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Coverage and Litigation Trends with Additional Insureds in the Southeast

I. Taking the Temperature

Understanding where in the Southeast your claim my lie will affect how you may go about adjusting and defending that claim. In some states, Courts are not aggressively enforcing Additional Insured provisions or obligations. In others, Courts are hitting Carriers or downhill contractors hard for failing to accept a tender.

In South Carolina, for example, the Additional Insured claim and cost of defense may prove to be more dangerous and expensive than the underlying defect claim. In Mississippi, Carriers have to make a decision as to whether to raise a coverage defense to either their Named Insured or Additional Insured as doing so would trigger additional defense obligations in Moeller counsel.

Florida is another hotbed in the Southeast where these claims are sometimes more problematic than the underlying defect litigation.

Understanding where your claim may lie and the current state of affairs on the way that state is trending is important in analyzing things upfront.

II. Show Me the Money!

The uphill contractor is sued and they or the Carrier want to be covered. They show the Additional Insured provision within their contract or an endorsement. What now? This section will focus on the financial considerations that may come with Additional Insured claims.

Is the defense more expensive than the settlement? Are there ways in certain Southeastern states to carve out the Named Insured and eliminate AI obligations or

does settling the claim for the Named Insured not affect the continuing cost of defense for the AI?

This section will also briefly discuss some of the Carrier hurdles of properly underwriting and collecting premiums on Additional Insured Endorsements and how the industry has adjusted as AI case law has established itself throughout the Southeast.

GEORGIA

Georgia Courts look to the contract between contractors to determine obligations for additional insurance coverage. An "insurance clause" or "additional insured" requirement in a contract shifts the risk of negligence to the Insurer of one or both parties to the contract regardless of fault. In Georgia, these indemnity provisions in contracts containing both indemnity and insuring clauses will be enforced as written. Tuxedo Plumbing & Heating Company, Inc. et al v. Lie- Nielsen, 245 Ga. 27, 262 S.E.2d 794 (1980). Where there is no specific or mandatory insurance clause, the court has upheld indemnity provisions where other portions of the contract evidenced the parties' intent to shift the loss to an insurer. See Glazer v. Crescent Wall Coverings, Inc., 215 Ga. App 492, 451 S.E.2d 509 (1994). Parties agree to look solely to insurance in the event of a loss and not to the liability of one of the parties when the contact contains an additional insured clause. See Tuxedo, *supra*; McAbee Constr. Co. v. Ga. Kraft Co., 178 Ga. App. 496, 498, 343 S.E.2d 513 (1986); Vasche v. Habersham Marina, 209 Ga. App. 263, 433 S.E.2d 671 (1993).

However, where the contract calls for a party to insure against a loss, and they fail to obtain such coverage, the clause will be enforced against them and they become a **self-insurer**. See Myers v. Texaco Refining & Co., 205 Ga. App. 292, 422 S.E.2d 216 (1992); Everett v. Everett, 256 Ga. 632, 633, 352 S.E.2d 370 (1987). Courts will not infer waiver of a party's rights as an Additional Insured when they fail to require proof of insurance. See also Great Atl. & Pac. Tea Co. v. F.S. Assocs., 257 Ga. App. 534, 537 (2002).

Duties owed to one claiming Additional Insured status:

An Insurer's duty to indemnify and its duty to defend are separate and independent obligations. Penn-America Ins. Co. v. Disabled Am. Veterans, Inc., 481 S.E.2d 850, 852 (Ga. Ct. App. 1997). Under Georgia law, "[a]n insurer's duty to defend is determined by comparing the allegations of the complaint with the provisions of the policy." Fireman's Fund Ins. Co. v. Univ. of Ga. Athletic Ass'n, Inc., 654 S.E.2d 207, 209 (Ga. Ct. App. 2007). "(T)he duty to indemnify is determined by the underlying facts of the case." Id. This is sometimes referred to as the "eight corners" rule because coverage is determined by comparing the four corners of the insurance policy with the four corners of the complaint against the insured. *Id*. Generally, the duty to defend is interpreted as broader than the duty to indemnify because it is based off of the pleadings.

