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"INSURING" THE RAILROAD'S GENERAL LIABILITY RISKS:

PRACTICAL CONSIDERATIONS WHEN NEGOTIATING WITH OUTSIDE CONTRACTORS

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"INSURING" THE RAILROAD'S GENERAL LIABILITY RISKS:
PRACTICAL CONSIDERATIONS WHEN NEGOTIATING WITH OUTSIDE CONTRACTORS[1]

Risks associated with railroads are unique. Because railroad rights-of-way intersect thousands of non-railroad-owned properties and thoroughfares, there are endless potentials for liability. Risks associated with railroad properties which do not involve rights-of-way are only slightly less due to the unique nature of the industry.

The risks are compounded when a railroad allows contractors to access railroad property. This access can occur when the contractor performs work for the railroad, or when a contractor must access or traverse railroad properties or rights-of-way in order for those contractors to perform work for others. Once a loss occurs, it is not uncommon to see a contractor's employee sue the Railroad, a third party sue the Railroad, or even the contractor itself bring suit against the Railroad.

Railroads are, for the most part, self-insured, and thus highly motivated to offload liability in as many ways as possible. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VI.R.1 (July 2002). Railroad risk management is most effective when it can prospectively offload its risk to another. Through insightful risk management, Railroads have effectively utilized the following strategies to either offload or avoid potential liabilities:

- Indemnification agreements with the Contractor's Commercial General Liability ("CGL") policy insuring the obligation:

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[1] These materials address contractor and insurance considerations which relate to Commercial General Liability issues. Therefore, the scope of these materials does not include additional considerations for the Railroad in regards to additional risks such as Commercial Automobile issues.

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- This protection insulates the Railroad against claims brought by others to, at a minimum, indemnify the Railroad for the Contractor's fault in causing injury to a third person, or, if permissible, to indemnify the Railroad for the Railroad's own fault in causing the loss.

- Additional Insured status under the Contractor's CGL policy:
    - This protection is intended to provide the Railroad with direct insurance coverage for the loss at issue.

- Purchasing Railroad protective liability policies:
    - This protection provides direct primary occurrence coverage to the Railroad for risks which may otherwise be excluded under commercial general liability policies.

These materials overview each of these risk management tools, discuss how each separate tool provides maximum (and many times duplicative) protection to the Railroad, and address some practical considerations for use in the Railroad's negotiation with Contractors. In addition, these materials outline a series of clauses and endorsements the Railroad should look for in Contractor policies once they are obtained.

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INDEMNIFICATION AGREEMENTS

Indemnification agreements contractually obligate one party to indemnify, and many times defend, another against losses arising from the subject matter of the contract. Most jurisdictions interpret the construction and effect of indemnification agreements as a matter of law. See e.g., Art Goebel, Inc., v. North Suburban Agencies, 567 N.W.2d 511, 515 (Minn. 1997). "A party may

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contract to indemnify another for damages or injuries caused by the negligence of the indemnitee and beyond the control of the indemnitor." Christy v. Menasha Corp., 297 Minn. 334, 211 N.W.2d 773, 777 (1973). Most courts will enforce the scope of an unambiguous indemnification agreement even if it indemnifies for the indemnitee's own negligence unless it runs afoul of public policy or statutory considerations. Therefore, it is important to understand how the state law of the jurisdiction involved will interpret the provision before it is proposed in a Contractor Agreement.

Typically, some form of nexus or connection between the liability and the project is required in order to enforce the indemnification agreement. Minnesota, for example, requires that there be a temporal and geographic nexus, or a causal nexus, between the contractor's work and the injuries or damages at issue. Anstine v. Lake Darling Ranch, 305 Minn. 243, 249, 233 N.W.2d 723, 727 (1975), overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838, 840 n. 4 (Minn. 1979). A temporal nexus exists between the contractor's work and the injury where the worker's injury occurs while the worker is preparing for work, or in the process of working, but not after the completion of the work. Fossum v. Kraus-Anderson Const. Co., 372 N.W.2d 415, 418 (Minn. App. 1985). A geographic connection exists between the injury and the contractor's work if the injury is sustained on the job site, regardless of its cause. Id. at 417-18. Alternatively, a causal nexus exists when, "but for" the work, the injury would not have occurred. National Hydro Systems v. M. A. Mortenson, 528 N.W.2d 690, 693 (Minn. 1995).

