Questions and Answers on Additional Insured Issues—Part 1

More than 18 years (and 5 editions) after publication of The Additional Insured Book, the use of additional insured status as a contractual risk transfer technique remains one of the most misunderstood and controversial practices in all of risk management.

Jack P. Gibson, CPCU, CRIS, ARM Additional Insured Issues July 2009

A complicating factor that has arisen in the past 5 or so years is the advent of nonstandard endorsements that sometimes take drastically different approaches to granting or restricting the coverage provided to an additional insured in a commercial general liability (CGL) policy. Indeed, we have collected nearly 300 hundred different nonstandard CGL endorsements that are used by insurers to add additional insureds to liability insurance policies.

With the hope of clearing some of the confusion regarding these endorsements, we presented an IRMI Webinar, "Additional Insured Endorsements: The Good, the Bad, and the Ugly," in May 2009. It focused on nonstandard additional insured endorsements used with the CGL insurance policy, comparing them to the standard Insurance Services Office, Inc. (ISO) endorsements. This article is the first of a two-part series that presents a selection of the questions submitted by the attendees and our brief answers in reply.

While a few of the questions do refer back to the Webinar presentation, most are self-standing. If you attended the Webinar, you received a link to the archived version in an email that allows you to review it again. If you were unable to attend, the archived version of the Webinar will be available on IRMI.com for purchase through November 2009.

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

Since most of the questions fall into the scope of coverage category, this article deals exclusively with these. Part 2, which will be published in a couple of weeks, will then tackle the other four categories of questions. Check back in a few weeks for part 2 or watch for a link to it in *IRMI Update*.

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.

Scope of Coverage

1. **What specific versions of the additional insured endorsements are you referring to in your example?**

   The discussion in the IRMI Webinar was (and these answers to questions are) based on the current July 2004 editions of both CG 20 10 and CG 20 33 additional insured endorsements. It is easy to recognize these editions because of the reference to injury or damage "caused, in whole or in part, by your acts or omissions."
   We did refer in passing to the original November 1985 edition of CG 20 10, which covered the additional insured with respect to "liability arising out of your work for the additional insured." That language—rarely, if ever, available anywhere to the best of our knowledge—provided coverage (1) for the additional insured's sole negligence and (2) with respect to the named insured's completed operations.

2. **Often, entities that want to be named as additional insureds are partnerships, joint ventures, or limited liability corporations (LLCs). The final sentence in the ISO CGL "Who Is an Insured" section says:**

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations. The ISO additional insured endorsements do not modify this CGL wording in any way. As a result, if a partnership, joint venture, or LLC is added to the CGL policy as an additional insured, doesn't this provision effectively preclude coverage since the endorsement doesn't modify this CGL provision? The way I read the CGL language, partnerships, joint ventures, and LLCs are *only* covered if shown as a *Named Insured* on the *Declarations* page. Do you agree? I know there is at least one federal court case, *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508 (5th Cir. 2002), that supports this, but it involved a blanket additional insured endorsement that didn't specifically name any of the additional insureds. Despite that, do you concur that it wouldn't matter even if the entity *was* named on an additional insured endorsement like the CG 20 10, since it's not named on the Declarations page as required by the CGL wording?

It seems clear that the "Who Is an Insured" provision pertaining to joint ventures, partnerships, and LLCs is intended to keep the persons and organizations already listed as insureds in Section II from being afforded insured status with respect to a joint venture, partnership, or LLC in which the named insured is a participant. By requiring the disclosure of any joint ventures, partnerships, or LLCs in which any of the named insureds or other insureds are members, the insurer is provided an opportunity to underwrite the risk and charge an appropriate premium for the risk.
In circumstances when an entity that would normally seek additional insured status under another party's CGL policy is a joint venture, partnership, or LLC, there is no underwriting justification for applying the limiting language at the end of Section II of the policy to prevent such insured status from being arranged by endorsement. (For example, a project owner seeking AI status under its general contractor's policy could easily be a partnership or LLC; just as it is not uncommon for two or more general contractors to form a joint venture and require AI status under their subcontractors'

