

# **Additional Insured Endorsements: Recent Efforts to Limit Coverage to the Additional Insured<sup>†</sup>**

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## **I. INTRODUCTION**

Disputes often arise among insurers, named insureds and additional insureds when litigation arises out of construction projects. The Insurance Services Office's (ISO) 2004 amendments to the "additional insured" endorsements are an attempt to limit the liability coverage available to "additional insureds" by restricting coverage to injury involving negligence by the named insured, rather than injury involving only negligence by the additional insured.

The effect of the 2004 amendments is not yet clear as no court has interpreted the new language. However, the amendments will likely operate to restrict coverage in many jurisdictions. Policyholders faced with discrepancies between the liability assumed in their construction contracts and the coverage actually provided to the additional insured may also face lawsuits from their additional insureds and as a result may be quick to assert bad faith

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claims against insurers. This article will summarize the recent changes in the additional insured endorsement and their likely effects and evaluate other new case law that affects the insurer – named insured – additional insured relationship.

## II.

### INSURANCE COVERAGE FOR THE ADDITIONAL INSURED

#### A. *Conferring Additional Insured Status*

Additional insured issues commonly arise in the construction context, as most construction subcontract agreements require subcontractors to obtain general liability insurance and to name the developer or general contractor as an additional insured on the policy.<sup>1</sup>

Generally, an additional insured is added to an insurance contract by endorsement or by certificate of insurance. Additional insured status can also be established if the policy provides coverage for “insured contracts,” subject to the policy’s definition of an “insured contract.”

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<sup>1</sup> In the event the subcontractor fails to procure additional insured status for the general contractor, the subcontractor may be found to have breached the subcontract. The subcontractor may then be liable to the general contractor for whatever coverage might have been available had the required insurance been procured. *See Goodyear Tire & Rubber Co. v. J. M. Tull Metal Co.*, 629 So.2d 633 (Ala. 1993). This claim would not be covered under the subcontractor’s general liability insurance. Also, the general contractor would have no claim against the subcontractor’s insurer directly as it was not an additional insured on the policy. *See Alex Robertson Co. v. Imperial Cas. & Indem. Co.*, 10 Cal. Rptr. 2d 165 (Ct. App. 1992).



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### 1. Certificate of Insurance

A certificate of insurance merely confirms the existence of the named insured's coverage. It is not a contract of insurance, and it does not establish the type or limits of coverage.<sup>2</sup> Although certificates of insurance are frequently issued, they should not be relied on to establish coverage as the policy language and the presence or absence of an endorsement will generally control over the language of a certificate.

### 2. Additional Insured Endorsements

There are numerous types of endorsements providing additional insured coverage. Some of the most common ones are:

#### a. *Blanket endorsements*

When the policyholder or the insurer is faced with repeated demands for additional insured status, a "blanket" additional insured endorsement may be utilized. The language of blanket endorsements varies, but they typically extend additional insured status to any

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<sup>2</sup> See *SLA Property Mgmt. v. Angelina Cas. Co.*, 856 F.2d 69, 73 (8th Cir. 1988) (the terms of the insurance contract prevail over the language of the certificate of insurance because the certificate is merely "evidence of insurance," not a part of the insurance contract). See also *Penske Truck Leasing Co. v. Home Ins. Co.*, 674 N.Y.S.2d 400 (App. Div. 1998); *Am. Ref-Fuel Co. v. Resource Recycling, Inc.*, 671 N.Y.S.2d 93 (App. Div. 1998).

entity that the named insured agrees to name as an additional insured under its policy. Many additional insured blanket endorsements limit coverage to liability arising out of ongoing operations performed by the named insured or on the named insured's behalf, including acts or omissions of the additional insured in connection with the general supervision of such operations.

b. *The Former ISO CG 20 09 Additional Insured Endorsement*

The 1993 ISO CG 20 09 Endorsement, also known as the "long form" additional insured endorsement, provides that the additional insured becomes an insured "but only with respect to liability arising out of [the named insured's work] for the additional insured or acts or omissions of the additional insured in connection with their general supervision of [the named insured's] work."<sup>3</sup> This endorsement no longer appears as a current ISO form, but it may still be in use by some insurers, and is certainly still found in older policies that are in litigation.

c. *The ISO CG 20 10 Additional Insured Endorsement*

The ISO CG 20 10 Endorsement, also known as the "short form" additional insured endorsement, adds as additional insureds any entities identified on the additional insured schedule. The limitations on coverage vary by edition date.

The 1985 and earlier versions of the Form CG 20 10 Additional Insured Endorsement limit coverage as follows:

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of 'your work' for that insured by or for you.<sup>4</sup>

The 1993 and later editions of Form CG 20 10 add the concept of completed operations to the coverage limitation, providing:

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.<sup>5</sup>

The Form CG 20 10 Endorsement does not alter any existing exclusions in the policy to which it is appended. Those exclusions, thus, apply in full to the additional insured. Further,

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<sup>3</sup> ISO Form CG 20 09 (10/93). All ISO forms cited in this article are copyrighted by ISO Properties, Inc. and are available through [www.iso.com](http://www.iso.com).

<sup>4</sup> ISO Form CG 20 10 (11/85).

<sup>5</sup> ISO Form CG 20 10 (10/93).

policies typically contain a “separation of insureds” provision which would result in the application of the exclusions directly to the additional insured. However, the term “you” and “your” is defined in policies as referring only to the named insured, not to any additional insureds. This is an important distinction in the application of the “your work” and “your product” exclusions.

