Sharing the Load:

Developments in Spreading the Costs of CD Claims

Perrin Construction Defect Conference 2025

Allocation Across the Coverage Block

- Trigger of Coverage Theories: exposure, manifestation, injury-in-fact, continuous

- Allocation: All Sums/Joint & Several, Time-on-Risk

Allocation Across the Coverage Block

- *Ex*: South Carolina – modified, continuous injury-in-fact trigger
  - *Crossmann Cmtys. of N.C. v. Harleysville (S.C. 2011)*
    - "[W]e find that each triggered insurer must indemnify only for the portion of loss attributable to property damage that occurred during its policy period."
    - "No reasonable policyholder could have expected that a single one-year policy would cover all losses caused by [a progressive injury] over the course of several decades."
    - "[T]he 'joint and several' theory creates a false equivalence between an Insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage"

Allocation Across the Coverage Block

- But *Crossmann* decided under 1996 iteration of CG 00 01
- In 1999, ISO added new language to CG 00 01:

> c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under paragraph 1. of **SECTION II - WHO IS AN INSURED** or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

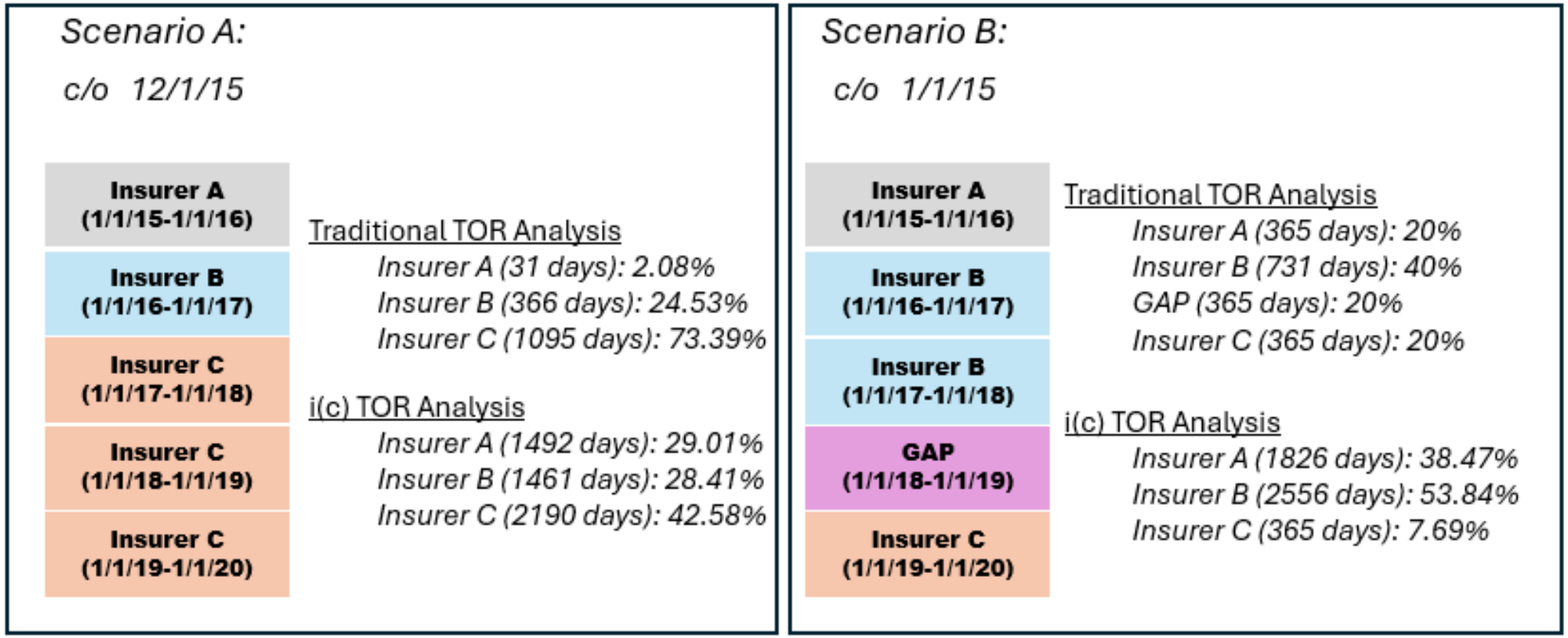
Allocation Across the Coverage Block

- Section i(c) case law:
