

**ADDITIONAL INSURED ENDORSEMENTS TO LIABILITY POLICIES:  
Typical Defects and Solutions**

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## Table of Contents

|                                                                                                                      | Page |
|----------------------------------------------------------------------------------------------------------------------|------|
| I. CONUNDRUM                                                                                                         |      |
| A. Introduction .....                                                                                                | 1    |
| B. Certificates of Insurance .....                                                                                   | 1    |
| 1. <u>Typical Defects</u> .....                                                                                      | 1    |
| a. Reliance on Certificate .....                                                                                     | 1    |
| (1) Not Reasonable to Rely on Certificate .....                                                                      | 1    |
| (2) COI Signed But Not by an "Authorized Representative" of the Insurer<br>with Authority to Bind the Insurer .....  | 7    |
| (3) No Standard Certificate Language to Describe Additional Insured<br>Coverage .....                                | 8    |
| (4) Standard Certificate Does Not Disclose Policy Modifications Limiting<br>or Eliminating Indemnity Insurance ..... | 8    |
| (a) ISO CG 21 39 Contractual Liability Limitation .....                                                              | 9    |
| (b) ISO CG 24 26 Amendment of "Insured Contract" Definition<br>Endorsement .....                                     | 9    |
| b. Designated as Certificate Holder But Not as Additional Insured .....                                              | 9    |
| c. Designated as Additional Insured and as Certificate Holder .....                                                  | 9    |
| d. Erroneously Issued or Completed Certificate .....                                                                 | 10   |
| (1) Clerical Error .....                                                                                             | 10   |
| (2) Misinterpretation by Agent of Scope of Blanket Endorsement .....                                                 | 11   |
| (3) Erroneous Belief by Agent in Existence of Coverage .....                                                         | 11   |
| (4) Fictitious Insured Statements Issued by Fictitious Agents .....                                                  | 11   |
| 2. <u>Solutions</u> .....                                                                                            | 11   |
| a. Obtain and Review Certified Copy of Policy and Endorsements .....                                                 | 11   |
| (1) Be Prepared to Deal with Unavailability of Policies and Endorsements .....                                       | 11   |
| (2) Require Confirmation That Coverage is Applicable to the Project .....                                            | 11   |
| (3) Rely on Certificate if Issued by Agent with Authority to Bind<br>and Amend Coverage .....                        | 11   |
| b. Blanket or Automatic Additional Insured Coverage Endorsements .....                                               | 12   |
| c. Manuscript Certificates .....                                                                                     | 12   |
| d. Sue the Agent .....                                                                                               | 13   |
| e. Sue the Protecting Party .....                                                                                    | 13   |
| C. Insurance Specifications .....                                                                                    | 13   |

|     |                                                                                                                                                                                                     |    |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 1.  | <u>Typical Defects</u> .....                                                                                                                                                                        | 13 |
| a.  | The Typical Insurance Specification .....                                                                                                                                                           | 13 |
| (1) | Presumption that Common Industry Terms Have a Well-Defined Meaning .....                                                                                                                            | 14 |
| (2) | Only Persons Stated in Endorsement Are Additional Insureds; and Other Distinctions as to Insured Status that do Not Apply to Additional Insureds Without Special Language Added to the Policy ..... | 18 |
| (2) | Only Persons Stated in Endorsement Are Additional Insureds.....                                                                                                                                     | 18 |
| (3) | Issuance of an Endorsement on a Form Not Applicable to the Relationship Between Named Insured and the Additional Insured .....                                                                      | 19 |
| (4) | Failure to Specify that Policy Limits Are to Be Available to Additional Insured .....                                                                                                               | 19 |
| (5) | Failure to Specify that Additional Insured Endorsement May Not be Deleted During Policy Term .....                                                                                                  | 19 |
| b.  | Specification in Contract of Coverage that is Ultimately Not Provided .....                                                                                                                         | 19 |
| (1) | Violation of Contract .....                                                                                                                                                                         | 19 |
| (2) | Waiver of Right to Enforce .....                                                                                                                                                                    | 19 |
| 2.  | <u>Solutions</u> .....                                                                                                                                                                              |    |
| a.  | Specify an ISO Additional Insured Endorsement Form .....                                                                                                                                            | 20 |
| (1) | CG 20 10 Additional Insured-Owners, Lessees and Contractors .....                                                                                                                                   | 20 |
| (2) | CG 20 11 Additional Insured-Managers or Lessors of Premises .....                                                                                                                                   | 20 |
| (3) | CG 20 26 Additional Insured-Designated Person or Organization.....                                                                                                                                  | 20 |
| b.  | Be Prepared to Respond to Being Tendered a Non-ISO Form.....                                                                                                                                        | 20 |
| (1) | Manuscript Forms.....                                                                                                                                                                               | 20 |
| (2) | Recommendations.....                                                                                                                                                                                | 20 |
| (a) | Add to the Specification of an ISO Additional Insurance Endorsement Form "Or Equivalent".....                                                                                                       | 21 |
| (b) | Attach a Copy of the ISO Form as an Exhibit to the Insurance Specification .....                                                                                                                    | 21 |
| (c) | Specify Limitations or Exclusions to Coverage that Are Not Acceptable.....                                                                                                                          | 21 |
| (d) | Specify That Endorsement Shall Expressly Cover Additional Insured's Concurrent Negligence.....                                                                                                      | 22 |
| D.  | Determining the Priority in Parties' Coverage .....                                                                                                                                                 | 22 |
| 1.  | <u>Typical Defects</u> .....                                                                                                                                                                        | 22 |
| a.  | No Insurance Specification in Parties' Contract Addressing Priority of Named Insured's Insurance Coverage and its Additional Insured's "Other Insurance" Coverage.....                              | 22 |
| (1) | First Dollar Coverage.....                                                                                                                                                                          | 22 |

|                                                                                                                                                         |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| (2) Excess and Umbrella Coverage.....                                                                                                                   | 25 |
| b. No Specification in the Certificate of Insurance of Priority of Coverage;<br>Failure of Additional Insured to Review Policies and Endorsements ..... | 26 |
| 2. <u>Solutions</u> .....                                                                                                                               | 26 |
| a. Insurance Specifications that Address Priority of Coverages Available to<br>Additional Insured .....                                                 | 26 |
| (1) First Dollar Coverage.....                                                                                                                          | 26 |
| (2) Excess and Umbrella Coverage.....                                                                                                                   | 27 |
| b. Review Policies and Amend as Necessary .....                                                                                                         | 27 |
| <br>II. FORMS                                                                                                                                           |    |
| A. The Standard Certificate of Liability Insurance – ACORD 25 (with Modifications).....                                                                 | 28 |
| B. ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person<br>or Organization .....                                         | 33 |
| C. ISO CG 20 11 Additional Insured – Managers or Lessors of Premises .....                                                                              | 35 |
| D. ISO CG 20 26 Additional Insured – Designated Person or Organization .....                                                                            | 39 |
| E. ISO CG 20 33 Additional Insured – Owners, Lessees or Contractors – Automatic Status<br>When Required in Construction Agreement.....                  | 41 |
| F. ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors<br>– Completed Operations .....                                                     | 42 |
| G. ISO CG 24 26 Amendment of "Insured Contract" Definition.....                                                                                         | 43 |
| H. ISO CG 02 05 Amendment to Liability Policy to Provide Additional Insured Notice<br>of Cancellation or Material Change .....                          | 44 |
| I. TE 99 01B Additional Insured – Texas Business Auto Policy .....                                                                                      | 45 |
| J. ISO CA 02 44 06 04 Texas Cancellation Provision or Coverage Change Endorsement .....                                                                 | 46 |
| K. TEXAS REAL ESTATE FORMS MANUAL Insurance Addendum to Lease .....                                                                                     | 47 |
| Author's Supplement to Insurance Addendum to Lease.....                                                                                                 | 49 |
| Annotations to Insurance Addendum and Supplement .....                                                                                                  | 55 |
| L. Author's "Fair Form" Manuscripted Endorsements.....                                                                                                  | 73 |

## USEFUL MATERIALS

**Additional Insured Endorsements; Liability Insurance**

2 TEXAS REAL ESTATE FORMS MANUAL CH. 18 *Risk Allocation: Indemnity, Waiver, and Insurance* (State Bar of Texas) by Charles Comiskey. [Charles.comiskey@bch-insurance.com](mailto:Charles.comiskey@bch-insurance.com) 713.979.9706.

4 BRUNER & O'CONNOR ON CONSTRUCTION LAW Ch. 11 Insurance §11:56 et seq. *Commercial General Liability (CGL) Coverage – Coverage Afforded to Additional Insureds* (West 2002 and 2007 Supp.).

43 AM. JUR.2d Insurance § 129 *Representation of Insurer or Insured – Brokers – Status While and After Procuring Policy*.

46 C.J.S. Insurance §1410 *Risks or Causes of Loss – Liability Insurance – Owner's, Landlord's and Tenant's Liability Insurance*.

BEST PRACTICES FOR CERTIFICATES OF INSURANCE (Independent Insurance Agents of Texas Jan. 2007).

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MALECKI ON INSURANCE: *Certificates of Insurance – When a Court Says Certificates Cannot Be "Reasonably" Relied On, Certified Copies Of Policies May Be The Answer* (August 2007 Vol. 16, No. 10 pp. 1-4); *A Critique of An Additional Insured Endorsement* (March 2006 Vol. 15, No. 5 pp. 3-6); *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005 Vol. 14, No. 10 pp. 1-8); *Dual Purpose Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (October, 2005 Vol. 14, No. 12 pp. 1-8); and *Coverage on a Primary and Noncontributory Basis – The Reason Reference to "Noncontributory" May Be Necessary* (March, 2005 Vol. 14, No. 5 pp. 1-5).

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Annot., *Resolution of Conflicts, in Non-Automobile Liability Insurance Policies, Between Excess or Pro-Rata "Other Insurance" Clauses*, 12 A.L.R.4<sup>th</sup> 993.

Bower, *Certificates of Insurance: What Every New York Risk and Insurance Professional Needs to Know* [www.thomasbower.com/Certificates](http://www.thomasbower.com/Certificates) (2002).

Caley, Foster, Evans and Karnani, *The Scope of Additional Insured Coverage – A State Survey*, INSURANCE LAW 2006: UNDERSTANDING THE ABC'S (PLI 2006).

Locke, *Allocating Extraordinary Risk In Leases – Indemnity, Insurance, Releases, Exculpations and Condemnation (Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual's Office Lease)*, 27<sup>th</sup> ANN. ADVANCED REAL ESTATE LAW COURSE Ch. 45 (State Bar of Texas 2006); *Annotated Risk Management Provisions: Indemnity and Insurance (Focus on Texas Real Estate Forms Manual's Retail Lease)* 18<sup>th</sup> ADVANCED REAL ESTATE DRAFTING COURSE Ch. 20 (State Bar of Texas 2007).

See following link for access to copies of these articles:

[http://www.gdhm.com/people\\_and\\_practices/bios/?ID=35](http://www.gdhm.com/people_and_practices/bios/?ID=35)

Pape, *Selected Insurance Issues Affecting Leases of Real Property Insurance Basics*, NEGOTIATING COMMERCIAL LEASES: HOW OWNERS AND CORPORATE OCCUPANTS CAN AVOID COSTLY ERRORS – MCCREARY'S REAL ESTATE INSURANCE REVIEW (PLI 2007).

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Wong and Morris, *Scope of Coverage for Additional Insureds*, INSURANCE COVERAGE 2006: CLAIM TRENDS & LITIGATION (PLI May 2006).

### **Certificate of Insurance**

45 TEX. JUR.3d Insurance Contracts and Coverage, § 274 *Agents and brokers distinguished*; § 295 *Ratification of acts*; § 308 *Particular acts indicative of agency*; § 309 *Creation of agency; estoppel or ratification*; § 320 *Effect of imputation of knowledge of agent to insurer*; § 325 *Imputation of knowledge from particular agents*; § 352 *Endorsement; provision for additional coverage*; § 355 *Effect of statute*; § 365 *Power of agent to bind insurer* (West 2006 and Supp. 2008).

4 BRUNER & O'CONNOR ON CONSTRUCTION LAW Ch. 11 Insurance § 11:66 *Commercial General Liability (CGL) Coverage - Certificates of Insurance* (West 2002 and 2007 Supp.).

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Gluckman, *et al*, "Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation," 21 *Construction Lawyer* 30, 33-34 (Winter 2001).

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Annot., *Applicability of exculpatory clause in lease to lessee's damages resulting from defective original design or construction*, 30 A.L.R.3d 971.

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Annot., *Sufficiency and timeliness of notice by indemnitee to indemnitor of action by third person*, 73 A.L.R.2d 504.

Annot., *Validity of exculpatory clause in lease exempting lessor from liability*, 49 A.L.R.3d 321.

Annot., *Validity of contractual provision by one other than carrier or employer for exemption from liability, or indemnification, for consequences of own negligence* 175 A.L.R. 8.

Bond, *Indemnification Under the TBOC*, TEXAS BUSINESS ORGANIZATIONS: CHOICE OF ENTITY AND FORMATION Ch. 7 (State Bar of Texas 2006).

Cheatham and Tulli, *Indemnity Agreements in Mergers and Acquisitions Transactions*, 4<sup>th</sup> ANN. ADVANCED BUSINESS LAW COURSE Ch. 6 (State Bar of Texas 2006).

Kuntz, *Texas Fair Notice Requirements: Express Negligence and Conspicuousness* 40<sup>th</sup> ANN. MORTGAGE LENDING INSTITUTE (University of Texas 2006).

Locke, State Bar of Texas: REAL ESTATE STRATEGIES ADVANCED COURSE *Finance* (Panel) (2007); ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2008, 2007, 2003, 2002) and the ANNUAL ADVANCED REAL ESTATE LAW COURSE (2006) on *Additional Insured Endorsements: Typical Defects and Solutions*; *Annotated Risk Management Provisions (Focus on Texas Real Estate Forms Manual's Retail Lease)*; *Allocating Extraordinary Risk in Leases: Indemnity, Insurance, Releases and Exculpations and Condemnation (Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual's Office Lease)*; *Risk Management*; and *Shifting of Extraordinary Risk: Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation and Exculpation*. See following link for access to copies of these articles: [http://www.gdhn.com/people\\_and\\_practices/bios/?ID=35](http://www.gdhn.com/people_and_practices/bios/?ID=35)

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Tarry, *Legal Opinions and Indemnification and Exculpation Provisions*, 3<sup>rd</sup> ANN. ADVANCED BUSINESS LAW COURSE Ch. 15.2 (State Bar of Texas 2005).

Wielinski, *Causation: Common Terminology Used in Insurance Policies*, 3<sup>rd</sup> ANN. ADVANCED INSURANCE LAW COURSE Ch. 17 (State Bar of Texas 2006).

Youngblood, Waldrop, Smith and Reisman, *Negotiating and Drafting Indemnity Clauses - A Discussion of Contractual Indemnity in Texas*, State Bar of Texas Webinar (2006).

