

Letter from the Insurance Company Team

FIRST THINGS FIRST

“Insureds may wish, or be contractually obligated, to extend their insurance coverage to other individuals or entities,” commonly referred to as additional insureds. In fact, in certain industries, additional insured provisions in contracts “are as frequent as snow falling during an Iowa winter.”

Coverage for additional insureds is typically provided in one of two ways. First, a specific endorsement may expressly name the individual or entity as an additional insured on the policy. Second, a blanket additional insured endorsement may provide coverage to a limited category of individuals or entities without having to be expressly identified.

Generally, “[t]he additional insured’s interest in the policy is regarded as coextensive with that of the named insured unless the policy includes a severability of interests clause.” Thus, “the additional insured enjoys the full benefits of the policy despite any restrictions contained in a separate contractual agreement with the insured, as well as being subject to all policy exclusions.”

The articles in this issue highlight the nuances and complexities of additional insured coverage. Is coverage limited to vicarious liability for liability arising out of the acts or omissions of the named insured? What is the impact on coverage of a severability of interests clause? What if the insured contracts to procure coverage for a third party but ultimately purchases coverage that is less than what is contracted for? The articles herein will provide you with a “FirstLook” at common additional insured issues.

¹ “Additional insureds”, 9 Couch on Ins. § 126:7.

² Terry J. Galganski, Andrea G. Woods, V. Samuel Laurin, Y. Lisa Colon-Heron, A Construction Lawyer’s Top 10 Additional-Insured Considerations, *Constr. Law.*, Fall 2010, at 5.

³ “Additional insureds”, 9 Couch on Ins. § 126:7.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

INSIDE THIS EDITION:

The Issue About Additional Insured Issues...



IN THIS ISSUE

Limited To Vicarious Liability?	Page 2
Contract Language v. Policy Language	Page 5
Severability of Interests Clause	Page 7

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Is Coverage for Additional Insureds Limited to Vicarious Liability for Liability Arising Out of the Acts or Omissions of the Named Insured? By Meredith J. Risati

An issue that arises with respect to coverage for an additional insured under a named insured's CGL policy is whether the coverage for the additional insured is limited to the additional insured's vicarious liability for the acts or omissions of the named insured.¹ While many insurers claim that coverage is limited to vicarious liability, those securing additional insured status often contend that coverage extends beyond vicarious liability losses.² In support of their position, insurers argue that each person or organization should remain responsible for their actions and it would be against good business practice to pay on behalf of an additional insured if that person or organization contributed in any way to injury or damage.³ Therefore, insurers argue that coverage should only be extended to an additional insured on someone else's CGL policy if the additional insured is found vicariously liable, i.e. the additional insured has liability imposed on it not for its own acts, but for the acts of others.⁴

In evaluating a claim involving an additional insured seeking coverage under the named insured's policy, claim representatives and attorneys should carefully review the specific additional insured endorsement to determine the specific form involved.⁵ There are at least six ISO forms that can be used with the CGL policy with regard to the addition of an insured.⁶ The two most prominent additional insured endorsements are Form A (CG 20 09) and Form B (CG 20 10).⁷ The ISO dropped the Form A/Form B distinction in 1997, and replaced Form A with form CG 20 09 and Form B with form CG 20 10.⁸ The distinction between these two forms can have a significant impact on a court's determination as to whether there is coverage for the acts or omissions of the additional insured under the additional insured endorsement.

The Form A (CG 20 09) additional insured endorsement specifically provides that the additional insured is covered for both: "(1) the operations performed for the additional insured by the named insured, and (2) the acts or omissions of the additional insured in connection with his or her supervision of the named insured."⁹ There is an exclusion in Form A barring coverage for "any bodily injury or property damage arising out of the act or omission of the additional insured, other than his or her 'general supervision' of the additional insured."¹⁰ However, the term "general supervision" is not defined and, therefore, remains open to broad interpretation, as "[m]any independent acts of the additional insured can reasonably be construed to fall within the scope of 'general supervision.'"¹¹

The Form B (CG 20 10) additional insured endorsement adds the additional insured as an "insured" under the policy "with respect to liability 'arising out of' operations performed for the additional insured by or on behalf of the named insured."¹² The majority of courts have found that under a Form B endorsement, "an additional insured has coverage even if the injury to the named insured's employee was caused by the additional insured's sole negligence."¹³ Therefore, despite insurers' arguments that additional insured coverage should not extend further than claims where the additional insured is vicariously liable for the actions of the named insured, numerous courts have interpreted the language as extending coverage much further to provide coverage for the additional insured where its own negligence contributed to the accident.¹⁴ Courts following this interpretation have been reluctant to narrowly construe additional insured endorsement language, specifically the phrase "arising out of" the named insured's work.¹⁵ Instead, courts commonly construe this language broadly, giving it a causal interpretation.¹⁶ Therefore, in those cases, the courts have found coverage where there is some causal relationship between the named insured's work and the accident, no matter who was actually at fault for the casualty.¹⁷ This interpretation has led some commentators to note that "arising out of" language "has been construed to be so broad as to cover virtually anything having the least bit to do with the named insured's work."¹⁸

The Supreme Court of Appeals of West Virginia has broadly interpreted similar policy language to provide coverage for an additional insured's negligent acts. In *Elk Run Coal Co., Inc. v. Canopus U.S. Ins., Inc.*,¹⁹ the policy at issue stated:

The insurance provided to these additional insureds is limited as follows: 1. That person or organization is an additional insured only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused, in whole or in part, by: a. [The named insured’s] acts or omissions; or b. The acts or omissions of those acting on [the named insured’s] behalf.