As noted above, indemnification agreements, and especially those which seek to indemnify a Railroad for its own negligence, may be void or unenforceable either because of public policy or

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statutory considerations. The most common statutory prohibition against indemnification for an indemnitee's own fault are the Construction Anti-Indemnification Statutes now in place in well over 40 states. 3 Bruner and O'Connor on Construction Law, § 10:77, p. 917 (2002). Specific statutory prohibitions vary from state to state, and therefore the jurisdiction's statute should be consulted if the Contractor will be engaging in construction activities. The statutes generally either prohibit the indemnitee from assuming the indemnitor's sole negligence, limit the indemnitee's protection to only the amount of fault of the indemnitor, or contain atypical or miscellaneous limitations. Id. Minnesota's statute, for example, is uniquely formatted to prohibit a Contractor from indemnifying a Railroad in a construction contract unless the Contractor obtain a policy to insure the indemnification obligation. Minn. Stat. Ch. 337.

Some jurisdictions may void an indemnification contract under various public policy reasons. An ambiguous clause may limit the scope of an indemnification agreement. In addition, some courts look to whether, at the time of contracting, there was a great disparity of bargaining power between the parties. For example, in Cook v. Southern Pacific Trans. Co., 623 P.2d 1125 (Or. App. 1981), a court invalidated an indemnification clause where the agreement was on a form prepared by the railroad, did not specifically allocate risk of third-party negligence (the cause of the injury to the railroad's employee), and the railroad was under a broad duty of care pursuant to the Federal Employers Liability Act ("FELA"). Despite these "legal" reasons, it appears what motivated the court was the fact the Contractor was financially unable to actually perform the indemnification obligation as he was a single individual who took on a job to demolish and remove an abandoned

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station house for the sum of $1,500. Assuming what in effect was the railroad's liability under FELA was just too great of a disparity to allow the court to enforce the agreement.

Despite careful drafting, many indemnification agreements do not fully detail the scope of the obligation imposed on the Contractor, and therefore may be considered ambiguous by a later-reviewing Court. For example, typical indemnification agreements impose an obligation for the Contractor to "defend" or "fully defend" the Railroad. These words, however, may only obligate the contractor to defend the Railroad for the claims actually indemnified. This scope of defense, as discussed below, is a much more narrow than that provided by an insurance policy. These obligations also raise the question of which party, the Contractor or the Railroad, will control the defense of the claim or suit. In addition, it may be unwise to have an indemnitor "defend" a Railroad in situations where the Contractor is also a party to the lawsuit.

Another concern about indemnification agreements typically utilized in Railroad/Contractor Agreements is that the scope of the type of injury indemnified may not be as broad as the Railroad requires. Typically, indemnification agreements require "bodily injury" and "property damage" to be the basis for the damages sought and for which the Contractor indemnifies the Railroad. However, especially in an age where security concerns predominate the industry, the Railroad may have additional exposures beyond physical injury to a person or property. There may be situations where a person may claim a more intangible injury such as those alleged in false arrest, detention or malicious prosecution matters. There may well be other matters involved with a project which potentially involves a constructive eviction of a property owner adjacent to the project, or some type

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of libel or slander. Indemnification Agreements should be looked at to determine if the scope of the injury involved needs to be expanded to include protection from claims of personal injury or advertising injury such as these.

Finally, indemnification agreements raise collectability issues in that the Contractor may not be in a position later to deliver the bargained-for right of the Railroad.

INSURING THE INDEMNIFICATION OBLIGATION

The Railroad's indemnification right is only as valuable as the Contractor's balance sheet, or the Contractor's ability to insure the obligation. Since many contractors' balance sheets are not attractive to a railroad, the latter option is the only viable means of assuring the railroad that the obligation will be performed if needed.