  - *Twin City Fire Ins. Co. v. Am. Cas. Co*. (D. Col. 2016) ("[S]ubsection c. extends American Casualty's Policy's coverage to the continuation of the property damage after the policy period. Therefore, its time-on-the-risk is the entire coverage period, i.e., 2,296 days")
  - *Grange Mut. Cas. Co. v. W. Bend Mut. Ins. Co.* (Ind. App. 2011) ("[W]e hold that because the West Bend policy was triggered at the time McCurdy negligently fractured the drain pipe, the policy covers all damages that flowed from the original damage, including the extensive flood damage")

Allocation Across the Coverage Block

- *Portrait Homes v. Penn. Nat'l Mut. Cas. Ins. Co.* (S.C. Ct. App. 2023) ("[T]he trial court concluded that the progressive property damage caused by continuous or repeated exposure to water intrusion occurring after the end of a policy period is deemed to be included in what is covered by the policy … We find no error in the trial court's reasoning…")

Allocation Across the Coverage Block



Allocation to Non-Parties: Getting Non-Defendants on Verdict Form

- Another way to share the load is to request for the jury to allocate fault to parties other than named defendants on the verdict form
- Gives effect to the “empty chair” defense

Allocation to Non-Parties: Getting Non-Defendants on Verdict Form

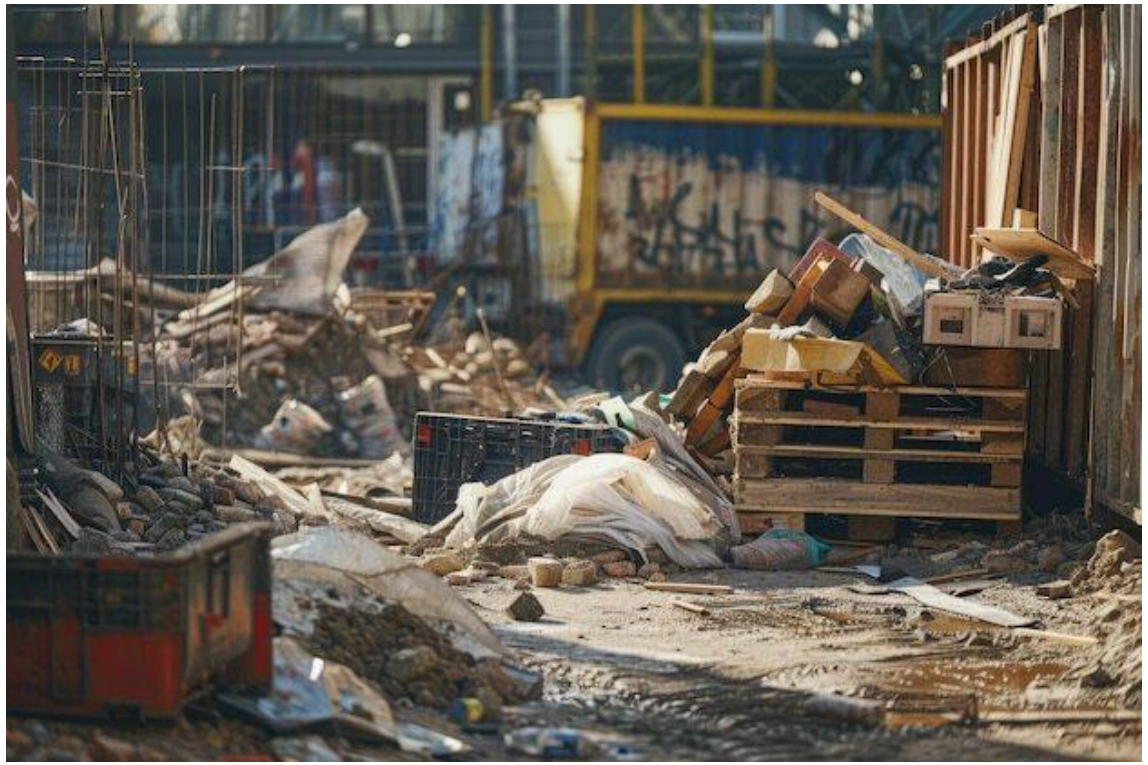
- States differ in whether they allow, require, or forbid apportionment of fault to third parties

