Additional Insured Endorsements – A Potential Minefield

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It's a standard, run-in-the mill, you've seen one you've seen them all recommendation – make sure you get listed on someone else's CGL policy as an additional insured. Maybe more importantly, you have just agreed to list someone on your CGL. What did you give? What did you get? Considering that all additional insured endorsements are not created equal, the need for some analysis becomes apparent. But where do you start? How do you compare one additional insured endorsement to another? This analysis becomes more complicated when your client hands you an additional insured endorsement that contains an insurer's own unique wording.

Here are some areas to consider in a basic analysis of any additional insured endorsement. How much weight to give any particular area depends upon a great number of variables – not the least of which is the actual wording (or lack of wording) in the contract that requires your client to list another organization as an additional insured.

Connection to Named Insured

The coverage afforded an additional insured is usually restricted in some manner. Aside from the issue of *who* may be liable for the injury or damage, usually some *connection* between the named insured and additional insured must first be established.

Vendor Let's say a cell phone manufacturer, Cell Maker, Inc. (the named insured), using the ISO Additional Insured – Vendors endorsement (CG 20 15 07 04), lists as an additional insured on their CGL policy a retailer (vendor) who sells Cell Maker's phones. A claim is made against the retailer/vendor for injuries suffered by a customer caused by a cell phone. The retailer sends the claim to Cell Maker's CGL insurer, seeking protection for the claim as an additional insured. It quickly becomes apparent the cell phone that caused the injury *was made by a competitor of Cell Maker and not by Cell Maker*. As the retailer/vendor is an additional insured only for the cell phones *manufactured by Cell Maker*, the necessary connection has not been established between the retailer and Cell Maker – the retailer/vendor is not covered as an additional insured for this claim.

Leased Equipment Another example: a restaurant leases a walk-in freezer from a leasing company. As required by the lease contract, the restaurant (named insured) lists as an additional insured on their CGL policy the leasing company (lessor), using the ISO Additional Insured – Lessor of Leased Equipment (CG 20 28 07 04). While visiting the leasing company's premises to inspect an oven she is considering leasing, the restaurant owner falls and severely injures her knee.

She brings suit against the leasing company, who in turn seeks coverage as an additional insured under the restaurant's CGL as an additional insured. Again, the connection is not sufficient – the injury was not caused in any way by the leased walk-in freezer – the lessor has no coverage as an additional insured under the restaurant's CGL policy for the restaurant owner's injuries.

Contractors The use of additional insureds, and the coverage disputes that result from additional insured coverage, are so common in the construction industry that any discussion about additional insureds must include a mention of contractors.

Office Project Gerald's General Contracting, Inc. compels every subcontractor, including Paul's Painting, Inc., to add Gerald's as an additional insured to the subcontractor's CGL policy using the ISO Additional Insured – Owners, Lessees or Contractors (CG 20 10 07 04) endorsement listing the covered operations as the new office building project (wouldn't it be nice if insurance requirements were this clear?). Paul's complies and provides Gerald's General Contracting with the requested certificate, including the express notation that Gerald's General Contracting is an additional insured via CG 20 10 07 04 for the office project.

School Project For a separate school project in which Paul's Painting is not in any way involved, Gerald's General Contracting, who is the general contractor for the school project, has borrowed Paul's scaffolding. Unfortunately, the scaffolding at the school collapses and several people are injured, including a passerby. Gerald's General Contracting is quickly besieged with claims and lawsuits – all of which are sent to Paul's Painting, Inc. CGL insurer by Gerald's, demanding defense and indemnity as an additional insured. Gerald's is considerate enough to include along with the claim documents the certificate of insurance from Paul's issued for the office building project that conclusively demonstrates Gerald's is an additional insured on Paul's CGL.

No Connection Paul's insurer denies any obligation to defend or indemnify Gerald's General Contracting – Gerald's is an additional insured on Paul's CGL *only for ongoing operations performed by Paul's Painting, Inc. at the new office building project*. Lending the scaffolding to Gerald's does not fit within "the performance of ongoing operations for the additional insured at the locations designated." The connection between Paul's (the named insured) and Gerald's (the additional insured) is not sufficient to even suggest the possibility of coverage for Gerald as an additional insured under Paul's CGL.