*d. ISO’s 2004 Revisions to the CG 20 10 Endorsement*

In 2004 ISO introduced significant revisions to the CG 20 10 Endorsement. While no court has yet interpreted the scope of the amended endorsement, the intent of the amendment is to limit the coverage available to additional insureds by requiring some act or omission by the named insured.

The July 2004 version of Form CG 20 10 provides:

A. Section II Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does 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
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.<sup>6</sup>

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<sup>6</sup> ISO Form CG 20 10 (07/04).

The July 2004 version of the CG 20 10 Endorsement seeks to limit coverage for additional insureds to liabilities that are associated with the principal policyholder. In filing the 2004 version, ISO stated that the changes reflected the original intent of the policies and were needed because many courts were broadly interpreting the coverage available under the 1993 CGL policy and the “arising out of” language in the previous CG 20 10 Endorsement.<sup>7</sup>

The 2004 CG 20 10 Endorsement introduces a causal connection between the named insured’s acts or omissions and the additional insured’s liability, limiting additional insured coverage to injuries “caused, in whole or in part” by the named insured’s acts or omissions or by the acts or omissions of those acting on behalf of the named insured in the performance of ongoing operations for the additional insured.<sup>8</sup> Depending on how the courts interpret the new language, the effect may be to eliminate coverage for the additional insured’s sole negligence. The plain meaning of the new language certainly requires that the named insured be at least a partial “cause” of the injury or damage.<sup>9</sup>

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<sup>7</sup> Meg Fletcher, *ISO Seeking to Narrow CGL Coverage for Additional Insureds*, Business Insurance, Jan. 19, 2004, at [www.businessinsurance.com/cgi-bin/article.pl?articleid=14005](http://www.businessinsurance.com/cgi-bin/article.pl?articleid=14005). The majority of courts that have reviewed the “arising out of” language construe it broadly, equating the phrase “arising out of” to “causally connected with.” See, e.g., *Acceptance Ins. Co. v. Syufy Enters., Inc.*, 81 Cal. Rptr. 2d 557 (Ct. App. 1999) (when an insurer chooses not to use clearly limiting language in an additional insured endorsement clause, but instead grants coverage for liability “arising out of” the named insured’s work, the additional insured is covered without regard to whether injury was caused by the named insured or the additional insured); *Container Corp. of Am. v. Maryland Cas. Co.*, 707 So. 2d 733, 735 (Fla. 1998) (“[b]ecause the endorsement in the instant case contains no limiting language, we hold that Container was entitled to coverage under the Maryland policy for its own negligence arising out of ‘operations [of the named insured]’”); *Merchants Ins. Co. of N.H., Inc. v. U.S. Fid. & Guar.*, 143 F.3d 5, 10 (1st Cir. 1988) (Massachusetts law) (the phrase “arising out of” does not exclude coverage for the additional insured’s own negligence); *Township of Springfield v. Ersek*, 660 A.2d 672, 675 (Pa. Commw. Ct. 1995) (“policy clearly provides coverage to the township where an injury occurs on the pro shop premises as a result of the pro shop’s operations, regardless of whether the negligence which gives rise to the claim rests with [the pro shop operator] or the township”); *Consol. Edison Co. of N.Y. v. Hartford Ins. Co.*, 610 N.Y.S.2d 219, 211 (App. Div. 1994) (“the [‘arising out of’ coverage condition] focuses not upon the precise cause of the accident, as defendants urge, but upon the general nature of the operation in the course of which the injury was sustained . . . the fact that the cause of the injury may have been [the additional insured’s] fault or due to [the additional insured’s] negligence, is immaterial”); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993) (Kansas law) (“the additional insured endorsement does not limit the policy’s coverage to cases where Wichita is held vicariously liable for festival’s negligence”).

<sup>8</sup> Joseph Postel, *How Will Courts Construe ISO’s New Additional Insured Endorsements?*, July 2004, [www.irmi.com/expert/articles/2004/postel07.aspx](http://www.irmi.com/expert/articles/2004/postel07.aspx).

<sup>9</sup> Gregory R. Shaughnessy, *Your Additional Insured Endorsements: How Coverage May Be Narrowing*, Oct. 17, 2005, [www.constructionweblinks.com/Resources/Industry\\_Reports\\_\\_Newsletters/Oct\\_17\\_2005/your.html](http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/Oct_17_2005/your.html).

3. Coverage for “Insured Contracts”

In July 2004, ISO also introduced an optional endorsement entitled “Amendment of Insured Contract Definition” (CG 24 26 07 04). The new endorsement provides:

9. “Insured contract” means:

- a. A contract for lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization, provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for “bodily injury” or “property damage” arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
  - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
  - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.<sup>10</sup>

The relevant change is to Part f, which now echoes the 2004 amendments to the CG 20 10 Endorsement and limits coverage for liability assumed by contract to injuries "caused, in whole or in part" by the named insured or those acting on the named insured's behalf.

Again, the intent is clear: to eliminate coverage for the sole negligence of a contractual indemnitee, like that of an additional insured under an endorsement.<sup>11</sup>

#### B. *Policyholder Concerns Regarding the 2004 CG 20 10 Endorsement*

The 2004 amended CG 20 10 Endorsement presents numerous concerns for policyholders and counsel. It is not yet clear how courts will interpret the new language; some possibilities are discussed below. However, policyholders should assume that at least some courts will interpret it to eliminate additional insured coverage where the only negligence alleged is that of the additional insured.