Youngblood, Adams, Flocos and Luton, *Drafting and Enforcing Indemnity Agreements*, State Bar of Texas Webinar (Nov. 2007).

## I. CONUNDRUM

### A. Introduction

"Conundrum: 1. a riddle whose answer is or involves a pun 2a: a question or problem having only a conjectural answer b: an intricate and difficult problem." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY. Effecting additional insured coverage presents at least a "2b" category conundrum, and hopefully, not a "2a" category conundrum. Given more time to write this article, a "1a" might have been presented.

At a recent gathering of real estate lawyers, this author voiced concern that many real estate lawyers do not understand the insurance provisions they are drafting into their contracts and how to confirm that the specified insurance, and the underlying risk management objective, has been achieved. This author noted that this lack of understanding seemed particularly acute in addressing one of the most common risk management tools, having the client named as an additional insured on another contract party's liability insurance policy. One member addressing the gathering opined that "insurance is beyond the role of the lawyer and should be left to the client's insurance agent." He stated that he did not understand insurance; did not want to understand insurance; used boiler plate insurance provisions; and relied on the insurance agent to obtain a certificate of insurance confirming the required coverage. He said it was not his practice to confirm that the insurance requirements he had drafted into a contract were in fact implemented.

Liability insurance is the standard method of protecting one against the risk of catastrophic liability for injuries, death or other occurrences defined as personal injuries. Successfully having a client's liability covered by another party's liability policy through being an additional insured on the other party's liability policy is a worthy goal. Achieving additional insured status on the other party's liability policy achieves among other ends the following: it protects one's own policy limits; it guarantees a defense being provided by the other party's insurer; it backstops a potentially unenforceable indemnity agreement; it may afford coverage not available on the additional insured's own liability policy; it avoids subrogation by the other party's insurance carrier; and it affords an inexpensive means of protecting against the additional risk of liability arising out of the

multiparty business relationship in which the client is entering.

It is this author's experience that it is common that the insurance industry persons responsible for effecting additional insured coverage do not understand the additional insurance specifications drafted by the lawyer; do not know whether the insurance proffered meets the insurance specifications; do not or refuse to take the time to determine how to meet the specifications; and that the parties thereafter rely on the existence of the specified insurance without a reasonable basis for such reliance. Generalized additional insurance specifications like "landlord shall be named as an additional insured on tenant's liability policy" result in leaving it up to the tenant'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. As explained below, reliance on statements of additional insured status set out in the standard certificate of insurance also is a perilous and potentially imprudent.

The conundrum both is the intricacy and difficulty of achieving the goal but also the typical means employed by lawyers and client to achieve the goal. This article identifies the typical defects in achieving optimum protection of the client as an additional insured and offers strategies ("solutions") to achieve the goal.

### B. Certificates of Insurance

#### 1. Typical Defects

##### a. Reliance on Certificate

##### (1) Not Reasonable to Rely on Certificate

The most common (day-to-day) means for a party, an owner, tenant, contractor, or subcontractor (the "**protecting party**" or the "**named insured**"), to prove its compliance with another contract party's insurance requirements is to produce a certificate of insurance (sometimes referred to herein as a "COI") "certifying" the existence of policies and their coverages to the party identified in the certificate as the "**certificate holder**" (also referred to herein as the "**party to be protected**"). The most standard method of doing this is for the insured's broker to certify coverage by completion and delivery of completed ACORD forms, the "**standard certificate**"). Some agencies have their own non-ACORD certificate forms. Some parties-to

be protected have their own form of certificate of insurance for use by their named insured's broker.

Due to wide acceptance, the ACORD forms can be considered "standard." Until the mid-1970's, there was not standard format for a certificate of insurance. In 1976 a cooperative effort between a number of large property-casualty insurers and leading agents' professional associations produce standardizing certificate forms. This effort was supervised by the nonprofit corporation, the Agency-Company Operations Research and Development ("**ACORD**").

The ACORD Certificate of Liability Insurance sets out the following information: the name and address of the agent or broker issuing the certificate (called in the certificate the "**Producer**"); (1) the name and address of the named insured (called in the certificate the "**Insured**"); (2) the name of all insurance companies providing the coverages listed in the certificate (called in the certificate the "**Insurers Affording Coverage**" each of which are identified by letter, e.g., "**Insurer A**" and by "**Insr Ltr**"); (3) following the heading "**Coverages**" the following - the types of policies issued to the named insured (e.g., General Liability; Automobile Liability; Garage Liability; Excess/Umbrella Liability; and Workers Compensation and Employers' Liability, called herein the "**Liability Policies**"); the insurance policy numbers; the insurance policy effective dates and expiration dates; the limits of insurance for each policy; some details of the coverages (e.g., occurrence or claims-made liability; limits); (4) a blank for insertion of information concerning "description of operations / locations / vehicles / exclusions add by endorsement / and special provisions"; (5) the name and address of the certificate holder; (6) The certificate holder's status as an addition insured, and on which policies; (7) a notice-of-cancellation provision stating that the insurers will make an effort to provide a specified number of days' written notice to the certificate holder prior to cancellation of the policies; (8) the signature of the person signing the certificate (identified as the "Authorized Representative"); and (9) a variety of disclaimers and alarming notices. For an example of an ACORD 25 Certificate of Liability Insurance, see **Form A** attached to this article.

An ACORD form can not and should not be relied on by the certificate holder as being accurate or as properly defining coverages, exclusions, and deductibles. The most common disputes that arise

out of use of the ACORD form are due to the failure of the certificate holder or additional insured to receive notice of cancellation of one or more of the listed Liability Policies or due to a discrepancy between the coverage "certified" on the COI and the actual scope of coverage (e.g., no additional insured protection although the boxes indicating additional insured coverage have been checked). In such circumstances insurers typically seek to rely on disclaimers written into the face and on the back of the ACORD COI. Insurers also may argue that the issuer of the certificate is not authorized to bind the coverage or make the changes to the insurer's indicated on the COI.

The ACORD 25 Certificate of Insurance contain five disclaimers. These five disclaimers are to the effect that the certificate is informational only; the certificate confers no rights upon the certificate holder; the certificate does not amend, extend or alter the coverage afforded by the policies listed in the certificate; if the certificate holder is an additional insured, the policies must be endorsed and a statement on the certificate does not confer rights to the certificate holder in lieu of such endorsement; if subrogation is waived, certain policies may require an endorsement and a statement on the certificate does not confer rights to the certificate holder in lieu of such endorsement; and the certificate is not a contract between the issuing insurers, authorized representative or producer, and the certificate holder.

On the ACORD front of the form are the following disclaimers:

First disclaimer, which is in all caps and bold print:

**THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.**

Second disclaimer, which is in smaller font than the first disclaimer, is in all caps but is not in bold print:

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY

CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

On the back of the ACORD form are the following third, fourth and fifth disclaimers:

**IMPORTANT**

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

**DISCLAIMER**

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

See front and back disclaimers on the ACORD 25 attached as **Form A** to this article.

Cases as to Certificates with ACORD-Type Disclaimers that Erroneously Certify Existence of Additional Insurance Coverage

In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5<sup>th</sup> Cir. 2002), *aff'd* 184 F.Supp.2d 591 (S.D. Tex. 2001), the client (Safety Lights) of a delivery service (U. S. Delivery) and the client's insurer (TIG) sued an insurance broker (Sedgwick James of Washington, "Sedgwick"), alleging that the broker had misrepresented on an insurance certificate that Safety Lights was an additional insured on the Delivery Service's liability insurance policy issued by Lumbermens Mutual Casualty Co. The suit arose after Wright, an independent contractor hired by U. S. Delivery, was injured

delivering a steel plate to Safety Light's facility. TIG, Safety Light's liability insurer, defended the claim by Wright and sought reimbursement for the settlement and the costs of defending the suit after Lumbermens denied that Safety Lights was an additional insured on its liability policy. It is undisputed that the certificate of insurance certified that Safety Lights was an additional insured on the Lumbermens CGL policy.

The Fifth Circuit Court found that Sedgwick did not have authority, either actual or apparent, to make Safety Lights an additional insured on Lumbermens CGL policy. The court found that the disclaimer on the COI (the first ACORD disclaimer above) effectively negated reliance by Safety Lights on the express statement of additional insured coverage in the COI, absent the existence of proof of Sedgwick's apparent authority to alter the terms of Lumbermens CGL policy to add Safety Lights as an additional insured. The court stated Texas law as

A person who seeks to bind a principal based on the agent's apparent authority must show that the principal acted in such a way that a reasonably prudent person would believe the agent could bind the principal. (citation omitted). The principal must visibly confer authority for the agent to perform a range of tasks that include the disputed action. (citation omitted).

The court determined that

TIG, however, did not present any evidence that Lumbermens visibly had granted Sedgwick the power to add additional insureds. The only visible sign identified by either party-the COI-expressly disclaimed Sedgwick's power to do so. Sedgwick did not have the power to obligate Lumbermens contractually. We must still consider, however, whether the Sedgwick's actions in issuing the COI, pursuant to delegated authority, support TIG's disguised estoppel or straightforward mutual mistake arguments. .... Estoppel cannot modify the express terms of an insurance policy. *Tex. Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602-93 (Tex. 1988). ... TIG cites cases from Alaska, Illinois, Massachusetts, New York, and Ohio that permitted insureds to recover under the terms of the COI. Most of these

jurisdictions do not read COI's as modifying the underlying insurance policy but, instead, enforce the COI's under an estoppel theory. *E.g., Dumenric v. Union Oil Co.*, 238 Ill.App.3d 208, 179 Ill.Dec. 398, 606 N.E.2d 230, 233-34 (1992). The Texas Supreme Court has foreclosed us from following them....

The district court had found

Sedgwick's issuance of numerous certificates of insurance without Lumbermens' prior approval does not constitute a grant by Lumbermens of apparent authority to Sedgwick, since Plaintiffs only became aware of this practice by Sedgwick and Lumbermens after the suit commenced.... Plaintiffs have produced no evidence that they relied on any actions by Lumbermens in 1997, when the certificate of insurance was issued to Safety Lights and prior to Wright's accident.

The Fifth Circuit court also agreed with the district court's determination that Sedgwick was a "soliciting agent" as opposed to a "recording agent", and thus did not have actual authority to amend the policy to add Safety Lights as an additional insured. The court noted that the agency agreement between Sedgwick and Lumbermens authorized Sedgwick to solicit insurance on behalf of Lumbermens but permitted Sedgwick to bind Lumbermens only "to the extent specific authority (was) granted in the schedule(s) attached." Sedgwick had the authority to issue COI's and binders but lacked the authority to modify the policy itself. The court noted that TEX. INS. CODE art. 21.02, now TEX. INS. CODE § 4001.052 (West Supp. 2008) provides that "The agent may not alter or waive a term or condition of the application or policy."

The district court held as a matter of law that Safety Lights could not have reasonably relied on the insurance certificate. The court made the following statements:

An insured has a duty to read the insurance policy and is charged with knowledge of its provisions.... The Court concludes that (the client), claiming to be an additional "insured" under (the policy) should be held to the same obligation as a named insured to review a policy of insurance on which it seeks to rely,

and its reliance solely on the agent's certificate of insurance is not reasonable under the circumstances presented by the admissible evidence. ...there is no admissible evidence to suggest that (the client), had it made the request, would have been unable to obtain and read the insurance policy in issue.... Moreover, (the client), the holder of a certificate of insurance, was warned it was not entitled to rely on the certificate itself for coverage. The certificate stated to the holder that the certificate did not create coverage.... The certificate issued by (the insurance broker) prominently stated that it was "issued as a matter of information only" and did not "amend, extend or alter" coverage provided by the listed policies. Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy) ... Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiffs' reliance upon (the insurance broker's) representation of (the client's) additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail.

184 F.Supp.2d at 603-04 (footnotes omitted). See discussion at 17 Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE § 242:33 (3d ed. 1997) where it is stated:

Where an entity requires another to procure insurance naming it an additional insured, that party should not rely on a mere certificate of insurance, but should insist on a copy of the policy. A certificate of insurance is not part of the policy-if it states that there is coverage but the policy does not, the policy controls.

TIG also did not prove up a case of fraud or negligent misrepresentation against Sedgwick. The court noted

TIG did not offer any summary judgment proof that Sedgwick negligently or carelessly issue the COI. TIG did not advance a theory about the relevant standard of care; it does not cite omitted precautions or any other indicia of negligence; it did not explain why Sedgwick, rather than Corporate Express,

bore the burden of reading the incorporated policy.

Also, of interest is the follow up state court action, *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006), *rev'd* 178 S.W.3d 10 (Tex. App. – Hou. [1<sup>st</sup> Dist] 2005). The Texas Supreme Court held that the discovery rule did not apply to defer accrual of the 4 year statute of limitations. Safety Lights and TIG, under its subrogation rights, filed suit against Via Net and its parent, U. S. Delivery, 2 days before the lapse of 4 years after they were notified by Lumbermens that Safety Lights was not an additional insured on Lumbermens CGL policy. This was however more than 4 years after the issuance of the COI. The court of appeals had held that Safety Lights could not have discovered the breach of contract by Via Net until the denial of coverage by Lumbermens and thus the discovery rule postponed accrual of the 4 year statute of limitations applicable to breaches of contract. The Texas Supreme Court disagreed and held:

Contracting parties are generally not fiduciaries. (citation omitted). Thus, due diligence requires that each protect its own interests. (citation omitted). .... Due diligence may include asking a contract partner for information needed to verify contractual performance. (citation omitted). If a contracting party responds to such a request with false information, accrual may be delayed for fraudulent concealment. (citation omitted). But failing to even ask for such information is not due diligence. (citation omitted). Safety Lights argues that it acted diligently by obtaining a certificate of insurance listing it as an additional insured. But the certificate warned that it conferred no rights and was limited by the underlying policy. Safety lights argues, with some force, that there is little use for certificates of insurance if contracting parties must verify them by reviewing the full policy. But the purpose of such certificates is more general, "acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers." BLACK'S LAW DICTIONARY 240 (8<sup>th</sup> ed. 2004). Given the numerous limitations and exclusions that often encumber such policies, those who take such certificates at face value do so at their own risk. Moreover, in this case Safety Lights learned of the breach within

a few months after it occurred. While the facts of this specific case do not govern the categorical inquiry, they are not atypical. Additional-insured status under a general liability policy generally provides coverage for personal injury and property damage claims, most of which must be brought within two years of injury. (citation omitted). Accordingly, unless no claims are filed for a long time, breach will generally be discovered within four years. .... Some contract breaches may be inherently undiscoverable and objectively verifiable. But those cases should be rare, as diligent contract parties should generally discover any breach during the relatively long four-year limitations period provided for such claims.

