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ADDITIONAL INSUREDS UNDER CGL POLICIES

[Ref. Law of Insurance: General Liability, Para. 1.02]

Construction claims present a wide variety of issues, and have accordingly generated litigation on a grand scale. Construction sites are ripe for problems, with workers from multiple trades and companies often on site at the same time, heavy equipment, steel girders, power tools, excavations, heights, weather, and deadlines all creating their own risks. Typically, those involved in construction projects attempt to protect against these risks through insurance coverage and contracts that govern the various aspects of project responsibilities. Often, contracts include indemnity provisions requiring one party to protect another party in claims that result from the construction project. Similarly, the contracts might also require that insurance be secured for the job and that the party securing the insurance name certain entities as additional insureds.

Both indemnity agreements and insurance required by the parties to construction contracts can be affected by state law. Over 40 states have laws that affect the validity of indemnity contracts involving construction work and more than a quarter of these states also have laws affecting the validity of contracts requiring insurance coverage for additional insureds. Aside from these concerns, the owner of a project will usually require the general contractor to include the owner as an additional insured on the general contractor's policy. It is also common for a general contractor to require subcontractors to name the general on the subs' policies. The idea is that those further up the food chain, who are likely to be brought into suits based on the fault of those they have hired, will be protected as additional insureds. A reasonable premise, but drafting the additional insured definition to provide the intended coverage has proved to be a challenge.

It has been argued that it was always the insurers' intent that the additional insured be covered only for situations in which the additional insured could be vicariously liable for the acts of the named insured. But, courts often found coverage for other than vicarious liability claims. In response, various attempts were made at perfecting the additional insured language. One result is the definition currently the subject of most litigation. This definition, as found in the standard ISO CGL policy amendatory endorsement, provides coverage for an additional insured if the additional insured's potential liability "arises out of" the operations of the named insured. Because the general rule of insurance contract interpretation is to broadly interpret policy language granting coverage, many courts have continued to find coverage for other than vicarious liability claims. Some decisions require coverage for the additional insured even when there is no basis for holding the named insured liable – clearly not what the insurers intended.

As a result, ISO issued a new version of the additional insured endorsement in 2004. This incarnation no longer uses the "arising out of" language and instead requires that the alleged injury

or damage be “caused, in whole or in part, by” the named insured. The theory is that this language should not allow coverage for an additional insured when the named insured did nothing to cause the injury or damage. Since the pre-2004 policies continue to generate litigation and policies with this older definition are still being issued, decisions involving the “arising out of” language will be our focus. Some commentators seem to feel that the 2004 changes should properly limit the scope of coverage. Others, though, are not so certain. While there has been little litigation involving the 2004 form to date, the newer language will also be explained.

“ARISING OUT OF”

A named insured who wants to add another party as an additional insured under a CGL policy can do so via an amendatory endorsement (ISO form CG 20 10), which provides that the person or organization named on an accompanying schedule is an additional insured, “but only with respect to liability arising out of your ongoing operations performed for that insured.” An owner, for example, would be an additional insured under a contractor’s policy only if the owner’s liability arose out of the contractor’s operations performed for the owner. Arising out of, however, is not defined in the policy or the endorsement.

Although insurers may have intended to limit additional insured status to cases of vicarious liability, courts consistently have held that an additional insured’s liability arises out of the named insured’s operations if the additional insured’s and the named insured’s negligence combine to cause the injury. But, what if the named insured did nothing to contribute to the loss? While this is the kind of claim insurers clearly did not envision as being covered, the majority of courts have held such losses are covered.

Federal Insurance Company and Southern Wine and Spirits of America, Inc. v. American Hardware Mutual Insurance Company, 184 P3d 390 (Nev. 2008), involved a named insured, Clark Lifts, and an additional insured, Southern Wine and Spirits. A Clark employee, Pierce, was performing repairs on a conveyor belt at Southern’s facility when he slipped on a piece of cardboard on the floor. As he fell, Pierce reached out and his hand became caught in the conveyor belt. Pierce sued Southern for serious injuries to his hand and Southern tendered the defense to Clark’s insurer, American Hardware. American argued that the “arising out of” part of its additional insured definition only obligated the insurer to defend claims for which the named insured could be held vicariously liable. The insurer sought a ruling from a federal court on this insurance coverage issue. The parties stipulated that the accident occurred as Pierce described – due to the negligence of the additional insured, Southern. The federal court certified the following coverage question to the Nevada Supreme Court:

“Under Nevada law, does an additional insured endorsement provide coverage for an injury caused by the sole independent negligence of the additional insured?”

The Nevada court explained that it and other courts require clear language to restrict an insurer’s coverage. The court said the American Hardware policy did not contain any “distinctly limiting language.” The court went on to say that it and other courts have recognized that the scope of coverage provided by “arising out of” is ambiguous because it is unclear whose acts are covered. One reasonable interpretation is that the endorsement limits coverage to when the named insured’s acts or omissions cause the loss and the additional insured is vicariously liable. Another reasonable interpretation is that the endorsement covers the additional insured’s direct negligence as long as the plaintiff’s injury has some connection to the work or operations that the named insured performed for the additional insured. Two reasonable interpretations make the language ambiguous and require that the court interpret the ambiguous language in the insured’s, or in this case, the additional

insured's favor.

