

Additional Insured Liability and Contractual Indemnity Coverage

Presentation Materials

John Franks
Infinity Insurance Company
Birmingham, AL

Lewis Collins
Butler Pappas Weihmuller Katz Craig
Tampa, FL

I. Overview:

- a. Distinguish between an insurer's obligations to those who qualify as additional insureds and those who benefit from contractual indemnity obligations;
- b. Evaluate how tenders of defense and indemnity should be made under both policy and trade agreement;
- c. Describe the protocols to be considered when tenders are received under both insurance policy and contract;
- d. Identify the relevant factors when sending or receiving tenders.

II. What is an Additional Insured?

a. Additional insured:

1. What is an additional insured?

- i. A person or organization for whom another (typically subcontractor) agrees to provide insurance as is afforded by its insurance policy; Typically, that person or organization is an insured only with respect to operations performed by subcontractor or on subcontractor'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.

ii. Sample insurance policy provision – definition of AI:

“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:

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

iii. More liberal clauses may provide coverage for the AI's work. Some may provide coverage only *during ongoing operations*, etc.

- Check to make sure coverage is in effect at the time of loss.

iv. Example exclusions to the AI endorsement which may limit 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

(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."

2. Some policies have **limiting provisions** which indicate coverage will not be broader than contracted for in the indemnity agreement.

3. Responsibilities:

i. AI has same responsibilities as the named insured.

ii. An additional insured owes the duty to cooperate with the insurance company to the same extent and in the same degree as would the named insured 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.

4. Rights:

i. Same as the named insured.

ii. Will policy protect the AI from: vicarious liability, joint liability, primary liability?

iii. Defense – see below section on tenders.

iv. Negligence of the additional insured is not necessarily a defense to coverage. Depends on the indemnity agreement and how much your AI clause includes.

v. Example:

- Commercial tenant
- Add the landlord to your CGL policy
- A customer visits your business and is injured because of your negligence
- Customer sues the landlord
- Policy protests landlord as additional insured
- However: what if the landlord is negligent?
- Is landlord protected under your policy?
- Probably not, unless policy is that liberal

III. What is relationship between Contractual Indemnification and Additional Insureds?

a. Contractual indemnitee types:

- Named insured protected by promises made in an indemnity agreement?
1. A subcontractor, via indemnity agreement, may be required by contract to purchase insurance naming the owner/GC as additional insured which would extend the insurance benefits, rights, and responsibilities to the owner/GC under the SC's insurance contract.
 2. 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.

3. Indemnity agreements provide assurance, not insurance.
4. Different types of contracts:
 - i. Agree to hold harmless/indemnify the owner from your negligence? joint negligence?
 - ii. From their own negligence (see below anti-indemnity states).

- iii. Most have requirement to name owner as additional insured, provide certificate of insurance.
- b. Indemnitee has no contractual relationship with **carrier** – privity only with indemnitor (named insured).
- c. a contractual indemnitee seeking benefits from a carrier must prove that the named insured owed it a duty. Through contract or otherwise.
- d. What if the named insured doesn't name the additional insured?
 1. See *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) (“And, the intent of the parties to have the indemnitee covered by insurance, expressed in the contract, is controlling even if the indemnitor fails to secure the required insurance....construing together the indemnity provision and the requirement of insurance in the Subcontract, which is referenced in the indemnity provision at issue in this case, the Court concludes that the Subcontract clearly and unambiguously shows that the parties intended coverage of the indemnity agreement by insurance. Therefore, the indemnity agreement is enforceable...”).

2. Example of additional insured clause in indemnity 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.

- d. Does your state prohibit indemnity agreements in some form?
 1. Purpose: prohibit indemnity agreements which require party to insure against the **sole negligence** of the indemnitee.
 2. “Unfair” to hold the subcontractor responsible for the actions of the GC.
 3. See chart.
 4. “General” indemnity clauses, i.e., clauses which do not address themselves to issue of indemnitee's negligence, may be construed to provide indemnity for loss resulting in part from indemnitee's passive

negligence, but they will not be interpreted to provide indemnity if indemnitee has been actively negligent. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal. 3d 622, 532 P.2d 97 (1975).

5. Way around the anti-indemnity statutes:

- i. Loophole: indemnity clause is invalid, but the indemnitee still has status as an additional insured under the policy.
- ii. State has anti indemnity statute but Court allowed entity listed as an additional insured to retain status. *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). (Additional insured afforded coverage for liability due to their fault even where an indemnity agreement is invalid).
- iii. Dependent on what your AI policy clause covers.
- iv. 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).
- v. Arkansas Statute which finds hold harmless agreements in a construction contract unenforceable, but allows for an additional insured agreement.¹

¹ (b) A clause in a construction agreement or construction contract entered into after July 31, 2007, is unenforceable as against public policy to the extent that a party to the construction contract or construction agreement is required to indemnify, defend, or hold harmless another party against:

(1) Damage from death or bodily injury to a person arising out of the sole negligence of the indemnitee, its agent, representative, subcontractor, or supplier; or

(2) Damage to property arising out of the sole negligence of the indemnitee, its agent, representative, subcontractor, or supplier.