*Id.* at 314-315. See generally 45 TEX. JUR.3d Insurance Contracts and Coverage, § 274 *Agents and brokers distinguished*; § 295 *Ratification of acts*; § 308 *Particular acts indicative of agency*; § 309 *Creation of agency; estoppel or ratification*; § 320 *Effect of imputation of knowledge of agent to insurer*; § 325 *Imputation of knowledge from particular agents*; § 352 *Endorsement; provision for additional coverage*; § 365 *Power of agent to bind insurer* (West 2006 and Supp. 2008). See generally *Scottsdale Ins. Co. v. Mason Partners LP*, 2007 WL 2710735 (5<sup>th</sup> Cir. 2007); *Granite Constr. Co. v. Bituminous Cos*, 832 S.W.2d 427 (Tex. App.—Amarillo 1972 *no writ h.*). Also see *Alabama Electric Cooperative, Inc. v. Bailey's Construction Company, Inc.*, 950 So. 2d 280 (Sup. Ct. Ala. 2006). The court found that the ACORD certificate's disclaimer negated reasonable reliance by a landowner on erroneous statement in the certificate the landowner was an additional insured. The court noted that the landowner did not attempt to obtain a copy of the policy or the endorsement. This case involved a contract that did not call for the landowner to be designated as an additional insured, but the contractor told the landowner that it would be an additional insured and produced a certificate of insurance designating the landowner as an additional insured. The court held that the contractor's contractual duty to cause the landowner to be additional insured ended on execution of a contract silent on the subject.

Also see discussion of this issue at MALECKI ON INSURANCE, *Certificates of Insurance – When a Court Says Certificates Cannot Be "Reasonably" Relied On, Certified Copies Of Policies May Be The Answer* (August 2007 Vol. 16, No. 10 pp. 1-4);

THE ADDITIONAL INSURED BOOK 5<sup>th</sup> Ed., Malicki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance, pp. 345 (International Risk Management Institute, Inc. [www.IRMI.com](http://www.IRMI.com) 2004).

But see *Sumitomo Marine & Fire Insurance Co. of America v. Southern Guaranty Ins. Co. and Columbia Nat. Ins. Co.*, 337 F. Supp.2d 1339 (U.S.D.C. No. Dist. Ga. 2004). Certificate holder who relied on a certificate confirming additional insured status was still able to obtain both defense and indemnity in a case where certificate stated certificate holder was an additional insured, but no additional insured endorsement was issued. Also, the court in *Marlin v. Wetzel County Bd. of Education*, 569 S.E.2d 462 (Sup. Ct. of App. W. Va. 2002) held an insurance agent's misrepresentation estopped the insurer from denying additional insured coverage as the court found that the certificate holder "reasonably" relied on certificate to its detriment. Also see *Lenox v. Excelsior Ins. Co.*, 255 A.D.2d 644, 645, 679 N.Y.S.2d 749, 750 (1998); *Zurich Ins. Co. v. White*, 221 A.D.2d 700, 633 N.Y.S.2d 415 (1995) (insurer was estopped from asserting deductibles to liability coverage when certificate of insurance represented there were no deductibles); *Criterion Leasing Group v. Gulf Coast Plastering & Drywall*, 582 So.2d 799 (Fla. App. 1991) (under doctrine of promissory estoppel, insurer was prevented from denying workers' compensation coverage to subcontractor's employee when subcontractor was named as a "coinsured" on certificate of insurance); *Bucon, Inc. v. Pennsylvania Mfg. Assoc. Ins. Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (1989) (insurer estopped from denying the existence of plaintiff's coverage after issuing certificate of insurance identifying the plaintiff as an "additional insured"); *Blackburn, Nickels & Smith, Inc. v. National Farmers Union Property and Cas. Co.*, 482 N.W.2d 600, 603 (N. D. 1992). Annot., *Doctrine of Estoppel or Waiver as Available to bring Within Coverage of Insurance Policy Risks Not Covered by its Terms or Expressly Excluded Therefrom*, 1 A.L.R.3d 1139, 1144 (1965).

#### Cases as to Certificates without ACORD-Type Disclaimers

In *International Amphitheatre Co. v. Vanguard Underwriters Ins. Co.*, 177 Ill. App.3d 555, 532 N.E.2d 493 (1998) the court held that the additional insured was covered for its negligence despite an exclusion in the named insured's policy because the certificate of insurance did not contain the exclusion and did not contain an ACORD-type

disclaimer. Also see *J. M. Corbett Co. v. Ins. Co. of North America*, 43 Ill. App.3d 624, 357 N.E.2d 125 (1976) (certificate without an ACORD-type disclaimer found to provide additional insured coverage even though policy did not). And see *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305 (7<sup>th</sup> Cir. 1993) (certificate became the policy where issued and no policy existed).

#### Cases as to Certificates Correctly Certifying Existence of Additional Insurance Coverage, But Coverage Is Unsuitable

The court in *Pekin Ins. Co. v. American Country Ins. Co.* 213 Ill. App.3d 543, 572 N.E.2d 1112 (1991), held an insurer was not liable to an additional insured, a general contractor, for coverage of injuries suffered by an employee of the named insured, a roofing subcontractor, even though the named insured provided the additional insured with a COI reflecting that the additional insured was covered by the named insured's liability insurance as to a particular project, where the insurance policy was endorsed to exclude coverage to the subcontractor for bodily injury arising out of the subcontractor's roofing work! The court relying on the ACORD disclaimer language held:

Plaintiffs (the general contractor-additional insured and its own CGL insurer) argue that there was an ambiguity in the certificate at issue because the language of the certificate implied that some form of insurance was provided but the exclusion in the policy excluded all possible coverage for the ... project. However, pursuant to the statements in the certificate, the plaintiff was advised to look at the policy to ascertain the nature and the extent of coverage. We conclude it was also ... (the general contractor) rather than American Country's (the roofer's CGL insurer) duty to determine whether this coverage was adequate for the intended purpose. To hold otherwise would place an excessive burden on insurers to review all construction contracts in order to determine the insurance needs of the project prior to issuing a certificate of insurance. Lastly, although plaintiffs argue that they never received a copy of the policy, there is no evidence in the record that they requested one.

The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6<sup>th</sup> Cir. 2000) in which the Sixth Circuit applied Texas law emphasizes why it is important to obtain and read a copy of the additional insured endorsement and not to rely either upon a statement in the certificate of insurance that "x" is an additional insured for liabilities arising out of the work "y" or upon a general statement in the contract that "x" is to be listed as an additional insured on "y's" commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said "the negligence of the additional insured is excluded" and that the certificate of insurance stating that "x" was an additional insured and the contractual provision in the contract between "x" and "y" that be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence. The following are the provisions in the contract, the certificate of insurance and the endorsement.

**Contract.** Contractor [Bath] shall have a comprehensive general liability policy in the amount of at least \$1,000,000 with an Additional Insured Endorsement naming Owner [BP Chemical] as an additional insured.

Contractor hereby indemnifies and agrees to defend and save Owner and its affiliated Corporations, their agents, servants and employees harmless from any and all losses, expenses, demands and claims that may be claimed or for which suit is brought for any actual or alleged bodily injury or death occurring to any person whatsoever, in any manner arising out of or in connection with, or resulting in whole or in part out of the acts of omissions of Contractor, or any subcontractors employed by or under the direct control of the Contractor, and their respective officers, agents and employees in the performance of the Work in accordance with this Agreement, and agrees to pay all damages, costs and expenses, including attorneys' fees, arising in connection therewith. Such obligation shall not apply when the liability arises solely from the negligence of Owner, its employees or agents. Such obligation shall also be limited, in a case involving or alleging joint negligence between Contractor and Owner, its employees or agents, to Contractor's actual percentage of comparative negligence, if any, found by the trier of fact in a cause of action brought against Contractor arising out of the performance of the Work or alleged negligence in accordance with this Agreement. This indemnity obligation of Contractor shall not be applicable to the extent that Owner is provided coverage as an additional insured under Contractor's insurance policies as specified in **Exhibit A** to this Contract, or to the extent that the right of indemnity is prohibited or limited by the laws of the state in which the Work is located.

**Certificate of Insurance.** Owner is an additional insured there under as respects liability arising out of or from the Work performed by Contractor for Owner.

**Endorsement.** 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 insureds.

See *National Union Fire Ins. Co. v. Glenview Park District*, 230 Ill. App.3d 578, 594 N.E.2d 1300 (1992), *aff'd in part, rev'd in part*, 158 Ill.2d 116, 632 N.E.2d 1039 (1994) (additional insured park district was bound by endorsement that excluded coverage for the additional insured's own negligence; certificate of insurance contained standard ACORD disclaimers, but did not indicate the limitation on coverage). See the later holding of the Texas Supreme Court in *ATOFINA Petrochemicals, Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005) discussed at **B. 2.b(2)(c)** below in which the court noted that a similarly worded endorsement, if so interpreted, would be largely illusory.

The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E.D. Tex. 1994) also illustrates the risk inherent in not reading the insurance policy of the party obligated to name the prospective additional insured as an additional insured. The court found that a fact issue existed defeating a summary judgment motion as to whether the proposed additional insured had accepted the defendant's insurance policy which contained an additional insured provision that included the plaintiff, but which provision was worded so as to exclude coverage in cases where the proposed additional insured was already insured (a so-called "Escape Clause").

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

The party providing the insurance provided insurance naming the proposed additional insured as an additional insured and therefore did not violate the covenant to name the plaintiff as an additional insured, but the additional insured provision contained as Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

**(2) COI Signed But Not by an "Authorized Representative" of the Insurer with Authority to Bind the Insurer**

COI are issued by the Producer and are signed in the lower right hand corner by an "authorized

**representative".** Neither of these terms are defined on the face of the standard ACORD COI. Except for 5 disclaimers of authority and accuracy, the ACORD COI is silent on the authority of the "authorized representative" to bind the listed Insurers. The ACORD COI does not identify whether the Producer is agent for the Insured, agent for the Insurer, a dual agent for both the Insured and the Insurer; does not whether the signer is "authorized representative" of just the Producer or of the Producer as "agent" of the Insurer. The COI does not give notice of the scope of the "authorized representatives" authority, except to the 5 disclaimers "disclaiming" authority. See discussion of the limitation of authority of "agents" signing COI's in the preceding section of this article. Distinctions sometimes have been made based on whether the "authorized representative" is a "broker" (an insurance seller which is approached by the a potential insured and the insurance seller only submits an application to the insurer); a "soliciting agent" (an insurance seller which contacts the insured but lacks the power to modify, change, or waive the terms of the issuer's policy); a "recording agent" (a person who has the actual authority of the insurer to write policies, bind the insurer on risks, and collects premiums on behalf of the insurer; or an "insurer's agent" (a catch-all category for agents selling insurance not falling in one the other three categories). Some courts hold that a COI issued by a "broker" does not indicate authority to bind the insurer. *McKenzie v. New Jersey Transit Rail Operations*, 772 F.Supp. 146, 149 (S.D.N.Y. 1991) (holding that local broker has no authority to bind an insurer); and *First Financial Ins. Co. v. Jetco Contracting Corp.*, 2000 WL 1013945 (S.D.N.Y. 2000). See *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5<sup>th</sup> Cir. 2002) discussing 3 categories of insurance sellers under the former version of the Texas Insurance Code, arts. 21.02, 21.04 and 21.14 TEX. INS. CODE (superseded by acts enacted in 2003 and effective 2005, §§ 40001.051-.052, TEX. INS. CODE). Although the 2005 revision to the Texas Insurance Code states

A person who solicits an application for ... insurance is considered the agent of the insurer issuing a policy on the application and not the agent of the insured in any controversy between the insurer and the insured ....

§ 40001.052(a), TEX. INS. CODE (Supp. 2007), other sections of the revised Insurance Code alert the consumer to the limited nature of the agent's authority as follows:

The agent may not alter or waive a term or condition of the application or policy.

§ 40001.052(b), TEX. INS. CODE (Supp. 2007), and

This section does not authorize an agent to orally, in writing, or otherwise alter or waive a term or condition of an insurance policy or an application for an insurance policy.

§ 40001.051(c), TEX. INS. CODE (Supp. 2007). See generally, 45 TEX. JUR.3d Insurance Contracts and Coverage, § 355 *Effect of statute* (West 2006).

**(3) No Standard Certificate Language to Describe Additional Insured Coverage**

The standard certificate provides a column next to the listing of the Liability Policies with the header "ADD'L INSRD" for the agent to check mark the existence of additional insured coverage. The standard certificate without further language being added does not indicate "who" is the additional insured. The certificate is addressed to the certificate holder, but without further disclosure on the certificate, there is no indication that the certificate holder is the additional insured. It is SOP to set out in the box bearing the heading "DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADD BY ENDORSEMENT / AND SPECIAL PROVISIONS" a statement identifying the person(s) that are additional insureds. However, given the small size of the box and the limited writing skills of the clerk preparing the certificate, it is likely that the statement will be cryptic, e.g., "Certificate holder is additional insured on liability policy, automobile liability, and umbrella policy." It is likely that the statement will not include all persons designated in the underlying contract's insurance specifications. For example, omitting designation of the officers, directors and employees of the party to be protected as additional insureds.

**(4) Standard Certificate Does Not Disclose Policy Modifications Limiting or Eliminating Indemnity Insurance**

The standard certificate does not disclose whether the Liability Policies contain coverage for the named insured's liability assumed under an

"insured contract", the named insured's contractual indemnity of the party to be protected (such coverage is known as "**contractual liability insurance**", and is referred to by the author as "**Indemnity Insurance**"). The standard CGL policy (the ISO policy form) provides Indemnity Insurance unless that coverage has been eliminated by endorsement.

Also, the standard certificate (the ACORD COI) does not disclose whether the Liability Policies, including the additional insured endorsement thereto, has been modified with one of the endorsements limiting or eliminating Indemnity Insurance.

**(a) ISO CG 21 39 Contractual Liability Limitation**

ISO endorsement CG 21 39 removes from coverage "paragraph f" of the "exceptions from the exclusion" for coverage of insured contracts. Paragraph f excepts from the exclusion of coverage for "insured contracts" a written contract by which the named insured assumes the tort liability of another by contract entered into prior to the occurrence of the bodily injury (*i.e.*, an intermediate or broad form indemnity). Adding this endorsement to a standard liability policy leaves coverage intact for the 5 automatic contracts dealing with L-E-A-S-E, the acronym for Leases of premises, Easements and license agreements, Agreements required by municipalities, Sidetrack agreements and agreements involving Elevators and escalators.

**(b) ISO CG 24 26 Amendment of "Insured Contract" Definition Endorsement**

This endorsement was added in 2004. It limits contractual liability coverage to less than the sole fault of the indemnitee or additional insured. See **Form G**.