In *Elk Run*, the additional insured sought coverage under the named insured’s CGL policy after an employee of the additional insured accidentally flipped the named insured’s coal truck while loading it with coal using a front-end loader, causing damage to the named insured’s coal truck and injuring an employee of the named insured who was inside the coal truck at the time.²⁰ The court found that, because the additional insured was no longer contractually obligated to supply a front-end loader with operator to assist the named insured, but nevertheless, continued to provide this service, the additional insured was “acting on [the named insured’s behalf],” and was therefore covered by the terms of the policy.²¹ Thus, although the insurer argued that there was no coverage for the sole negligence of the additional insured, the court broadly interpreted the language of the policy to provide coverage for the additional insured.²²

Another case arising out of the Southern District of West Virginia illustrates the broad interpretation that courts will give to “arising out of” language in an additional insured endorsement. In *Norfolk Southern Ry. Co. v. National Union Fire Ins. of Pittsburgh, PA*,²³ an additional insured sought coverage under the named insured’s policy after employees of the additional insured accidentally caused a derailment of a train at a coal loading facility, which then hit a support beam, causing the facility to collapse. The court held that, for purposes of determining whether there was coverage for the additional insured under the named insured’s policy, the derailment “arose out of the [named insured’s] ‘work’” as defined in the policy because a derailment was “foreseeably identifiable” with the named insured’s work as it occurred at the named insured’s facility, during the named insured’s operations, and on property leased by the named insured.²⁴ Furthermore, the court noted that at the time that the train derailed, the additional insured was repositioning it at the additional insured’s request.²⁵ Therefore, the court held that the derailment “arose out of the [named insured’s] work, or, at the very least, arose out of operations performed on [the named insured’s behalf].”²⁶

The Fourth Circuit Court of Appeals has also favored broad interpretation of additional insured endorsements, observing that the language of the policy at issue “plainly lack[ed] the vicarious liability limitation that the [insurer] seek[s] to impose.” *Capital City Real Estate LLC v. Certain Underwriters at Lloyds of London, Subscribing to Policy Number: ARTE018240*.²⁷ Noting that the additional insured endorsement was devoid of language concerning vicarious or derivative liability, the court stated that “if the parties had intended coverage to be limited to vicarious liability, language clearly embodying that intention was available.”²⁹

Insurers have had more luck, although not much more so, in arguing that the Form A (form CG 20 09) is restricted to vicarious liability.³⁰ For example, in *Liberty Mutual Ins. Co. v. Capeletti Bros. Inc.*,³¹ a general contractor sought coverage under its subcontractor’s additional insured endorsement as a result of a claim brought by a motorist who was injured while driving through a construction area. The motorist claimed that the general contractor was negligent in causing the accident by failing to follow standard safety protocols to ensure the safety of motorists driving through the construction zone.³² The court held that the plain meaning of the policy’s language excluding coverage for “bodily injury ... arising out of any act or omission of the additional insured(s) ... other than the general supervision of work performed for the additional insured(s)” precluded coverage for the general contractor for its acts of negligence that were unrelated to its supervision of the subcontractor, i.e. its own independent acts of negligence.³³

Additionally in *National Union Fire Ins. Co v. Nationwide Ins. Co.*,³⁴ a general contractor was denied additional insured coverage under the named insured plumbing subcontractor’s CGL policy for a claim asserted against the general contractor by one of the subcontractor’s employees who was injured after slipping and falling on a wet floor. The policy language limited coverage to situations where the additional insured was “held liable” for the named insured’s acts or omissions.³⁵ The court equated “held liable” with “vicarious liability,” and, therefore, because the general contractor’s liability did not arise out of its supervision of the subcontractor’s work, the general contractor was not afforded coverage

under the additional insured endorsement.³⁶

This minority of courts that hold that additional insured endorsements only provide coverage for vicarious liability is continuously shrinking.³⁷ Due to this expansive interpretation of additional insured endorsements, “many general contractors essentially are being handed coverage under their subcontractors’ policies.”³⁸ By “[p]ushing all liability onto the subcontractor, which is precisely the result of these expansive additional insured endorsement interpretations,” the least able party is forced to “bear the cost for another’s negligence, and is encouraging no one to take any steps to prevent future accidents.”³⁹ The inequities of this situation become even more apparent when considering that the additional insureds, who may undisputedly be solely at fault, do not have to pay anything as a result of their negligence, including the named insured’s deductible or the increased insurance premiums that the named insured will potentially face due to negative risk experience ratings.⁴⁰

While one solution to this problem is ensuring that more limiting language is used in the additional insured endorsements, this only solves half of the problem, as courts have disregarded exclusionary language in the past.⁴¹ Therefore, the true solution to this problem really lies with the courts, which have the power to apply the plain language of policies to allow coverage for vicarious liability only.⁴²

¹ Scott C. Turner, *Is the Additional Insured’s Coverage Limited to Vicarious Liability from the Named Insured?*, *Insurance Coverage of Construction Disputes*, §42.4 (2d ed. June 2017 update).

