Strafford

Presenting a live 90-minute webinar with interactive Q&A

Additional Insured Endorsements: How They Modify Coverage, Shift Risk, and Affect Indemnification

Scope of Coverage, Risk Allocations, and Insurer's Duties With Additional Insured Endorsements

TUESDAY, OCTOBER 4, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Kevin P. Sullivan, Partner, **Goldberg Segalla**, Newark, NJ

Christine A. Gudaitis, Partner, **Ver Ploeg & Marino P.A.**, Miami, FL

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Recording our programs is not permitted. However, today's participants can order a recorded version of this event at a special attendee price. Please call Customer Service at 800-926-7926 ext.1 or visit Strafford's website at www.straffordpub.com.

Strafford Webinar

Additional Insured Endorsements: How They Modify Coverage, Shift Risk, and Affect Indemnification

Kevin P. Sullivan
Partner
Goldberg Segalla
(973) 681-7052
kpsullivan@goldbergsegalla.com

Christine A. Gudaitis
Partner
Ver Ploeg & Marino, P.A.
(305) 577-3996
cgudaitis@vpm-legal.com

GOLDBERG SEGALLA

VPM | Ver Ploeg & Marino

Glossary

- **Named Insured ("NI") or First Named Insured**: The person or entity to whom the insurance policy is issued – typically listed in the Declarations to the policy.
- **Additional Named Insured**: Someone who, typically through an endorsement, is made an NI on the policy and has all of the same rights to coverage as the NI. Example a subsidiary or affiliate of the NI.
  - **Note**: Don't confuse an Additional Named Insured with an Additional Insured
  - **Note**: Parties other than the NI or Additional Named Insured who nevertheless qualify as an "Insured" under the policy through the policy's "Who Is An Insured Provision" will generally have the same rights to coverage under the policy as the NI and any Additional Named Insureds.
- **Additional Insured ("AI")**: Someone who is neither an NI or an Additional Named Insured, or otherwise qualifies as an "Insured" under the policy's "Who Is An Insured Provision", but who qualifies as an AI under the policy, typically through an AI Endorsement.
  - **Note:** The scope of the coverage available to the AI may be more narrow than the scope available to NIs, Additional Named Insureds, or Insureds.
  - **Note:** Additional exclusions and conditions may apply to AIs.
    - Coverage available to AI determined by the endorsement granting AI status.

Glossary, Continued

- **Contractual Indemnitor**: Person or entity who is obligated by contract or agreement to defend and/or indemnify another person or entity
- **Contractual Indemnitee**: Person or entity who is contractually entitled to a defense and/or indemnity from another person or entity
  - **Note:** Although often times a contractual indemnitee may also qualify as an AI, the concepts are distinct

I. Overview of additional insured coverage

How is additional insured status created?

- Typically through a written contract or agreement (contractor-sub/vendor-vendee/rental or lease agreements/landlord-tenant) that requires one party, i.e., the NI, to provide another party, i.e., the AI, with status as an AI on its insurance policy or policies
  - Contract may specify the scope of the coverage. For example, must be no more narrow than the coverage available to the NI, or must cover certain types of claims or liability
  - Contract may specify that a particular endorsement or its equivalent be used to create AI status under the policy
  - Contract may also require NI to give to AI Certificates of Insurance evidencing the required coverage

Why become an additional insured?

- Risk transfer mechanism backed by insurer, rather than contract partner
- Coverage, but no premium
- Not responsible for policy deductible
- Does not erode limits of AI's own policy
- Typically applies before self-insured retention on AI's policy

"Cons" For NI

- May erode policy limits
- Premium increase based on amounts paid on behalf of AI

Additional insured endorsements

Two Major Kinds:

1. **Scheduled Endorsements**: Specifically list the person or entity qualifying as an AI.
   - Endorsement may also list a specific location or specific operations, and then limit coverage to the location or operations
2. **Blanket Endorsements**: Grants AI status to any party or entity for whom the NI was contractually obligated to name as an AI on its insurance policy

Written contract requirement

- Direct written contract with the NI:

A. Section II – Who Is An Insured is amended to include as an additional insured 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 be added as an additional insured on your policy.

AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc., 102 A.D.3d 425 (1st Dep't 2013) (requiring contractual privity between NI and AI)

First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc., 48 F. Supp. 3d 158 (D. Conn. 2014) (*not* requiring contractual privity between NI and AI)

Direct contractual relationship requirement

- Alternative Provisions:

"any person or organization with whom you have agreed to add as an additional insured by written contract …"

Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 31 N.Y.3d 131 (2018) (requiring contractual privity between NI and AI)

"any person or organization with whom you have agreed, through written contract, agreement or permit to provide primary additional insured coverage."

