

# ADDITIONAL INSURED ENDORSEMENTS: BREEDING GROUNDS FOR COVERAGE DISPUTES

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It is commonplace in many business settings for a contracting party to agree to add one of its customers as an additional insured under the contracting party's liability insurance policy. For example, construction contractors are commonly required by construction contracts to maintain public liability policies with stipulated limits of liability, specifically naming the building owner as an additional insured under the policy. Customers or clients are added as additional insureds by endorsements intended for that purpose, called *additional insured endorsements*. Once such an endorsement has been bound or issued, the customer or client is usually furnished with a *certificate of insurance*, reciting that it is an additional insured under a specific policy. The customer or client seldom asks for, and usually is not given, a copy of either the policy or the additional insured endorsement.

Some agents and underwriters erroneously assume that the coverage granted by additional insured endorsements is necessarily limited to only risks "within the control of" the named insured, or only occurrences in which the named insured was "primarily" or "actively" negligent, or only claims that the additional insured is merely *vicariously* liable for acts or omissions of the named insured. To agents and underwriters laboring under such misconceptions, it might seem that additional insured endorsements are relatively inconsequential and do not incur for the insurer any significantly different or additional risk than has already been assumed by issuing the policy in the first place. As a result, broadly or vaguely worded additional insured endorsements are too often

issued as a matter of routine courtesy; *i.e.*, with only limited attention to their wording and for little or no additional premium.

Many insurers have been unpleasantly surprised to learn that the coverage extended by additional insured endorsements was not as limited as they thought. Additional insured endorsements — even those issued for little or no additional premium — may create additional coverage that was never intended by the insurer. In each instance, the language of the endorsement and the way that language meshes with other policy provisions define the extent to which the policy provides coverage for an additional insured. If such coverage is intended to be limited to risks “within the control of” the named insured, or to occurrences in which the named insured was “primarily” or “actively” negligent, or to claims that the additional insured is merely *vicariously* liable for acts or omissions of the named insured, that limitation should be clearly and unambiguously expressed in the endorsement. If such a limitation is not clearly and unambiguously expressed, an insurer may suddenly find itself obliged to cover broader and more substantial risks than it intended.

That point is illustrated by *Aetna Cas. & Sur. Co. v. Ocean Accident & Guar. Corp.*, 261 F.Supp. 223 (W.D.Pa.,1966), *aff'd*, 386 F.2d 413 (3d Cir. 1967). In *Aetna v. Ocean*, Latrobe Brewing hired an independent contractor, Dill Construction Co., to make modifications in a brewery. During the work a Dill employee was killed, solely as a result of Latrobe’s negligence. The employee’s estate sued Latrobe, which was defended by Aetna. Latrobe impleaded Dill, which was defended by Ocean. At trial, a directed verdict was entered in favor of Dill, and the jury found Latrobe liable for the employee’s death. Aetna paid the judgment entered against Latrobe, then sued

Ocean, Dill's liability insurer, for partial reimbursement of the amount Aetna had spent defending and satisfying the judgment against Latrobe.

Aetna's case against Ocean was based on specific language in the Ocean policy, which contained an additional insured endorsement providing, in the following language, that Latrobe was an additional insured:

The name of the Insured is defined to mean any corporation herein referred to as 'owner' who have let work under contract to Dill Construction Co., Inc. to perform. In consideration of this agreement, this policy shall cover the liability as therein defined, of said owner in the same manner and to the same extent as though their names were individually expressed as the insured in Item 1 of the Declarations of the policy.

*Id.*, 261 F.Supp. at 225.

The Ocean policy's insuring agreements extended coverage for bodily injury liability "arising out of" certain hazards, including operations of the "insured's" independent contractors:

#### COVERAGE A BODILY INJURY LIABILITY

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident *and arising out of the hazards hereinafter defined.*

#### Definition of Hazards

DIVISION 3 INDEPENDENT CONTRACTORS Operations performed for the named insured by independent contractors and general supervision thereof by the named insured, if the accident occurs in the course of such operations.

*Id.* (emphasis added).