Normally, the Contractor's CGL Policy will contain some form of coverage for indemnification agreements. However, the coverage may not be sufficient to insure the agreement with the Railroad. Therefore, the Railroad should insist that the Contractor procure contractual liability coverage which is sufficient to protect the obligation provided to the Railroad. This duty to procure clause may also assist the Railroad in defeating a state's Anti-Indemnification Statute. See e.g., Minn. Stat. § 337.05, Subd. 2; Holmes v. Watson-Forsberg Co., 488 N.W.2d 473 (Minn. 1992).

The indemnification obligation running in favor of the Railroad (unlike other parties) often runs afoul of the Contractor's CGL Policy's Contractual Liability Exclusion. Specifically, typical CGL coverage for bodily injury or property damage is excluded if "the insured is obligated to pay

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damages by reason of the assumption of liability in a contract or agreement." See e.g., Insurance Services Organization ("ISO") Commercial General Liability Form CG 00 01 10 01 at p. 2.[2] Therefore, unless an exception to the exclusion applies, the main provision of this exclusion bars coverage for the Contractor's liability to indemnify the Railroad.

The Contractual Liability Exclusion does contain an exception which restores coverage for liabilities "assumed in a contract or agreement that is an 'insured contract,' provided the bodily injury or property damage occurs subsequent to the execution of the contract or agreement." Id. The standard insurance form's definition of an "Insured Contract," however, does not include indemnity obligations which would arise in most scenarios where the Contractor would either be doing work for the Railroad, or be accessing Railroad property to perform work for another. Specifically, while an indemnification agreement taken on in a sidetrack agreement would be covered, similar obligations in an easement or license agreement are not covered when the agreement is "in connection with construction or demolition operations on or within 50 feet of a railroad." Id. Also, the indemnification obligation in favor of the Railroad is not insured when the "'bodily injury' or 'property damage' aris[es] out of construction or demolition operations, within 50 feet of any railroad

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[2] The Insurance Services Organization ("ISO") publishes "standard" insurance forms which are promulgated from time to time by the industry. "CG" forms address commercial general liability risks. Each CG form is designated by a set of four two-digit numbers. The first two sets of numbers (here 00 01) describe the type of form involved (here, the commercial general liability base coverage form). The second two sets of numbers describe the edition date of the form (here 10 01 (October 2001)). It is absolutely imperative that ISO forms be identified, not just by the form number, but by the edition date as significant changes have taken place to all forms in the years since each form was originally issued.

property and affecting any Railroad bridge or trestle, tracks, road beds, tunnel, underpass, or crossing."

The insurance industry recognizes that Railroads require coverage for the indemnification set forth in its Contractor Agreements. Therefore, insurers will usually agree to have the Contractor's CGL Policy endorsed with a standard ISO Form, number CG 24 17 10 01 ("Contractual Liability – Railroads"), to eliminate Railroad-related limitations to Insured Contract coverage discussed above. Form CG 24 17 10 01 is a scheduled form which requires the Railroad to be listed on the form, as well as a description of the "Designated Job Site." The "Designated Job Site" description should be sufficiently broad to encompass all potential areas which might be impacted by the Contractor's operations or work.

However, simply because the "Contractual Liability – Railroads" form is available does not mean that the insurer will automatically add the Endorsement to the Contractor's policy. As more fully discussed below, in 2004, the insurance industry modified several of its "Additional Insured" standard endorsement forms to potentially severely limit the scope of coverage available under a Contractor's CGL policy. This modification has also been implemented in the industry's revisions to the "Insured Contract" definition in the endorsements addressing a Contractor's contractual liability to a railroad. In conjunction with these changes, ISO issued a new form CG 24 26 07 04 designed to limit an indemnitee's contractual liability coverage to only bodily injury or property damage that "is caused, in whole or in part, by [the Contractor] or by those acting on your behalf." Id. This restricts a Contractor's coverage for its indemnification obligation in two respects. First,

the standard form Insured Contract definition did not contain any nexus requirement between the Contractor's acts or omissions and the injury or damage. Therefore, so long as the contract was an Insured Contract, there was coverage, even if the Contractor was not at fault. This Endorsement requires that there be a causal link between the bodily injury or property damage and the (negligent?) acts or omissions of the Contractor. Second, coverage designed to protect a Contractor from its indemnification obligation is now lost if the indemnitee is solely at fault for the injury or damage at issue.