- Most jurisdictions permit inclusion of all tortfeasors in apportionment question, including non-parties (particular requirements/nuances may vary per state)
  - *AK, AZ, CA, CO, FL, GA, HI, ID, IL, IN, KS, KY, LA, MI, MN, MS, MT, NH, NJ, NM, NY, ND, OH, OK, TX, TN, UT, WA, WV, WI, WY*

- However, some jurisdictions do not allow consideration of non-party fault
  - *AL, IA, NC, MA, MD, MO, MT, NV, OR, PA, RI, SC, VT*

Allocation to Non-Parties Case Study: SC Tort Reform

Before H-3430 Bill



SC Tort Reform Bill

- Effective January 1, 2026
- New-and-improved “Empty Chair” defense
  - Add “tortfeasors” on the verdict form upon motion
- Set-off in lieu of adding nonparty to verdict form
- Settling non-parties required, with limited exceptions, to be added to the verdict form

Where's My Setoff?

- Setoff is an equitable principle that entitles a non-settling defendant to a "credit for the amount paid by another defendant who settles for the same cause of action." *Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 531, 905 S.E.2d 380, 391 (2024).
- Purpose → prevent "double recovery"

Where's My Setoff?

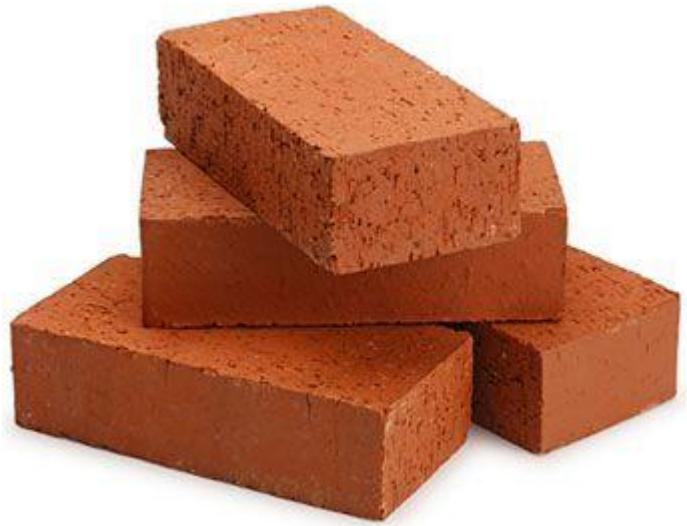
- Implicated when → Multiple parties may be responsible for a claim + plaintiff recovers funds in a settlement prior to trial
- Setoff considerations
  - "Same" v. "Different" Injuries

Where's My Setoff?

- Setoff rules ultimately vary by state, and a defendant may be entitled to setoff at common law or by statute
  - Examples *(not exhaustive)*:
    - *IL, SC, IN, TX*
      - Right at common law and/or right codified by statute
    - *AZ & FL*
      - Abolished or largely eliminated joint and several liability, so settlement credits are unnecessary/unavailable

Where's My Setoff?

- Case Study – New SC cases:
  - *Palmetto Pointe*
  - *Green*



Risk Transfer:
Additional Insured & Contractual Identification

- Additional Insured (“AI”) Risk Transfer
- Contractual Indemnification (“CI”) Risk Transfer

Additional Insured: Endorsements

- An Additional Insured ("AI") is a person or organization that the Named Insured agrees, in a contract, to have added to its own policy as an "insured".
- The policy must contain an AI endorsement or provision to confer AI status, which is generally done by modifying the definition of "insured".
- The Insurer's coverage obligations are to the entity qualifying as an additional insured.
- There are two general types of AI endorsement:
  - Specifically naming an entity
  - Blanket – usually "as required by written contract"

Sample AI Endorsement Language

A. Section **II** — Who Is An Insured is amended to include as an additional insured any person or organization for whom you have performed operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" performed for that additional insured and included in the "products-completed operations hazard".

