

Additional Insured Changes in the CGL

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New changes to the additional insured endorsements and the introduction of a limitation to the definition of "insured contract" are characterized by ISO as reductions in coverage. Policyholders whose insurers use the new forms may be confronted with a couple of problems that they will need to address.

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In July 2004, many jurisdictions will implement revisions that will reduce coverage provided in various Insurance Services Office, Inc. (ISO) commercial general liability (CGL) additional insured endorsements and will also introduce a new, optional ISO endorsement that limits contractual liability coverage by restricting the definition of "insured contract."

Background

Considerable debate and litigation has surrounded the extent of coverage provided to an insured that has been added by an additional insured endorsement to the CGL policy. Potential litigation over the extent of coverage has led some to question the value of having additional insured status.

For instance, the American Institute of Architect (AIA), Document A 201 (1997)—General Conditions of Contract for Construction, has removed *entirely* the requirement that the contractor name the owner as an additional insured on the contractor's liability insurance. In their 1997 commentary, the AIA observed, "while some additional protection may be gained in this way [adding the owner as additional insured], it ultimately increases the cost of insurance to the contractor without measurably reducing the risk of disputes on the project."

Sole Negligence of the Additional Insured

For several years now, most courts have interpreted additional insured endorsements quite broadly, particularly the phrase "arise out of operations" or "arising out of your ongoing operations." Coverage was generally found to apply to the additional insured even if the additional insured's negligence was the *sole* cause of the injury—it was not necessary for the named insured to have caused the accident.

Nonetheless, as far back as the 1940s, ISO and its predecessor, the National Bureau of Casualty and Surety Underwriters, have maintained their intent was to provide coverage for the additional insured only to the extent the additional insured was found liable for the activities of the named insured. Some commentators have referred to liability arising out of the named insured's acts as *vicarious liability*.

Vicarious Liability

Black's Law Dictionary (6th ed.) defines vicarious liability as:

The imposition of liability on one person for the actionable conduct of another, **based solely upon a relationship between two persons.** Indirect or imputed legal responsibility for the acts of another; for example, the liability an employer for the acts of an employee, or a principal for torts and contracts of an agent [Emphasis added].

The concept of vicarious liability is expounded upon in an Illinois Appeals Court case, *Great American Ins. v West Bend Mut. Ins.*, 723 NE2d 1177 (Ill App 2000). In that case, the court stated:

Liability for negligence may be imputed where the person to whom the negligence is imputed had a legal right to control the action of the person actually negligent. Negligence in the conduct of another will not be imputed to a party if he did not authorize such conduct, participate therein, or have the right or power to control it.

Independent Contractor—Named Insured

Although it is not always the case, the named insured on a CGL is usually an independent contractor hired by the additional insured. By definition, the person engaging or hiring an independent contractor (the additional insured) does *not* have a right to control the independent contractor (the named insured). Therefore, the additional insured, according to the *Great American Ins.* court, cannot be *vicariously* liable for the acts of the named insured.

Restatement (Second) of Torts

An authoritative legal treatise, *Restatement (Second) of Torts*, does convey the restrictions on vicarious liability for the acts of an independent contractor. Subject to specific exceptions, Section 409 of *Restatement* does express the general principle that an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. The exceptions are numerous, but fall into three general categories.

1. Negligence of the employer in selecting, instructing, or supervising the contractor.
2. Nondelegable duties of the employer that arise out of some relation toward the public or other persons.
3. Work which is specifically, peculiarly, or inherently dangerous.

Certainly, the first category of exceptions above cannot be properly categorized as vicarious liability as it is the direct negligence of the employer (additional insured) and not the independent contractor (named insured) that is the basis for liability. This basis of liability is more correctly categorized as *direct* liability and may be imposed upon the additional insured (employer) even if liability results from the *sole negligence* of the additional insured.

The second and third exceptions, although categorized in *Restatement* as falling within the rules of vicarious liability, appear distinguishable from vicarious liability as defined in *Black's* as the liability is not based *solely on a relationship*. Rather, it may be argued, that a separate element must be present *in addition* to the relationship with the independent contractor—a non-delegable duty or inherently dangerous work.

Liability of Additional Insured

The above is not to suggest that the additional insured can never be held liable for actions of the named insured. The exceptions enumerated above in *Restatement* will be applied as deemed appropriate by the courts. Depending on the definition adopted, there is, however, a genuine question as to whether or not an additional insured (employer) can, under any circumstances, be held vicariously liable for the acts of a named insured (independent contractor) and therefore receive any protection as an additional insured.