For some reason, when the ISO changes to the Additional Insured forms and the Insured Contract definition were implemented in 07 04, ISO failed to revise the "Contractual Liability – Railroads" form discussed above. ISO sought to remedy this problem with the issuance of a new form, CG 24 27 03 05, which is designed to replace CG 24 17. This new form mirrors the changes discussed in regards to the 07 04 Amendment of the Insured Contract Definition. The Contractor's contractual liability coverage for bodily injury or property damage only applies if the injury or damage is caused in whole or in part by the named insured or those acting on behalf of the named insured. This restricts a Contractor's coverage for its indemnification obligation to the Railroad in the same two respects as discussed above. First, Form CG 24 17 10 01 did not contain any nexus requirement between the Contractor's acts or omissions and the injury or damage. Therefore, so long as the contract was an Insured Contract, there was coverage, even if the Contractor was not at fault. Second, indemnification coverage for the Contractor is now lost if the Railroad is solely at fault for the injury or damage at issue.

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Limited Contractual Liability Coverage for Personal and Advertising Injury Endorsement: If the Railroad expands the scope of the indemnification involved in the agreement to include personal and advertising injuries, an additional ISO Form may be of interest. The Contractor's CGL Policy, if it follows standard language, will likely include coverage for personal injury and advertising injury. However, this protection contains a broad exclusion to bar coverage for personal injury and advertising injury "for which the insured has assumed liability in a contract or agreement." Form CG 00 01 10 01 at p. 6. Therefore, even if the Railroad bargained for indemnification of these additional liabilities, there would not usually be coverage available for the Contractor for the obligation.

The insurance industry has recognized that contractual liability coverage for at least some of these liabilities is marketable. ISO has issued a Form CG 22 74 10 01, entitled "Limited Contractual Liability Coverage for Personal and Advertising Injury" to address this issue. This is a scheduled form which requires the designated contract or agreement to be listed on the endorsement. If the endorsement is attached to the Contractor's policy, the Contractor would have coverage for an indemnification agreement which assumes the Railroad's liability for personal injury related to false arrest, detention and imprisonment.

Because the insurance industry has this limited endorsement, it may well be that the Contractor's CGL carrier would reject attempts to expand the exceptions in this endorsement on a manuscript basis to have the Contractor covered for all contractually-assumed personal injury and

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advertising injury liability. However, this limited indemnification coverage for some personal injury and advertising injury offenses is better than nothing.

Defense Fees and Costs Payment: Even if there is Insured Contract coverage for settlements or judgments under the Contractor's CGL policy for bodily injury, property damage or other injury, there is a question as to how the Railroad's defense fees, costs and disbursements will be paid. The Contractor's CGL policy contains two separate provisions which may be applicable to those amounts. The first provision is found in the standard CGL Policy's "Supplementary Payments" provision. This provision states that, so long as the following conditions are met, the Contractor's CGL carrier will defend the Railroad in an action where both the contractor and the Railroad are named as defendants:

a. The "suit" against the Railroad seeks damages for which the insured has assumed the liability of the Railroad in a contract or agreement that is an "insured contract";

b. The Contractor's CGL policy applies to the liability assumed by the Contractor;

c. The obligation to defend, or the cost of the defense of, the Railroad has also been assumed by the Contractor in the same "insured contract";

d. The allegations in the "suit" and the information the Carrier knows about the "occurrence" are such that no conflict appears to exist between the Railroad's and Contractor's interests;

e. The Railroad and the Contractor each ask the Carrier to conduct and control the defense of the Railroad, and further agree that the Carrier may assign the same counsel to defend both the Contractor and the Railroad; and

f. The Railroad:

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(1) agrees in writing to:

(a) cooperate with the Carrier in the investigation, settlement or defense of the "suit";

(b) immediately send the Carrier copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) notify any other Insurer whose coverage is available to the Railroad; and

(d) cooperate with the Carrier with respect to coordinating other applicable insurance available to the Railroad; and

(2) provides the Carrier with written authorization to:

(a) obtain records and other information related to the "suit"; and

(b) conduct and control the defense of the Railroad in such "suit."