² Philip L. Bruner & Patrick J. O’Connor, Jr., *Slippery Scope of Additional Insured Coverage*, *Bruner & O’Connor on Construction Law*, § 11:333 (Aug. 2017 update).

³ *Id.*

⁴ Craig F. Stanovich, *Drafting Risk Transfer and Insurance Requirements in Business Contracts: Strategies for Mitigating Risk – Additional Insured Endorsements – A Potential Minefield (Part 2)*, *The American Law Institute Continuing Legal Education ALI-CLE Course Materials* (Jan. 27, 2015).

⁵ Pat Magarick & Ken Brownlee, *Additional Insureds*, 2 *Casualty Insurance Claims*, § 26:43 (May 2017 update).

⁶ *Id.*

⁷ Scott C. Turner, *Coverage for Additional Insured’s General Supervision of Named Insured’s Operations Under Both Forms*, *Insurance Coverage of Construction Disputes*, § 42:5 (2d ed. Nov. 2017 update).

⁸ *Under ISO Form B Additional Insured Endorsement, the Additional Insured Has Coverage for an Injury to the Named Insured’s Employee Caused by the Additional Insured’s Sole Negligence – Coverage Not Limited to Additional Insured’s Vicarious Liability*, 23 *No. 5 Ins. Litig. Rep.* 151 (2001) (hereinafter “ISO Form B”).

⁹ Turner, *supra* note 1, at §42.4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ ISO Form B, *supra* note 8.

¹⁴ Jess B. Millikan, *The Law of Unintended Consequences: Legal Issues Involving Additional Insured Endorsements*, 15 *U.S.F. Mar. L. J.* 299, 304 (2003); see also Philip L. Bruner & Patrick J. O’Connor, Jr., *Coverage for Additional Insured’s Own Negligence – Broad View*, *Bruner and O’Connor on Construction Law*, § 11:332 (August 2017 update).

¹⁵ Bruner & O’Connor, *supra* note 14, at § 11:332.

¹⁶ *Id.*

¹⁷ Millikan, *supra* note 14, at 304; see also Bruner & O’Connor, *supra* note 14, at § 11:332.

¹⁸ Trisha Strode, *From the Bottom of the Food Chain Looking Up: Subcontractors and the Full Costs of Additional Insured Endorsements*, 25 *SUM Construction Law* 21, 23 (2005); see also Turner, *supra* note 1, at §42.4 (“The ‘arising out of’ language is so broad and general that virtually anything having to do with the name insured’s work falls within the scope of Form B (CG 20 10).”).

¹⁹ 235 *W. Va.* 513, 519, 775 *S.E.2d* 65, 71 (2015).

²⁰ *Id.* at 516, 775 *S.E.2d* at 68.

²¹ *Id.* at 520, 775 *S.E.2d* at 72.

²² *Id.*

²³ 999 *F. Supp. 2d* 906, 909 (S.D. W. Va. 2014).

²⁴ *Id.* at 914.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 788 *F.3d* 375, 380-81 (4th Cir. 2015).

²⁸ The policy at issue provided coverage for the contractor as an additional insured, “but only with respect to liability for . . . ‘property damage’ . . . caused in whole or in part by: 1. [the subcontractor’s] acts or omissions; or 2. [the] acts or omissions of those acting on [the subcontractor’s behalf; in the performance of [the subcontractor’s] ongoing operations[.]” *Id.* at 377. The court identifies this endorsement as the 2004 revised version of Form B – Form CG 20 10 07 04. *Id.* at 380.

²⁹ *Id.* at 380.

³⁰ Bruner & O’Connor, *supra* note 14, at § 11:332.

³¹ 699 *So. 2d* 736, 737 (Fla. Dist. Ct. App. 1997).

³² *Id.*

³³ *Id.* at 738.

³⁴ 82 *Cal.Rptr.2d* 16 (Cal. Ct. App. 1999).

³⁵ *Id.* at 22.

³⁶ Id.

³⁷ Strode, *supra* note 18, at 21, 27.

³⁸ Id.

³⁹ Id.

⁴⁰ Id. at 25, 27.

⁴¹ Id. at 27-28.

⁴² Id.

Coverage Promised in a Contract to Procure Insurance v. Coverage Provided by the Policy By: Devon J. Stewart

A typical scenario seen by carriers, particularly in construction cases, arises out of a tender from someone other than the insured named in a lawsuit involving bodily injury or property damage who alleges to be entitled to coverage. For example, a construction employee working for a subcontractor may have been injured in an accident on the job site caused by an accident involving equipment under the project owner's control, and the employee brings suit against the project owner. The project owner then asks the subcontractor's insurer to provide a defense and indemnity for the employee's claim. This request is usually tendered on the basis that the insured's policy names this third party as an additional insured, or because the insured's contract required the insured to indemnify the third party, and it is asserted the policy covers the insured's contractual liability to indemnify the third party.

