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The BRIEF

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Consumer Class Actions

Additional Insureds

Additional Protection and Additional Issues

By Michael Menapace

A social services agency wants to use the basement of a local church for weekly meetings with the agency's clients; coffee and other refreshments will be served. The church wants to be a good community citizen but is concerned, for example, about taking on the risk of someone spilling coffee at the meeting and then naming the church as a defendant in a slip-and-fall claim.

A window installation subcontractor bids for work on a new building being constructed by a general contractor (GC). The GC awards the subcontractor the work but requires that the window installer hold the GC harmless for any liability associated with the installer's work.

The social services agency and window installer can agree to hold harmless the church and the GC, respectively, and to provide contractual indemnity, but the church and the GC will have additional concerns because contractual indemnification only goes so far. For example, what about defense costs? Are the agency and window installer sufficiently capitalized to satisfy the contractual indemnity obligations? Are there state laws restricting indemnification in construction contracts?[1] Thus, in these scenarios, the church and the GC likely will look to transfer their risks to the insurer of the agency or window installer, respectively, in addition to obtaining contractual indemnification. Variations of these two scenarios occur frequently in business transactions.

Potentially injured parties and insurers all have to confront myriad issues concerning insurance

coverage for additional insureds. *The Handbook on Additional Insureds* (ABA Publishing) was published in 2012 to address these issues and many others. The handbook was written and edited by insurance practitioners to address everyday issues, routine and complex. Last year, the handbook was expanded and significantly revised to address the development of the law concerning additional insureds since the original publication.[2] This article discusses some of the many issues addressed in the handbook.

Additional Insured Status

Named insureds are, of course, entities or individuals specifically listed as insureds in a policy. Additional insureds consist of two categories: "automatic insureds" or "additional insureds." Automatic insureds automatically obtain insured status due to a special relationship, such as a family member or corporate subsidiary, with a named insured. Additional insureds often are added to another's insurance policy in connection with a business relationship.

Though "additional named insureds" and "additional insureds" are often confused with one another, two primary differences exist: (1) certain exclusions apply only to named insureds (including additional named insureds), and (2) the notice and deductible provisions generally apply only to named insureds. For example, additional insured status does not provide coverage for the additional insured's employees, executive officers, and directors. Likewise, commercial general liability (CGL) policies typically require that the named insured reimburse

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TIP
Generalized statements about additional insureds are complicated by the many nuances involved in gaining additional insured status and the rights that follow.

any deductible amount prepaid by the insurer in connection with a claim. Finally, some common policy exclusions, such as the Your Product and Your Work exclusions, apply only to named insureds.

An entity or individual can qualify as an additional insured in two ways. First, an additional insured endorsement can identify expressly the specific entity or individual. Second, additional insured status may arise from a blanket additional insured endorsement. Instead of listing the additional insured(s) by name, a blanket endorsement provides coverage for any entity or individual who has a contract with the named insured that requires additional insured coverage.

Contracting parties often require a certificate of insurance (COI) to memorialize additional insured coverage. COIs are one-page information sheets generally issued by insurance brokers or agents at the request of named insureds.[3] A COI records a broker's or agent's representation that one party is an additional insured on another party's insurance policy. However, the COI does not grant additional insured status; it simply represents that the policy includes the certificate holder as an additional insured.[4]

The policy can add an entity as an additional insured in several ways. For example, one common blanket endorsement amends the "Who Is an Insured" provision of the insurance policy to include as an insured

> [a]ny person or organization that the named insured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy and is approved by the company in writing within 30 days.[5]

There are, of course, variations of the blanket endorsement, including those, like Insurance Services Office (ISO) CG 20 33 and 20 38, that do not require the insurer to consent to the underlying contract.

Specific Endorsement Terms

Parties seeking additional insured status can take advantage of one of three ways to establish that status: (1) tailor the underlying contractual terms so that the party falls within the terms of a blanket endorsement; (2) require the named insured to expressly name the entity in an endorsement; or (3) specify scope of coverage in a manuscript, i.e., nonstandard, endorsement.

Blanket endorsement. CG 20 10 11 85 had been the most commonly used blanket endorsement for CGL policies. This endorsement extends additional insured status to "owners, lessees or contractors" for liability claims arising out of both ongoing work and completed operations performed by the named insured. However, ISO has modified the "20 10 endorsement"; and the newer versions differentiate coverage for those additional insureds who have coverage for "ongoing operations" and those who have coverage for "completed operations," typically covering the former but no longer the latter.[6] Because the current version provides scheduled coverage for ongoing operations only, the additional insured should be scheduled specifically on the endorsement if coverage for completed operations is intended.