ISO Form CG 00 01 10 01 at p. 8.

So long as these numerous conditions are met, the carrier will pay the defense expenses "in addition to limits" of the Contractor's indemnity coverage (i.e., the defense expenses will not erode the indemnity limits of insurance).

If the Supplementary Payments provisions do not apply, there is another provision which is available to pay for the defense fees and costs. This language is found in the policy's bodily injury and property damage "Contractual Liability Exclusion:"

> "Solely for the purposes of liability assumed in an "insured contract," reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of 'bodily injury' or 'property damage,' provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same 'insured contract'; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceedings in which damages to which this insurance applies are alleged."

ISO Form CG 00 01 10 01 at p. 2.

This provision provides fallback protection for the Railroad-indemnitee to confirm that, if defense expenses are not paid under the contractor's CGL policy's supplemental payments provisions, the defense costs will nonetheless be paid. This language is much more passive than the onerous conditions set forth in the policy's Supplementary Payments provision. Most importantly, payments of defense fees and costs are not conditioned on the Insurer controlling the defense. However, this comes at a "cost" of the defense fees and costs coming out of the CGL policy's indemnity limits, thereby eroding those limits.

Of note, there is no similar provision contained in the personal injury and advertising injury Contractual Liability Exclusion. This is logical given that the exclusion is very broad based and does not contain the exceptions set forth in the policy's bodily injury and property damage counterpart. However, the concept of paying defense fees and costs seen is not in the Limited Contractual Liability Coverage for Personal and Advertising Injury Endorsement discussed above either.

The changes to the Supplementary Payment Provisions and the Contractual Liability Exclusion addressing defense expenses are a fairly recent addition to the standard form CGL coverage. Prior to these provisions being part of the policy, numerous coverage disputes arose as to whether defense expenses were included within the "assumption of tort liability of another." As

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a practical matter, these provisions now, at a minimum, allow the CGL carrier to immediately pick up the Railroad's defense, subject to resolving whether the defense is in addition to limits or eroding the coverage, depending on the applicability of these parts of the policy.

An example of the difficulties caused by the lack of this additional language and the supplementary payments in the contractual liability exclusion is seen in a recent Minnesota case, Soo Line Railroad Co. v. Brown's Crew Car of Wyoming, 694 N.W.2d 109 (Minn. App. 2005). In Brown's, the contractor agreed to indemnify and defend the railroad for any loss related to the car transportation services provided by the contractor. An automobile accident injured two of the railroad's employees, who later sued several third parties. One of the third parties in turn sued the railroad for indemnification or contribution. The railroad tendered the suit to the contractor under the indemnification agreement in place between the parties. The contractor refused to defend the railroad. Ultimately, the underlying case was settled, apparently without the railroad participating in funding any part of the settlement.

The carrier challenged the railroad's claim the carrier owed the contractor for the contractor's obligation to defend the railroad. The carrier argued that the contractor's assumption of the obligation to pay defense fees and costs was not an assumption of "tort liability" of the railroad, especially when the railroad was not found at fault in the underlying litigation. Such an interpretation, which had support in at least one other jurisdiction, would have left the contractor obligated to pay the railroad's defense expenses in any situation where the railroad was ultimately not found at fault

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(either because of settlement without contributing to the settlement or by court Judgment) despite the fact the railroad had been sued for tort liability.

The court rejected the CGL carrier's technical application of the Insured Contract language. In so doing, the Court determined that defense costs are inseparable from the underlying events of the accident which gave rise to the indemnification claim. Since the fees and costs were incurred in defense of a tort claim, they are compensable to the railroad under the indemnification agreement, and are insured under the exception to the Contractual Liability Exclusion as an "Insured Contract." The Court was not swayed by the carrier's argument that the attorneys' fees and legal expenses were not a claim for liability to pay for bodily injury, but were a claim for liability to pay fees and expenses, items which are not bodily injury.

