

Preconference Workshop 1

Monday, November 7, 9:00 a.m.–noon and 1:30–4:30 p.m.

THE CHANGING FACE OF ADDITIONAL INSURED COVERAGE

Moderator



**Jack Gibson, CPCU, CRIS
President
IRMI**

Panelists



**Paul Becker, CPCU, ARM
Vice President
Willis**



**Jill B. Berkeley
Partner
Schiff Hardin LLP**

Recently the coverage provided to additional insureds has been under attack from both the insurance industry and the legislative branch. The 2004 changes to standard additional insured endorsements dramatically restrict the scope of the additional insured's coverage, and many of the non-standard endorsements currently in use are even more restrictive than the standard versions. At the same time, a

number of state legislatures have introduced, and in some cases passed, legislation that makes it illegal to require insurance coverage that exceeds the scope of allowable indemnification under the anti-indemnity statute. In many instances, even the new standard additional insured endorsements would exceed the allowable scope of coverage. This workshop will provide a brief review of the evolution of the standard additional insured endorsements and present a panel of experts who will address a variety of concerns that standard and insurer endorsements present for owners and general contractors.



**Daniel F. Conway
President
AIG Construction
Risk Management**



**Donald S. Malecki, CPCU
Principal
Malecki Deimling Nielander
& Associates, LLC**



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**Paul Becker
Vice President
Willis**

Mr. Becker is a panelist for Monday's Preconference Workshop 1, "The Changing Face of Additional Insured Coverage." He has been executive vice president of the Construction Risk Management Group for Willis for the United States since August 1993. He is located in Nashville. This group is responsible for coordinating and directing marketing, safety management consulting, claims management, statistical support, coverage, contractual issues, and insurer relations for property and casualty insurance for Willis.

Mr. Becker is a frequent speaker at a variety of industry meetings and seminars including DBIA, CFMA, and AGC. He currently is a national director of CFMA and serves on the Risk Management Committee of AGC. In addition, he is a frequent contributor to industry publications.

Mr. Becker is a graduate of Franklin and Marshall College in Lancaster, PA. His professional designations include Chartered Property and Casualty Underwriter (CPCU) and Associate in Risk Management (ARM).

**Jill B. Berkeley
Partner
Schiff Hardin LLP**

Ms. Berkeley is a panelist for Monday's Preconference Workshop 1, "The Changing Face of Additional Insured Coverage." A partner, she leads the Insurance Practice Group at Schiff Hardin LLP in Chicago. Ms. Berkeley's practice focuses on insurance coverage. She has extensive experience representing insurers, self-insurers, and policyholders in coverage litigation and risk management issues relating to construction, product liability, environmental, intellectual property, and general commercial disputes. Ms. Berkeley has authored numerous papers and articles, including the reference guide, *CGL Reporter—The Insurance Coverage Litigation Handbook*. Some of her recent publications include: "Six Myths To Overcome for Insuring Economic Loss, Breach of Contract, and Faulty Workmanship," *CGL Reporter*, Spring 2004; "Duty to Defend," *Commercial and Professional Liability Insurance*, Illinois Institute of Continuing Legal Education, 2002; "Managing the Ongoing Insurer-Insured Relationship," *The Brief*, Vol. 30, No. 2, p.60 (Winter 2001); "Getting Along with the Insurer: A Guide for the Zealous Defense Litigator," *The Practical Litigator*, Vol. 9, No. 6, p.19 (November 1998); "Policyholder Panacea? The Role of Independent Counsel," 44 *Risk Management* 57 (June 1997).

Ms. Berkeley graduated from the University of Michigan with a B.A. with High Honors, 1972, Phi Beta Kappa, and from Northwestern University School of Law, 1975.

Daniel F. Conway
President
AIG Construction Risk Management

Mr. Conway, a panelist for Monday's Preconference Workshop 1, "The Changing Face of Additional Insured Coverage," is president of AIG Construction Risk Management and has 18 years of field and home office underwriting experience. He began his career with AIG in 1995 in AIG's Philadelphia office. In 1998, Mr. Conway joined the Construction Risk Management Home Office as divisional vice president and became president of the division in 2004.

Mr. Conway is leading AIG's 2005 initiative, AIG Construction Solutions, as a natural extension of the scope of coverage and services available to contractors and sponsors of wrap-up projects. It is designed to provide seamless coordination of primary casualty lines, builders risk, excess/umbrella, pollution liability; A&E/professional, surety, accident & health, Defense Base Act, foreign voluntary workers compensation, and risk finance to AIG construction risk management clients and prospects.

Prior to AIG, Mr. Conway held various underwriting and management positions with a Pennsylvania regional mutual insurer that specialized in workers compensation.

Mr. Conway holds a bachelor of science degree in risk management from Temple University.

Jack P. Gibson
President
International Risk Management Institute, Inc.

Mr. Gibson is cochairman of the Conference and is also moderating Monday's Preconference Workshop 1, "The Changing Face of Additional Insured Coverage." He has been an integral part of International Risk Management Institute's management team since 1982, and became president of IRMI in 1985. Prior to joining IRMI, Mr. Gibson was a consultant with a leading national risk management firm. His consulting practice focused on financial institutions, public entities, and contractors. Mr. Gibson majored in risk management at the University of Georgia where he received a bachelor of business administration degree, *cum laude*, in 1977 and a master of business administration in 1979. In 1996, he was honored as Georgia's Outstanding Insurance Alumnus of the year. He is a Chartered Property and Casualty Underwriter (CPCU), a Chartered Life Underwriter (CLU), and holds the Associate in Risk Management (ARM) designation. Mr. Gibson is the coauthor of 11 reference works on insurance and risk management, all of which have been published by IRMI. Included among these works are *Contractual Risk Transfer*, *Construction Risk Management*, and *The Additional Insured Book*. In addition to his management duties, he continues as editor of *The Risk Report*, and is currently editor-in-chief of IRMI.com. A sought-after and highly rated seminar speaker, Mr. Gibson has been a presenter at the annual conventions or meetings of virtually every major industry trade association serving the risk management and insurance communities as well as many construction industry and lawyer seminars and meetings. He serves as cochair and presenter at the IRMI Construction Risk Conference and received the Words of Wisdom (WOW) award. Mr. Gibson is an active member of the CPCU Society. He has held many committee and officer positions, including president, in the Dallas Chapter. Additionally, he served on a national level from 1985 through 1999, when his 3-year term on the Board of Directors ended.

Donald S. Malecki, CPCU
Principal
Malecki Deimling Nielander & Associates, LLC

Mr. Malecki is a panelist for Monday's Preconference Workshop 1, "The Changing Face of Additional Insured Coverage." He is a principal of Malecki Deimling Nielander & Associates, LLC, an insurance, risk, and management consulting firm in Kentucky. He also is president of Malecki Communications Company, publisher of *Malecki on Insurance*, a monthly newsletter on commercial insurance subjects.

He has been in the insurance and risk management business for more than 45 years as a broker, claim consultant, consultant, supervising underwriter, teacher, and writer.

Mr. Malecki is currently on the examination committee of the American Institute for Chartered Property Casualty Underwriters and the Consultants, Legal and Expert Witness Section Committee of the Society of CPCU, and he is an active member of the Society of Risk Management Consultants. He is past president of the Cincinnati Chapter of CPCU (1975) and past member of the Commercial Lines Industry Liaison Panel of the Insurance Services Office, Inc. He was given the Standard Setter Award of the Society of CPCU in 1998 and the Insurance Professional of the Year by various insurance groups in the Cincinnati, Ohio, area in 2004.

He is the author and coauthor of 10 books, including three textbooks used in the CPCU curriculum. In addition to *The Additional Insured Book* (1991), two of the books, *Insuring the Lease Exposure* (1981) and *The CGL Book* (1986), were Cincinnati Chapter research projects. His latest book is *The MCS-90 Endorsement: Truckers versus Insurers and the Government Makes Three*, published by IRMI in 2004.

Mr. Malecki is a graduate of Syracuse University, served 4 years with the U.S. Air Force, and holds the Korean Service Medal.

Notes

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The Changing Face of Additional Insured Coverage

***Paul Becker**
Willis*

***Jill Berkeley**
Schiff Hardin*

***Dan Conway**
AIG*

***Jack Gibson**
IRMI*

***Don Malecki**
Malecki Deimling Nielander*

Additional Insured



Evolution of the Construction Additional Insured Endorsement

Jack P. Gibson
IRMI

Presentation Overview

- Evolution of CGL Additional Insured Status
- Why the History Is Relevant
 - All Forms in Use in the Marketplace
 - Occurrence Coverage Trigger
- Where We Are Today
- Contractors' Action List

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Reasons To Require AI Status

- Insulate My Insurance Program
- Back-up to Indemnity Agreements
- Direct Rights in the Policy
- Defense Coverage
- Broader Transfer Than Allowed under State Law

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Standard and Nonstandard Forms

- Insurance Services Office (ISO) Forms
- Insurer or Insured Drafted ("Manuscript") Forms

Note: All policy language quoted in this presentation is copyrighted by Insurance Services Office, Inc.

