The Additional Insured Obligation: The Devil is (Always) in the Details

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By

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About the Author

Joe Junfola is principal of Junfola Claim Consulting ("JCC") and Construction Defect Claim Resources ("CDR"). JCC provides commercial claim consulting services including coverage analysis, mediation representation, claim audits, training, and other services. CDR provides a solid and reliable information and educational resource for insurance, risk management, construction, and design professionals in a world where construction defect claims proliferate.

George: Alright. Listen, I gotta get some reading done. You mind if I do this here? I can't concentrate in my apartment.

Jerry (checking out George's textbook): Risk management?

George: Yeah. Steinbrenner wants everyone in the front office to give a lecture in their area of business expertise.

Jerry: Well what makes them think you're a risk management expert?

George: I guess it's on my resume.[1]

Contracts are ubiquitous in commercial transactions especially in construction projects. Prominent within these contracts should be risk management provisions. While construction contracts are standardized to a large degree, there are plenty of variations and, consequently, plenty of potential for conflict.

A contract typically includes insurance requirements in general, a specific additional insured obligation, and an indemnity obligation. A contract may also include exculpatory provisions, liability limitations, and subrogation waivers. These latter three provisions do not transfer financial risk. Rather, they limit or relieve liability.

The additional insured obligation, along with the hold harmless and indemnity obligation, are important risk transfer techniques, and they are a vital part of an overall risk management strategy. While different, they are complementary and together they can accomplish effective risk transfers. Of course, the devil is always in the details.

A contractual indemnity claim against the named insured and an additional insured claim by the same party on the named insured's policy can be confusing and it's critical to distinguish both. What is the difference between an additional insured and indemnitee?

Contractual Indemnification

Contractual indemnification (aka: hold harmless and indemnity) is a non-insurance risk transfer technique. Financial risk is transferred or shifted from the indemnitee (e.g. general contractor) to the indemnitor (e.g. subcontractor). The indemnitor agrees to indemnify the indemnitee for certain hazards that produce claims like those for bodily injury and property damage. The indemnitor *assumes* the financial liability of the indemnitee. This liability of the indemnitee includes its vicarious liability for the work of the indemnitor and, in many instances, its own independent acts of negligence (subject to anti-indemnity laws).

Contractual indemnification is not insurance. However, the agreement is only as good as the indemnitor's ability to pay so insurance is routinely required to back up the agreement.

This transfer does not relieve the indemnitee of its liability for damage to the third party; it merely transfers the financial obligation to the indemnitor. If the indemnitor cannot pay, the indemnitee must. The following exhibit demonstrates the risk transfer process:

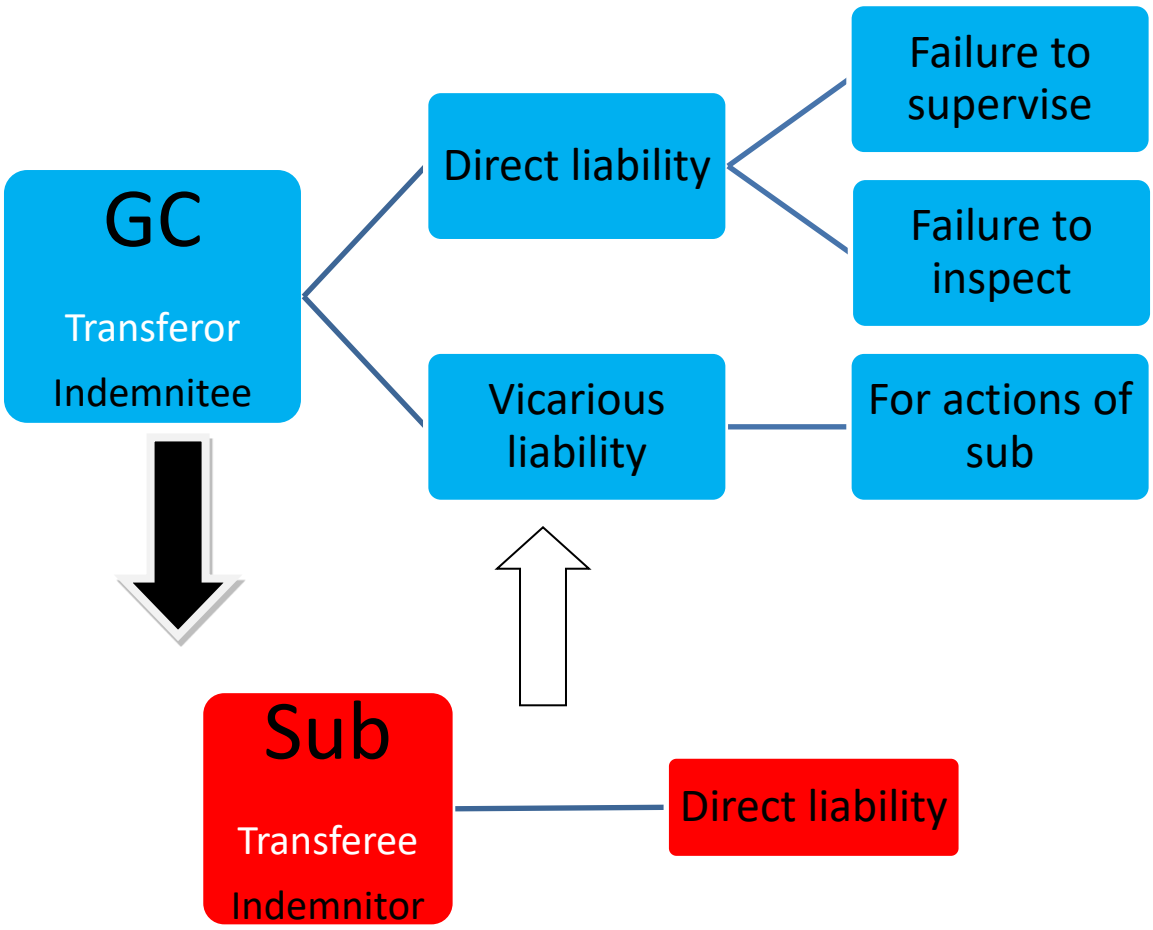

Exhibit A: Risk Transfer

The Additional Insured

The insurance requirements in a contract typically include an additional insured obligation. Like the hold harmless and indemnity agreement, there is risk transfer in the additional insured obligation. But instead of a transfer to the subcontractor the risk is transferred to a third party, the insurer.[2]

An additional insured is a person insured on the policy who has direct rights under the policy. On the other hand, an indemnitee has no direct rights under the policy. The additional insured is not

a named insured. Certain provisions in the policy apply to the named insured but not the additional insured.

The construction contract may require that the general contractor be named as an additional insured on the named insured's (subcontractor) policy. This can be accomplished by a blanket or scheduled endorsement. The latter specifically lists the parties; the former is a handy way to provide coverage to those parties the named insured is obligated by written agreement to include as additional insureds. This alleviates what could be a logistical nightmare for both the named insured and the underwriter caused by the necessity of specifically naming each party. Frequently, both types of endorsements are used in the same policy.

The contractual obligation to provide insurance is not the same as the contractual obligation to name the general contractor as an additional insured. The latter obligation is often included within the general insurance requirements provision of a contract. The failure of the named insured to name the general contractor as an additional insured, if required to do so, is a breach of contract that is not covered under the CGL policy.

The additional insured obligation provision may require that the additional insured's policy be primary and noncontributory, and may contain provisions as to duration and scope. For example, the requirement to name the general contractor as an additional insured may extend to a certain period of time after completion and acceptance of the named insured's work, coinciding with the state's statute of limitations and/or statute of repose. Additional insured coverage may be limited to ongoing operations only and may contain language as broad as "arising out of" or as limited as "as caused by".

Pay particular attention to the phrase, "as required by contract", in the additional insured endorsement. To determine the extent of coverage available to the additional insured, by necessity you need to review the contract to determine exactly what is required. For example, certain limits may be required. If the required limits are less than the policy limits, then only the required limits are available to the additional insured.

These and other issues will be addressed in later sections.

The following exhibit compares the rights and obligations of the additional insured to those of the indemnitee:

Additional Insured	Indemnitee
Direct rights under policy.	No direct rights under policy.
Rights governed by insurance policy.	Rights governed by indemnity provision
Obligation to pay rests with insurer.	Obligation to pay rests with indemnitor
(Typically) defense in addition to limits.	(Typically) defense within limits.[3]
Immediate duty to defend. (Pay as you go.)	Indemnification.[4] (Reimbursement or pay as you go.)

Exhibit B: Additional Insured v. Indemnitee

The Tender

The tender, demonstrated in the following exhibit, begins the process.

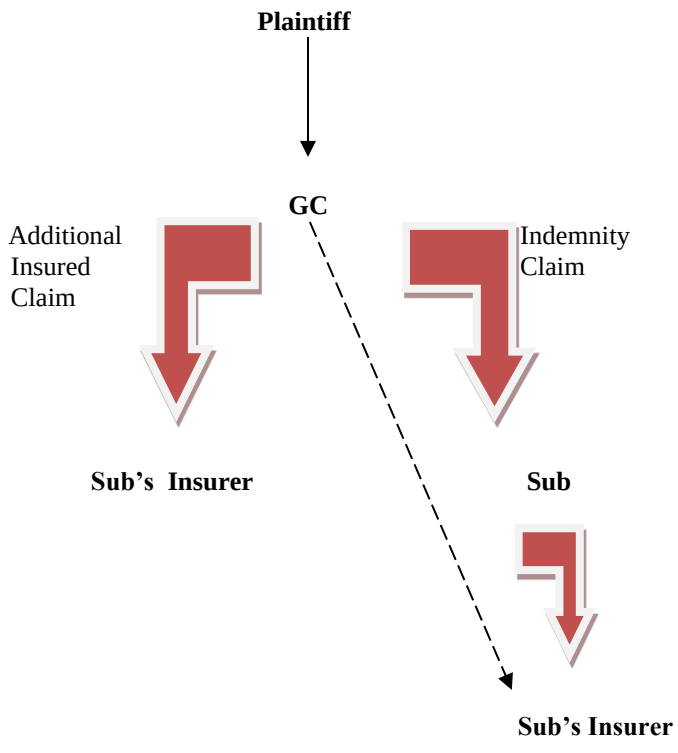

Exhibit C. The Tender

1. Plaintiff sues the general contractor ("GC").
2. GC tenders an additional insured claim to the subcontractor's ("Sub") insurer on Sub's policy.
3. GC tenders to Sub for contractual indemnification based on the indemnity provision in the subcontract.
4. Sub tenders GC's indemnification claim to Sub's insurer.
5. Alternatively, GC tenders additional insured claim and contractual indemnity claim to Sub's insurer.

The thick solid lines in the exhibit indicate direct relationships. For example, the general contractor has a direct relationship as an additional insured with the sub's insurer. The dotted line indicates that the general contractor does not have a direct relationship, as an indemnitee, with the sub's insurer but will benefit from the policy because the sub is covered for its assumption of the tort liability of the general contractor.

