

**ADDITIONAL
INSURED
TENDERS**

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CONSTRUCTION COMMERCIAL GENERAL LIABILITY INSURANCE

- **The standard Commercial General Liability (“CGL”) policy offers multiple ways for general contractors to become additional insureds under their subcontractors’ CGL policies, apart from simply being named on the policy as an additional insured.**

RESPONDING TO GENERAL CONTRACTORS' DEFENSE TENDERS – HOW DOES THE INSURER DECIDE IF THE CONTRACTOR IS AN ADDITIONAL INSURED?

- **In most cases when a contractor becomes an additional insured under another contractor's CGL policy, the insurer will have no record reflecting the contractor's insured status.**
- **Instead, the insurer must make the additional insured determination based on the tender and any additional information obtainable from the purported additional insured, the named insured, or the broker.**

WAYS A CONTRACTOR BECOMES AN ADDITIONAL INSURED ON ITS SUBCONTRACTOR'S CGL POLICY

- **BLANKET ENDORSEMENTS**
- **SCHEDULED ENDORSEMENTS**
- **INSURED CONTRACT**

BLANKET ADDITIONAL INSURED ENDORSEMENT

Additional Insured Endorsement BCG 0013 (1099)

- “any person or organization . . . that requires in a “work contract” that such person or organization be made an insured under this policy” is an additional insured, but only with respect to bodily injury, property damage, personal injury. . . which results from the named insured’s work under the work contract.

SCHEDULED ENDORSEMENTS

- **CG 20 10 07 04 – Ongoing Operations**

CG 20 37 07 04 – Completed Operations

“CAUSED IN WHOLE OR IN PART”

- In 2004, ISO narrowed the coverage afforded by the “arising out of” language under both the CG 20 10 and the CG 20 37 by limiting the coverage to liability at least caused in whole or in part by the named insured (*i.e.*, eliminating coverage for the additional insured’s sole negligence).**

SCHEDULED LOCATION CG 20 37

CG 20 37 -- "Who is an Insured" includes the identified persons or organizations, "but only with respect to liability for 'bodily injury' or 'property damage' caused, in whole or in part, by 'your work' at the location designated and described in the schedule of [the endorsement] performed for that additional insured and included in the "products-completed operations hazard."

SCHEDULED LOCATION CG 20 10

- “Who is an Insured” includes the identified persons or organizations, “but only with respect to liability for ‘bodily injury,’ ‘property damage’ or ‘personal 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 locations designated [in the endorsement].”

HOW THEY DON'T GET IN: CERTIFICATES OF INSURANCE

- **ACORD CERTIFICATES OF INSURANCE**
 - **FROM THE STANDPOINT OF PROVING
ADDITIONAL INSURED STATUS, NOT WORTH
THE PAPER THEY'RE PRINTED ON**

DISCLAIMERS, DISCLAIMERS . . .

- **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**

BUT . . . AI COVERAGE BY ESTOPPEL

ARGUMENTS FOR ESTOPPEL TO DENY ADDITIONAL INSURED COVERAGE

- * INSURER KNOWS ABOUT CONTRACTUAL INSURANCE
REQUIREMENT**
- * INSURER KNOWS ABOUT THE CERTIFICATE OF INSURANCE**
- * INSURER REFUSES TO PROVIDE ADDITIONAL INSURED WITH A
COPY OF THE POLICY**

HOW THEY GET OUT

- **Once Additional Insured Status Is Established Generally, What Will Take The AI Out of Coverage?**
 - * **No Allegation of Derivative Liability in the Complaint**
 - * **Invalid Indemnity Clause Under Anti-Indemnification Statute**
 - * **AI Violates a Condition Precedent to Coverage**

EIGHT CORNERS RULE APPLIED TO AI

- **Where Liability Is Entirely Derivative: No Duty to Defend Unless Derivative Liability Alleged in the Complaint (Eight Corners Rule Applies to Additional Insureds)**

INDEMNITY AGREEMENT VIOLATES ANTI-INDEMNIFICATION STATUTE

- **If Indemnity Clause is Source of AI Status, The Clause Must Be Valid Under State Law**
 - **In a “Pure” Anti-Indemnity State, Any Obligation to Indemnify, Even for Partial Negligence of AI, Voids the Indemnity Clause**
 - **A Void Indemnity Clause Will Not Give Rise to a Duty to Defend or Indemnify on the Basis of “Insured Contract” Status**

CONTRACTUAL LIABILITY EXCLUSION

The Contractual Liability exclusion (exclusion b.) of the CGL Policy 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."

