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Coverage for Additional Insureds Under Commercial General Liability Insurance Policies: The Law of Additional Insured Tenders

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Coverage for Additional Insureds Under Commercial General Liability Insurance Policies

The Law of Additional Insured Tenders

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Additional Insured Provisions Are Risk Shifting Devices

- Additional insured endorsements have traditionally been a way to shift risks from an owner to a named insured subcontractor.
- Depending on the language of the additional insured clause and a court's interpretation of it, an additional insured endorsement can shift the risks to a named insured even where the named insured in fact had no responsibility for causing the loss.

Sources of Additional Insured Coverage

- Added as an Additional Insured or Named Insured on the Schedules
- Blanket Endorsements
- Scheduled Endorsements
- In addition, the “insured contract” exception to the CGL Coverage Form’s Contractual Liability Exclusion may provide coverage to the named insured for indemnity obligations to an indemnitee under an “insured contract”.

Blanket AI Endorsements – CG 20 33 and CG 20 39

"Blanket" endorsements, for ongoing operations (CG 20 33) and completed operations (CG 20 39, CG 20 40), apply automatically when a written contract requires that a person or organization be added as an additional Insured.

The endorsements require, however, that the additional insured be shown in the Schedule. Additionally, the additional insured is not covered for their sole negligence. Instead, the liability must have been caused in whole or in part by the named insured. Certain other restrictions apply.

Key Provisions of the CG 20 33 Blanket Endorsement

- “for whom you are performing operations” – additional insured coverage is limited to property damage or bodily injury occurring prior to completion of the named insured’s work

- The additional insured is not insured for their sole negligence – the named insured must be liable in whole or in part for the loss

Requirement of a Written Contract

- The language, “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”, requires a written contract which, depending on the language of the contract and the governing state law, may have to be signed by one or both parties and may not be proved by extrinsic evidence.

Coverage Not Broader Than That Required by the Contract

- If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

Coverage Not Expanded by Terms of Underlying Contract

• If the underlying contract requires more insurance by use, for example, of broader coverage terms, the endorsement does not require that the policy cover those broader terms. It is only when the contract requires less insurance that coverage under the policy is affected by a limitation on coverage so as not to exceed what is called for in the contract.

Coverage Ends When Named Insured's Operations for Additional Insured Are Completed

- A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

Scheduled Endorsements – CG 20 10 and CG 20 37

- Scheduled endorsements name a specific individual insured, and restrict additional insured coverage to a specific “location of covered operations”.
- No written contract requirement

CG 20 10 - Scheduled Endorsement for Ongoing Operations

- The additional insured is not insured for their sole negligence – the named insured must be liable in whole or in part for the loss
- Principal endorsement for ongoing operations is CG 20 10
- In a scheduled endorsement, name of additional insured and location of covered operations must be specified
- The additional insured is not insured for their sole negligence – the named insured must be liable in whole or in part for the loss

A Master Agreement Often Does Not Specify a Location

- A master service agreement is typically intended to be accompanied by a purchase order applicable to a specific job.

- Purchase orders are often omitted, or unexecuted.

- Either the master agreement or the purchase order must specify the location for purposes of a scheduled endorsement.

Ongoing Operations Endorsements and Meaning of Completed Operations

Ongoing Operations endorsements like the CG 20 10 and CG 20 33 endorsements do not apply to “bodily injury” or “property damage” occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

Meaning of “Put to Its Intended Use”

- 2. That portion of “your work” out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Omitted from Definition of Property Damage

The endorsement's exclusion as to completed operations omits the following part of the CGL Coverage Form's definition of "products-completed operations hazard":

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.

Ongoing Operations Scheduled Endorsement Converted to a Blanket Endorsement

By writing “all projects when required by a written contract” in the locations section, a scheduled endorsement may be converted into a blanket endorsement.

In this way, insureds obtain a blanket endorsement without a written agreement requirement or a limitation on coverage as to individual locations of operations.

