

Potential Changes in Additional Insured Status Under Commercial General Liability Policies

Requesting to be identified as an additional insured on another person's commercial general liability insurance policy is relatively routine in the construction industry. Yet, the question that frequently arises is; what benefit does being named as an additional insured on somebody else's policy provide? Many view the additional insured designation as being another insurance policy that applies with the same force and effect as their own insurance policy. Such perceptions, however, may be inaccurate, as the extent to which an additional insured is entitled to benefits under such a policy depends upon the nature of the claim asserted against the additional insured and the language of the additional insured endorsement. This topic has been the subject of substantial litigation and, perhaps, because of the wide range of decisions, the Insurance Services Office ("ISO") has proposed changes to policy language that defines when an additional insured is entitled to coverage. These changes may impact the extent of coverage and present important information for those named as an additional insured.

In general, being named as an additional insured should provide the named party coverage (*i.e.*, a paid for defense and indemnity) for certain claims that involve bodily injury or property damage. In the past, coverage has been limited to claims that **arise out of the named insured's ongoing operations** (*i.e.*, the person who is named as the primary insured in the policy's declaration pages, as opposed to those who are named as an additional insured). Under this language, if the claim in question does not arise out of the named insured's ongoing operations, the additional insured would likely not be entitled to coverage. Of course, questions arose concerning when a claim can be said to arise out of the named insured's ongoing operations. For example, would an additional insured be entitled to coverage for a claim that resulted solely from the additional insured's negligence? Or, would coverage be available if the claim resulted from the named insured's and the additional insured's combined negligence? In each instance under the prevailing language, the question was whether the claim arose out of the named insured's ongoing operations.

Consider the following example. An engineer is named as an additional insured on a general contractor's commercial general



The Schiff Hardin LLP Construction Law Group is pleased to provide you with this Construction Law Update. We have endeavored to identify contemporary and important issues that address the myriad, varied interests our wide-ranging clients present. We welcome feedback from you. Please do not hesitate to suggest a topic that is germane to you or to provide us with further insights on any of the topics addressed.

In addition, future editions of this Construction Law Update will be sent in electronic format as well as the standard printed version. Please be sure to update your contact information on the enclosed postcard. Please also feel free to contact any of us with your comments or suggestions.

For convenience, a listing of the individuals in our construction law group along with their contact information is provided at the end of this update. We look forward to sending you future construction law updates periodically and to receiving your feedback. We hope that you find these updates informative and useful.

Understanding these boundaries [of when an additional insured qualifies for coverage] is essential to evaluating one's risk on a project.

Potential Changes ... *(continued)*

liability policy. The engineer is sued for failing to design a floor system with sufficient load bearing capacity and, as a result, the floor collapses causing property damage. There are no allegations that any contractor deviated from the contract documents or performed work defectively. Would the engineer be entitled to a defense and indemnity under the general contractor's insurance policy? The answer to that question would depend upon whether a court viewed the facts as supporting a conclusion that the claim arose out of the general contractor's ongoing operations. In this example, it seems unlikely that the court would conclude in this fashion. However, an argument could be made that the general contractor's ongoing operations include the project and, the engineer's work was part of the project. Further, if allegations existed that, in fact, the load capacity was improperly stated and the general contractor failed to include specified structural members, it would be more difficult to conclude that the claim did not, at least in part, arise out of the general contractor's ongoing operations, thereby resulting in coverage for the additional insured.

As one might expect, those named as an additional insured advocated interpretations that favored coverage, while insurance carriers often argued that coverage should be more limited. Perhaps in an effort to clarify the extent to which an additional insured is entitled to coverage, the ISO recently proposed modifications. Instead of using the policy language for liability arising out of the insured's ongoing operations, the ISO has proposed that the additional insured coverage be modified to provide coverage for liability caused in whole or in part by the named insured's acts or omissions and/or by the acts or omissions of those acting on behalf of the named insured. The proposed change appears to reflect an attempt to limit coverage for an additional insured to losses in which the named insured's conduct contributes to the cause of the loss, at least, partially, as opposed to a loss that the additional insured solely caused.