policies.) Under arrangements of this kind, the provision of insured status to such entities should be no more problematic than it would be with any other kind of additional insured (e.g., a corporation). We believe that two details of insurance policy interpretation would support arranging additional insured status in this way. One of these details is the rule of insurance policy interpretation that a *specific* policy provision (such as scheduling an additional insured by endorsement) supersedes a *general* policy provision (such as the Section II limitation regarding partnerships, etc.). The other detail is the language of standard additional insured endorsements. For instance, endorsement CG 20 10 begins this way: "Section II—Who Is an Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule…." One of the ways in which Section II would have to be "amended" by this language to afford additional insured status to a partnership, etc., is to eliminate the restriction on partnerships, etc., at the end of Section II—with respect to the particular additional insured scheduled in the endorsement. The endorsement says it will amend the policy so as to include insured status for the scheduled party, and we think that's exactly what it does.
Bott v. Shea involved a subcontractor who was required to add a joint venture of general contractors as an additional insured. Instead, it added only one of the joint venturers as an insured under its policy. The court recognized the contractor's insured status by virtue of the endorsement, but still applied the restriction regarding partnerships. In other words, it ruled that the individual joint venturer was an insured but not in connection with the operation of the joint venture. The court's decision does not address in what way coverage would have been amended if the joint venture itself had been properly scheduled as an additional insured. We believe that, in that alternative situation, our rationale above would establish coverage for the joint venture despite the language of Section II.

3. **Assume a blanket additional insured endorsement provides AI status to entities or individuals other than those with whom a direct contract exists, and an owner requires a contractor to name an owner-hired architect or engineer as an additional insured. Will the contractor's CGL policy insure the architect or engineer for its professional liability if there is not a professional liability exclusion on the contractor's policy?**

The standard additional insured endorsement intended for the purpose of adding architects or engineers as additional insureds—CG 20 32, Engineers, Architects or Surveyors Not Engaged by You—does contain its own design professional liability exclusion. Thus, if that endorsement were used, the named insured contractor would not be providing coverage for that exposure even if the policy itself contained no such exclusion. If there were no such exclusion in either the CGL policy or in the AI endorsement (a nonstandard endorsement without an A/E professional exclusion, for example), then the additional insured would indeed receive some coverage for the professional liability exposure. That coverage would, however, be subject to the CGL terms and conditions that make professional liability coverage under the policy difficult to establish (such as the requirement of an "occurrence").
This question does point out one of the drawbacks of using an overly broad grant of blanket additional insured coverage, as may be the case with endorsements that provide automatic status to anyone the named insured, for example, "agrees in a written contract or agreement to add as an additional insured." Absent some additional limitations on the coverage scope included in the endorsement itself, only the terms of the CGL policy will limit the additional insured's coverage. A careful study of the ISO forms reveals that many of the endorsements include provisions and restrictions that match the type of contract for which the endorsement is intended, whether construction, rental agreements, franchise agreements, vendors, leases, etc. It is probably impossible

to draft a single endorsement that will contemplate every type of contract into which an insured might enter.

4. **What is the preferred additional insured endorsement for an "additional insured" general contractor desiring coverage under the named insured subcontractor's CGL policy to provide defense and indemnity for civil suits filed against the additional insured by an employee of the named insured, where the allegation is that the additional insured failed to provide a safe place to work, or the additional insured's negligence was the proximate cause of the employee's injuries?**

   Coverage for suits brought against an additional insured by an injured employee of the named insured (often called "third-party-over actions") should be covered under any edition of standard ISO additional insured endorsements CG 20 10 or CG 20 33. Some uncertainty attaches to this question with regard to the current (July 2004) editions of those endorsements, which require that injury be caused at least in part by an act or omission of the named insured employer. No allegations of negligence or fault on the part of the named insured will be made in connection with such suits because the named insured's legal obligations to the injured party will be addressed by the workers compensation system, which does not operate on the basis of allegations of fault. IRMI believes, though, that in practically every conceivable case, some act or omission of the named insured employer (whether negligent or not) can be pointed to as one cause of work-related injury to the employee. Thus, a sustainable coverage denial for these types of claims based solely on the current endorsements' requirement that the named insured contribute to the cause of the loss should be an exceedingly rare event.

