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Hot Topic: Contractual Indemnity and Additional Insured Provisions

At the end of the day, most workplace accident and construction defect cases boil down to who pays what. This often depends not only on liability and damage issues – but also contractual indemnity and additional insured rights and obligations. This class will provide an update on recent contractual indemnity and additional insured trends, including recent court decisions limiting these provisions, whether certificates of insurance are sufficient to establish additional insured coverage, the breadth of the duty to defend, and when the duty to defend an additional insured starts and ends.

I. Making – And Responding To – Additional Insured Tenders

A. What Additional Insured Form(s) Is (Are) At Issue

1. Arising Out Of vs. Caused in Whole or in Part

The scope of a putative additional insured's coverage will be directly impacted by the additional insured form's insuring agreement. An insuring agreement which provides additional insured coverage for "bodily injury" or "property damage" arising out of the named insured's work is generally construed broadly. In *Old Republic General Insurance Corporation v. Travelers Property Casualty Company of America*, 2021 Cal. Super. LEXIS 108635 (Cal. Super. Ct. Mar. 12, 2021), the California Superior Court held that where a policy provides additional insured coverage for liability "arising out of" the named insured's work, such additional insured is covered for injury caused by the named insured or the additional insured. By contrast, ensuring agreements which provide additional insured coverage for "bodily injury" or "property damage" caused in whole or in part by the named insured's work are generally construed more narrowly. In *Old Republic General Insurance Corporation v. Liberty Insurance Corporation*, 2022 U.S. Dist. LEXIS 73635 (S.D. Fla. Apr. 21, 2022), the United States District Court for the Southern District of Florida determined that an additional insured provision affording coverage caused by in whole or in part by the acts, errors or omissions of the named insured covered only the additional insured's vicarious liability, and not for its own negligence.

2. Ongoing Operations/Completed Operations

The scope of a putative additional insured's coverage will also be impact by the type of operations covered under the additional insured form's insuring agreement. Additional insured forms generally provide coverage for either ongoing operations or completed operations. In *Carl E. Woodward, LLC v. Acceptance Indemnity Insurance Company*, 743 F.3d 91 (5th Cir. 2014), the Fifth Circuit Court of Appeals, applying Mississippi law, held that a putative additional insured was not entitled to overage for damage based on construction that was not in conformity with construction plans because those damages arose out of the additional insured's completed operations, and the policy form at issue was limited to ongoing operations. More recently, in *Scottsdale Insurance Company v.. Columbia Group, Inc.*, 972 F.3d 915 (7th Cir. 2020), the Seventh Circuit Court of Appeals, applying Illinois law, found that if any liability could be premised, at least in part, on ongoing operations, an additional insured form limiting coverage to ongoing operations did not preclude coverage for the putative additional insured.

B. Triggering the Duty to Defend

There is much debate regarding what evidence may be considered in determining an insurer's duty to defend a putative additional insured. Courts fall into one of three camps: (1) extrinsic evidence may be considered; (2) extrinsic evidence may not be considered; and (3) extrinsic evidence may be considered in certain limited circumstances. In *Monroe Guaranty Insurance Company v. BITCO General Insurance Corporation*, 640 S.W.3d 195 (Tex. 2022), the Supreme Court of Texas re-affirmed that it falls into the third camp. The court noted that extrinsic evidence may be considered where the evidence: (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved. In contrast, in *Axis Construction Corporation v. Travelers Indemnity Company of America & State National Insurance Company*, 2021 U.S. Dist. LEXIS 166083 (E.D. N.Y. Sept. 1, 2021), the United States District Court for the Eastern District of New York, applying New York law, held that an insurer must consider judicial admissions in the insured's responsive pleading or any other formal submissions.

C. Whether Overt Allegations Against the Additional Insured Are Required

Another area of contention is whether an overt allegation against a putative additional insured is required to trigger an insurer's duty to defend. Requirements will vary on a state-by-state basis. For example, in *Precision Underground Pipe Services v. Penn National Mutual Casualty & Verizon Pennsylvania LLC*, 225 A.3d 1127 (Pa. Super. Ct. 2019), the Pennsylvania Superior Court found that Pennsylvania law does not require overt allegations of negligence against an additional insured to trigger an insurer's duty to defend. However, in *Sate Auto Property & Casualty Insurance Company v. Shores Builders, Inc.*, 2020 U.S. Dist. LEXIS 183922 (S.D. Ill. Oct. 5, 2020), the United States District Court for the Southern District of Illinois, applying Illinois law, noted that a complete must allege that a putative additional insured had control of the operations at issue, and was liable for the named insured's actions.

D. When the Duty to Defend Starts and Ends

1. Pre-Suit or Post-Suit

Insurers are often confronted with pre-suit tenders by putative additional insureds. Whether an insurer has an obligation to defend the putative additional insured pre-suit varies by jurisdiction. In *Mitsui Sumitomo Insurance Company of America v. Travelers Property Casualty Company of America*, 2017 U.S. Dist. LEXIS 46725 (W.D.N.C. Mar. 29, 2017), the United States District Court for the Western District of North Carolina, applying North Carolina law, held that the duty to defend a putative additional insured may be triggered by pre-suit communications, provided the insurer is aware that the allegations potentially fall within the policy's coverage, and it's assistance is desired by the putative additional insured. By contrast, in *Harper Construction Company v. National Union Fire Insurance Company*, 377 F. Supp. 3d 1134 (S.D. Cal. 2019), the United States District Court for the Southern District of California, applying California law, held that an insurer had no obligation to defend claims that were tendered pre-suit.

