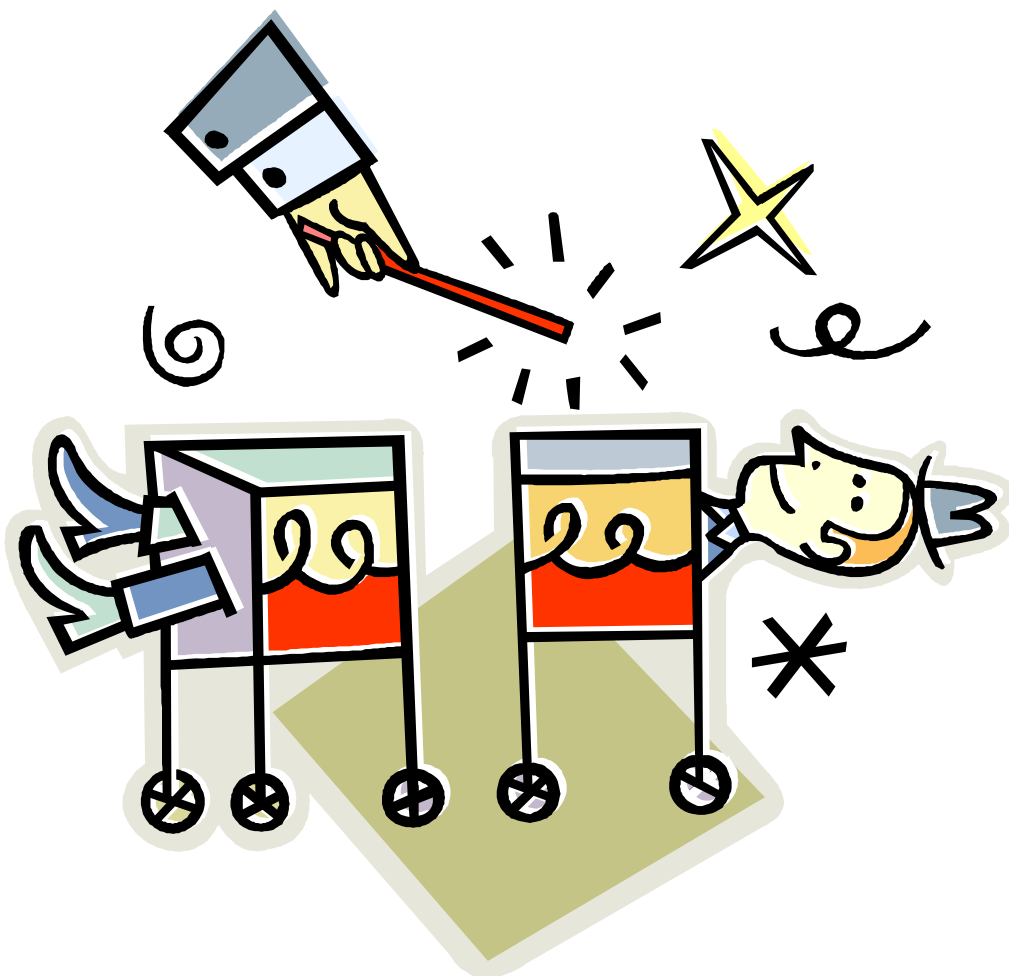


The Additional Insured Illusion

And Other Feats of Contractual Risk Transfer Magic
Even David Copperfield Couldn't Pull Off



Presented by

Bill Wilson, CPCU, ARM, AIM, AAM
Independent Insurance Agents & Brokers of America

Copyright Notice and Disclaimers

COPYRIGHT

All information and content included in this material, including but not limited to (i) text, graphics, logos, icons or images; (ii) data and content compilations; and (iii) software, is the property of the Independent Insurance Agents & Brokers of America, Inc. (IIABA) or Rick Cohen, Esq. and is protected by United States and international copyright laws. You may not modify, copy, distribute, transmit, display, publish, sell, or license any information from this material without the express written consent of the authors or copyright owners and any applicable third-party owner or licensor. You may not create derivative works, or use any information or content for commercial or public purposes without the express written consent of the authors or copyright owners and any applicable third-party owner or licensor. In addition, you may not reproduce, transmit, transcribe, store in a retrieval system, or translate into any human or computer language any part of the material in any form or by any means whatsoever without the express written consent of the authors or copyright owners. Such consent may be requested by contacting Bill Wilson at Bill.Wilson@iiaba.net.