Plaza Constr. Corp. v. Zurich Am. Ins. Co., 2011 N.Y. Misc. LEXIS 1234, *9 (N.Y. Sup. Ct. Mar. 23, 2011) (AI status found where party, although not in contractual privity with NI, was entitled to AI status under contract between NI and third party)

Execution requirement

- Many AI endorsements require that the contract/ agreement granting AI status be **executed** prior to the PI/BD
- What does “executed” mean?
  - **Signed?**
  - **Performed? (Blanket AI Endorsements)**

Burlington Ins. Co. v. Utica First Ins. Co., 71 A.D.3d 712 (2d Dep't 2010) (contract not “executed” where it was neither signed or **fully** performed prior to accident at issue)

Mid-Continent Cas. Co. v. Global Enercom Mgmt., 323 S.W.3d 151 (Tx. 2010) (contract signed by only one of two contracting parties prior to accident at issue was nevertheless “executed” because the executing party had **partially** performed under the contract)

Scope of AI coverage

- Policy provisions policy apply to NI and AI.
- Scope of AI coverage depends on the causal nexus required in the AI endorsement.
  - Require AI coverage for AI's Sole Negligence?
  - Require AI coverage for AI's Direct Negligence, provided AI is not solely negligent?
  - Acts or Omissions versus Negligence
  - What is vicarious liability?

"Arising Out Of"

A. 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.

"Arising out of" broadly construed to require only that the property damage or bodily injury "originate from", "grow out of", or have a "substantial nexus with" the NI's ongoing operations.

Coverage under AI endorsement even if the AI was 100% negligent, so long as BI or PD arose out of NI's operations. *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. Tex. 2000)

Even if "arising out of" AI endorsement includes an exclusion for AI's independent negligence, AI is usually entitled to a defense. *City of New York v. Travelers Prop. Cas. Co. of Am.,* 196 A.D.3d 401 (1st Dept. 2021)

"Caused By"

. That person or organization is an additional insured only with respect to liability for "bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in part, by:

a. Your acts or omissions; or

b. The acts or omissions of those acting on your behalf.

Scottsdale Ins. Co. v. United Rentals (N. Am.), Inc., 977 F.3d 69 (1st Cir. 2020) (AI entitled to coverage for direct and vicarious liability)

Burlington Ins. Co. v. NYC Transit Auth., 29 N.Y.3d 313 (2017) (AI entitled to coverage if injury is proximately caused by the NI)

Schafer v. Paragano Custom Bldg., Inc., 2010 N.J. Super. Unpub. LEXIS 356 (App Div. Feb. 24, 2010) (AI only entitled to coverage for vicarious liability); *but see Friedland v. First Specialty Ins. Corp.*, 2016 N.J. Super. LEXIS 1841 (Law Div. Aug. 3, 2016)

Vicarious Liability?

- Imposed based on defendant's *relationship* to the tortfeasor (e.g., principal – agent), as opposed to defendant's own negligence

- Unless complaint alleges that AI is vicariously liable for NI's negligence, AI liability is not "caused in whole or in part" by the NI. *Amerisure Ins. Co. v. Seneca Spec. Ins. Co.*, 2020 WL 3317035 (S.D. Fla. June 18, 2020)

Ongoing vs. completed operations

Ongoing Ops Coverage

A. Section II – Who Is An Insured is amended to include as an additional insured 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 be added as an additional insured on your policy. Such person or organization is an additional insured 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.

Ongoing operations

- AI status ends when the NI's operations for the AI end.
- Exclusions barring coverage for BI/PD occurring after:
  - All work (other than/including service, maintenance, or repair) to be performed by or on behalf of AI have been completed, or
  - The portion of NI's work out of which injury arises has put to its intended use
- **Note:** Completion of operations is a fact-sensitive issue
- **Note:** Some states find that work performed under service or maintenance contracts to be ongoing, even if the specific operation alleged to have caused the accident or injury was completed

Completed operations

Completed Ops Coverage

A. 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" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

Completed operations

- “Products-Completed Operations Hazard”
  - PD and BI occurring away from premises NI owns or rents and arising out of NI’s work or product;
  - Does **not** include:
    - Products still in NI’s possession
    - Work that has not been completed or abandoned.
      - Work is complete at the *earliest* of:
        - When all work required by contract is completed,
        - If contract requires work at more than 1 jobsite, when work is completed at job site, or
        - When work has been put to its intended use
      - Work that needs service, maintenance, correction, repair, or replacement, but which is otherwise complete, **is** treated as complete

