Questions and Answers on Additional Insured Issues—Part 2

As explained in Questions and Answers on Additional Insured Issues—Part 1, the IRMI Webinar, "Additional Insured Endorsements: The Good, the Bad and the Ugly," produced in May 2009, focused on nonstandard additional insured endorsements used with the commercial general liability (CGL) insurance policy, comparing them to the standard ISO endorsements. This article presents a selection of questions submitted by the attendees and our brief answers to these questions.

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For ease of understanding, we arranged the questions into five categories as follows:

1. Scope of Coverage
2. Additional Insured Requirements as a Risk Transfer Strategy
3. Other Insurance
4. Certificates of Insurance
5. Miscellaneous Issues

Part 1 of this additional insured issues series dealt with questions concerning the scope of coverage provided to an additional insured. This article will deal with the remaining four categories.

While a few of the questions do refer back to the webinar presentation, most are self-standing. If you attended the Webinar, you were e-mailed a link to the archived version which will allow you to review it again. If you did not attend the Webinar, the archived version of the webinar will be available on IRMI.com for purchase through November 2009 if you are interested in viewing it.

Many of these questions and answers have also been posted in the IRMI Group on LinkedIn to allow discussion among IRMI Group members. If you are a member of LinkedIn, join the IRMI LinkedIn Group and add your thoughts on these issues.

Additional Insured Requirements as a Risk Transfer Strategy

1. **Why do insurance companies allow coverage to be given away via the use of additional insured endorsements? Why not end this practice?**

   This is a question that can only be answered in the home offices of insurance companies, and you are likely to get a different response at each one. However, we can discuss some possible reasons.

   The first and foremost reason is that the commercial insurance marketplace is truly competitive. As long as contractors, renters, lessees, and others are contractually required to add others as additional insureds, these organizations are going to seek insurance companies that will help them comply with their contracts and thereby conduct their businesses. To discontinue a common practice such as this would require an industry-wide approach which would be tenuous at best. If one insurer were to continue the practice of issuing additional insured certificates, that insurer would gain a competitive advantage. Other insurers would most certainly jump ship as well.

   Second, probably as many insurers benefit from as are penalized by the practice. And some both benefit and are harmed by it. For example, consider construction. Many insurers write both general contractors, which typically allocate considerable risk down to subcontractors, as well as subcontractors. Insurers that write general contractors typically expect their insureds to establish effective risk transfer programs and evaluate them to some extent as part of the underwriting process. They benefit to the extent that the policies they write for their general contractor insureds are shielded by the subcontractors' policies. Those insurers who write both general contractors and subcontractors cannot very well turn around and refuse to give

general contractors (possibly their own insureds) additional insured status on the policies of the subcontractors they write.

Of course, insurers that primarily serve as markets for subcontractors likely would prefer to do away with the practice in its entirety. However, the competitive marketplace will not allow it. This, we believe, is the major driver for the restrictive nonstandard endorsements that have emerged in recent years. They are attempts by insurers to have their cake and eat it too, by allowing their subcontractor insureds to provide additional insured coverage while restricting the coverage to a scope deemed acceptable by the insurer (or, in some cases, restricting coverage to a nearly nonexistent scope).

This then causes contract drafters to tighten their insurance requirements to be very specific about the coverage being sought. The result is to place both agents and brokers in an unenviable position of trying to compare differing forms to the contract specifications and to cause many subcontractors to be in breach of their contracts.

We believe that the ultimate solution to this problem is to attack the main reasons these risk transfers are needed. One reason is third-party-over actions (where the injured employee of a subcontractor sues the general contractor for negligently contributing to the cause of the accident). If the possibility of third-party-over actions was eliminated in every state, the need for indemnity and additional insured status would be greatly reduced. Another primary reason is construction defect, which is probably best dealt with through a combination of quality control programs, warranty programs, and state legislative reform.

2. **What is the difference between "scheduled" and "blanket" additional insured endorsements?**

   A scheduled additional insured endorsement (such as CG 20 10) requires that the person or organization being given insured status be identified individually in a list, a "schedule," in the endorsement itself. The alternative approach to this—sometimes called "blanket" coverage—is an endorsement specifying that all persons and organizations meeting a particular qualifying threshold (such as their requirement in a contract that they be made additional insureds) are automatically insureds under the endorsement, without having to be individually listed. Following the moniker first used in The Additional Insured Book, ISO itself refers to endorsements of this kind in their titles as "automatic" additional insured endorsements.

Other Insurance Issues

3. **Does the CG 00 01 policy form automatically include primary coverage for an additional insured?**

   Yes. With certain exceptions, the coverage provided by a standard Insurance Services Office, Inc. (ISO) commercial general liability (CGL) policy applies as primary insurance. Coverage would be primary for an additional insured just as it would for the named insured.

   One of those exceptions, however, is that the CGL is excess over any other policy to which the named insured has been added as an insured by endorsement. This exception is advantageous for the named insured with AI status under another standard CGL policy, since

it means that the AI coverage will respond first, before the additional insured's own policy does.

By building this coordination into the standard ISO policy, it became unnecessary for the additional insured endorsement to specify that it provides "primary and noncontributory" coverage for the additional insured. Thus, such contract requirements are generally unnecessary.

