Additional Insured Status—Automatic or Wet Blanket?

October 2011

It has long been thought that the automatic or "blanket" additional insured endorsements to the commercial general liability (CGL) policies were a bit of a cure-all. Once the endorsement was attached to the policy, coverage was in effect for any additional insured—no further action was required.

by Craig F. Stanovich
Austin & Stanovich Risk Managers, LLC

While automatic additional insured endorsements certainly eliminate the need to list *each* person or organization as an additional insured, an automatic endorsement has its weaknesses, some of which are now being exposed as insurers intensify challenges to the coverage actually provided by automatic additional insured endorsements.

The Current Environment

Several years ago, a major international construction insurer, announcing its proprietary additional insured endorsements, stated that it wanted to "recapture the original intent of additional insured status." This insurer's view of "original intent" was that "parties to the contract will retain responsibility for their own actions and damages incurred by another party as a result of those actions." In other words, at least according to this insurer, the "original intent" is to protect the additional insured only for its vicarious liability.

Along the same lines, consider the experience of an attorney for a national law firm. When tendering coverage to an insurer on behalf of an additional insured, the attorney reports that, more often than not, insurers' preliminary response, regardless of the actual endorsement wording, is that coverage only applies to vicarious liability of the additional insured. The struggle begins.

Finally, a prominent policyholder attorney described the fight against additional insured endorsements as "a major insurance litigation battlefield" and, further, the wording of nonstandard additional insured endorsements as being "litigated all over the country in an effort to narrow the coverage provided to additional insureds."[1]

It is in this context that the benefits and disadvantages of an automatic or "blanket" additional insured endorsement must be weighed. Stated differently, will an automatic additional insured endorsement stand up to this type of increasing scrutiny?

A Missing Piece

The status of additional insureds is usually conferred when the named insured 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."[2]

In other words, a person or organization is an additional insured via an automatic additional insured endorsement only if certain documents make them so. What is critical here is that the documents upon which coverage rests exist entirely outside (and independent) of the additional insured endorsement.

In fact, you don't know if these extrinsic documents pass muster until the additional insured tenders a claim. This is precisely the wrong time to find out whether coverage is really in place for the additional insured.

Contract or Agreement

When looking at a contract or agreement to determine whether coverage for an additional insured exists, there are many facets to consider, some of which are discussed below.

Existence

As an initial matter, does any contract or agreement even exist? While this may appear to be much ado about nothing, consider the process of issuing hundreds, if not thousands, of certificates of insurance requested by a policyholder. Does a written contract or agreement support every additional insured request?

Oral Contract

In an attempt to transform a specific (nonautomatic) additional insured endorsement into an automatic additional insured endorsement, an insurer amended the schedule to include the person or organization as an additional insured "as required by contract, provided the contract is executed prior to loss." While no specific written contract existed, the subcontractor and sub-subcontractor produced various documents that they contended were "evidence of an oral agreement." While the wording in the schedule arguably required only that a contract exist (either oral or written), the court focused on the term "executed" and agreed with the insurer's contention that "executed" means a "written, signed agreement."

> The interpretation proposed by Suffolk and S&F would make simple formation of a contract sufficient for additional insureds. If the endorsement accepted mere formation, its language could end with the words "as required by contract." The further clause, "provided the contract is executed prior to loss," imposes a requirement beyond mere formation.

Suffolk Constr. Co., Inc. v. Illinois Union Ins. Co., 80 Mass. App. Ct. 90 (2011).

Added as Additional Insured

A general contractor insisted that it should be granted additional insured status on the policy of its subcontractor, even though the subcontract agreement addressing specific insurance requirements was left completely blank.

The court in *A.F. Lusi Constr., Inc. v. Peerless Ins. Co.*, 847 A.2d 254 (R.I. 2004), dismissed the suit against the insurer, finding that no additional insured coverage was provided on the insurer's policy, despite the automatic additional insured wording, observing that they (the court) were being asked to "follow a vanishing trail of contractual breadcrumbs…." In sum, while a written contract existed, the contract mistakenly failed to include any agreement between the parties to add the general contractor as an additional insured to the subcontractor's policy.

With Whom Must You Agree?