2013 endorsements

2013 ISO AI Forms

- The Insurance Services Office ("ISO") provides commonly used CGL coverage forms. New forms, for *both* claims-made (claim must be brought during coverage period) and occurrence policies, came into effect on April 1, 2013. The new forms provide a new AI endorsement *and* revised optional endorsement changing the definition of "insured contract."
- The 2013 ISO AI forms include several major changes. For example,
  1. Insurance provided to an AI will apply only to the extent permitted by law. *See, e.g.,* Form No. CG 20 37 04 13.
  2. If AI coverage is required in a contract or agreement, the AI will not be provided coverage that is any broader than required in that contract or agreement with the NI. *See id.*
  3. The limits available to an AI will be the lesser of the limits required by contract or available under the policy. *See id.*

Scope of coverage limited by state law

- With respect to the first change, this language is intended to address state anti-indemnity statutes. Some states limit the types of acts or omissions for which a party to a contract may be covered as an AI, or otherwise regulate indemnity and insurance requirements.
- In Florida, indemnification provisions in a construction contract where the downstream party agrees to indemnify the upstream party for the upstream party's negligence are void unless the contract contains a monetary limit on the extent of indemnification, among other requirements. *See* FLA. STAT. § 725.06(1) (2014).
- Other states outright prohibit construction contracts from requiring AI coverage that extends beyond liability for the negligence or fault of the named insured. *See, e.g.*, COLO. REV. STAT. § 13-21-111.5(6)(d)(I) (2014).

State law provisions on AI and indemnity

Kansas Statute Annotated § 16-121

(c) A provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such other party's own negligence or intentional acts or omissions is against public policy and is void and unenforceable.

Missouri Revised Statute § 434.100

1. Except as provided in subsection 2 of this section, in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable.

2. The provisions of subsection 1 of this section **shall not apply to**:

…

(2) A party's promise to cause another person or entity to be covered as an insured or additional insured in an insurance contract;

New Mexico Statute Annotated 56-7-1

A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

…

F. As used in this section, "indemnify" or "hold harmless" includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.

Uniformity?

- The new AI language is intended to be an easy fix given the myriad state laws that could feasibly apply. Accordingly, even if the policy otherwise affords broader coverage, coverage will be restricted for the AI to conform to the relevant state anti-indemnity law. The new language likely precludes any argument that the parties "contracted around the law" for broader coverage.

No coverage for sole negligence

- More recent editions of standard AI endorsements preclude coverage for AI's **sole** negligence
- This language does not necessary preclude coverage if the NI was also partially at fault

Coverage limited by contract

- The second change ensures that insurers do not provide greater coverage than required by the contract; in other words, the AI's coverage will not be broader than that required by the contract even if the policy affords greater coverage to the NI. *See* Form No. CG 20 37 04 13 (If AI coverage is required in a contract or agreement, the AI will not be provided coverage that is any broader than required in that contract or agreement with the NI).
- For example, if the contract states that the NI only provides coverage to an AI for the NI's vicarious liability, then the 2013 AI endorsement only provides coverage for the NI's vicarious liability, even though the policy would ordinarily provide broader coverage.
- This change also seems to mean that insurers can deny the AI coverage even when the NI has broader coverage. For example, if the contract documents require the contractor to maintain CGL limits of $1 million per occurrence, but the contractor obtains coverage for $2 million per occurrence, the owner would only receive the benefit of the $1 million in coverage.

Limits of coverage

- The final change affects the amount, or limits, of coverage available to the AI. *See* Form No. CG 20 37 04 13 (The limits available to an AI will be the lesser of the limits required by contract or available under the policy.).
- The restrictive effect of this language is that if the construction contract requires limits of liability that are less than the policy limits, the lower limits required in the contract will cap the coverage available to the AI even though the policy limits would otherwise be greater.

Scope of coverage

- This revision creates additional complications when the contract contains separate primary and umbrella or excess coverage requirements. *See* Form No. CG 20 37 04 13 (The limits available to an AI will be the lesser of the limits required by contract or available under the policy.).
- For example, a contract may require at least $2 million in AI coverage under a primary CGL policy and at least $5 million in umbrella coverage. If the party required to obtain the AI coverage procures a CGL policy with $3 million limits and an umbrella policy with $5 million limits, the new language would restrict the AI limits of the primary policy to $2 million. The umbrella carrier would argue that its policy could never be triggered for the AI, because the $3 million in underlying limits can never be exhausted. A gap in coverage results.
- There is not much law on the 2013 amendments; time will tell how these changes affect insureds' rights.

Injuries to employees

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

“the insured” is typically interpreted to refer to the specific insured seeking coverage

Some endorsements modify the exclusion to apply to employees of “any insured”

2019 AI Endorsements

- CG 20 39 12 19 Additional Insured – Owners, Lessee or Contractors - Automatic Status when Required in written Construction Agreement with You (Completed Operations)

- CG 20 40 12 19 Additional Insured – Owners Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction (Completed Operations)

II. Rights of additional insureds

Duty to defend additional insureds

Overview

- Benefit: AI enjoys direct rights on the policy and obtains the same coverage as the NI, while having no responsibility to pay premiums or deductibles.