You will routinely receive additional insured and contractual indemnitee tenders at the same time. Which coverage applies?

> A commonly asked question is, "When both additional insured and contractual liability coverages are available, which coverage applies to the claim or suit?" The answer is whichever one covers the loss. Insurers cannot pick and choose which coverage they want to invoke so as to eliminate coverage. If both forms of protection are available, the insurer must provide all of the protection possible.[5]

The Underlying Contract – Insurance Requirements

Despite some standardization, the Insurance Requirements in construction contracts vary as to both language and location in the contracts. Here are a few actual samples:

> ***"****Subcontractor shall procure and maintain in force for the duration of the Work…Comprehensive General Liability Insurance…Contractor, Owner and Architect shall be named as additional insureds."*
>
> *"Subcontractor…shall obtain the following insurance, which…shall be maintained at all times during the term of this Agreement and for a reasonable time hereafter…The Commercial General Liability policies…shall contain endorsements naming the Contractor…as additional insured(s); shall provide for severability of interests…"*
>
> ***"****Contractor shall obtain, pay for and keep in full force and effect until final completion and acceptance of the Work, the following insurance…and that …Builder… named by separate endorsement as additional insured."*

"Contractor shall obtain and maintain in full force and effect…the following insurance…

(a) Comprehensive or Commercial General Liability…Builder shall be named as additional insured.

All of the insurance…shall be maintained in effect at all times during all the work performed…until such work has been accepted by Builder. In addition…insurance shall be maintained continuously until ten years from completion of the Subcontractor's work and acceptance…by Builder…"

Certificates of Insurance

In construction defect claims, certificates of insurance ("COI") routinely accompany additional insured tenders. During the normal course of business, at the time a construction contract is made, the general contractor will typically require a COI from the subcontractor and usually the sub's insurance agent provides it. The COI includes policy information important to the general contractor such as named insured, names of insurers, types of coverage, policy periods, limits, and other basic information.

In other words, the COI provides the general contractor with confirmation that the subcontractor is insured, and what the terms of the policy are. The COI only provides information at the point in time that it is issued. It is a snapshot. But whether this information is accurate is another matter. It is not infrequent that an insurance agent will provide information on a COI and attachments that does not comport with the policy nor the insurer's records, a disappointing revelation to the certificate holder and a prolific source of coverage disputes.

Furthermore, the COI should not amend or change the policy in any way, explicitly stating so in the form of a disclaimer. The certificate is not the contract, the policy is. However, the disclaimer is proving not to be bulletproof, at least in Washington.

In T-Mobile USA Inc. v. Selective Insurance Co. of America, Slip. Op. No. 96500-5, 2019 WL 5076647 (Wash. Oct. 10, 2019), the Washington Supreme Court, on a certified question from the Ninth Circuit, held that despite the disclaimer, Selective's agent, under apparent authority, bound Selective to cover T-Mobile USA as an additional insured even though T-Mobile USA was not a signatory to the construction contract that contained the additional insured obligation.

Selective's named insured contracted with T-Mobile Northeast, not T-Mobile USA, for the construction of a cell tower and the former was required to be an additional insured on the policy. Initially, T-Mobile USA was named as the defendant in a subsequent construction defect lawsuit. Since T-Mobile USA was not a signatory to the construction contract and, therefore, not an automatic additional insured, Selective denied coverage.

Significantly, the COI identified "T-Mobile USA Inc., its Subsidiaries and Affiliates" as the additional insureds. The agent, Selective's "authorized representative", repeated this practice over a period of seven years. T-Mobile USA approved the form of the policy and was aware that the

COI identified it as the additional insured notwithstanding it not being a signatory to the subcontract (Selective presumably was aware of it as well).

While the disclaimer was clear, the representation by the agent, with apparent authority from Selective, trumped the disclaimer, requiring Selective to cover T-Mobile USA as an additional insured even though it did not make the contract with the named insured (as required by the endorsement).

The take-away is that a certificate of insurance disclaimer is not bulletproof. Accuracy matters.

Coverage for the Additional Insured – Issues

Coverage for an additional insured has been the subject of much litigation and some legislative action. At one time, the coverage was almost a "throw-in" with no or insufficient commensurate (with the risk being underwritten) premium.

In California, the *Presley* decision reveals just how much this "throw-in" can cost since defense coverage is typically unlimited and can be much more valuable than indemnity coverage.

Presley Homes, Inc. v. American States Insurance Company, 90 Cal. App. 4th 571, (Cal. App. 4th Dist. 2001), deals with the extent of the duty to defend an additional insured in California. The Court held that the defense obligation is complete regardless of the extent of the named insured's exposure:

> …by agreeing to pay a share of plaintiff's defense costs, defendant effectively admitted it owed a duty to provide plaintiff with a defense. Its efforts during the pendency of the Cassidy action to limit its defense obligation to the portion attributable to Link's and Sunrise's potential exposure, and the delay in providing a defense while the parties attempted to reach a mutually acceptable percentage, highlights the very reason the…Supreme Court requires an insurer to provide a complete defense even where the underlying lawsuit includes both covered and uncovered claims. *Presley* 571, 576-577

As to the additional insured, *Presley* is clear and requires a complete defense. However, it does not preclude equitable contribution among the defending carriers. Furthermore, it is important that the carriers who agree to defend coordinate their efforts, i.e. work out a cost-sharing arrangement and other details as to the defense of their mutual insured.

"As Required by Contract"

Attention must be paid to exactly what is required by contract. For example, duration of the obligation is often included, limits may be specified (and sometimes the limits are less than those available to the named insured), and there may be a general provision in the endorsement itself that specifies that no broader coverage is provided than is required by contract. Barring any other coverage issues, coverage available to the additional insured is restricted by the requirements in the construction contract.

