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Supreme Court affirms *Walsh Construction v. Mutual of Enumclaw*: additional insured endorsements required by construction contracts are void for now

By Ronald J. Clark

Historically, it has been common for general contractors to require as one of the conditions on a subcontract that the subcontractor agree to indemnify the general for any damages that may arise out of the subcontractor's work. Moreover, the standard general contract condition also requires the subcontractor to obtain liability insurance and to ensure that general is listed as a "additional insured" on the liability coverage. Because the subcontractor is understandably anxious to be awarded the subcontract, there was rarely any negotiation over to this liability-shifting condition.

In *Walsh*, the subcontractor had signed such a subcontract agreement and had obtained the necessary additional insured endorsement from its liability carrier (Mutual of Enumclaw) in favor of the general contractor, Walsh Construction. When one of the subcontractor's employees was injured on the job and filed suit against Walsh Construction, Walsh tendered the defense and indemnity of the case to Mutual of Enumclaw. Enumclaw rejected the tender based on the strength of ORS 30.140.

ORS 30.140 provides:

"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 the whole or in part by the negligence of the indemnitee is void."

Walsh Construction then settled the underlying injury case against it and brought this breach of contract action against Enumclaw arguing that Enumclaw had breached the additional insured endorsement in the liability policy. The trial court had ruled in favor of Enumclaw, and the Oregon Court of Appeals affirmed that ruling. The Court of Appeals reasoned that the legislature intended ORS 30.140 to void not only the indemnity requirement in the construction subcontract, but also voided any requirement that the subcontractor must obtain liability coverage in favor of the general contractor. The court also ruled that any subsequently-obtained additional insured coverage for the general contractor as required by the construction subcontract was likewise void and unenforceable. In the recent *Walsh* decision filed by the Oregon Supreme Court on January 27, 2005, the court of appeals decision was adopted almost verbatim and was affirmed.

It seems unlikely that this will be the last word on the issue. The practice in the construction industry of having subcontractors procure the liability insurance to cover the general contractor is too prevalent to simply die a quiet death. Already there is legislation before the Oregon Legislature that would essentially "overrule" the Supreme Court decision. The most likely result is a modification in the statute (ORS 30.140) such that it only voids indemnity provisions to the extent they would require the subcontractor to defend or indemnify the general for liability imposed for the general's own conduct. If the statute is modified in that fashion, it would seem to take away the underpinning to the argument that the additional insured endorsement must be voided. In other words, a system may still emerge by which subcontractors are required as a condition of the subcontract to obtain liability insurance on behalf of the general.