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# Changing Landscape of Additional Insured Obligations

## Introduction

There was a time, not to long ago, when Additional Insured status was not complicated. Two parties would simply agree that one was to name the other on their insurance policy and it was done. Sometimes, without even having executed a written agreement. A handshake was enough to get the job done. So, what changed? The insurance industry was paying out on claims that had not been contemplated when the policy was underwritten. Claims were becoming more expensive. Insurance gains were not as forecasted. Something had to change. Underwriters started looking at how Additional Insured coverage was effecting the bottom line. ISO, Insurance Services Offices, Inc., and carriers started to draft Additional Insured endorsements with new requirements and limited scope. That is what brings us here today.

## Contracts

This program will discuss the changing landscape of Additional Insured obligations from the prospective of defense counsel, coverage counsel, broker and client. We will look at what the expectations are of both the upstream and downstream contractors. What needs to be in a contract to trigger additional insured coverage? What documents should be collected and reviewed from downstream contractors to ensure that all contractual obligations have been met? And finally, confirming that the policy and the endorsements have met the contractual insurance requirements contained within the contract.

There are two ways for an upstream contractor to trigger coverage on a downstream party's policy. One way is through the hold harmless and indemnity provision. The second, is by means of additional insured endorsements. It is the second that we will delve into today.

Additional insured obligations begin with the drafting of the contract. As claims professionals, most of us are not involved at this stage. However, the insured's obligations contained within that contract will ultimately effect a carrier's decision on whether to extend Additional Insured coverage or not. It is very important that contracts contain adequate language to identify the insurance obligations of the downstream parties. The body of the contract should

contain general insurance obligation language, and reference the proper exhibit for more detailed requirements. For example, is it the intent of the upstream party to require that the policy aggregate apply per policy or per project and what is the difference? The contract should specify what coverages are important to the upstream party such as General Liability, Auto, and Workers Compensation. Is a Pollution or Builder's Risk policy necessary? The upstream needs to pay attention to these details during the contract phase if they wish to successfully transfer their risk to the downstream party. We will discuss later on how the contract will interplay with the Additional Insured Endorsements that are commonly used in the marketplace today. Finally, the body of the contract should also specify that even if proper coverage is not procured prior to commencement of the project, the obligation of the subcontractor to obtain conforming coverage survives.

The Insurance requirements, can be located in the body of the contract itself or attached to the contract via an exhibit. It is more common today to see the Insurance requirements as an attached exhibit because of the time and detail that the upstream party needs to put into their Insurance requirements to ensure that they are transferring the contemplated risk. The contract exhibit should contain considerably more detailed information outlining the insurance requirements of the downstream party such as the minimum coverage requirements for workers' compensation, commercial general liability, excess, and automobile coverage. In determining minimum coverage amounts, consideration should be given to the geographic location of the project, favorability of applicable laws, potential exposure for claims, and scope of recoverable damages in that particular venue. The scope of the project and track record of the particular downstream contractor should also be considered. If the Insurance requirements are a separate exhibit, then the upstream party needs to ensure that there is wording in the contract incorporating the exhibit into the contract. There are times when a contractor will go through the pains of determining what risk they wish to transfer and how it will be transferred and then not include proper incorporating language. Later in the presentation we will show how this impacts the insurer's obligation when a tender is received following a loss.

It is most important that the insurance exhibit identify all specific parties that are to be named as an additional insured (together with their affiliates, successors officers, agents, subsidiaries, etc.), including developers and lenders, as well as any party that the additional insureds are contractually required to indemnify. The insurance exhibit should also require procurement of insurance in accordance with any statutory requirements, and a waiver of subrogation against the additional insureds. Finally, the exhibit should include specific endorsement numbers (e.g., CG 20 10 11 85) or simply require coverage for ongoing and completed operations on a blanket basis.

