# Additional Insured Endorsements—A Potential Minefield (Part 2)

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**Part 1 of this series deals with the connection between the named insured and the additional insured and provides some areas to consider in a basic analysis of any additional insured endorsement. Part 3 will cover additional exclusions, conditions, and other coverage restrictions.**

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Insurance Services Office, Inc. (ISO) has changed many of its 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*.

## Scope of Coverage—Comparative 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 requires 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 its 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 U.S. 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 on 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 someone else's CGL policy is if the additional insured is found *vicariously liable*. Vicarious liability is liability imposed on additional insureds not for what they did, but for what someone else did.

### Vicarious Liability Coverage—An Illusion?

Vicarious liability is liability imposed on an additional insured not for what they did, but for what someone else did. The notion of providing additional insureds with 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 its 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 Co.*, 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 on 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 Noncontributory

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 December 2004 edition is clear on the issue of who pays when. The following provides 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.

### Noncontributory 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 "noncontributory."

### 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 noncontributory 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 noncontributory" insurance.

### Primary and Noncontributory

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 noncontributory" 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.

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