The court concluded that since the policy wasn't specific about whose fault triggers coverage and in light of the rule that policy language would be interpreted broadly to favor coverage, "it seems objectively reasonable that the additional insured would have expected coverage for liability connected to the named insured's operations, regardless of who was at fault." The court also pointed out that because the policy language does not purport to allocate coverage according to fault, other jurisdictions have found coverage even when only the additional insured was at fault. The court said:

Other jurisdictions agree. Indeed the majority of jurisdictions resolving disputes over whether coverage extends to the additional insured's own negligent acts have interpreted additional insured endorsements in favor of coverage, regardless of fault, provided that the injury or loss is connected to the named insured's operations performed for the additional insured. Thus, the common approach in addressing questions concerning whether injury or loss caused by the additional insured's own negligence falls within the scope of an additional insured endorsement is to broadly construe an endorsement's "arising out of" language as including instances when liability was occasioned by the additional insured's independent negligence.

The court did require that the injury or loss be "connected" to the insured's operations, but cited with favor a California decision that held that "only a minimal causal connection or incidental relationship" is necessary to meet this standard.

Of course, standard ISO language isn't used in all insurance policies. In *Baker Concrete Construction, Inc. v. Whaley Steel Corporation*, 2008 Mich. App. LEXIS 2407 (Mich. App. 2008), Etkin Construction, the general contractor for the construction of a Marriott hotel, hired Baker Concrete as the subcontractor for the concrete framework. Baker in turn hired L.W. Connelly & Son to provide a crane and crane operator to assist in constructing the framework. While the Connelly operator was lifting a "chair box" under the direction of a steel subcontractor, the chair box struck an upright stanchion. The stanchion fell nine floors and hit Rupersburg, an employee of the electrical subcontractor. The injured employee sued Etkin, Baker, Connelly, and the steel subcontractor. At trial, a jury assessed fault against all of the defendants except Connelly.

The subcontract between Baker and Connelly required Connelly to name Baker and the general contractor, Etkin, as additional insureds under its liability coverage. St. Paul Surplus Lines Ins. Co., Connelly's insurer, issued an endorsement naming Baker and Etkin as additional insureds, but "only for covered injury or damage that results from your [Connelly's] work for them." St. Paul argued that because Connelly was not negligent, there was no causal connection between Connelly's work and the accident, and Baker and Etkin did not qualify as additional insureds. The court ruled that the absence of fault on the part of Connelly was irrelevant. The court concluded:

The St. Paul policy ... does not require fault; rather, it requires a simple causal connection between Connelly's work and the accident. ... Therefore, because Rupersburg's injuries arise out of Connelly's contract performance, the policy is triggered. Again, the fact that the jury assessed zero fault against Connelly is irrelevant because the policy ... does not require fault as a basis for coverage.

While the court in *Baker Concrete* was faced with different language (this additional insured definition used "results from," rather than "arising out of"), the court required the same "simple causal connection" used when considering the "arising out of" language. Other variations on "arising out of" include "arising solely out of" and "only with respect to operations performed by."

As with the *Baker* decision, and depending on the specific facts, courts applying these variations reach similar results.

Not all decisions find coverage. In *Worth Construction Company v. Admiral Insurance Company*, 883 NE2d 1043 (N.Y. 2008), the prime contractor, Worth, subcontracted the fabrication and installation of metal stairs to the named insured, Pacific, and Worth was named as an additional insured under Pacific's policy. Pacific installed the metal framework and pans for the stairs. It then left the site and a concrete subcontractor arrived to fill in the stair pans with concrete. Then another sub came onto the site to fireproof the stairs. It was after this step that the plaintiff, Murphy, fell on the slippery fireproofing and was injured. Murphy, an employee of an iron work subcontractor, sued Worth and Worth requested coverage as an additional insured from Pacific's insurer. Pacific played no role in either contracting for or applying the fireproofing, nor did it subcontract with the injured employee's employer for any work at the site. An intermediate appellate court held that the mere fact that the loss occurred on the stairs was sufficient to constitute "arising out of" – enough for many courts to find coverage. The highest New York appellate court, though, disagreed. First, the court said that a lack of fault on Pacific's part was not the deciding factor. Even though Pacific was not negligent, or even present, it was necessary to also consider whether the loss could have arisen out of its operations. According to this court, " 'arising out of' has been interpreted to mean 'originating from,' 'incident to' or 'having connection with' and requires 'that there be some causal connection between the injury and the risk for which coverage is provided'."

The court held that in this case the necessary connection was absent. An entirely separate company applied the fireproofing and the named insured was not on the job site at the time of the injury. While the complaint originally alleged Pacific's negligence as a cause of the accident, once Worth admitted that its claim that Pacific was negligent was without factual merit, there was no other connection between Pacific's work and the risk for which coverage was intended.