Attention must also be paid to whether the putative additional insured is a signatory to the contract. A recent case in New York illustrates the issue. In *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 2018 NY Slip Op 02117, the issue was whether a non-signatory to the construction contract was entitled to additional insured coverage even if it was included as an additional insured on a certificate of insurance that was attached to the contract.

The insurance policy provided as follows:

> "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." (Emphasis added). *Gilbane* 2

The Court ruled that the operative language in the decision was "with whom". In other words, the only additional insured obligation extended to the signatory to the contract:

> Here, the endorsement would have the meaning Gilbane JV desires if the word "with" had been omitted. Omitting "with," the phrase would read: ". . . any person or organization whom you have agreed by written contract to add . . .", and Gilbane JV's position would have merit. But Samson and Liberty included that preposition in the contract between them, and we must give it its ordinary meaning. Here, the "with" can only mean that the written contract must be "with" the additional insured. Gilbane JV proposes other wordings that, in its view, would more clearly require the existence of a written contract between Samson and an additional insured, but those formulations are no clearer and, in any event, the endorsement's meaning is plain and unambiguous. *Gilbane* 2

Blanket v. Scheduled

As stated previously, blanket endorsements automatically provide coverage to parties that the insured is required to name as an additional insured. Scheduled endorsements specifically name the party entitled to coverage. Blanket endorsements are convenient especially if the named insured engages in many projects and makes contracts containing additional insured obligations.

"Arising Out Of" v. "Caused By"

There is an important distinction to be made between "arising out of" and "caused by". "Arising out of" is much broader and simply requires a nexus, or connection, barely minimal in some jurisdictions, between the damage/injury and the work. Mere presence at the construction site may qualify.

In 2004, ISO introduced major changes to the additional insured endorsements that were attempts to require at least some causation on part of the named insured and exclude the sole negligence of the additional insured.

"Caused by" requires acts or omissions of the named insured. The damage must have been caused, in whole or in part, by the named insured's work. The additional insured can be a partial cause but not the sole cause.

But what does "caused by" mean?

There is a difference between legal causation, for which there is legal culpability on the actor, and causal actions for which there may be no legal liability. The named insured's act could have caused an injury or damage, in the context of sequential cause and its effect(s), but the named insured may have no legal liability.

While the named insured may have no legal liability, it is possible that the additional insured is legally liable. The key question, then, in the more recent versions of the additional insured endorsements is whether they provide coverage for the additional insured that has legal liability because the named insured, for which it is vicariously liable, caused an injury or damage but was not itself legally liable.

New York's Appellate Division addressed this issue on August 11, 2015.

In 2009, Burlington Insurance Company's named insured's, Breaking Solutions, equipment was being operated by an employee of the NYC Transit Authority (additional insured) during excavation in the Brooklyn subway. An explosion occurred resulting in injury due to the equipment contacting a live electrical cable below concrete. The additional insured was responsible for providing a warning or shutting down the power. It did neither. So, while the named insured's equipment contacting the live wire caused the explosion, the named insured was not the legal cause of the explosion. The additional insured admitted liability in an internal memorandum.

The question was whether the additional insured was covered on the Burlington policy even though Breaking Solutions was not legally liable for the injury, and the additional insured was. In other words, did the "caused by" language in the additional insured endorsement mean legal causation?

The Appellate Division responded that causation without legal liability was enough to trigger the additional insured obligation:

> …NYCTA and MTA are additional insureds under the subject policy for purposes of a loss that was "caused, in whole or in part," by an "act[] or omission[]" of the named insured, even though the named insured's causal "act[]" was not negligent. It is undisputed that Kenny's injury was causally connected to an "act[]" of the named insured, specifically, the Breaking Solutions excavator's disturbance of the buried electrical cable, which triggered the explosion that led to Kenny's fall. While it is true that, because NYCTA had not warned the Breaking Solutions' operator of the cable's presence, Breaking Solutions' "act[]" did not constitute negligence, this does not change the fact that the act of triggering the explosion, faultless though it was on Breaking Solutions' part, was a cause of Kenny's injury. The language of the relevant endorsement, on its face, defines the additional insured coverage afforded in terms of whether the loss was "caused by" the named insured's "acts or omissions," without regard to whether those "acts or omissions" constituted negligence or were otherwise actionable.
>
> *Burlington Ins. Co. v NYC Tr. Auth.*, 2015 N.Y. App. Div. LEXIS 6349, 13-14 (N.Y. App. Div. 1st Dep't Aug. 11, 2015)

However, on June 6, 2017 the Court of Appeals reversed, holding that proximate or legal causation is required for coverage as an additional insured. *The Burlington Insurance Company v. NYC Transit Authority,* 2017 NY Slip Op 04384.

The interpretation of causation has particular and quite interesting relevance to third-party-over suits. The subcontractor's employee is injured on the job. He can't recover from his employer given the worker's compensation exclusive remedy. He then sues the general contractor which turns the claim over to the subcontractor pursuant to the contractual indemnity provision in the subcontract, and to the sub's insurance company as an additional insured on the sub's policy.

If causation in the additional insured endorsement means legal liability, and the general contractor has vicarious liability for the subcontractor which has immunity, how can any additional insured claim ever succeed? On the other hand, a causation without legal liability interpretation should enable the additional insured claim to succeed, but what about the fundamental duty of the insurer

to the insured in the Insuring Agreement? "We will pay those sums that the insured becomes **legally obligated** to pay as damages." The "insured" includes additional insureds.