Policyholders should carefully review their policies and their contracts to determine whether ISO coverages satisfy existing contractual requirements. The additional insured requirement in many contracts may be unclear as to whether the policyholder may eliminate or omit coverage for the additional insured's sole negligence.<sup>12</sup> Where existing indemnity agreements require broad form contractual coverage, such coverage may no longer be available or may be available at only an increased premium.<sup>13</sup> Large policyholders may also face a logistical nightmare of monitoring indemnity provisions in numerous contracts and comparing them to the "insured contract" language in their policies. Policyholders must be careful not to create financial exposure by undertaking indemnity obligations that are broader than their contractual liability coverage.<sup>14</sup>

The new forms may also result in an increase in declaratory judgment actions. Finally, there is a risk that insureds may potentially be pitted against each other while a claim is pending by an insurer's attempt to characterize the losses arising from the additional insured's sole negligence.<sup>15</sup>

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<sup>10</sup> ISO Form CG 24 46 (07/04).

<sup>11</sup> Greg Stanovich, *Additional Insured Changes in the CGL*, May 2004, [www.irmi.com/expert/articles/2004/stanovich05.aspx](http://www.irmi.com/expert/articles/2004/stanovich05.aspx).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Tyron Childress, *ISO Endorsements May Spur Coverage Disputes*, *Business Insurance*, Oct. 11, 2004, at [www.businessinsurance.com/cgi-bin/article.pl?articleid=15464](http://www.businessinsurance.com/cgi-bin/article.pl?articleid=15464).

<sup>15</sup> *Id.*

### C. *How Will Courts Interpret the Endorsements?*

It does not appear that any courts have yet addressed the 2004 amendments to ISO Form CG 20 10. However, some courts have interpreted similar language to mean that no coverage exists for claims alleging the sole negligence of the additional insured.

In *Transport International Pool, Inc. v. Continental Insurance Co.*,<sup>16</sup> the court enforced an additional insured endorsement that excluded coverage for damages “arising out of the sole negligence” of the additional insured.<sup>17</sup> Although the additional insured claimed that the named insured had also been negligent, the court applied the “eight corners” rule, looked at the contents of the policy and the contents of the complaint, and found that the complaint did not allege any acts or omissions by anyone other than the additional insured. The court therefore found that there was no coverage and no duty to defend the additional insured.

The Ohio Court of Appeals, in *Lubrizol Corp. v. Michael Lichtenberg & Sons Construction, Inc.*, similarly denied coverage to an additional insured based upon an exclusion for “liability arising out of the sole negligence of the additional insured.”<sup>18</sup> In that case, the plaintiff had sued based on the additional insured’s negligence and did not make any claim of negligence against any other party.

In cases where the identity of the negligent parties was clearly alleged, courts in Louisiana and New York have upheld exclusions for the sole negligence of an additional insured. In *Carrier v. Louisiana Pigment Co.*, the Louisiana court did not quote actual policy language to support its denial of coverage but did state that the policy met the contractual requirement that Louisiana Pigment be “named as additional insured except in their sole negligence.”<sup>19</sup> In *Royal Ins. Co. v. State*, the New York court denied additional insured coverage where the policy excluded coverage for “the sole negligence of [the additional insureds].”<sup>20</sup>

The District Court for the Southern District of New York held, in *Employers Insurance Co. of Wausau v. General Star National Insurance Co.*,<sup>21</sup> that an exclusion for the sole negligence of the additional insured was enforceable. However, in that particular case, the insurer still had a duty to defend the additional insured because it was not clear from the complaint whether the underlying injuries were the result of the additional insured’s sole negligence. The court put off ruling on the duty to indemnify on the ground that it would be resolved when the trial in the underlying action determined which parties had been negligent.<sup>22</sup>

<sup>16</sup> 166 S.W.3d 781 (Tex. Ct. App. 2005).

<sup>17</sup> *Id.* at 786.

<sup>18</sup> 2005 Ohio App. LEXIS 6335 at ¶34 (Ohio Ct. App. 2005).

<sup>19</sup> 846 So. 2d 803, 807 (La. Ct. App. 2003).

<sup>20</sup> 564 N.Y.S.2d 982, 983 (Ct. Cl. 1990).

<sup>21</sup> 2004 U.S. Dist. LEXIS 12904, \*11 (S.D.N.Y. 2004).

<sup>22</sup> *Id.* at \*12.

Several courts have also suggested, with reference to pre-2004 policies, that insurers are permitted to use policy language that limits additional insured coverage by excluding the additional insured's sole negligence. In *American Casualty Co v. General Star Indemnity Co.*, the California Court of Appeal held that a state statute limiting indemnity for losses arising from the sole negligence of the indemnitee did *not* limit the scope of additional insured coverage, because the statute specified that it did not affect the validity of any insurance contract.<sup>23</sup> However, the court acknowledged that an insurer could create such a limit in the language of the additional insured endorsement.<sup>24</sup> In *Gulf Oil Corp. v. Mobile Drilling Barge*,<sup>25</sup> the court noted that had the parties meant to exclude coverage for damages arising out of the additional insured's sole negligence, they could have done so by expressing that intent in the policy. The Fifth Circuit went even further, suggesting that insurers can limit additional insured coverage to claims where *only* the named insured is negligent.<sup>26</sup>

Finally, some courts have cited policy language excluding coverage for the "sole negligence" of the additional insured but have not actually evaluated coverage in light of those exclusions.<sup>27</sup>

We believe that existing case law, as described above, supports the application of the new ISO amended language to bar additional insured coverage where the additional insured is the only negligent party. However, all of the policies at issue in the cases cited above use the phrase "sole negligence," and those words do not actually appear on the amended ISO form. A pro-insured court could arguably find that the wording of the 2004 amendments is not as clear as the phrase "sole negligence" and decline to apply these cases to uphold the intent of the amended form.

