



2023 Insurance Roundtable

May 31 – June 2, 2023

SHIFTING THE RISK: ADDITIONAL INSURED AND INDEMNITY

Coverage implications and overlapping concerns; how to navigate when there are multiple insureds; claims for indemnity and defenses to those claims; and inadequate limits will be discussed during this roundtable. This session will also address hold-harmless and indemnification agreements, as well as the obligation to procure and maintain insurance.

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The Basics

Typical Scenario

Liability policies where there is an underlying agreement between the named insured and another party related to the named insured's work, e.g., subcontractors, vendors.

Purpose

At minimum, additional insured status provides that party with coverage for vicarious liability. Also provides the additional insured with direct rights under the other party's insurance policy.

The Underlying Agreement

Indemnity Clause

Agreement to Procure Insurance

Types of Additional Insureds

Named/Scheduled

Identified by name in an endorsement.

Blanket

Identified by category.

Indications of Additional Insured Status

The additional insured endorsement

ISO forms or manuscript.

Certificates

Form documents, typically prepared by a broker or agent, and generally issued for informational purposes only. Generally speaking, the certificate does not modify policies.

Common Issues

Whose fault is being insured?

Direct Liability vs. Vicarious Liability

Anti-Indemnity Statutes

Generally speaking, an "anti-indemnity statute" prevents contracting parties from entering into an agreement whereby Party A agrees to indemnify Party B for Party B's negligence. A majority of states have some version of an anti-indemnity statute.

Problematic Language: "by or on behalf of", "arising out of" and "with respect to."

These have been interpreted broadly by most courts. The most recent ISO forms have replaced these phrases

Shifting the Risk: Additional Insureds & Indemnity

with “caused in whole or in part by” “your work” or “your operations.” Coverage under the ISO AI forms has evolved over time, becoming progressively narrower in scope.

“Completed Operations” vs. “Ongoing Operations”

ISO Form CG 20 10 12 19 is the latest ongoing operations endorsement. It excludes coverage for the additional insured's sole negligence but goes on to state that it:

- Applies only to the extent permitted by law;
- Will not be broader than that which [the Named Insured] is required by contract to provide; and
- Will not pay more than the amount required by contract.

ISO CG 20 37 12 19 provides additional insured status with regard to completed operations and has same limitations.

Overlapping Coverages

Two or more policies covering the same risk.

Comparison of “Other Insurance” Clauses

Generally, where policies provide coverage for the same interest and against the same risk, concurrent coverage exists, and two or more primary insurers will be held to be co-insurers. Where policies have matching "other insurance" clauses, which allow for contribution by "equal shares," insurers will be required to contribute equally to the defense and indemnity of their mutual insured. Where "other insurance" clauses match, and there is no "equal shares" provision, courts will typically find the "other insurance" clauses to be "mutually repugnant" and interpret policies to require a pro rata allocation based on respective policy limits.