Apply only when the Named Insured is Negligent?

a. Oregon

Under ORS 30.140(2), coverage under the AI endorsement is triggered if the subcontractor's employee's injuries arise out of some fault of the subcontractor. *Tudor Ins. Co. v. Howard S. Wright Const. Co.*, 2005 WL 425464 (D.Or. 2005). "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. *Id.*

b. Treatment in other Jurisdictions

U.S. Fire Ins. Co. v Aetna Life & Cas. Co., 684 N.E.2d 956 (Ill. App. 1997) involved an action by the subcontractor's employee against the general contractor. The additional insured endorsement was similar to the new CG 20 10 language, providing coverage to the additional insured, "but only with respect to acts or omissions of the named insured in connection with the named insured's operations at the applicable location designated." Employee Startz was injured at the jobsite when he tripped on conduit protruding from a concrete slab and his complaint alleged claims of common law negligence and the Structural Work Act. The subcontractor employer Gateway was not named as a defendant. However, the complaint alleges that, at the time of the accident: (1) Startz "was employed by Gateway" on the job premises in the furtherance of the Argonne project; (2) "the duties and responsibilities of [Startz] required that he work on and about the aforesaid conduit protruding from [a] concrete slab"; and (3) Startz "was working on and about the aforesaid conduit protruding from [a] concrete slab when [he]

tripped on conduit protruding from [the] concrete slab while moving re-bars [sic], thereby proximately causing injuries to [him]."

The court reasoned that a comparison of the allegations in the complaint and the endorsement raised the potential for coverage and that potential is necessary to trigger the insurer's duty to defend. When injured, Startz was an employee of Gateway (the named insured), was performing tasks required of him ("in connection with the named insured's operations"), and was working at the Argonne construction project ("at the applicable location designated"). Defendants' alleged liability to Startz potentially could have arisen from an act or omission on the part of Gateway, whether or not the act or omission rises to the level of negligence. Such a possibility is sufficient to trigger the duty to defend on the part of Gateway's insurer under the additional insured endorsement. *Id*. at 960, 962–63.

c. Failure to Obtain Additional Insured Endorsement

The subcontractor's failure to procure additional insured status for the general contractor constitutes a breach of the subcontract, with the subcontractor then liable to the general contractor for the benefits that would have been available under the subcontractor's insurance policy had the required coverage been procured. Such a claim against the subcontractor would not be covered under the subcontractor's general liability insurance. Among other reasons, it would be excluded by the policy's "contractual liability" exclusion. The general contractor would have no direct cause of action against the subcontractor's insurer because no contractual relationship between the two would exist. The

developer or general contractor has direct rights against the subcontractor's general liability insurer only if it has been added as an additional insured. *Holman Erection Co., Inc. v. Employers Ins.*, 142 Or. App. 224, 231, 920 P.2d 1125 (1996).

In *Holman*, Northwestern entered into a construction subcontract with Mortenson regarding work to be performed on the Portland International Airport parking structure. The subcontract also included a provision that Northwestern would obtain insurance for Mortenson that protected Mortenson from claims for bodily injury or property damage arising out of Northwestern's work. Northwestern failed to procure the bargained for insurance. Later, Northwestern's employee sustained injuries in a fall on the jobsite. The employee filed an action against Mortenson to recover damages for his personal injuries. Mortenson tendered defense of the action to Northwestern, which, in turn, tendered the claim to Wausau, its insurer. Wausau responded that it intended to deny the claim because Northwestern had not named Mortenson as an additional insured on its liability insurance policy. Mortenson brought suit against Northwestern claiming damages for breach of contract, contending that due to Northwestern's failure to procure insurance, Mortenson had to defend and pay claims that otherwise would have been insured. Wausau informed Northwestern that it would not undertake the defense because the breach of contract claim was not covered under Northwestern's policy. Northwestern ultimately settled with Mortenson for damages due to Northwestern's failure to procure insurance.

Northwestern brought suit against Wausau for failure to undertake the defense of the lawsuit. The court specifically rejected Northwestern's argument that its failure to name Mortenson as an additional insured in its comprehensive general liability policy constituted an “occurrence” or “accident” that resulted in “property damage” for which coverage is provided under the policy. The court held that Northwestern's failure to procure insurance to protect Mortenson breached the agreement of the parties. It did not, however, constitute a breach of any duty imposed by law. *See Kisle v. St. Paul Fire & Marine Ins.,* 262 Or. 1, 6-7, 495 P.2d 1198 (1972). Thus, the damages caused by Northwestern's failure to perform under the contract were not recoverable under its liability insurance policy. *Id.* at 7.