Insurers wishing to exclude coverage for injury when the sole negligence is by an additional insured should also consider adopting the July 2004 endorsement amending the definition of "insured contract." The Idaho Supreme Court considered an additional insured endorsement excluding coverage for the sole negligence of the additional insured, and declined to enforce the exclusion because the policy covered insured contracts and the insured contract in question provided "indemnity for any liability, including liability resulting from

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<sup>23</sup> 24 Cal. Rptr.3d 34, 44 (Ct. App. 2005).

<sup>24</sup> *Id.*

<sup>25</sup> 441 F. Supp. 1, 7 (D. La. 1975).

<sup>26</sup> *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 499 (5th Cir. 2000) ("Mid-Continent could have expressly stated in the Policy that liability not resulting from [the named insured's] sole negligence was not covered by the additional insured endorsement. It did not do so.").

<sup>27</sup> *See, e.g., Federated Servs. Ins. Co. v. Les Schwab Warehouse Ctr.*, 2004 U.S. Dist. LEXIS 9252 (D. Oregon 2004) (noting existence of "sole negligence" language in additional insured endorsement but declining to interpret it in declaratory judgment action because of risk of inconsistent result in the contemporaneous underlying action); *Ohio Cas. Ins. Co. v. Madison County*, 2005 U.S. Dist. LEXIS 11798 (S.D. Ill. 2005) (noting "sole negligence" language but finding it irrelevant because the alleged additional insured was accused of intentional acts, for which no coverage could exist).

[the additional insured's] sole negligence."<sup>28</sup> The court held that the insurer "must be held to know the object of the contractual agreement which it is insuring," and therefore allowed the terms of the insured contract to override the terms of the policy.<sup>29</sup> The ISO amendment to the definition of "insured contract" would eliminate this loophole in the additional insured endorsement, because it specifies that insured contracts are not covered to the extent that they provide indemnity for the indemnitee's sole negligence.

### III. BAD FAITH CONSIDERATIONS

An insurer presented with legitimate coverage requests from both a named insured and an additional insured faces several potential areas of dispute over its treatment of the additional insured. ISO's 2004 amendments may increase the possibility of disputes between the named insured and the additional insured as well as the risk of the insurer being drawn into those disputes.

#### A. *Failure to Defend*

First, the additional insured will undoubtedly look to the named insured's insurer for a defense. Failure to defend an additional insured may result in bad faith liability.<sup>30</sup> In *Campbell v. Superior Court*,<sup>31</sup> the subcontractor was sued for its installation of leaking skylights; the general contractor, an additional insured on the subcontractor's policy, was also sued. The subcontractor's insurer agreed to defend the subcontractor but refused to defend the general contractor claiming that the subcontractor was not negligent in performing its work. The additional insured sued for bad faith based on the insurer's alleged breach of the implied covenant of good faith and fair dealing. The court found that the insurer had breached the implied covenant of good faith and fair dealing by refusing to defend the additional insured and held that the breach would support a bad faith claim if the insurer's conduct was unreasonable.<sup>32</sup>

Various courts have recognized the ability of an additional insured to directly make a bad faith claim against an insurer for failure to defend.<sup>33</sup> In addition, at least one court considered a policyholder's claim of bad faith against its insurer when the insurer refused to

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<sup>28</sup> *Bonner County v. Panhandle Rodeo Assoc., Inc.*, 620 P.2d 1102, 1106 (Idaho 1980).

<sup>29</sup> *Id.*

<sup>30</sup> *Campbell v. Superior Court*, 52 Cal. Rptr. 2d 385 (Ct. App. 1996).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 392.

<sup>33</sup> *See, e.g.*, *Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.*, 243 F.3d 1232, 1247 (10th Cir. 2001); *Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789, 797 (7th Cir. 2001); *Travelers Indem. Co. v. Millard Refrigerated Servs.*, 2002 U.S. Dist. LEXIS 4765 (D. Neb. 2002).

defend an additional insured and the additional insured sued the policyholder for failure to procure coverage.<sup>34</sup> The court rejected the bad faith claim because the statute of limitations had run while the policyholder awaited the outcome of the additional insured's suit. The statute of limitations began to run when the insurer rejected the defense of the additional insured, or at the latest when the additional insured sued the policyholder for breach of the contract requiring the policyholder to provide coverage.<sup>35</sup> It does not appear that there was any argument about the policyholder's ability to sue based on treatment of the additional insured.

*B. Allocating Policy Limits Between Named Insureds and Additional Insureds*

If both the named insured and the additional insured are defendants in a lawsuit, the insurer is often faced with the dilemma of allocating the policy limits between them. What should the insurer do if the claim against both insureds exceeds the available coverage? Can the insurer exhaust the policy limits by settling claims against one of the two insureds?