In sum, unless the requisite connection between the named insured and additional insured is established, coverage is not available for the additional insured, regardless of fault or any other terms contained in the additional insured endorsement. In other words, this is the first cut – if you can't get past this issue, there is no coverage for the additional insured.

Scope of Coverage – Comparative Liability

ISO has changed many of their additional insured endorsements to limit the protection provided to the additional insured. Specifically, in mid – 2004, coverage provided to an additional insured was limited by their *degree of liability*.

Sole Negligence Pre-2004 editions of ISO additional insured endorsements had been found to provide coverage for the *sole negligence* of an additional insured. The culprit was the phrase "arising out of," which has since been expunged and replaced with what one legal commentator referred to as a "fault based additional insured standard."

Caused in Whole or in Part The 2004 edition of the ISO additional insured endorsements require that injuries or damage be "caused in whole or in part" by the named insured's "act or omissions" (or those acting on behalf of the named insured, such as subcontractors). It is ISO's express intent to eliminate coverage for the additional insured's *sole* negligence. Nonetheless, the 2004 edition of ISO's additional insured endorsements is intended to protect the additional insured for *their own liability*, even if their liability is the major (but not sole) cause of the injury or damage, provided that the *named insured's* (or others acting on the named insured behalf) *acts or omissions* played a part in *causing* the same injury or damage.

The "caused in whole" wording provides the additional insured coverage for its vicarious liability – that is liability imposed on an otherwise blameless additional insured based solely upon the relationship with the named insured.

Company Specific Additional Insured Forms Choosing not to follow ISO, several insurers, including some well known national insurers, have written their own additional insured endorsements. Use of an insurer's own additional insured endorsements appears most prevalent if that insurer provides a market for those engaged in the construction industry.

An analysis of an insurer's proprietary additional insured endorsement should begin with a review of the scope of coverage provided to the additional insured in the context of comparative liability.

Named Insured's Negligence One insurer's additional insured endorsement provides coverage to the additional insured only if the bodily injury or property damage results from the *negligence* of the named insured. In the 2004 edition of their additional insured endorsements, ISO does not prescribe a specific *theory of liability* – the only requirement is the named insured must have, at least in part, *caused* the injury or damage by their *acts or omissions.*

Act or Omission versus Negligence In *Maryland Casualty Company v. Regis Insurance Company and Ran Holding Corporation* ((1997) No. 96 – CV -1790), the United States District Court for the Eastern District of Pennsylvania ruled on the difference between "act or omission" and "negligence:"

> "The Court finds that the use of the words 'act or omission' in the Additional Insured Endorsement does not require negligence on the part of the named insured. The plain and ordinary meaning of 'act or omission' requires only that the named insured do or fail to do something. Negligence would require the named insured to do [or fail to do] something 'which a reasonable [person] guided by those ordinary considerations would ordinarily regulate human affairs, would do [or not do].'"

Therefore, the requirement of *negligence* by the named insured may significantly narrow the circumstances under which an additional insured would receive coverage – and thus provide substantially less coverage than ISO in their 2004 edition additional insured endorsements. Commonly alleged theories of liability against a *named insured*, such as strict liability and breach of warranty, would seemingly leave the *additional insured* with no coverage – regardless of how liability is imposed upon the additional insured. An unexpected denial of coverage and a named insured that is not in compliance with insurance requirements could result.

Negligence of the Additional Insured One insurer continues to use the frowned upon "arising out of ongoing operations" wording but attempts to limit coverage for the additional insured by stating the insurance does not apply to *any* injury or damage arising out of the *negligence* of the additional insured. Here, the additional insured may actually *be covered* for its *sole liability* provided the theory of liability is not *negligence*. Probably not what was intended – but this is what is written.

Vicarious Liability Some insurers' view of the world is each person or organization should remain responsible for their actions. An interesting perspective considering that insurance stands for the proposition of paying on behalf of persons or organizations whose actions result in their being legally responsible.

At any rate, their point is that it defies good business practice to pay on behalf of an *additional insured* if that person or organization contributed *in any way* to injury or damage. In other words, the only time an additional insured should be protected on some else's CGL policy is if the additional insured is found *vicariously liability*. Vicarious liability is liability imposed upon additional insured not for what they did, but for what someone else did.