The ISO modifications appear to present a compromise by expressly including coverage for claims that are only partially caused by the additional insured's conduct, but by excluding coverage where the additional insured solely caused the loss. Those who are named as an additional insured must be familiar with the extent to which coverage is provided and should closely examine any such policy to determine what is necessary to trigger coverage. While being named as an additional insured may provide coverage for some percentage of the losses that may result on a construction project, the foregoing demonstrates that there are circumstances where coverage does not apply for an additional insured. Understanding these boundaries is essential to evaluating one's risk on a project.

Document Retention

Some documents, like the contract, should be filed away and kept virtually forever. But most project files languish in increasingly expensive storage space. Our clients ask us: "How long do we need to keep these files before discarding them?"

The answer depends on the statute of limitations in the state where the project is located. In Illinois, for example, the law states that no lawsuit or arbitration can be filed unless the problem on which it is based was discovered within ten years of the date of the act or omission that caused the problem. However, the law further states that a claimant who discovers a problem near the end of this ten-year period has an additional four years from the date of discovery in which to file the claim. Thus, for most practical purposes, after fourteen years from the end of the project, no further claims can be filed.

Every state's laws are different. Minnesota's statute of limitations is twelve years, and Michigan's is six. Some states do not have statutes of limitations applicable to construction claims. Ideally, you should determine the applicable statute of limitations and consider it in your risk analysis before signing your contract.

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Of course, the advice above is conservative because most claims are filed long before the statute of limitations expires. Most construction claims are filed within the first two years after the completion of the project, and the overwhelming majority of claims are filed within five years. So if storage space is unusually precious or expensive, nonessential documents can usually be safely discarded after five years from project completion.

Should You Use Digital Signatures?

Under what circumstances should your firm use or accept electronically transmitted digital signatures in place of an actual handwritten signature?

Unless you are responsible for administering a massive procurement program with multiple layers of contract approvals, signed originals of major contracts, or copies thereof, should reside in your files. To avoid problems with unauthorized signatories, don't accept facsimile signature pages without follow-up originals. To prevent misunderstandings, initial each page of the contract, just as you would normally do on multiple pages of design documents.

A digital acceptance signature, using Microsoft, Adobe or PKI standards, may be useful where there are multiple layers of approval needed by the parties that may otherwise delay execution of a legally binding contract. In these circumstances, a digital signature may be preferable to a fax signature page because of its ability to ensure authenticity, especially from a large corporation or government agency. In most situations, A/E's would not want or need to use a digital signature to indicate their acceptance of a contract.

Pitfall: Digital signatures can be dangerous if they lure people into only looking at computer screens before accepting contracts. The reasons are:

1. For most people, spending time reading a paper version of a contract and then affixing a signature best promotes an understanding and acceptance of the risks, especially when there is incorporation by reference of attachments such as proposals, terms and conditions and industry standard forms. As one of our clients told us, "I don't want to hear someone say he never saw the contract even though his signature is on it."

2. In most private firms many persons can legally bind the company. With electronic signatures there can be a tendency for contracts to be accepted that have not been properly reviewed by senior executives for economic risks and by legal and insurance counsel. The size of the contract should not always determine the contracting authority. Remember Paul Lurie's Law: "Your legal problems may be inversely proportionate to the size of the contract."

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If you are going to use or accept digital signatures, be sure to understand how the signature authentication software. Only accept signatures that conform to those standards. Make sure that your digital signatures likewise conform. Be aware of the implications for employee terminations. Just like with CAD, make sure you have a paper copy of all contracts.

Besides being careful about formal signatures, avoid inadvertently entering into binding contracts by an exchange emails or faxes. If you are concerned about misunderstandings as to when a business deal is final, include a legend: "*This message and attachments are not to be considered a formal agreement until an agreement is signed between the parties.*"

If you want to know a lot more about digital signatures, see the excellent article from the American Bar Association at <http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html>.

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