Some courts have held that an insurer can be liable for bad faith if it settles for policy limits on behalf of the named insured and withdraws its defense of the additional insured. In *Shell Oil Co. v. National Union Fire Insurance Co.*,<sup>36</sup> the insurer contributed its policy limits to a settlement on behalf of its named insured, leaving its additional insured with no coverage for its share of the settlement. The court held that the insurer had separate obligations to the named insured and to the additional insured, and although its obligations were limited by the policy limits, it had not satisfied its obligations by simply tendering the entire sum to the named insured. The California Court of Appeal addressed a similar question two years earlier, in *Lehto v. Allstate Insurance Co.*,<sup>37</sup> and held that an insurer could not have accepted an offer to settle for policy limits on behalf of one insured. The insurer "owe[d] the duty of good faith and fair dealing to each of its insureds, and [could not] favor the interests of one insured over the other," and the insured whose liability would have been settled by the offer was therefore not permitted to maintain a bad faith claim based on the insurer's failure to accept the offer.<sup>38</sup> *Lehto* did not deal with an additional insured, only with two individuals who were both insured under the same policy. Similarly, a New York court, also dealing with multiple named insureds rather than with an additional insured, has held that the duty of good faith does not permit an insurer to favor the interests of one insured over another.<sup>39</sup>

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<sup>34</sup> Precision Door Co. v. Meridian Mut. Ins. Co., 2005 U.S. Dist. LEXIS 17999 (D. Pa. 2005).

<sup>35</sup> *Id.*

<sup>36</sup> 52 Cal. Rptr. 2d 580 (Ct. App. 1996).

<sup>37</sup> 36 Cal. Rptr. 2d 814 (Ct. App. 1994).

<sup>38</sup> *Id.* at 821.

<sup>39</sup> Smoral v. Hanover Ins. Co., 322 N.Y.S.2d 12 (App. Div. 1971).

But other courts have reached the opposite conclusion, refusing to find that an insurer is in bad faith if it fails to allocate policy proceeds between named insureds and additional insureds. In *Pekin Insurance Co. v. Home Insurance Co.*,<sup>40</sup> the insurer paid out its policy limits in exchange for a covenant by the plaintiff not to sue the named insured. When the plaintiff sued the additional insured, the insurer agreed to defend under a reservation of rights because its limits were already exhausted. The additional insured rejected the defense, claiming that it was entitled to a defense without reservation and that the execution of the covenant had been in bad faith. The Illinois court held that the issuance of a reservation of rights did not constitute bad faith and that the insurer had fulfilled its duty to defend so that there was no bad faith claim. Because there was no bad faith, the court refused to find that the insurer would be liable for any judgment or settlement by the additional insured. The court did not directly address (and it appears that the additional insured did not explicitly raise) the issue of whether exhausting the policy limits in and of itself breached a duty to the additional insured.

In *Country Mutual Insurance Co. v. Anderson*,<sup>41</sup> the same court interpreted *Pekin* to mean that “an insurer’s act of securing a settlement for policy limits on behalf of one insured without notifying or obtaining a discharge of another insured, in and of itself, did not constitute bad faith.”<sup>42</sup> While the *Pekin* holding does not actually appear to go that far, it is clear that the Illinois courts interpret it that way: the court in *Country Mutual* found that an insurer could exhaust its limits on behalf of one insured and then withdraw from the defense of other insureds if its policy stated that the payment of policy limits ended the insurer’s duty to defend or settle.

A federal court in Louisiana has similarly held that it is not bad faith in and of itself for an insurer to tender its policy limits in exchange for a release of its named insured only.<sup>43</sup> Of course, if the insurer has committed other acts that amount to bad faith, it can still be liable for those acts.<sup>44</sup>

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<sup>40</sup> 479 N.E.2d 1078 (Ill. App. Ct. 1985).

<sup>41</sup> 628 N.E.2d 499 (Ill. App. Ct. 1993).

<sup>42</sup> *Id.* at 503.

<sup>43</sup> *Bohn v. Sentry Ins. Co.*, 681 F. Supp. 357 (E.D. La. 1988).

<sup>44</sup> *Anglo-American Ins. Co. v. Molin*, 670 A.2d 194 (Pa. Commw. Ct. 1995).

C. *Can Insurer Settle Additional Insured's Covered Exposure and Withdraw from Defense?*

The Minnesota Supreme Court has held, in *Meadowbrook v. Tower Insurance Co.*,<sup>45</sup> that a carrier can withdraw from defending its insured if all “arguably covered” claims against the insured have been dismissed with finality. *Meadowbrook* did not involve an additional insured; the insurer withdrew its defense because the only claims that remained against the named insured were clearly not covered by the policy. However, an insurer could argue based on *Meadowbrook* that if it settles or otherwise obtains dismissal of any arguably covered claims against its additional insured, it can withdraw from the defense of the additional insured on any remaining claims (such as claims arising out of the additional insured’s sole negligence).

A number of states have acknowledged that an insurer can withdraw a defense while claims still remain in the litigation.<sup>46</sup> *Bohn v. Sentry Insurance Co.*,<sup>47</sup> discussed above, involved an insurer that settled the claims against its named insured and then withdrew from the defense of its additional insured. The court held that the insurer could do so because the policy stated that the insurer’s duty to defend terminated after it had paid out its limit of liability for damages. No other court appears to have dealt with the specific issue of withdrawing a defense of an additional insured.

Note that a covered claim is not considered “extinguished,” and an insurer therefore may not withdraw a defense, if a further appeal could reinstate the claim.<sup>48</sup>

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<sup>45</sup> 559 N.W.2d 411 (Minn. 1997).