Direct Liability v. Vicarious Liability

A source of controversy and litigation is whether the additional insured GC is covered for the vicarious liability it has for its sub's negligence only or whether it can also be covered for its own direct liability. *Arguably*, it is the vicarious liability only that should be covered. After all, the additional insured should have its own insurance for its direct liability.

Contractors sometimes use their own employees to do some of the work at a project. Often, they hire subcontractors who are independent contractors. They are not employees. While, practically speaking, there may be some element of control, the independent subcontractor is not an employee of the contractor, and the sub is responsible for the results.

So those who hire independent contractors generally are not vicariously liable for the actions of the independent contractor. The *Independent Contractor Rule* holds that an employer is not liable for the physical harm to another caused by the independent contractor. Contrast an agency relationship, e.g. employer – employee, in which the principal is vicariously liable for the acts, errors, or omissions of the agent while in the scope of the agency, and the employer – independent contractor relationship, in which the employer does not have control over the means and methods of construction.

What is noteworthy about the Independent Contractor Rule are the numerous exceptions that have evolved over the years, to the point where the exceptions not only prove the rule, they have almost become the rule.

According to the Restatement of the Law, Second, Torts, an employer can be liable for the actions of the independent contractor in the following general ways:

- Negligent selection and supervision of the independent contractor, and negligent instructions
- Duties that cannot be delegated
- Work that is peculiar or inherently dangerous

(For a more detailed explanation, the rule and its exceptions can be found in the Restatement, §§409 – 429.[6])

In addition, typically the general contractor is liable for the subcontractor's work because of a contractual obligation to the owner or developer.

Therefore, the additional insured endorsement could specifically provide coverage for the additional insured's vicarious liability only. Or it may provide for coverage for the additional insured as long as the named insured caused the loss in whole or in part (and even if the additional

insured is partially directly negligent.) Or the endorsement may provide coverage even if the named insured did not cause the loss in part.

Ongoing Operations v. Completed Operations

While "ongoing operations" is not defined in the policy it can be deduced from the definition of "completed operations". The "products-completed operations hazard" includes:

> **a.** …all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> **…**
>
> **(2)** Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> **(a)** When all of the work called for in your contract has been completed.
>
> **(b)** When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> **(c)** When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.[7]

Ongoing operations, then, includes "work that has not yet been completed or abandoned." The following ISO additional insured endorsements address ongoing operations and completed operations (italics added):

> CG 20 10 04 13[8]
>
> **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:
>
> **…**
>
> in the performance of *your ongoing operations* for the additional insured…"

CG 20 33 04 13[9]

A. Section II – 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. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part…
…

in the performance of your *ongoing operations* for the additional insured.

CG 20 37 04 13[10]

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" or "property damage" caused, in whole or in part, by *"your work"* at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the *"products-completed operations hazard"*.

Prior to the 2004 ISO revisions of the additional insured endorsements (20-10), a question arose as to whether "liability for…property damage…caused…in the performance of your ongoing operations" precludes coverage for any property damage that occurs after the work is completed. If the liability is caused in the performance of ongoing operations, does it matter when the property damage occurs?

The following excerpt from a federal court case (**subsequently vacated**), *Valley Insurance Company, et al. v. Wellington Cheswick, LLC, et al., 2006 U.S. Dist. LEXIS 81049,* illustrates the argument:

> The dictionary defines "ongoing" as "being actually in process; continuously moving forward…"Operations" is defined as…"performance of a practical work or of something involving the practical application of principles or processes."…Thus, the common and ordinary meaning of this phrase is simply those things that the company does. ... Accordingly, the Court agrees with plaintiffs that the only reasonable conclusion here is that the Wellington entities' alleged liability for property damage arises from the ongoing operations performed by the subcontractors. While the

> property damage may not have occurred during those ongoing operations, the alleged liability did… *Valley* 81049, 19 – 20

In contrast, on August 9, 2007, the Court of Appeals, Division Three, in Colorado addressed this issue and cited *Valley.* In *Weitz Company, LLC v. MidCentury Insurance Company*, 181 P.3d 309, the Court affirmed the motion for summary judgment granted to the insurer, and the writ of certiorari was denied.

> The endorsements…insures the additional insureds, "but only with respect to liability arising out of [the subcontractor's] ongoing operations performed for that insured." …
>
> At the outset, "only" is a term of limitation. Neither "ongoing operations" nor "completed operations" is defined in the policy. However, "ongoing" is generally defined as "that [which] is going on…that [which] is actually in process…that [which] is continuously moving forward."
>
> By contrast, "complete" is generally defined as "[b]rought to an end or to a final or intended condition; concluded; completed; as, the edifice is…*complete.”*
>
> "Operation" is generally defined as "a doing or performing esp. of action: WORK, DEED." ... The term "operations" as used in the policy is the plural of "operation." *Weitz* 309, 313
>
> In our view, the policy is unambiguous as to the extent of the coverage available to the additional insured. The term "completed operations" as used in the policy extends that coverage to the subcontractor or named insured, and the term "ongoing operations" used in conjunction with "only" in the endorsement limits the coverage provided to the general contractor or additional insured. The use of different terms in the policy signals that those terms should be afforded different meanings… Therefore, we disagree with the general contractor's assertion that "ongoing operations" used in the endorsement to limit coverage…has the same meaning as "completed operations" used elsewhere in the policy. *Weitz* 309, 313 – 314
>
> …
>
> Thus, we conclude that under the plain and ordinary meaning of "arising out of your ongoing operations" the endorsement to the policy does not cover "…operations," and the insurer has no duty to

> defend or indemnify the general contractor under the circumstances here. *Weitz* 309, 315

Endorsements CG 20 10 07 04 and CG 20 33 07 04, predecessors to the 2013 editions, resolved the issue (as endorsements often do in response to court rulings) by including language that precludes coverage for any property damage that occurs after the named insured's work has been completed or put to its intended use.