**b. Designated as Certificate Holder But Not as Additional Insured**

The limited purpose and limited rights of a certificate holder are illustrated by the following cases. The court in *Gracida v. Tagle*, 946 S.W.2d 504 (Tex. App.—Corpus Christi 1997, *no writ*) held that being designated as a certificate holder does not make the certificate holder an insured, additional insured, or a third party beneficiary covered by the policies insurance. Also see *Postlewait Construction, Inc. v. Great American Ins. Co.*, 106 Wash.2d 96, 720 P.2d 805 (1986)

(lessor and certificate holder reflecting that lessee was an insured not entitled to maintain direct sue against insurer for breach of insurance contract). In *United States Pipe & Foundry Co. v. United States Fidelity & Guaranty Co.*, 505 F.2d 88 (5<sup>th</sup> Cir. 1974) the court refused to find that the certificate's manuscripted notice of cancellation provision created any right to notice in favor of the certificate holder. The lessee provided the lessor with a certificate of insurance indicating that lessee had CGL insurance in place covering lessee's operations at the leased premises. Thereafter due to nonpayment by lessee of the policy's premium the insurer, USF&G, cancelled the policy, notifying the lessee and not the lessor. Three months after the policy was cancelled, an explosion occurred on the leased premises, resulting in extensive damage to neighboring properties. Over 1,100 lawsuits were filed against the lessor. The certificate contained both the printed form notice provision and a typed provision as follows:

**Printed Form Provision:**

(Insurer) will make every effort to notify the holder of this Certificate of any material change in or cancellation of these policies, but assumes no responsibility for failure to do so.

**Manuscripted Typed Provision:**

A 10-day notice will be given to the holder of this certificate, in the event of cancellation.

In finding that the certificate did not confer rights on the certificate holder, the court held

Since U.S. Pipe was not a named beneficiary under the insurance policy, any coverage which it seeks to enjoy would have to arise from the certificate of insurance. A certificate issued to a lessor indicating that liability insurance has been acquired by the lessee does not constitute a contract between the lessor and the insurer. (Citations omitted.) The certificate simply provides a method whereby a lessee can show that he has complied with a lease provision requiring that insurance be obtained. The provision regarding notification in the event of cancellation is a mere promise, unsupported by any consideration.

**c. Designated as Additional Insured and as Certificate Holder**

Even if the certificate designates the party to be protected both as an additional insured and as a certificate holder, there are cases holding that the designated additional insured/certificate holder is not entitled to notice of cancellation, amendment or non-renewal of the policy, absent modification of the underlying policy to provide notice.

In *Wainwright v. Charlew Constr. Co.*, 302 A.D.2d 784, 755 N.Y.S.2d 751 (N.Y. Ad 3<sup>rd</sup> Dep't 2003) the court held that the presence of an ACORD-type notice of cancellation provision in the certificate did not impose on the insurer a contractual obligation to give the additional insured/certificate holder notice of cancellation of the policy for the insured's non-payment of premium. The court held that the insurer satisfied its contract obligations by complying with the contract's requirement of giving notice to the "first named insured" (the insurer's customer). The court also pointed to a New York statute which required notice to the first named insured but did not also specify that notice be given to additional insureds. The court dismissed the additional insured/certificate holder's arguments as follows:

The Merchants Mutual insurance policy was not in existence at the time of (the employee's) accident. Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel be used to create coverage. .... Since Merchants Mutual strictly complied with the notice of cancellation provisions set forth in ... (reference to NY statute omitted) by mailing a timely notice of cancellation to the "first-named insured" (Regels) and "such insured's authorized agent or broker" (Weller-Mercil), the policy was effectively cancelled ... (Citation omitted.), irrespective of its failure to comply with its "courtesy" policy of notifying additional insureds of a cancellation. Charlew's (the additional insured's) argument is further belied by the unambiguous disclaimer contained in the certificate of insurance ... (quotation of the ACORD language is omitted.).

*Id.* at 753-54.

A general contractor's failure to include in its insurance specifications that it be listed as an additional insured on its subcontractor's CGL policy

prevented it from recovering against its subcontractor for breach of contract in failing to provide additional insured coverage, even though the subcontractor had provided the contractor with a certificate of insurance certifying to the general contractor that it was an additional insured. *Public Administrator of Bronx County v. Equitable Life Assurance Society*, 198 A.D.2d 105, 603 N.Y.S.2d 830 (1993).

#### **d. Erroneously Issued or Completed Certificate**

See *S.L.A. Property Management v. Angelina Casualty Co.*, 856 F.2d 69 (8th Cir. 1988) (certificate listing a different person as the additional insured did not control over actual listing on policy endorsement); and *Mercado v. Mitchell*, 264 N.W.2d 532 (Wis. 1978).

Recourse against an insurer may not be available when an erroneous certificate is issued by the insurance broker for the insured as opposed to an agent for the insurer.

#### **(1) Clerical Error**

An amazingly common problem in the insurance industry is the issuance by the Producer of a certificate of insurance certifying to a party to be protected that it is an additional insured on the protecting-party's insurance, but then fail to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company refuses to provide coverage.

As observed by one commentator:

Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus is sometimes called the "fictitious insured syndrome." Sometimes this problem stems from a lack of communication. The insurance agent, for example may have the authority to add

another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.

THE ADDITIONAL INSURED BOOK 5<sup>th</sup> Ed., Malicki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 349-50 (International Risk Management Institute, Inc. [www.IRMI.com](http://www.IRMI.com) 2004)

As another commentator notes,

Although a broker for the subcontractor (policyholder) may have prepared the certificate of insurance, in many cases he or she did not follow through and actually obtain the necessary endorsement.... As a result, although a developer may hold a certificate that states it is named as an additional insured on the subcontractor's policy of insurance, the subcontractor's carrier will deny the tender of defense and contend that the agent did not have express authority to bind the carrier.

Richard H. Gluckman, *et al*, "Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation," 21 *Construction Lawyer* 30, 33-34 (Winter 2001).

**(2) Misinterpretation by Agent of Scope of Blanket Endorsement**

The agent may not review the blanket endorsement to confirm that it provides the coverage specified in the underlying contract between the named insured and the additional insured.

**(3) Erroneous Belief by Agent in Existence of Coverage**

This happens.

**(4) Fictitious Insured Statements Issued by Fictitious Agents**

This also happens.

**2. Solutions**

**a. Obtain and Review Certified Copy of Policy and Endorsements**

Instead of relying on the COI, as a condition of acceptance of the protecting party's insurance, it is recommended that you should require that you be furnished with and review or have the client's insurance advisor review a certified copy of the protecting party's Liability Policies and all endorsements. A certified policy is a copy of the policy certified by the issuer as being the issued policy. An uncertified copy of the policy may not contain all endorsements issued after the origination of the policy. The typical practice of being furnished by the protecting party or its insurance agent and reviewing a portion of the policy does not safeguard against this risk.

**(1) Be Prepared to Deal with Unavailability of Policies and Endorsements**

Unfortunately, obtaining a certified copy of the complete policy, including all endorsements, can be a lengthy process. Also, unfortunately, by the time it arrives, the parties are anxious to get on to the next stage and do not want to deal with any issues, such as the policy and endorsements do not match up to the coverage specified.

**(2) Require Confirmation That Coverage Is Applicable to the Project**

I have encountered situations where once the requested policy or endorsement arrives it is a blank form or sample of a typical form issued by the insurer, and not on its face guaranteed to be the form in place or committed to be in place on the particular project. Sometimes even if it identifies the project and parties, it does not contain any evidence on its face or with the materials tendered with it that conclusively establishes that it has been or will be issued.

**(3) Rely on Certificate if Issued by Agent with Authority to Bind and Amend Coverage**

One measure which may be employed in a case where the policy and endorsements are not readily available is to for the Producer and the Authorized Representative to prove up their authority to sign the COI certifying additional insured and other desired revisions to the policy (e.g., notice of cancellation). The Producer may produce relevant portions of its agency agreement with the insurer setting out the scope of the Producer's authority, if

any, to bind the Insurer to the form of additional insured coverage and notice requirements set out in the parties insurance specifications.

**b. Blanket or Automatic Additional Insured Coverage Endorsements**

Blanket or automatic additional insured endorsements are generally issued to the named insured at the inception of the policy and extend coverage to all persons that the named insured agreed in a written contract to add as an insured prior to the loss or occurrence. This type of endorsement modifies the "Who Is An Insured" definition to the insured's Liability Policy to include as additional insureds the persons designated in the written contract between the insured and the party to be protected, and thus extends coverage not only to the party entering into the contract with the insured, but also to non-contract parties required by the contract to be designated as additional insureds and specified in the blanket endorsement as being additional insureds if specified in the written contract between the parties (e.g., officers, directors, employees and agents). Blanket endorsements are a standard means of assuring additional insured coverage as they permit the parties to contract for additional insured coverage without having to return to the insurer to issue an endorsement extending additional insured protection to the parties-to be protected. Caution however must be exercised in relying upon this tool. Additional insured endorsements do not necessarily provide ISO standard additional insured coverage to the additional insured. Examples of "craftily" drafted blanket additional insured endorsements are given below (see the forms discussed below by Travelers, Bituminous Fire and Continental Casualty). Many times COIs are issued certifying additional insured coverage and even certifying additional insured coverage as meeting the party to be protected's insurance specifications in reliance on the existence of coverage through a blanket endorsement. A reading of the blanket endorsement may reveal that the coverage in fact does not meet the insurance specifications.

**c. Manuscript Certificates**

Some parties-to be protected have been able due to their bargaining position to require and obtain manuscript COIs. In these cases the manuscript certificate is set up to modify the terms and coverages of the underlying liability policies to the extent that they differ from the certificate. For

example, some manuscript certificates provide for a specific indication that the named insured has contractual liability coverage-typically a box to be checked. In such cases, the manuscript certificate may provide a space for a description of the indemnity.

The Tenth Circuit Court of Appeals in *dicta* stated the following as to a manuscript COI at issue in *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882 (10<sup>th</sup> Cir. 1991), which stated that the party to be protected was a named insured on the protecting party's liability policy:

Absent a plain manifestation of intent to incorporate a certificate or endorsement into an insurance policy, the policy will remain in force as originally written. (citation omitted). The majority view is that where a certificate, such as the ACORD certificate, expressly indicates that it is not to alter the coverage of the underlying policy, the requisite intent is not shown and the certificate will not effect a change in the policy. (Citation omitted). Here, however, we are dealing with an unusual certificate of insurance which goes beyond the mere absence of a disclaimer or deferral to the policy. The Mountain Fuel certificate states that it "does not amend, extend or otherwise alter the terms and conditions of the insurance coverage in the policies identified above, except as above set forth. (Emphasis in original)... The use of such language indicates Mountain Fuel's intent to incorporate the terms and conditions of the certificate into the underlying insurance contract. Moreover, the approval of the certificate by Freberg, an agent of Reliance, indicates an acceptance of the terms as stated. We agree, therefore, with the district court's ruling and Mountain Fuel's contention that the return of the completed Mountain Fuel certificates of insurance gave Mountain Fuel status as a named insured on the Reliance/Harbor policy.

However, Mountain Fuel's victorious argument as to effect of the manuscripted certificate was short lived, as the court also found that the liability in question occurred after the expiration of the policy covered by the certificate. The actual or apparent authority of the agent to bind the insurer was not discussed by the court.

The insured's broker when presented with a manuscript certificate is likely to submit it to the insurer for signature as opposed to relying on its agency relationship with the insurer. Some manuscript certificates are set up to require that the person signing the certificate as "authorized representative" be an employee of the insurer as opposed to an agent.

**d. Sue the Agent**

This may be an option, but obviously is an option being asserted when all else has failed to effect the desired coverage. *Mercado v. Mitchell*, 82 Wis.2d 17, 264 N.W.2d 532 (1978); *Dumenric v. Union Oil Co. of California*, 238 Ill. App.3d 208, 606 N.E.2d 230 (1992). Recovery may not be as easy as it might on first blush seem. See *Benjamin Shapiro Realty Co., LLC v. Kemper Nat. Ins. Companies*, 303 A.D.2d 245, 756 N.Y.S.2d 45 (N. Y. A.D. [1<sup>st</sup> Dept.] 2003) where the court observed:

Tanenbaum-Harber Co., the insurance broker of plaintiff landlord's tenant, was under no duty to plaintiff and, accordingly, was not liable to plaintiff for negligent misrepresentation or negligence by reason of Tanenbaum's issuance of certificates of insurance representing that the tenant's insurance policy, naming plaintiff as an additional insured, contained rental coverage insurance for plaintiff's benefit, even though such coverage was not included in the policy. Plaintiff and Tanenbaum had not contractual relationship and the fact that plaintiff had contact with Tanenbaum in the course of obtaining the certificates of insurance did not give rise to the sort of relationship, i.e., one approaching privity, requisite to the imposition of liability for negligent misrepresentation. (Citation omitted). Moreover, where, as here, certificates of insurance contain disclaimers that they are for information only, they may not be used as predicates for a claim of negligent misrepresentation.

*Id.*, at 245-46.

**e. Sue the Protecting Party**

The failure to effectuate contractually required additional insurance coverage, likely is a breach of contract. See the discussion above as to the application of the 4 year statute of limitations to a claim against the protecting party for its failing to

provide contractually required insurance. *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006), *rev'd* 178 S.W.3d 10 (Tex. App. — Hou. [1<sup>st</sup> Dist] 2005). Also see *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc. Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), *cert. den'd*, 510 & S. 820, 114 S.Ct. 76, 126 L. Ed.2d 45 (1993), a case where Getty sued NL Industries and its insurers for its failure to name Getty as an additional insured on NL Industries' liability policies.

**C. Insurance Specifications**

**1. Typical Defects**

**a. The Typical Insurance Specification**

Unfortunately, an all too often insurance specification seeking additional insured coverage reads "LL shall be named as an additional insured on T's CGL policy." or even "LL and its officers, directors, employees and agents shall be named as additional insureds on T's CGL policy." Each of these specifications neither specify the triggers to coverage nor what exclusions to coverage are to be permitted. The foregoing bare bones specifications at least trigger coverage if coverage exists. The court in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, \_\_\_ S.W.3d \_\_\_ (Tex. February 15, 2008) 2008 WL 400394, 51 Tex. Sup. Ct. J. 460 found that the following specification was sufficient to trigger additional insured coverage under blanket additional insured language in a named insured's excess liability policy: "(ATOFINA) shall be named as additional insured in each of (Triple S's) policies." See below the discussion of the coverage provisions reviewed by the *Evanston* court in the discussion of Texas' recent adoption of the no-fault interpretation of coverage for liabilities "arising out of operations" of a named insured. The following insurance specifications were held by the court in *Liberty Mut. Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 842 N.E.2d 170 (Ill. 2005) not to trigger additional insured coverage under a blanket additional insured endorsement:

|                                                                                                                                                                                                                                                               |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>(Contractor shall) secure, maintain and provide evidence of comprehensive general liability insurance for all claims for personal injury, bodily injury, including death, and property damage which may arise from the operations under this contract.</p> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

The court rejected the party to be protected's argument that the specification for the contractor to carry insurance "for all claims" that might arise from the contractor's operations included claims against the party to be protected. The court stated

The insurance provision only required (the elevator company) to secure insurance to cover its own negligence—which in turn, would protect (the utility) from those same liabilities ... There was no language in the insurance provision or insurance specifications section that obligated (the elevator company) to add (the utility) as an additional insured on the CGL policy. Under these circumstances, we find that (the utility) was not an additional insured under the ... CGL policy.