<sup>46</sup> *Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 332 N.E.2d 319, 323 (N.Y. 1975) (“The insurer’s duty to defend is, again, not an interminable one, and will end if and when it is shown unequivocally that the damages alleged would not be covered by the policy”). Courts that have acknowledged an insurer’s ability to withdraw after covered claims are extinguished include *Lockwood Int’l, B.V. v. Volm Bag Co.*, 273 F.3d 741, 744 (7th Cir. 2001) (Wisconsin law); *Conway Chevrolet-Buick, Inc. v. Travelers Indem. Co.*, 136 F.3d 210, 214 (1st Cir. 1998) (Massachusetts law); *Reese v. Travelers Ins. Co.*, 129 F.3d 1056, 1060 (9th Cir. 1997) (California law); *Wells’ Dairy, Inc. v. Travelers Indem. Co.*, 336 F. Supp. 2d 906, 910-911 (D. Iowa 2004); *Sachs v. St. Paul Fire & Marine Ins. Co.*, 303 F. Supp. 1339, 1341 (D. D.C. 1969); *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1259 (N.J. 1992); *Ricardelli v. Merrimack Mut. Fire Ins. Co.*, 2001 WL 717129 (Mass. Super. Ct. 2001); *Reller, Inc. v. Hartford Ins. Co.*, 765 So. 2d 87, 88 (Fla. Dist. Ct. App. 2000).

<sup>47</sup> 681 F. Supp. 357 (E.D. La. 1988).

<sup>48</sup> *Meadowbrook*, 559 N.W.2d at 417; *Commerce & Indus. Ins. Co. v. Bank of Hawaii*, 832 P.2d 733, 737 (Haw.1992); *Klamath Pac. Corp. v. Reliance Ins. Co.*, 950 P.2d 909, 915 (Or. Ct. App. 1997); *Harrington Haley L.L.P. v. Nutmeg Ins. Co.*, 39 F. Supp. 2d 403, 409 (S.D.N.Y. 1999).

D. *Is Additional Insured Entitled To Coverage Under Umbrella Policy Issued To Named Insured?*

Often an indemnity contract requires the indemnitor to obtain certain minimum coverage and to name the indemnitee as an “additional insured.” But what if the named insured obtains greater limits than those required in the indemnity agreement? Is the additional insured entitled to the increased limits available under the umbrella policy?

A typical indemnity agreement may contain provisions similar to these:

ARTICLE 34. Indemnity.

Subcontractor agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages to property and all damages or injuries to all persons, arising from, or in any manner connected with, the execution of the Work provided for in the Contract, or occurring or resulting from the use by Subcontractor, its agents or employees, of material, equipment or other property, whether the same be owned by Owner, Subcontractor or third parties. Subcontractor, to the fullest extent permitted by law, *agrees to indemnify and save harmless Owner, its agents and employees from all such claims including without limiting the generality of the foregoing, claims for which Owner may be or is alleged to be liable* and legal fees and disbursements paid or incurred to enforce the provisions of this article. *Subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage and endorsements as will ensure the provisions of this article.*

....

36.1.2 *Commercial General Liability Insurance, occurrence form, providing bodily injury, personal injury, and property damage liability with combined single limits of not less than one million dollars (\$1,000,000) and including Subcontractor’s Protective, Products and Completed Operations, Broad Form Property Damage with no explosion, collapse and underground (XCU) exclusions, and contractual liability coverage for the indemnity agreement contained herein.*

...

36.4 Insurance specified herein shall be minimum requirements and Subcontractor is responsible for providing any additional insurance deemed necessary to protect Subcontractor’s interests from other hazards or claims in excess of the minimum coverage. The liability of Subcontract to Owner is not limited to Subcontractor’s insurance coverage.

36.5 The foregoing limit requirements may be complied with through purchase of underlying coverage alone in the specified amounts or by obtaining lesser limits for underlying coverage and an umbrella excess liability policy bringing total cover up to the limit specified.

A typical blanket additional insured endorsement might contain language like the following:

It is agreed that if the Blanket Additional Insured Endorsement is attached to the underlying general liability policy pursuant to a written or oral contract or agreement between you and another person or organization (called additional insured), *this insurance is excess over such insurance provided to the additional insured* subject to the following conditions:

1. If the *limits specified in the written contract or agreement are less than the limits provided by the underlying policy*, then no coverage is provided to the additional insured under this policy.
2. If the limits specified in the written contract or agreement are greater than the limits provided by the underlying policy, then this insurance is excess over the insurance provided by the underlying policy. The limits of liability for the additional insured is the lesser of:
  - a. The limits specified in the written contract; or
  - b. The limits of the underlying policy plus the limits of this policy.

These limits are inclusive of and are not in addition to the limits of insurance shown in the Declarations.

Little case law has discussed whether a contractual requirement to obtain coverage “not less than” a specified amount means the additional insured is entitled to coverage under an umbrella policy with higher limits. While a few cases have addressed similar issues, their holdings span the entire spectrum.

In *Musgrove v. Southland Corp.*,<sup>49</sup> two employees of LCE were killed while performing maintenance work at a Citgo refinery pursuant to a purchase order contract between Citgo and LCE. LCE had procured CGL insurance with St. Paul providing coverage of \$1 million dollars per occurrence. LCE had also procured an excess liability policy with International.

Although the purchase order required it to do so, LCE failed to name Citgo as an additional insured under either policy. Citgo argued that it was an additional insured under the International excess policy immediately upon execution of the contract with LCE due to International’s definition of an insured as “any person, organization, trustee or estate to whom or to which the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy.”<sup>50</sup> The purchase order obligated LCE to provide

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<sup>49</sup> 898 F.2d 1041 (5th Cir. 1990).