Duty to Defend v. Duty to Indemnify

It is a well-established principle that the duty to defend is broader than the duty to indemnify. It is often touted as being "axiomatic". If there is a reasonable potential for coverage under the policy (with the benefit of the doubt accruing to the insured), there is a duty to defend against a *suit.*

The duty to indemnify, on the other hand, depends on the insured demonstrating that a loss is actually covered not just *potentially* covered.

Defense coverage can be more valuable than indemnity. In construction defect claims, the defense can be expensive given the number of parties, the size of the project, extent of discovery, presence of experts, etc. The defense may include not just the named insured. Because contractors frequently enter into agreements requiring them to provide additional insured coverage, the defense coverage would extend to this obligation as well.

Separation of Interests

If you were to go through the December 2004 edition of ISO's CGL policy you would find in excess of 200 references to such words and phrases as "you", "your", "any insured", "the insured", etc. The exact terminology and phrasing are consequential.

The following condition in the policy is important:

> Separation Of Insureds
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each insured against whom claim is made or "suit" is brought.

Our focus here is on part b. It is important to remember that the additional insured must be treated independently from the named insured, that their interests are several and not collective:

> It has been said that an additional insured should receive no broader coverage than the protection provided to the named insured. Because of the severability of interests provision, however, it is possible for a liability policy to apply to an additional insured even though coverage for the named insured is excluded…Instead, when there is more than one insured, the effect is as though a separate policy is issued to each…[11]

This means that the focus of policy provisions like exclusions should be applied based on who is actually looking for coverage and the specific language, and that a denial of coverage to one insured may not necessarily prove fatal to another insured. The preamble to the policy begins with some definitions that must be understood:

> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.
>
> The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.
>
> *Other words and phrases that appear in quotation marks have special meaning.* Refer to Section **V** –Definitions. (Emphasis added.)

An additional insured becomes an insured on the policy. "You" and "your" are reserved for the named insured. "An insured", "the insured", and "any insured" include the additional insured. It is very important to pay attention to the adjective that modifies the term "insured". And while the additional insured must be treated as a separate insured, the analysis of coverage must include the language of the specific additional insured endorsement as well.

For example,

> The practical consequence of this language, as interpreted by a majority of the courts, is that CGL references to "the insured" are to be construed very differently from other references to "an insured" or "any insured." Specifically within the context of policy exclusions, for example, "the insured" means the insured who is looking for coverage—in the language of the Separation of Insureds condition, the insured "against whom claim is made or suit is brought." For example, an exclusion of damage to "property in the care, custody or control of the insured" [emphasis added] only limits coverage for the insured who actually has care, custody, or control of the damaged property. If another insured were to be held liable

for the same damage, the exclusion would not apply to that other insured.[12]

Also, the preamble states that other words and phrases in quotation marks have *special meanings* like “your work” and “your product” in the definitions section of the policy.

For example, review the definition of “your work”:

"Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and
(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work," and

(2) The providing of or failure to provide warnings or instructions.

Let’s focus on exclusion l. Does exclusion l., reproduced below, apply to the additional insured contractor when the named insured contractor performs the work, and the damage is confined to the named insured’s work?

This insurance does not apply to:

…

l. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Let’s assume that the following additional insured language is operative:

> **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" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and Included in the "products-completed operation hazard".

The first thing you should note is that in order to determine whether an additional insured is subject to a specific exclusion you should review the specific additional insured endorsement, the definition of "your work", the preamble, and the exclusion…in our question, the l. exclusion.

It certainly seems reasonable that the additional insured is also subject to the exclusion since "your work" has a special meaning and that the focus of the exclusion is on the work of the named insured as opposed to the party that is seeking coverage.

In 2007, the Montana Supreme Court, in *Swank Enterprises, Inc., et al. v. All Purposes Services, LTD., et al*., 2007 MT 57 (Supreme Court of Montana), took issue with the language of the insurer's policy and found its provisions ambiguous. It is unclear whether the language in the Continental policy is similar to the language addressed in this paper the following excerpts from the decision are instructive. They explain each party's position and, in the end, the Court found the exclusions ambiguous.

> Exclusions (j), (k), (l) and (m), which Continental asserts preclude coverage for the City of Libby's claims against Swank, all address "you" or "your." The 1997 policy defines "you" and "your" as referring to the "Named Insured," All Purpose. The exclusions at issue thus only directly refer to All Purpose. The exclusions apply to "property damage" arising out of All Purpose's operations and "property damage" to All Purpose's "product." The exclusions, therefore, if applicable, would preclude coverage for damage due to All Purpose's botched paint job.
>
> The policy lists Swank as an additional insured, and provides coverage to Swank for "liability arising out of [All Purpose's] operations performed for [Swank]." The policy also contains a "severability of interests" clause entitled… "Separation of Insureds." This clause provides that the policy applies "[s]eparately to each insured against whom claim is made or 'suit' is brought." Swank contends, and the District Court agreed, that the "severability of interests" clause acts to provide All Purpose, as the named insured, and Swank, as the additional insured, with separate coverage, as if each were separately insured with a distinct policy. As the exclusions only reference the "named insured," they do not apply to Swank as an "additional insured." The only restriction on

