



# Shifting the Risk: Additional Insureds and Indemnity

*August 6, 2024*





# PRESENTERS



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# THE BASICS



# The Typical Scenario

- Liability policy where there is an underlying agreement between the named insured and another party calling for additional insured status
- Two paths to indemnity — contractual and additional insured
  - This can create tension between the named insured and its carrier when tenders are issued
  - Best practices

# The Purpose

- At minimum, additional insured status provides the party with coverage for vicarious liability
- It also provides the additional insured with policy rights
  - Defense
  - Indemnity
  - And most (if not all) rights afforded to the named insured under the policy
    - NOTE: Most endorsements expressly limit the policy benefits available to an additional insured

# The Underlying Agreement

- The Underlying Agreement is usually what facilitates additional insurance
- In addition to specifying the types of insurance which must be procured by the contracting party, the provision will indicate something to the effect of “Party A shall name Party B as an additional insured on its policies of insurance herein described.”



# The Underlying Agreement

- Some jurisdictions allow for limitations contained in the Underlying Agreement to be interpreted as though they are in the policy (depending on the nature of the additional insured endorsement language)
- California and Texas are examples
  - *The Hartford v. State of California*, 41 Cal.App.4th 1564, 1567 (2003) (a contractual provision providing AI coverage “only insofar as the operations under this contract are concerned” applied to scope of defense/indemnity for additional insured)
  - *In re Deepwater Horizon*, 470 S.W.3d 452, 468-469 (Tex. 2015) (holding “Texas law has long allowed insurance policies to incorporate other documents by reference, and policy language dictates the extent to which another document is so incorporated”)

# Types of Additional Insureds

- Expressly named Insureds
  - Procured by seeking a policy endorsement from an insured's broker to expressly name a party as an additional insured
  - Certificates of Liability are not endorsements!
- Blanket Additional Insureds
  - "WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you."



# Pop-Up Question

- **What are the two types of additional insured endorsements?**
  - A.** Blanket Endorsements and Express Endorsements
  - B.** Subrogee endorsements and subrogor endorsements
  - C.** Indemnatee endorsements and indemnitor endorsements
  - D.** Insured endorsements and insurer endorsements

# COMMON ISSUES IMPLICATED BY ADDITIONAL INSURANCE





# Whose Fault is Being Insured?

- Direct Liability v. Vicarious Liability
- Anti-Indemnity Statutes
  - Prevent contracting parties from entering certain types of indemnity agreements
  - Most States have some form of an anti-indemnity statute
    - Some bar indemnity for sole negligence
    - Some bar indemnity for sole *or* partial fault (oftentimes in public works projects)
    - Some expressly apply to additional insurance

# How broad is the Additional Insurance Coverage?

- Older Insurance Services Offices' endorsements used phrases like “by or on behalf of,” “arising out of,” or “with respect to” the named insured’s scope of work
  - These were interpreted to provide *broad* coverage for additional insureds
- Newer ISO endorsements narrow the scope using phrases like “caused in whole or in part by [the named insured]....”



# Scope of AI Endorsements

- Who qualifies as an Additional Insured?
  - Limited Liability Companies – members or managers?
  - Corporations – Executives, board members, shareholders?
  - Partnerships – Named Partners?

# “Supplementary Payments” Provision

- If the policy contains no AI Endorsement (blanket or express), what other potential coverages exist for indemnitees?
  - Supplementary Payment provision catch-all
  - Erosion of limits by defense costs (i.e. “burning limits”)



# “Completed Operations” versus “Ongoing Operations”

- Completed Operations Endorsements
  - Intended to provide coverage for property damage falling within the “products completed operations hazard” of a CGL policy
- “Ongoing Operations” Endorsements
  - Intended to cover only those property damages arising from operations that were in the process of occurring at the time the damage occurred

# The Decades Long Battle of “Ongoing Operations”

- ISO form CG 20 10 10 93 *attempted* to limit additional insured coverage to avoid claims which arose *years* after a project was completed using the following phrasing:

“WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.”

**Spoiler alert:** it did not achieve its intended goal



# Majority Rule

- Most Courts interpreting the endorsement (and the ones that followed) concluded there *could* be a potential for coverage even when damages manifested years after a project was finished
  - Because of the possibility the damages happened during the “ongoing operations” but simply did not get discovered
  - *McMillin Management Services, L.P. v. Financial Pacific Ins. Co.*, 17 Cal.App.5th 187 (2017)
    - Great summary of the history of the “ongoing operations” dispute
    - But not a great opinion for insurers!

# Minority Rule

- A minority of Courts held the endorsement accomplished what it set out to do
  - *Noble v. Wellington Assocs.*, 145 So.3d 714, 720 (Miss.App. 2013) (Holding “endorsement did not cover property damage manifesting itself after [subcontractor named insured] stopped working on the site”)
  - *Weitz Company, LLC v. Mid-Century Insurance Company*, 181 P.3d 309 (Colo. App. 2007) (Because the contractor's liability for the water intrusion damage arose out of the subcontractor's completed operations—the work was completed five months before the intrusion—rather than its ongoing operations, there was no coverage under the additional-insured endorsement)
  - These opinions focused on when the *liability* arose, as opposed to when the damage may have occurred

# The Most Recent Completed Operations Endorsement

- CG 20 39 12 19 (Completed Operations) has some interesting additions
  - “Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.”
  - The most we will pay on behalf of the additional insured is the amount of insurance: 1. Required by the contract or agreement you have entered into with the additional insured; or 2. Available under the applicable limits of insurance....



# The Most Recent “Ongoing Operations” Endorsement

- CG 20 33 12 19 utilizes new language :
- “A person’s or organization’s status as an additional insured under this endorsement ends when your operations for that additional insured are completed.”
  - *Zurich American Insurance Company v. Ledcor industries (USA), Inc.*, 8 Was.App.2d 1002, (3/18/2019 Wash. Ct. App.) (holding the policy unambiguously provides “a person’s or organization’s status as an additional insured under this endorsement ends when your operation for that additional insured are completed.” Consequently, Ledcor has not demonstrated that it qualifies as an additional insured for ongoing operations under either policy.”)
  - The only case that could be located interpreting the clause (unpublished)

# Overlapping Coverages and the Contributions Methods

- When there are multiple coverages, Courts generally look to the “other insurance” provisions
- “Primary and non-contributory” endorsements? Contract language?
- Equitable contributions formulas:
  - “time on risk,” equal shares, premiums collected, etc.

# QUESTIONS?





**THANK YOU! If you have any questions, please contact one of the presenters**



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