Recent Developments Affecting Additional-Insured Coverage Portfolios

David E. Schoenfeld
Justin R. Donoho[1]

I. INTRODUCTION

Many insurance policies extend coverage to additional parties who are not named insureds under the policy. This situation arises, for example, when a general contractor requires its subcontractors to list it as an additional insured on the subcontractors' insurance policies. The benefits to the additional insured are several. The additional insured obtains additional coverage while the named insured pays the premiums, and, in the event of a claim might avoid consumption of its own insurance and increased future premiums.

But the benefits can also be uncertain. What is the scope and amount of additional insurance available? Recent decisions underscore that evaluating this question depends on the type of "additional insured" endorsement(s) or provision(s) found in the policy and which state's law governs the policy.

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[1] David E. Schoenfeld is a partner and Justin R. Donoho is an associate in the Chicago office of Shook Hardy & Bacon, LLP, where they advise and represent insurers in coverage disputes arising from mass tort, environmental, product liability, construction defect and bad faith claims. The authors would like to thank William H. Howard, Coverage Counsel for Zurich North America, and Ruth S. Kochenderfer, Senior Vice President of Marsh U.S.A. Inc., for their invaluable contributions. The views and opinions expressed in this article do not reflect the positions or opinions of the authors' law firm or clients, the contributors' employers, or their clients or insureds. This article is for informational purposes only and does not, and is not intended to, provide legal advice.

Pre-2004 policies typically provide coverage to additional insureds only with respect to liability "arising out of" the named insured's work for the additional insured. Depending on which state's law governs the policy, such language has usually been interpreted broadly, providing coverage for the additional insured's acts, omissions, or negligence so long as it has some connection to the named insured's operations. However, a minority of jurisdictions interpret such language narrowly, providing coverage only for the additional insured's exposure to vicarious liability for the negligent acts of the named insured.

Typical policies since 2004 have begun to remove the "arising out of" language and instead provide coverage to additional insureds only with respect to injury or damage "caused, in whole or in part" by the named insured's acts or omissions or those acting on behalf of the named insured for the additional insured. Like pre-2004 policies, post-2004 policies also have a range of interpretations depending on the state law governing the policy, though the range is smaller. Such language has been interpreted from relatively broadly, providing coverage using a but-for causation standard, to relatively narrowly, providing coverage only for losses proximately caused by the named insured. On the other hand, separate language in post-2004 policies providing additional-insured coverage for liability caused by those those acting "on [the named insured's] behalf" has been interpreted almost as broadly as have most pre-2004 policies, providing coverage when the additional insured is liable for assisting the named insured's performance of its work.

Since 2013, it has become more typical for additional-insured clauses to use not only the "caused, in whole or in part" language in post-2004 policies but also language limiting coverage to the extent required by an agreement to provide coverage. For example, if a general contractor required that its subcontractor list it as an additional insured in the subcontractor's policy only

with respect to certain operations, and that the general contractor would assume liability for other operations, then the subcontractor's insurance policy would require that one look also to that separate agreement to understand that no additional-insured coverage would be provided to the general contractor for the latter operations.

Those are just the typical insurance policies according to forms issued by the Insurance Services Office, Inc. ("ISO"), an industry-supported organization that develops standard insurance policy forms. Insurer-specific and manuscript forms also exist. Insurance policies also change and, as just described, can change via a change of underlying agreement incorporated by reference. Moreover, many states have enacted anti-indemnity statutes that may restrict coverage for negligence caused by an additional insured, different states interpret such statutes differently, and such statutes are especially important in light of the provision added to the 2013 ISO form providing that additional-insured coverage is available "to the extent permitted by law." In short, evaluating one's portfolio of insurance coverage as an additional insured can be tricky.