DISCLAIMER

This material has been designed for use in training programs for insurance industry personnel throughout the United States. It is not intended to be used as a complete reference resource on the programs and coverages outlined herein. Unless indicated otherwise, the coverage discussion herein are based on various editions of "ISO standard" policy forms. Programs, coverages, rules, and coverage interpretations presented in this publication may be different from those used by individual insurance companies writing these programs. Contact individual companies for details about their interpretations of the programs outlined herein and/or their own proprietary programs and contracts. The opinions expressed in this document are just that. No warranties, express or implied, of any kind are made, intended or inferred. The information contained herein is not legal advice, nor should it be taken as such. When such legal issues arise, proper advice should be sought, where applicable and appropriate, from qualified legal counsel.

INDEMNITY

You agree to defend, indemnify, and hold harmless IIABA and Rick Cohen, together with their respective employees, agents, directors, officers, and shareholders, from and against all the liabilities, claims, damages, and expenses (including reasonable attorney's fees and costs) arising out of your use of this material; your breach or alleged breach of this Agreement; or your breach or alleged breach of the copyright, trademark, proprietary, or other rights of IIABA, Rick Cohen, or third parties.

***Copyright 2012 by the Independent Insurance Agents & Brokers of America And Rick Cohen.
All rights reserved.***

"Includes Copyrighted Material of Insurance Services Office, Inc. With Its Permission.
Copyright Insurance Services Office. 20__"



William C. Wilson, Jr., CPCU, ARM, AIM, AAM is the Associate Vice President of Education and Research and founder and director of the Virtual University of the Independent Insurance Agents & Brokers of America, the country's largest trade association of independent insurance agents. He is the former Director of Education & Technical Affairs for the Insurors of Tennessee and, prior to that time, he was employed by Insurance Services Office, Inc. Mr. Wilson is a graduate of the Illinois Institute of Technology with a B.S. degree in Fire Protection & Safety Engineering.

Bill was a licensed insurance and surplus lines agent, and his professional affiliations have included past president of the Middle Tennessee Chapter of CPCU, member of the board of directors of the national CPCU society, PMLG of the Honorable Order of Blue Goose, International, member of the Independent Insurance Agents & Brokers of America (IIABA) National Education Committee, member of the Certified Insurance Service Representative (CISR) National Advisory Committee, member of the National Underwriter FC&S editorial board, member of the Society of Insurance Trainers and Educators (SITE) and its SITE Journal editorial committee, member of the National Writers Association, chairman of the Tennessee Insurance Commissioner's Education Advisory Committee, member of the Middle Tennessee State University Insurance Liaison Committee, and member of the Nashville State Technical Institute's Business Management Advisory Committee.

Bill has served as a trainer and speaker for various organizations, including the Independent Insurance Agents & Brokers of America and 48 of its state affiliates, the CPCU Society national convention and chapter programs, the National Association of Insurance Women (NAIW), the Southern Agents Conference (SAC), the Risk & Insurance Managers Society (RIMS), the International Risk Management Institute (IRMI), and the Society of Risk Management Consultants (SRMC).

He has conducted hundreds of technical seminars, workshops and convention presentations—from Hawaii to Rhode Island and Alaska to Florida—as well as programs on time management, presentation and public speaking skills, seminar development, and many others. He has been the top-rated presenter at several CPCU National Conventions and his programs are always highly rated by attendees. He has presented seminars or webinars to as many as 5,000 attendees in a single session.