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ISO Changes Timeline

- 1973 CGL Program
- 1986 CGL Program Revisions (CG 20 10 11 85)
- 1993 CGL Program Revisions (CG 20 10 10 93)
- 1997 CGL Program Revision (CG 20 10 03 97)
- 2001 CGL Program Revision (CG 20 10 10 01)
- 2004 Endorsement Revision (CG 20 10 07 04)

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1986: Comprehensive to Commercial

Most Controversial CGL Revision Ever

1973 Endorsement (GL 20 10 Ed. 01 73)

The "Persons Insured" provision is amended to include as an insured the person or organization named below but only with respect to liability arising out of **operations performed** for such insured **by or on behalf of the named insured**.

1986 Endorsement (CG 20 10 11 85)

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.

Emphasis Added

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1986: The Issues

■ Other Insurance Clauses

- Primary and Noncontributory Contract Requirements
- Changing AI's Other Insurance Clause

■ Completed Operations Coverage

■ Form A versus Form B

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1993: Eliminating Completed Ops Coverage

1986 Endorsement (CG 20 10 11 85)

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 Endorsement (CG 20 10 10 93)

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.

Emphasis Added

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Reaction to Completed Ops Restriction

- Contract Requirements for 11 85 ed.
- Insurer Response Until 2001
- Insurer Response Since 2001

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1997: Addressing the Other Insurance Issue

■ Other Insurance Provision Endorsement

This insurance is excess over:

... Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

■ Name Change To Clarify Form A versus Form B

■ Automatic AI Endorsement (CG 20 33)

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2001: More on Completed Operations

■ Completed Ops Exclusion for CG 20 10 and CG 20 33

■ Completed Ops Coverage Endorsement (CG 20 37)

■ Incorporated Other Insurance Endorsement into CGL Form

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2001 CG 20 10

2001 Endorsement (CG 20 10 10 01)

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.

With respect to the insurance afforded to these additional insureds, the following exclusion is added:

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

- (1) All work, including materials, parts or equipment furnished in connection with such 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**
- (2) 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 a part of the same project.**

Emphasis Added

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Completed Ops Coverage Endorsement

2001 Completed Ops Endorsement (CG 20 37 10 01)

Section II – Who Is An Insured 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" at the location designated and described in the schedule of this endorsement performed for that insured and included in the "products-completed operations hazard".

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2004: Goodbye to Sole Negligence Coverage

- The Issue: Broad Coverage Regardless of Fault or Negligence
 - Subcontractors
 - Insurers
- The Solution: Fault Requirement
 - Additional Insured Status
 - Contractual Liability Coverage

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Relevant 2001 Endorsement Language (CG 20 10)

Section II – Who Is An Insured 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.

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Relevant 2001 Endorsement Language (CG 20 10)

Section II – Who Is An Insured 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.

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Relevant 2004 Endorsement Language (CG 20 10)

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for **“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.

Emphasis Added

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Points To Consider


- Any Degree of NI's Fault Will Trigger Coverage for AI
- Is an Owner or Contractor "Acting on Your Behalf" in Providing a Safe Workplace?
- Action Over Claims

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Action Over Claims

- Subcontractor's Employee Injured
 - Collects WC Benefits
 - Sues GC and/or Owner
 - Cannot Sue Employer (Subcontractor)
- GC or Owner as AI and Indemnitee

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Reactions

- Subcontractors
- General Contractors and Owners
- Insurers

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Action List

- Transferor
 - Keep Up with the Marketplace Stance
 - Carefully Draft Insurance Requirements
 - Monitor Subcontractor Compliance
 - Assert NI’s Culpability in Tender to NI’s Insurer
 - Consider Alternatives, Such as CIPs

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Action List

■ Transferee

- Include in Renewal Negotiations
- Resist the Contractual Liability Endorsement
- Know What Your Underwriters Will Do with AI
- Develop Negotiating Tactics
- Train Contract Negotiators

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Endorsement Language

Old CG 20 10

Section II – Who Is An Insured 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.

New CG 20 10

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "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.

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PANEL DISCUSSION TOPICS

Scope of CG 20 10 07 04 Coverage

Coordination with NI's Own Insurance

Completed Operations Coverage

Nonstandard Endorsements

Certificates of Insurance

Additional Insured

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