

The Most Common Yet Most Misunderstood Risk Management Tool – the Additional Insured Endorsement

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Business owners, service providers and users are, by definition, in multiparty relationships, whether as or with their landlord, tenant, contractor, supplier, or customer. The purpose of this article is to give you an understanding of the most common risk-management tool – being listed as an additional insured on another person's liability insurance policy – so that you may also avoid one of the most common risk-management mistakes. For instance, if your client is contemplating leasing space in a to-be-built multi-tenant project, the prospective transaction involves a complex relationship among numerous parties.

In this common scenario, in addition to landlord and tenant, there are many other parties involved in the landlord/tenant relationship: on behalf of the landlord there are its lender, building contractor, architect, engineer, and project service providers (management company, security guard service, and maintenance service); and on behalf of the tenant there are its tenant-finish contractor, space planner, architect, and engineer. Each of these parties typically has its own commercial general liability insurance ("CGL") policy protecting it against liability for bodily and personal injuries arising out of its negligence. Each party has negotiated with its insurance carrier the coverages, limits and deductibles of its CGL policy and the consequent premium. Each of the parties in this hypothetical will additionally seek to protect itself from liability for injuries arising out of its relationship with each of the other parties – whether due to the work, operations, acts or omissions of each of the other parties or due to their presence on or about the leased premises. Among the many risk-management tools that might be employed, such as insurance, indemnity, releases, waivers, disclaimers, exculpations and limitations of liability, the most common is to require one or more of the other parties to cause their insurance carriers to endorse their CGL insurance to list your client as an additional insured. An additional insured endorsement specifies its coverage and is subject to the limits of the named insured's policy. It results in the named insured's insurance carrier providing the additional insured a defense to claims by injured third parties due to injuries arising out of the covered aspects of the relationship. It works to shift to the other party's CGL insurance the risk of loss due to injuries arising out of the other person's operations or presence at the premises. The strongest rationale for this request is the perceived fairness of making the other person's insurance carrier responsible for the increased exposure to loss created for the additional insured due to the named insured's operations. The cost typically is nominal or significantly less than the premium previously paid by the named insured for its policy.

Unfortunately, although this is the most common risk management technique, it is also the most commonly misunderstood, even by professionals in the field such as risk managers, insurance agents and lawyers. The most common error is failing to specify the coverage terms to be contained in the additional insured endorsement. Parties commonly cover the additional insured requirement by specifying "_____(the named insured) will cause its CGL insurer to list _____ as an additional insured on its CGL policy." A landlord may specify in its lease that the tenant and the tenant's contractors will cause each of their CGL insurers to list the landlord and its lender and management company as additional insureds on the tenant's and the tenant's contractors' CGL policies; a tenant may specify in its contract with its tenant-finish contractor that the contractor is to cause its CGL insurer to list the tenant, its landlord, and the landlord's lender and management company as additional insureds on the tenant-finish contractor's CGL policy; the tenant's contractor may specify in its subcontract with its subcontractors that the subcontractors list the contractor as an additional insured on the subcontractor's CGL policy. Unfortunately, in each of these cases, the person desiring protection as an additional insured has, by this wording of its insurance clause, left it up to the other party's insurance carrier to define the scope of the coverage to be provided. This is equivalent to letting the fox determine how, when, and if to protect the chicken. This mistake has been made because there is no commonly accepted definition of what is an "additional insured."

There are two basic types of additional insured endorsements – those issued on endorsement forms prepared by the Insurance Services Office, Inc. (known as “ISO”), the largest nationwide insurance advisory organization, and “manuscripted” endorsements – forms prepared by insurance issuers that vary from ISO’s forms. ISO forms have been tailored to address the most common circumstances where one party requires that it be listed as an additional insured on another person’s CGL policy. When a party fails to specify more than it being listed generically as an “additional insured,” it has opened the door to the other party’s insurer picking between the available ISO forms or issuing a manuscripted form that effectively eliminates or conditions coverage for the additional insured.

The following are two of the most frequently used ISO endorsement forms:

ISO Form CG 20 10 Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization. A. Section II – Who Is An Insured is amended to include as an 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 locations(s) designated above. B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply: 2. This insurance does not apply to “bodily injury” or “property damage” occurring after: (1) All work ... on the project ... at the site of the covered operations has been completed; or (2) That portion of “your work” out of which the injury or damages arises has been put to its intended use....