For insurance carriers faced with a claim to provide indemnity to a third party, coverage questions are often complex. This article examines two typical sources of the insurer's duty to provide coverage to a third party and a case law scenario involving a conflict between policy provisions, which ultimately turns on a conflict between the indemnity required under the insured's contract with the third party v. what the policy actually provides. In that regard, there are two types of policy provisions that may give rise to an insurer's obligation to provide coverage for someone the insured either agreed to procure coverage for or indemnify, or both: (1) policy language regarding coverage for a named additional insured, and (2) policy language regarding coverage for a third party the insured is contractually liable to indemnify.

(1) Coverage for a named additional insured

Contract provisions may require one party to purchase coverage for another as an additional insured. Such provisions are common in the construction industry, requiring subcontractors to name general contractors or project owners as additional insureds on subcontractor insurance policies.¹

As additional insured provisions typically do not refer to or incorporate the terms of the insured's contracts with other parties, the analysis of coverage turns on the interpretation of the policy. So unlike provisions requiring coverage for contractual liabilities, discussed below, coverage under additional insured provisions typically does not require analysis of any underlying contract provisions involving the insured. The questions are whether the party claiming coverage was named as an additional insured under the policy, and whether the event was covered by the policy.

Whether the party claiming coverage was named as an additional insured can be answered in straightforward fashion by reviewing the policy. Occasionally an insured fails to honor a contractual obligation to procure additional insured coverage, and the intended additional insured argues that the carrier should be liable for the insured's failure to procure insurance coverage.² Courts have rejected this argument. For example, the Supreme Court of Delaware concluded that an insurer was not obligated to provide coverage for the insured's failure to procure insurance even where the insurance policy covers sums which the insured "shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies."³ The court reasoned that, although bodily injury or property damage may have occurred, the insured's liability is not "because of" bodily injury or property damage, but because of a separate contractual liability the insurer is not obligated to cover. Thus, insurers are generally not responsible for their insured's failure to obtain coverage for others.⁴

Of course, the insured remains liable for a breach of the obligation to procure insurance. Courts have reached this conclusion even in construction cases in jurisdictions, like West Virginia,⁵ where broad anti-indemnity statutes may ordinarily render a contractual indemnity obligation unenforceable as a matter of public policy.⁶ A well-recognized construction law treatise states that it would be "incongruous for courts to borrow interpretation standards from a law governing indemnity agreements and apply them to promises to procure insurance, where the case law consistently finds the two obligations to be distinct."⁷ The prevailing view among authorities is that public policy prohibitions on indemnity agreements do not allow an insured to avoid contractual obligations to procure insurance.⁸

Because coverage turns only on the policy language, an important limitation arises out of the way additional insured provisions are written and interpreted. It is frequently argued that coverage afforded to an additional insured under the standard form endorsements does not extend to the additional insured's own negligence.⁹ This is not, however, a consensus view among jurisdictions.¹⁰

In summary, where the underlying contract requires coverage in a circumstance where the additional insured provision does not require coverage, courts typically have concluded that the insurer is not liable for the insured's breach of duty to procure insurance.

(2) Coverage for contractual liability

An insurer may also be obligated to indemnify a third party that has contracted with the insured pursuant to an endorsement or attachment to the insured's policy. The typical coverage language provides:

The company will pay on behalf of the insured all sums which the insured, by reason of contractual liability assumed by him under a contract designated in the schedule for this insurance, shall become legally obligated to pay as damages because of
Coverage Y Bodily injury or
Coverage Z Property damage
to which this insurance applies, caused by an occurrence¹¹

Coverage for purely contractual liabilities may also arise out of an exception to a general exclusion of liabilities assumed by the insured by contract or agreement for certain types of "insured contract" agreements, or with respect to liabilities the insured would have in the absence of the contract or agreement.¹² Whether coverage for contract liabilities arises out of a coverage provision or an exception to the general exclusion is material, in that it will shift the burden of proof from the insured, whose burden it is to show that coverage exists, to the insurer, whose burden it is to show that an exception applies.¹³

A common limitation under both types of policy language regarding coverage for contractual liabilities stems from the basis for the insured's liability to the third party—whether the insured's assumed liability arises out of a separate non-contractual duty (such as a tort liability), or whether the insured's assumed liability arises out of a purely contractual agreement with the third party (such as a warranty or contractual indemnity). At least one court has indicated that contractual liability coverage might be applicable in cases arising exclusively out of an alleged breach of contract, even for policies purporting to exclude coverage for "the assumption of liability in a contract or agreement." The Supreme Court of Wisconsin has stated that the term "assumption" must be interpreted to add something to the phrase "assumption of liability in a contract or agreement," so that an exclusion of "assumed" liabilities applies only to contract indemnity obligations. According to the court, the exclusion does not apply to other types of contractual obligations, such as warranties.¹⁴ The Supreme Court of Appeals of West Virginia agrees with that analysis,¹⁵ and the Supreme Court of Texas disagrees.¹⁶