CG 20 37 – Scheduled Endorsement for Completed Operations

- Additional Insured—Owners, Lessees or Contractors—Completed Operations (CG 20 37 07 04), provides the additional insured coverage for injury or damage that occurs *after* the work is completed and is included in the Products-Completed Operations Hazard

CG 20 33 – Blanket Endorsement for Ongoing Operations

- The CG 20 33 07 04 endorsement, “Additional Insured-Owners, Lessees or Contractors-Automatic Status When Required in Construction Agreement With You,” provides coverage to “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” for liability arising out of the named insured’s ongoing operations.

Blanket Additional Insured Endorsement CG 20 38 – Upstream Parties

- CG 20 38 provides ongoing operations coverage for upstream parties -- the entities or individuals above the level where an entity is contracting. While the CG 20 33 only provides additional insured status where there is a direct written contract, the CG 20 38 extends coverage to “any other person or organization you are required to add as an additional insured under the contract or agreement.”

Must the "Written Contract" be Signed?

- One court found that a purchase order that expressly provided that it was effective upon acceptance and did not contain signature lines, met the endorsement's "written contract" requirement.

Zurich Am. Ins. Co. v. Endurance Am. Speciality Ins. Co., 145 A.D.3d 502, 43 N.Y.S.3d 40 (N.Y. App. Div. 2016)

Signed Before the Happening of the Occurrence

- *LMIII Realty, LLC v. Gemini Ins. Co.*, 90 A.D.3d 1520, 1521, 935 N.Y.S.2d 412 (N.Y. App. Div. 2011) (finding a written but unsigned purchase order, which included an additional insured endorsement, but was not signed until after a claim arose, was sufficient to obligate an insurer to add a third party as an additional insured to the policy).

Additional Insureds and the Duty to Satisfy the Policy's Notice Requirements – One View

The plaintiffs, as additional insureds, had an implied duty, independent of Integrity, to provide Nationwide with the notices required under the policy, i.e., notice "as soon as practicable" of both the "occurrence" and of any "claim" or "suit" arising therefrom.

23-08-18 Jackson Realty Assocs. v. Nationwide Mut. Ins. Co., 53 A.D.3d 541, 542, 863 N.Y.S.2d 35, 36 (N.Y. App. Div. 2008)

And Another View

- "You" refers to the named insured. "The notice [of occurrence] provision . . . is imposed only on the named insured[:] 'You must see to it that we are notified as soon as practicable of an 'occurrence' . . .' [T]he policy imposes on 'you' (*i.e.*, the named insured) the obligation to notify West Bend of a claim or suit."

W. Bend Mut. Ins. Co. v. Cmty. Unit Sch. Dist. 300,193 N.E.3d 266, 282 (Ill. Ct. App. 2021)

Duty to Forward Suit Papers Applicable to Additional Insureds

- However, additional insureds are subject to the policy's duty to forward suit papers "immediately", a requirement that applies not only to the named insured but to "any other involved insured" and is a separate duty from the requirements of notice and cooperation.
- "[N]otice of suit must be provided by both the named insured and the additional insured: 'You and any other involved insured must:' provide notice of a claim or suit." *W. Bend Mut. Ins. Co. v. Cmty. Unit Sch. Dist.*,193 N.E.3d 266, 282 (Ill. Ct. App. 2021).

Certificates of Insurance

ACORD CERTIFICATE WARNS IT IS

* “a matter of information only and confers no rights upon the certificate holder”
* not part of the policy – if it states that there is coverage but the policy does not, the policy controls.

COI and Estoppel Arguments

Knowledge of Insurance Requirement Prior to Policy Issuance

Knowledge of COI?

Failure to provide additional insured with a copy of the policy upon request?

Types of Anti-Indemnity Statutes

- **Sole Negligence**: will invalidate any agreement by one party to indemnify another party for its own sole negligence. If the indemnitee is 100% at fault, an indemnification agreement purporting to indemnify the indemnitee will be held invalid.
- **Partial Negligence**: indemnitor can be required to indemnify the indemnitee only to the extent of the indemnitor's own negligence. The indemnitor cannot be held responsible for the indemnitee's negligence, no matter the degree.