This article aims to aid such an evaluation by illustrating the range of interpretations of additional-insured clauses such as those located in the above-described ISO forms, demonstrating the different ways insurance policies might incorporate a separate insurance agreement, and discussing the different ways additional insured coverage may interact with the state anti-indemnity statutes. Section II discusses the latest types of insurance policies that limit themselves by incorporation of a separate agreement in the context of *In re Deepwater Horizon*, 470 S.W.3d 452, 455 (Tex. 2015), subsequent cases interpreting it, and *Kmart Corp. v. Footstar, Inc.*, 777 F.3d 923 (7th Cir. 2015). Section III discusses two recent cases drawing conclusions on the opposite sides of the causation spectrum regarding the "caused, in whole or in part"

language in post-2004 policies, and a third recent case reaching a broader result than the first two via an interpretation of different language in post-2004 policies. Section IV discusses two recent cases illustrating the divergent interpretations of the "arising out of" language in pre-2004 policies. Section V discusses anti-indemnity statutes. The conclusion summarizes key things to consider when evaluating one's portfolio of insurance as an additional insured, as gleaned from the previous sections.

II. 2013 ISO FORM

The 2013 ISO form provides: "If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you [the insured] are required by the contract or agreement to provide for such additional insured."[2] Under this language, if a contract between a named insured and an additional insured requires the named insured to maintain coverage for the additional insured that is narrower in scope than what the named insured carries for itself, then the additional insured may be limited to what is required by the contract and will not be able to take advantage of the named insured's own broader coverage.

No reported decisions yet interpret this new language, but recent cases illustrate the issue to which this language responds. For example, the insurance policy at issue in *Deepwater Horizon* was not so explicit as the 2013 form but the Texas Supreme Court concluded it was similar in effect. In that case, policies were issued to Transocean, which owned the Deepwater Horizon oil-drilling rig and provided services under a drilling contract to oil-field developer BP. The drilling contract allocated risk such that Transocean agreed to indemnify BP for above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all sub-surface

[2] ISO Additional Insured Endorsement Form CG 20 10 04 13.

pollution. The drilling contract further required Transocean to maintain CGL coverage for this indemnity agreement and name BP as an additional insured "for liabilities assumed by [Transocean] under the terms of [the Drilling] Contract."[3]

Transocean's policy provided for automatic inclusion as an additional insured "any person or entity to whom the Insured is obliged by any oral or written Insured Contract to provide insurance such as is afforded by this Policy."[4] The policy further provided that additional insureds would be covered "where required by written contract."[5]

After the April 2010 explosion and sinking of the Deepwater Horizon in the Gulf of Mexico, BP sought additional insured coverage for underwater spillage. BP argued that the policy did not limit the scope of additional insured coverage to above-surface risks, and that the court should confine its analysis to the four corners of the policy and not consider the drilling contract in considering the scope of additional-insured coverage.

The Texas Supreme Court rejected BP's argument and held that the drilling contract limited the scope of additional-insured coverage to the risks assumed by Transocean in that contract. According to the court, the language of the insurance policy dictated that the policy incorporated the drilling contract by reference such that BP was an additional insured only so far as the drilling contract "obliged" and "required" Transocean to indemnify BP and require insurance for such indemnification. Since Transocean was not obliged or required under the drilling contract to indemnify BP and maintain coverage for sub-surface pollution, the court

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3 470 S.W.3d at 457.
4 470 S.W.3d at 470.
5 *Id.*

concluded that the scope of additional-insured coverage did not include coverage for such pollution.[6]

Two subsequent Texas cases addressed the incorporation of contractual limits on the scope of additional-insured coverage following *Deepwater Horizon* and reached different results because of the specific language of the insurance policies at issue. In *Ironshore Specialty Ins. Co. v. Aspen Underwriting, Ltd.*, 788 F.3d 456 (5th Cir. 2015), the Fifth Circuit, interpreting Texas law, was presented with a policy that, like in *Deepwater Horizion*, provided for automatic inclusion as an additional insured "any person or entity to whom the Insured is obliged by any oral or written Insured Contract to provide insurance such as is afforded by this Policy," but, unlike in *Deepwater Horizon*, did not further provide that additional insureds would be covered "where required by written contract." The court held that the former "obliged" language standing alone was enough to limit any additional-insured coverage to be congruent with the limits imposed by a separate agreement.[7]

By contrast, in *Liberty Surplus Ins. Corp. v. Exxon Mobil Corp.*, No. 14-14-00254-CV, 2015 WL 9256675 (Tex. App. Dec. 17, 2015), the policy defined an additional insured as "any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by you."[8] The court held that "the endorsement does not incorporate coverage limitations from the underlying contract . . . it refers the reader to the written contract when identifying who is an

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6 470 S.W.3d at 465–69.

