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# 'Additional Insured Endorsements' Can Shift Risk to Parties Not at Fault

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"Additional insured" clauses most often start with a contract requiring the first party to name the second party as an additional insured under the first party's insurance policy. This is often found with or near a contract clause requiring the first party to indemnify, defend and hold harmless the second party. That obligation to indemnify is an obligation that is covered by a standard general liability insurance policy. But parties often – almost always, these days – want the additional protection of being an additional insured on the first party's policy.

These contract requirements come up in various commercial dealings. The most frequently litigated additional insured provisions are those that relate to construction projects. Typically, a developer will require the general contractor to hold the developer harmless, and to name the developer as an additional insured on the general contractor's general liability insurance. The general contractor will make similar demands upon its subcontractors.

In real estate transactions, landlords will require a tenant to indemnify the landlord, and to name the landlord as an additional insured on the tenant's liability insurance.

In the manufacture and sale of products, the wholesaler may require that a manufacturer indemnify and save harmless the wholesaler, and that the manufacturer provide additional insured status to the wholesaler. A retailer may make similar demands upon the wholesaler or manufacturer.

A sample insurance requirement might require that "Contractor, … and the Owner … shall be named as additional insureds under the Subcontractor's Commercial General Liability policy for liability arising out of the performance of the work." It might further stipulate that "Coverage for the Contractor … and the Owner … as additional insureds shall be provided by a policy provision or endorsement at least as broad as ISO Additional Insured endorsement CG 20 10 11 85." And very often the contract will require that the additional insurance be primary and Contractor's insurance is excess and will not contribute.

Court decisions sometimes state that the additional insured provision is to guarantee the obligations under the indemnity provision. But the so-called "contractual liability" coverage in a general liability policy does that. The additional insurance provision does much more.



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Another concept is to shift risk to the "at fault" party – the subcontractor whose work causes injury to others, the tenant whose use and occupancy causes damage to others or the manufacturer whose product is responsible for an injury under products liability law.

However, additional insured provisions – and hold harmless provisions – often shift risk onto a not-at-fault party.

An additional insured endorsement will have a "schedule" to list who is an additional insured. It might also have another schedule to list applicable or covered locations or projects or products. The additional insured endorsement will have language to define the scope to which the policy applies—the named insured's "work," "products, "acts." There also needs to be some connecting language to bring this together. The coverage needs to connect to scope.

One common example is use of the phrase "arising out of" – as in the additional insured is an insured for loss "arising out of" the named insured's work. Historically this was viewed as expressing a need for a cause in fact, but the modern trend is to hold that this means "minimal" causation.

Another example is endorsements which provide coverage to an additional insured "but only with respect to liability arising out of "your [the named insured's] work".

So, this raises the issue of what "causal link" is sufficient? Must there be proximate cause or legal cause? Or cause in fact? Must there be vicarious liability of the additional insured for the named insured's acts or omissions?

Or is some minimal causation sufficient. One illustration of what "minimal causation" means is the case *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 60 Cal. App. 4th 321. There a contractor was working on the owner's premises. A worker was leaving work to pick up his wife at the airport. He was off the clock. As he was leaving, he was injured by a defect in the premises which was not caused by the contractor, and which was not within the scope of the contractor's work. The additional insured endorsement provided additional insured coverage to the owner for loss "arising out of" the named insured contractor's work. The court found that "arising out of" only requires minimal causation, and that was satisfied on these facts.

So, if the endorsement has "arising out of" language, this only requires "minimal causation". And that does not mean the named insured has to be at fault or somehow responsible. The presence of a worker on a job site will satisfy this requirement.

As courts have adopted interpreted the language expansively, insurers have rewritten the endorsements for more precise underwriting. The 1985 Additional Insured – Owners, Lessees and Contractors endorsement used the language "arising out of" the *named insured's work*. ISO form CG 20 10 11 85. In 1993 that language was changed so that this endorsement used the language



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"arising out of" the *named insured ongoing operations*. ISO forms CG 20 10 10 93, CG 20 10 10 01. This did not change the causation language, but is restricted the endorsement to ongoing operations, so as to not provide coverage for completed operations. (There was a separate endorsement for completed operations).

In 2004 the language was changed again, this time to address the causal connection issue. The endorsement now provided coverage to the additional insured for loss "caused in whole or in part by your [the named insured's] acts or omissions … in the performance of your ongoing operations". ISO form CG 20 10 07 04.