CG 20 10 07 04

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The above form is an endorsement to be added to the named insured’s CGL policy to specify by Schedule certain person(s) as additional insured(s) on the named insured’s CGL policy (e.g., to specify a landlord and/or tenant as an additional insured on a tenant’s contractor’s CGL policy). Note that this form specifies covered occurrences (“liability ... caused, in whole or in part, by ... (the named insured’s) ... performance of (its) ongoing operations”) and certain exclusions from coverage (occurrences after “all work ...has been completed” and “that portion of ‘your work’ ... has been put to its intended use”).

ISO Form CG 20 11 Additional Insured—Managers or Lessors of Premises. 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 the ownership, maintenance or use of that part of the premises leased to you (the named insured) and shown in the Schedule and subject to the following additional exclusions: This insurance does not apply to: 1. Any “occurrence” which takes place after you cease to be a tenant in that premises. 2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

CG 20 11 01 96

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The above form is an endorsement to be added to the named insured tenant’s CGL policy to specify by Schedule certain person(s) as additional insured(s) (e.g., to specify the landlord and its management company as additional insureds on the tenant’s CGL policy). Note that this form specifies the covered occurrences (“liability arising out of the (named insured’s) ownership, maintenance or use of that part of the premises leased to you (the named insured)”) and certain exclusions from coverage (“Any ‘occurrence’ which takes place after you (the named insured) cease to be a tenant in that premises” and “Structural

alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule").

The following insurance language is found in a manuscripted additional insurance endorsement issued by AIG:

It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities arising out of their operations performed by or for the named insured, but excluding any negligent acts committed by such additional insured.

Note that the language in the ISO and the AIG endorsements is very similar, in that each specifies a covered relationship, status or activity. But also note that the AIG endorsement limits the additional insured's protection under the named insured's CGL policy by excluding from coverage liabilities arising out of "any negligent acts committed by such additional insured." The AIG exclusion effectively eliminates from insurance coverage all liabilities for which the additional insured would wish to be listed as an additional insured on the named insured's policy!

In *ATOFINA Petrochemicals, Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005), the Texas Supreme Court rejected an insurance company's position that the exclusionary language in Paragraph 2 of the following additional insured endorsement excluded coverage for injuries caused in part by the additional insured's negligence.

1. That person, or organization, is only an additional insured for its liability arising out of premises "you" own, rent, lease or occupy or for "your work" for or on behalf of the additional insured; and
2. The insurance afforded the additional insured under this endorsement does not apply to ... any liability arising out of any act, error or omission of the additional insured, or any of its employees....

Fina, the additional insured, argued successfully that the exclusion was only for injuries caused by Fina's sole negligence. The court stated

Fina contends Paragraph 2 excludes Fina's sole negligence. We adopt this reasonable construction. See *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (holding a court "must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent"). In addition, we adopt Fina's construction because Continental's interpretation that the exclusion bars all coverage when any negligence on the part of the premises owner is pleaded, unless the owner's responsibility is based solely on vicarious liability for the acts of the contractor, would render coverage under the endorsement largely illusory. See *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997); see also *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (noting a premises owner has no vicarious liability for the acts of an independent contractor performing work on a site, but is liable for the contractor's work only if the premises owner exercises control over the contractor's work).

Id. at 444-45.

It is possible to craft an endorsement form to meet your particular risk management goals. In circumstances where the premises are not within the exclusive use of one party or are maintained by one

person but used by another person (e.g., parking garages, common area facilities), it may make more sense to tailor the additional insured endorsement to exclude from the insurance protection afforded by the endorsement such common facilities or facilities maintained by others. Unfortunately, due to lack of understanding, parties may resort to the "one size fits all" rationale, and list as additional insureds persons that reasoned fairness would indicate should rely on their own CGL insurance as opposed to being listed on the other party's CGL insurance as an additional insured. This is even more so the case where a tenant has been required to list the landlord as an additional insured on the tenant's CGL policy, but the tenant is being billed for the landlord's CGL insurance as part of common area expense pass-throughs.