It is customary for a general contractor to not only require its subcontractors to add the general contractor as an additional insured, but the general contractor also requires the subcontractor to demand any of its subcontractors (often referred to as "sub-subcontractors" or subcontractors engaged by the subcontractor) to include the general contractor as an additional insured. Does this so-called flow down provision afford the general contractor additional insured status under the automatic additional insured endorsement found on the policy of the sub-subcontractor?

In considering the wording "when you and such person or organization have agreed in writing in a contract or agreement," at least one court has ruled that this phrase means "a direct written agreement."

> Notably, the provision does not refer to any person or organization. By repeatedly using the terms "such" instead of "any," the provision necessarily requires that, in order to qualify as an additional insured, an entity must enter into a direct written agreement with JAK [the sub-subcontractor] listing them as additional insured.

Westfield Ins. Co. v. FCL Builders, Inc., 407 Ill. App. 3d 730 (Ill. App. Ct. 1st Dist. 2011).

The implications for this decision are far ranging. For example, requirements that subcontractors include as an additional insured the owner of a project or an architect may be problematic. The subcontract usually does not contract directly with the owner or the architect, and therefore neither would be considered an additional insured to the extent the subcontractor's automatic additional insured wording requires a "direct written agreement." Thus, the "flow down" provision so frequently relied on to provide additional insured status to the owner or architect may not survive a challenge by the subcontractor's insurer. As suggested by the court, different automatic additional insured wording may be required.

Automatic Additional Insured versus Insured Contract

Misunderstandings are so prevalent relating to the status of an insured on the insurance contract of another versus the right of contractual indemnification arising from a noninsurance contract that any discussion of automatic additional insured status would be lacking without again raising the distinction.

In late 2009, an attorney wrote an article for an insurance publication in which he concluded "that a lease is an 'insured contract' and that when a lease requires a landlord to be an additional insured, the tenant's CGL policy automatically covers the landlord." Simply stated, a tenant's agreement to indemnify the landlord in the lease does not provide the landlord with that status of an additional insured on the liability insurance of the tenant.

While a "contract for a lease of premises" is usually within the CGL insurance policy definition of "insured contract," the landlord, as an indemnitee, is not automatically afforded the status of an insured on the CGL policy of the tenant. In other words, "insured contract" is not the functional equivalent of an automatic additional insured endorsement. Here is how one court expressed the distinction (including the duty to defend the noninsured indemnitee):

> Thus, notwithstanding USAI's written agreement to indemnify the plaintiff, the hold harmless agreement did not contain any requirement that USAI name the plaintiff as an additional insured under the subject policy.
>
> Contrary to the plaintiff's contention, the supplementary payments provision did not demonstrate an intent by the defendant insurer to afford the plaintiff coverage solely on the basis that it is an indemnitee of the named insured, in the absence of the plaintiff's addition as "an insured" under Section II of the subject policy pursuant to the additional insured endorsement (see *Stainless, Inc. v. Employers Fire Ins. Co.*, 69 A.D.2d 27 (N.Y. App. Div. 1st Dep't 1979) at 33).

> Liability coverage under the policy is afforded by Section I, not the supplementary payments provision. *Therefore, Hargob's status as an indemnitee does not operate to confer upon it status as an additional insured, and it is, thus, not entitled to liability coverage under the subject policy pursuant to the supplementary payments provision*. [Emphasis added.]

Hargob Realty Assoc., Inc. v. Fireman's Fund Ins. Co., 2010 N.Y. Slip. Opp. 4143, 73 A.D.3d 856 (N.Y. App. Div. 2d Dep't 2010).

Conclusion

While automatic or "blanket" additional insured endorsements serve a valuable role, the coverage provided by such endorsements can no longer be taken for granted. It is time to give careful consideration to coverage the automatic additional insured endorsements provide and do not provide to various persons or organizations. Not only is it important to recognize that not all automatic additional insured endorsements are created equal, is it equally important to know that automatic additional insured endorsements may not be a panacea—and may not provide coverage to all those seeking additional insured status as may have been presumed.

---

[1] Jill B. Berkeley, "Additional Insured Endorsements: Watch Your Language!" Howrey, RISK - *Legal Issues in Insurance Recovery and Construction*, 4th Quarter, 2010, pp. 1.

[2] CG 20 33 07 04 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement with You © ISO Properties, Inc. 2004.

Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based "rent-a-risk manager" outsourcing, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com.