- Policy language requiring carrier to assume the AI's defense, rather than merely indemnify the AI for its defense costs, is generally preferable for the NI and AI because those defense costs will generally not impair the policy limits.

- Goal: parties seek to control the risks associated with their contractual activities through a combination of contractual indemnity and specific AI insurance requirements.

Duty to Defend: Notice & Reporting Obligations

- Individual policy language controls.

- Generally, the "notice prejudice" rule, adopted by an increasing majority of states, is likely to apply.

- The rule holds an insurer cannot avoid its duty to defend and indemnify an insured due to a failure to receive timely notice; it must instead demonstrate it suffered actual prejudice as a result of the delay.

Duty to defend additional insureds

- In Florida an AI may rebut a prejudice claim by: pointing to the carrier's violation of the Claims Administration Statute; showing another carrier made a complete investigation of the claim; and/or establishing the carrier had access to substantial claim information. *See, e.g., Nationwide Mut. Fire Ins. Co. v. Beville,* 825 So.2d 999, 1004 (Fla. 4th DCA 2002) *cert. denied*, 845 So. 2d 891 (Fla. 2003) (carrier's violation of Claims Administration Statute barred late notice argument and even if that were not so, carrier could point to no prejudice from insured's failure to notify carrier earlier, thus requiring carrier to pay pre-tender defense costs); *Banta Props., Inc. v. Arch Specialty Ins. Co.*, No. 10-61485-CIV, 2011 WL 5928578, at *4 (S.D. Fla. Nov. 23, 2011) (insured may demonstrate lack of prejudice by showing "another insurer using competent individuals made a complete investigation of the claim" or "the insurer had access to 'substantial information' regarding the claim"); *Scottsdale Ins. Co. v. Deer Run Prop. Owner's Ass'n, Inc.*, 642 So. 2d 786, 787-88 (Fla. 4th DCA 1994) (awarding pre-tender fees due to lack of prejudice).
- **Best practice: ERR ON THE SIDE OF CAUTION! Give notice as soon as the AI becomes aware of a possible "occurrence."**

Duty to Defend Additional Insureds: What To Consider?

- Eight Corners
- Courts look to the allegations in the third-party pleading the policy language only to determine AI status
  - *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660 (3d Cir. 2016)
  - *Exxon Mobil Corp. v. Insurance Co. of the State of PA*, 568 S.W.3d 650 (Tex. 2019) (underlying contract may be considered when policy provision incorporates the contractual terms)

Duty to Defend Additional Insureds: What to Consider?

- Extrinsic Evidence
- Insurer cannot make a "fortress" of the pleadings to deny coverage
- Insurer must consider facts developed during claim investigation
  - *Pahl v. Grenier*, 277 A.D.2d 681 (3d Dep't 2000)
  - *County of Hudson v. Selective Ins. Co.*, 332 N.J. Super. 107 (App. Div. 2000)

Priority of coverage

- Priority of coverage refers to the proper sequence in which concurrent policies will be liable to indemnify a loss, up to their respective limits.

- A policy's "other insurance" clause describes what occurs if other coverage is available for a particular loss.

Priority of Coverage: Primary & Non-Contributory Coverage

- Form CG 20 01 entitled, “Primary and Noncontributory – Other Insurance Condition,” specifies coverage is provided to the AI on a primary and noncontributory basis so long as the contract so requires. This aims to solve the problem of which party’s insurance applies when the AI has its own policy in addition to AI coverage.
- To take advantage of this endorsement, the indemnitee should request the form in the contract, verify that the NI’s policy contains this form, and ensure that the contract requires the AI coverage be provided on a “primary and noncontributory” basis as to any other insurance of the indemnitee.
- Often, indemnitee has excess or umbrella coverage in addition to primary coverage. To mitigate against problems posed by “other insurance” clauses in the excess or umbrella policies, the contract should require the indemnitor’s excess or umbrella insurance to also provide coverage on a primary and noncontributory basis.

Priority of Coverage Analysis

- Traditional rule: You look to the insurance policy "other insurance" provisions – not the underlying contract's insurance procurement provisions.
- *Jeffrey M. Brown Assocs., Inc. v. Interstate Fire & Cas. Co.*, N.J. Super. 160, 163 (App. Div. 2010)
- *U.S. Liab. Ins. Co. v. Mountain Valley Indem. Co.*, 371 F. Supp. 2d 554, 558 (S.D.N.Y. 2005).

Priority of Coverage Analysis

- There is no bright line rule with respect to priority of coverage. Some courts inquire into the intentions and relationships of the parties to determine whether an indemnity agreement takes precedence over the language of the policy.

