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Not So Simple Addition:
Coverage Issues Surrounding Additional Insureds in the Southeast

I. Introduction

Generally speaking, there are three ways to become an "insured" under a commercial general liability policy. First, a party can be designated as an insured on the declarations page. Second, a party can fall within the definition of an "insured" pursuant to the "Who Is An Insured" section under the policy. Third, a party can be deemed an additional insured via either a specific or blanket endorsement. This paper is going to concentrate on the third category; additional insureds. Additional insureds are commonly found in the construction context when a general contractor requires or requests that its subcontractor(s) add the general as an additional insured on the subcontractor's policy. Issues tend to arise, however, in interpreting the additional insured endorsements and the scope of coverage for an additional insured under the named insured's policy. Many of these issues are traced back to the language contained in the original agreement between the general contractor and the subcontractor. Thus, it is important in both the insurance context and the transactional context to have clear and binding contracts that truly express the intent of the parties thereto.

II. The Policy- Before ISO Changes in 2004

The following is a typical specific additional insured endorsement used prior to the 2004 Insurance Services Office, Inc. (ISO) change to the form. This language is still sometimes found in policies today:

> **ADDITIONAL INSURED - OWNERS, LESSEES OR**
>
> **CONTRACTORS –**
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> **Who Is An Insured** (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured. A person's or

organization's status as an insured under this endorsement ends when your operations for that insured are completed.

This endorsement seeks to add a specifically scheduled person or organization as an additional insured to the policy. The endorsement limits the additional insured's coverage to "liability **arising out of** your ongoing operations performed for that insured" (emphasis added). What does this phrase mean? Does coverage for the additional insured extend to the additional insured's own negligence or is the coverage limited to the additional insured's vicarious liability (or alleged vicarious liability) for the named insured's actions? Courts in the Southeast have addressed this issue in different ways.

III. Florida

In Florida, the courts have refused to limit coverage to the additional insured's vicarious liability for the named insured's actions unless the endorsement clearly states this intent. In *Monticello Ins. Co. v. City of Miami Beach,* 2009 WL 667454 (S.D. Fla. 2009)*,* the City of Miami Beach sought coverage as an additional insured under an insurance policy issued to Hurricane Beach Rentals (a beach rental kiosk) for two drownings that occurred in the Atlantic Ocean. The policy issued to Hurricane Beach Rentals contained an additional insured endorsement which stated that the City of Miami Beach was an insured "but only with respect to liability **arising out of** the operations performed for [the City of Miami Beach] by or on behalf of [Hurricane Beach Rentals]" (emphasis added). The court noted in its findings of fact that the policy issued did not contain specific language stating that coverage for the city was limited to its vicarious liability for the negligence of Hurricane Beach Rentals or that there was no coverage for the city's own negligence. Notably, the court held that while the term "arising out of" was not ambiguous, there was still a question regarding whether the remaining language in the additional insured endorsement is ambiguous to the extent it is unclear whether the endorsement covers the additional insured for its own negligence or only for the additional insured's vicarious liability. The court ultimately held that the additional insured endorsement was ambiguous as to the scope of coverage and thus the city was entitled to coverage for its own negligence under the policy issued to Hurricane Beach Rentals.

In contrast, the Florida District Court of Appeals for the Third District in *Liberty Mutual Insurance Co. V. Capeletti Bros., Inc.,* 699 So.2d. 736 (Fla. Dist. Ct. App.1997) refused to extend coverage to a general contractor under a subcontractor's policy for the general contractor's **nonsupervisory** acts of negligence. In *Capeletti*, *supra*, Capeletti, a general contractor, hired Community Asphalt Co. to work on a road construction project. As a part of their agreement, Capeletti was named as an additional insured on Community Asphalt's insurance policy issued by Liberty Mutual (Liberty). The additional insured endorsement on the Liberty policy provided as follows:

> 1. Who is an insured (Section II) is amended to include as an insured the person or organization (called "additional insured") shown in the Schedule but only with respect to liability arising out of:
>
> A. "Your work" for the additional insured(s) at the location designated above, or
>
> B. Acts or omissions of the additional insured(s) in connection with their general

supervision of "your work" at the location shown in the Schedule.

2. With respect to the insurance afforded these additional insured(s), the following additional provisions apply:

....

B. Additional Exclusions. This insurance does not apply to:

....

(3) "Bodily injury" or "property damage" arising out of any act or omission of the additional insured(s) or any of their employees, other than the general supervision of work performed for the additional insured(s) by you.

