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# *The Additional Insured Dilemma*

While the issues surrounding additional insured coverage are certainly not new, recent coverage changes and one recent court decision have risk managers, brokers and insurers scratching their heads. This article is intended to help bring some clarity to this widely confused and often misunderstood topic by summarizing the fundamentals of additional insured coverage.

## Why Additional Insured?

The concept is simple – you want to keep losses out of *your insurance program* – so you demand that *someone else's insurance protect you*. Usually because of your strong bargaining position, you can require another party to add your organization to *their insurance* – often a Commercial General Liability ("CGL") policy – as an insured.

This is common practice in business relationships such as between landlord and tenant, general contractor and subcontractor, manufacturer and vendor, and lessor and lessee. In each case, the party agreeing to include your organization as an insured must somehow modify their CGL to *add* your organization as an insured – thus the term "*additional* insured."

## Named Insured versus Additional Insured

A named insured is the person or organization to which the policy is issued, listed on the policy Declarations Page under the item "named insured." Having the status of a named insured (in particular, the *first* named insured), bestows on the named insured all of the rights and obligations under the policy – such as the obligation to pay premiums and right to change the terms of the policy.

The CGL policy is also intended to cover *all of the operations or activities of the named insured*. Moreover, others who are acting on behalf of the named insured – such as officers, directors, employees and volunteers – are automatically protected as insureds by the CGL for their personal liability arising out of duties they perform for the named insured.

Unlike a named insured, an additional insured is not covered for all of their activities or operations – coverage is generally restricted to liability that arises out operations performed by the named insured for the additional insured or for liability that arises out of listed locations or scheduled equipment owned by the additional insured and occupied or used by the named insured.

If the activity, location or operation of the additional insured is *not related* to the named insured, the additional insured does not usually have the status of an insured on the named insured's CGL policy. For example, the additional insured does not have the status of an insured on a named insured's CGL policy for a location that is occupied by a tenant who is not the named insured.

## Additional Insured Coverage- The Benefits

So exactly what coverage does the additional insured receive? Herein lies the rub – the answer is "it depends." It depends on the exact wording of the endorsement listing the additional insured as well as the courts' interpretation of what those words mean. With over thirty *standard* additional insured endorsements (some with multiple edition dates), combined with insurers' manuscript versions, it becomes easier to see why additional insured issues can be so confused.

Nonetheless, attaining the status of insured does provide some meaningful benefits:

- The insurer must directly defend the additional insured for claims covered by the policy;
- The additional insured is a party to the contract and thus has privity – standing to sue the insurer for breach of contract;
- States that prohibit certain types of hold harmless and indemnification agreements usually do not restrict additional insured coverage;

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- To the extent an additional insured has coverage, the named insured's insurer cannot recover from the additional insured via subrogation;

- If you are an additional insured on a standard ISO CGL policy, the policy on which you are an additional insured is *primary* insurance and your own policy is *excess* insurance.

## Additional Insured Coverage- Some Problems

Relying on additional insured status on the CGL policy of another is not without its drawbacks.

- You will share the limits of liability with the named insured – the CGL policy limit is per occurrence, not per insured;

- While it may be a benefit to have the named insured's insurer defend you, possible conflicts may arise that may make this arrangement less than desirable – usually when the named insured and the additional insured are both defendants in the same complaint;

- The insurer for the named insured rarely has a duty to notify the additional insured if the named insured's policy is terminated;

- You are only an additional insured if you are listed on the named insured's policy *at the time bodily injury or property damage takes place.* For example, if a General Contractors requires a Subcontractor to list the GC as additional insured *only until the project ends*, it is likely that the GC will *not* have additional insured status on the sub's CGL for any injury or damage that takes place *after* the project is completed, even if the sub has completed operations coverage in effect well after the project ends.

- Finally, compliance with additional insured requirements is frequently an issue. Changes in additional insured forms wording, vague and ambiguous insurance requirements, and conflicting expectations often lead to compliance disputes and litigation.

## Additional Insured – Breadth of Coverage

Most disputes focus on the breadth of coverage afforded the additional insured. While it is often stated that *the intent* is to provide coverage to the additional insured only for their vicarious liability for the acts of the named insured, few additional insured forms express such coverage limitations.

Consequently, many courts have found coverage not only for the shared negligence of the named insured and additional insured, but also coverage for the *sole negligence* of the additional insured.

## July 2004 ISO Changes

In an effort to rein in the breadth of coverage afforded an additional insured, ISO filed for use in July, 2004 significant changes to their most commonly used additional insured endorsements.

The July, 2004 ISO changes *eliminate* coverage for the *sole negligence* of an additional insured – the new forms require that the injury or damage be caused "in whole or in part" by the "acts or omissions" of the name insured (or those acting on behalf of the named insured).

## Walsh Construction v. Mutual of Emumclaw

A recent Oregon Supreme Court decision *voided additional insured coverage entirely* – applying the state's anti-indemnification law to an agreement to purchase insurance for the liability (even shared liability) of another. The implications of this are yet unknown, but certainly the benefit of additional insured status in Oregon is in question.

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