On the basis of the plain meaning of that policy language, Aetna argued that the Ocean policy co-insured Latrobe for the death of Dill's employee, because his death "arose out of" Dill's "operations performed for the [additional] named insured by [Dill, and] in the course of such operations."

Ocean defended itself by arguing that the policy language granting coverage for occurrences

“arising out of operations performed for the named insured [Latrobe] by independent contractors” was intended to provide coverage only if the occurrence resulted from an act or omission of such an independent contractor, and here the death had been caused solely by *Latrobe’s* negligence, not the negligence of Dill or any other independent contractor. Both the District Court and the Third Circuit Court of Appeals rejected that argument. The District Court pointed out that

[T]he coverage extended by the provisions of Coverage A and Division 3, requiring Ocean to pay Latrobe’s legal obligations, is not conditioned upon or limited to activities or negligence of Latrobe, nor is it limited to accidents caused by acts of Dill. The above quoted provisions of the policy do not contain language which either expressly or by implication injects the causation factor.  
*Id.*, 261 F.Supp. at 226.

The Third Circuit agreed, stating:

The policy language “arising out of” is very broad and vague. It must, therefore, be construed strictly against the insurer and liberally in favor of the insured. Construed in this manner, “arising out of” means causally connected with, not proximately caused by. “But for” causation, *i.e.*, a cause and result relationship, is enough to satisfy this provision of the policy. Although the accident in the instant case was not caused by Dill’s negligence it did occur while Dill’s employee was performing work for Latrobe. But for Dill’s operations, the accident would not have occurred and Latrobe would have incurred no liability for breaching a duty owed to the employee of an independent contractor. It is not inconsistent to say that the accident arose out of operations performed for Dill by Latrobe because of Latrobe’s negligence.  
*Id.*, 396 F.2d at 415 [citations omitted].

Viewed in that light, the death *was* an occurrence “arising out of operations performed for the named insured by independent contractors,” even though it was not *caused by* any negligent act or omission *of* an independent contractor.

That decision was not an instance of judicial rewriting of an insurance policy to benefit a policyholder: no policyholder was a party to the action. On the contrary, Ocean’s policy and its additional insured endorsement were broadly written; the courts merely applied them according to

their terms. If Ocean had intended to limit its coverage of Latrobe to only those occurrences for which Latrobe was vicariously liable for the acts or omissions of its independent contractors, then it could (and *should*) have expressed that limitation with appropriate policy language. Compare, *e.g.*, *Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co.*, 150 Ill.App.3d 472, 103 Ill.Dec. 495, 501 N.E.2d 812 (1986) (insurer required to defend and indemnify additional insured regardless of additional insured's fault, where additional insured endorsement provided coverage "with respect to liability *arising out of* operations performed for the additional insured by the named insured"), with *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F.Supp. 1292 (W.D.Pa.1976) (additional insured coverage applied only when negligence of named insured directly caused additional insured's loss, because additional insured endorsement was expressly limited to "*acts or omissions of the named insured* in connection with the named insured's operations at the applicable location").

Insurers should carefully consider the language of each additional insured endorsement and how it will relate to the remainder of the policy. If the underwriting intent is to provide coverage for only a limited class of risks or occurrences — *i.e.*, something narrower in scope than the coverage provided to the named insured under the full policy — then that limitation should be clearly and unequivocally expressed in the endorsement or it may not be honored by the courts. A recent decision from Illinois, *National Union Fire Ins. Co. v. Glenview Park District*, 230 Ill.App.3d 578, 594 N.E.2d 1300 (1st Dist.), *lve to appeal granted*, 146 Ill.2d 632, 602 N.E.2d 458 (1992), illustrates that at least some courts are prepared to honor clear, unambiguous limitations in additional insured endorsements.

In *National Union v. Glenview Park*, National Decorating Service entered into a written

contract with Glenview to refurbish an ice rink. In accordance with the construction contract, National Decorating maintained a policy of public liability insurance with stipulated limits, and had its primary insurer (National Union) add Glenview as an additional insured under the policy. During the policy period, one of National Decorating's employees was seriously injured while working on the Glenview Park ice rink job. A personal injury action against Glenview ensued.