"INSURED CONTRACT" EXCEPTION

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."**

***Insured contracts* are those in which the named insured assumes another party's (such as a contractor's) tort liability to a third person.**

HOW THEY GET OUT, CONT'D: AI VIOLATED A CONDITION PRECEDENT

- -- **Tenders by additional insureds require compliance with timely notice conditions in the named insured's policy. Delays of only a few months can be untimely as a matter of law if deemed material.**
- -- **In a No Prejudice Jurisdiction, a Material Delay Voids Coverage Even If the Insurer Is Not Prejudiced.**

HOW THEY DON'T GET OUT – NAMED INSURED'S VIOLATIONS OF POLICY

- **Where Named Insured Violates a Condition Precedent to Coverage (Late Notice, Refusal to Cooperate), This Sin Is Not Visited Upon The AI**
- **Because Each Insured's Rights and Obligations Are Assessed as if they were the Only Insured.**

FUN THINGS TO WATCH FOR

Surprises in the Underwriting File

- * **Promises to Add Additional Insureds**
- * **Communications from Broker that Named Insured Expects GC to be Added as an AI**
- * **Scheduled Endorsements Specify Location But No Evidence Such Scheduled Location was Actually on the Policy**

FUN THINGS, CONT'D.

- **THINGS THE BROKER SAID**
 - **PROMISES TO INSURED TO ADD AI'S**
 - **HANDING OUT COI'S LIKE CANDY**
- **SCHEDULED ENDORSEMENTS READING "ALL LOCATIONS"**

IMPORTANT COVERAGE DECISIONS INVOLVING ADDITIONAL INSURED ISSUES

- * In Gilbane Bldg. Co. v. Admiral Ins. Co., 664 F.3d 589 (5th Cir. 2011), the Fifth Circuit found that a general contractor was an additional insured, but that the insurer owed no duty to defend where the complaint did not allege negligence on the part of the named insured. 664 F.3d at 594.
 - The policy, however, provided coverage for additional insureds "only with respect to liability for [injuries or damage] caused, in whole or in part, by [the subcontractor's] acts or omissions; or . . . [t]he acts or omissions of those acting on [the subcontractor's] behalf."

CASES INVOLVING ADDITIONAL INSURED DETERMINATIONS, CONT'D

- Gilbane Bldg. Co. v. Admiral Ins. Co., continued:

* Holding that "caused, in whole or in part by" required proximate causation, the court applied the "eight corners rule" under Texas law and found the complaint alleged only the general contractor's negligence as the cause of the injuries, and thus there was no duty to defend the general.

* See Pekin Ins. Co. v. Roszak/ADC, LLC, 402 Ill.App. 3d 1055, 1059-63, 341 Ill. Dec. 902, 906-09, 931 N.E.2d 799, 803-06 (2010) ("[D]irect allegations of negligence against an additional insured do not fall within coverage granted 'only with respect to liability incurred solely as a result of some act or omission of the named insured'").

CASES ON THE EFFECT OF NAMED INSURED'S POLICY VIOLATIONS ON ADDITIONAL INSURED

* Admiral Ins. Co. v. Joy Contrs., Inc., 2012 NY Slip Op 4670, ¶ 6, 19 N.Y.3d 448, 460, 948 N.Y.S.2d 862, 869, 972 N.E.2d 103, 110 (N.Y. June 12, 2012) (even though the policy was void as to Century on account of its misrepresentation, "each individual additional insured must be treated as if separately covered by the policy and indeed as if he had a separate policy of his own") (citations and internal punctuation omitted)

* Mt. Hawley Ins. Co. v. Robinette Demolition, Inc., 2013 IL App (1st) 112847 (Ill. Ct. App. 2013) (additional insured coverage was in fact owed to a construction contractor, even where the named insured failed to make a timely claim of the "occurrence" under the policy).

HOW GC'S CAN PROTECT ADDITIONAL INSURED STATUS

- **OBTAIN A COPY OF THE SUB'S COMPLETE POLICY**
- **SEEK TO BE A NAMED ADDITIONAL INSURED**
- **ALTERNATIVELY, SEEK ADDITIONAL INSURED STATUS UNDER SCHEDULED ENDORSEMENTS**