7 *Id.* at 462.

8 *Id.* at *5.

insured, but not when limiting the circumstances under which such a person or organization is considered to be an insured."[9]

Unlike the policy in *Liberty Surplus*, the 2013 ISO form and similar forms unambiguously link the scope of additional-insured coverage to requirements in the underlying contract. A recent case from the Seventh Circuit with policy language similar to the 2013 ISO form is illustrative. In *Kmart Corp. v. Footstar, Inc.*, 777 F.3d 923 (7th Cir. 2015), Footstar and Kmart entered into a services agreement authorizing Footstar to operate the footwear department in Kmart stores but to sell or furnish no other merchandise or services in the stores without prior written permission from Kmart.[10] In essence, the footwear department was to function as its own store within the larger Kmart store. The services contract required Footstar to indemnify Kmart for damage "arising out of Footstar's performance or failure to perform under this Agreement," and to maintain insurance for personal injury claims "arising out of or relating to the goods and services provided pursuant to this Agreement." [11]

Footstar's policy provided that additional insured coverage "[a]pplies only to coverage and limits of insurance required by the written agreement, but in no event exceeds either the scope of coverage or the limits of insurance provided by this policy."[12]

A customer asked a Footstar employee for help in getting a stroller down from a shelf. The Footstar employee and a Kmart employee reached up and attempted to bring the stroller down. As they were bringing it down, an infant carrier inside the stroller fell and struck the customer in the face. The accident took place in the infant/stroller department, which was

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9 *Id.*

10 *Id.* at 926.

11 *Id.* at 926.

12 *Id.* at 926.

entirely outside of the Footstar department. The customer brought suit and Kmart sought coverage for the acts of the Footstar employee.

The Seventh Circuit first agreed with other courts analyzing the same policy language and finding that it incorporated and required the Court to look at the services agreement to determine which acts could give rise to coverage. It then held that since the services agreement limits the coverage to work provided for in the agreement, meaning only those acts performed in the footwear department, Kmart did not have additional-insured coverage because the Footstar employee was not working pursuant to the services agreement since he was acting outside the footwear department.[13]

III. 2004 ISO FORM

The 2004 ISO form provides additional-insured coverage "only with respect to liability for 'bodily injury,' 'property damage' or 'personal 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 locations designated [in the endorsement]."[14] Under this language, an additional insured may obtain coverage if the claim against it is caused at least in part by the named insured.

Two recent cases analyzed the precise language above and came to different conclusions as to what it means for claimed damages to be "caused" by the named insured. In *James G. Davis Const. Corp. v. Erie Ins. Exch.*, No. 802 SEPT. TERM 2014, 2015 WL 6510538 (Md. Ct. Spec. App. Oct. 28, 2015), a subcontractor set up a scaffold, which collapsed. Plaintiffs sued the subcontractor and general contractor, accusing both of negligence. The insurer declined to defend the general contractor as an additional insured on the ground that the policy did not cover

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[13] *Id.* at 929.

[14] ISO Additional Insured Endorsement Form CG 20 10 07 04.

additional insureds for their own negligent acts. The trial court agreed and granted the insurer summary judgment. The Maryland Court of Appeals, in a case of first impression under Maryland law, reversed, finding that the ISO 2004 form is not limited to granting additional-insured coverage only for instances of vicarious liability, and that additional-insured coverage was available even if the general contractor engaged in negligent acts so long as the named insured subcontractor proximately caused the injury.[15]

In *Orchard v. Phoenix Ins. Co.*, No. 2:14-CV-11902, 2015 WL 7294574, (E.D. Mich. Nov. 19, 2015), a general contractor directed the manner in which to remove and replace covers on two sludge-processing digester tanks at wastewater treatment plant. Plaintiffs were killed or injured when they used a torch to remove the covers, which ignited the methane gas inside the tanks and caused an explosion. Plaintiffs sued the general contractor and the project engineer, accusing both of negligence. After first noting that "[n]o courts within the State of Michigan or the Sixth Circuit have had the opportunity to settle whether these types of additional insured clauses are limited only to instances of vicarious liability," the court then held that they were not so limited, held that the additional-insured endorsement should be interpreted using a but-for causation standard, and found a duty to defend, stating: "while some of the allegations in the underlying complaints are premised on independent acts or omissions by [the project engineer], others arise from acts or omissions also associated with [the general contractor]'s work. Because [the general contractor] was undisputedly responsible for jobsite safety, and many of the allegations concern jobsite safety, the omissions alleged arguably can be said to arise, at least in part, from [the general contractor]'s work."[16]

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[15] *Id.* at **6–8.
[16] *Id.* at **6–8.