National Union undertook the defense of Glenview under a reservation of rights, then brought a declaratory judgment action, alleging that the terms of its primary policy expressly exclude coverage for damages arising from the negligence of its additional insured, Glenview. As of this writing the case is on appeal to the Illinois Supreme Court, but so far both the Circuit Court of Cook County and the Appellate Court of Illinois have agreed with National Union. (A decision from the Illinois Supreme Court is not expected before fall, 1993.)

The additional insured endorsement to National Union's policy reads:

The Persons Insured provision of this policy is amended to include as an Insured any Persons or organization whom the Named Insured has agreed by contract, either oral or written, prior to loss, to include as an Insured with respect to operations performed by or on behalf of the Named Insured. *Such Additional Insureds, and the insurance afforded in paragraph A above shall not apply to damages arising out of the negligence of the Additional Insured(s).*  
*Id.*, 230 Ill.App.3d at 581, 594 N.E.2d at 1302.

Glenview argued that the italicized limitation in the endorsement was ambiguous, that it rendered the policy meaningless as to Glenview, and that it was void and unenforceable as against public policy. Both the trial and intermediate appellate courts summarily rejected those arguments. *Id.*, 230 Ill.App.3d at 583, 594 N.E.2d at 1303. Glenview also argued that since the certificate of insurance it received made no mention of the limitation in the policy's additional insured

endorsement, that limitation should not be applied to it. The courts have so far rejected that contention as well, since the certificate of insurance contained appropriate language warning Glenview that the certificate was not part of the policy and conferred no rights on Glenview, thereby clearly communicating that it was incumbent on Glenview to look to the actual policy language for its detailed provisions. *Id.*, 230 Ill.App.3d at 585, 594 N.E.2d at 1304.

In public statements concerning the case, Glenview's representatives have argued that National Union's limitation on its additional insured coverage renders the policy "worthless" to additional insureds, because it limits coverage to "rare" cases of vicarious liability and "essentially deprives an insured of any coverage the policy purports to provide." Fletcher, *Contractor's policy excludes cover for additional insured*, BUSINESS INSURANCE, January 18, 1993, at 25, col. 4. National Union, on the other hand, argues that, "Glenview's conclusion that the insurance bargained for was not intended to be limited to such a slight risk is directed at the wrong party. Glenview's dispute is not with National Union, but [National Decorating]." *Id.*

Notwithstanding Glenview's public litigation posture, it is by no means unheard of or new-fangled for an insurer in such situations to try to limit its potential liability to additional insureds in that way. See, e.g., COUCH ON INSURANCE 2D (Rev. ed. 1982) 44:385 and cases cited therein. Indeed, numerous ISO additional insured endorsement forms contain a variety of limitations and exclusions intended to restrict the coverage afforded additional insureds. One of them (CG 20 09 Additional Insured — Owners, Lessees, or Contractors (Form A)) contains a number of exclusions, the most significant of which excludes coverage of bodily injury or property damage arising out of any act or omission of the additional insured(s) or any of their employees, other than general supervision of

work performed for the additional insured(s) by the named insured. Malecki, D.S., and Flitner, A.L., *COMMERCIAL GENERAL LIABILITY* (4th ed., 1992), p. 85-87.<sup>1</sup>

The kind of coverage dispute exemplified by *National Union v. Glenview Park, supra*, is a predictable result of the fact that construction contracts are negotiated and written separately from, and between different parties than, their related insurance coverages. In negotiating the construction contract, it is often the intent of the property owner or lessee to shift away from itself and its insurance, and onto the construction contractors and their insurance, all risk of property damage and bodily injury arising from or related to the work. Construction contractors, notoriously hungry for work, are often willing to accept those risks as a condition of getting the job, and to execute broad indemnification agreements as part of the construction contracts. So far, so good.