Endorsements Limited by Terms of An Applicable Anti-Indemnity Statute

- Insurance for the Additional Insured Applies Only to the Extent Permitted by Law
- 45 States Have Anti-Indemnity Statutes
- Unless Indemnity Clauses are reviewed for compliance both with anti-indemnity statutes and additional insured endorsements, they may not be effective at shifting risk.

Three Forms of Indemnity Agreements

- (1) Limited: Subcontractor assumes only the responsibility for its own negligence. There is no coverage if the owner/general contractor is even partially at fault.
- (2) Intermediate: Subcontractor assumes responsibility for its own sole negligence or partial negligence. If the owner/general contractor is solely at fault, there is no indemnity.
- (3) Broad: The subcontractor must indemnify even for indemnitee’s sole negligence.

Two Types of Intermediate Indemnity Agreements

- Full Indemnity: If the subcontractor is partially at fault, he pays all the damages. This allows an owner/general contractor who was 99% at fault to receive indemnity from the subcontractor who was only 1% at fault.
- Partial Indemnity: subcontractor only liable to the extent of its own negligence.

Does a Savings Clause "Save" an Otherwise Void Indemnity Clause? Two Views.

- The indemnity provision does not fail as a whole because the offending portion may be excised.... The indemnity agreement contains a 'savings' clause limiting its scope '[t]o the fullest extent permitted by law' [which] permits its enforcement to the extent permitted by [the anti- statute].

Sheehan v. Mod. Cont'l/Healy, 62 Mass. App. Ct. 937, 937, 822 N.E.2d 305 (2005)

Indemnity Savings Clauses – Another View

[W]e decline to step in and correct the overbreadth of Article 16. According to [plaintiff], "to the extent permitted by law" operates as a savings clause, allowing us to strike the void language and enforce what remains. However, neither Virginia law nor the subcontracts themselves authorize courts to "blue pencil" or otherwise rewrite the parties' written agreements.

Fortune-Johnson, Inc. v. QFS, LLC, 2025 Va. App. LEXIS 105, at *9 (Ct. App. Feb. 25, 2025)

Another View, cont'd

Moreover, each subcontract contains a severability clause that would authorize a court to strike an entire provision as unenforceable, not language within the provision. The severability clause provides as follows: "Should any provision of this Agreement be determined by a court to be unenforceable, such a termination shall not affect the validity and enforceability of any other section or part hereof."

Fortune-Johnson, Inc. v. QFS, LLC

Duty to Defend – No Allegations Against Named Insured in First Party Complaint

- Where additional Insured coverage is limited to BI or PD caused in whole or in part by the Named Insured's work, if the suit against the Additional Insured does not allege that the Named Insured caused BI or PD that would trigger the indemnity clause, there is no duty to defend the Additional Insured.

Duty to Defend Additional Insured Where Complaint Does Not Mention Named Insured

- *Wilson Cent. Sch. Dist. v. Utica Mut. Ins. Co.*, 123 A.D.3d 920, 921, 999 N.Y.S.2d 440, 442 (N.Y. App. Div. 2014) ("The underlying complaints seek to hold the District liable only for its own independent acts and omissions. The defendant School Bus Service, Inc., the insured, is not even referred to in the underlying complaints. Hence, the District is not an additional insured under the policy.")

Additional Insured Cannot Create Duty to Defend By Its Own Allegations in a Third Party Complaint

- *Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 127126, at *25-26 (E.D. Pa. Nov. 30, 2010) ("[T]he third party complaint cannot be used to bolster the allegations in the original complaint and thereby trigger Cumberland's duty to defend Dale in Francis's original lawsuit. ")
- *Colony Ins. Co. v. Peachtree Constr., Ltd.*, No. 08-135, 2009 U.S. Dist. LEXIS 96061, 2009 WL 3334885, at *4 (N.D. Tex. Oct. 14, 2009) (third party complaint filed by putative additional insured was extrinsic evidence irrelevant to the analysis of whether the insurer had a duty to defend)

Duty to Defend – Anti-Indemnity Statutes

If the indemnity agreement is void under state law, it may not provide a basis for additional insured status.