Litigation has been ongoing over similar coverage issues. A few insurers have been using additional insured endorsements that exclude coverage if the additional insured is negligent, purporting to provide coverage only if the additional insured is vicariously (and not directly) liable for the named insured's actions. If an additional insured cannot be vicariously liable for the actions of an independent contractor (the named insured), litigants have contended that the additional insured endorsement provides no coverage and therefore the endorsement is illusory. (See also [Is Additional Insured Coverage Becoming Just an Illusion?](#), Joseph P. Postel, July 2002, IRMI.com.)

This is more than an academic issue—if coverage for an additional insured applies *only* if the additional insured is vicariously liable for the activities of the named insured, very little, if any, coverage may be provided to the additional insured. If this is ISO's intent, coverage may be very limited indeed.

ISO Newly Revised Additional Insured Endorsements

In their Circular filing for the newly revised additional insured endorsements, ISO does raise the issue of whether the additional insured endorsement is to provide coverage only for the additional insured's vicarious liability arising out of the named insured's acts or coverage for the additional insured's sole negligence.

A Middle Ground

It does appear to be ISO's intent to stake out middle ground. ISO points out in their Circular that the revised additional insured endorsements will not provide coverage for the additional insured's sole negligence, but will provide coverage for what ISO refers to as the additional insured's "contributory negligence." In other words, the newly revised additional insured endorsements provide coverage to the additional insured that is broader than just vicarious liability arising out of acts of the named insured.

Caused in Whole or in Part

The newly revised endorsements, which include the most commonly used ISO additional insured endorsements, will provide coverage for the additional insured but only with respect to liability for bodily injury, property damage, personal injury, or advertising injury *caused in whole or in part*, by the named insured's acts or omissions or the acts or omissions of those acting on behalf of the named insured. The phrase "arising out of" has been eliminated.

When Coverage Applies

If injury or damage is caused in part by the additional insured and in part by the named insured (or caused in part by others working on behalf of the named insured—such as another independent contractor), coverage does apply to the additional insured. In other words, if the additional insured is concurrently or jointly negligent along with the named insured (or others acting on behalf of the named insured), the revised additional insured endorsement will provide coverage to the additional insured (to the extent of the additional insured's liability). The additional insured does have coverage for their own negligence, provided it is in conjunction with the named insured's negligence.

Further, if the named insured (or others acting on behalf of the named insured) is the sole cause of the injury or damage, the additional insured is also covered by the additional insured endorsement (to the extent of the additional insured's liability). The latter falls under the principle of vicarious liability—and raises a genuine issue as to the extent of coverage, if any, actually provided to the additional insured.

When Coverage Does Not Apply

By contrast, if the additional insured is the sole cause of the injury or damage—and the named insured (or others acting on behalf of the named insured) did not contribute to the injury or damage, the additional insured will not have coverage. As it is the express intent of ISO to eliminate this sole negligence situation, it follows that coverage will not apply to the additional insured.

Coverage also does not apply if the additional insured is currently or jointly negligent with a person or organization other than the named insured or someone acting on behalf of the named insured.

Illustrations

Nick's Plumbing was a subcontractor at a jobsite in Lansing, Michigan, controlled by the general contractor, Chelsea's Builders, Inc. As required by contract, Nick's Plumbing listed Chelsea's Builders on his CGL using the newly revised Additional Insured—Owners, Lessees or Contractors (CG 20 10 07 04) endorsement.

Example One. A pipe Nick's Plumbing was installing fell off the building and hit a pedestrian. It was determined that Nick's Plumbing was careless in installing the pipe and Chelsea's Builders was also negligent for failing to protect a passerby from falling objects. As the injury to the pedestrian was caused in part by Nick's Plumbing (the named insured) and in part by Chelsea's Builders (the additional insured), Chelsea's Builders, Inc. is protected as an additional insured on Nick's Plumbing CGL for the claim by the pedestrian.

Example Two. An employee of the roofing contractor is injured in a fall when Chelsea's Builders does not properly set up a scaffold. The injured worker demands damages from Chelsea's Builders and it is determined that Chelsea's Builders improper placing of the scaffold is wholly the cause of the injury. Chelsea's Builders expects Nick's Plumbing CGL insurer to pay for injuries to the worker. As the injury to the worker was not caused in whole or in part by Nick's Plumbing, Inc. (the named insured), Chelsea's Builders (the additional insured) has no coverage as an additional insured for the injured worker's claim. The injury arose out of the sole negligence of Chelsea's Builders (the additional insured), who will have to rely on their own CGL policy for coverage for this incident.

