

# The Additional Insured Endorsement

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## Introduction

A typical construction contract almost always contains a clause providing for the indemnification of the general contractor by the subcontractor for all claims, damages or losses arising out of the performance of the subcontractor's work. The construction contract also typically requires the subcontractor to purchase a liability insurance policy protecting the general contractor from all claims which may arise out of or result from the subcontractor's operations.

## Named Additional Insured

The subcontractor, to fulfill the obligations of the contract, may secure an "Additional Insured Endorsement" to its existing Commercial General Liability policy specifically identifying the general contractor as an insured under the policy. A certificate of insurance is also usually provided to the general contractor reciting that it is an additional insured. However, all additional insured endorsements are not created equal. It is the actual wording or lack of wording in the construction contract that requires the subcontractor to list another organization, entity or *general contractor* together with language in the additional insured endorsement that is the first step in determining who is actually covered in a dispute.

Consider the following language in the Insurance Services Office (ISO) clause:

**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.<sup>1</sup>

The intent of the above endorsement is to provide insurance coverage for the "additional insured" (the general contractor) only in those situations where the additional insured may have liability arising out of the named insured's negligence at the construction site. A clause written in this form is not intended to indemnify the additional insured for claims arising out of the additional insured's own negligence.

## Blanket Additional Insured

Another form of an Additional Insured Endorsement is called Automatic Additional Insureds-Construction Contracts:

Any person(s) or organization(s) (hereinafter called "Additional Insured") with whom you **agreed in**

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Any claim dispute in first-party coverage typically involves only the policyholder and insurer, and any covered payment by the insurer would be made directly to the insured.

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**a written construction contract** to name as an insured is an insured with respect to liability **arising out of ongoing operations performed by you or on your behalf** on the project specified in the construction contract, including acts or omissions of the Additional Insured in connection with the **general supervision** of such operations.<sup>2</sup>

This type of Additional Insured Endorsement specifically extends coverage to the additional insured for those lawsuits alleging negligence by the additional insured in connection with the general supervision of the construction site.

Most courts have interpreted the foregoing additional insured endorsement and similar versions quite broadly in construing phrases "arise out of operations" or "arising out of your ongoing operations". Coverage was generally found to apply to the additional insured even if the additional insured's negligence was the sole cause of the injury – it was not necessary for the named insured to have caused the accident. The named insured's work or operations need not be the proximate cause of the loss to satisfy the coverage condition. Fault is immaterial to the coverage determination. "But for" causation is enough to provide coverage to the additional insured.

Broadly or vaguely worded additional insured endorsements have surprised many insurers, who have learned that coverage extended by additional insured endorsements was not as limited as they thought. The language of the endorsement together with other policy provisions defines the extent to which the policy provides coverage for an additional insured. If 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 only vicariously liable, that limitation should be clearly and unambiguously expressed in the endorsement.

## 2004 ISO Revision

In 2004 the ISO form was changed to eliminate coverage for the additional insured's sole negligence, but provides

coverage for the additional insured's contributory negligence.

**Section II-WHO IS AN INSURED** is amended to include as an additional 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, 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
3. **At the location(s) designated above.**<sup>3</sup>

This version provides coverage to the additional insured that is broader than just vicarious liability arising out of acts of the named insured. It provides coverage for the additional insured but only with respect to liability for bodily injury, property damage, personal injury or advertising injury caused in whole or in part by the named insured's acts or omissions or those acting on behalf of the additional insured. The revision eliminates the phrase "arising out of" and replaces it with a **fault based** standard. The language of the 2004 revision requires fault - a casual connection between the named insured's acts or omissions and the additional insured's liability.

In sum, if the additional insured is concurrently or jointly negligent along with the named insured (or others acting on behalf of the named insured), the 2004 revised additional insured endorsement will provide coverage to the additional insured **to the extent** of the additional insured's liability. The additional insured does have coverage for its own negligence, provided it is in conjunction with the named insured's negligence. For example, a subcontractor's employee is injured on a construction site and sues the general contractor for failure to provide a safe workplace. Courts construing the old form held that "but for" the injured plaintiff's employment with the named insured, the accident would not have happened. The employment relationship itself satisfies the coverage condition. But not under the 2004 ISO form. Now, the general contractor will have to establish that there is at least a possibility that its liability to the subcontractor's employee arises out of his employer's (the named insured's) acts or omissions in order for the additional insured (general contractor) to be covered.

#### Conclusion

Additional insured endorsements differ from each other and reflect a great discrepancy in the breadth of coverage provided to additional insureds. The issues that underlie coverage are numerous and complex. Many ISO additional insured endorsement forms contain a bevy of limitations and exclusions intended to restrict coverage afforded additional insureds.

Broadly or vaguely worded additional insured endorsements have surprised many insurers, who have learned that coverage extended by additional insured endorsements was not as limited as they thought.

No matter what version of the additional insured endorsement you are dealing with, it is absolutely necessary for counsel to read the construction contract, insurance contract, certificate of insurance and the case law of the jurisdiction that will be applied by the court in deciding the coverage dispute.

Do not rely on certificates of insurance naming the client as an additional insured, because they do not create coverage.

Ask for copies of the subcontractors insurance policies. Insurance policies are contracts and unless you read them carefully you will not focus on the important issues of your case.

Moreover, there is as yet scant case law on the 2004 ISO Additional Insured Endorsement.

How to determine if and when the general contractor - additional insured is entitled to a defense by the subcontractor-named insured's insurance carrier is a topic for another day. Stay tuned. ■

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#### Endnotes

- 1 ISO Coverage Form CG 20 10 10 93.
- 2 ISO Coverage Form CG 799 (7-87) emphasis added.
- 3 ISO Coverage Form CG 20 10 emphasis added.

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