A motorist was injured when travelling through the Community Asphalt work zone. The motorist sued Capeletti for failure to follow standard procedures to ensure the safety of motorists. Liberty Mutual assumed the defense of Capeletti under a reservation of rights, citing Exclusion (3), above. Capeletti filed a declaratory judgment action and the trial court granted Capeletti's motion for summary judgment. The appellate court reversed, finding that the plain meaning of exclusion (3) above eliminates coverage for Capeletti for Capeletti's acts of negligence that do not constitute supervision of Community Asphalt's work.

IV. Georgia

The Georgia Court of Appeals found coverage for an additional insured in the case of *Ryder Integrated Logistics, Inc. v. BellSouth Telecommunications, Inc.*, 277 Ga.App. 679, 627 S.E.2d 358 (2006)(reversed on other grounds by *Ryder Integrated Logistics, Inc. v. BellSouth Telecommunications, Inc.* 281 Ga. 736, 642 S.E.2d 695 (2007)). In *Ryder*, *supra*, Tom Ray was a truck driver for Ryder and was injured at a BellSouth facility while unloading his truck. Ray and his wife sued Bellsouth alleging he was injured as a result of BellSouth's *sole* negligence in maintaining their property. Ryder and Bellsouth had a contract in which Ryder was to name Bellsouth as an additional insured. BellSouth tendered the claim to Ryder and its insurer, Old Republic Insurance Company (Republic) who refused to defend or indemnify Bellsouth. The additional insured endorsement on the Republic policy named Bellsouth as an additional insured with respect to liability "arising out of" Ryder's operations. The trial court held that Republic had a duty to defend and indemnify BellSouth and reasoned that the complaint was a premises liability claim and that the additional insured endorsement provided coverage for premises liability claims. Ryder and Republic argued in their appeal that the endorsement only qualified BellSouth as an additional insured if BellSouth's liability arose out of Ryder's operations. The Court of Appeals found that the phrase "arising out of your operations" meant arising out of a "business transaction" or work performed by Ryder. Since Ray was performing work at the BellSouth site pursuant to Ryder's contract with BellSouth, the Court of Appeals found that Ray's injuries arose out of that business transaction and thus BellSouth should have been covered as an additional insured. The Supreme Court reversed the Court of Appeals on other grounds, but seemed to support the finding of coverage for BellSouth as an additional insured.

In *BBL-McCarthy, LLC v. Baldwin Paving Co.*, 285 Ga.App. 494, 646 S.E.2d 682 (2007) a general contractor and its liability insurer brought action against subcontractors and their liability insurers to recover for breach of duties to defend and indemnify the general contractor in underlying tort suits. The subcontractor was hired to construct a deceleration lane going into an office complex. An accident occurred in the deceleration lane whereby several motorists were killed, and their estates sued the general contractor. The general contractor tendered the defense of the suit to the subcontractor's carrier as an additional insured under the policy, but the tender was denied. In holding that the general contractor was an additional insured under the subcontractor's policy, the Georgia Court of Appeals held that the "arising out of" language in an additional insured endorsement means "[a]lmost any causal connection or relationship . . ." and grants coverage "without regard to whether the injury was attributable to the named insured or the additional insured."

V. North Carolina

A federal court interpreting North Carolina law has taken a different stance in the case of *St. Paul Fire And Marine Ins. Co. v. Hanover Ins. Co.*, 187 F.supp.2d 584 (U.S.D.C. E.D N.C., 2000). In this case, a general contractor and its commercial general liability carrier brought a declaratory judgment action against its primary subcontractor's insurer, seeking coverage as an additional insured for a personal injury action brought by an employee of a secondary subcontractor.

> The policy at issued stated:
> 1. WHO IS AN INSURED (Section II) is amended to include any person or organization you are required by written contract to include as an insured, but only with respect to liability arising out of "your work." **This coverage does not include liability arising out of the independent acts or omissions of such person or organization.** The written contract must be executed prior to the occurrence of any loss.
>
> 2. Where required by contract, this insurance is primary and noncontributing as respects the person or organization included as an insured under this endorsement and any other insurance available to any such person or organization shall be excess and noncontributing with this insurance....
> (emphasis added)

The above additional insured endorsement contains language that specifically excludes coverage for liability arising from independent acts or omissions of the additional insured. The court held the above language to be sufficient to limit the additional insured coverage to vicarious liability, and as there were no claims for vicarious liability asserted in the complaint, the subcontractor's carrier had no duty to defend the general contractor. In dicta, the court stated "indeed, an agreement between [the subcontractor and general contractor] to provide insurance for [the general contractor] would be void against public policy in North Carolina. Under North Carolina law, a general contractor cannot require a subcontractor to insure it against its own negligent acts." *Id*. at 590 n.7. That dicta suggests that, at least in conflicts between general contractors and subcontractors in North Carolina, even if the subcontractor's additional insured endorsement did not contain language limiting coverage to vicarious liability, coverage will be limited to vicarious liability as a matter of public policy.