- *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 588-89 (8th Cir. 2002).
- *Contrans, Inc. v. Ryder Truck Rental, Inc.*, 836 F.2d 163 (3d Cir. 1987) (finding parties' reasonable expectations superseded policy language).

Priority of Coverage: Equitable Contribution & Subrogation

- Equitable contribution is a carrier's right to recover from a co-obligor that shares the same liability.
- A majority of jurisdictions (including NJ) permit an insurer to recover defense and indemnity costs from non-performing co-insurers with a defense obligation.
- Equitable subrogation allows a carrier who does not have primary responsibility for the defense to shift the cost of the defense to the carrier with the primary duty to defend. Allocation claims between primary and excess carriers typically proceed under an equitable subrogation theory. Equitable subrogation also applies to primary insurers on different risks.

Certificates of insurance

Overview

- Indemnity agreements typically require the indemnitor to provide proof of insurance, usually *via* a certificate of insurance ("COI").

- **These certificates, however, are not insurance!** They are only evidence of insurance.

- COIs are generally not actionable and may contain disclaimers to that effect; however, courts in some jurisdictions have adopted theories that impose coverage based on the wording of the certificate.

- **In practice, an AI should not rely on this possibility and should confirm that the indemnitor has purchased the correct insurance on the AI's behalf**.

Certificates of insurance

Overview

- The AI's own CGL policy may contain certain requirements.

- Some examples: maintain COIs for all indemnitors working on the AI/indemnitee's behalf; maintain specific dollar amounts of that insurance; require that all indemnitors' insurance be primary and not contribute with insurance provided by the AI/indemnitee's policy.

- Failure to comply could impact coverage should it be needed under the AI's own policy. *See, e.g., Meridian Constr. & Dev., LLC v. Admiral Ins. Co.*, 105 F. Supp. 3d 1331 (M.D. Fla. 2013) (holding requirement that contractor obtain COIs identifying insurer as an AI and other agreements from subcontractors was a condition precedent to coverage).

Certificates of insurance

- In *West Bend Mutual Insurance Co. v. Athens Construction Co., Inc.*, 29 N.E.3d 636 (Ill. Ct. App. 2015), a general contractor (Athens Construction) entered a subcontract with the NI (Carrozza Plumbing), stating: "the following clause should be provided on the Subcontractor's [COI]: Athens Construction Co., Inc. Additional insured, on a primary and non-contributory basis."

- Carrozza obtained a COI listing Athens Construction as a certificate holder and provided: "Athens Construction Co. Inc. is an Additional Insured for General Liability on a Primary and Non-Contributory basis as required by a written contract."

- Athens Construction and Carrozza were sued; Athens Construction tendered its defense to Carrozza's CGL insurer, West Bend.

Certificates of insurance

- West Bend's blanket AI endorsement extended AI status to "any person or organization whom you are required to add as an additional insured on this policy under a written contract or written agreement."
- West Bend denied the tender, claiming Carrozza's written agreement to list Athens Construction as an AI on a COI did not satisfy the requirements of the AI endorsement.
- The trial court ruled in West Bend's favor, and the appellate court affirmed, finding the subcontract unambiguous: "The plain meaning of article 13.1 is that Carrozza was required to state that Athens was an additional insured on a certificate of insurance. …However, the certificate contained a disclaimer that it conferred no rights on Athens…" The appellate court rejected the argument that the COI manifested intent contrary to the plain language of the subcontract, and held "there is a presumption against provisions that easily could have been included in a contract but were not," and noted "Athens could have required Carrozza to add it as an additional insured, but did not."
- *Athens Construction* confirms **a contract requiring a party be identified in a COI as an AI usually will not constitute a writing sufficient to trigger coverage under a blanket AI endorsement.**

Coverage inconsistent with underlying contract requirements

- A contractual provision seeking to create an AI relationship is typically insufficient absent specific language creating the relationship in the policy.
- Failure to procure the specific insurance coverage required by a contract is generally a breach of contract. *See Roldan v. New York Univ.*, 81 A.D.3d 625, 629 (N.Y. App. Div. 2011) ("ABM obtained a policy that was subject to a $1 million self-insured retention, when it was required to obtain a $2 million policy that was primary to the NYU defendants' own policy.").