In sum, under both cases, the insurer was held to have a duty to defend when the complaint alleged negligence against both the named insured and additional insured. However, in *Orchard* the court used a more lenient standard, under which an indemnity obligation would arise even if the named insured did not proximately cause the injury but merely contributed to it.

A third recent case found additional-insured coverage via a broad reading of the "on your behalf" language in a policy similar to the ISO 2004 form. In *Elk Run Coal Co. v. Canopius U.S. Ins., Inc.*, 775 S.E.2d 65 (W. Va. 2015), a policy was issued to Medford, a trucking company that provided hauling and delivery services to Elk Run, a coal company. Medford's policy provided that Elk Run was an additional insured "only with respect to liability . . . caused, in whole or in part, by . . . [the] acts or omissions of those acting on your [Medford's] behalf."[17] An Elk Run employee injured a Medford employee while loading coal onto a Medford truck, and there was no allegation that Medford caused or contributed to the accident in any way. Nevertheless, the court found that Elk Run was an additional insured because Elk Run caused the accident while acting on Medford's behalf. According to the court, although Medford was hired to work for Elk Run, Elk Run's assistance to Medford's performance of that work constituted "acting on behalf" of Medford even though Elk Run was not contractually obligated to assist Medford.[18]

IV. PRE-2004 ISO FORMS

Pre-2004 ISO forms provide coverage to additional insureds "only with respect to liability arising out of your ongoing operations performed for that insured."[19] Most courts have reasoned that such a provision provides coverage so long as there is some nexus between the

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[17] *Id.* at 71.

[18] *Id.* at 72.

[19] ISO Additional Insured Endorsement Form CG 20 10 10 01.

additional insured's negligent act and the named insured's operations, whereas a minority of jurisdictions confine additional-insured coverage under such a provision to instances of vicarious liability.

Two recent cases are illustrative. In *Higby Crane Serv., LLC v. Nat'l Helium, LLC*, No. 10-1334-JAR, 2015 WL 5692078 (D. Kan. Sept. 28, 2015), the operator of a helium plant negligently released or vented various gases in such a manner that a vapor cloud formed and ignited. As a result of the fire, the crane owned by plaintiff was damaged. The court reasoned that the plant operator was covered as an additional insured on the plaintiff crane operator's policy because "liability for negligence may arise out of the named insured's operations even though only the additional insured is liable for negligence. All that is required to trigger CGL coverage . . . is the existence of a sufficient causal nexus between the named insured's operations and the liability—whether that is the liability of the named insured or the liability of the additional insured." [20]

In *Currier v. Penn-Ohio Logistics*, 2010-Ohio-195, 186 Ohio App. 3d 249, 927 N.E.2d 604, a crane operator was stacking steel bundles on the floor of an industrial building leased by his employer. The floor collapsed and the crane operator was killed. His estate filed a wrongful death action alleging independent acts of negligence against the employer and the building's landlord. The court, following a line of Ohio precedent, found that the landlord was not covered as an additional insured on the tenant employer's policy, reasoning, unlike *Higby*, that "the policy provided coverage for [the landlord] solely for its vicarious liability." [21] According to the court, this was apparent from the "plain language" of the "arising out of" provision, the lack of premium indicating a lack of intent to include the landlord for its independent acts of negligence,

[20] *Id.* at *9.