## Collection of Documents

Prior to the start of the project, it is essential to collect documents from the downstream parties that demonstrate compliant coverage has been procured. Certificates of insurance are not adequate proof of coverage. It has been well established that they are for informational purposes only. Actual policies, with all endorsements, must be collected to ensure that proper coverage limits have been issued, that the proper additional insureds are included, that the additional

insureds are listed as certificate holders, and to determine the policy period to ensure that renewals occur timely. Most importantly, you need to determine which Additional Insured endorsement was procured and how it reads. For example, does the endorsement contain "caused by" language or "arising out of" language? In New York the Courts have held that the "caused in whole or in part" language means proximate cause. See *The Burlington Insurance Company v. NYC Transit Authority, et al, No 2016-00096, Court of Appeals*. This decision and others like it in other jurisdictions greatly narrow the scope of coverage afforded to an additional insured. You need to confirm that the policy does not contain exclusions that undermine the purpose of the procurement. For example, exclusions for injuries to employees of the named insured or no coverage for accidents above ground level.

Here is an example where a carrier seeks to limit fall from a height coverage by attaching endorsement GL 01 18 0411,

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

## EXTERIOR WORK LIMITATION (FOUR STORY HEIGHT LIMITATION)

It is hereby agreed that with respect to new construction or exterior contracting operations performed on the exterior side of structures or buildings, any work performed by the insured, or by any subcontractor on behalf of the insured, shall be at heights of no greater than 75 feet or four stories.

Any claims for "bodily injury," "property damage" or "personal and advertising injury" involving exterior work performed at greater than 75 feet or four stories in height shall be excluded hereunder.

Another example:

**EXCLUSION - DESIGNATED ONGOING OPERATIONS**

This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART
SCHEDULE

Description of Designated Ongoing Operation(s): **Any Exterior Work in Excess of 2 Stories Roofing**

The following exclusion is added to paragraph 2. Exclusions of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I - Coverages):

This insurance does not apply to "bodily injury" or "property damage" arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others.

Unless a "location" is specified in the Schedule, this exclusion applies regardless of where such operations are conducted by you or on your behalf…….

These endorsements not only apply to the named insured, but would also apply to an Additional Insured thus limiting the upstream contractor's ability to transfer this contemplated risk regardless of the Additional Insured endorsement attached to the policy.

Upon each renewal, all documents must be collected again.

## Endorsements

There are some standard additional insured endorsements available in the insurance marketplace, although variations abound which may complicate risk transfer. Standard ISO endorsements may or may not meet the needs of the parties dependent upon the situation. For example, one ISO endorsement – the CG 20 33 – provides additional insured contract only to the party in a direct contractual relationship with the named insured. This may not be sufficient where contracts require additional insured status for other parties (e.g., for upstream project owners, affiliated companies, property management entities and the like).

Scenario:

A general contractor signs a written contact to build a building for an owner. The contact requires the general contractor to purchase a CGL policy naming the owner as an additional insured. The contract also requires that all subcontractors purchase CGL coverage naming the owner as an additional insured. The general contractor hires several subcontractors and executes a contract with each one. This contract requires that the subcontractor purchase a CGL policy and name both the owner and the general contractor on the policy as additional insureds. The subcontractor purchases endorsement CG 20 33 to comply with the contacts insurance requirements. Here is the problem, the owner does not have a written contract with the subcontractor. Therefore, if there is a loss at the project and the owner is sued. The GC will be able to transfer the risk to the subcontractors but not the owner.

Now let's take a look at manuscripted language that was the subject of ***Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 2018 NY Slip Op 02117.***

> "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you."

Not all carriers use ISO forms but rather manuscript their own Additional Insured endorsements. In this case, the language is very similar to that found in some ISO forms. In the Gilbane case, the highest Court in New York, the Court of Appeals, affirmed the Appellate Division order finding that the above language is not ambiguous. The majority focused on the word "with" and concluded that the named insured must agree with the purported additional insured, in a writing between those parties, to add coverage for that entity under the policy. In

other words, the written contract must be "with" the additional insured. Other entities that are not a signatory party to the written contract do not qualify for coverage under the policy.