d. Primary or Excess Coverage

When a party is covered by its own insurance and is an additional insured under another party's insurance, issues arise as to which insurance applies first when there is a claim. The question of which policy is primary and which is excess (or secondary) sometimes may be determined by the "other insurance" clauses of the policies. An "other insurance” clause defines the extent to which the insurer will respond if some other policy covers the same claim or suit. In the absence of specific policy language governing how apportionment should proceed in the event of other insurance, the majority approach is to require proration in the ration in which the individual insurer's limits bear to the sum of all available coverage. Ostrager & Newman, *Handbook on Insurance Coverage Disputes* § 11.04 (13th ed. 1998). When an insured has more than one

potentially applicable policy for a claim, courts determine the insurers' obligations to the insured by applying a body of law developed to resolve "other insurance" disputes. *Id.* at § 11.01.

The standard CGL policy has a pro rata “other insurance” clause and unless changed by some other provision, that clause will limit the additional insured coverage under the subcontractor's policy to its pro rata share of the loss, along with the owner's and contractor's own policies. There are two basic ways that owners and contractors have tried to overcome this problem: (1) by requiring, in the construction contract, that the additional insured coverage be sole, primary, or noncontributing, and (2) by endorsing the owner's or contractor's own policy with an “excess other insurance” clause. Problems can still arise under this second scenario. For example, if the subcontractor's insurer inserts a matching excess clause in the AI endorsement, that would leave the owner or contractor, again, with only concurrent coverage. Also, even where the subcontractor's insurer does not endorse its AI endorsement with an excess clause, the excess clause on the owner's or contractor's own policy will not be recognized in the states that have adopted the "Lamb-Weston" rule.

Lamb-Weston et al v. Ore. Auto. Ins. Co., 219 Or. 110, 341 P.2d 110 (1959) is the Oregon case that set forth the pro-ration rule that has been used to allocate liability among insurers in Oregon. It applies to claims between insurers, not disputes between insurers and insureds.

In that case, one of the plaintiffs, Lamb-Weston, Inc., had a tort claim brought against it. Two insurance policies, each with liability limits of $10,000,

covered that claim. The other plaintiff, St. Paul Fire and Marine Insurance Company, had issued one of the policies, while the defendant had issued the other. Lamb-Weston settled the tort claim for $3,400, using money that St. Paul provided in return for a loan receipt. Thereafter, Lamb-Weston and St. Paul sued the defendant, seeking to recover the amount that they had paid in the settlement. *Lamb-Weston*, 219 Or. at 113-15, 341 P.2d 110.

The issue in *Lamb-Weston* was how to determine which insurer should pay when both covered the same loss. Each insurer had tried to anticipate the problem in its policy; each policy contained an "other insurance" clause whose purpose was to require another insurer to pay first. The trial court found in favor of St. Paul on the ground that the defendant was the primary insurer. On appeal, the defendant argued that, contrary to the trial court's conclusion, St. Paul's coverage was primary. For that reason, the defendant insisted, it was not liable until St. Paul paid its policy limits, which it had not done. After discussing a number of relevant cases, the Oregon Supreme Court rejected the approach of attempting to find one insurer to be primary and another secondary. It concluded that attempting to apply the "other insurance" provision of one policy while rejecting that of another was "like pursuing a will o' the wisp." *Id*. at 122, 341 P.2d 110. There simply was no legal basis for concluding that one policy should yield to the other. The only way to resolve the dilemma was to require each insurer to contribute to the insured's loss in proportion to its share of the total policy limits. Because in Lamb-Weston the two insurers' policy limits were identical, the

defendant was liable for one-half of the settlement, and St. Paul was liable for the other half. *Id*. at 122, 128-29, 341 P.2d 110.

Lamb-Weston was essentially a dispute between insurance companies about which should pay the loss. Its fixed proration principle is useful in apportioning responsibility between insurers for common obligations to the same insured.

e. Related Issues

A related issue is the allocation of insurance when the insured sustains loss that occurred over a period of time and during more than one policy period. At least one Oregon court recently adopted the pro rata allocation of damage approach in *California Ins. Co. v. Stimson Lumber Co.,* 2004 WL 1173185 (D. Or. 2004) (quoting *Olin Corp. v. Ins. Co. of Am*., 221 F.3d 307, 322 (2d Cir. 2000)). Applying this methodology, liability is allocated among all triggered policies based on some objective factor, such as the amount of risk the insurer assumed, or the amount of time the insurer spent on the risk ("time on the risk analysis"). *Id.* Unlike joint and several liability, allocation avoids burdening one insurer with the complete loss, the duty to bring claims for contribution, and the risk that contribution may not materialize because of insolvent insurers. *Id .* at 322-23.

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