Specific identification in endorsement. As mentioned above, additional insureds can be identified expressly in an endorsement. ISO CG 20 26 allows for the simple insertion of the additional insured's name without further limitations. While this form is used to provide blanket additional insured status with modifications, its primary function is scheduled coverage. In addition, ISO CG 20 26 may be preferable in certain instances because it does not incorporate an exclusion for claims "arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services."[7]

Manuscript endorsement. Finally, contracting parties may decide that additional insured protection needs to be linked to a particular project or risk. Customized endorsements, often called manuscript endorsements, can extend additional insured status for certain transactions or events.[8] In a coverage dispute involving a manuscript endorsement, the disputed issues typically center on the scope of coverage and not the additional insured's status as an insured.

Need for careful review. The additional insured should review endorsements carefully to confirm the bargained-for coverage. For example, the most recent revision of the standard form endorsement (ISO's 04 13 edition date) ties the available limits to the amount specified in the contract between the parties if that amount is less than the policy's limits,[9] thus reducing the policy

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limits available to the additional insured. This restriction is not in the previous edition of the same form (ISO's 04 07 edition date). Additionally, as noted, some form endorsements provide coverage to additional insureds by modifying the "Who Is An Insured" section of the form policy. Therefore, it is a good practice for additional insureds to review carefully the complete insurance policy whenever possible.

The distinctions among endorsements can be critical, particularly in large construction projects with multiple tiers of contractors and vendors, many of whom will not contract directly with the project owner but will be required to add the project owner as an additional insured on their insurance policies. Because the project owner does not contract with the subcontractors, some endorsements will not provide additional insured status to the project owner, but others will. The best practice for the insureds is to make sure that direct contractual privity between the owner and the subcontractor is not required for the owner to be added as an additional insured.

Notice

Once an entity is included as an additional insured, questions of the entity's obligations and rights come to the fore. The question of who must, or may, provide notice of a claim to the insurer is common.

Before 1986, the standard CGL form required that only the first-named insured give notice of an occurrence, claim, or suit. In 1986, however, the standard CGL policy form changed, requiring that "you" give notice of an occurrence, suit, or claim. The term *you* refers to all named insureds. Technically, then, the notice provision applies only to named insureds. However, some courts have found that additional insureds have an implied duty to provide notice even where the policy does not require it.[10] Moreover, even though it is not an express requirement, additional insureds still may have an obligation to forward suit papers in a timely fashion to the insurer.[11]

Despite these generalized rules, there are circumstances in which the named insured's notice to the insurer may be deemed to constitute sufficient notice on behalf of the additional insured. Such might be the case where the named insured has a contractual duty to provide notice for the additional insured or where only the additional insured is named in a lawsuit and the named insured notifies the insurer on behalf of the additional insured. However, some policies require that the "insured and any other involved insured" each must provide notice.

Nevertheless, the prevailing opinion is that the additional insured has an independent duty to tender notice of a claim.[12] Thus, additional insureds would be wise to provide notice of a claim even when they know that the named insured has already done so and even in the absence of explicit language in the notice provision directed toward additional insureds.[13]

Of course, notice by an additional insured might depend upon whether the party is even aware that it is an additional insured. While failure to provide any notice is almost universally held inexcusable, some courts have excused an additional insured's delay in providing notice to the insurer if it can be demonstrated that due diligence was exercised to discover whether there was insurance coverage available to the additional insured and that, once discovered, the additional insured then provided notice to the insurer as soon as practicable.[14]

The coverage afforded to additional insureds is no greater than the coverage afforded to the named insured.

Scope of Coverage

After finding that an entity is entitled to additional insured status and the insurer has been given notice of a claim, the question then turns to the scope of the additional insured's coverage. Courts and commentators have recognized the "well-understood meaning" of the term *additional insured* in insurance policies as "an entity enjoying the same protection as the named insured."[15]

Under this understanding, the insurer has the same defense duties to the additional insured as to the named insured under the policy.[16]

It also is well settled that the coverage afforded to additional insureds is no greater than the coverage afforded to the named

insured.[17] Adding an additional insured to a policy does not "extend the nature of the substantive coverage originally given by the policy but merely gives to other persons the same protection afforded to the principal insured."[18] Likewise, an additional insured is generally subject to policy conditions, such as cooperation (and sometimes notice (discussed above)).