- **What is the measure of damages for the breach?**
  - Breaching party becomes the "insurer" of the party entitled to AI coverage, and must indemnify it for all amounts that would have been covered had the coverage been obtained. *Antenucci v. Nick's Mens Sportswear*, 212 N.J. Super. 124 (App. Div. 1986).
  - If the non-breaching party, aware that insurance was not purchased, then purchases its own insurance, measure of damages for the breach are limited to the amount of premium paid for the coverage. *Inchaustegui v. 666 5th Ave. P'ship*, 268 A.D.2d 121 (1st Dep't 2000)

Coverage inconsistent with underlying contract requirements

- Contractual requirements are subject to waiver. *See Bott v. J.F. Shea Co., Inc.*, 388 F.3d 530 (5th Cir. 2004). In *Bott*, Gulf Coast Grouting, a subcontractor, agreed in a contract to procure insurance and add Shea/Keefe, a joint venture, as an AI. The contract administrator for Shea/Keefe provided Gulf Coast Grouting forms that directed it to name J.F. Shea as the AI, contrary to the subcontract requirement.
- Despite a non-waiver of insurance requirements clause in the subcontract, the court held Shea/Keefe waived the insurance requirement by receiving two non-conforming certificates without objection, and allowing Gulf Coast Grouting to begin and complete the project without complaint. *Id.* at 534. The court explained the non-waiver clause, under Texas law, is some evidence of non-waiver, but is not a substantive bar to finding waiver. *Id.*

Coverage inconsistent with underlying contract requirements

- Arising out of the April 2010 Gulf of Mexico oil spill, the Texas Supreme Court's decision in *In re Deepwater Horizon*, 2015 WL 674744 (Tex. Feb. 13, 2015) illustrates why having a carefully drafted contract is pivotal to AI coverage.

- The drilling contract between BP and Transocean required Transocean to name BP as an AI on its policies.

- The Deepwater Horizon rig exploded and sank, resulting in subsurface oil discharge into the Gulf of Mexico.

- BP claimed $750 million in coverage under Transocean's policies as an AI for damages arising out of the subsurface oil discharge.

Coverage inconsistent with underlying contract requirements

- The Texas Supreme Court held Transocean's policies required reference to the drilling contract terms to determine the extent of BP's AI coverage.
- This was based on policy language granting AI status to those "whom the 'Insured' is obliged by oral or written 'Insured Contract' . . . to provide insurance such as afforded by [the] Policy."
- The policy defined an "Insured Contract" as a contract under which the named insured "assumes the tort liability" of another party.
- The court therefore referred to the drilling contract (i.e., the "Insured Contract") to determine whether the contract "obliged" Transocean to provide BP AI coverage for subsurface pollution.

Coverage inconsistent with underlying contract requirements

- The court further held—although the policy contained no such limitation—the drilling contract terms limited the scope of BP's AI coverage to not include coverage for damages arising from subsurface pollution.
- This was because the drilling contract's AI provision required BP to be named as an AI on Transocean's policies "for liability assumed by [Transocean] under the terms of this contract."
- Under the contract, Transocean agreed to indemnify BP for above-surface pollution regardless of fault, while BP agreed to indemnify Transocean for all pollution risk Transocean did not assume, i.e., Transocean had not assumed liability for subsurface pollution.
- Accordingly, though an AI for some purposes, BP was not covered under Transocean's policies for damages resulting from the infamous oil spill.
- **More careful contract drafting and attention to the language in Transocean's policies could have resulted in a different outcome.**

III. Insured contracts vs. additional insured coverage/status

“Insured Contract” Coverage

- CGL Policies typically include a “Contractual Liability” exclusion, which states that the insurance does not apply to:

  b. Contractual Liability

  … ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

  (1) That the insured would have in the absence of the contract or agreement; or

  (2) Assumed in a contract or agreement that is an ‘insured contract’ …

  An “insured contract” is defined in relevant part as:

  f. That part of any other contract or agreement pertaining to your business … under which you assume the tort liability of another party to pay for … ‘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.

What Is An "Insured Contract"?

- The existence of an "insured contract" triggers an exception to the "Contractual Liability" exclusion – exception 2.b.(2).
- "Insured contracts" have two elements:
- The contract must expressly provide for the insured's assumption of the other party's alleged liability. *U.S. Fid. & Guar. Co. v. Cont'l Cas. Co*., 120 S.W.3d 556, 561 (Ark. 2003).
- The insured must assume the alleged tort liability of another. *Id*.

- Examples of "Insured Contracts"
- *Ring Power Corp. v. Amerisure Ins. Co.*, 326 Fed. Appx. 502 (11th Cir. 2009) ("Lessee shall defend, indemnify and hold harmless Lessor … against all loss, liability and expenses . . . by reason of bodily injury …."");
- *Capitol Specialty Ins. Corp. v. Royal Crane, LLC*, 2015 WL 859073 (S.D. Fla. Feb. 27, 2015) ("[indemnitor] agreed to indemnify [indemnitee] from claims for death or personal injury arising from [indemnitor's] work" qualified as an "insured contract").

Insured contracts vs. additional insured coverage/status

- Scope of the contractual indemnity obligation may be narrower than the scope of the coverage.