Example Three. Nick's Plumbing uses Acme Welding to weld some large piping. Sparks from the welding ignite the adjacent building, causing a serious fire. A court determines that Acme Welding's careless use of welding equipment was the prime cause of the fire and that Chelsea's Builders was also at fault in not properly supervising the welding operations. Chelsea's Builders again expects Nick's Plumbing CGL insurer to pay for the damage caused by the fire. As Acme Welding, acting on behalf of Nick's Plumbing (the named insured), partially caused the damage, Chelsea's Builders is protected as an additional insured on Nick's Plumbing's CGL for their liability for damage to the building.

Example Four. Chelsea's Builders directly contracts with an iron and steel subcontractor. The crane being used to lift the beams collapses, injuring several workers and pedestrians. The investigation shows that the iron and steel contractor was not qualified and competent to perform the work delegated by Chelsea's Builders. Both the iron and steel contractor and Chelsea's Builder's were found to be jointly responsible for the collapse of the crane and resulting injuries and damages.

Even though Chelsea's Builders was not solely negligent, they will have no coverage under Nick's Plumbing CGL policy as an additional insured as the injuries and damage was not caused in whole or in part by Nick's Plumbing or by anyone acting on behalf of Nick's Plumbing (coverage for Chelsea's Builders would also be eliminated by other limitations found in Nick's Plumbing additional insured endorsement).

Amendment of Insured Contract Definition

ISO has also introduced an optional endorsement entitled "Amendment of Insured Contract Definition" (CG 24 26 07 04). The endorsement changes the definition of the "insured contract," part f., to that part of any other contract or agreement pertaining to the named insured's business under which the named insured assumes the tort liability of another provided the bodily injury (BI) or property damage (PD) is caused, in whole or in part, by the named insured or those acting on the named insured's behalf.

The intent is clear—if coverage for the sole negligence of an *additional insured* is being eliminated, *contractual liability coverage* for that portion of an indemnity agreement in which the named insured has assumed liability for the sole negligence of another is also being eliminated.

Broad Form Blanket Contractual Liability Coverage

The effect of the new amendment of insured contract definition is to reduce contractual liability coverage from broad form blanket contractual to intermediate form blanket contractual coverage. Although intended to be used along with the new additional insured endorsements, it appears that amendment of insured contract definition endorsement may be used at any time to limit contractual liability coverage.

Conclusion

The changes to the additional insured endorsements as well as the introduction of the new limitation to the definition of "insured contract" are characterized by ISO as reductions in coverage. Policyholders whose insurers use the new forms may be confronted with a couple of problems.

First, the new additional insured coverage may not comply with a policyholder's existing contractual requirements. Real estate leases, for example, are often multiple year agreements that may require a tenant to provide coverage to the landlord that is broader than the revised additional insured endorsements will provide. A landlord may expect that their additional insured status on the tenant's policy will protect the landlord for claims by business invitees of the tenant that are injured on the premises, regardless of whether the liability arises out of the sole negligence of the landlord.

Further, additional insured requirements found in various contracts or agreements are often vague or ambiguous. Phrases such as "lessor is to be a coinsured on lessee's public liability insurance" are common. Does the quoted requirement allow the policyholder to eliminate coverage for the additional insured's sole negligence? The answer may ultimately be decided in legal actions brought against the policyholder alleging breach of contract.

Second, as the new additional insured endorsements are not time tested, and based on the historical position of ISO and their member insurers, some insurers may be inclined to interpret the revised endorsements to provide coverage *only if the additional insured is vicariously liable for the acts of the named insured*. As documented above, such an interpretation may greatly reduce or practically eliminate coverage to the additional insured, leaving the policyholder susceptible to breach of contract litigation and the insurer a target for declaratory judgment actions.

Finally, the optional reduction in contractual liability coverage from Broad Form to Intermediate Form by use of the new Amendment of Insured Contract Definition endorsement may evolve into an underwriting practice independent of the use of any additional insured endorsements. While many jurisdictions do not allow indemnification for the sole negligence of another, some do allow such indemnification. Policyholders who need (possibly because of an existing indemnity agreement) broad form contractual coverage may find it is no longer available or available on a very limited basis for significant additional costs.

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