VI. South Carolina

One of the more recent cases in the Southeast addressing additional insured coverage is out of South Carolina. The case of *Standard Pacific of the Carolinas, LLC v. Amerisure Ins. Co.*, 2012 WL 6604614 (C.A.4. (S.C.)) was decided by the U.S. Court of Appeals for the 4th Circuit in December of 2012. In *Standard Pacific*, *supra*, a developer sought additional insured status under a general contractor's policy. The developer was sued when Terry Shortt fell off his bicycle and broke his back after riding over a deteriorated section of an asphalt path in the Ridge Point Community in Rock Hill, developed by Standard Pacific of the Carolinas, LLC (Standard) and built by Matthews Construction Company, Inc. (Matthews). Shortt alleged that Matthews and Standard were jointly and severally liable for his injuries because of their negligence in design, development, construction, management and maintenance of the asphalt path. Matthews' carrier was Amerisure Insurance Company (Amerisure). The Amerisure policy contained an additional insured endorsement, providing coverage for parties whom Matthews was required to add as an additional insured by "written contract or agreement", with the following limitation for liability arising out of:

> (b) Your ongoing operations performed for that additional insured, **unless the written contract or agreement or the certificate of insurance requires "your work" coverage (or wording to that same effect)** in which case the coverage provided shall extend to "your work" for that additional insured. (emphasis added).

Amerisure contended that Standard was not an additional insured under the commercial general liability (CGL) policy it issued to Matthews because (1) the indemnity provision in the construction contract between Standard and Matthews was void and unenforceable under South Carolina Code § 32-2-10; (2) Shortt's claim did not **"**arise out of" Matthews' ongoing operations; and (3) the exception to the exclusion did not apply because there was no contract between Matthews and Standard requiring "your work" coverage. The district court concluded that the indemnity provision in the construction contract did not violate § 32-2-10, finding that even though one of the sentences appeared to hold Standard harmless for the Standard's own simple negligence, the code section is only a bar to indemnification for that negligence, not to a waiver, which was the language in the contract. The court went on to conclude that Standard qualified as an additional insured. However, the court observed that the insurance provided to Standard was limited to the ongoing operations that Matthews performed for Standard. The court further noted the exception to the exclusion did not apply. While Standard may have thought it was going to get completed work coverage, no such language was present in the agreement between Standard and Matthews. Consequently, the court denied the developer's motion for judgment on the pleadings and granted summary judgment in favor of the insurer. The Court of Appeals reversed, finding there was coverage for Standard, but not because of the applicability of the "arising out of" language, but because the Court of Appeals read the contract between Standard and Matthews as an agreement by Matthews to extend "your work" coverage to Standard and thus the exception to the exclusion applied.

VII. 2004 Change to the Policy Form

ISO made a major change in 2004 by removing reference to the "arising out of" language in the additional insured endorsement and linking coverage directly to acts or omissions of the named insured. This was done to avoid many of the issues that arose in the cases discussed above. The form CG 20 10 07 04 ISO 2004 endorsement states:

> A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

The U.S. Court of Appeals for the 5th Circuit has relatively recently evaluated the applicability of language like that in form CG 20 10 07 04 ISO 2004 in the case of *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, 664 F. 3d 589 (5th Cir. 2011). In *Gilbane*, *supra*, the Gilbane Building Company ("Gilbane"), the general contractor on a project, required that its subcontractor provide it additional insured coverage. An employee of one of Gilbane's subcontractors was injured and sued Gilbane. The underlying complaint alleged that recent rainstorms had caused the construction site to accumulate mud and that Gilbane had been negligent in failing to keep the workplace clean. The subcontractor was insured by Admiral Insurance Company ("Admiral"). Gilbane requested that Admiral defend and indemnify Gilbane as an additional insured. The insurance policy provided coverage for additional insureds, "but only with respect to liability for 'bodily injury' … caused in whole or in part, by . . . [the subcontractor's] acts or omissions or omissions of those acting on [the subcontractor's] behalf." Admiral denied coverage under the policy and Gilbane filed a declaratory judgment action. The district court granted summary judgment in favor of Gilbane finding that there was an inference from the underlying complaint of contributory negligence on the part of the employee, which was sufficient to trigger the duty to defend under the Admiral policy. *Id*. The Fifth Circuit reversed the district court's ruling. Applying the eight-corner rule (under Texas law), the Fifth Circuit found that the allegations of the underlying complaint did not implicate the employee's contributory negligence or the subcontractor's negligence. The underlying complaint focused only on the liability of Gilbane in failing to correct the problem posed by the mud on the project and did not allege facts implicating the employee or the subcontractor. *Id.*