Finally, in at least one opinion, the Supreme Court of Nebraska has considered a coverage question where there was a conflict between the insured's obligation to procure insurance, and the insurance that was actually procured.¹⁷ The coverage question in that case turned on the interpretation of two policy provisions which seemingly suggested different results on the question of coverage for an additional insured. In *Federal Service Ins. Co. v. Alliance Construction, LLC*, a subcontractor agreed to procure insurance for a general contractor for personal injuries or property damage arising out of operations performed by the subcontractor.¹⁸ An employee of the subcontractor was then injured during an operation performed by the subcontractor, under circumstances that could only have been caused by the sole negligence of the general contractor. On one hand, the policy excluded coverage for liabilities caused by the "sole negligence" of the additional insured, which is typical in the industry.¹⁹ Yet on the other hand, the policy provided coverage to "[a]ny person or organization . . . for which [the insured subcontractor has] agreed by written contract to procure bodily injury or property damage liability insurance, arising out of operations performed by [the insured subcontractor] or on [its] behalf" ²⁰ The court concluded that the policy provided coverage, reasoning that for liability to "arise out of the operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident. Rather, it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured.²¹ In reconciling these conflicting provisions of the policy to find coverage, the court noted that its interpretation of the "arise out of the operations" language represents the majority view.

In summary, the analysis of coverage for indemnity claims by third parties first turns on the language of the insurance policy. Coverage provisions may, by their terms, require coverage for the third party as an additional insured, subject to important terms such as the additional insured's sole negligence. Where the insured's contract requires additional insured coverage but the insured failed to procure additional insured coverage, courts have held that the carrier is not liable. Coverage provisions may also, by their terms, require an insurer to provide coverage for an insured's contractual indemnity obligations to the third party. Claims in this context will require an analysis of the underlying contract to determine whether the insured may be contractually liable, as well as the particular policy language, which may be limited to certain narrow categories of insured contract agreements or non-contractual liabilities, not including indemnity agreements. Courts differ in their interpretation of exceptions to common contractual liability exclusions, particularly whether the policy excludes coverage for all contract-based claims or only contract indemnity claims. As in the *Federal Service Ins. Co. v. Alliance Construction, LLC* case discussed above, it is possible for policy provisions to both, seemingly, preclude coverage under a typical additional insured exclusion, but also, inconsistently, provide coverage under contractual liability endorsements. The takeaway from these authorities is that, if a claim arises involving an apparent conflict between the insured's obligation to procure insurance and the policy language, the facts, law, and policy language must all be carefully examined to determine whether coverage exists.

¹ Phillip Lane Bruner & Patrick J. O'Connor, Jr., *Bruner And O'Connor on Construction Law* § 11:415.

² See, e.g., *O'Keefe Structures, Inc. v. Home Ins. Co.*, 503 A.2d 193, 197 (Del. 1985).

³ Id.

⁴ Bruner & O'Connor, *supra* § 11:415.

⁵ See W. Va. Code § 55-8-14 (prohibiting contract indemnity agreements requiring indemnity for the indemnitee's sole negligence with respect to certain types of construction contracts, with exceptions for "construction bonds or insurance contracts or agreements"); see also Syl. Pts. 1-3, *Dalton v. Childress Serv. Corp.*, 189 W. Va. 428, 432 S.E.2d 98 (1993).

⁶ See *Jokich v. Union Oil Co. of Cal.*, 574 N.E.2d 214 (Ill.App.3d 1991).

⁷ Bruner & O'Connor, *supra* § 11:415 (citing *Woods v. Dravo Basic Materials Co.*, 887 F.2d 618, 622 (5th Cir. 1989)).

⁸ But see *Walsh Constr. Co. v. Mut. Of Enumclaw*, 104 P.3d 1146 (2005) (concluding a subcontract provision requiring subcontractor to procure additional insured coverage violated Oregon's anti-indemnity law).

⁹ Bruner & O'Connor, *supra* § 11:415. The two most prominent additional insured endorsements are examined in a related article in this issue. See page 2 herein.

¹⁰ See *id.* § 11:415 n.25 (collecting cases finding coverage for additional insureds notwithstanding additional insured's negligence) (citing *Heat & Power Corp. v. Air Prods. & Chemicals, Inc.*, 320 Md. 584, 578 A.2d 1202 (1990); *Md. Cas. Co. v. Chicago and N. W. Transp. Co.*, 126 Ill. App. 3d 150, 81 Ill. Dec. 289, 466 N.E.2d 1091 (1st Dist. 1984); *Dayton Beach Park No. 1 Corp. v. National Union Fire Ins. Co.*, 175 A.D.2d 854, 573 N.Y.S.2d 700 (2d Dep't 1991); *Harbor Ins. Co. v. Lewis*, 562 F. Supp. 800 (E.D. Pa. 1983); *Chrysler Motors of Cal. v. Royal Indem. Co.*, 76 Cal. App. 2d 785, 174 P.2d 318 (2d Dist. 1946); *Glass v. Morgan Guar. Trust Co.*, 238 Ill. App. 3d 355, 179 Ill. Dec. 552, 606 N.E.2d 384 (1st Dist. 1992); *Consol. Coal Co., Inc. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976)).