(e) The parties to a construction contract or construction agreement may enter into an agreement in which:

(1) The first party indemnifies, defends, or holds harmless the second party from the first party's negligence or fault or from the negligence or fault of the first party's agent, representative, subcontractor, or supplier;

(2) The first party requires the second party to provide liability insurance coverage for the first party's negligence or fault if the construction contract or construction agreement requires the second party to obtain insurance and the construction contract or construction agreement limits the second party's obligation to the cost of the required insurance;

(3) The first party requires the second party to provide liability insurance coverage for the first party's negligence or fault under a separate insurance contract with an insurance provider; or

(4) The first party requires the second party to name the first party as an additional insured as a part of the construction agreement or construction contract.

- vi. So far only 3 states extend anti indemnity statute to additional insured agreements (Kansas, Ohio, Oregon).

IV. Tenders of defense and indemnity made under policy and/or trade agreement

- a. Duty to indemnify vs. Duty to Defend: liability insurer's duty to indemnify runs only to claims that are actually covered by the policy, while the 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).

► **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).

- b. Duty to Defend

1. Tender of defense by either contractual indemnitor or additional insured will suffice – don't need status as both.
2. Duty to defend is determined entirely by the allegations in the pleadings and the language of the insurance policy. *King*, 85 S.W.3d at 187.
3. All that is needed to invoke the duty are factual allegations that support a claim **potentially covered by the policy**. See *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 310 (Tex.2006).
4. Any doubt as to facts; resolved in favor of the insured. See *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).
5. Interpret the allegations in the petition liberally and 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).
6. No duty to defend until tender. insurer had no duty to inject itself gratuitously into a lawsuit by defending an additional insured who had **not requested a defense** and who 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) (“[T]he insurer's obligation to defend and investigate is not triggered until Plaintiff tenders the defense of a third[-]party lawsuit to the

insurer.... 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).

7. Contribution to defense?

- Generally, when there is an enforceable indemnity agreement, only the **primary policy is responsible for defense** and indemnification. No apportionment appropriate. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*
- NE region: *Transamerica Insurance Group v. Turner Construction Co.*, 33 Mass. App. Ct. 446, 601 N.E.2d 473 (1992) (Transamerica defended and settled a claim against its additional insured, Turner. Transamerica sued Turner’s insurer, arguing it should share in the cost of Turner’s defense and settlement of the case. Since Turner’s insurance policy contained an endorsement that provided its policy did not apply to “that portion of the loss for which the Insured has other valid and collectable insurance as an additional insured on a liability insurance policy issued to a subcontractor of the named insured,” the court held that, Transamerica was not entitled to participation by Turner’s insurer).
- But see, *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 171 P.3d 610 (Ct. App. 2007). This case could have to do with multiple coverage periods/insurers. **Both** liability insurers covering general contractor as named insured or additional insured **owed duty to defend** entirety of action, even though one insurer covered general contractor for only one year while the other insurers provided three years of primary coverage.

c. Duty to Indemnify

1. Other insurance/priority of coverage:

- Most of the time, the AI/contractual indemnitee will have its own coverage.
- Most GC, CGL policies will contain a clause which deems it excess to other policies in which there insured is named as AI.
- Contractor’s policy, under 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 provide 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).
- Depends on what the “other insurance” clauses say...

- *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 171 P.3d 610 (Ct. App. 2007) (Liability coverage for general contractor under additional insured endorsement to subcontractor's policy was excess over coverage provided by general contractor's commercial general liability (CGL) policy; the endorsement made its coverage excess over any other valid and collectible insurance available to the additional insured whether primary, excess, or contingent, and this was an "other insurance" provision and did not conflict with "other insurance" clause in general contractor's policy).

► **PRACTICE TIP:** Gather documents: indemnitor/named insureds policies, trade contracts, all policies of the indemnitee/additional insured.

V. What to do when tenders are received under both insurance policy and contract

- a. Analyze the status of the claimant under the above analysis.
- b. Under the indemnity contract you may owe a duty to indemnify the liability of the named insured...even if there is no AI coverage under the policy.
 1. When CGL policy includes an "insured contract" provision, there may be coverage under the indemnity agreement.
- c. Most policies provide a contractual liability exclusion:
 1. For coverage which excludes bodily injury and property damage that the insured is obligated to pay "by reason of the assumption of liability in a contract or agreement."
 2. However, most policies will provide for an express exception to that exclusion for certain "insured contracts." Through 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.
- d. Analysis of whether indemnity clause is valid. What does it provide for? Prohibited by law?
- e. Don't forget to consider when the indemnity agreement was signed.

VI. Wrap Up: What to do when sending or receiving tenders

- a. Can your insured tender defense/indemnity to another carrier?
 - 1. Under an indemnity contract?
 - 2. Under insurance policy?
- b. Does your insured have potential liability to another?
- c. Look at all the policies and trade agreements.
- d. Prioritize coverages under “other insurance” provisions.
- e. Careful analysis prior to declining defense – potential bad faith implications:
 - 1. Leave without defense – agreed settlement