Thus, judging from Gilbane, the 2004 rendition of the additional insured endorsement seems to accomplish what insurers thought the prior edition was written to do, i.e., limit additional insured coverage to claims against an additional insured for vicarious liability for the named insured's actions. *See also, Dale Corp. v. Cumberland Mut. Fire Ins. Co.,* 2010 WL 4909600 (E.D. Pa. Nov. 30, 2010)(finding that the allegations in the underlying complaint "did not trigger the insurer's duty to defend the purported additional insured because they do not in any way implicate the named insured as required by the additional insured endorsement when

the additional insured endorsement required a showing that the injuries were caused "in whole or in part" by the named insured's negligence).

VIII. 2013 Change to the Policy Form

In the words of the Greek philosopher Heraclitus, "there is nothing permanent, except change." In April 2013, ISO again changed the additional insured form. These changes significantly narrowed the scope of coverage. Because these changes are so recent there is not any significant case law around the country addressing the applicability of the changes. However, because the form has been around for the past three years, we have had the opportunity to apply the form in practice.

Generally, the 2013 additional insured form changes three major things. First, it limits coverage to the additional insured "only to the extent permitted by law." This change to the form follows the law in many states which bar indemnification agreements in which the indemnitor is asked to indemnify the indemnitee for the indemnitee's own negligence. This provision seemed to be put into place so as not to run afoul of such state indemnity laws. Interestingly, in some states, the legislature has already done this either by restricting legal indemnity agreements (See e.g., CA CIVIL §2783) or by expressly finding that additional insured provisions that seek to provide insurance for an indemnitee's sole negligence are void. See e.g, V.A.T.S. Insurance Code §151.104 (Texas), TX INS §151.104. In other states, indemnification clauses like this are barred unless the risk can be shifted to insurance. See e.g*., ESI Inc, of Tennessee v. Westpoint Stevens, Inc.*, 254 Ga.App. 332 (2002.)

Second, the form provides that coverage to the additional insured will not be broader than that which the named insured is required by the contract or agreement to provide. Based on this language, if the contract between a contractor and additional insured requires the contractor to maintain insurance coverage that is narrower in scope than what the contractor actually carries, the owner, as an additional insured, will be limited to what is actually required by the contract. There are situations where the contract requires narrower coverage than the contractor actually purchased. If that is the case, the narrower coverage would apply. Thus, as a carrier, it is very important to review the contract between your insured and the purported additional insured to determine the scope of any coverage for the additional insured.

Finally, the form limits the amount the insurer is required to pay out to the amount of insurance (a) required by the contract or (b) available under the applicable limits of insurance, whichever is less. Again, like number two above, as a carrier, it is important to look at the contractual requirements for the amount of coverage as your coverage for the additional insured may be limited.

While there are no recorded cases addressing the applicability of this form as of the writing of this paper, there are some courts around the country that have addressed language similar to that in the 2013 ISO form. For example, in *Kmart Corp. v. Footstar, Inc.*, 777 F.3d 923 (7th Cir. 2015), the Court applied an additional insured provision that stated that the additional insured coverage "applies only to coverage and limits of insurance required by the written agreement, but in no event exceeds either the scope of coverage or the limits of insurance provide by this policy." In the Kmart case, the contract between Kmart and Footstar provided

that Footstar would operate a footwear department in Kmart stores. Footstar was to get insurance which would name Kmart as an additional insured for personal injury claims "arising out of or relating to the goods and services provided pursuant to this agreement." When a Footstar employee negligently injured a Kmart customer, while assisting that customer with something outside of the footwear department, the trial court and 7th Circuit Court of Appeals both agreed that Kmart was not an additional insured because the actions of the Footstar employee were outside of those for which Footstar was supposed to insured Kmart. See in contrast, *Federated Service Insurance Co. v. Alliance Construction*, LLC, 282 Neb. 638 (2011)(finding coverage for an additional insured despite limiting coverage to that required by the contract because the contract provided coverage would be obtained for the additional insured's own negligence.)