> Swank's coverage, Swank claims, is that the liability "arise out of" All Purpose's operations for Swank.
> Continental counters that, while the exclusions do refer to All Purpose and All Purpose's work, they also exclude Swank's claims that arise from All Purpose's work because the exclusions apply to all claims alleging the described "property damage," regardless of who is seeking coverage. Continental would have no reason to include exclusions relating to Swank's own work, because Swank's own work is outside the scope of coverage. According to Continental, Swank is entitled to full coverage, as a separate insured, but … not to extra coverage excluded under the policy.
>
> …
>
> The language of the exclusions at issue is clear and the reference pronouns are defined in the policy. The exclusions clearly refer to "property damage" arising out of *All Purpose's* operations and "property damage" to *All Purpose's* "product." The exclusions do not reference Swank. When strictly construed based on their plain language, the exclusions at issue do not exclude claims made by Swank, especially when considered in light of the severability of interests clause. On the other…hand, the exclusion section is prefaced by the language "[t]his insurance does not apply to" with the list of exclusions following, which can be read to exclude coverage to *any* insured when the underlying damage triggers the exclusion.
>
> The exclusions at issue, therefore, can be read two ways: either the exclusions only apply to All Purpose, since they specifically reference the named insured, or the exclusions arise from the actions of the named insured but apply to any insured seeking coverage. In other words, the language of the exclusions is ambiguous. An ambiguity exists when the contract taken as a whole in its wording or phraseology is reasonably subject to two different interpretations… Ambiguities in the language of the contract will be construed against the insurer…*Swank* 57, P22 – P31

On the other hand, in June 2008, the United States Court of Appeals For The Fifth Circuit ruled in *Abbeville Offshore Quarters Inc v. Taylor Energy Company*, 286 Fed. Appx. 124 (5th Cir. La. 2008):

> …assuming *arguendo* that Taylor is…entitled to additional insured coverage under the XL policy…we affirm the district court's grant of summary judgment in favor of XL because we find that Exclusion

23 of the XL policy prevents Taylor from recovering its defense costs from XL. *Abbeville* 124, 127 – 128

…

Exclusion 23 excludes "'Property damage' to: (a) Property you own, rent or occupy[.]" The policy defines "you" to "refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." …Abbeville is the only relevant "Named Insured" …the term "you" in Exclusion 23 refers exclusively to Abbeville… *Abbeville* 124, 128

Based…upon the plain language of Exclusion 23, XL argues that the XL policy precludes any insured from obtaining coverage based on a claim of damage to property owned by Abbeville…XL argues that because "you" is synonymous with "Abbeville," Exclusion 23 excludes coverage for property damage to property owned by Abbeville.

Taylor responds that Exclusion 23 must be read in conjunction with the "Separation of Insureds" provision in the XL policy, which states that the insurance applies "[s]eparately to each insured against whom claim is made or 'suit' is brought." Taylor argues that, although the term "you" in Exclusion 23 may prevent Abbeville from recovering under the XL policy under similar circumstances, it must be treated separately and independently under the separation of insureds provision. In other words, Taylor argues that Exclusion 23 does not apply to it because of the separation of insureds provision.

Taylor is correct that a separation of insureds provision "operates to provide coverage to one insured even though another insured might be excluded"… Accordingly, the fact that Abbeville would fall under…Exclusion 23 under similar circumstances does not dictate a finding that Taylor is also excluded. Rather, when determining "the effect of a 'separation of insureds' provision upon a given exclusion," we look to "the precise terms used in that particular exclusion…"

…we agree with XL that the XL policy excludes a specific class of losses–namely property damage to property owned by Abbeville–irrespective of whether Abbeville, Taylor, or any other additional insured is seeking coverage. "[Y]ou" in Exclusion 23 undisputably means Abbeville, such that the meaning of "you" does not alter depending upon which insured seeks coverage (e.g., Abbeville as

> named insured or Taylor as an additional insured). We find that the plain language of Exclusion 23 excludes coverage for damage to Property owned by Abbeville, notwithstanding the existence of a separation of insureds clause. *Abbeville* 124, 128 – 129

Priority of Coverage

If the named insured general contractor is also an additional insured on its sub's policy, which policy responds first? Or do both concurrently apply?

Recall that the purpose for the inclusion of additional insured provisions (and contractual indemnity) is to facilitate risk transfer and ultimate financing of the loss. In other words, the GC intends that the sub and its insurer pay defense and indemnity if the sub is responsible for the loss.

When analyzing the priority of coverage, the subcontract, the named insured's (GC) policy, and the sub's policy must be examined. An effective transfer of risk to the sub by the general contractor will require, in writing, that the sub name the GC an additional insured on the sub's policy, along with broad terms and sufficient limits. The GC's policy should include an Other Insurance condition clause that clearly specifies that if the GC named insured is covered as an additional insured on another policy then the GC's policy is excess over that other insurance. In fact, the sub's policy may also include an endorsement specifying that the sub's policy, as to the additional insured, is primary and non-contributing. Both provisions follow:

CG 00 01 04 13[13]

Other Insurance Condition

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when Paragraph **b.** below applies…
>
> **b. Excess Insurance**
>
> **(1)** This insurance is excess over:
>
> …
>
> **(b)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, **for which you have been added as an additional insured**. (Emphasis added)

CG 20 01 04 13[14]

Primary and Noncontributory – Other Insurance Condition

> This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:
>
> **(1)** The additional insured is a Named Insured under such other insurance; and
>
> **(2)** You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

There is well-established precedent in the case of *competing or conflicting* other insurance clauses. Such clauses are "mutually repugnant" and these "escape clauses" should be nullified requiring the carriers to both contribute. While this is valid when the conditions are *competing or conflicting* it shouldn't be if the conditions are *complimentary*.

