

**CGL ISSUES AND DEVELOPMENTS SEMINAR*****COVERAGE ISSUES FOR  
ADDITIONAL INSUREDS IN  
CONSTRUCTION DEFECT LITIGATION***

Presented by

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Ms. Oonk is one of the presenters for Monday's "CGL Issues and Developments" seminar. She is a partner with the Tampa, Florida, office of Butler Burnette Pappas. Her practice centers on insurance coverage litigation, both first- and third-party, and on the defense of construction defect and environmental and toxic tort liability suits.

Ms. Oonk is a member of the Florida Defense Lawyers Association, the Defense Research Institute, and the American Bar Association. She is active in the Tort and Insurance Practice Section of the ABA, currently serving as a vice chair for the Section's Insurance Coverage Litigation Committee. She has contributed articles to the TIPS publications *The Reference Handbook on the Comprehensive General Liability Policy: Coverage Provisions, Exclusions and Other Litigation Issues*; *Property Insurance Issues in Catastrophe Losses: Legal Questions and Practical Solutions*; and *Recurring Issues in Insurance Disputes: A Guide for Insurers and Insureds*. She served on the faculty of the TIPS national institute on Insurance Coverage for Defective Construction and published an article in the Summer 1999 issue of *The Brief* titled "The Construction Industry: Coverage Issues Created By Claims Against Additional Insureds." Along with partner R. Steven Rawls, she coauthored Chapter 12, "Litigating Coverage During the Pendency of the Underlying Tort Suit" of West's recently published insurance law treatise *Law and Practice of Insurance Coverage Litigation*.

Ms. Oonk is a 1985 graduate of Lehigh University with a bachelor of arts in history, *summa cum laude*. She received her J.D. from the UCLA School of Law in 1988 and is a member of both the California and Florida Bars. She is admitted to practice in the federal courts of both jurisdictions.

# **COVERAGE ISSUES FOR ADDITIONAL INSUREDS IN CONSTRUCTION DEFECT LITIGATION**

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## **Where to start the analysis**

- ∩ Contract between Named Insured and contractor Named Insured is working for**
- ∩ Policy language conferring additional insured status**

## **Construction Contract**

- Ω **Named Insured's indemnity obligation**
- Ω **Named Insured's insuring obligation**

## **Indemnification Clause**

- Ω **Key is the extent of indemnity owed**
- Ω **Indemnification for the indemnitee's own negligence is primary consideration**
- Ω **Statutory limitations on indemnity may affect interpretation of contractual language**

## **Types of contractual indemnification**

- ∞ Indemnification for indemnitee's own, active negligence**
- ∞ Indemnification for passive negligence of indemnitee**
- ∞ Indemnification for vicarious liability of indemnitee where indemnitee has not been negligent**

## **Indemnification for indemnitee's own active negligence**

- ∞ Statutory limitations generally preclude indemnification for damage caused solely by indemnitee or results from indemnitee's willful or intentional misconduct**
- ∞ Indemnification clause must specifically reference that indemnitee is being indemnified for their own negligence**

## **Indemnification for passive negligence of indemnitee**

∴ **Absent specific language that indemnitee will be indemnified for indemnitee's own negligence, this is the interpretation most commonly applied by courts**

## **Indemnification for vicarious liability of indemnitee where indemnitee has not been negligent**

∴ **This is the most limited type of indemnity and is consistent with common law indemnity**

## Insurance Clause

- Ω **What types of coverage is the Named Insured required to carry?**
- Ω **What limits of liability is the Named Insured required to carry?**
- Ω **Is the Named Insured required to obtain coverage for others, and if so, what type of coverage is required?**

## Example

- Ω Subcontractor shall at all times maintain in effect throughout the performance of this agreement workers' compensation insurance, as required by law covering all employees. Subcontractor shall also at all times maintain in effect bodily injury and property damage liability insurance for (a) all operations, (b) subcontract work, (c) contractual obligations, (d) products and completed operations, (e) all vehicles, and (f) non-owned vehicles. Bodily injury liability, including auto, shall be in the amounts of \$500,000/\$1,000,000. Property damage liability, including auto, shall be in the amount of \$300,000. All such insurance shall be written in form and underwritten by companies approved by Contractor, and will name Contractor as an additional insured. Subcontractor shall deliver to Contractor certificates evidencing all such insurance issued by the insurers prior to commencement of the work. Failure of the Subcontractor to deliver all such certificates by the time Subcontractor is to commence the work shall be a default under this agreement.