These are, of course, general rules—for which there are certain exceptions. One specific exception deals with the limits of indemnity. In a landmark opinion arising out of the Deepwater Horizon explosion and massive contamination of the Gulf of Mexico, the Texas Supreme Court held that the scope of an additional insured's coverage was limited by the terms of the underlying drilling contract.[19] The court noted that the liability policies of the drilling rig owner (Transocean) made the oil field developer (BP) an additional insured "where required by written contract."[20] Turning to the drilling contract, the court held that BP's indemnity rights under the policy were limited to the liabilities assumed by Transocean under that drilling contract, even though the Transocean insurance policy had limits far in excess of the limits that Transocean had promised to secure for BP in the drilling contract. Thus, in that situation, BP did not have the same insurance rights as the named insured, Transocean.

Courts often are required to read the language of other-insurance provisions to determine how liability is to be apportioned between two insurers and must determine whether the clauses "conflict or can be harmonized."

One issue that is well settled and does not have an exception is the total indemnity obligation owed by the insurer under the policy. Named insureds and additional insureds are collectively entitled to only one limit of liability.[21] Policy limits are finite such that an additional insured being added to a policy does not increase the limits of liability available under a policy; instead, claims by the additional insured deplete the policy limits in the same way as claims by the named insured.[22] In fact, courts that have considered circumstances in which exhaustion of the policy limits has occurred due to settlement payments made on behalf of the named insured have generally concluded that an insurer may decline to defend the additional insured.[23] The rationale most commonly noted in support of this position is the promotion of settlement of lawsuits.[24]

Coordination of Other Insurance

Additional insureds often are covered under more than one policy, including policies in which they are the named insured. In that circumstance, there can be a conflict among insurers as to which has the primary obligation to defend or settle a suit. When two insurers are potentially responsible for defense and indemnification, each insurer may try to place all or the lion's share of the burden on the other.

Insurance policies (other than life insurance policies) almost always will have provisions referred to as "other insurance" clauses, which establish how loss is to be apportioned among insurers when more than one policy covers the same loss. Other-insurance clauses generally come in three different forms:

- *Pro-Rata Clause*. This type of other-insurance clause apportions liability amongst the concurrent insurers, often based on coverage limits of the respective policies.
- *Excess Clause*. An excess clause restricts liability on an insurer to excess coverage after another insurer has paid its policy limits.
- *Escape Clause*. An escape clause purports to avoid all liability in deference to other applicable insurance.[25]

The obvious problem arising from other-insurance provisions is that the provisions often compete against each other. In some cases, the policies will contain identical provisions. For instance, if both policies contain an escape clause or an excess clause, each insurer will claim that the other is on the hook for the entire defense and payment. In other cases, the policies will have differing other-insurance provisions that create a conflict regarding apportionment of responsibility. For example,

one policy may contain an escape clause, while the other may contain a pro-rata or excess clause. Courts often are required to read the language of other-insurance provisions to determine how liability is to be apportioned between two insurers and must determine whether the clauses "conflict or can be harmonized."[26]

A full survey of how courts resolve this issue is beyond the scope of this article, but *The Handbook on Additional Insureds* provides a comprehensive analysis of these conflicts.

Conclusion

The issues regarding additional insureds are complex, and policy and contract wording are not uniform. *The Handbook on Additional Insureds* provides a more comprehensive treatment of the issues discussed above and addresses many other issues, including subrogation, choice of law, concerns related to specific business lines, and additional-insureds laws in Canada and the United Kingdom. The handbook is written by practitioners for practitioners and is helpful to both the lawyer who deals with additional insureds occasionally and the lawyer who deals with them more frequently. It not only walks through many issues that lawyers must confront but also explains their development and includes citations to multiple jurisdictions so that practitioners can use this as a go-to resource. ■

Notes

1. N.C. Gen. Stat. § 22B-1 (2017).

2. Michael Menapace, Timothy A. Diemand, Joseph G. Grasso & Charles Platto, The Handbook on Additional Insureds (2d ed. 2018).

3. *See* Ass'n for Coop. Operations Research & Dev., Certificate of Liability Insurance (1997); ACORD 25 (Mar. 2016).

4. *See* Cincinnati Ins. Co. v. Vita Food Prods., Inc., 808 F.3d 702, 705 (7th Cir. 2015) (Illinois law) (holding that certificate "is not a contract").

5. *E.g.*, Travelers Indem. Co. v. Navigators Ins. Co., No. C 99-4509 CRB, 2000 U.S. Dist. LEXIS 6702 (N.D. Cal. May 8, 2000).

6. *See* ISO CG 20 33 07 04 (applicable to ongoing operations).

7. *Compare* ISO CG 20 26, *with* ISO CG 20 33, *and* ISO CG 20 38.

8. Doerr v. Mobil Oil Corp., 774 So. 2d 119 (La. 2000); Glen Lincoln, Inc. v. Zurich Ins. Co., No. 95-5621, 1999 U.S. Dist. LEXIS 567 (E.D. Pa. Jan. 31, 1999).