"Where the complaint filed against the insured does not assert any claims upon which there would be insurance coverage, the insurer is justified in refusing to defend the insured's lawsuit." Nationwide Mut. Fire Ins. Co. v. Somers, 591 S.E.2d 430, 434 (Ga. Ct. App. 2003). If a declaratory action is filed during the pending of the underlying matter and the court determines that there is a duty to defend, they will refrain from ruling on whether the policy provides for indemnity - this is referred to as the prematurity rule. However, if the court finds an absence of a duty to defend under the policy, this issue is dispositive of the duty to indemnify. See also National Cas. Co. v. Pickens, 582 Fed. Appx. 839, 841 (11th Cir. 2014) (per curiam) ("If there is no duty to defend, there is no duty to indemnify.").

Important for insurance companies in Georgia is an exception to the duty to defend which increases the insurers responsibilities when faced with claims against an Insured or Additional Insured. Even if the pleadings do not trigger coverage, if the Insured notifies the Insurer of "true facts" indicating coverage, the Insurer is bound to investigate those facts before it can safely deny coverage. Anderson v. S. Guar. Ins. Co. of Ga., 235 Ga. App. 306, 508 S.E.2d 726 (1998); Colonial Oil Indus. Inc. v. Underwriters, 491 S.E.2d 337, 338-39 (Ga. 1997). Therefore, if information is provided to an Insurer that might trigger coverage, they have an additional duty to investigate these claims prior to a decision on their duty to defend.

MISSISSIPPI

Mississippi has not addressed the issue of carve outs of the Named Insured to eliminate Additional Insured obligations. Mississippi has not addressed the issue of whether settlement of a claim on behalf of the Named Insured impacts the cost of defense for the Additional Insured.

There are financial ramifications to be considered that arise with Additional Insured claims in Mississippi, particularly in cases where the insurer issues a reservation of rights. In Mississippi, Carriers oftentimes have to make a decision as to whether to raise a coverage defense to either their Named insured or Additional Insured. If a coverage defense is raised and a reservation of rights letter is issued, the insured is entitled to its own separate attorney (Moeller Counsel) at the insurer's expense. In such a situation, the Carrier could feasibly have five attorneys involved in defending the Named Insured and the Additional Insured (two defense attorneys, one coverage attorney for the Carrier and two Moeller Counsel-one for the Named Insured and one for the Additional Insured).

NORTH CAROLINA

As we've seen in recent opinions in North Carolina, a failure to pick up an AI tender can result in the Carrier owing more than the cost of defense had they picked up the tender in the first place. While the costs of defense may increase as a result of defending an

Additional Insured, the Carrier will have a say in defense strategy and risk allocation as to save costs it may otherwise be forced to pay later on upon a finding that they should have picked up the AI tender earlier on.

There are no specific ways to carve out the Named Insured and eliminate AI obligations where coverage is clearly triggered. Settlement of the claim for the Named Insured does not affect the continuing cost of defense for the Additional Insured unless policy limits have been exhausted; however, it is important for a Carrier to attempt to resolve the matter in controversy on behalf of the Named Insured and Additional Insured.

Given the additional defense costs associated with AI tenders and the recent trend in North Carolina re: failure to pick up AI, it appears that Carriers may begin to increase premium charges for AI endorsements and may become critical of Additional Insured provisions in their insured's subcontracts.

SOUTH CAROLINA

In South Carolina, if indemnification Crossclaims have already been initiated against the Named Insured, then the Named Insured will remain in the litigation as a result. In order to fully extract a Named Insured from litigation in a situation such as this, a settlement must be reached with the Cross-Claimant to lift the Additional Insured obligations.

If the Insurance Carrier has already accepted the tender and the Named Insured has since settled, the Insurance Carrier still owes all duties and obligations to the Additional Insured to continue to pay for defense costs. As a result, it may be worthwhile to value the Additional Insured's liability and possible exposure to determine if settling with them at mediation or accepting their tender and extracting them from litigation is the most cost effective option.

TENNESSEE

Accepting an AI tender can be vastly more expensive than the settlement of the claim. This is because, in Tennessee, the duty to defend and the duty to indemnify are distinct. St. Paul Fire & Marine Ins. Co. v. Torpoco, 879 S.W.2d 831, 835 (Tenn. 1994). The duty to defend is broader than the duty to indemnify. *Id.* The duty to defend is triggered by the "pleadings test" which requires a duty to defend if a complaint pleads any fact that falls within a policy's coverage. *Id.* The duty to indemnify, on the other hand, is triggered only after a fact finder determines the "true facts" and these facts are within a policy's coverage. Given this two part test, it is easy to see how an insurance company could have an expensive duty to defend an AI but has no obligation whatsoever to indemnify it for a judgment.