- If insurer must indemnify its NI, i.e., the Contractual Indemnitor, for its contractual indemnity obligation, insurer usually cannot rely on “other insurance” provision to shift the risk

What Is The Scope Of The Indemnity?

The Scope of the Indemnity Obligation

By statute, some states provide that any agreement requiring the Indemnitor to indemnify the Indemnitee for the Indemnitee's own negligence is void and unenforceable

NY General Oblig. Law 5-322.1

(1) A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement r*elative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances* including moving, demolition and excavating connected therewith, *purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part,* ***is against public policy and is void and unenforceable***

Clear From Parties' Agreement

Other states permit indemnity for the Indemnitee's own negligence even if the language of the indemnity provision does not expressly so provide, as long as the parties' intentions to allow for this indemnity is clear.

- *Kelly v. Dimeo*, 31 Mass App. Ct. 626 (Sup. Ct. Ma. 1991) ("It is well established that the express indemnity clause like the one in this case [which did not reference the indemnitee's own negligence] rescues the indemnitee from paying damages, even when it is negligent, [] and it is not necessary that an indemnity clause state expressly that it covers the indemnitee's negligence.");
- *Blain v. Sam Finley, Inc*., 226 So. 2d 742 (Miss. 1969) ("Although some courts have held that in order for an indemnitee to be indemnified against his own negligence, the indemnity contract must contain express language to that effect. However, the better rule and that which is followed by a majority of the courts is that the indemnitee will be indemnified against his own negligence when the contract shows by clear and unequivocal language that this is the intention of the contracting parties").

Insurer Owing AI Status To Indemnitee

- Most cases hold the "insured contract" exception does not trigger a carrier's duty to defend the indemnitee. Courts base this conclusion on various grounds, including the absence of policy language expressly requiring the carrier to assume the indemnitee's defense, the absence of policy language affording the indemnitee rights under the policy, and/or the absence of an endorsement making an AI an entity that the insured agrees by written "insured contract" to designate as an AI. *See, e.g., Carye v. Granite State Ins. Co.*, No. 281-5-08 Wncv, 2008 WL 6555503 (Vt. Super. Ct. Oct. 6, 2008); *Jiminy Peak Mountain Resort, LLC v. Wiegand Sports, LLC*, No. 14-40115-MGM, 2016 WL 1050260 (D. Mass. Mar. 16, 2016); *Leaf River Cellulose LLC v. Mid-Continent Cas. Co.*, No. 2:11-CV-54-KS-MTP, 2012 WL 1906529 (S.D. Miss. May 25, 2012).
- A few cases support the argument that a carrier is obligated to immediately assume a contractual indemnitee's defense. *See, e.g., Krieger v. Wilson Corp.*, 131 P.3d 661 (N.M. 2005); *Marlin v. Wetzel County Bd. of Educ.*, 569 S.E.2d 462 (W. Va.2002).

Defense Owed To Indemnitee?

- As one treatise explains in the context of a CGL policy/construction disputes:

  There has been a great deal of debate concerning a CGL insurer's obligation to provide a defense to its insured's indemnitee under contractual liability coverage. Indemnitees desire such coverage because much of their exposure results from the litigation costs of defending the claims against the indemnitee. The insurance industry, through the ISO, has maintained that a defense is not contractually owed to the indemnitee and if it is provided, it is done so gratuitously by the insurer. The industry, again through the ISO, has attempted a compromise solution. In 1996, the ISO initiated policy changes to the contractual liability provisions. Language was added to the provision whereby the indemnitee's reasonable attorney's fees and litigation expenses are deemed to be damages because of 'bodily injury' or 'property damage.' This fiction has the effect of bringing such litigation costs into the indemnity grant. The CGL policy's 'supplementary payments' section was also revised in 1996 to set forth the circumstances under which the insurer will defend an indemnitee. The conditions under which an insurer will provide a defense are quite restrictive. Among the conditions that must be met are: (1) the insured is a codefendant with the indemnitee in the same suit, (2) no conflict exists between the interests of the insured and the interests of the indemnitee, (3) the indemnitee and the insured ask the insurer to conduct and control the defense and agree to the assignment of the same counsel, and (4) the indemnitee must provide written authorization allowing the insurer to conduct and control the indemnitee's defense. Only when these conditions are met will the insurer provide a defense to the indemnitee under the 'supplementary payments' portion of the policy and thereby avoid litigation costs from reducing the insured's limits of insurance. If these conditions are met and the insurer provides a defense, the limits of coverage are not affected.

4 Bruner & O'Connor Constr. Law § 11:112.

AI Status For Contractual Indemnitee

- A few cases hold an entity's contractual indemnitee status confers AI status on that entity.