5. **Are you saying that "your work" includes both ongoing and completed operations or just completed operations?**

   The standard CGL policy defines "your work" as "work or operations performed by you or on your behalf." That language has been consistently interpreted by the courts to mean both work that *has been performed* by the named insured, and work that *is being performed* by the named insured. In other words, both ongoing operations and completed operations are included in the term "your work." ISO acknowledged this meaning of the term in its filing materials when it dropped "your work" in favor of "your ongoing operations" in the 1993 edition of several of the standard additional insured endorsements for use in the construction industry.

6. **The ISO endorsement "Additional Insured Lessor of Leased Equipment" includes the "caused in whole or in part" wording. How can a contractor limit its CGL policy so that it doesn't pay for losses that arise primarily out of the Lessor's lack of scheduled maintenance?**

   You raise an excellent point. Previous editions of CG 20 28, which provides additional insured status to the owner of equipment leased to the named insured, contained an exclusion of injury or damage arising out of the owner/lessor's sole negligence. That exclusion was eliminated in the current (2004) edition of the endorsement. The issue of causation under CG 20 28 is especially problematic because the named insured will virtually always be at least a partial cause of any injury or damage that occurs under the lease—at least in those cases when the named insured is operating the leased equipment. Under such circumstances, the owner/lessor could still be the only *negligent* cause of an accident (say, through faulty maintenance of the equipment), and that sole negligence would be covered under CG 20 28.

Assuming that a contractor/lessee is not assuming liability in the lease for fault that arises exclusively out of negligent maintenance or some other instance of sole negligence on the owner/lessor's part, the contractor's interests might be well served by putting a "sole negligence of the additional insured" exclusion back into the endorsement. If, on the other hand, the contractor is holding the owner/lessor harmless for the latter's sole negligence, there is little to be gained by restricting the coverage available for the owner/lessor under the AI endorsement.

7. **If we, as a project owner, receive an endorsement that limits our coverage as additional insured to the limits required by written contract, and the appropriate limits have accidentally been left blank, what are we likely to get if there is a claim? Does a silent contract mean we get nothing at all when the limit is tied to what appears in the contract?**

Assuming the project owner drafted the contract, it is likely the courts would interpret any ambiguities against the owner. Of course, how this would affect coverage under a blanket or automatic additional insured endorsement would depend on the specific language of the endorsement and the contract. If the owner specified no minimum limit of liability in the contract, it would appear that the owner would not be covered as an additional insured under many of the blanket additional insured endorsements used in the marketplace. In such an instance, the owner would have to rely exclusively on the indemnity provision in the contract. This illustrates why we believe that both indemnity clauses and insurance requirements are important to effect solid risk transfers.

8. **Should we ask for CG 20 10 10 01, or is 07 04 our best bet?**

If the 2001 edition of CG 20 10 (the ISO endorsement used to comply with construction contracts) is available from the insurers that cover the contractors or subcontractors you retain, it would arguably provide broader coverage than the July 2004 edition since there is no question under the 2001 "arising out of" language that the AI is covered even for its sole negligence as long as liability can be tied in some way to the named insured's operations.
However, it is important to understand that, when ISO files a new policy form or endorsement, it withdraws the previous edition of that form or endorsement. As a result, previous editions of the additional insured endorsements—whether, for example, the October 2001 or November 1985 editions—are no longer approved for use in most states. Therefore, the insurer would be likely required to make a special filing to use them. It is our understanding that, in the current marketplace, these older endorsements are at best difficult for most contractors to secure and impossible for many. Based on this marketplace reality as well as our belief that the current endorsements will be found by the courts to be nearly if not equally as broad as the previous versions, we advocate specifying the current versions of the endorsements in contract insurance requirements.