In sum, Brown's is noteworthy for the types of problems policyholders faced prior to the time the Supplementary Payment Provision and the Contractual Liability Exclusion were changed to address defense expenses. These modifications no doubt meet with a Railroad's expectation of being reimbursed in a timely fashion for defense expenses which are subject to the indemnification agreement. Therefore, it is likely scenarios such as Brown's should not arise with any frequency in the future.

Control of the Railroad's Defense Pursuant to the Indemnification Agreement: An indemnification agreement generally will contain language compelling the indemnitee to "defend" or "fully defend" the indemnitor. What does this language mean, especially if a Railroad drafts the provision such that a Contractor can argue the words are ambiguous? It is not unheard of for a

Contractor to try to limit its defense obligation to only those claims for which the Railroad may obtain indemnity. Therefore, if multiple claims are brought against the Railroad, some of which are subject to the indemnification clause and some are not, a Contractor may well be required to *only* defend the Railroad on those claims for which indemnity may later be sought. This would ultimately require a tedious allocation of attorneys' fees and costs by defense counsel between covered and uncovered claims in order to determine which entity may be responsible for paying the defense expenses. Therefore, the Railroad may want to consider adding a clause to the indemnification provision requiring the Contractor to fully defend the insured on all claims or causes of action asserted so long as any one claim or cause of action is subject to the defense obligation. In addition, the Railroad may wish to include a provision in the Contractor Agreement which permits the Railroad to control its defense subject to the Railroad's consenting to a waiver of that right.

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ADDITIONAL INSURED COVERAGE

An additional time-tested approach to offload the Railroad's risk is to compel the Contractor to add the Railroad as an Additional Insured on the Contractor's CGL policy. Additional Insured status provides the Railroad with an attractive risk transference mechanism, usually at minimal costs incurred by the Contractor. The practice is widespread and well accepted within the insurance industry.

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Despite its "common" nature, there are numerous pitfalls involved with the Additional Insured status which could limit or render the protection illusory. Therefore, a Railroad should be mindful of the snares which await an attempt to obtain, and then later collect on, Additional Insured coverage.

Preliminarily, a few states have enacted versions of their Anti-Indemnification Statutes to not only prohibit the transference of the obligation to pay the indemnitee's fault through an indemnification agreement, but to also prohibit the indemnitee from compelling the Contractor to procure CGL coverage by adding the indemnitee as an Additional Insured under its CGL policy. Two examples of such statutes are seen in Oregon and New Mexico. Oregon's Anti-Indemnification Statute, Ore. Stat. § 30.140, has recently been interpreted in Walsh Constr. Co. v. Mutual of Enumclaw, 104 P.3d 1146 (Or. Jan. 27, 2005) in just such a fashion. In Walsh Constr., the Oregon Supreme Court held that Oregon's Anti-Indemnification Statute in construction contracts is drafted in a manner which voids any clause compelling the indemnitor to also name the indemnitee as an Additional Insured under its Commercial General Liability policy. Therefore, it is incumbent to determine if the jurisdiction's statutes and caselaw permit the imposition of an Additional Insured status in the Contractor's CGL policy.

The Railroad also should consider whether the endorsement utilized actually provides the coverage intended by the parties. This involves an analysis of the Contractor's CGL policy provisions to determine what "standard" language is being used by the Contractor's Carrier. ISO has developed several Additional Insured forms which are used in various situations. Typically, a Railroad will see a Carrier has endorsed a version of ISO Form CG 20 10, or Form CG 20 26, onto its Contractor's

CGL policy in response to a request for Additional Insured status. Form CG 20 10 is the most common endorsement utilized. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VI.H.10 (Nov. 2004). There are other Additional Insured forms which are available, but are generally not considered appropriate in a Railroad/Contractor situation. All Additional Insured forms are scheduled forms which require the Endorsement to name the Additional Insured in the schedule before coverage can attach.