However, the insurance afforded to such additional insured:

1. Only applies to the extent permitted by law; and
2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

AI Status Analysis

1. "with whom you have agreed **in writing in a contract or agreement**"

2. That "**such person or organization**" be added as an additional insured

3. The putative AI's liability must be:
    1. For property damage or bodily **injury caused in whole or in part by the named insured's work**
    2. **The work must have been done for that putative AI**
    3. **The work must have be included in the PCOH**

Additional Insured Issues

- If an entity demonstrates that it meets the requirements of the applicable AI provision, it has not established an entitlement to a defense or indemnification. Rather, it has only established that it qualifies as a type of insured referred to as “an additional insured.” The insurer must now conduct a thorough coverage evaluation of the claim against that specific entity to determine whether there is in fact a duty to defend and/or indemnify.

- That analysis starts with reviewing whether the claim against the insured is within the scope of the insuring agreement, and continues through analysis whether any of the exclusions, conditions or other limiting provisions apply as to that insured.

Contractual Indemnification: Types of Indemnity Provisions

- **Broad**: protects the indemnitee from virtually ALL liability, including liability caused by its own sole negligence.

- **Intermediate**: protects the indemnitee from all liability other than where the indemnitee is solely negligent; both indemnitor and indemnitee can be at fault; allows indemnification for loss caused in whole or in part by the indemnitor's negligence.

- **Restrictive**: seeks to protect the indemnitee from only that liability caused by the indemnitor's acts, errors or omissions; any negligence by the indemnitee bars indemnification

Contractual Indemnification Obligations

- The ***contractual indemnification obligation*** is between a contractor and the party it contracted with – it is the Named Insured's contractual promise.
- The ***coverage obligation*** for a contractual indemnification claim is between the Named Insured and the Insurer.
- The Insurer's coverage obligation to provide coverage for contractual indemnity does ***NOT*** extend directly to the Indemnitee.
- In other words, the Insurer's obligation is to the Named Insured, not the Indemnitee.

Impact of NI's Contractual Indemnity Agreements

- If the Named Insured rejects the CI tender and gets sued by the Indemnitee:
  - Insurer may have a duty to defend the Named Insured against a claim asserting that the Named Insured owes contractual indemnification for BI or PD.
  - This defense of the NI is outside limits

- If the Named Insured accepts a valid CI tender, or is ordered to provide CI:
  - There is no limit of liability on the NI's obligation to the Indemnitee.
  - Defense costs paid on a covered CI claim are within limits and are paid by the Insurer as "damages".
  - There generally are no priority of coverage issues – contractual indemnity is a "pass through" to the Named Insured's policies (primary and excess).
  - ***Insurer's coverage obligations are to the Named Insured. All coverage defenses apply.***
  - No direct coverage obligation is owed to the Indemnitee.

CI Risk Transfer in Litigation?

- Beware the Indemnification Clause!
- Implications for risk transfer in CD cases

50 State Legal Matrix – Anti-Indemnity Statutes for 2025

The following matrix provides insight into state anti-indemnity statutes. Fifty (50) states and the District of Columbia have enacted anti-indemnity statutes that limit or prohibit enforcing indemnification agreements in construction settings. Anti-indemnity legislation is intended to prevent the party with superior bargaining power from taking advantage of the party with inferior power. Also, some states with anti-indemnity legislation protect only the government by limiting the application of these rules to public projects.

Please be advised that hyperlinks were added to the statutory and case citations. By clicking on the citation hyperlinks, you will be brought to the webpage containing the statutes and case law that will provide the relevant information.