He was the recipient of the IIABA L.P. McCord National Education Award for having the #1 ranked state insurance education program in America and has won five other national education awards, including the 2010 George M. Gottheimer Memorial Award which is presented annually to a CPCU Society member who has made an outstanding contribution to the field of insurance education, risk management or insurance consulting.

Bill has researched, developed, written, and published dozens of technical articles, manuals and CDs/audio tapes, and has authored articles in business and industry trade periodicals such as *Presentations* magazine, *American Agent & Broker* magazine, *Independent Agent* magazine, *Tennessee Insuror* magazine, *Tennessee Business* magazine, the *CPCU Journal*, CPCU Interest Group newsletters, and the *SITE Journal*.

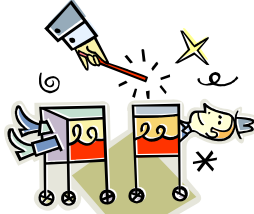
He has been quoted as an expert in a number of mainstream publications, including *Readers Digest*, *Kiplinger's*, and *Money* magazines, and he has been cited as an expert resource/interviewee for local television and radio media. He has also served as an expert witness in litigation.

According to Nashville NBC television affiliate WSMV, "Bill Wilson is an expert when it comes to insurance." Dr. William T. Hold, president of the Society of Certified Insurance Counselors in Austin, Texas has said that, "Bill Wilson is recognized by his peers as one of the premier insurance educators in America."

Finally, not that it has anything whatsoever to do with this program, but Bill is also an avid (notice we didn't say 'good') electric blues guitar player. He can be contacted at bill.wilson@iiaba.net. You can visit IIABA's Virtual University by going to <http://www.bigivu.com>.

The Additional Insured Illusion

*And Other Feats of Contractual Risk Transfer Magic
Even David Copperfield Couldn't Pull Off*



Presented by

Bill Wilson, CPCU, ARM, AIM, AAM
Big "I" Virtual University



Shifting the Risk

"The trend in risk management is to try to transfer all liability (or as much as is legally possible), whether insurable or not. It takes an astute, well-trained, experienced, and qualified individual to undertake the scavenger hunt often necessary to identify exposures in lengthy or complex contracts."

Mike Edwards, CPCU, AAI
Insurance educator




Shifting the Risk Agent caveat...

"Ask an Expert" question:

"Is there a reference I can go to in order to find sample wording for a hold harmless agreement? This is for one of our customers, a roofing contractor, to use with his subs. Thanks."


- South Carolina agent



Shifting the Risk

Risk Management 101

- Avoidance
- Retention
- Loss Control
 - Loss prevention
 - Loss reduction
- **Transfer**
 - Insurance (*suspenders*)
 - Non-insurance contractual transfer (*belt*)




Shifting the Risk

Another agent inquiry...

“Ask an Expert” question:

“In the past, we have not been individually adding Additional Insured endorsements, relying on them being an indemnitee in the ‘insured contract’ wording of the CGL or BOP policies, which gives them AI status without endorsing that on the policy. Our state now has a law that says if we put AI status on the certificate, we MUST have an AI endorsement added to the policy. Is this correct or can we still rely on ‘indemnitee in an insured contract’ and not go to the trouble or expense of using AI endorsements?” – Texas agent

Deepwater Horizon example: <http://tinyurl.com/BPandTransocean>




Shifting the Risk

Court answers agent inquiry...

“Liability coverage under the policy is afforded by Section I, not the supplementary payments provision. Therefore, Hargob’s status as an indemnitee does not operate to confer upon it status as an additional insured, and it is, thus, not entitled to liability coverage under the subject policy pursuant to the supplementary payments provision.”