In 2004, the insurance industry made comprehensive changes to its Additional Insured Endorsements. All Additional Insured forms were "updated" in "07 04" editions to "clarify" the scope of coverage the Additional Insured is provided under the Contractor's CGL policy. Unfortunately, this "clarification" likely has the result of reducing, sometimes severely, the scope of CGL coverage the Railroad may have under the Contractor's CGL policy. The following details how these changes impact the scope of coverage.

Prior to the insurance industry's 2004 standard policy language revisions, Additional Insured status conveyed coverage to a Railroad with respect to liability "arising out of" either the Contractor's "work" or "ongoing operations" (depending on the edition of the form) performed for a Railroad. "Arising out of" is not the same as a "proximate cause" or even a "causal" relationship. Instead, it denotes a more tenuous relationship under which coverage would not be provided "but for" the connection between the Named Insured Contractor's activities and the Additional Insured Railroad's liability. "Arising out of" in essence means originating from, or having its origin in,

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growing out of, or flowing from. See, Associated Indep. Dealers, Inc., v. Mutual Serv. Ins. Cos., 304 Minn. 179, 182, 229 N.W.2d 516, 518 (1975).

An example of this "but for" interpretation is seen in Andrew W. Youngquist v. Cincinnati Ins. Co., 625 N.W.2d 178 (Minn. App. 2001). In Youngquist, a subcontractor's employee was injured on a building construction site while providing subcontracted-for electrical work. There did not appear to be any fault or negligence on either the employee or the subcontractor. The contractor was listed as an Additional Insured under the subcontractor's policy. The endorsement utilized to add the contractor as an Additional Insured utilized the "arising out of" language. Under these circumstances, the court had no problem in finding that the subcontractor's policy insured the contractor for CGL coverage as the injury arose out of the subcontractor's work. Moreover, the court did not require that the contractor be vicariously liable for the injury in order for the coverage to attach.

Recent changes in all ISO Additional Insured forms attempt to narrow the circumstances under with the CGL carrier will be required to cover the Additional Insured. First, the 2004 editions eliminate the "arising out of" language, and replaces it with the term "caused . . . by." Under these new forms, there must be more than a tenuous "but for" relationship between the Contractor's ongoing operations and the loss in order for the Railroad to be covered.

The second narrowing of the Additional Insured status seen in the 2004 editions of the Additional Insured forms is the elimination of coverage when the Additional Insured is solely at fault or otherwise negligent for the loss. The forms create this "exclusion" by stating that the bodily injury,

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property damage, or personal injury and advertising injury must, "in whole or in part," be caused by the Contractor's acts or omissions, or those acting on the Contractor's behalf, in the performance of the contractor's ongoing operations at the scheduled locations, for the Railroad to be an additional insured under the policy. See e.g., ISO Form CG 20 10 07 04. In other words, even if the Railroad bargained for Additional Insured status under the Contractor's CGL policy, and the agreement passes muster under the jurisdiction's statutes and caselaw, the Railroad will not have coverage under the Contractor's policy if the Contractor is solely at fault for the loss at issue.

Completed Operations Considerations: There are additional limitations in the ISO Additional Insured forms which the Railroad should consider when negotiating with Contractors. In situations where the project involves mere access to or across Railroad property, the Railroad may not need to be directly insured for risks associated with putting the project to use after construction is completed. However, if the Contractor Agreement involves a project on Railroad premises, the Railroad would be highly interested and motivated in obtaining completed operations coverage for some length of time after the completion of the project.

When the Additional Insured endorsement Form CG 20 10 debuted in 1985, the Additional Insured received coverage with respect to "liability arising out of 'your work' performed for that insured by or for you." ISO Form CG 20 10 11 85. "Your work" was and is generally defined as the work or operations performed by the Contractor for the Railroad. Therefore, this early Additional Insured form provided not only coverage in relation to the Contractor's operations while being performed, but also provided coverage for the Contractor's *completed operations* once the project

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was put to use. This "completed operations" coverage was valuable additional protection for the Railroad if, for some reason, injury or damage arose after the project was completed.