GRSM50
GORDON REES SCULLY MANSUKHANI
YOUR 50 STATE LAW FIRM

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
AK	Construction & Design	Alaska Statute § 45.45.900	No	Yes	Yes
AL	Not Applicable	Ala. Code § 41-9A-3(b). Indemnity provisions are generally held valid. Indemnification for an indemnitee's own negligence must be clearly and unequivocally stated. *Craig Constr. Co., Inc. v. Hendrix*, 568 So.2d 752 (Ala. 1990). There is a limit to Alabama's acceptance of broad indemnity agreements. "Agreements that purport to indemnify another for the other's intentional conduct are void as a matter of public policy." *Price-Williams Associates, Inc. v. Nelson*, 631 So. 2d 1016, 1019 (Ala. 1994).	Yes	Yes	Yes
AR	Construction & Design	A.C.A. § 4-56-104; *Arkansas Power & Light Co. v. Home Ins. Co.*, 602 F.Supp. 740, 746 (E.D. Ark. 1985). A.C.A. § 22-9-214 (public construction)	No	Yes	Yes
AZ	Construction & Design	Ariz. Rev. Stat. §§ 34-226; 41-2586 (public construction) and 32-1159; 32-1159.01 (private construction)	No	Private Contracts Only	Yes
CA	Residential Construction Contracts post Jan. 1, 2009	Cal. Civ. Code § 2782(a);(d)	No	No	Yes
CA	Non-residential Construction Contracts	Cal. Civ. Code § § 2782(b); (c) & 2782.05 (Contracts entered into on or after January 1, 2013 will no longer be allowed to contain indemnification for the indemnitee's own active negligence)	No	Yes but only for passive fault for contracts entered into before Jan 1, 2013	Yes
CO	Construction	C.R.S. § 13-21-111.5. (Applicable to construction agreements entered into on or after July 1, 2007). For construction contracts entered into before July 1, 2007, indemnification is allowed for the indemnitee's own negligence if clearly and unequivocally stated. *Williams v. White Mountain Constr. Co.* 749 P.2d 423, 426 (Colo. 1998)	No (except for contracts entered into before July 1, 2007)	No (except for contracts entered into before July 1, 2007)	Yes
CO	Construction & Design with Public Entities	C.R.S. § 13-50.5-102	No	No	Yes
CT	Construction	Conn. General Statute § 52-572k (Applicable to contracts entered into on or after October 14, 1977)	No	No	Yes
DC	Construction	D.C. Code § 27A-202 (applicable to contracts entered into on or after April 1, 2023). For contracts before April 1, 2023, case law provides that indemnity provisions should not be construed to permit an indemnitee to recover for its own negligence unless the court is convinced that such an interpretation reflects the intention of the parties. *Parker v. John Moriarty & Assocs. of Virginia, LLC*, 332 F. Supp. 3d 220, 248 (D.D.C. 2018)(citing *W.M. Schlosser Co., Inc. v. Maryland Drywall Co.*, 673 A.2d 647, 653 (D.C. 1996)	No (except for contracts entered into before April 1, 2023)	Yes	Yes
DE	Construction & Design	Del. Code Ann. Tit. 6 § 2704	No	No	Yes
FL	Construction	Fla. Stat. § 725.06 (Applicable to contracts entered into on or after July 1, 2001)	No, unless there is a monetary limit	No, unless there is a monetary limit	Yes
FL	Design	Fla. Stat. § 725.06 (Applicable to contracts entered into on or after May 25, 2000)	No	No	Yes
GA	Construction	Ga. Codes Ann. § 13-8-2(b)	No	Yes	Yes
GA	Design	Ga. Codes Ann. § 13-8-2(c)	No	No	Yes

CI – Case Study

- New SC Case:
  - *Retreat at Charleston National*

CI Risk Transfer in Litigation: Takeaways

- For Subs:
  - Read and understand indemnity obligations flowing to GC
- For GC:
  - Ensure enforceability – do they require sub to indemnify for GC's own or sole negligence?
- Severability Clause might not save it – no blue pencil!
- If same contract language litigated prior, you may be bound by the ruling even if appealed

Questions?

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