9. *See* ISO CG 20 37 04 13.

10. Spoleta Constr., LLC v. Aspen Ins. UK Ltd., 119 A.D.3d 1391, 1394, 991 N.Y.S.2d 183, 186 (2014), *aff'd*, 27 N.Y.3d 933, 50 N.E.3d 222 (2016).

11. Nat'l Union Fire Ins. Co. v. Crocker, 246 S.W.3d 603 (Tex. 2008).

12. *See, e.g.*, Jenkins v. State & Cty. Mut. Fire Ins. Co., 287 S.W.3d 891, 895–98 (Tex. Ct. App. 2009); W. Bend Co. v. Chiaphua Indus., 11 F. App'x 616, 618 (7th Cir. 2001); England v. Am. S. Ins. Co., 380 F.2d 137, 139 (4th Cir. 1967).

13. Judlau Constr. v. Westchester Fire Ins. Co., No. 100529/2005, 2009 N.Y. Slip Op. 51659U (N.Y. Sup. Ct. July 21, 2009); Liberty Mut. Fire Ins. Co. v. Navigators Ins. Co., 2017 N.Y. Misc. LEXIS 920, at *10, 2017 N.Y. Slip Op. 30504(U) at 8 (N.Y. Sup. Ct. Mar. 16, 2017).

14. Unverzagt v. Prestera, 13 A.2d 46 (Pa. 1940); Hartford Accident & Indem. Co. v. Creasy, 530 S.W.2d 778 (Tenn. 1975); Int'l Harvester Co. v. Cont'l Cas. Co., 179 N.E.2d 833 (Ill. App. Ct. 1962).

15. *See* Pecker Iron Works of N.Y., Inc. v. Traveler's Ins. Co., 786 N.E.2d 863, 864 (N.Y. 2003) (internal quotation marks omitted); Del Bello v. Gen. Accident Ins. Co. of Am., 585 N.Y.S.2d 918 (N.Y. App. Div. 4th Dep't 1992).

16. BP Air Conditioning Corp. v. One Beacon Ins. Group, 821 N.Y.S.2d 1, 6 (N.Y. App. Div. 2006) (holding that the "named insured and additional insured each enjoys 'status as an insured' to the extent of the coverage afforded it in the policy"); St. Paul Fire & Marine Ins. Co. v. Valley Forge Ins. Co., 2009 WL 789612, at *8 (N.D. Ga. Mar. 23, 2009).

17. *See* Sonoco Prods. Co. v. Travelers Indem. Co., 315 F.2d 126, 128 (10th Cir. 1963); Mass. Turnpike Auth. v. Perini Corp., 349 Mass. 448, 457 (1965); Wyner v. N. Am. Specialty Ins. Co., 78 F.3d 752, 756 (1st Cir. 1996); DeJarnette v. Fed. Kemper Ins. Co., 299 Md. 708, 724 (1984).

18. *Mass. Turnpike*, 349 Mass. at 457.

19. *In re* Deepwater Horizon, 470 S.W.3d 452, 465 (Tex. 2015).

20. *Id.* at 470.

21. Randall L. Smith & Fred A. Simpson, *The Mixed Action Rule and Apportionment/Allocation of Defense Costs and Indemnity Dollars*, 29 T. Marshall L. Rev. 97, 178 (2003).

22. Davis v. Nat'l Indem. Co., 135 Ga. App. 793, 795 (1975).

23. Travelers Indem. Co. v. Citgo Petroleum Corp., 166 F.3d 761, 765–66 (5th Cir. 1999); Adega v. State Farm Fire & Cas. Ins. Co., No. 07-20696-CIV-HOEVELER, 2009 U.S. Dist. LEXIS 97230, at *12–13 (S.D. Fla. Oct. 16, 2009); Bohn v. Sentry Ins. Co., 681 F. Supp. 357, 365 (E.D. La. 1988), *aff'd*, 868 F.2d 1269 (5th Cir. 1989).

24. *In re* Enron Corp. Secs., No. H-01-3913, 2005 U.S. Dist. LEXIS 43387, at *39–40 (S.D. Tex. Mar. 14, 2005); Tex. Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 315 (Tex. 1994).

25. *See* Ky. Nat'l Ins. Co. v. Empire Fire & Marine Ins. Co., 919 N.E.2d 565, 600 n.36 (Ind. Ct. App. 2010).

26. Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch., 444 S.W.2d 583, 584–85 (Tex. 1969) (noting that a court must consider "whether the two restrictive provisions conflict, and if so, how the conflict should be resolved").