¹¹ Dwight G. Conger, Michael T. Lynch, Mary Catherine Rentz, David R. Stechow, *Construction Accident Litig.* § 10:4 (2d ed.).

¹² In 1986, the Insurance Services Office, Inc. revised the CGL form to provide coverage generally for indemnity and hold-harmless agreements through the insured-contract exception within the general CGL policy, as opposed to coverage through a broad-form endorsement. See *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 130 (Tex. 2010) (citing 21 Eric Mills Holmes, *Holmes' Appleman on Insurance* § 132.3[B]).

¹³ *Camden-Clark Mem'l Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co.*, 224 W. Va. 228, 237, 682 S.E.2d 566, 575 (2009); 17A *Couch on Insurance* § 254:11 (3d ed.) ("Generally speaking, the insured bears the burden of proving all elements of a prima facie case including the existence of a policy, payment of applicable premiums, compliance with policy conditions, the loss as within policy coverage, and the insurer's refusal to make payment when required to do so by the terms of the policy."); *id.* § 254:12 ("Until a prima facie case of coverage is shown, the insurer has no burden to prove a policy exclusion.") (citing *Fortune Ins. C. v. Owens*, 526 S.E.2d 463 (N.C. 2000); *Gen. Acc. Ins. Co. of Am. v. Am. Nat. Fireproofing, Inc.*, 716 A.2d 751 (R.I. 1998); *Smith v. State Farm Fire and Cas. Co.*, 656 N.W.2d 432 (Minn. Ct. App. 2003); *Farmers Mut. Ins. Co. of Neb. v. Kment*, 658 N.W.2d 662 (Neb. 2003); *Kozlik v. Gulf Ins. Co.*, 673 N.W.2d 343 (Wis. App. 2003); *Alea London Ltd. v. Lee*, 2007 WL 1953596 (Ga. Ct. App. 2007); *Strader v. Progressive Ins.*, 2007 WL 2178037 (Mo. Ct. App. S.D. 2007); *For Kids Only Child Dev. Ctr., Inc. v. Philadelphia Indem. Ins. Co.*, 260 S.W.3d 652 (Tex. App. Dallas 2008)).

¹⁴ *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 81 (Wis. 2004).

¹⁵ Syl. Pt. 5, *Marlin v. Wetzel Cnty. Bd. of Educ.*, 212 W. Va. 215, 569 S.E.2d 462 (2002).

¹⁶ See *Gilbert Texas Constr.*, *supra*, at 132 ("We disagree, by and large, with courts' and treatises' conclusions that the language of the contractual liability exclusion before us applies to indemnity or hold harmless agreements for the reasons mentioned above."); *id.* at 121 (finding coverage does not exist).

¹⁷ See *Federated Serv. Ins. Co. v. All. Const., LLC*, 805 N.W.2d 468 (Neb. 2011).

¹⁸ N.B.: Under Nebraska law, an indemnitor party to a construction contract may agree to indemnify an indemnitee if the contract contains "(1) express language to that effect or (2) clear and unequivocal language shows that that is the intention of the parties." *Id.* at 475. As a matter of public policy, jurisdictions differ on the extent to which courts will enforce such agreements. See, e.g., *supra*, n.5.

¹⁹ See *supra*, n.9.

²⁰ *Id.* at 477.

²¹ *Id.* at 478.

The Impact of Additional Insureds on Coverage – Severability of Interests Clause By Chelsea V. Prince

The application of a “severability of interests” or “separation of insureds” clause can have surprising effects on coverage. Further, this clause may be invoked by insurers involved in multi-party litigation who are seeking to defeat a declaration of non-coverage by another insurer. Prediction of coverage outcomes requires a thorough analysis of the clause as applied to the facts of the claim, with a view to the historical interpretation of the courts in the subject jurisdiction. This article will briefly examine the language and effect of this clause in the context of a Commercial General Liability (“CGL”) policy and homeowner’s policy, as well as explore examples of its application in cases.

The most recent version of the ISO CGL “separation of insureds” provision states:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the First Named Insured, this insurance applies:

1. As if each Named Insured were the only Named Insured; and
2. Separately to each insured against whom claim is made or “suit” is brought.¹

The practical effect of this language is that, except with respect to coverage limits, the policy of insurance applies to each insured as though a separate policy was issued to each.² Consequently, the policy will generally cover a claim made by one insured against another additional insured. Where multiple named insureds are in play under the policy, the argument that is often advanced is that this clause will operate to defeat an otherwise valid exclusion.