The insurance industry did not believe it should be covering Additional Insureds for its Named Insured's completed operations. Therefore, ISO modified the Additional Insured endorsement Form CG 20 10 in its October 1993 edition to only convey Additional Insured coverage to "liability arising out of your *ongoing operations* performed for that insured." ISO Form CG 20 10 10 93.[3] Despite the intent to eliminate "completed operations" coverage, many Additional Insureds continued to argue that the broad "arising out of" language, in conjunction with "ongoing operations," continued to provide completed operations coverage to the Additional Insured once the project was completed, as the injury would not have occurred "but for" the Contractor's operations.

To eliminate this possible ambiguous interpretation, ISO again modified the Additional Insured Form CG 20 10 in 2001 by adding explicit completed operations exclusions to the coverage:

> "There is no coverage for injury or damage that occurs:
>
> > after all the work for the Additional Insured has been completed, or
> >
> > after the portion of the work out of which the injury or damage occurs has been put to its intended use."

ISO Form CG 20 10 10 01. This revision put to rest any effort for an Additional Insured to seek completed operations coverage under these endorsements.

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[3] There are modified versions of the 11 83 editions of the ISO Additional Insured forms which also contain this "ongoing operations" language. Therefore, a Railroad should carefully review the Contractor's Additional Insured form language, even if it claims to be form CG 20 10 11 85, to determine whether "work" or "ongoing operations" is utilized in the form.

As will be seen below, and despite these changes, Railroads should continue to insist on utilizing the original language in Additional Insured endorsements which utilize "arising out of" and also "your work" to provide broad CGL coverage for both operations and completed operations. In addition, a Railroad may best be served by also requiring the Contractor to name the Railroad as an Additional Insured for a certain length of years following the project's completion. Clearly, the Railroad could not request such an Additional Insured status indefinitely. However, Additional Insured status may well be appropriate for two to three years following the project's completion. The exact length of time, however, should be considered on a case-by-case basis so as to not overburden any party with unreasonable clauses.

Coverage Limits: Another concern regarding the Additional Insured Endorsement is determining just how much coverage is available for a particular loss. Because the Contractor Agreement requires the Contractor to maintain coverage limits in some amount, there may be a difference in the Contractor's liability limits already in place with its Carrier and the limits mandated by the Agreement. Further, the Contractor's limits may be eroded by other claims without the Railroad's knowledge. Therefore, it is important to consider whether the Contractor should notify the Railroad of the erosion of limits as of a certain point, and/or compelling the Contractor to replenish the limits at some additional point. As a practical matter, these "notice" provisions are cumbersome, and rely on a later events usually not occurring in the normal course of events. Therefore, it would be very easy for even a conscientious contractor to overlook providing the Railroad with mandated notice until it was too late to address the eroded limits issue.

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Instead, a better approach is to demand that the Contractor's policy contain an amendment of limits form which provides for separate operations, and, where appropriate, completed operations, coverage limits to the specific project involved. There are a variety of forms to consider. For example, ISO Form CG 25 01 07 98 addresses Amendment of Limits of Insurance (Designated Project or Premises). This Endorsement has the ability to modify the limits of all the coverages available under the Contractor's policy to amounts that would be applicable to the specific project. However, this form does not create separate limits, and therefore the limits are subject to erosion from other claims against the Contractor for liability on other non-Railroad sites. This form is also impractical when the scheduled limits in the Contractor Agreement are actually less than the general liability limits of the Contractor; there is no reason to artificially limit the amount of coverage available for the project if the Contractor's insurance coverage limits are higher than those stated in the contract. The only appropriate time to potentially use this form is in situations where the Railroad mandates coverage limits that are higher than what the Contractor has in its CGL coverage. However, as noted above, there is no guarantee those limits would actually be available once a claim is made, as those limits could be eroded by non-project losses.

A possibly appropriate form to utilize is ISO form CG 25 03 03 97 ("Designated Construction Project General Aggregate Limits"), or its "locations" sibling, ISO form CG 25 04 03 97 ("Designated Location(s) General Aggregate Limits"). The former form is utilized when the Railroad is involved in construction projects. The latter form is utilized in situations where mere access to or through the Railroad premises is required in order for the Contractor to perform work for others.

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