## **Obtaining additional insured status**

- Ω **Certificate of Insurance**

- Ω **Additional insured endorsement**

## **Certificate of Insurance**

- Ω **Generally construed as evidence of insurance rather than conferring additional insured status, even where certificate specifically references that the certificate holder has been added to the policy as an additional insured**

- Ω **Certificate generally not as specific about coverage as needed**

## **Additional Insured Endorsement**

- ∩ **Added to named insured's policy as part of the policy**
- ∩ **Outlines the coverage afforded to the additional insured**
- ∩ **ISO forms -- need to be sensitive to edition date of form as coverage has changed**
- ∩ **Manuscript forms -- more specific but more difficult to obtain**
  - **Insurer may have its own form which is manuscript or hybrid of ISO forms**

## **ISO additional insured endorsements**

- ∩ **CG 20 09**
- ∩ **CG 20 10**
- ∩ **CG 20 33**

# CG 20 09 additional insured endorsement

## 🔗 Most limited form in common usage

## 🔗 Pertinent parts of endorsement to construction defect issues

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization (called "additional insured") shown in the Schedule but only with respect to liability arising out of:
  - A. Your ongoing operations performed for the additional insured(s) at the location designated above; or
  - B. Acts or omissions of the additional insured(s) in connection with their general supervision of such operations.

\* \* \*

- B. Additional Exclusions. This insurance does not apply to:

\* \* \*

### (2) "Bodily injury" or "property damage" occurring after:

- (a) All work on the project (other than service, maintenance, or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or
- (b) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

ISO CG 20 09 1993 and 1996

# CG 20 10 additional insured endorsement

## 🔗 Different versions of endorsement confer different coverage impacting completed operations

## 🔗 1985 version arguably covers completed operations

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of "your work" for that insured by or for you.

## 🔗 1993 version of the endorsement does not cover completed operations

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

## CG 20 33 additional insured endorsement

- ∞ Adds additional insureds where contractual obligation to provide additional insured coverage exists
- ∞ Arguably includes completed operations and should pick up continuing contractual obligation to provide additional insured coverage after project terminates

**WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you agreed, because of a written contract or agreement or permit, to provide insurance such as is afforded under this policy, but only with respect to your operations, "your work" or facilities owned or used by you.**

## Coverage for the additional insured's own negligence

- ∞ Generally found to exist absent express language in endorsement limiting coverage to named insured's negligence
- ∞ Example
  - **WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the schedule as an insured but only with respect to liability arising out of your acts or omissions.**

## Coverage for completed operations

- ◊ Pardee Construction Co. v. Ins. Co. of the West, 77 Cal. App. 4th 1340 (Cal. Ct. App. 2000)(certified for partial publication)
- ◊ Low v. Golden Eagle Ins. Co., 2002 WL 398211 (Cal Ct. App. 2002)(not officially published)

## Defense obligation owed to an additional insured

- ◊ The defense obligation does not appear to be limited to the scope of the work performed by the named insured
  - Presley Homes, Inc. v. American States Ins. Co., 90 Cal. App. 4th 571 (Cal. Ct. App. 2002)
- ◊ Issues where equitable subrogation or contribution are not available to allocate defense obligation among responsible insurers
  - Schal Bovis, Inc. v. Casualty Ins. Co., 315 Ill. App. 3d 353 (Ill. Ct. App. 2000)

## Does the additional insured have all of the coverage available under the named insured's policy?

### ⌚ Jacobs Constructors, Inc. v. NPS Energy Services, 264 F. 3d 365 (3rd Cir. 2001)

- Additional insured is not the same as a named insured and did not have contractual liability coverage under policy

### ⌚ Marathon Ashland Pipe Line LLC v. Maryland Casualty Co., 243 F. 3d 1232 (10th Cir. 2001)

- Additional insured is the same as a named insured and had coverage for employer's liability

## Coordinating additional insured coverage with additional insured's own coverage

### ⌚ Policy provisions available which make additional insured's own coverage excess to additional insured coverage

### ⌚ Absent policy provision, "other insurance" provisions apply to determine obligations of various insurers

### ⌚ Additional insured's self-insured retention is not "other insurance"

- Consolidated Edison Co. of New York v. Liberty Mutual, 2002 WL 31387744 (N. Y. Supreme Court 2002)

## **Good Faith/Bad Faith implications of additional insured coverage**

- ⌚ **Failure to defend an additional insured can support a bad faith claim**
- ⌚ **Allocating available policy limits between named and additional insureds**

## **Supplementary payments**

- ⌚ **Even without additional insured status, means exist to obtain defense under current version of ISO policy**
- ⌚ **If party an insured owes indemnity to is not an additional insured and does not qualify for defense under supplementary payments, defense costs are covered and are part of indemnity limits**
  - **Golden Eagle Ins. Co. v. Ins. Co. of the West, 99 Cal. App. 4th 837 (Cal. Ct. App. 2002)**

## Tips for procuring additional insured coverage

- ② Specify in the construction contract what limits should be obtained
- ② Specify in the construction contract the quality of the carrier that must be used
- ② Specify in the construction contract that the additional insured coverage should be primary
- ② Specify in the construction contract that the additional insured coverage should apply to completed operations and the length of time such additional insured coverage should be maintained

## Tips for procuring additional insured coverage (con't)

- ② Specify in the construction contract that the additional insured's own negligence should be covered, consistent with the indemnity provisions of the construction contract
- ② Specify in the construction contract which form of additional insured endorsement to be used
- ② Specify in the construction contract that the policy obtained, including the additional insured endorsement shall be provided (preferably before work begins)
- ② Institute an internal monitoring process to insure that required additional insured status is maintained after the project is completed