

## Despite Walsh, judge enforces additional-insured coverage

In Hoffman Construction Co. of Oregon v. Travelers Indemnity Insurance Co., decided Nov. 28, 2005, a federal district court judge enforced an insurance policy provision that gave additional-insured coverage to a prime contractor. The federal court did so despite the fact that the Oregon Supreme Court had invalidated a similar additional-insured provision in its 2005 watershed decision in Walsh Construction Co. v. Mutual of Enumclaw.

In Hoffman, the prime contractor's contract with one of its subcontractors ("Subcontractor A") required Subcontractor A to name the prime contractor as an additional insured on Subcontractor A's general liability insurance policy. A laborer employed by another subcontractor was injured on the project and later sued the prime contractor for allegedly improper construction by Subcontractor A.

The prime contractor tendered defense of the laborer's suit to Subcontractor A's insurance company, based on the prime's status as an additional insured on Subcontractor A's general liability policy.

Subcontractor A's insurance company refused to accept the tender, contending that the additional-insured provision of the policy was invalid in light of the Oregon Supreme Court's decision in Walsh.

In Walsh, the Oregon Supreme

Court invalidated an additional-insured provision in a subcontractor's insurance policy on the grounds that it violated Oregon's "anti-indemnity" statute, Oregon



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Revised Statute 30.140. That statute reads in part as follows:

"(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."

The Supreme Court's decision was based on the language of

Subsection (1) of the statute, which renders void any provision in a construction contract requiring a person's insurer "to indemnify another against liability for damage ... caused in whole or in part by the negligence of the indemnitee."

In Walsh, there was no argument that the insured subcontractor had caused the injury and thus that the claim against the prime contractor was based on the prime's vicarious liability for its subcontractor's act. As such, the Supreme Court's decision presumed the claim was based on injury caused by the prime contractor itself. On that basis, the Court invoked Subsection (1) of ORS 30.140 to invalidate the additional-insured coverage.

In the Hoffman decision, the federal court pointed out that the additional-insured coverage being sought by the prime contractor was not for a claim based on the prime contractor's own misconduct but rather was for a claim based on the prime's vicarious liability for the alleged misconduct of its subcontractor. Given this distinction between the facts before it and the facts in Walsh, the federal court held that Subsection (1) of ORS 30.140 did not apply as it did in Walsh. In addition, based on the facts involved, the federal court held that the decision in Walsh did not bar Subsection (2) of ORS 30.140 from being applied to validate the prime

contractor's claim.

Said the federal court judge: "I do not find Walsh an obstacle to finding that ORS 30.140(2) applies when there is evidence of fault by a subcontractor."

The court's decision in Hoffman has significant implications for project owners, prime contractors, subcontractors and others involved in construction projects.

The federal court's ruling is not the final word on this issue because the decision interprets Oregon state law, and the Oregon Supreme Court is the ultimate arbiter of state law. However, if the federal court's reasoning withstands future legal challenges, the additional-insured provisions of liability policies on Oregon construction projects will be enforceable when the additional-insured party is sued not because of its own negligence or other wrongdoing but rather because of its alleged vicarious liability for the negligence or other wrongdoing of the insured, lower-tier party.

Thus, if Hoffman states the applicable law, project owners, prime contractors and other upper-tier parties on Oregon construction projects will be relieved of the troubling breadth of the Walsh decision.

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