The application of the clause is most evident in examining the interpretation of policy references to “the insured”, which are construed very differently from references to “an insured” or “any insured.” Particularly where the analysis concerns a policy exclusion, “the insured” means the insured who seeks coverage. Similarly, policy provisions referring to “you” trigger a special analysis in the context of this clause. When a named insured seeks coverage under the policy, those sections of the policy referring to “you” are to be read as if the additional insureds under the policy did not exist in light of the severability clause stating that the policy provisions apply separately to each insured. In short, the primary named insured is considered “you” under a CGL policy and additional insureds are treated as if they do not exist under that policy.

The following cases demonstrate differing results by courts interpreting similar clauses. *Taylor v. Admiral Ins. Co.* was decided by the Florida District Court on February 10, 2016.³ In April 2006, Kerry Taylor (Plaintiff) attended a private event at Villa Vizcaya, hosted by Mears Acquisition Company d/b/a Hello Florida Inc. (“Hello Florida”). Taylor was employed by Hello Florida at the time of the event. While leaving the event, Taylor slipped and fell, sustaining physical injuries. Hello Florida was a named insured under a general liability policy covering the pertinent time frame. The parties disagreed as to whether Villa Vizcaya was an additional insured under the policy at the time of the incident.

Taylor sued Miami Dade County and Villa Vizcaya as a result of her injuries. When the County requested a defense and indemnity from Admiral under the policy, Admiral declined stating that “none of the parties named in the litigation are insured under the policy.” Subsequently, the litigants entered into an agreement whereby Taylor was paid \$25,000.00, with an agreed consent judgment of \$550,000.00. Villa Vizcaya and the County assigned all of their rights under the policy to Taylor, who then filed suit against Admiral for breach of contract, common law bad faith, and statutory bad faith.⁴

Taylor and Admiral both moved for summary judgment. Taylor argued that Villa Vizcaya and the County were additional insureds under the policy, making the denial of coverage improper. Admiral argued that coverage was excluded by the Absolute Employer’s Liability provision under the policy which provided in pertinent part:

e. Employer’s Liability

“Bodily injury” to:

- (1) Any “employee” of any insured arising out of and in the course of:
 - (a) Employment by any insured; or
 - (b) Performing duties related to the conduct of any insured’s business; or
- (2) The spouse, child, parent, brother or sister of that “employee” as a consequence of Paragraph (1) above.

This exclusion applies:

- (1) Whether any insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay some-one else who must pay damages because of the injury. (emphasis supplied).

The trial court concluded that Villa Vizcaya and the County were additional insureds under the Admiral policy (based upon the evidence submitted in the opposition motions) but concluded that coverage was excluded by the aforementioned Absolute Employer's Liability provision. The district court reversed the trial court's decision applying the severability of interests clause to find coverage.

The policy provision at issue stated:

7. Separation of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned this Coverage Part to the First Named Insured, this insurance applies:

- a. As if each named insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

The district court concluded that the Separation of Insureds provision operated to permit coverage for Taylor's claim against Villa Vizcaya and the County, even if she was on location because of her employment with Hello Florida. Neither Villa Vizcaya nor the County was Taylor's employer and under the Separation of Insureds provision, each was separately insured by Admiral and subject to claim by non-employee Taylor.

In explaining its analysis, the district court cited *Evanson Ins. Co. v. Design Build Interamerican, Inc.*, 569 Fed. Appx. 739 (11th Cir. 2014):

Florida courts have explained that severability clauses, like the separation of insureds provision here, create separate insurable interests in each individual insured under a policy, such that the conduct of one insured will not necessarily exclude coverage for all other insureds. See *Mactown, Inc. v. Cont'l Ins. Co.*, 716 So.2d 289, 292–93 (Fla. 3d DCA 1998).

Applying those general principles to the specific language of the policy – particularly in light of the determination that the County and Villa Vizcaya were additional insureds – the district court concluded that coverage for Taylor's injuries was not precluded by the Absolute Employer's Liability Provision because neither insured was her employer. While this clause likely prevented her from making a claim against Hello Florida, the severability of interests clause permitted her to pursue her claims against the additional insureds. The district court thus reversed summary judgment in favor of Admiral and remanded with instructions to the trial court to enter summary judgment for Ms. Taylor.

While the Taylor case demonstrated the application of the severability of interests clause to find coverage in a CGL policy, other courts have reached different conclusions in the context of an intentional/criminal acts exclusion in a homeowner's policy. The case of *American National Property and Casualty Co. v. Clendenen* is illustrative of this opposite outcome.⁵ The facts of *Clendenen* were particularly tragic. Teenagers Sheila Eddy and Rachel Shoaf were friends with their classmate Skylar Neese. In the spring of 2012, Eddy and Shoaf decided they wished to terminate their friendship with Neese but were concerned Neese would disclose embarrassing information about them. They devised a plan to kill Neese, instead, and executed that plan on July 5, 2012, by driving Neese to a remote location using a vehicle belonging to Eddy's mother, Tara Clendenen, and stabbing her to death.⁶

Neese's parents filed a wrongful death action against the two teenagers Eddy and Shoaf, as well as their mothers, Tara Clendenen and Patricia Shoaf. With respect to the mothers, the Neeses asserted that Mrs. Clendenen and Mrs. Shoaf had been negligent in their supervision of the two teenagers, including with respect to the entrustment of Mrs. Clendenen's vehicle.