Also, see *Clarendon Am. Ins. Co. v. 69 West Washington Mgmt. LLC*, 870 N.E.2d 988 (Ill. 2007).

Typical additional insurance specifications suffer from the five following defects.

**(1) Presumption that Common Industry Terms Have a Well-Defined Meaning**

The term "additional insured" is a term without universal industry-prescribed meaning. Additional insured endorsements typically furnish coverage to an additional insured for liabilities "**arising out of**" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes. However, these key terms do not disclose whether coverage is afforded to the additional insured for liabilities caused in whole or in part by the acts or omissions of the additional insured, whether coverage is afforded for liabilities occurring after the completion of the work or operations or after the termination or expiration of the tenancy arrangement between the insured and the additional insured, or whether coverage is confined to liabilities occurring in the premises.

The industry-standard understanding of what coverage is afforded to an additional insured may be found by an examination of the industry-standard additional insured endorsements issued by ISO and discussed below. ISO has promulgated 33 forms of additional insured endorsements, each tailored to a different risk transfer. Although ISO forms are considered the

industry standard, many insurers, including insurers providing a significant share of the industry's insurance, manuscript their additional insured endorsements to add various exclusions to coverage not contained in the ISO forms.

ISO form CG 20 10 is ISO's standard endorsement for use in adding a project owner as an insured to a general contractor's CGL policy or a general contractor to a subcontractor's CGL policy (See **Form B** CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization). CG 20 10 provides coverage for the additional insured's liabilities arising out of the "**ongoing operations**" of the named insured. CG 20 10 has undergone changes from coverage for liabilities "*arising out of the work*" of the named insured in the November 1985 version (CG 20 10 11 85), to "*arising out of the ongoing operations*" of the named insured in the October 1993 version (CG 20 10 10 93), the March 1997 version (CG 20 10 03 97), and the October 2001 version (CG 20 10 10 01). ISO made this change to clarify that this particular form of additional insured endorsement is intended to cover liabilities arising out of the "ongoing operations" of the named insured as opposed to liabilities arising out of operations that have been completed. The October 2001 revision added an express exclusion from coverage for liabilities "*occurring after ... all work ... has been completed*" to further emphasize the "ongoing" operations requirement.

The ISO CG 20 10 11 85 additional insured endorsement ("**arising out of your work**") was construed in *Pardee Constr. Co. v. Insurance Co. of the West*, 92 Cal. Rptr.2d 443 (Cal. App. 2000) to cover an additional insured contractor's liabilities arising out of the completed operations of its named insured subcontractor. In *Pardee* the CGL policy and additional insured endorsement were issued 4 years after completion of the subcontractor's work on the project in question and were held to cover injuries arising out of the earlier work of the subcontractor. Wording of the additional insured endorsement must be examined to determine if completed operations coverage is included (e.g., by not limiting coverage to "*ongoing*" operations or by not expressly excluding coverage for completed operations). If completed operations coverage is desired and coverage is not afforded by the proffered endorsement form, coverage may be effected either by manuscripting the endorsement to extend to completed operations or

by adding the coverage by a completed operations endorsement. ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations, **Form F** to this article, is designed to cover completed operations liabilities, first by stating that it covers liabilities “*arising out of your (the named insured’s) work*” and stating that the liabilities covered are those liabilities arising out of the work that are “*included in the products-completed operations hazard*.”

There are two ISO endorsements used primarily to add as an additional insured the owner of premises or land leased to the named insured. See **Form C** for CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises, which ISO additional insured endorsement adds designated persons as additional insureds as to designated “**premises**” and covers the additional insured’s liability.

An almost identical ISO endorsement is CG 20 24 11 85 Additional Insured – Owners or Other Interests from Whom Land Has Been Leased. The sole and obvious difference being “land” versus “premises.” The most common factually litigated scenario regarding these endorsements involves injuries occurring “**outside**” the “**part**” of the premises “*shown in the schedule*” leased to the tenant. This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the “part of the premises” leased to the named insured.

Additional insured status affords the additional insured protection at least with coverage against vicarious liability arising out of the named insured’s acts or omission. An additional insured’s vicarious liability for the acts or omissions of a named insured, however, is an exceptional situation, for example, an owner’s liability for its contractor’s acts or omissions in the case of non-delegable duties, retained control and other exceptions to the independent contractor rule. 44 TEX. JUR.3d Independent Contractors (2005); and Restatement (Second) of Torts Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured’s vicarious liability is illusory and against public policy. See the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994); and see *ATOFINA Petrochemicals, Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005) discussed below in which the Texas Supreme Court construed an additional insured

endorsement against merely covering the additional insured’s vicarious liability, rejecting the insurance company’s reading of the endorsement language as providing largely illusory coverage. As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured’s vicarious liability for the named insured’s negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), cert. den’d, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring the party to be protected (Getty) to be listed as an additional insured on the protecting party’s (NL Industries’) liability policies. In *Getty* the injuries arose out of Getty’s sole negligence; the indemnity provision excluded indemnity for Getty’s negligence; the insurance covenant was silent as to whether the insurance was or was not to cover injuries due to Getty’s negligence; the insurance covenant in the contract provided for NL Industries to maintain commercial general liability insurance and for such insurance was to “*extend to and protect Getty*.” The court found that there was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries’ policies (e.g., through an automatic blanket insured provision).

In 2004, ISO issued revisions to its additional insured endorsements, including the CG 20 26, CG 20 10 and CG 20 37 which may be interpreted by the courts to eliminate coverage an additional insured’s sole negligence. For example, the CG 20 10 form has been revised to read as follows:

**Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organizations 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 (the named insured’s) 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.

The 2004 revision seeks to limit the trigger for additional insured coverage to occurrences caused in whole or in part by the acts or omissions of the named insured. Note, however, the 2004 language does not expressly exclude coverage of liabilities concurrently caused by the negligent acts or omissions of the additional insured!

The 2004 ISO revisions were in part a response to holdings, such as by Texas courts in *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex.App.—Austin [3<sup>rd</sup> Dist.] 1999, *no writ*) and *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App. [1<sup>st</sup> Dist.] 1999, *writ den'd*) and courts construing Texas law, like *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5<sup>th</sup> Cir. 2000). These cases involved earlier versions of the ISO CG 20 10 and the courts held that the earlier versions were ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured (the earlier versions used the terminology "arising out of" the work or operations of the named insured and the courts held that this terminology, in the absence of express exclusionary provisions, extended to cover liabilities caused in whole or in part by the negligence of the additional insured).

ISO's decision to revise the coverage language in its CG 20 10 has been validated by the decision of the Texas Supreme Court in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, \_\_\_ S.W.3d \_\_\_ (Tex. February 15, 2008) 2008 WL 400394, 51 Tex. Sup. Ct. J. 460. The court was not reviewing the ISO 20 10, but was reviewing an umbrella policy which defined "Who Is an Insured" as follows:

**III.B.6** A person or organization for whom you have agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you. (Emphasis added.)

Additionally, the umbrella policy contained the following catch-all section to pick up other insureds covered by the policy:

**III.B.5** Any other person or organization who is

insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance.

The underlying policy identified ATOFINA as an additional insured "only with respect to liability arising out of (Triple S's, the general contractor's) ongoing operations performed for (ATOFINA), but in no event for (ATOFINA's) sole negligence."

ATOFINA contracted with Triple S to perform maintenance and construction work at ATOFINA's refinery. Triple S agreed to indemnify ATOFINA from all injuries sustained during the performance of the contract, "except to the extent that any such loss is attributable to the concurrent or sole negligence, misconduct, or strict liability of [ATOFINA]." Triple S agreed to carry at least \$500,000 of primary comprehensive general liability insurance, "[i]ncluding coverage for contractual liability insuring the indemnity agreement," and an excess (or "umbrella") liability policy "following form for [the CGL policy]" of at least \$500,000. The contract required Triple S to furnish certificates of insurance to ATOFINA evidencing the required insurance coverage and showing ATOFINA as an additional insured on the policies. Triple S complied with its contract obligations by purchasing a \$1 million CGL policy from Admiral Insurance company and a \$9 million commercial umbrella policy from Evanston Insurance Company. Matthew Todd Jones, a Triple S employee working at the ATOFINA facility pursuant to his employer's contract with ATOFINA, drowned after he fell through the corroded roof of a storage tank filled with fuel oil. Jones's survivors sued Triple S and ATOFINA for wrongful death. Admiral tendered its \$1 million policy limits. ATOFINA then demanded coverage from Evanston as an additional insured under the umbrella policy. Evanston denied the claim, and ATOFINA brought Evanston in to the case as a third-party defendant for a declaration of coverage. The Jones's case was settled for \$6.75 million. ATOFINA sought recovery from Evanston for the \$5.75 million not covered by Admiral. The supreme court noted that although the pleadings in the underlying suit do not indicate whether or

not Jones was performing a Triple S operation at the time of the accident, Jones was present at ATOFINA's facility for purposes of Triple S's operations when the accident occurred. The court noted that the Jones family sued both ATOFINA and Triple S, alleging both parties were negligent and that there were allegations in ATOFINA's pleadings that Jones himself was contributorily negligent. The court noted that Triple S was eventually nonsuited, and the Jones's claim against ATOFINA was settled with no admission of liability by either party.

The supreme court examined the interplay between a contractual indemnity provision and a service contract's requirement to name an additional insured. The court stated the issue before it as having to "decide whether a commercial umbrella insurance policy that was purchased to secure the insured's indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party."

Evanston contended that Jones's death was caused solely by ATOFINA's negligence and therefore the death did not "respect ... operations performed by (Triple S)" and thus could not be covered by Section III.B.6. Evanston argued that "with respect to operations" does not cover liabilities caused by an additional insured's own negligence. Evanston also contended that the umbrella policy was a "following form" policy and that the nature of the policy precludes coverage.

The court declined to look to the scope of the indemnity provision to determine the scope of coverage under the umbrella policy. In so doing it disapproved of the approach taken by the court of appeals in *Emery Air Freight Corp. v. Gen Transp. Sys. Inc.* 933 S.W.2d 312 (Tex. App.—Hou. [14<sup>th</sup> Dist.] 1996, *no writ*). The court found that without a determination of liability due to the settlement, it was impossible to say whether ATOFINA's responsibility for the accident excluded it from coverage under Section III.B.5 of the policy. The court also found that Section III.B.6 extended coverage to ATOFINA as an independent ground of coverage and that Section III.B.6 covered ATOFINA's sole negligence (if that be the case), even though Section III.B.5 did not.

The court disapproved of the holding in *Granite Construction Co. v. Bituminous Insurance Cos.*, 832 S.W.2d 427, 428 (Tex.App.—Amarillo 1992, *no writ*), a court of appeals decision that held that the language "only with respect to liabilities arising out of operations performed for such insured" covered liabilities only to the extent they were caused by a wrongful act of the named insured during its operations. (This language is contained in the pre-2004 ISO additional insured endorsement form.) The court in *Granite* adopted a fault-based interpretation of "arising out of operations." In rejecting *Granite* the *Evanston* court held

... regardless of the underlying service agreement's terms (the underlying service agreement excluded ATOFINA's negligence from Triple S's indemnity), we do not follow *Granite* because the fault-based interpretation of this kind of additional insured endorsement no longer prevails. (FN 15 citations omitted.) Instead, we interpret "with respect to operations" under a broader theory of causation. Generally, an event "respects" operations if there exists "a causal connection or relation" between the event and the operations; we do not require proximate cause or legal causation. (FN 16 citations omitted.) In cases in which the premises condition caused a personal injury, the injury respects an operation if the operation brings the person to the premises for purposes of that operation. (FN 17 citations omitted). The particular attribution of fault between insured and additional insured does not change the outcome. (FN 18 citations omitted.)

Our interpretation results, in part, from the ordinary and natural meaning of the phrase "with respect to." (FN 19 citations omitted.) It also results from our recognition that, had the parties intended to insure ATOFINA for vicarious liability only, "language clearly embodying that intention was available." (FN 20 citations omitted.) The majority of other courts facing the issue have reached a similar result. (FN 20 citations omitted).

The court also disapproved of the holding of a court of appeals, *Emery Air Freight Corp. v. Gen Transp. Sys. Inc.* 933 S.W.2d 312 (Tex. App.—Hou. [14<sup>th</sup> Dist.] 1996, *no writ*), that a contractual requirement for additional insured coverage is not an independent obligation for insuring liability beyond the scope of the contractual indemnity in the contract between the named insured (the indemnifying party) and the additional insured (the indemnified party). In *Evanston* the court held that "it is unmistakable that the agreement in this case to extend *direct* insured status to ATOFINA as an additional insured is separate and independent from ATOFINA's agreement to forego *contractual* indemnity for its own negligence."

**(2) Only Persons Stated in Endorsement Are Additional Insureds; and Other Distinctions as to Insured Status that do Not Apply to Additional Insureds Without Special Language Added to the Policy**

An additional insured's officers, directors, employees, agents or contractors are not insured as additional insureds if the policy or endorsement language does not state that such derivative persons are additional insureds. See MALECKI ON INSURANCE, *A Critique of An Additional Insured Endorsement: Another Nonstandard Endorsement for the Offering* (March 2006 Vol. 15, No. 5 pp. 3-6) reviewing an additional insured endorsement covering derivative persons. This result is different than is the case with the named insured of the CGL policy as to which certain defined persons are automatically insured.

The standard CGL policy (the ISO CGL policy) provides that certain other persons have "insured" status without having to be listed by endorsement to the policy as being insured by the policy. Section II—Who is An Insured extends coverage to the following persons ("automatic insureds") based on that person's relationship to the named insured:

- The spouse of an individual named insured.
- Partners and joint venturers in a named insured partnership or joint venture.
- Members and managers of a named insured limited liability company.

- Trustees of a named insured trust.
- Employees and volunteer workers of the named insured business.
- Then named insured's real estate manager.
- Any person having proper temporary custody of a deceased named insured's property.
- The deceased named insured's legal representative.

Each of these persons have liability exposure growing directly out of its relationship with the named insured. The standard CGL policy has added these persons as insureds primarily due to the expense and practical difficulty of obtaining separate insurance policies for them. These persons are "insureds" but are not "named insureds". The term "**named insured**" is not a defined term in the standard CGL policy, but is a term used in several sections of the policy. The named insured is identified on the Declaration page of the of the policy. If there more than one person is identified on the Declaration page of the policy as a named insured, the first such person is referred to in the policy as the "**first Named Insured**." For example, the standard policy contains the following provisions as to the named insured:

- The first Named Insured is given specific rights and duties with respect to the payment of policy premiums.
- The separation of insureds policy condition states that the insurance applies "as if each Named Insured were the only Named Insured.
- Coverage is extended to organizations acquired by the named insured for a period of 90 days following the acquisition, provided they are not already covered by other general liability insurance; and past partnerships, joint venturers, and limited liability companies must be listed as named insureds in order for coverage to apply to them.
- The notice of cancellation and nonrenewal apply to the "first Named Insured."