[21] *Id.* at ¶ 26.

and the fact that it would have been easy, had the parties intended, to include in the additional insured provision that the landlord was to be an additional insured "with respect to its independent acts of negligence" that occur on the leased premises. [22]

V. ANTI-INDEMNITY STATUTES

A second provision of the 2013 ISO form additional-insured endorsements highlights another potential gap between intended contractual risk allocation and the risk transfer actually effected by additional-insured coverage. Many states have enacted statutes limiting the extent to which an indemnitor may indemnify the indemnitee for the indemnitor's negligence, sole negligence, or construction design.[23] Typically such statutes are limited to the construction industry though they exist for other industries as well. For example, an Illinois statute governing construction contracts states that "every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable." [24]

Parties may look to insurance to fill this gap: a named insured may be able to procure additional-insured coverage protecting its upstream parties from liability for which it could not indemnify them directly. But this strategy might be limited by state-by-state restrictions. For example, although Illinois' anti-indemnity statute has an exception stating that it does not apply to insurance contracts or agreements,[25] Illinois courts have held that the anti-indemnity statute voids agreements to purchase insurance that are "inextricably tied" to void indemnity

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22 *Id.* at ¶¶ 27–29.

23 Allen Holt Gwyn, Paul E. Davis, "Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law," *Construction Lawyer* (Summer 2003).

24 740 ILCS 35/1.

25 740 ILCS 35/3.

provisions.[26] Other courts such as in California have reached the opposite conclusion.[27] Texas does the opposite of creating an exception for insurance, explicitly stating that a provision in a construction contract requiring a named insured to add the other party as an additional insured is void "to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an agreement to indemnify, hold harmless, or defend."[28]

The scope of the law regarding anti-indemnity statutes is thus varied. It is also critical to understand the scope of such law in the state governing an insurance policy when examining the scope of coverage, especially in light of the provision added to the 2013 ISO form providing that "[t]he insurance afforded to such additional insured only applies to the extent permitted by law."[29] No case interpreting that provision has yet arisen but the provision appears to be an attempt to ensure that additional-insured coverage will not be found when barred by an anti-indemnity statute, and to enable a court to reform the policy so that the coverage provided is consistent with state statutory or common law. Even without that provision, however, a court may find no additional-insured coverage when the scope of coverage is otherwise dependent on a separate agreement (such as described in Section II above) that a court finds void.[30] Parties need to be mindful of what anti-indemnity statutes might apply and if they do what are their scope (sole negligence, negligence, etc.) and whether they operate to void or limit additional-insured coverage or agreements to provide such coverage.

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[26] *Transcon. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 662 N.E.2d 500, 506 (Ill. App. Ct. 1996).

[27] *Am. Cas. Co. of Reading, PA. v. Gen. Star Indem. Co.*, 125 Cal. App. 4th 1510, 1525, 24 Cal. Rptr. 3d 34, 44 (2005).

[28] Tex. Ins. Code Ann. § 151.104. On the other hand, Texas does make an insurance exception for its oilfield anti-indemnity statute. Tex. Civ. Prac. & Rem. Code § 127.005.

[29] ISO Additional Insured Endorsement Form CG 20 10 04 13.

[30] *Transcon.*, 662 N.E.2d at 506.

VI. CONCLUSION

As the above cases illustrate, different states' laws may dictate different judicial interpretations on the scope of the various standard ISO form additional-insured endorsements. The range of coverage for an additional insured absent an incorporated indemnity and insurance agreement, from broadest to narrowest, can be anywhere from covering (1) any negligence by the additional insured so long as it is connected in some way to the named insured's operations; to (2) any negligence by the additional insured so long as it was incurred while assisting the performance of the named insured's work; to (3) negligence by the additional insured in which the named insured also contributed to the injury; to (4) negligence by the additional insured in which the named insured proximately caused the injury; to (5) only vicarious liability of the additional insured for the negligent acts of the named insured. When evaluating the scope of one's additional-insured coverage it is critical to know, for each policy potentially providing such coverage, which state's law governs, the terms of the policy, and how governing law interprets such terms.

Moreover, in addition to navigating different additional-insured clauses under different states' laws, in the latest ISO form additional-insured coverage can be affected by an indemnity agreement including a requirement to procure insurance, as well as by state anti-indemnity statutes. This means that policyholders, insurers, underwriters, and brokers need to be careful when negotiating and drafting such agreements to ensure (1) that they are valid and (2) that they fully and accurately reflect the bargained-for risk allocation. In addition, parties need to be careful when renewing or changing insurance policies or insurers, to do so in a way that does not breach the insurance provision of the underlying contract.