Limit Your Liability from AdditionalInsureds

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Every supplier and trade contractor has seen contracts that require a downstream contractor to name upstream parties as additional insureds its commercial general liability policy.

Often, the downstream contractor simply forwards the requirements to its insurance broker, who makes sure the contractor's insurance provides the coverage the upstream parties want.

That approach may expose the downstream contractor to more liability and potential cost than the law requires.

A crane, rigging, millwrighting, or other downstream contractor needs to make sure its contract keeps coverage for additional insureds as narrow as possible.

Depending on the state where you will be working, laws may limit the coverage you need to provide for additional insureds. Also, the Insurance Services Office form you use can affect your exposure.

Broader Coverage, Extra Risk

If a downstream contractor gives additional insureds (upstream companies) broad coverage, the downstream contractor's insurance may have to pay for, or help pay for, losses the downstream contractor didn't cause. Those losses would become part of the downstream contractor's loss history.

Many states have recently passed anti-indemnity and anti-insurance statutes that benefit downstream contractors.

But a downstream contractor may also limit its exposure by using Insurance Services Office form ISO CG 20 10 04 13, which can narrow the coverage the contractor provides for additional insureds, thereby reducing the risk to the downstream contractor's loss history.

How We Got Here

Traditionally, construction contracts have used indemnity clauses to transfer risk downstream. Modern construction contracts are based on form agreements originally published in 1888. They are designed to transfer risk from the project owner to the general contractor and trade contractors.

Historically, the transfer was done through an indemnity clause, in which the downstream party would agree to fully protect or hold harmless all upstream parties from all claims. Essentially, an indemnity clause makes the downstream party the insurer for those upstream.

Gradually, case and statutory law limited the effect of indemnity clauses. Case law often limits the scope and effect of indemnity clauses by interpreting them narrowly and imposing strict drafting requirements. In addition, many states have passed statutes that either void or severely limit the effect of indemnity clauses. An indemnity clause is also limited by the downstream party's ability to pay.

The legal and practical limitations of indemnity clauses led upstream parties to create construction agreements that required downstream parties to buy liability insurance that named upstream parties as additional insureds. An additional-insured provision can give an upstream party protection they often cannot get from an indemnity clause.

Updated Form Helps Protect Downstream Parties

Originally, a party could be named as an additional insured by using a manuscript endorsement. Although they still can, today's most common way to name additional insureds is an Insurance Services Office (ISO) form.

The ISO form, CG 20 10 11 85, appeared in November, 1985. That form is very broad, both from its language and from court interpretations. It has been interpreted so broadly that the additional-insured status could be triggered even when the named insured (downstream contractor) was not negligent or has not caused the loss.

Any loss by any additional-insured party (upstream contractor) on a jobsite where the primary insured (downstream) contractor was working could trigger

the additionally-insured coverage. Also, CG 20 10 **11 85** provided coverage even for *completed* operations.

Since 1985, ISO has revised the CG 20 10 form many times. In fact, the CG 20 10 **11 85** form is not even commercially available today.

The revisions tried to limit coverage for additional insureds. Some of those limitations have included requiring the loss to be caused by the named insured (downstream contractor) and eliminating completed-operations coverage. As mentioned above, one of the newer additional-insured forms, CG 20 10 ***04 13***, can help protect downstream contractors.

Stop right here. Call your insurance broker. Does your policy currently have CG 20 10 04 13? If not, ask your broker to interpret the endorsement. The new endorsement can really help downstream contractors.

One of the most interesting changes in CG 20 10 04 13 is in Section A.

It limits an additional insured to: *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.*

However: 1. The insurance afforded to such additional insured only applies to the extent permitted by law; and 2. 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.

We believe two provisions in this endorsement can help a downstream contractor control its additional-insured exposure and, therefore, its loss history.

The first: "*only applies to the extent permitted by law.*"

The second: "*the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide.*"

When the insurance granted to the additional insureds is limited by law, as the first passage says, the insurance contract must be read in concert with applicable statutes and case law. Applicable laws include anti-indemnity statutes, anti-additional insured statutes, and case law that voids, narrows, or strictly interprets indemnity clauses.

Well over 40 states have some form of anti-indemnity statute. They typically apply to industries such as construction, energy (gas and oil), or transportation, and may be limited by the nature of the project (public vs. private). The statutes can go as far as eliminating indemnity or limiting it to the sole fault of the party seeking indemnity.

Some statutes allow indemnity only for damages caused by the indemnifying party. CG 20 10 04 13 lets a downstream company argue that if the law limits or does not allow indemnity, the insurance coverage granted under the endorsement is also limited or not allowed.

The same argument applies to anti-additional-insured statutes.

Those statutes may void, limit, or narrow all contractual additional-insured requirements. While the statutes may control the scope of additional-insured coverage on their own, the language in the CG 20 10 **04 13** endorsement provides additional protection. It leaves no doubt as to the parties' intent to limit additional-insured status.

That is particularly important when dealing with limitations on additional insurance created by case law. In some states, the anti-indemnity statute has been interpreted as prohibiting additional insurance. In those cases, the broadly worded language of the endorsement should make sure those limitations are applied to the additional insured.

Some judicially created rules may also limit indemnity clauses.

In one state, using a typeface that is too small and not bold enough can invalidate an indemnity clause. Under a different additional-insurance endorsement, that case law would not affect the additional-insured endorsement. But when the additional-insured coverage is limited to what the law allows, you can argue that the void-indemnity clause should limit the additional-insured coverage. Other case law limitations, such as the requirement for specific language requesting indemnity for your own fault, may also be used to limit additional insured status. The argument being that since the law limits indemnity and the additional insurance is limited by the law, then the law should also limited the additional insurance.

The second provision mentioned above says, "*the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide.*" This is another important limitation found in CG 20 10 **04 13**. Under a broadly worded additional insured endorsement, such as a CG 20 10 **11 85**, there was seemingly no limit to coverage for the additional insured. They could reasonably say they should have the same benefits as the named insured, and that not providing those benefits would be bad faith on the part of the insurance company. That argument often cost an insurance company lots of money. Insurers were often forced to let the additional insured select their own lawyers, who would run up enormous bills and then help the additional insured bully the insurance carrier into settling, without concern for the amount, so long as it was within the named insured's limits. The costs would flow directly to the named insured's loss history.

By limiting the additional-insured's coverage to the contract terms, the named insured has a chance to keep the additional insured under control.

We often fight for language that says we will only provide insurance or indemnification for a loss or claim caused solely by our negligence. If our insured caused a loss, our insured pays. But if the loss is caused by the upstream contractor or another downstream contractor, we don't pay. That is typically the intent of the anti-indemnity statute.

The type of additional-insured endorsement you use is important.

Don't just make sure you have the requested coverage. Aim to provide it in the most narrow and economical way possible.

It can have a positive impact on your loss history and in turn, your current and future financial condition. ■