Additional insureds should be concerned about how their coverage is affected by each of the four above conditions under a proffered additional

insured endorsement to the named insured's CGL policy.

**(3) Issuance of an Endorsement on a Form Not Applicable to the Relationship Between Named Insured and the Additional Insured**

One form of common clerical error of an issuing agent is issuing the wrong additional insured endorsement form or assuming that an existing blanket insured endorsement form appropriately applies to the transaction (for example, the authorized representative signing the certificate of insurance may erroneously believe that the blanket additional insured endorsement attached to the policy applies to a landlord/tenant relationship, but the blanket endorsement covers the owner/contractor relationship.

**(4) Failure to Specify that Policy Limits Are to Be Available to Additional Insured**

Some additional insured endorsements specify a sublimit for additional insured coverage that is less than the policy limits applicable to the named insured. MALECKI ON INSURANCE, *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005 Vol. 14, No. 10 pp. 1-8). Endorsement provides that the additional insured limits are as follows: "The Limits of Insurance applicable to the additional insured are those specified in the written contract or written agreement, if any, between you and the additional insured regarding the work described above, or in the Declarations of this policy, whichever is less. A sublimit is the specified on the Declaration page in an amount less than the policy limits applicable to the named insured.

**(5) Failure to Specify that Additional Insured Endorsement May Not be Deleted During Policy Term**

Some additional insured endorsements provide that coverage terminates upon deletion of the additional insured endorsement by the insurer and under the policy terms this does not trigger notice to the additional insured unless the policy has been endorsed to provide notice to the additional insured on the occurrence of such event. MALECKI ON INSURANCE, *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005 Vol. 14, No. 10 pp. 1-8). One endorsement provided:

The coverage provided to the additional insured by this endorsement and by paragraph f. of the definition of "insured contract" under Definitions (Section V), as amended by this endorsement, does not apply to "bodily injury" or 'property damage' beyond: ... d. The effective date of any deletion of, any removal of, or any non-continuance of, this additional insured endorsement from this policy.

**b. Specification in Contract of Coverage that is Ultimately Not Provided**

**(1) Violation of Contract**

Failure of a protecting party to provide additional insured coverage conforming to the party to be protected's insurance specifications may impose on it contractual liability. This can lead to catastrophic damages because in such cases the protecting party has no insurance to cover its default in failing to provide contractually required insurance. A party that breaches its contractual obligation to list the other party as an additional insured is liable for all damages that would have fallen within the protection of the additional insured endorsement. The court in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d. 119 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2000, writ denied) found that Coastal failed to list Crown as an additional insured on Coastal's Trucker's Policy and was liable to Crown for the \$4,816,549.28 judgment obtained by an employee of Coastal that was injured on Crown's premises. The insurance covenant did not refer to an additional insured designation but required Coastal to obtain insurance "protecting" Crown. The insurance covenant in *Coastal Transport* reads as follows:

Carrier agrees to purchase at Carrier's cost ... Comprehensive General Liability Insurance including care, custody and control coverage and liability assumed with \$1,000,000 limit per occurrence for bodily injury and property damage combined. .... Such insurance shall ... fully extend to, defend and protect Crown.

Also see *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc. Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), cert. den'd, 510 & S. 820, 114 S.Ct. 76, 126 L. Ed.2d 45 (1993), a case where Getty sued NL Industries and its insurers for its failure to name Getty as an additional insured on NL Industries' liability policies.

**(2) Waiver of Right to Enforce**

An additional insured's failure to confirm the existence of the additional insurance coverage may be deemed to be a waiver of the coverage or an estoppel against suit to require coverage.

**2. Solutions****a. Specify an ISO Additional Insured Endorsement Form**

A solution for an additional insured to avoid not receiving adequate additional insured coverage is to specify in the insurance specifications the appropriate "ISO form" as opposed to merely requiring "additional insured coverage." The party to be protected might, for example, specify that one of the following ISO additional insured endorsements be provided:

**(1) CG 20 10 Additional Insured-Owners, Lessees and Contractors**

Additional insured coverage is afforded to "owners", "lessees" and "contractors" of the named insured for

bodily injury ... caused, in whole or in part, by: 1. Your (the named insured's) 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. ... This insurance does not apply to 'bodily injury' or 'property damage' occurring after: (1) All work ... 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 ....

See **Form B.**

**(2) CG 20 11 Additional Insured-Managers or Lessors of Premises**

Additional insured coverage is afforded to "managers" or "lessors" of the named insured for

liability arising out of the ownership, maintenance or use of that part of the premises leased to you 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.

The most common factually litigated scenario regarding these endorsements involves injuries occurring "**outside**" the "**part**" of the premises "shown in the Schedule". This issue can also take on the nuance of whether coverage is affected if the Schedule designates more or less than the "part of the premises" leased to the named insured. See discussion at Footnote 5 following the copy of the ISO CG 20 11, attached to this article as **Form C.**

**(3) CG 20 26 Additional Insured-Designated Person or Organization**

Additional insured coverage is afforded to the specific person or organization "scheduled" in the endorsement on the named insured's liability policy for

"bodily injury" ... caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf: A. In the performance of your ongoing operations; or B. In connection with your premises owned by or rented to you.

See **Form D.**

**b. Be Prepared to Respond to Being Tendered a Non-ISO Form****(1) Manuscript Forms**

All non-ISO forms are considered "manuscripted" forms. There is no standard non-ISO form. Coverage of additional insureds can range from (a) "limited" form coverage: coverage for the "vicarious liability" of the additional insured if injury is caused in whole or in part by the acts or omissions of the named insured or of those persons for which the named insured has liability, to (b) "intermediate" form coverage: coverage for the contributory negligence of the additional insured (up to 99%) if the injury is caused in whole or in part by the acts or omissions of the named insured, to (c) "broad" form coverage: intermediate coverage plus coverage for the sole negligence of an additional insured if the injury "arises out of" the act or omission of the named insured or some condition related to the named insured (e.g., the named insured's use of or rental of the additional insured's premises). Additional insured coverage can either be affected by an endorsement issued after the issuance of the policy in response to a

request to schedule a person as an additional insured or pursuant to an already existing blanket automatic additional insured endorsement.

## (2) Recommendations

The following approaches can be employed in order to be prepared to respond to being tendered a non-ISO form in response to the contract's insurance specifications:

- (a) **Add to the Specification of an ISO Additional Insurance Endorsement Form "Or Equivalent"**
- (b) **Attach a Copy of the ISO Form as an Exhibit to the Insurance Specification**
- (c) **Specify Limitations or Exclusions to Coverage that Are Not Acceptable**

The party to be protected might expressly specify in the insurance specifications that the additional insured endorsement can not exclude coverage of the additional insured's concurrent negligence.

Some forms of additional insured endorsements are written to cover liability only attributable to the acts or omissions of the named insured. The implication is that liability attributable to the concurrent negligence of the additional insured is not covered. Other additional insured endorsements are written as expressly excluding liability attributable to the "independent" acts or omissions of the additional insured. The term "independent" is typically not defined in these endorsements. The following is an example of this type endorsement issued by Travelers:

WHO IS AN INSURED (Section II) is amended to include any person or organization you are required by written contract to include as an insured, but only with respect to liability arising out of "your work." This coverage does not include liability arising out of the independent acts or omissions of such person or organization.

This type of endorsement does not exclude coverage altogether when the additional insured's own negligence is a contributing cause of the injury or damage. But the insurer does not pay damages awarded on the basis of the additional insured's contributory negligence. It covers the additional insured only for liability imposed on some basis other than the additional insured's acts or omissions (i.e., vicarious liability).

Another example of this approach is Travelers' CG D2 46 08 05 Blanket Additional Insured (Contractors) which provides:

WHO IS AN INSURED – (Section II) is amended to include any person or organization that you agree in a "written contract requiring insurance" to include as an additional insured on this Coverage part, but: ... b) If, and only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of "your work" to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization.

See MALECKI ON INSURANCE, *Dual Purpose Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (October, 2005 Vol. 14, No. 12 pp. 1-8) where the following endorsement is reviewed:

This insurance provided to the additional insured is limited as follows: 1. That person or organization is an additional insured solely for liability due to your (named insured's) negligence specifically resulting from 'your work' for the additional insured which is the subject of the written contract or written agreement. No coverage applies to liability resulting from the sole negligence of the additional insured.

The following is an example of language in an additional insured endorsement that excludes the negligence of an additional insured:

Bituminous Fire & Marine Insurance Contractors Extended Liability Coverage – GL-2785-TX (07/00) Coverage B. Blanket Additional Insureds – Construction Contracts.

This insurance does not apply to: (3) "Bodily injury" or "property damage" arising out of any act or omission of the additional insured(s) or any of their employees, other than the general supervision of work performed for the additional insured(s) by you (the named insured).

This form was tendered by a tenant to a landlord in response to a general specification that the landlord was to be designated as an additional insured on tenant's commercial general liability policy and thus is an example of the wrong form being tendered.

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

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).

In *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6<sup>th</sup> Cir. 2000), the Sixth Circuit held that the following additional insured endorsement meant exactly what it said "the negligence of the additional insured is excluded."

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 insureds

The craftiness of insurance companies to gut fundamental coverage by endorsements is illustrated in the recent case of *American Wrecking Corp. v. Burlington Insurance Co.*, N.J. Superior Court, recent unpublished opinion (Docket No. ESX-L-5777-06 November 29, 2007):

In the policy renewal, Burlington inserted the Exclusion, which eliminated coverage for "any insured." Thus, the Exclusion effectively eliminates liability coverage for the insured and any entities listed as additional insureds under the policy. This result is fundamentally inconsistent with commercially reasonable standards.

**(d) Specify That Endorsement Shall Expressly Cover Additional Insured's Concurrent Negligence**

The insurance specifications should state that the additional insured endorsement shall expressly cover the additional insured's concurrent negligence.

**D. Determining the Priority in Parties' Coverage**

MALECKI ON INSURANCE, *Coverage on a Primary and Noncontributory Basis – The Reason Reference to "Noncontributory" May Be Necessary* (March, 2005 Vol. 14, No. 5 pp. 1-5).

**1. Typical Defects**

**a. No Insurance Specification in Parties' Contract Addressing Priority of Named Insured's Insurance Coverage and its Additional Insured's "Other Insurance" Coverage**

**(1) First Dollar Coverage**

A poorly drafted contract between the insured and the additional insured may either (a) contain no statement as to the priority of coverage between the insured's and the additional insured's liability insurance (the additional insured's "other insurance") or, (b) state merely that the named insured's CGL policy shall be "primary" or "primary and noncontributory" without further addressing the role of the additional insured's own

insurance. The terms "primary" and "noncontributory" are in common use in the insurance industry. These common insurance terms are the combination of seemingly mutually exclusive terms. A policy that is required to provide coverage on a "primary basis" cannot, at the same time, be "noncontributing."

The terms "primary" and "noncontributing" have no prescribed industry meaning. These terms typically are not defined in the named insured's policy or the additional insured endorsement. What the insurer views as the meaning of "primary" and "noncontributory" may not necessarily be what the additional insured perceives these terms to mean.

The standard liability policy provides that its coverage is "primary" and thus, assuming that both the named insured and its additional insured have standard liability policies will both purport to provide primary insurance. The standard liability policy also contains what is known as an "other insurance" provision. This provision requires any other insurance available to the additional insured to contribute with the named insured's insurance on some basis (e.g., prorata).

Assuming both the protecting party's CGL policy and the protected party's CGL policy are standard form policies, then both parties' policies by their standard terms declare themselves to be "primary" insurance and require any "other insurance" to which the additional insured has access to contribute proportionately towards covering the liability. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969); *Texas Employers Ins. v. Underwriting Members*, 836 F.Supp. 398, 404 (S. D. Tex. 1993). In *Mid-Continent Insurance Co. v. Liberty Mutual Ins. Co.*, 236 S.W.2d 765 (Tex. 2007) the court reiterated this position in answering certified questions from the Fifth Circuit Court of Appeals at 405 F.3d 296. The court was called on to determine if pro rata "other insurance" clauses contained in liability policies issued by the protecting party's policy and in the party to be protected's (additional insured's) other insurance precluded an equitable contribution claim by one insurer against the other insurer for its failure to pay its pro rata share of a settlement. The other insurance clause in the additional insured's own insurance declared that its coverage was primary with any other insurance provided to its insured. Thus, the additional insured's own insurance did not contain a provision added to the standard ISO

policy discussed below which provides that the additional insured's own insurance is excess in such circumstances. The court stated the rules in the cases involving pro rata "other insurance" clauses (those without the 1997 ISO exception discussed below) as follows:

We recognized long ago in *Hicks Rubber* (referring to *Traders & General Insurance Co. v. Hicks Rubber Co.*, 140 Tex. 586, 169 S.W.2d 142 (1943)) "the general rule that, if two or more insurers bind themselves to pay the entire loss insured against, and one insurer pays the whole loss, the one so paying has a right of action against his co-insurer, or co-insurers, for a ratable proportion of the amount paid by him, because he has paid a debt which is equally and concurrently due by the insurers. *Hicks Rubber*, 169 S.W.2d at 148.... We also recognized in *Hicks Rubber*, however, that this direct claim for contribution between co-insurers disappears when the insurance policies contain "other insurance" or "pro rata" clauses. 169 S.W.2d at 148. A pro rata clause operates to ensure that each insurer is not liable for any greater proportion of the loss than the coverage amount in its policy bears to the entire amount of insurance coverage available. ... In addition, the co-insurer paying more than its contractually agreed upon proportionate share does so voluntarily; that is, without a legal obligation to do so. *Id.* at 609-10. Thus a co-insurer paying more than its proportionate share cannot recover the excess from the other co-insurers.... the presence of the pro rata clauses in the CGL policies precludes an equitable contribution claim.

*Id.* at 772-73.

ISO attempted to establish an exception to this contribution scheme by adding an exception, Paragraph 4b(2). The following are the "other insurance" provisions in the current ISO liability insurance form. These provisions are likely contained in both the protecting party's CGL policy and the party to be protected's CGL policy.

ISO CGL Policy:

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then we will share with all that other insurance by the method described in c. below....

(Emphasis added. Continued.)

b. Excess Insurance

This insurance is excess over: ...

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of any endorsement; ...

(Emphasis added. Continued.)

c. Method of Sharing

If all the other insurance permits contribution by equal shares; we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains; whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

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(Emphasis added.)