The common practice in the insurance industry was to provide additional insured coverage on a "blanket" basis, by filling in the schedule to indicate that the additional insured was "as required by contract".

The insurers also began modifying their additional insured endorsements to provide that such coverage was not broader than required by contract, and for no greater than limits required by the AI contract or limits of the policy, whichever is less. ISO form CG 20 10 04 13. Before that modification, if a party acquired additional insured status, it would have coverage to the full scope of that endorsement, and often the full limits of the policy, even though the underlying construction contract might have required a narrower scope or lower limits.

Another addition to this language was that such coverage was provided "only to the extent permitted by law". This was addressed to the appearance of statutes that sought not only to restrict the scope of indemnity being given (so-called "anti-indemnity statutes") but also to concomitantly restrict the scope of insurance being provided. e.g. Cal Civ Code § 2782.05 prohibits agreements in any construction contract entered into on or after January 1, 2013, that purport to *insure or* indemnify to the extent the claims arise out of the active negligence or willful misconduct of that indemnified party.

The other area of evolution of these endorsements concerns scope. Separate endorsements were developed to provide additional insured coverage on the completed operations side. E.g. CG 20 37 10 01 (providing coverage for liability arising out of the named insured's work included within the completed operations hazard); CG 20 37 07 04 (providing coverage for liability caused in whole or in part by the named insured's work included within the completed operations hazard); CG 20 37 04 13 (same).

Another limitation seen in the three endorsements above was to limit the additional insured coverage to the designated location shown in the schedule. This also would often be filled in on a blanket basis – "as required by contract".

Finally, there has been a privity issue raised in some later versions of the endorsement. One form provides additional insured status to any person when the named insured and that person agreed that such person be added as an additional insured. CG 20 33. But another form provides additional



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insured status to any other person you are required to add as an additional insured. CG 20 38. What is the difference? If a subcontractor contracts with a general contractor and agrees to provide additional insured coverage for the general contractor and the owner, the general contractor would be an additional insured under either form. But the owner would be insured under the latter form (because the named insured agreed that *any other person* the named insured is required – be added) but not the former form (because the named insured agreed that only *such* person – the one with whom the named insured contracted – be added).

For example, in *Gilbane Bldg. v. St. Paul Fire*, 31 NY 3d 131 (2018) a government entity hired a general contractor for construction of a new laboratory. The government entity also contracted with a construction manager for the project. The general contractor agreed to provide an additional insured endorsement naming the entity, the construction manager and other entities specified. The additional insured endorsement provided coverage to anyone with whom the general contractor had agreed to add as an additional insured by written contract. The court held that since the general contractor had not agreed with the construction manager (its contract was with the government entity) that the construction manager was not an additional insured.

In a few recent cases, courts have taken a very sharp look at the insurance law distinction between ongoing operations and completed operations.

In *Pulte Home Corp. v. American Safety Indem. Co.* (2017) 14 Cal. App. 5th 1086 and *McMillin Mgmt. Servs., L.P. v. Fin. Pac. Ins. Co*. (2017) 17 Cal. App. 5th 187, the issue was whether homeowner construction defect complaints arose out of ongoing operations, where there was no completed operations coverage for the additional insured. Both cases found that there could have been some progressive or continuous damage that began before the units were sold, while operations were ongoing, and that this would trigger the additional insured "ongoing operations" coverage. One court also found that completed operations damage could "arise out of" – have a minimal causal connection to – damage during the ongoing operations phase. Both of these decisions are contrary to the conventional understanding of the ongoing operations / completed operations divide.

Finally, umbrella and excess policies may be involved. The first party may require such additional coverage or higher limits. Or it may happen even though such requirements are not made. In *Indus. Chem. & Fiberglass Corp. v. North River Ins. Co.* (11th Cir 1990) 908 F.2d 825 a chemical manufacturer and its distributor were sued for wrongful death of two workers. After its insurer refused to settle, the distributor, as an additional insured, sued the manufacturer's insurers. The additional insureds were covered by the primary policy. The excess policy included as an insured anyone who was insured in the primary policy. This resulted in excess coverage for the additional insured, even though the contracts did not require it.

Given the widespread use of the "as required by contract" language, parties seeking additional insured status on another party's policy should draft their contracts to take these insurance policy language developments into account.



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