THE 2004 REVISION: A CAUSATION REQUIREMENT

In 2004, ISO endorsement CG 20 10 was revised, and the "arising out of" language was deleted. The endorsement now provides:

Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organizations(s) shown in the Schedule, but only with respect to "bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

The revised endorsement's introduction of causation language was intended to eliminate situations in which an additional insured could be covered under the named insured's policy when the injury was caused solely by the additional insured's negligence. Although only a few courts have ruled on the meaning of "caused, in whole or in part" as opposed to "arising out of," it would seem that the new language would bar coverage in cases such as *Federal Insurance*, discussed previously, in which only the additional insured was negligent and the only connection between the injury and the named insured's work was that the injured employee was working for the named insured when he was injured. The employee's injury can be said to have arisen out of the named insured's work, since the employee was doing the named insured's work at the time of the accident, but it does not

appear that the injury was “caused,” even “in part,” by any “act or omission” of the named insured.

Since the revised language requires that the injury be caused, at least in part, by some act or omission by or on behalf of the named insured, coverage as an additional insured should also be barred when the injury is caused by the negligence of the additional insured and third parties other than the named insured, such as other subcontractors. It’s not entirely clear, however, that all courts will interpret the new language in this way.

A federal court in *American Empire Surplus Lines Insurance Co. v. Crum & Forster Specialty Insurance Co.*, 2006 U.S. Dist. LEXIS 33556 (S.D. Tex. 2006), applied Texas law and held that a general contractor was covered as an additional insured by a subcontractor’s policy under the “caused, in whole or in part” language, even though the plaintiff alleged that both were negligent and made no allegation of vicarious liability. Finger Companies was the general contractor on a residential construction project in Houston. Finger hired Multi Building, Inc. as the framing subcontractor. The subcontract required Multi to name Finger as an additional insured under its liability coverage. Multi’s insurer, Crum & Forster, issued a policy with an endorsement using the 2004 ISO language. It named Finger as an additional insured “... only with respect to liability for ‘bodily injury’ ... caused in whole or in part, by” Multi’s acts or omissions or the acts or omissions of those acting on behalf of Multi.

One worker was killed and another injured when they fell from a makeshift aerial lift (a “trash box” attached to a forklift). The family of the deceased worker filed a wrongful death claim against Finger and Multi, alleging negligence against both. The plaintiffs later filed an amended complaint alleging that Finger was vicariously liable for Multi’s conduct, and Crum & Forster conceded that Finger was an additional insured from that point on. The insurer maintained, however, that it did not have any duty to defend Finger before that amendment because “the policy covers Finger only when Finger is found vicariously or derivatively liable for the acts of Multi.” American Empire countered by arguing that the policy should be interpreted exactly as it is written, “... i.e., that Finger is covered as an additional insured for injuries ‘caused, in whole or in part’ by Multi, and Finger’s conduct is not pertinent to this analysis.” The court rejected Crum’s argument as follows:

Contrary to Crum’s argument, nothing in the “whole or in part” sentence of the endorsement ... expressly limits Finger’s additional insured coverage to derivative or vicarious claims based on Multi’s acts, as Crum asserts. The words “derivative” and “vicarious” are conspicuously absent from the endorsement. ... Crum may not read into the clause an unstated limitation that Finger’s negligent conduct in combination with Multi’s disqualifies Finger as an additional insured.

The court in *American Empire* went on to hold that coverage as an additional insured under the “caused, in whole or in part” language is not limited to vicarious liability for the named insured’s negligence because even if the plaintiff alleges that the additional insured’s negligence caused, in part, the injury, that does not preclude an allegation that the named insured also “caused, in part,” the injury. The court said that the plaintiffs’ allegations against Finger and Multi satisfied the “caused, in whole or in part” requirement because “plaintiffs ... may argue at trial ... that Finger and Multi acted in concert in participating in the decisions to use, supply, or design the makeshift aerial lift; that Finger and Multi collaborated in directing the workers’ use of the lift; or that Finger and Multi jointly made other decisions that rendered the workplace unsafe.”

Thus, it is possible to read *American Empire* as holding that a general contractor is an additional insured under a subcontractor’s policy only when the general contractor and sub have acted in concert or collaborated in their negligent acts or omissions, leaving the question of independent acts of negligence to later decisions.

CONCLUSION

For CGL policy endorsements that use the “arising out of” language, the additional insured will almost always qualify for coverage if there is an allegation that the additional insured is vicariously liable for the named insured’s negligence. Similarly, if the allegation is that the named and additional insureds were both negligent, coverage for both is likely. If the plaintiff alleges that the injury or property damage was caused solely by the negligence of the additional insured, with no allegation of negligence on the part of the named insured, the majority of courts that have decided this issue have extended coverage to the additional insured when the claim alleged a connection to the named insured’s operations.

When the injury or damage was caused by the negligence of both the additional insured and the named insured, one court has held that the loss is covered under the 2004 endorsement, at least when the allegation is that the named and additional insureds acted in concert.

The 2004 “caused, in whole or in part” language was introduced with the hope that it would be more effective in precluding coverage for an additional insured when the additional insured is alleged to be the only negligent defendant. With few reported cases on this issue, it remains to be seen whether the “caused by” language will achieve the desired result.