Other jurisdictions have likewise taken a similarly restrictive approach to analyzing additional insured endorsements. For example, Illinois and Louisiana courts have issued decisions similar to New York which find that contractual privity is required by certain endorsement language. *See Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115 (Ill. App. Ct. 2011); *Venable v. HilCorp Energy Co. Inc.*, 2010 WL 18117757 (E.D. La. 2010).

The downstream subcontractors should request Additional Insured endorsement CG 20 38 to include coverage for upstream parties for ongoing operations.

The CG 20 10 (ongoing operations) and CG 20 37 (completed operations) contain no such restrictive language in the body of the endorsement. However, schedules included on these endorsements may be filled out in such a way as to impose new, restrictive requirements. For example, a carrier may fill in the Name of Additional Insured Person(s) or Organization (s) schedule with something like this:

Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.

Now the endorsement, which had no restrictive language, is restricting additional insured coverage to the party that executed the contract. Again this is limiting the intent of the upstream party to be able to effectively transfer a risk to a subcontractor. Had the upstream party not requested the actual endorsement to review, they may have accepted on its face that all upstream parties are additional insureds.

There was a time when contracts and policies did not interact. The policy was a contract with the insured and the construction contract or lease was an agreement between two parties contemplating a good or service for consideration. Now, endorsements include language that pull construction contracts and leases into the insurance mix.

## Benefits of a Wrap

One way to simplify all of these issues is through the purchase of WRAP policies (Owner Controlled Insurance Program (OCIP) and Contractor Controlled Insurance Program (CCIP)). These policies provide consistent coverage to all enrolled parties. Risk transfer by way of additional insured coverage is no longer the main source of coverage for the owner or GC. Through a Wrap Up, the owner (OCIP) or general contractor (CCIP) can control the policy limits and coverage. The owner or contractor will ensure that the policy does not contain exclusions such as residential or height limitations which, as we have seen, can limit the opportunity of risk transfer through the Additional Insured endorsement. A WRAP policy gives all enrolled parties the peace

of mind of knowing that the project will have sufficient coverage to meet any and every potential risk.

Another benefit of WRAP-UP programs or policies is that it eliminates the figure pointing following a loss. There is no need to establish liability in order to trigger an Additional Insured provision ("caused by" v. "arising out of" language). This assists in the defense of claims that may arise at the project and ultimately saves on defense costs by eliminating the need for assignment to multiple law firms.

However, consideration must be given to excluded parties to ensure that those parties are still obtaining adequate coverage as discussed above.

## Strategies for Managing Additional Insured Requirements

All aspects of the project team should be called upon to ensure compliance with insurance requirements. Downstream documents should be reviewed by the requiring party, its broker, and potentially its attorneys. These documents should be maintained by the project team, and updated as needed upon renewals. One must ensure that their policy conforms to the insurance requirements call upon in the contract. When a policy does contain an endorsement that effects additional insured coverage, the client and broker should work together to negotiate their removal.

Discussion need to be held with carrier underwriters so that the carrier thoroughly understand the intent of their insured's contractual obligations. The underwriter should endeavor to work with the insured so that together they can comply with contractual obligations rather than trying to limit the carrier's exposure in the event of a loss. Underwriters are the best resource for educating the insured as to their company's products and resources so that both the insured and the carrier are comfortable with the policy.

Additionally, it is important that the adjuster, when called upon to determine if a party qualifies as an Additional Insured on a policy, completes a thorough investigation of both the policy and the surrounding facts. Which endorsement is on the policy and what is the prevailing case law? Moreover, they should attempt to understand the expectations of all the parties involved. An adjuster should bring the underwriter into the conversation so that the underwriting intent is understood. Will a denial of Additional Insured standing expose the insured to a breach of contract claim? Will the carrier have a contractual indemnity obligation anyway?