Vicarious Liability Coverage – An Illusion? Vicarious liability is liability imposed upon an additional insured not for what they did, but for what someone else did. The notion of providing additional insureds vicarious liability coverage brings with it the question of whether any real coverage is being provided to the additional insured. More importantly, has the named insured discharged their obligations to the additional insured by protecting them only for vicarious liability?

Considering how limited vicarious liability can be, there is a better than even chance the coverage provided to the additional insured will fall below what was agreed upon (or at least expected by the additional insured).

Usually Not Vicariously Liable While often misunderstood, the following commentary by the Supreme Court of Connecticut (*Norman Pelletier, et al v. Sordoni/Skansa Construction Company SC 16743 & SC 16747 July, 2003*) plainly states why an additional insured is not normally vicariously liable for the named insured:

> "…a general contractor is not liable for the torts of its independent subcontractors."

While there are certainly exceptions to the above, they are just that – exceptions and not the rule. Providing only vicarious liability coverage for additional insureds does, indeed, provide little meaningful coverage.

Vicarious Liability - A Federal Court's View The Tenth Circuit in *Marathon Ashland Oil Pipe Line LLC v. Md. Cas. Co, 243 F.3d 1232 (10th Cir. 2001)* made the following observations (applying Wyoming law) on additional insured endorsements that purport to provide coverage only for the vicarious liability of the additional insured for the acts of the named insured:

> "Where the additional insured is held no more than vicariously liable for the acts of the named insured, the additional insured would have an action for indemnity against the primary wrongdoer. Thus, an endorsement that provides coverage only for the additional insured's vicarious liability may be illusory and provide no coverage at all. In this light, it is obvious that additional insureds expect more from an endorsement clause than mere protection from vicarious liability."

As noted in *Marathon*, if the additional insured has no liability, other than liability imposed upon it for the acts of others, the additional insured would have a right of indemnity against the named insured regardless of any insurance provided to the additional insured by the named insured.

A Failure to Communicate As the right to be an additional insured is not constitutionally guaranteed, there is nothing inherently wrong with providing little or no coverage to another person or organization – provided everyone understands and has agreed to what is and what is not being provided. Quite often there is no common understanding or agreement on what coverage is provided. As observed in *Marathon*, an additional insured may expect more coverage than for their vicarious liability.

Order of Coverage - Primary and Non-Contributory

When a person or organization is added by an endorsement as an additional insured to the CGL policy of another, that person or organization usually has two CGL policies available to pay claims – the policy on which they are a named insured and the policy on which they are an additional insured. Which policy pays first? Or do they both pay and share the loss?

December, 2004 CGL The ISO CGL edition of December, 2004 is clear on the issue of who pays when. Here's an example:

Dave's Plumbing has an ISO December, 2004 CGL policy on which Dave is the named insured. Fred's Construction also has an ISO December, 2004 CGL on which Fred is the named insured. To comply with a written agreement, Dave has added Fred to his CGL policy as an additional insured using the ISO Additional Insured – Owners, Lessees or Contractors (CG 20 10 07 04) endorsement.

Primary Insurance A claim is made against Fred, who is found to have coverage for this claim as an additional insured under Dave's policy. The Other Insurance condition of both policies is identical – Dave's policy is primary (they pay first) *including payment of the claim against Fred*. Fred's policy states it is *excess* over any other primary insurance (remember, Dave's insurance is primary) in which Fred has been added *by endorsement* as an *additional insured*. In short, Dave's policy pays first on Fred's behalf – if Dave's policy is not enough, Fred's own policy will pay in excess of Dave's policy.

Non-Contributory Insurance Since Dave's insurance is primary, Dave's insurer's obligation to pay *is not affected* by other insurance that is *not* also *primary* (remember, Fred's insurance is *excess*). This wording in Dave's policy prevents his insurer from attempting to force Fred's insurer to *share payment of the loss* and thus renders Dave's policy "non-contributory."

Prior to 1997 Some of older ISO CGL policies (issued prior to 1997) did not address in the Other Insurance condition how additional insureds losses were to be handled. For CGL policies issued before 1997 (using the same example), both Fred's and Dave's insurers might have had to pay their share of the claim – contrary to what either Dave or Fred wanted. The resolution to this problem that was sought by some policyholders was to demand that Dave's policy not only add Fred as an additional insured, but also expressly state the coverage provided to Fred was primary and would not contribute with Fred's own insurance. The demand for "primary and non-contributory" insurance coverage continues today.