Hargob Realty Assoc., Inc. v. Fireman’s Fund Ins. Co., 2010 N.Y. Slip. Opp. 4243, 73 A.D.3d 856 (N.Y. App. Div. 2d Dep’t 2010)



Shifting the Risk

Belt and Suspenders Approach


- Indemnification Provisions (*belt*)
 - Addressed by the CGL contractual liability “coverage”
 - Covers sole negligence but defense within limits
 - Beware the CG 21 39 and CG 24 26
- Insurance Requirements (*suspenders*)
 - Addressed by ISO AI endorsements
 - Does not cover sole negligence but defense is outside limits



Indemnification Issues

“No one knows what evil lurks in the hearts of men...but it’s all insured.”

California Chief Justice
Malcolm Lucas



Indemnification Issues

Indemnity Agreements

- Requirement to Insure
 - Inside indemnity clause
 - Outside indemnity clause
- Indemnitee vs. Indemnitor
 - Subcontractor indemnitor agrees to compensate general contractor indemnitee for loss
 - Indemnity agreements often include hold harmless agreement
- Sample Contract Language



Indemnification Agreements in Construction Contracts

- “The insurer agrees to defend, indemnify and hold harmless the City of Newark, NJ, its agents, servants and administrator from any and all complaints claiming liability and damages for injuries arising out of work and/or duties to be performed under entire contract.”



Indemnification Agreements in Construction Contracts

- “...but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.”



Indemnification Agreements in Construction Contracts

- “To the fullest extent permitted by applicable law, Contractor shall **insure** and defend, indemnify, and hold harmless Owner and Agent and their respective officers, directors, members, employees, agents, shareholders, partners, joint venturers, affiliates, successors, and assigns from and against any and all liabilities, obligations, claims, demands, causes of action, losses, expenses, damages, fines, judgments, settlements, and penalties including, **without limitation** and **without regard to the cause or causes** thereof...”



Indemnification Agreements in Construction Contracts

- "The [insured] will defend, indemnify and release ABC and XYZ, and their subsidiaries, affiliates, successors and assigns (collectively called 'Indemnified Parties'), against **all claims, causes of action, damages, liabilities, attorneys' fees and related expenses** ('Claims') which the Indemnified Parties may suffer or for which the Indemnified Parties may be liable, by reason of actual or claimed injury (including death) to any person or actual or claimed damage to any property, directly or indirectly caused or contributed to, or claimed to be caused or contributed to by reason of any act, omission or negligence, including strict liability, whether active or passive, of the [insured], its employees or its subcontractors, unless caused by the sole negligence or sole willful misconduct of the Indemnified Parties."



Indemnification Issues 3 Types of Indemnity Clauses


- **Broad**
 - Reimbursement of indemnitee by indemnitor for entire loss, including that involving the sole negligence of the indemnitee
- **Intermediate**
 - Reimbursement of indemnitee by indemnitor for entire loss unless the result of the indemnitee's sole negligence
- **Limited**
 - Reimbursement of indemnitee by indemnitor only to the extent of the indemnitor's own fault




Anti-Indemnity Laws Variations in Laws

- Statutes vs. case law
- May apply to private or public contracts
- May apply to construction industry only
- May bar indemnity for sole or partial fault
- May allow additional insured coverage


Summary listing of statutes by state.....
 Source: Rick Cohen, Esq., Goldberg Segalla

 **Anti-Indemnity Statutes**
Bars Indemnity for Sole Fault:


- Alaska
- Arkansas
- Georgia
- Hawaii
- Idaho
- Indiana
- Maryland
- Michigan
- New Jersey
- South Carolina
- South Dakota
- Tennessee
- Virginia
- West Virginia

 **Anti-Indemnity Statutes**
Bars Indemnity for Sole or Partial Fault:

- Colorado
- Connecticut
- Delaware
- Florida
- Illinois
- Kansas
- Kentucky
- Louisiana
- Minnesota
- Mississippi
- Missouri
- Nebraska
- New Hampshire
- New Mexico
- New York
- North Carolina
- Oklahoma
- Oregon
- Texas
- Utah
- Washington