The one thing that is certain is that these changes make reviewing the contract between your named insured and the purported additional insured more important than ever.

IX. Priority of Coverage and Contribution Among Insurers

Another issue that commonly arises in the additional insured context is priority of coverage between a primary carrier for the purported additional insured and the carrier who provides additional insured coverage. Many additional insured endorsements attempt to address this issue and read something like as follows:

> Any coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured... unless the 'written contract' specifically requires that this insurance be primary and that the additional insured's primary coverage be non-contributory.

The Courts are then left to analyze whether the written contract between the parties (usually the general and the sub) indicate a requirement that the additional insured coverage be primary. Unfortunately, many construction contracts are not clear on this issued.

The Georgia Courts have analyzed additional insured endorsements such as the one above. In determining whether the endorsement creates excess or primary coverage, the Georgia Courts have looked to the actual contract language related to insurance coverage and from that have tried to glean the intent of the parties. The Courts have looked to whether the contract requires the company seeking coverage (usually the general contractor) be added to the subcontractor's policy as an additional insured or as a named insured. The Court has indicated in dicta that the former requirement (adding as an additional insured) shows no requirement of primary coverage and has found outright that the latter requirement (adding as a named insured) indicates a requirement of primary coverage. In *3060 Corp. v. Crescent One Buckhead Plaza, L.P.*, 300 Ga.App. 749 (2009), the Georgia Court of Appeals found that a lease agreement requiring the tenant to get an insurance policy for the landlord that listed the landlord as a "named insured" was sufficient to show a "requirement" that the tenant's insurance be primary.

More often than not, the additional insured will have its own CGL policy providing coverage for the claim. This raises the question of which policy provides primary coverage – the additional insured's own policy or the named insured's policy? Some policies contain an "other

insurance" clause which renders its coverage excess above any other insurance available to the additional insured. A problem can arise when the additional insured's policy also contains an "other insurance" clause which renders its coverage excess above other policies. In that instance, most courts find that the "other insurance" clauses cancel each other out, and the insurers are required to split the additional insured's defense costs pro rata. See, e.g., *Certain Underwriters at Lloyds, London Subscribing to Policy No. SA 10092-11581 v. Waveblast Watersports, Inc.*, 2015 WL 204563 (S.D. Fla. 2015); *Northland Ins. Co. v. American Home Assurance Co.*, 301 Ga. App. 726 (2009).

Beyond the duty to indemnify and priority of coverage therein, is the duty to defend. There are two trains of thought in this regard, and both are represented in the Southeast. In Florida, while there is a right to contribution for indemnity payments among insurers, there is no a right to contribution for defense costs. The reasoning is that there is an absolute duty for each insurer to defend and the benefit is granted by the policy. The rights, duties, or benefits of another insurer should not be taken into account. See e.g., *Continental Casualty Co. v. United Pacific Insurance Company*, 637 So.2d 270, 19 Fla.L.Weekly D894 (5th Dis. 1994.) South Carolina similarly does not permit contribution amongst insurers for defense costs. There, the United States Court of Appeals for the Fourth Circuit found again that the duty to defend is personal to each insurer and by defending the insurer is doing no more than what it had obligated itself to do. See, *Auto-Owners Insurance Company v. Travelers Casualty and Surety Company of America*, 587 FedAppx 197 (4th Cir. 2015). In contrast, in Georgia, equitable contribution is not permitted between two insurers, but the "other insurance" clause found in most insurance contracts constitutes a sufficient contractual arrangement to allow one insurer to seek contribution from another insurer for defense costs. *Graphic Arts Mutual Insurance Company v. Essex Insurance Company*, 465 F.Supp.2d 1290 (N.D. GA 2006). See also, *Nationwide Mutual Insurance Company v. State Farm Mutual Auto Insurance Company*, 122 N.C.App. 449 (1996)(finding that an insurer who has a duty to defend its insured may not recover its defense costs from another insurer who also has a duty to defend, but if the insurer has no real duty under its policy to defend, but does it anyway, contribution is available.)

X. Conclusion

Relatively recent changes in additional insured endorsements commonly used in commercial general liability policies issued to contractors and subcontractors have limited the scope of additional insured status. Further, cases interpreting additional insured endorsements across the Southeast have brought to light how important the construction contract between the general contractor and the subcontractor is in evaluating status as an additional insured as well as in evaluating priority of coverages.