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What do you mean there's an issue with my additional insured coverage? by James Terry and Christopher Long

This is a question that one hopes never to have to ask, and as attorneys we hope never to have to prompt or answer. Unfortunately, however, instances do arise in which this very chilling question is asked early on in litigation by an owner, developer, or construction manager struggling to process what they have just been told. People who thought they had limited their liability exposure and potential legal costs end up embroiled in an ancillary battle to determine their additional insured status while also footing the bill defending an underlying lawsuit seeking to saddle them with liability. With careful planning at the contract phase of a project, and by knowing what the Additional Insured forms used in the industry say, one can avoid having to confront the above question.

The Insurance Services Office ("ISO") has recently filed a series of changes to its Commercial General Liability Additional Insured coverage forms, which many insurance carriers are expected to adopt right away. The current revisions – the first significant changes made to these forms since 2004 – are expected to have a meaningful impact on the scope of Additional Insured status and thus on risk allocation in construction contracts. These changes are summarized below.

Significantly, the changes appear on all Additional Insured endorsements by ISO, including the regularly used construction risk forms CG 20 10, CG 20 37, and CG 20 33. One such revision is that Additional Insured coverage is restricted to the extent permitted by law. Another notable change is that the Additional Insured scope of coverage is restricted to that which is required by contract. A third meaningful revision is that the Additional Insured coverage limit is restricted to that which is required by contract as well. Taken together, these changes clearly reflect an increased focus on aligning the scope of coverage with contract terms requiring Additional Insured coverage. The relevant language (italicized) and its likely impact are as follows:

- **The insurance afforded to such Additional Insured only applies to the extent permitted by law.**

Prior to this change, in states where anti-indemnity laws apply to Additional Insured coverage, state-specific Additional Insured endorsements were needed; if the wrong form were to be used, the Additional Insured coverage could be lost. The 2013 amendment addresses this issue by obviating the need for such state-specific endorsements.

- **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 are required by the contract or agreement to provide for such additional insured.**

Typically, construction contracts call for Additional Insured protection for the "upstream" contractual parties, e.g., the owner and the general contractor in the case of a subcontractor. However, construction contracts vary widely on the scope of required Additional Insured coverage, ranging from a simple request to be added as an Additional Insured to complex, multi-paragraph articles delineating the scope of the liability covered. This change reconciles the limits of the scope described in the Additional Insured endorsement form with specific contract requirements. The Additional Insured must therefore exercise caution to include contractual terms specifying coverage encompassing the broadest liability attributable to the acts or omissions of the Named Insured.

- **If coverage provided to the Additional Insured is required by a contract or agreement, the most we will pay on behalf of the Additional Insured is the amount of insurance: 1) Required by the contract or agreement; or 2) Available under the applicable Limits of Insurance shown in the Declarations; whichever is less.**

Insurance carriers are naturally loathe to be placed in the position of providing greater liability limits to an Additional Insured than may have been required by the Additional Insured's contract, and this change addresses that possibility. Be aware that this change gives rise to a scenario where a gap in insurance coverage for an Additional Insured could exist, i.e., where the contract calls for a lower limit of CGL Additional Insured coverage than the limits of the CGL policy providing the coverage. In this

instance an Additional Insured could be responsible for a gap between the CGL coverage and an excess policy coming into play after the limits are exhausted, even though no such gap in insurance coverage was contemplated by the parties. In addition to the above-described changes to existing endorsements, ISO has introduced a new endorsement, Form 2038 04 13, effectuating Additional Insured coverage for project owners by project subcontractors. "Who is an Insured" is amended to include as an additional insured, "Any other person or organization you are required to add as an additional insured under the contract or agreement described...above." This new form addresses a well-known and often litigated issue arising from existing Form CG 20 33 in circumstances where an owner not in direct contractual privity with a subcontractor on a project is nevertheless intended under the contract documents to be an Additional Insured on the subcontractor's liability insurance.

While the above discussion is not intended to be an exhaustive identification of the ISO's recent revisions, the above-noted changes will clearly impact typical construction contract risk allocation through the Additional Insured mechanism and ought to be contemplated when contracting for work or services on a project. The bottom line is to be sure that your actual insurance coverage is aligned with the intent of your agreements.

The above article is an overview only, and should not be considered legal advice, which is dependent upon specific facts and circumstances. For more information, please contact or at 212.682.6800.

ATTORNEYS

James J. Terry