<sup>50</sup> *Id.* at 1043.

CGL insurance “of not less than \$1 million per occurrence for itself and Citgo.”<sup>51</sup> Despite the “not less than” language, the Fifth Circuit held that because the International policy only covered losses in excess of \$1,000,000, it did not afford the coverage required by the purchase order contract.

Citgo also argued that its contractor’s manual, incorporated into the purchase order contract, obligated LCE to provide the excess coverage afforded under the International policy. The contractor’s manual provided that “all insurance coverage carried by [LCE], *whether or not required hereby*, shall extend to and protect [Citgo] to the full amount of such coverage, but not less than the following shall be provided: . . . [CGL] insurance . . . not less than \$1,000,000 per occurrence.”<sup>52</sup> Citgo argued that LCE’s voluntary decision to obtain excess liability coverage for itself triggered an obligation to obtain the same coverage for Citgo. The court did not agree, holding that the purchase order contract only required LCE to obtain at least \$1 million in CGL coverage for itself and Citgo. The court found the manual could be interpreted to provide that LCE’s voluntary decision to obtain additional coverage for itself included the prerogative of obtaining additional coverage for Citgo. In any event, the decision remained voluntary, and LCE was not contractually obligated to obtain excess liability coverage for Citgo.

The Fifth Circuit Court of Appeals dealt with this issue again in *Forest Oil Corp. v. Strata Energy, Inc.*<sup>53</sup> Strata and Forest had entered into a joint evaluation agreement for the exploration and development of oil and gas fields. Pursuant to the agreement, Forest was obligated to procure liability insurance for the benefit of both parties. Specifically, the agreement stated that Forest was to provide:

General public liability . . . with limits of not less than \$100,000 covering injury to or death of one person, and not less than \$300,000 covering injury to or death or [sic] more than one person by reason of one accident.

. . . .

*No other insurance shall be carried at the expense of the joint account except by mutual consent of the parties.*<sup>54</sup>

Prior to entering into the agreement, Forest had obtained \$1 million in primary coverage from American and a \$1 million excess policy from Southern. Neither policy expressly named Strata as an additional insured. However, the American policy provided coverage “to those for whom the Named Insured has agreed in writing to provide insurance.”<sup>55</sup> Similarly,

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 929 F.2d 1039 (5th Cir. 1991).

<sup>54</sup> *Id.* at 1040.

<sup>55</sup> *Id.* at 1041.

the Southern policy provided coverage to those whom Forest was obligated by virtue of a written contract or agreement to provide insurance, “*but only to the extent of such obligation.*”<sup>56</sup>

Pursuant to operations arising out of the joint agreement, four employees of a drilling company that had contracted with Forest to perform work were injured. The parties sued Forest and later settled. Forest then sued Strata to recover one third (Strata was a one-third partner with Forest) of Forest’s contribution to the agreed judgment. Strata argued that it was entitled to the full benefits of the primary and excess coverage procured by Forest, even though this coverage was substantially in excess of the \$100,000/\$300,000 that Forest was required to procure under the agreement with Strata.

With respect to the primary American policy, the court found that Strata was an additional insured to the full extent of the \$1 million limit of liability. The court relied on the fact that the American policy did not limit its additional insured coverage to the level that Forest was contractually required to provide. The Southern excess policy, on the other hand, provided coverage to additional insureds, “*but only to the extent*” of any contractual obligation. The court found that Forest was not obligated to provide excess insurance under the agreement, but rather, was only required to provide insurance of not less than \$100,000/\$300,000. Consequently, the court found Strata was not an insured under the Southern excess policy.

The United States District Court for the District of New Jersey addressed a similar issue in *Allied Corp. v. Frola*.<sup>57</sup> In *Allied*, the tenant was required to obtain general public liability insurance insuring the landlord (Frola) “*for not less than \$500,000.*”<sup>58</sup> The tenant purchased a CGL policy with a \$500,000 limit of liability. However, this policy only applied to the tenant, and not Frola. The tenant also obtained an umbrella policy which provided coverage to any person to whom the tenant was obligated by virtue of a written contract to provide insurance.

The factual background giving rise to liability in *Allied* is extremely complex. In sum, the tenant went bankrupt and the bankruptcy trustees sought coverage under the insurance policies in response to an environmental clean up action. Frola argued that because the tenant had a duty to obtain “*not less than \$500,000*” of general public liability coverage, Frola was an additional insured under the umbrella policy. However, the court held otherwise and found that the umbrella policy only obligated the insurer to provide coverage in excess of \$500,000. Consequently, because the lease agreement required the tenant to obtain \$500,000 of coverage, but the umbrella policy only afforded the tenant coverage in excess that amount, Frola was not an insured under the umbrella policy. Inherent in this rationale is the fact that “*not less than \$500,000*” was interpreted to mean \$500,000.

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<sup>56</sup> *Id.*

<sup>57</sup> 1992 U.S. Dist. LEXIS 15778 (D.N.J. Oct. 6, 1992) (unpublished opinion).

<sup>58</sup> *Id.* at \*3.