For example, assume both the general contractor and subcontractor's policies contain the same other insurance conditions. Further assume that the subcontract requires that the subcontractor name the GC as an additional insured on the sub's policy. The sub's policy is primary.

The GC's policy other insurance clause clearly states that the policy is excess over any primary insurance available to the GC in which the GC is added as an additional insured. Further support is available if the sub's policy contains a primary/non-contributing endorsement. And the fundamental risk transfer intent in the contract is fulfilled.

On February 26, 2018, the 10th Circuit reinforced the priority of coverage. First Mercury Insurance Company insured the subcontractor and Cincinnati Insurance Company's named insured was an additional insured on the First Mercury policy:

> According to First Mercury, the provision in the Cincinnati policy irreconcilably conflicts with the provision in the First Mercury policy as to which policy is primary and how financial obligations are apportioned. First Mercury contends that when such a conflict occurs, New Mexico requires…the insurers to "contribute on a pro-rata basis determined by their respective [policy] limit[s]." …
>
> First Mercury's argument fails at its inception, however, because the provisions in the two insurance policies are not in conflict. Each policy makes clear that First Mercury is the primary insurer and that Cincinnati is an excess insurer. The Cincinnati Policy states:

b. Excess Insurance

This insurance is excess over:

. . . .

(2) *Any other primary insurance available to the insured* [Bingham] covering liability for damages arising out of the premises or operations, or the products and completed operations, *for which the insured [Bingham] has been added as an additional insured by attachment of an endorsement*.

(3) Any other insurance:

(a) Whether primary, excess, contingent or on any other basis, except when such Insurance is written specifically to be excess over this insurance . . .

First Mercury's "Primary and Non-Contributing Insurance" endorsement, which completely replaces the policy's "Other Insurance" section, does not conflict with Cincinnati's excess insurer status. Rather, that endorsement provides it will follow a contribution-by-equal-share approach if permitted by all other insurance policies "unless the insured is required by written contract signed by both parties, to provide insurance that is primary and noncontributory" and "[w]here required by a written contract signed by both parties, this insurance will be primary & noncontributing only when and to the extent as required by that contract." The subcontract agreement between High Desert and Bingham provided just such a requirement, stating: "The insurance policies . . . shall be endorsed to add [Bingham], the Owner and their parent companies, subsidiaries and affiliated companies as additional insureds on a *primary and non-contributory basis* . . . . The insurance carried by [High Desert] naming [Bingham] and the Owner as additional insureds *shall be primary* over any insurance policies carried by [Bingham] and the Owner." …

The combination of the First Mercury Policy and the subcontract agreement make the First Mercury Policy primary over the Cincinnati Policy. The Cincinnati Policy is expressly excess over any policy in which Bingham is named as an additional insured. Because the subcontract agreement requires the policy procured by High Desert to be primary and non-contributory, the district court correctly held that the First Mercury Policy is the primary policy.

First Mercury Ins. Co. v. Cincinnati Ins. Co., Nos. 17-2006, 17-

> 2010, 2018 U.S. App. LEXIS 4929, at *30-33 (10th Cir. Feb. 26, 2018)

Evading Anti-Indemnity Laws with Additional Insured Coverage

Considerable regulatory oversight exists with respect to the transfer of financial responsibility for an indemnitee's negligence and public policy in construction contracts. The courts are not enamored with the transfer of the financial consequences of the indemnitee's sole negligence, or even partial negligence. (Also, insurers are increasingly amending the definition of insured contract by endorsement that precludes coverage for the indemnitee's sole negligence.)

> In general, there are two overarching reasons why construction contracts are often singled out for special treatment when it comes to the permissibility of indemnification for an indemnitee's own negligence. First is a concern that a party being indemnified for its own negligence will have less incentive to exercise due care in the performance of its work…
>
> The other rationale for treating indemnification in the construction arena differently from other contexts is a concern that general contractors, because of unequal bargaining power, can compel their subcontractors to accept such an onerous contractual term as one that requires a party to assume liability for the negligence of others.[15]

In an effort to do an "end around", a general contractor may require a very broad additional insured obligation that covers the GC's liability, direct or vicarious, partial or sole.

If the requirement to obtain insurance is determined to be tied to the invalid indemnity agreement, then the obligation to provide such insurance may be invalidated as well by statute. In other words, if it is apparent that the sole reason for the insurance is to fund an indemnity agreement, and the indemnity agreement is unenforceable, so will be the insuring agreement…an important point to keep in mind when drafting such agreements. For example, consider Colorado's anti-indemnity statute:

> (b) Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or

> supervision of the indemnitee is void as against public policy and unenforceable.
>
> …
>
> (d) (I) This subsection (6) does not apply to contract clauses that require the indemnitor to purchase, maintain, and carry insurance covering the acts or omissions of the indemnitor, nor shall it apply to contract provisions that require the indemnitor to name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insured coverage provides coverage to the indemnitee for liability due to the acts or omissions of the indemnitor. Any provision in a construction agreement that requires the purchase of additional insured coverage for damage arising out of death or bodily injury to persons or damage to property from any acts or omissions that are not caused by the negligence or fault of the party providing such additional insured coverage is void as against public policy.[16]

Conclusion

When analyzing an additional insured tender, the devil is always in the details. The additional insured has direct rights under the name insured's policy; its rights are governed by the insurance policy; the obligation to pay rests with the insurer; defense is typically in addition to limits; and the defense obligation is immediate.

Contract language matters. Policy language matters.

Endnotes

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[3] Exception: indemnitee coverage in Supplementary Payments Provision.
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