III. Coverage Concerns on Additional Insureds

Once you have determined that Additional Insured obligations are owed, the extent of your indemnity may vary be state. Do you just owe to the extent of whatever would be covered for your Named Insured or have you now taken on more risk than anticipated by way of your Additional Insured from an indemnity standpoint? Some of these common issues exist when a contractor agrees to provide Additional Insured obligations to Owner or Designer. The liability policy issued for the contractor (Named Insured) was not originally drafted to include claims that the Owner or Design Professional may be responsible for.

In South Carolina, coverage concerns exist with continuous trigger. In many Southeastern states, failures to issue Reservations of Rights to the Additional Insured can have drastic consequences as to coverage. In Mississippi, the issuance of a Reservations triggers Moeller Counsel obligations where a Carrier could feasibly have five attorneys involved in defending just two entities (Two Defense Attorneys, a Coverage Attorney for the Carrier and Two Moeller Counsel - One for the Named Insured and One for the Additional Insured). In Florida, third party bad faith and cost issues exist. Knowing your coverage issues up front on Additional Insured Claims will help you properly adjust and defend those claims early.

GEORGIA

Certificate of Insurance Issues

Georgia courts have allowed a Certificate of Insurance ("COI") to establish coverage for a non-party to the contract on an Additional Insured basis. In a 2004 Georgia federal case, a developer's insurer sought a declaration that a general contractor's insurers had a duty to indemnify and defend the developer in an underlying lawsuit due to their being named an additional insured on the general contractor's certificate of insurance. Sumitomo Marine & Fire Ins. Co. of America v. Southern Guar. Ins. Co. of Georgia, 337 F. Supp. 2d 1339 (N.D. Ga. 2004). The general contractor insurers argued that the developer was not an "additional insured" under their policies due to the fact that the agent who issued the COI to the developer was not the insurer's agent, but rather the agent of the general contractor. The District Court found coverage for the developer as an Additional Insured.

In order to prevent cases where the terms of a certificate of insurance might conflict with an underlying policy, the Georgia legislature passed a statute in 2011 that prohibits one from "knowingly prepar[ing] or issu[ing] a certificate of insurance that contains any false or misleading information or that purports to affirmatively or negatively alter, amend, or extend the coverage provided by the policy of insurance to which the certificate makes reference." O.C.G.A. § 33-24-19.1(g). Therefore, it appears by statute

that one may not produce a Certificate of Insurance which would not provide coverage under their policy. All certificates of insurance must be submitted for approval by the Insurance Commissioner's office. Further, penalties may be assessed against entities that amend certificates of insurance to reflect something different than what is provided for in the underlying policy. O.C.G.A. § 33-24-19.1(b), (n). See also Popham v. Landmark Am. Ins. Co., 340 Ga. App.603, 609, 798 S.E.2d 257, 262-63 (2017) (alleged insured could not rely on certificate of insurance alone to show that an insurance contract was formed, where binder conflicted with the terms of the alleged insurance contract).

MISSISSIPPI

Generally speaking, within the construction context, contractual provisions requiring one party to indemnify another party for its own negligence is against public policy. This is seen and codified at Mississippi Code Ann. 31-5-41. This portion of the Mississippi Code is known as the "Anti-Indemnity Statute." The statute contains an exception and states that is does not apply to insurance contracts or agreements. The exception clearly provides that contracts for insurance are enforceable and valid. This typically appears in the form of a requirement that one party name another party as an "Additional Insured" on a CGL policy.

Outside of this context, there is no recent case law discussing the extent of indemnity.

SOUTH CAROLINA

In South Carolina, coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during progressive damage. Accordingly, in progressive damage cases such as construction defect litigation, the injury is ongoing and repetitive in nature and therefore, continues to trigger coverage until the damage is complete. Defining when the occurrence that caused the damage is often difficult to determine. That being said, South Carolina takes an expansive view of occurrence under a CGL policy.