ISO add as Paragraph 4b(2) an exception to the declared primary coverage in Paragraph 4a for additional insurance coverage of the named insured. Thus, ISO revised its standard policy to provide that in a case where the party to be protected has both its own CGL policy and is an additional insured on the protecting party's CGL policy, then the party to be protected's CGL insurance states that its coverage is excess to the coverage available to through being covered under the additional insured endorsement on the protecting party's insurance.

Many blanket (automatic) additional insured endorsements provide that the coverage provided to the additional insured by the named insured's policy will be excess to the additional insured's other insurance unless the insurance specifications in the contract between the named insured and the additional insured expressly provide that the coverage to be provided by the named insured's policy to the additional insured is "primary and noncontributory" and that the additional insured's other insurance is excess. This approach is called a "**primary-when-required**" provision. Examples of this approach are the following endorsements by Travelers' and CNA.

Travelers' CG D2 46 08 05 Blanket Additional Insured (Contractors) provides:

The insurance provided to the additional insured by this endorsement is excess over any valid and collectible "other insurance", whether primary, excess, contingent or on any other basis, that is available to the additional insured for a loss we cover under this endorsement. However, if the "written contract requiring insurance" specifically requires that this insurance apply on a primary basis or a primary and non-contributory basis, this insurance is primary to "other insurance" available to the additional insured which covers that person or organization as a named insured for such loss, and we will not share with that "other insurance". But the insurance provide to the additional insured by this endorsement still is excess over any valid and collectible "other insurance", whether primary, excess, contingent or on any other basis, that is available to the additional insured when

that person or organization is an additional insured under such "other insurance."

CNA's G-147167-A (Ed. 04/04) General Liability Extension Endorsement provides:

This insurance is excess over: Any other insurance naming the additional insured as an insured whether primary, excess, contingent or on any other basis unless a written contract or agreement specifically requires that this insurance be either primary or primary and noncontributing. Where required by written contract or agreement, we will consider any other insurance maintained by the additional insured for injury or damage covered by this endorsement to be excess and noncontributing with this insurance.

If the party to be protected's liability policy does not contain language similar to the above-quoted 1997 revision to the ISO standard policy, the party to be protected may find that its own liability policy provides that it provides primary coverage with the protecting party's policy and that it contributes with the protecting party's policy for the liability. One court, *Pecker Iron Works of New York, Inc. v. Travelers Ins. Co.*, 786 N.E.2d 863 (N.Y. 2003) found that silence in the insurance specifications as to the priority and coordination of coverage available to the additional insured did not result in the additional insured's other insurance contributing to the liability on a primary basis.

If the party to be protected's insurance specifications fail to provide that the protecting party's insurance be modified to provide that its additional insurance coverage is provided on a primary and noncontributory basis to any other insurance that the party to be protected may have, the party to be protected may also find that the protecting party's additional insured coverage provides that it is excess to the party to be protected's insurance (the above-quoted CNA and Travelers' endorsements).

## (2) Excess and Umbrella Coverage

The court in *Gilbane Building Co. v. Keystone Structural Concrete, Ltd.*, 2007 WL 2130373 (Tex.App. – Hou. [1<sup>st</sup> Dist.] 2007) held that the following insurance specifications failed to make the named insured's umbrella insurance primary and noncontributing, *i.e.*, coverage to be called on

prior to calling on the additional insured's coverage:

Gilbane Building Company (the general contractor) and William Marsh Rice University (the job site owner) are each to be named as an "Additional Insured" on all Liability Insurance. Provide Waiver of Subrogation on all divisions of Liability Coverage in favor of Gilbane Building Company and William Marsh Rich University. Commercial General Liability to be provided on an "occurrence" basis,....

Bodily Limits: \$1,000,000 each occurrence.  
\$1,000,000 aggregate.

Excess Umbrella Liability, to provide insurance in excess of Employers' Liability, Commercial General Liability, and Automobile Liability policies required hereunder:

\$5,000,000 each occurrence  
\$5,000,000 general policy  
aggregate.

An employee of Keystone (the subcontractor) was injured on the job site and sued Gilbane. The employee's case was settled for \$2,000,000 with Admiral Insurance, Keystone's primary carrier paying the first \$1,000,000 and Gilbane's primary insurance carrier, Zurich, paying the second \$1,000,000. After the settlement funded, Gilbane sued Keystone and Keystone's excess carrier, Royal Insurance, seeking to recover the million dollars it paid to settle the claim. The court held

Although the insurance specifications require Keystone to maintain an umbrella policy in the amount of \$5 million, the contract does not specify the priorities between Keystone's insurance and any other insurance. To interpret the contract under Gilbane's analysis, we would have to add a provision stating that the umbrella policy would be primary to Gilbane's insurance. We decline to do so. Parties should be held to the contract that they drafted. ... Here, it is undisputed that Gilbane drafted the Gilbane-Keystone contract and the insurance specifications. Thus, because the insurance specifications do not require Keystone's umbrella policy to be primary insurance above any and all additional insurance, Keystone did not breach its agreement to

obtain excess insurance in the amount of \$5 million dollars.

The court also rejected Gilbane's argument that requiring Gilbane to be listed as an additional insured on all liability policies meant that "Gilbane be protected by Royal's excess coverage before looking to Gilbane's coverage." *Id.* at 7. Further, the court found that Keystone did not breach a duty to Gilbane to inform Gilbane that Keystone held an additional liability insurance policy issued by another carrier in the amount of \$1,000,000 not listed in the COI as to which Gilbane was an automatic additional insured. The court held

Furthermore, the insurance specifications are silent regarding whether Keystone is required to inform Gilbane of all insurance that Keystone procures. The insurance specifications state that Keystone will "furnish certificates of insurance with Gilbane Building Company's project name and number stated on the certificates and submit prior to the beginning of on-site operations." Keystone complied with this requirement in that the insurance specifications require, at a minimum, \$1 million in commercial general liability insurance and \$5 million in an excess umbrella liability policy.

**b. No Specification in the Certificate of Insurance of Priority of Coverage; Failure of Additional Insured to Review Policies and Endorsements**

The ACORD COI does not have a box for the Producer to check to advise the certificate holder as to the priority of coverage provided by the policies. Sometimes COI's are manuscripted to state in the Special Provisions box that the insured's CGL policy is "primary" or "primary and noncontributing." As noted above, adding such a statement to COI does not advise the certificate holder as to the effect under the named insured's liability policies, if the additional insured has other insurance. In order for the Producer to advise the certificate holder as to the effect of the additional insured having other insurance, the Producer would have to additionally review the additional insured's other insurance and determine if the additional insured's other insurance provides that it is excess to the Producer's named insured's insurance.

Another typical situation is that the additional insured neither obtains a copy of protecting party's policy and relevant endorsements to determine what they say as to the priority of the coverages of the insured and the additional insured's "other insurance" nor reviews its own policy to determine what it says as to priority of contribution towards the liability.

**2. Solutions**

**a. Insurance Specifications that Address Priority of Coverages Available to Additional Insured**

**(1) First Dollar Coverage**

Insurance specifications need to address the priority of coverages available to the additional insured (the party to be protected). If it is intended that the additional insured's own policies are not to be contributory with the named insured's (protecting party's) CGL policies, then the insurance specifications should define "noncontributing" by providing that the protecting party's insurer will not invoke the other insurance condition of the protecting party's policy and will not seek contribution from any other insurance available to the additional insured.

As discussed above, endorsing the protecting party's policy to provide that it is primary does not solve the problem. In fact, as noted above, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. The standard ISO form policy also provides for proration when other insurance is available to the additional insured. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969). Without more, in such cases the additional insured's desire to have the named insured's policy respond prior to the additional insured's own policy is thwarted.

The party to be protected should include in its insurance specifications a requirement that the protecting party's insurance provide that the additional insurance coverage is to be provided on a primary and noncontributory basis, and define this basis as meaning that the insurer will not seek contribution from any other insurance of the additional insured. For example, the insurance specifications might require that the following language, or equivalent language, be included in the additional insurance endorsement:

Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above; and the insurer will not seek contribution from any other insurance of the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured..

Also, if the protected party's insurance does not contain the standard 1997 "other insurance" provision, then the protected party should cause its own policy to be endorsed to make it excess over all other coverage available to the protected party, including the coverage afforded by the additional insured endorsement.

## **(2) Excess and Umbrella Coverage**

The insurance specifications should be drafted to provide that the additional insured's other insurance is excess both as to the primary and as to the umbrella insurance of the named insured. The insurance specifications should provide that the excess policy be endorsed to state that it affords primary and noncontributory coverage with respects to any other insurance available to the additional insured, other than the additional insurance coverage afforded by the additional insured endorsement to the protecting party's primary policy.

Note that the "other insurance" provision of the 1997 ISO standard liability policy provides that the coverage afforded to the party to be protected's own liability policy is "excess over: (2) any other *primary* insurance available to (the party to be protected) for which (the party to be protected) has been added as an additional insured...." The protected party may wish to consider having its own insurer modify this language to either delete the word "primary" or revise the reference to be to "any other insurance available to (it) whether primary or excess."

An Illinois court found in *Kajima Constr. Servs. v. St. Paul Fire and Marine Ins. Co.*, 856 N.E.2d 452 (Ill. App. 2006) that the protecting party's excess insurance was just that "excess". The court reviewed the protecting party's excess policy and stated

In the instant case, it is undisputed that (the general contractor) has \$3 million in primary general liability coverage available to it. (One policy) provides \$1 million in primary coverage to (the general contractor) as the named insured and (the other policy) provides \$2 million in primary coverage to (the protecting party), which also named (the general contractor) as an additional insured. It is also undisputed that the umbrella policy issued to (the protecting party) is a true excess policy.

The umbrella policy provided that it was excess to all primary policies. Illinois courts follows a "horizontal" exhaustion rule requiring all primary policies to be exhausted before umbrella policies are triggered. This result might have been averted if the umbrella policy had been endorsed to be primary and noncontributory as to the additional insured's own insurance or if the additional insured's own insurance had been endorsed to be excess to the primary and excess insurance provided by the protecting party.

## **b. Review Policies and Amend as Necessary**

The party to be protected (the additional insured) must review both the protecting party's policy and its own policy and determine what priority each provides as to coverage. Otherwise, the party to be protected may learn at the time of a covered loss that its risk management goal of shifting coverage from its policy to the protecting party's policy has not been accomplished. In such case, both the protecting party's policy and the party to be protected's policy will contribute prorata towards coverage of the liability, or worse yet, the party to be protected's policy will respond in full before the coverage afforded by the policies of the "protecting party."

## A. The Standard Certificate of Liability Insurance – ACORD 25 (with Modifications)

|                                                              |  |                                                                                                                                                                                                                                               |
|--------------------------------------------------------------|--|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>ACORD<sup>TM</sup> CERTIFICATE OF LIABILITY INSURANCE</b> |  | DATE(MM/DD/YYYY)                                                                                                                                                                                                                              |
| PRODUCER                                                     |  | THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED. <sup>1</sup> |
| INSURED                                                      |  |                                                                                                                                                                                                                                               |
|                                                              |  | INSURERS AFFORDING COVERAGE                                                                                                                                                                                                                   |
|                                                              |  | INSURER A:                                                                                                                                                                                                                                    |
|                                                              |  | INSURER B:                                                                                                                                                                                                                                    |
|                                                              |  | INSURER C:                                                                                                                                                                                                                                    |
|                                                              |  | INSURER D:                                                                                                                                                                                                                                    |
|                                                              |  | INSURER E:                                                                                                                                                                                                                                    |

## COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES.<sup>3</sup> AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

| INSR LTR | ADD'L INSRD | TYPE OF INSURANCE                                                                                                                                                    | POLICY NUMBER | POLICY EFFECTIVE DATE (MM/DD/YY) | POLICY EXPIRATION DATE (MM/DD/YY) | LIMITS                                    |       |
|----------|-------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|----------------------------------|-----------------------------------|-------------------------------------------|-------|
| A        |             | GENERAL LIABILITY<br>• COMMERCIAL GENERAL LIABILITY<br>• CLAIMS MADE • OCCUR<br>• _____<br>• _____<br>GEN'L AGGREGATE LIMIT APPLIES PER:<br>• POLICY • PROJECT • LOC |               |                                  |                                   | EACH OCCURRENCE                           | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | DAMAGE TO RENTED PREMISES (Ea occurrence) | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | MED EXP (Any one person)                  | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | PERSONAL & ADV INJURY                     | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | GENERAL AGGREGATE                         | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | PRODUCTS - COMP/OP AGG                    | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   |                                           |       |
| B        |             | AUTOMOBILE LIABILITY<br>• ANY AUTO<br>• ALL OWNED AUTOS<br>• SCHEDULED AUTOS<br>• HIRED AUTOS<br>• NON-OWNED AUTOS<br>• _____<br>• _____                             |               |                                  |                                   | COMBINED SINGLE LIMIT (Ea accident)       | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | BODILY INJURY (Per person)                | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | BODILY INJURY (Per accident)              | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | PROPERTY DAMAGE (Per accident)            | \$    |
|          |             | GARAGE LIABILITY<br>• ANY AUTO<br>• _____                                                                                                                            |               |                                  |                                   | AUTO ONLY - EA. ACCIDENT                  | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | EA ACC                                    | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | OTHER THAN AUTO ONLY: AGG                 | \$    |
| C        |             | EXCESS/UMBRELLA LIABILITY<br>OCCUR • CLAIMS MADE<br>• DEDUCTIBLE<br>• RETENTION \$ _____                                                                             |               |                                  |                                   | EACH OCCURRENCE                           | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | AGGREGATE                                 | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   |                                           | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   |                                           | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   |                                           | \$    |
| D        |             | WORKERS COMPENSATION AND EMPLOYERS' LIABILITY<br>ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?<br>If yes, describe under SPECIAL PROVISIONS below        |               |                                  |                                   | WC STATUTORY LIMITS                       | OTHER |
|          |             |                                                                                                                                                                      |               |                                  |                                   | E.L. EACH ACCIDENT                        | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | E.L. DISEASE - EA EMPLOYEE                | \$    |
|          |             |                                                                                                                                                                      |               |                                  |                                   | E.L. DISEASE - POLICY LIMIT               | \$    |
|          |             | OTHER                                                                                                                                                                |               |                                  |                                   |                                           |       |

DESCRIPTION OF OPERATIONS / LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS<sup>4</sup>

## CERTIFICATE HOLDER

## CANCELLATION

|  |                                                                                                                                                                                                                                                                                                                                                                                |
|--|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, <sup>2</sup> THE ISSUING INSURER WILL ENDEAVOR TO MAIL _____ <sup>30</sup> DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES. <sup>1</sup> |
|  | AUTHORIZED REPRESENTATIVE <sup>5</sup>                                                                                                                                                                                                                                                                                                                                         |

<sup>1</sup> **Notice of Cancellation.** The ACORD certificate contains statements as to the effective date and expiration date of the Liability Policies. The certificate does not contain an obligation to give the certificate holder notice of pending expiration or expiration of a Liability Policy, except a loosely worded statement in the lower right hand corner of the certificate that "SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL \_\_\_\_\_ DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES." See *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882 (10<sup>th</sup> Cir. 1991) (court observed that, "The language in the notice of cancellation clause appears to be phrased so as to avoid creating any firm obligation to give notice." In *dicta* the court also found that Mountain Fuel's manuscripted certificate bound the insurer as to the coverage terms specified in the certificate because the certificate manifested an intent to do so by adding "except as specified" as provided in COI change (2) below. However, under the facts of *Mountain Fuel* this conclusion was to no avail for the insured as the accident in question occurred after the policy covered by the certificate had expired).