2. No Indemnity Obligation or Exhaustion of Limits

Once an insurer undertakes the defense of an additional insured, it may question at what point its duty to defend ends. There are several ways in which a duty to defend ends. For example, in *Crescent Beach Club, LLC v. Indian Harbor Insurance Company*, 468 F. Supp. 3d 515 (E.D.N.Y. 2020), the United States District Court for the Eastern District of New York, applying New York law, determined that the duty to defend an additional insured ends once it is determined that the insurer has no possible basis for indemnifying the additional insured. The United States District Court for the Middle District of Florida reached another basis for terminating the duty to defend in *United Fire & Casualty Company v. Progressive Express Insurance Company*, 2020 U.S. Dist. LEXIS 258617 (M.D. Fla. June 15, 2020). The court, applying Florida law, found that the insurer's duty to defend an additional insured ended upon payment of the policy's limits in settlement of the liability of the named insured.

II. Contractual Indemnity in Construction Contracts and The "Insured Contract" Exception

A. "Insured Contract" Issues

Commercial General Liability contracts generally contain an exclusion for contractual liability. This exclusion contains an exception for liability assumed under an "insured contract". Coverage issues involving whether a contract constitutes an "insured contract" often involve a dispute as to whether the contract assumes the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Under these policies, tort liability is generally defined as liability that would be imposed in the absence of any contract or agreement. To determine whether a contract qualifies as an "insured contract", the contract between the third-party and the named insured must be carefully reviewed.

B. Indemnity Coverage Void in Construction Contracts

Even if the named insured agrees to very broad indemnification language in a contract with a third-party, such language may be unenforceable as a matter of law. By way of example, Texas has passed an Anti-Indemnity Act, Subchapter C of Chapter 151 of the Texas Insurance Code. This Act states that a provision in an indemnification provision is generally void if it requires the indemnitor to indemnify, hold harmless, or defend an indemnitee against a claim caused by the

indemnitee's negligence or fault. The Act provides that it applies to additional insured coverage. It does not apply to indemnification for claims of bodily injury/death of an employee of the indemnitor, its agent, or its subcontractors.

C. No Indemnification for Sole Negligence

Certain states also statutorily prohibit the indemnification of a party's sole negligence. California Civil Code § 2782 provides that it is contrary to California's public policy to permit indemnification for injury or loss arising from the indemnitee's sole negligence or willful misconduct. It is important to note that this provision is limited to indemnification provisions and does not affect the validity of an insurance contract providing additional insured coverage.

III. Authorized Agents – Certificates of Insurance as a Trigger for Additional Insured Coverage

A. Majority Rule

The majority rule in the United States is that a certificate of coverage cannot amend an insurance policy. For example, in California, a certificate of insurance is merely evidence that a policy is issued – it is not a contract between the insurer and the certificate holder. *City of Ontario v. Allied World Assurance Company U.S.*, 2021 U.S. Dist. LEXIS 231304 (C.D. Cal. Sept. 30, 2021). Most states have also held that general disclaimer language in a certificate of insurance sufficiently undercuts any argument that a certificate of insurance is evidence of the parties' intent that it be considered in determining additional insured coverage. *Quincy Mutual Fire Insurance Company v. Imperium Insurance Company*, 636 Fed. Appx. 602 (3rd Cir. 2016) (applying Pennsylvania law).

B. Notable Exception

There are two notable exceptions to the general rule – Washington and Florida.

In *T-Mobile USA Inc. v. Selective Insurance Company of America*, 450 P.2d 150 (Wash. 2019), the Supreme Court of Washington, concluded that an insurer is bound by representations regarding additional insured coverage made by its authorized agent in a certificate of insurance. The basis for this conclusion was that in Washington, an insurance company is bound by all acts, contracts, or representations of its agent, so long as the actions were within the scope of the agent's real or apparent authority. The court rejected that the existence of general disclaimers was sufficient to preclude coverage because the disclaimers were boilerplate, whereas the additional insured statements were specifically written to be part of the certificate.

In *Liberty Mutual Fire Insurance Company v. State Farm Florida Insurance Company*, 2022 U.S. App. LEXIS 9233 (11th Cir. Apr. 6, 2022), 11th Circuit Court of Appeals, applying Florida law, held that an entity listed as an additional insured on a certificate of insurance, but who was not added as an additional insured via endorsement, was entitled to coverage under a contractors' policy and umbrella policy. The court reached this conclusion by relying upon Florida's general rule that ambiguities are to be construed against the insurer and in favor of broad coverage.

C. Best Practices Involving Authorized Agents

Given that agents may bind an insurer in certain jurisdictions, it is recommended that carriers provide agents with clearly written guidelines regarding the issuance of certificates of insurance. These guidelines should unambiguously state that the agent agrees not to issue certificates of insurance that are contrary to the language of the insurance policy at issue. To avoid any doubt, we recommend that all agents agree to follow the guidelines, in writing.

Most issues arise due to an inattention to detail during the issuance of certificates of insurance. Unless the putative additional insured is explicitly named as an additional insured in the policy, certificates of insurance should not state that the putative additional insured is an additional insured. (Even if they are explicitly named as an additional insured, it is important to note whether such coverage contains any limitations, such as ongoing/completed operations).

Where a policy contains a blanket additional insured endorsement, it is recommended that the certificate of insurance merely state the name and form number of the endorsement. If the putative additional insured requires language stating that they are an additional insured, it is recommended that a copy of the policy be attached to the certificate insurance and that the certificate of insurance state that the putative additional insured is an additional insured to the extent they qualify as an additional insured in the attached policy.

It is also important that the agent carries sufficient errors and omissions coverage. Because errors and omissions policies generally provide that defense costs erode limits, higher limits of liability may be necessary to ensure coverage for any liability, as well as the carrier and agent's defense costs.