4. **You discussed some very restrictive nonstandard additional insured endorsements that take the opposite approach to the ISO policy and make the coverage excess over other insurance available to the additional insured. What would happen if the additional insured was self-insured?**

   In answering this question, it is first necessary to define what we mean by self-insurance. In the strictest sense of the word, self-insurance means "noninsurance." It is the absence of an insurance policy covering the same risk.

   Take, for example, a public entity that does not buy any form of liability insurance to cover its premises-operations and related exposures. It may set up loss reserves and fund for incurred losses, rightfully calling this a "self-insurance program." Since there is no insurance policy, it is also effectively a noninsured, just as is any organization up until the moment it buys a liability policy to cover itself. If this public entity were an additional insured in a contractor's policy, the only liability policy covering it would be the contractor's policy and it should apply as primary insurance since there is no "other insurance." This insurer could no more seek participation in a loss from the municipality than it could from any named insured for a loss covered by the policy.

   The existence of excess insurance over a self-insured retention would complicate the analysis significantly. Any excess insurance the municipality purchased—by excess, we mean a policy that is triggered only when a specified level of loss is met, $1 million, for example—would apply according to its own provisions. One possible response, again depending on its provisions as well as the specific provisions of the nonstandard AI endorsement, would be to come in excess of the greater of its specified self-insured retention or the each-occurrence limit of the primary CGL policy on which the municipality is an additional insured. However, another possibility is for the "other insurance" provisions of the two policies to cause them to share in the payment of defense costs and any awards or settlements.

   If, rather than being a "noninsured," the municipality retains an insurance company to issue a policy with a $1 million dollar limit of liability and a $1 million dollar deductible (and thereby operate as a "fronting company"), the municipality may have the financial equivalent of self-insurance, but it is now technically an insured under the policy issued by the fronting company. In this case, the terms of the fronting policy would also influence the primacy of coverage. If that fronting policy were a standard ISO CGL form, it would have the provision making it excess over the policy on which the municipality is an additional insured. Thus the fronted policy should apply in excess of the policy on which the municipality is an additional insured. Since your hypothetical involves a nonstandard AI endorsement that attempts to take the opposite approach from the standard ISO forms, it is quite possible that a court would decide that the two excess clauses would work to cause the two policies to share in their responses to the claim.

Certificates of Insurance

5. **Since certificates of insurance are not an amendment to any policy, when would you ever see a certificate making someone an additional insured (other than back in the 1980s)?**

   You're correct that, as a rule, certificates of insurance do not confer coverage or insured status. However, if an insurance policy includes a provision that specifically references a certificate of insurance as a means to effect coverage, this general rule should not apply. Some nonstandard additional insured endorsements—like the one discussed in the Webinar—actually require the issuance of a certificate to trigger insured status. With this particular endorsement, both the endorsement and the certificate would be necessary, and it could be said that, in a sense, the additional insured was given insured status by the certificate.

6. **With regard to insurance certificates, when you consider that you do not have access to the actual CGL policy forms, should you require that any certificate you receive as an additional insured actually have the additional insured endorsement attached to the certificate or have the endorsement form actually be declared on the certificate?**

   We believe the best "real-world" approach to getting AI status documented is to require a copy of the additional insured endorsement. Requests for copies of the named insured's policy itself are, in almost all cases, unrealistic. And certificates alone—as you rightly observe—confer no actual coverage. (The one exception to this would be created by those nonstandard additional insured endorsements, discussed in the Webinar, that require the issuance of a certificate to trigger AI status under the endorsement. With respect to endorsements of this kind, an additional insured would, of course, want to see both the certificate and the additional insured endorsement.)

Miscellaneous Issues

7. **What states have ruled that the scope of coverage provided to an additional insured may be no broader than the scope allowed to be transferred under the applicable state's anti-indemnity statute?**

   The states that have applied the restrictions of their construction anti-indemnity statutes to the permissible scope of contractually required additional insured status are California (with respect to residential construction defect claims only), Colorado, Kansas, Montana, New Mexico, and Oregon. Legislation is being considered in at least one additional state at this time, and we will report on these developments in our *Contractual Risk Transfer* and *Construction Risk Management* reference publications.

8. **I have seen a blanket ISO AI endorsement that begins with the number "70." When is that used?**

   ISO has not promulgated any standard CGL endorsements with a designation beginning "CG 70...." Insurers sometimes use the "70" designation to identify their own individually filed

endorsements. Therefore, you were probably looking at a nonstandard endorsement developed by the insurer.

9. **Does an additional insured have to remain on the policies during the named insured's operations only or must it remain for each year thereafter for some period?**

   If the additional insured requires coverage for claims arising out of the named insured's completed operations, then two things must be done:

   (1) An AI endorsement that specifically covers completed operations (such as CG 20 37) must be used; and

   (2) That endorsement must be attached to successive policies for as long as the named insured has agreed to provide completed operations coverage to the additional insured.

   This assumes that a standard occurrence trigger ISO CGL policy is used to cover the named insured. Remember that it is the occurrence of bodily injury or property damage that triggers an occurrence liability policy—not the date that the insured's work is completed—and a completed operations loss by definition happens after the insured's work is completed.