The most common change sought to be made to the pre-printed form language of the certificate is to emendate this language in such a way as to impose on the insurer a duty to give notice of cancellation to the certificate holder. In order to do this, the certificate needs to be altered in the following 3 places:

- (1) First, the disclaimer appearing in the upper right hand corner must be altered. The first sentence must be deleted as follows: "~~THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER.~~"
- (2) Second, the second sentence reading "THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW." must be qualified by adding at its end "EXCEPT AS SPECIFIED." Otherwise, the revisions to be made to the cancellation notice provision at the bottom of the conflict with these sentences of the certificate.
- (3) Third, the cancellation notification language in the lower right hand portion of the certificate must be altered to delete the "endeavor to" qualifier and the last sentence stating that the failure to give the notice imposes no obligation or liability on the insurer must be deleted. The language as so change is to read as follows:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, ~~BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.~~

Thirty days is a typical period for notice of cancellation. The certificate holder may obtain a longer notice period in cases where the insurer has agreed to give the named insured a longer notice of cancellation.

A good practice is for the additional insured to specify in the insurance specifications in the contract with the named insured sample wording of the notification provision that is required to be added to the named insured's policy. The insurance specifications could be drafted to state that the requested notification provision be added to the additional insured endorsement itself. See the sample wording of a notification provision following each of the ISO additional insured endorsements at Forms B – D.

<sup>2</sup> **Notice of Non-renewal or Material Change.** Another frequently sought change to the certificate is to add a duty on the insurance issuer to give advance notice of intent not to renew or of material changes to the policy. This assurance is sought to be effected by adding words like the following before the notice requirement: "OR A DETERMINATION BE MADE NOT TO RENEW ANY OF THE ABOVE DESCRIBED POLICIES, OR A MATERIAL CHANGE BE MADE IN THE COVERAGE OF ANY OF THE DESCRIBED POLICIES". Notice of intent not to renew may not be necessary if the expiration date of the policy extends beyond the term of the underlying contract between the insured and the certificate holder/additional insured.

<sup>3</sup> **Primacy of Insurance Specifications over Conflicting Policy Provisions.** The following sentence appearing above the list of policies is sometimes sought to be deleted on the belief that its deletion will be a guarantee by the insurance issuer of the existence of the coverage specified in the parties' insurance specifications: "~~NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES.~~"

<sup>4</sup> **Exclusions and Special Provisions.** The ACORD COI contains a small blank area ("box") for the COI preparer to insert information as to "DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS." For the party to be protected, completion of this box is an important means of being advised of any limitations added by endorsements to the standard coverage or to confirm that the coverage is the "standard" coverage as opposed to coverage lesser than the standard ISO CGL policy coverage. To fill out this box, the certificate preparer should review the Liability Policies to determine if any endorsements have been added for the purpose of limiting or eliminating coverage (for example, an ISO CG 21 39 Contractual Liability Limitation (1988), an ISO CG 24 26 Amendment of "Insured Contract" Definition Endorsement (2004) to eliminate tort liability assumption from being covered under an "insured contract", an endorsement excluding coverage for explosion, collapse and underground hazards, or an endorsement eliminating Coverage B dealing with personal and advertising liability as covered liabilities ("and the list goes on"). The certificate holder may also seek to use this box to have the Producer to make affirmative statements as to the scope of coverage: for example, the additional insured coverage (who is an additional insured [the person-to be protected by name, and other persons related to the additional insured, such as officers, directors, and employees]; and the presence of waivers of subrogation provisions and as to whom subrogation is waived, such as the person-to be protected by name, and other related persons, such as officers, directors, and employees). However, Producers may balk at use of the COI as a means of assuring the certificate holder of this coverage.

An example of coverage statements are inclusion in the box of the following:

**Additional Insured Coverage:**

The certificate holder, and its officers, directors and employees are designated as additional insured on the above-referenced

General Liability Policy under the most current edition of ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors without modification, and on the Automobile Liability by a TE 99 01B (1992) Additional Insured Endorsement and Umbrella Liability Policies by endorsements that do not expressly exclude coverage of the additional insured's negligence, except for the additional insured's sole negligence. Coverage afforded to the additional insureds is primary and does not require contribution from other insurance the additional insureds may have.

(See Form I to this article for the TE 99 01B Additional Insured – Texas Business Auto Policy form)

or as opposed to specifying an ISO form, specifying the wording of the additional insured coverage, for example as follows:

The certificate holder, and its officers, directors and employees are designated as additional insured on the above-referenced General Liability Policy with respect to liability for "bodily injury", "property damage" or "personal and 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 the named insured's behalf; in the performance of the named insured's ongoing operations for the additional insureds at \_\_\_\_\_ and without exclusion of coverage if the liability arises in part from the acts or omissions, including negligence, of the additional insureds.

**Primary, Noncontributory Coverage:**

Whether an additional insured's CGL policy will be required to contribute with the named insured's CGL policy in satisfying a covered claim or in the cost of defense is an important question to be addressed in the parties insurance specifications. Additional insureds sometimes seek confirmation in the COI that their CGL coverage is recognized by the named insured's insurance issuers as being noncontributory and excess to the coverage afforded by the additional insured coverage. The following is an example of such confirming language sometimes inserted in the box:

The Liability Policy shown above are primary and do not require contribution from any other insurance of the additional insureds specified herein or any self-insurance program of any of the additional insureds. Insurance of the additional insureds is excess of coverage provided to additional insured by the Liability Policies listed above and shall not contribute with the Liability Policies listed above.

However, an additional insured must also need to amend its own Liability Policy to provide that its coverage is excess or noncontributory to the additional insurance coverage afforded by the additional insured endorsement to the named insured's Liability Policies. Otherwise, the additional insured's own policies may override or at least be in conflict with the priority of coverage specified in this statement added to the COI. Some named insured policies provide that the coverage afforded thereby to an additional insured are primary and noncontributory, except if the additional insured's own Liability Insurance provides that it is primary and contributory.

**Waiver of Subrogation:**

The following is an example of a confirmation of the inclusion in the Liability Policies of a waiver of subrogation as to claims against specified persons:

The issuers of the insurance policies have waived subrogation against (a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) \_\_\_\_\_ (the "Building Owner HVAC Contractor"), (d) \_\_\_\_\_ (the "Building Owner Security Service") , (e) \_\_\_\_\_ ("Parking Garage Operator"), (f) \_\_\_\_\_ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender").

**Separation of Insureds Condition Included in Policies:**

The additional insureds may wish confirmation that the General, Automobile and Excess Liability Policies contain separation of insured provisions allowing for coverage of the additional insured even though their exists claims or suits by the additional insured against the named insured.

By virtue of adding one party to another party's insurance policy as an additional insured there results 2 insureds on the same policy. "Cross liability coverage" is coverage added to the Named Insured's policy to assure the insureds that adding the additional insured will not invalidate the Named Insured's coverage for any liability it may have to the additional insured. The liability of one insured to another is called "**cross-liability**." The separation of insured language establishes separate coverage for each insured under the policy, except as respects the policy limits.

The standard commercial liability form, ISO CG 01 00 01, and the standard business auto liability form, ISO CA 00 01, contain separation of insureds provisions. In ISO's CGL form, this provision appears as policy condition 7 "Separations of Insureds." In standard business auto policies this provision is built into the definition of "insured".

The following is the ISO CGL Separation of Insureds clause:

**SEPARATION OF INSUREDS CONDITIONS**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the first Named Insured in this Coverage Part, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

ISO, 2003©

The following is the ISO separation of insureds language as built into the definition of "Insured" in the ISO business auto policy:

**Business Auto**

"Insured" means any person or organization qualifying as an insured in the Who Is an Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

ISO, 2000©

Separation of insured language is generally provided in non-ISO CGL policy forms and in business auto policy and umbrella liability policy forms. Since the separation of insured language is contained in the ISO CGL policy form, ISO does not have an endorsement form to add separation of insured language to a CGL policy. It is prudent to specify that the required liability policies provide cross-liability coverage as would be achieved under the standard ISO separation of insureds clause. If you are tendered a non-ISO CGL or other liability policy, you should examine it to confirm that it contains separation of insured language protective of the insured and the additional insured.

Note that there is no standard form umbrella or excess liability insurance forms. ISO does not publish an umbrella or excess liability form. Note also the General Liability or Business Auto Liability policy forms may not be an ISO form and thus may not contain a separation of insureds provision. Some umbrella or excess liability policy forms or nonstandard general or automobile liability policy forms exclude coverage for suits between insureds.

The following is language that may be inserted into the COI seeking such assurance that the Liability Policies contain standard separation of insureds provisions:

The General, Automobile and Excess Liability Policies listed above provide for severability of interests (cross-liability coverage) applicable to the additional insureds designated herein, including the certificate holder as additional insured, and the named insured. The insurance applies separately to each insured against whom claim is made or suit is brought except with respect to the insurer's limits of liability. The inclusion of any person or organization as an insured shall not affect any right which such person or organization would have as a claimant if not so included.

<sup>5</sup> **Authorized Representative.** What is an "authorized representative?" What is the actual authority of the person signing the COI to make changes to the COI form or to insert information as to scope of coverage other than merely filling in the form? Can the authorized representative bind the issuer? See discussion in the article at I.B.1.a(1) Certificates of Insurance – Typical Defects – Reliance on Certificate-Not Reasonable to Rely on Certificate and .a(2) Signed But Not by an "Authorized Representative" of the Insurer with Authority to Bind the Insurer. If the authorized representative is authorized only to deliver an ACORD COI with the blanks filled in but not to bind, alter or amend coverage, then what is accomplished by the common changes to the COI suggested in Endnotes 1-4 above, if the insurers are not bound thereby?

Certificate holders sometimes manuscript the COI to contain a warranty by the authorized representative that it is authorized to sign the COI by the insurers and to bind the insurers as to the changes to the policies reflected by the statements set out in the COI. Some certificate holders go so far as to require that the signature affixed to the COI be manually applied by the authorized representative as opposed to the more common practice of large Producers of applying a machine generated facsimile signature. The following is an example of a manuscripted revision to a COI addressing the authority of the authorized representative:

I, the undersigned, attest and warrant to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate and herewith provide acknowledgment of the insurer(s) listed in this certificate that I am legally authorized by that insurer or those insurers to so obligate them. Except as stated above nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements, or exclusions of the referenced policies.

Authorized Representative:

Signature: \_\_\_\_\_ (Original signature required)

Typed Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: ( ) \_\_\_\_\_ Fax Number: \_\_\_\_\_

Email: \_\_\_\_\_

Date Signed: \_\_\_\_\_

[Backside of ACORD form]

**IMPORTANT**

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

**DISCLAIMER**

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

The above provisions are contained on the reverse side of the ACORD certificate. Unless these provisions are struck from the certificate a conflict arises with the changes made to the printed-form language on the front side of the certificate.

**B. ISO 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization**

Endorsement to contractor's CGL insurance policy to make the landlord and the tenant an additional insured.

POLICY NUMBER:  
LIABILITY

COMMERCIAL GENERAL

CG 20 10 07 04

**ADDITIONAL INSURED – OWNERS, LESSEES OR  
CONTRACTORS – SCHEDULED PERSON OR  
ORGANIZATION <sup>1</sup>**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

| Name of Additional Insured Person(s)<br>Or Organization(s)                                                                                                                                                                                                                                                                             | Location(s) of Covered Operations |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| [insert name of additional insureds: (a) _____, and its successors and assigns, and its directors and employees (the owner/landlord), (b) _____ (the landlord's management company), (c) _____ (the landlord's lender), (d), _____, and its successors and assigns, and its members and employees, and (e) _____ ("tenant's lender").] | [insert building address.]        |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations.                                                                                                                                                                                                                                 |                                   |

**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<sup>2</sup>, 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 exclusion is added:

This insurance does not apply to "bodily injury" or "property damage" occurring after<sup>3</sup>:

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 site 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>4</sup>

CG 20 10 07 04

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[***Emphasis added.***]

\* "You" and "your" refers to the named insured (the one to whose policy this endorsement is attached).

<sup>1</sup> **Naming Landlord and Tenant as Additional Insureds on Tenant's Contractor's CGL Policy.** This endorsement has been completed as an endorsement to a tenant's contractor's CGL insurance to list as additional insureds the persons in the Schedule: the landlord, its management company and lender, and the tenant and its lender.

<sup>2</sup> **Coverage for Injuries Caused by Named Insured-Contractor's Acts or Omissions.** This endorsement provides coverage to the additional insured (e.g., landlord and tenant) on the contractor's CGL policy for "liability" "**caused, in whole or in part, by**" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those

of its subcontractors, etc.). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy).

The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent and the additional insured was the solely negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent.

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured's employee is barred by the workers' comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer.

<sup>3</sup> **Exclusions.** Liabilities occurring after completion of the work are not covered. Coverage for liabilities arising after completion of the contractor's operations but attributable to the contractor's acts or omissions prior to completion may be added by requiring both this endorsement and a CG 20 37 Additional Insured-Owners, Lessees or Contractors-Completed Operations endorsement.

<sup>4</sup> **Crafting an Additional Insured Endorsement.** A good contract drafting practice is to attach to the parties insurance specifications an example of the ISO additional insured endorsement referenced in the insurance specifications. An even better drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

**Notification Requirement.** The parties insurance specifications in addition to specifying that the additional insured endorsement be a specific ISO form might also provide that the ISO form is to be manuscripted to include within it advance notification to the additional insured of cancellation of the named insured's policy due to nonpayment of premium or due to other events. Additionally, it could specify advance notification of non-renewal or material changes to the policy. See Forms H-1 for notification endorsements to the policy. The following is sample notification language to be added on the face of the additional endorsement form.

In the event of cancellation or material change that reduces or restricts the insurance afforded to the additional insured, we agree to mail prior written notice of cancellation or material change to the additional insureds listed in the Schedule to the following address, or such other address for the additional insured of which we have been notified by the additional insured, at least \_\_\_\_ days before the effective date of the cancellation or material change, and in the case of material change the notification shall provide to the additional insured a copy of the material changes:

Additional insured's name and address: \_\_\_\_\_

The additional insured should also require in its insurance specifications that the named insured's insurer recognize that the coverage afforded by the additional insured endorsement to the additional insured is primary and noncontributory, meaning that any other insurance of the additional insured shall be deemed to be excess to the coverage afforded by additional insured endorsement.

Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured.