

Additional Insured Liability and Contractual Indemnity Coverage

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THE FOLLOWING **PREVIEW** HAS BEEN APPROVED FOR
ALL AUDIENCES

CE Credit
Evaluations
Questions?



A vintage television set with a wooden cabinet. The screen displays a test pattern consisting of a top row of seven vertical color bars (white, yellow, cyan, green, magenta, red, blue), a middle row of seven horizontal color bars (blue, magenta, yellow, red, cyan, black, white), a bottom row of a grayscale ramp and a rainbow gradient, and a bottom-most row of a grayscale ramp. A black text box is overlaid on the screen.

A REWARDING PRESENTATION????
NO TRIVAL MATTER!!!!



Next Week on Dallas.....



Next Week on Dallas.....

- Contractual issues
 - Insurance Contract
 - Business Contract
- Obligations of insurer vs. Contract indemnitee
- Tenders
 - Defense
 - Indemnity
 - Protocols

Who Shot JR?



Character

Actor/Actress name

Year assassin
was revealed?





SURVEY SAYS...!



WHAT IS AN ADDITIONAL INSURED?

NAME SOME TYPICAL ADDITIONAL INSUREDS?

Sub contractor (contractor)

Suppliers (product manufacturer)

Manufacturer (retailer)

Lessee (lessor)

Others?



WHAT IS AN ADDITIONAL INSURED?

Definition:

- A person or organization for whom another (typically subcontractor) agrees to provide insurance
- Afforded by its insurance policy;
- Insured only with respect to operations performed by sub or on sub's behalf,
- Or facilities owned or used by sub

Evanston, 256 S.W.3d at 665–66; *Zurich Am. Ins. Co.*, 268 S.W.3d at 495–96.



WHAT IS AN ADDITIONAL INSURED?

Sample insurance policy provision – definition:

“any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization is an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of:

“1. ‘your work’ at the location designated; ...”



Got You Covered?

- Not so fast my friend!
- Exclusions
 - Limit to the coverage period:
“This insurance **does not apply** to “bodily injury” or “property damage” **occurring after**:
 1. All work...to be performed by or on behalf of the additional insured(s) at the site of the covered operations **has been completed**; or



Got You Covered?

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 part of the same project.”
 - Coverage not broader than contracted for in the indemnity agreement



DUTY BOUND

- Responsibilities:
 - AI has same responsibilities as named insd.
 - Addtl. insd. owes duty to cooperate w/ins. co.
 - To same extent & in the same degree as would the named insd. had he alone been involved

***Cotton States Mut. Ins. Co. v. Martin*, 110**

***Ga.App. 309, 138 S.E.2d 433; Ericson v. Hill*, 109**

Ga. App. 759.



DUTY BOUND

- Rights:
 - Same as the named insured.
 - Will policy protect the AI from:
 - vicarious liability,
 - joint liability,
 - primary liability?
- Defense



PROTECT ME

- Negligence of AI – is it a defense?
- Lawyer answerdepends
 - On the indemnity agreement
 - AI clause
- Example:
 - Commercial tenant
 - CGL policy
 - Landlord is AI



PROTECT ME

- Hypothetical:
 - Customer visits insured business & injured
 - Customer sues landlord
 - What if the landlord is negligent?
 - Is landlord protected under policy?
- Answer?????
 - Most policies, probably not
 - Protects due to negligence of tenant (indemnitor)



IT'S ALL ABOUT RELATIONSHIPS!

Between Contractual Indem. & Additional Insureds

- Contractual indemnitee types:
 - AI protected by promises made in indemnity agreement
 - NI agrees to purchase ins. naming AI
 - Extends benefits under policy to AI
 - Same rights as NI
 - Same responsibilities as NI



IT'S ALL ABOUT RELATIONSHIPS!

Sample indemnitee contract provision:

To the fullest extent permitted by law, the subcontractor shall defend, indemnify, and hold harmless the **contractor** and all of its agents and employees from and **against all claims**, damages, losses, and expenses, including attorneys' fees, in **any way arising** out of or resulting from the performance, condition, or existence of the work under the contract, whether or not such claim, damage, loss, or expense is based **in whole or in part upon any negligent act or omission** of the contractor.



IT'S ALL ABOUT RELATIONSHIPS!

- What does “in whole or part” mean?
- What must you look to in determining?
- How can you defend if facts not yet developed to establish degrees of neg.?
- What must you do?



IT'S ALL ABOUT RELATIONSHIPS!

- Who did Maxwell Smart have a “relationship” w/ in Get Smart?
 - Character “name”
 - Actress name?
- Trivia: TV Guide ranked Get Smart’s opening title sequence No. 2 on its list of TV’s Top 10 Credits Sequences as selected by readers.



WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE!

- What movie?
- You said I would be covered by your insurance. . .but
 - What if the named insured doesn't name the AI?



WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE!

Garrett v. Nelson And Affiliates, LLC, 761 F. Supp. 2d 1312, 1317, 78 Fed. R. Serv. 3d 854 (M.D. Ala. 2011) (applying Georgia law)

- Intent of the parties to have the indemnitee covered by insurance, expressed in the indemnity contract, **is controlling**
- **Even if** the indemnitor fails to secure the required ins.
- Ct. construed the indemnity provision & requirement of ins. in the Subcontract



WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE!

Garrett v. Nelson And Affiliates, LLC, 761 F. Supp. 2d 1312, 1317, 78 Fed. R. Serv. 3d 854 (M.D. Ala. 2011) (applying Georgia law)

- Subcontract included the indemnity provision
- Court concludes:
 - Subcontract clearly and unambiguously shows that ***the parties intended coverage***
 - Of the indemnity agreement by insurance.
 - Therefore: “***the indemnity agreement is enforceable...***”



WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE!

- Example of AI clause in building contract:

The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Owner's lender(s), the Owner's landlord, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions **during the Contractor's operations**; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions **during the Contractor's completed operations**.



OH NO YOU DON'T

- Prohibition of some indemnity agreements
- Sub Contractor's Trade associations
- Purpose: prohibit indemnity agreements involving sole negligence of the indemnitee.
- State specific
- Industry specific (Florida road construction contracts – Cone Bros.)
- “Unfair” to hold the subcontractor responsible for the actions of the GC
- Chart of laws: Published by: Foundation of the American Subcontractors Association, Inc.



OH NO YOU DON'T

- Knowledge of the requirements in your state is crucial
- When tender is made, must determine
- “General” indemnity clauses:
 - Do not address issue of indemnitee's negligence
 - May be construed to provide indemnity for loss resulting in part from indemnitee's passive negligence (vicarious liability)
 - But not if indemnitee has been actively negligent.

***Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal. 3d 622, 532 P.2d 97 (1975).**



NOW WHAT?

- If indemnity clause is invalid (state law) what do I do?
 - Can deny tender, however, maybe not . . .
 - Loophole: Indemnatee may still have coverage
 - State has anti indemnity statute but Court allowed entity listed as an additional insured to retain status.
 - Additional insured afforded coverage for liability due to their fault even where an indemnity agreement is invalid).

Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co., 180 Cal. App. 3d 639, 225 Cal. Rptr. 742 (4th Dist. 1986); *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 578 A.2d 1202 (1990).



NOW WHAT?

- Dependent on what your AI policy clause covers.
 - Owner entitled to coverage under engineer's CGL policy when listed as additional insured, even though indemnity agreement did not provide for indemnity of the loss. [Shell Oil Co. v. National Union Fire Ins. Co., 44Cal.App.4th 1633 \(1996\)](#).
 - Arkansas Statute which finds hold harmless agreements in a construction contract unenforceable, but allows for an additional insured agreement.
 - Only 3 states extend anti indemnity statute to additional insured agreements (Kansas, Ohio, Oregon).



LEGAL TENDER?

- Duty to indemnify vs. Duty to Defend:
 - Insurer's duty to indemnify runs only to claims that are actually covered by policy
 - Duty to defend extends to claims that are merely potentially covered.

Crawford v. Weather Shield Mfg. Inc., 44 Cal. 4th 541, 187 P.3d 424 (2008).



LEGAL TENDER?

- Duty to indemnify vs. Duty to Defend:
 - ▶ **PRACTICE TIP:** Would the named insured be obligated to accept the risk (under an indemnity contract) in absence of insurance policy?
 - If yes, and they tender, then you likely owe duty to defend to any additional insured and any contractual indemnitor (assuming the indemnity contract is valid)



LEGAL TENDER?

- Duty to Defend
 - Tender contractual indemnitor or additional insured will suffice
 - Duty to defend determined allegations and policy language
 - All that is needed:
 - Factual allegations that support a claim potentially covered by the policy

GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.3d 305, 310 (Tex.2006).



LEGAL TENDER?

- Any doubt as to facts?
 - Resolved in favor of the insured
 - Interpret allegations in petition liberally
 - Resolve any doubts in favor of the duty to defend

KLN Steel Prod. Co., Ltd., 278 S.W.3d at 435 (Tex.App.–San Antonio 2008)

National Union Fire Ins. Co. of Pittsburgh, PA v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex.1997)

Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 394 S.W.3d 228, 233 (Tex. App. 2012).



LEGAL TENDER?

- What if no tender, but insurer knows of case against AI?
 - No duty to defend until tender
 - No duty to inject gratuitously into a lawsuit if AI had **not requested a defense**
 - **AI failed to comply** with the policy's forwarding conditions

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker, 246 S.W.3d 603, 608 (Tex. 2008), citing *Weaver v. Hartford Accident & Indemnity Co.*, 570 S.W.2d 367 (Tex. 1978)
Icasiano v. Allstate Ins. Co., 103 F.Supp.2d 1187, 1191 (N.D.Cal.2000)



LEGAL TENDER?

- **Obligation to defend & investigate not triggered until tender of defense**
 - In the absence of the tender of a third-party lawsuit, [insurer's] duty to indemnify Plaintiff did not somehow trigger a pre-tender duty to defend Plaintiff.”).
Mt. Hawley Ins. Co. v. Golden Eagle Ins. Corp., 645 F. Supp. 2d 878, 886 (C.D. Cal. 2009).
- **Contribution to defense?**
 - When enforceable indemnity agreement, only the primary policy is responsible for defense & indemnity
 - No apportionment appropriate



AM I PROTECTED?

- Duty to Indemnify?
 - Other insurance/priority of coverage:
 - Most likely: AI/contractual indemnitee will have its own coverage.
 - Most GC, CGL policies contain a clause which deems it excess to other policies in which there insured is named as AI.



AM I PROTECTED?

- Example:
 - Contractor's policy (excess clause) did not provide insurance
 - If there was any other collectible insurance available
 - Unless its limits exceeded liability of other insurance, was excess to additional insured coverage provided to the contractor through the subcontractor's policy

Underground Constr. Co. v. Pac. Indem. Co., 49 Cal. App. 3d 62, 122 Cal. Rptr. 330 (Ct. App. 1975)



AM I PROTECTED?

- Depends on (there's that lawyer word) wording of "other insurance" clauses
 - Liability coverage for GC under AI endorsement to subcontractor's policy was excess over coverage provided by GC's CGL policy
 - Endorsement - coverage excess over any other valid and collectible insurance available to AI
 - Whether primary, excess, or contingent
 - "other insurance" provision did not conflict with "other insurance" clause in GC's policy

Regal Homes, Inc. v. CNA Ins., 217 Ariz. 159, 171 P.3d 610 (Ct. App. 2007)



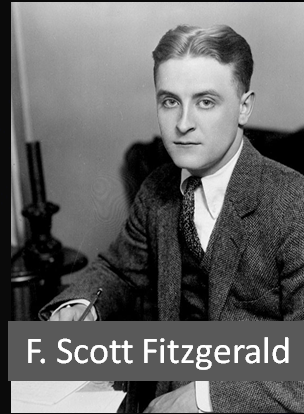
➤ Practice Tip:

- Gather documents:
 1. Indemnitor/named insureds policies
 2. Trade contracts
 3. Policies of the indemnitee/AI
 4. Contracts



TENDER UNDER WHICH CONTRACT?

- Who wrote “**Tender** is the Night“?
 - In what recent film was he & his wife fictionalized?
 - What was his wife’s name?
- What if tender received under both policy & contract?
 - Analyze the status of the claimant under both
 - Why ??????



F. Scott Fitzgerald



TENDER UNDER WHICH CONTRACT?

- Under what circumstances would an indemnity provision provide coverage ...even if there is no AI coverage under the policy?
 - Where CGL policy includes an “insured contract” provision
 - Most policies initially provide a contractual liability exclusion:
 - For coverage which excludes BI & PD that insured is obligated to pay “by reason of the assumption of liability in a contract or agreement.”



TENDER UNDER WHICH CONTRACT?

- **However**, policies may provide for express exception for “insured contracts.”
 - Definition of “insured contract” such as:

That part of any other contract or agreement pertaining to your business... under which [the insured] assume[s] the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
 - Don’t forget to consider when the indemnity





► **PRACTICE TIP:**

- Analyze contractual indemnity clause
- Is it valid?
- In accord with state statute?
- What does indemnity cover; how far-reaching?

THE BIG FINISH

- What to do when sending or receiving tenders
 - Can your insured tender defense/indemnity to another carrier?
 - Under an indemnity contract?
 - Under insurance policy?
 - Does insured have potential liability to another?



THE BIG FINISH

- Look at all policies & trade agreements.
- Prioritize coverages under “other insurance” provisions
- Careful analysis prior to declining defense
 - Potential bad faith implications
 - Leave AI without defense – agreed settlement !



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