Walsh Constr. Co. v. Mut. of Enumclaw, 104 P.3d 1146, 1147 (Or. 2005) (Anti-indemnity statute] prohibited not only "direct" indemnity arrangements between parties to construction agreements, but also "additional insurance" arrangements by which one party was obligated to procure insurance for losses arising in whole or in part from the other's fault.)

Exclusions Applicable to Named Insured Also Apply to Additional Insureds?

S&B's claim as an additional insured is based on American Pipe's work or product. S&B is correct that if S&B's work or product had been the basis of the suit, these exclusions would not apply, but they do apply in this case because American Pipe's work or product is the cause of the claim.

Nat'l Union Fire Ins. Co. v. Liberty Mut. Ins. Co., 234 F. App'x 190, 193 (5th Cir. 2007)

Exclusions Applicable

It is the general rule that an additional insured . . . enjoys the full benefits of the policy, despite any restrictions contained in a separate contractual agreement with the insured, as well as being subject to all policy exclusions**.** 9 Steven Plitt et al., Couch on Insurance § 126:7 at 126-29 (3d rev. ed. 2008)

Insured Contract Exception to Exclusion (b)

Exception to the Contractual Liability Exclusion: The bodily injury or property damage occurs after entering into the contract, and

The named insured liability is assumed in a hold harmless or indemnity agreement that falls within the definition of "insured contract.”

Definition of Insured Contract

9. “Insured Contract” means

a. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The CG 24 26 Amendment to the Definition of “Insured Contract”

- The standard Amendment of Insured Contract Definition commercial general liability (CGL) endorsement (CG 24 26) alters the policy's definition of "insured contract, to require that the injury or damage for which coverage is sought was caused "in whole or in part" by the named insured or those acting for it.
- The amendment limits coverage to situations where the injury or damage is caused at least in part by the named insured

Requires a Contract and an Assumption of Tort Liability

- If the indemnitor only agrees to indemnify the indemnitee for the indemnitor’s negligence, it has not assumed the tort liability of the indemnitee.

Typical Purpose of Indemnity Clause is to Indemnify Against Vicarious Liability of Indemnitee

- Where agreement is to indemnify indemnitee to the extent that indemnitor is negligent, indemnification is limited to the indemnitee's vicarious liability for the acts of the indemnitor.
- Other language, if not specific enough to express a contrary intent, may be interpreted as limiting indemnification to vicarious liability.

Coverage Under an “Insured Contract” Requires a Valid Indemnity Clause

- The Contractual Liability exclusion (exclusion “b”) of the CGL Coverage Form eliminates coverage for "'bodily injury' or ‘property damage' for which an insured is obligated to pay damages by reason of assumption of liability in a contract or agreement.“
- The insured cannot have such an obligation if the “assumption of liability” is by means of an indemnity clause that is void under the anti-indemnity statute of the state whose law control the interpretation of the policy.

"Insured Contract" Requires That the Insured Assume the Tort Liability of Another

- An agreement to indemnify only for the negligence acts of the indemnitor is not an agreement to assume the tort liability of another.
- *Mulvey Constr. v. Bitco Gen. Life Ins. Corp.*, 2015 U.S. Dist. LEXIS 143508, at *33-34 (S.D. W. Va. Oct. 22, 2015) ("DCI/Shires assumed only that liability "arising out of or arising from performance of [DCI/Shire]'s Work" . . . As such, it did not assume the liability of anyone other than itself and, therefore, the subcontract herein does not meet the policy's definition of an insured contract."

Does the "Insured Contract" Exception Apply to Assumption of Non-Covered Tort Liability?

If the policy does not cover the tort liability of the insured for the risk, that non-covered risk is not converted to covered damages by virtue of assuming another's liability for that non-covered risk.

"Because the Policy does not extend coverage to RSC itself for any liability arising from Smith's death, it likewise does not extend coverage for liability that RSC assumed for Smith's death under the Sandstone lease."