However, there was a different outcome in *Doran v. Corn Products*.<sup>59</sup> Doran's employer, Super Electric, had entered into an electrical maintenance agreement with Corn Products, under which Super Electric was to purchase CGL coverage containing a blanket additional insured endorsement. While performing work under the maintenance agreement, Doran was injured and brought suit against Corn Products. Corn Products then sought coverage under Super Electric's CGL policy up to the limits of \$1 million, as well as indemnification under the umbrella policy of up to the \$5 million limits. Pursuant to the electrical maintenance agreement, Super Electric was required to obtain CGL coverage "with limits of liability not less than" \$100,000/300,000/50,000.<sup>60</sup> Rather abruptly, the court found that Corn Products was entitled to the full \$1 million limit of liability under the primary coverage. Despite the insurer's argument that coverage totaling \$100,000/\$300,000 was all that was required, the court noted that to accept this argument would require it to hold that the contractual language "not less than" meant "not more than." The court held this result would be clearly erroneous and contrary to the parties' intent.

Turning to the umbrella policy, the *Doran* court found that Corn Products was an insured and entitled to the full \$5 million limit of excess liability. In its decision, the court emphasized the "Persons Insured" language of the umbrella policy, which provided that coverage was available to "any person or organization included as an insured under the terms of the immediate underlying policy."<sup>61</sup> As Corn Products was an insured in the underlying policy, the court held it was insured under the umbrella policy as well. It further noted that no provisions in the umbrella policy limited the liability of the insurer (Continental) to the insured. Notably, the electrical maintenance agreement did have a provision requiring excess liability insurance.

In *BP Chemicals, Inc. v. First State Insurance Co.*,<sup>62</sup> the contractual requirement of excess coverage was not dispositive. BP Chemical had entered into an electrical maintenance agreement with Bath Electrical to provide services at one of its plants. The BP-Bath contract required Bath to obtain "at least \$1,000,000" in CGL coverage.<sup>63</sup> While performing work under the maintenance agreement, one of Bath's employees was electrocuted and the wrongful death action settled for \$3 million.

Bath had procured CGL coverage with the stated \$1 million limit of liability from National Union. Bath had also obtained a \$5 million excess liability policy from First State. The court held BP was an insured under both policies, based primarily on the fact that the excess policy was a following-form policy that defined "insured" to include any person or organization who was insured in the underlying insurance, "subject to all the limitations

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<sup>59</sup> 1992 U.S. Dist. LEXIS 12494 (N.D. Ill August 19, 1992).

<sup>60</sup> *Id.* at \*9.

<sup>61</sup> *Id.* at 10.

<sup>62</sup> 226 F.3d 420 (6th Cir. 2000).

<sup>63</sup> *Id.* at 423.

upon such underlying insurance other than the limits of the underlying insurer's liability." The court distinguished *Musgrove* and *Forest Oil* because those excess policies expressly defined "insured" to mean one to whom the named insured was obligated by written contract to provide excess coverage. In *BP*, simply because BP qualified as an additional insured in the underlying policy's blanket endorsement, it was also an insured under the excess policy.

#### IV. THE 2004 20 10 ENDORSEMENT LIMITS COVERAGE FOR COMPLETED OPERATIONS

The 1993 and later versions of the CG 20 10 Endorsement specifically limit the additional insured coverage to the period of ongoing operations by the insured. The 2004 CG 20 10 Endorsement specifically adds an exclusion which provides:

This insurance does 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
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 principle as part of the same project.<sup>64</sup>

Courts that considered earlier language limiting coverage to ongoing operations had no difficulty restricting the coverage available to the additional insured to the timeframe of the ongoing operations.<sup>65</sup>

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<sup>64</sup> ISO Form CG 20 10 (07/04).

<sup>65</sup> See, e.g., *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882 (10th Cir. 1991) (coverage for the additional insured is distinct from coverage for the named insured in that it ends once the named insured completes work on the covered item and the item is used for its intended purpose); *Pa. Dep't of Transp. v. Am. States Ins. Co.*, 588 A.2d 1320 (Pa. 1991) (even though there was a policy in effect at the time of the accident which named the plaintiff as an additional insured, the additional insured was only covered during performance of the named insured's work on the project).

There was, however, no language in the 1985 or earlier versions of the CG 20 10 Endorsement limiting the timeframe of the additional insured coverage to the time of the ongoing operations of the named insured. Thus, some courts afforded coverage to the additional insured after operations ceased.<sup>66</sup>

The 2004 20 10 Endorsement does clearly limit coverage to the period of ongoing operations. This language will almost certainly be upheld by the courts.

## V. CONCLUSION

While the 2004 ISO Endorsement appears to intend to exclude coverage for the sole negligence of an additional insured, different courts will likely reach different conclusions on its effect. In addition, coverage for insured contracts may be affected not only by the scope of the amended endorsement but by the policy definition of an insured contract. If that definition does not exclude coverage for a policyholder's agreement to indemnify an additional insured for its own negligence, the policyholder or the additional insured can argue that the insurer's obligation to cover the insured contract supersedes any limitation on additional insured coverage.

Policyholders faced with conflicts between the requirements of their insured contracts and their actual additional insured coverage may be quick to assert bad faith claims for failure to defend an additional insured or for uneven allocation of policy limits between the named insured and the additional insured. Additional insureds may also attempt to claim coverage under excess policies where they are not named, and some courts may permit them to do so.

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<sup>66</sup> See, e.g., *Pardee Constr. Co. v. Ins. Co. of the W.*, 92 Cal. Rptr. 2d 443 (Ct. App. 2000) (the unambiguous language of the additional insured endorsement provided the additional insured with coverage for the completed operations of the named insured subcontractors, including coverage for projects completed before inception of the policies, because no language in the endorsement limited additional insured coverage to the time of the ongoing operations of the insured.) The *Pardee* court suggested the insurer could have limited coverage to the period of ongoing operations had it chosen to do so. *Id.*

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