- In *Ring Power Corp. v. Amerisure Insurance Co.*, 326 Fed. Appx. 502 (11th Cir. 2009), for example, the court, interpreting Florida law, conferred AI status on an entity based on an indemnification agreement that stated "Lessee [insured contractor] shall defend, indemnify and hold harmless Lessor [Ring Power] … against all loss, liability and expenses … by reason of bodily injury including death …". *See id.* at 504.

- The court held "Ring Power is an additional insured under the plain language of the CGLCF [Commercial General Liability Coverage Form] by virtue of its insured contract with [the insured contractor]." *Id*.

AI Status To Contractual Indemnitee

- In *Elk Run Coal Co., Inc. v. Canopius U.S. Insurance, Inc.*, 775 S.E.2d 65 (W.Va. 2015) the court conferred AI status based on the indemnification agreement, the policy's "insured contract" definition, and the "insured contract" exception to the contractual liability exclusion.
- *See also United Parcel Serv. v. Lexington Ins. Grp.*, 983 F. Supp. 2d 258, 261, 264 (S.D.N.Y. 2013) (holding because the Adelis-UPS indemnity contract – requiring Adelis to defend and indemnify UPS against all claims and name UPS as an additional insured on its policies – was an "insured contract," the "Policy covers UPS [the contractual indemnitee] to the extent the [insured contract] legally obligates Adelis to pay for [the claimant]'s bodily injury. The terms of the [insured contract] require Adelis to indemnify UPS …. Therefore, Lexington must indemnify UPS pursuant to the Insured Contract Provision…."); *Andarko Petroleum Corp. v. Century Sur. Co.*¸ No. H-09-3381, 2010 WL 1031056, at *1 (S.D. Tex. Mar. 16, 2010) (holding because the indemnity contract was an "insured contract", it was covered by the indemnitor's policy and the indemnitor's carrier was obligated to defend the contractual indemnitee).

Express Reference

Some states strictly construe contractual indemnity provisions and require the agreement to specifically state the scope of the indemnity extends to the Indemnitee's own negligence

- *Ruzzi v. Butler Petroleum Co*., 527 Pa. 1 (1991) ("The law has been well settled in this Commonwealth for 87 years that if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language").
- *Azurak v. Corp. Prop. Investors*, 175 N.J. 110, 112-13 (2001) ("[I]n order to allay even the slightest doubt on the issue of what is required to bring a negligent indemnitee within an indemnification agreement, we reiterate that the agreement must specifically reference the negligence or fault of the indemnitee").

Excess/umbrella coverage

- True excess and umbrella policies are forms of excess insurance requiring the existence of a primary policy

- Excess insurance policies often follow the terms and conditions of the underlying primary policy while umbrella policies frequently provide coverage in addition to that provided by the underlying insurance

- Follow form policies will typically incorporate the provisions of the underlying policy so long as they are not inconsistent with the provisions of the excess policy. Whether a provision is “inconsistent” is often a point of contention.

Excess/umbrella coverage

- Some policies require actual payment of losses up to the attachment point, not mere accrual of liability, to trigger excess coverage. *See Ali v. Fed. Ins. Co.*, 719 F.3d 83 (2d Cir. 2013) (exhaustion of the underlying insurance occurs "solely as a result of payment of losses thereunder").

- Other policies are triggered once the underlying insurer is held liable to pay. *See Highlands Ins. Co. v. Gerber Prods. Co.*, 702 F. Supp. 109 (D. Md. 1988) ("liability shall attach . . . only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss.").

Excess/umbrella coverage

Underlying contract may determine the priority of coverage between NI's insurance tower and AI's insurance tower.

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Exxon Mobil Corp., et al.* (Tex. Ct. App. Sept. 21, 2021), the Court held a contractual insurance provision requiring AI to maintain "normal and customary CGL insurance" referred to primary insurance only.

Effect is that AI can only access the NI's primary policy limits

Excess/umbrella coverage

- A party can be an AI under an umbrella policy even if it does not qualify as an AI under the primary. *See, e.g., 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112 (2d Cir. 2010). In *10 Ellicott Square*, the primary policy would not provide AI coverage until the underlying construction contract was executed; the contract was never signed so the owner and construction manager were not made AIs under the primary policy.
- The umbrella policy provided: "Each person or organization who is an 'insured' in the 'underlying insurance' is an 'insured' under this insurance subject to all the limitations of such 'underlying insurance' other than the limits of the underlying insurer's liability." *Id.* at 124. It further stated: "Any person or organization with whom or with which you have agreed in writing prior to any loss, 'occurrence[,]' or 'offense' to provide insurance such as is afforded by this policy is an insured...." *Id.*
- The language in the latter provision did not require the contract be executed, which rendered the owner and construction manager insureds under the umbrella policy. Irrespective of whether the owner and construction manager were covered under the primary policy, the broad definition of insured in the umbrella policy afforded them coverage.