Company Specific Additional Insured Forms It is not uncommon for insurers who write their own additional insured endorsements to replace the standard Other Insurance condition with their own wording – which may or may not provide what was agreed upon by the named insured and additional insured. If the additional insured endorsement

replaces or amends the standard other insurance condition, a close examination of the new wording is highly recommended.

Primary and Contributory For example, one insurer's additional insured form states that if the named insured has agreed in a written contract to provide the additional insured coverage on a *primary* basis, they will consider the insurance for the additional insured *primary*.

In the very next sentence, the insurer states that when their insurance is primary, and there is other insurance available to the additional insured *from any other source*, the insurer will share with that other insurance. When read together with the added condition that the additional insured is required to tender the defense and indemnity of any claim *to any other insurer* that also insures against the same loss, it seems clear that this insurer intends to seek contribution from *any other insurer* if at all possible. Pretty hard to state with any confidence that the additional insured has been granted "primary and non-contributory" insurance.

Primary and Non-Contributory By contrast, another insurer's form is much clearer on this issue – if the named insured has agreed to do so, the coverage provided to the additional insured will be on a primary basis and will not seek contribution from the additional insured's policy.

Additional Insured on Multiple Policies Some insurers try to remain as excess insurance or reserve their right to seek contribution from other insurance available to the additional insured – but will *not* seek contribution from insurance purchased by the additional insured as a *named insured*. In other words, if the additional insured is also an additional insured on the policy of another subcontractor – all bets are off and the insurer will pay only as excess or will only pay their share of a loss. Whether this approach can be deemed "primary and non-contributory" is debatable. While there are clearly merits to this approach, if the idea is not clearly expressed in the endorsement, such attempts serve only to further confuse the "order of coverage" issue.

Additional Exclusions

Be aware that exclusions are often added by additional insured endorsements and may apply to the additional insured, the named insured or both.

Products-Completed Operations Hazard An example of such an exclusion can be found in the ISO Additional Insured – Owners, Lessees or Contractors (CG 20 10 07 04) endorsement. The *additional insured* has no coverage for any for injury or damage that occurs *after* work is completed. Of course, ISO has promulgated a separate additional insured endorsement, Additional Insured – Owners, Lessees or Contractors – Completed Operations (CG 20 37 07 04), that will provide the additional insured coverage for injury or damage that occurs *after* the work is completed – work that is included within the "products-completed operations hazard."

Difficult to Obtain Unfortunately, the Additional Insured – Owners, Lessees or Contractors – Completed Operations (CG 20 37 07 04) endorsement is notoriously difficult to obtain – many insurers do not wish to provide such coverage. For some in the construction industry, the difficulty (or impossibility) of obtaining certain specific additional insured endorsements seems of little consequence – witness the continued demand for the ISO Additional Insured endorsement CG 2010 11 85 edition, which is generally not available today.

Other Examples A couple more examples - exclusions are also added to the Additional Insured – Lessor of Leased Equipment endorsement (CG 20 28 07 04) (coverage is excluded for any injury or damage that takes place after the equipment lease expires) as well as the Additional Insured – Managers or Lessors of Premises (CG 20 11 01 96) (coverage is excluded for any "occurrence" that takes place after the named insured ceases to be a tenant and coverage is excluded for any structural alterations, new construction or demolition performed by the additional insured or on the additional insured's behalf).

Company Specific Additional Insured Forms As with the Other Insurance condition, an insurer's own additional insured forms vary widely as to the exclusions that have been added and to whom the exclusions apply – another area that requires a detailed review.

Injury to Employee Exclusion For example, one insurer adds an exclusion for injury to the employees of *any insured*. The intent seems clear – if an employee of the *named insured* brings claim against the *additional insured* for injuries suffered at a jobsite, which is a very common event, no coverage is afforded the *additional insured*. This exclusion is quite troublesome as it eliminates coverage often provided to the additional insured. The result may be the named insured will be found not to have complied with insurance requirements of a construction agreement.

Other Coverage Restrictions

Exclusions do not contain all of the limitations that may apply to additional insured endorsements. A careful reading of the entire additional insured endorsement is vital to understanding the breadth of the coverage. The following coverage restrictions are most often found in an insurer's own additional insured endorsements, particularly those that offer automatic or blanket status to the additional insured.

Written Contract or Agreement The automatic additional insured endorsements require the named insured to have agreed in writing (or in some cases in a permit) to add others to the policy as an additional insured. Therefore, if the named insured agrees to add a person or organization as an additional insured, but does not formalize the agreement in writing (or no permit exists), the reliance on the automatic or blanket endorsements is misplaced – the person organization would have to be added separately as a scheduled additional insured for coverage to apply.

Written Contract In Effect Some insurers require not only the existence of a written agreement, but further require the agreement to include a person or organization as an additional insured to be in effect *during the policy period*. While normally this should not pose a problem, it does broach the question as to what exactly the insurer means by "in effect."

Construction Contracts Consider a construction contract where the insurance requirements are that the subcontractor will add the owner and general contractor as additional insureds to the CGL *during the course of the work* and for two years *after the work is complete* (in this example the subcontractor is expected to add the owner and general contractor as additional insureds for the *products-completed operations hazard*). Once the project is complete and all the work called for under the contract finished, will the insurer for the subcontractor consider the continuing obligation to list the owner and general contractor as a written contract in effect during the policy period? The answer should be yes – performance on the written contract is not complete until all obligations are discharged – but clarification would be helpful here.

Limits Many automatic or blanket additional insured endorsements will state the limits of liability provided to the additional insured by the endorsement will be the *lesser of* the limits required in the written contract or the policy limits. Such a limitation is generally fair to both the named insured and additional insured and a good idea – there is no reason to provide an additional insured with greater limits than requested or required.

Breadth of Coverage Similar to limits, some additional insured endorsements will restrict the breadth of coverage provided to the additional insured by stating the actual coverage provided will not exceed that which was agreed upon in the written contract. This issue is a little trickier as the wording in many contracts as to the breadth of coverage to be provided the additional insured is either lacking or completely non-existent – resulting in disputes and litigation. However, if the contract wording is clear, this is a desirable restriction as respects the named insured. Once again, there is no need to provide the additional insured with broader coverage than required.

Contractual Liability One insurer restricts *contractual liability coverage* available to the *named insured* in their additional insured endorsement. By their form, if the named insured has not agreed in a written contract to add the additional insured for the products-completed operations coverage, the endorsement amends the definition of "insured contract" so the *named insured* has no contractual liability coverage for an agreement to indemnify the additional insured for injury or damage included within the products-completed operations hazard.

As hold harmless and indemnity agreements, such as the American Institute of Architects A201 General Conditions for the Contract of Construction – 1997 Edition, often do not make any distinction between indemnity for operations claims and indemnity for completed operations claims, this restriction is quite harsh and may leave the named insured with no contractual liability coverage for what might be a large indemnity obligation.

Additional Conditions

The ISO additional insured endorsements do not usually change the conditions that apply to an additional insured. However, it is very common for insurers who use their own endorsements to change or add conditions that apply to an additional insured.

For example, several insurers require the *additional insured* to give prompt to the insurer of any occurrence or offense that *may* result in a claim as well as to immediately forward legal papers. Another condition applicable to the additional insured is the requirement to tender defense and indemnity to *any other insurer* that may cover the loss.

One insurer goes a step further and demands the additional insured make available any other insurance that the additional insured has for a loss – with no exception for the additional insured's own insurance. Such conditions may weaken or completely eviscerate that "primary and non-contributory" wording.

Conditions are important to consider as failure to comply may result in denial of coverage to the additional insured – and the resulting uproar from the additional insured that they were never made aware or agreed to such conditions now being imposed upon them.

Conclusion

Additional insured endorsements seem to be like snowflakes – no two are alike. Not only do additional insured endorsements reflect a great discrepancy in the breadth of coverage provided to additional insureds, the issues that underlie coverage are numerous and complex. Whether you are providing additional insured coverage for others, requesting additional insured coverage for your organization, providing advice to clients about additional insured coverage, or placing and certifying coverage for additional insureds, understanding the workings of additional insured coverage is imperative.

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