However, when the contractors go to fulfill their contractual obligations to have the owner named as an additional insured under the contractors' policies, things start to break down. Instead of a seamless process of contract negotiation and formation, involving the same small number of parties in a coordinated transaction, each contractor will go separately to its own broker to get an additional insured endorsement, and each broker will go to its appropriate market for such an endorsement. The brokers and insurers are seldom, if ever, given copies of the construction contracts, or required to comply with detailed policy specifications, or asked to adopt or ratify the contractual intent of the owner and contractor. Instead, they are typically just asked to issue an additional insured endorsement, naming either specific parties or a class of parties as additional

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<sup>1</sup> An alternative version of the endorsement, minus that exclusion, is contained in form CG 20 10 Additional Insured — Owners, Lessees, or Contractors (Form B). *Id.*

insureds. The resulting absence of shared intent between the owner, contractors, and insurers is an invitation to misunderstandings. The same underlying elements of potential uncertainty and misunderstanding are present with respect to additional insured endorsements often negotiated for insureds' clients, customers, distributors, vendors, managers, lessors, and other commercial relationships.

To make matters worse, different contractors' policies may or may not provide contractual coverage for the liability assumed in the indemnity clauses of their construction contracts, or the construction contracts might lack an enforceable indemnity clause. Even if there are indemnity clauses and contractual coverage, there are often disputes about their exact significance in different factual scenarios. In addition, many underwriters seem to assume that their additional insured endorsements provide coverage for only the *vicarious* liability of the additional insured, but that limitation is often not expressed clearly (or at all) in the actual language of the endorsement. In the event of a substantial claim, the additional insured may be disconcerted to find that an insurer does not believe it has written the kind of coverage the additional insured thought it had bargained for. The insurer's claims personnel may be just as irritated to find that the additional insured demands a lot more coverage than the insurer ever agreed or was asked to provide, or for which it charged a premium. That kind of confused scenario is a coverage lawsuit just waiting to happen.

What is to be done? For anyone currently involved in coverage litigation similar to the two cases discussed above, the immediate and obvious goal is to win the case. The longer-range and more cost-effective goal, however, should be to avoid such disputes in the future.

Risk managers who wish to avoid such disputes and be sure of just what protection they have

as additional insureds, should get, review, and save copies of their contractors' actual insurance policies and endorsements, and not content themselves with certificates of insurance. That may be a burdensome and expensive exercise, particularly for busy organizations with many contractors, but it provides a much higher level of certainty than does collecting certificates of insurance.

In addition, organizations requiring that they be named as additional insureds under their contractors' policies might provide contractors with detailed insurance specifications and require them to provide those specifications to their brokers and insurers before binding additional insured coverage. One potential problem with that approach is that some underwriters may be reluctant to comply with such specifications, or compliance may retard issuance of the coverage in situations where the speedy commencement of work is important to the additional insured. Requiring contractors to buy additional insured coverage that complies with the additional insured's specifications might also end up costing contractors a significant amount of money, which they would then seek to pass back to the additional insured.

In some instances, risk managers might even want to have direct discussions with contractors' brokers and insurers, to make sure their coverage intent is clearly understood and shared by all participants.

Contractors who are frequently asked to provide additional insured coverage for their customers or clients should price such coverage before bidding on work, so they do not run into unpleasant surprises in the form of unexpectedly high additional premium for such coverage after they are locked into a bid. Contractors should also try to work with their customers to establish uniform wording for additional insured endorsements, so they do not repeatedly present their brokers

and insurers with different, perhaps inconsistent, “required” additional insured language from each of many customers.

Insurers intending to limit their coverage of an additional insured must ensure that the additional insured endorsement does so in clear and appropriate language: *e.g.*, phrases like “arising out of” and “in connection with” should always excite an underwriter’s close attention. Underwriters should also avoid playing cut-&-paste and mixing endorsements from old policy forms, or from different lines of business, or from different companies’ forms. Underwriters should also think twice before issuing additional insured endorsements as a routine courtesy to policyholders or producers: such endorsements may embody substantial additional risk that should be reflected in additional premium.

As additional insured endorsements proliferate in a variety of commercial contexts for the foreseeable future, so will disputes between insurers and additional insureds. The best time to worry about them is before, not after, a loss.