Mrs. Clendenen was insured under a homeowner's policy issued by American National Property and Casualty Company ("ANPAC"), which included an exclusion for its personal liability coverage for any bodily injury ... "a. Which is expected or intended by any insured even if the actual injury or damages is different than expected or intended;" and "p. Arising out of any criminal act committed by or at the direction of any insured". The policy also included a severability of interests clause stating, "This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence."

Mrs. Shoaf was insured under a homeowner's policy issued by Erie Insurance Property and Casualty Company ("Erie"). The Erie policy also contained similar exclusionary language pertaining to intentional acts,⁷ as well as a severability of interest clause:

This insurance applies separately to anyone we protect.⁸ Regardless of the number of people

we protect, claims made or persons injured, our total liability under Personal Liability Coverage for damages resulting from one occurrence, offense, claim or suit will not exceed the amount shown on the Declarations for Personal Liability Coverage. All bodily injury, property damage and personal injury resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one occurrence, offense, claim or suit.

Following the filing of the wrongful death action, ANPAC and Erie filed declaratory judgment actions in the United States District Court for the Northern District of West Virginia seeking a determination that the homeowner's insurance policies did not provide coverage for the claims asserted against Mrs. Clendenen and Mrs. Shoaf due to the unambiguous application of the intentional and criminal acts exclusions. The Neeses opposed this position, arguing, in pertinent part, that the severability of interests clauses conflicted with the intentional and criminal acts exclusions, creating an ambiguity that was required to be construed in favor of coverage.

This question was certified to the Supreme Court of Appeals of West Virginia which concluded that the "severability clauses' command to apply the insurance separately to each insured does not alter the intentional/criminal act exclusions' plain meaning or create ambiguity in its application."⁹ While surveying the case law reaching varying conclusions, this Court concluded that the "purpose of severability clauses is to spread protection, to the limits of coverage, among all of the insureds. The purpose is not to negate unambiguous exclusions. The policies should be read as a whole with all policy provisions given effect."¹⁰ Therefore, the West Virginia Court reached a different conclusion from the Florida District Court applying similar clauses.¹¹

As the foregoing hypotheticals and case examples illustrate, the presence of a "severability of interests" or "separate of insureds" clause can dramatically alter the availability (or non-availability) of coverage, particularly where a party is deemed to be an additional insured. It would be prudent to secure an analysis of these issues in the context of claim-specific situations should they be present in a claim.

¹ The previous ISO CGL version of this clause stated:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the First Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured.

² Historically, severability clauses became part of the standard insurance industry form contract in 1955.

³ Taylor v. Admiral Insurance Company, 187 So.3d 258 (D.C.Fl. 2016).

⁴ After the action was removed to federal court, Admiral alleged, for the first time, that Brown & Brown, who was as the agent of Hello Florida, was not authorized to bind coverage for it. Admiral argued that it is an excess and surplus lines insurer which only sells products through its authorized excess lines brokers and that Brown & Brown was not one of those brokers. Admiral moved for summary judgment on that basis, but Taylor amended the Complaint to allege a claim of fraud against Brown & Brown and the matter was remanded to state court. Later discovery showed that Brown & Brown was the agent for Hello Florida and had worked with Peachtree Special Risk ("Peachtree"), undisputedly an authorized Admiral broker, to obtain and to bind the coverage for Hello Florida. It appears that Brown & Brown requested that Peachtree bind coverage for Hello Florida in 2005 after being assured by Peachtree that the policy included coverage for blanket additional insureds. At the instruction of Peachtree, Brown & Brown issued a Certificate to Peachtree naming Villa Vizcaya as an additional insured. During the pertinent period, Brown & Brown issued 90 such Certificates of Insurance in connection with Hello Florida's business, each of which was forwarded to Peachtree. Prior to Taylor's injury, no one from Admiral or Peachtree ever advised Brown & Brown that it had no authority to issue the additional insured Certificates.

⁵ American Nat'l Prop'y and Cas. Co. v. Clendenen, 238 W. Va. 249, 793 S.E.2d 899 (2016).

⁶ Both Eddy and Shoaf eventually confessed to the murder and were sentenced to prison.

⁷ The Erie Homeowners Policy also contained certain exclusions from the personal injury liability coverage, including the following:

We do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage, and Medical Payments To Others Coverage:

1. Bodily injury, property damage or personal injury expected or intended by anyone we protect even if:
 - a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
 - b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.

....

We do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, or Personal Injury Liability Coverage:

....

9. Personal injury arising out of willful violation of a law or ordinance by anyone we protect.

⁸ "Anyone we protect" was defined as "you and the following members of your household: 1. relatives and wards; 2. other persons in the care of anyone we protect..."

⁹ Clendenen, 238 W. Va. at 267-68, 793 S.E.2d at 917-18.

¹⁰ Id.

¹¹ Whereas the West Virginia Court relied upon the phrase "any insured" to reach its conclusion denying coverage, that phrase mattered not to the Florida Court which found coverage in spite of the exclusion including the language "any employee of any insured."

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