Regarding an allocation of damages among multiple insurance Carriers, South Carolina has adopted the time-on-risk pro-rata approach to allocating fault among insurance Carriers. Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 63, 717 S.E.2d 589, 601 (2011). The Harleysville decision notes that "the proper method for allocating damages in a progressive property damage case is to assign each triggered insurer a pro rata portion of the loss based on the insurer's time on the risk." Accompanying this explanation, the Court included the below method for allocating damages:

> The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the

> total number of years during which the damage progressed. The fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.

Id. at 65, 717 S.E.2d at 602. Notwithstanding, the Court indicated a willingness to modify the above method if proof was available showing that the damage progressed in a different way. As a result, if evidence exists that the damage progressed during the years with which a certain insurance Carrier provided coverage for both the named insurance and the Additional Insured, they could be hit with paying more.

TENNESSEE

In Tennessee, an Additional Insured enjoys the full benefits of the policy. However, a policy can specifically limit the extent of an Additional Insured's benefits. Prior to accepting an AI's tender, it is important to determine whether coverage is predicated on the Named Insured being "in whole or in part" at fault as a condition precedent to coverage. And, of course, when contracts between the Named Insured and the AI are implicated, they should be carefully considered.

Additionally, it is very difficult to resolve the question of whether there is a duty to indemnify the AI at the summary judgment stage. Thus, it is often difficult to predict whether there is coverage for indemnity until after a judgment is entered.

VIRGINIA

Virginia, as in the majority of states, has enacted legislation that restricts or prohibits indemnification agreements in the construction context, including where the provision could be read to indemnify the indemnitee for its own negligence. Uniwest Constr., Inc. v. Amtech Elevator Serv., Inc., 699 S.E.2d 223 (Va. 2010) (citing Va. Code § 11-4.1). Notably, however, the statute does "not affect the validity of any insurance contract . . . or agreement issued by an admitted insurer." As such, as is typical in the insurance context, the insurer's duty to defend in Virginia is broader than the duty to indemnify.

Outside of this context, there is little recent case law or practitioner commentary addressing the extent of indemnity.

IV. Ethical Concerns for the Defense Attorney

This portion of the program will look at ethical concerns that the hired Defense Attorney may have during the course of litigation. It is normal for the Carrier to retain the

defense lawyer for their Named Insured before Additional Insured tenders begin rolling. What role can the defense lawyer have in advising the Carrier on AI obligations? What role can the defense lawyer of an uphill contractor, like a General Contractor, have in issuing tender letters and filing Crossclaims and Third Party Complaints as needed?

During the course of litigation, the Carrier may be willing to resolve the claim for the Named Insured. In states where resolution of the claims against the Named Insured does not necessarily extinguish Additional Insured defense obligations, the Carrier and Defense Counsel must be careful and cognizant of what role, if any, the cost of defending the AI claim should have on the ability to resolve the underlying Named Insured claim.

MISSISSIPPI

In Mississippi, a lawyer owes absolute loyalty to his or her client, the insured. A lawyer should exercise independent professional judgment for the benefit of the insured. However, Mississippi recognizes that Defense Counsel is retained by the insurance Carrier to represent the interests of the insured and therefore owes similar obligations to the insurer. Such a relationship is not prohibited as long as the insurer is not interfering with counsel's independent judgment in defending the case. Mississippi Courts hold that the fact an insurance contract authorizes the insurance company to employ an attorney to handle the defense of a case in no way impairs or diminishes the duty of the lawyer to the insured client. Hartford A.C.C. & Indemnity Co. v. Foster 528 So. 2d 255 (Miss. 1998).

Although not specifically ruled on by our Courts, in the case where Defense Counsel is representing the General Contractor who may be an Additional Insured under a sub-contractor's CGL policy, counsel for the insured can draft tender letters and file Crossclaims and Third Party Complaints as needed in representation of the insured.

Defense counsel should not have any role in advising the Carrier on Additional Insured obligations when they represent a subcontractor and are in receipt of an AI tender from a general contractor or an uphill subcontractor. A conflict of interest would arise.

NORTH CAROLINA

Defense counsel's tripartite relationship prevents counsel from engaging in insurance coverage controversies between the insurer and its insured. This presents as a conflict of interest. However, in the case of Additional Insured coverage where Defense Counsel is representing a general contractor who may be an Additional Insured under a subcontractor's CGL policy, it would seem that the general contractor's Defense Counsel's efforts in convincing the subcontractor's insurer to take up an AI tender would

be a position in favor of both the insured and its insurer. Accordingly, there would be no conflict getting in the way of the tripartite relationship.