S.-Owners Ins. Co., Inc. v. Roberts Sand Co., LLLP, 2016 U.S. Dist. LEXIS 204993, at *11 (N.D. Fla. July 13, 2016)

Thus, the "Insured Contract" Exception Would Not Apply to the Assumption of Another's Liability for an Intentional Tort

- *Erie Ins. Exch. v. Little Ducklings Day Care Assocs., L.P.*, 178 A.3d 199 (Pa. Super. Ct. 2017) ("[T]he inapplicable insured contract provision does not provide coverage for the intentional torts pled. The Policy exclusion for property damage 'expected or intended from the standpoint of the insured' governs and rules out coverage for intentional torts. Thus, there is no merit in Landlord's claim that coverage is supplied under the insured contract provision.").

Intent to Indemnify Indemnitee for Its Own Negligence Must Be Expressed Unequivocally

- [A] contract of indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitees, unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation."

Jacobs Constructors, Inc. v. NPS Energy Servs.,
264 F.3d 365, 371-72 (3d Cir. 2001)

Agreement to Indemnify for “Any and All Claims Arising from” Indemnitor’s Work Not Specific Enough to Overcome Presumption

- While the provision that Allegheny will hold C & P harmless "from *any and all* claims . . . on account * * * of the injury * * * to *any* person * * * arising from said work . . . and the provision that Allegheny “assumes *all* responsibility and liability in *any and all* of said contingencies," speak for themselves, their strength cannot cure the defect caused by their lack of affirmative specificity.

Chesapeake & Potomac Tel. Co. v. Allegheny Constr. Co., 340 F. Supp. 734, 744 (D. Md. 1972) (Pennsylvania and Maryland law)

"In Whole or In Part" Limits Indemnitor's Liability to Its Own Negligence? One View

- [The Agreement provides] that Hankins will indemnify Rudolf for damages for bodily injury caused in whole or in part by *Hankins*' negligent act or omission. This language appears to limit Hankins' liability to its own negligence and does not extend to the negligence of Rudolf. We simply do not find that the language of the hold-harmless agreement clearly expresses an intention to indemnify Rudolf against its own negligence.

Hankins v. Pekin Ins. Co., 713 N.E.2d 1244, 1248 (Ill. Ct. App. 1999)

Another View

"RLI argues that the indemnity clause is ineffective to cover Wal-Mart's own negligence because such an obligation is not clearly and unequivocally expressed as required by Arkansas law.

"We are not persuaded. The indemnity provisions are very broad and state that Cheyenne will indemnify Wal-Mart for claims resulting '*in whole or in part*' from any actual or alleged defect in the lamps.

Wal-Mart Stores v. RLI Ins. Co., 292 F.3d 583, 588 (8th Cir. 2002)

Reason for Applying Clear Intent Rule to Intermediate Indemnity Clauses

- "[B]ased on the terms of a standard intermediate form indemnity, if an indemnitor were found even one percent negligent, the indemnitor would be liable for the entire amount of liability. Based on this unusual and extraordinary result, we will not assume the indemnitor intended to assume this responsibility unless the express terms of the contract puts it beyond doubt."
- *Bracken v. Burchick Constr. Co.*, 108 A.3d 111, 2014 Pa. Super. Unpub. LEXIS 2330 *20 (Pa. Super. Ct. 2014)

Checklist for Additional Insured Coverage

- Subcontract contains enforceable indemnity agreement. (Have language reviewed by coverage counsel)
- Subcontract/purchase order executed by both parties prior to date of property damage bodily injury
- Specify project location in subcontract or purchase order, with contract language specifying purchase order is a part of contract
- Check COI against contract requirements – does it cite required endorsements.

Checklist, cont'd

- Obtain copy of policy and confirm insurance requirements met (have reviewed by coverage counsel)
- Note policy notice requirements regarding occurrence, potential claims, claims and suits, as well as requirements to forward suit papers
- Assign personnel responsible for reporting to additional insured's carrier and insurance broker, and make sure subcontractor complies with all notice requirements

Checklist, cont'd

- Prepare additional insured tenders with proper enclosures (written claims or demands, suit papers, copies of contracts containing indemnification clauses that may apply)
- Follow up