In a recent case, the Wilmington office represented a general contractor in a personal injury where a subcontractor's leased employee was injured while working on a job site. Given recent case law that came out in March of 2018, Continental Casualty Company v. Amerisure Insurance Company, which found an insurer in breach of contract for improper denial of a AI tender claim, we were able to successfully convince the subcontractor's insurer to pick up the defense of the general contractor pursuant to its Subcontract and the AI endorsement included in its CGL policy. As a result, we eliminated the exposure to the client insurer and ensured coverage for our client insured. See Cont'l Cas. Co. v. Amerisure Ins. Co., 886 F.3d 366, 2018 U.S. App. LEXIS 7754 (4th Cir., March 28, 2018).

V. Bad Faith Concerns on Additional Insured Claims

This segment of the panel will address the dangerous repercussions of denying an Additional Insured tender or letting a tender sit during the course of litigation. Absent something in the policy or a state's case law, Additional Insureds are given most, if not all, of the same rights as a Named Insured under the policy. That includes first party rights if there is a breach of the insuring agreement by the Carrier. In the Southeast, we have seen a rise in Court Orders and Verdicts in which a Carrier who failed to accept a tender has been hit - not only for the defense costs, but for extra-contractual damages typically associated with Bad Faith claims.

In normally Carrier-friendly North Carolina, several opinions have been issued in which a Carrier has been ordered to pay significantly more than what they would have owed under a defense to an uphill contractor. In South Carolina, several large home builders filed actions against dozens of Carriers for failure to pick up AI tenders. In Florida, first and third party bad faith considerations are rampant.

NORTH CAROLINA

There has been no case law in North Carolina suggesting that an insurer's failure to pick up an AI tender is bad faith, but recent case law arising from a declaratory judgment action regarding an underlying construction defects claim has suggested that an insurer can be exposed to Unfair Claims Settlement violations and, in turn, Unfair and Deceptive Trade Practices violations where the insurer with an AI endorsement has failed to promptly determine coverage upon notice of a lawsuit with the potential of triggering the AI endorsement and has failed to, within a reasonable time, communicate with the potential Additional Insured (and its primary insurer) as to affirmation or denial of coverage under the AI endorsement.

See recent decision in Westfield Insurance Company v. Weaver Cooke Construction, LLC, et al., No. 4:15-CV-00169-BR (E.D.N.C., April 11, 2019).

Currently, in North Carolina, there is no independent third party action for bad faith, and as such, there is no case law governing whether a general contractor, as Additional Insured, has an independent bad faith action against a subcontractor's insured.

SOUTH CAROLINA

In South Carolina the Additional Insured claim can be a powerful tool for arguing a bad faith claim where a tender was denied. This is the result of a recent ruling where a federal judge allowed a bad faith claim to proceed against the subcontractor who failed to step in and defend the case for its Additional Insured. In UFP Eastern Division, Inc. vs. Selective Insurance Company of South, the Court held that South Carolina law does permit an Additional Insured to bring a claim for bad faith. In so doing the Court noted:

> "The South Carolina Court of Appeals addressed an Additional Insured's bad faith claim in BMW of N. Am.,LLC v. Complete Auto Recon Services, Inc., 731 S.E.2d 902, 907 (S.C. Ct. App. 2012). The Court of Appeals held that defendant Colony Insurance Company was entitled to summary judgment on the bad faith claim brought by BMW, an Additional Insured under a policy issued by defendant, because the subject matter of the claim was not covered by the insurance agreement. There is no suggestion that BMW lacked standing to bring a bad faith claim against Colony Insurance at all. Further, this Court can discern no apparent reason why a party identified as an insured in the insurance contract should not be able to bring a bad faith claim regarding the handling of its claim for insurance benefits brought under the insurance contract."

As a result, the ability of an Additional Insured to bring a bad faith claim should certainly be a consideration when reviewing a possible obligation to defend Additional Insureds under South Carolina law.

VI. The Big Issues on Additional Insureds from the Carriers

This closing segment will involve our Carrier panelists and audience members to share their biggest frustrations and challenges on Additional Insured Claims. These claims are affecting expenses and ratios. Are there strategies that have proven valuable and successful in certain areas and states?