 **Anti-Indemnity Statutes**
Depends on Type of Work:

- Arizona
- California




Anti-Indemnity Statutes
No Statute:

- Alabama
- Iowa
- Maine
- Nevada
- North Dakota
- Pennsylvania
- Vermont
- Wisconsin
- Wyoming



Insurance Issues...CGL


Contractual Liability (Exclusion)
Employer's Liability Exclusion
"Other Insurance" Clause





Insurance Issues...CGL
Contractual Liability

- Exclusion or Coverage?
- "Broad Form Contractual Liability"
- Indemnitee vs. Insured...Revisited
- Does Contractual Liability Override Exclusions?




Insurance Issues...CGL
Exclusion or coverage?

2. Exclusions
This insurance does not apply to:

b. Contractual Liability
"Bodily injury" or "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", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement....



Insurance Issues...CGL
Exclusion or coverage?

9. "Insured contract" means:

- a. A contract for a lease of premises...;
- b. A sidetrack agreement;
- c. Any easement or license agreement...;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume 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.



Insurance Issues...CGL
Caveat: READ THE POLICY!

- **Exclusions**
This insurance does not apply to:
- **b. Contractual Liability**
...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 **BY YOU** in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement....

• *NPS Energy Services, Inc., et al. v. National Union Fire Insurance Company of Pittsburgh, PA, et al., 264 F.3d 365 (3rd Cir. 2001) – cited by Malecki on Insurance, May 2012*




Insurance Issues...CGL
"Broad Form Contractual"

- **Broad**
 - Covers the indemnitee's sole fault
 - **Insurance example:** CGL contractual liability "coverage"
- **Intermediate**
 - Covers the indemnitee's direct and vicarious liability as long as the indemnitor has some liability
 - **Insurance example:** 2004 ISO AI endorsements
- **Limited**
 - Covers only the indemnitee's vicarious liability for the indemnitor (no direct liability of the indemnitee)
 - **Insurance example:** Many insurer AI endorsements



Insurance Issues...CGL
Indemnitee vs. insured

- Sole negligence may be indemnified
- Defense usually within limits
- Indemnitee has no policy rights yet indemnification is subject to policy provisions...




Insurance Issues...CGL
Contractual and exclusions

Does contractual liability override policy exclusions?


"Ask an Expert" question:

"We have an insured who leases a premises and while operating his backhoe, he accidentally damaged a door at the premises. The adjuster denied the claim under his CGL policy. We believe that his CGL contractual liability coverage should pay. He has a lease that makes him responsible for damages to the premises and a lease is an 'insured contract'."




Insurance Issues...CGL
Contractual and exclusions

- Contractual liability coverage extends to "damages to which this contract applies..."
- "Contractual liability coverage provided for all indemnity obligations of Subcontractor."
- "To the fullest extent permitted by applicable law, Contractor shall **insure** and defend, indemnify, and hold harmless Owner and Agent and their respective officers, directors, members, employees, agents, shareholders, partners, joint venturers, affiliates, successors, and assigns from and against **any and all** liabilities, obligations, claims, demands, causes of action, losses, expenses, damages, **fin**es, judgments, settlements, and penalties including, **without limitation** and **without regard to the cause or causes thereof**..."




Insurance Issues...CGL
Employers Liability Exclusion

- ISO language:
"This insurance does not apply to...'bodily injury' to...An 'employee' of **the** insured..."
- Proprietary insurer language:
"This insurance does not apply to...'bodily injury' to...An 'employee' of **any** insured..."




Insurance Issues...CGL
"Other Insurance" Clause

- "Primary and Noncontributory"
- Primary vs. Excess
- Endorsement Requirement
- ISO "or Equivalent"



Insurance Issues...CGL
 "Primary and noncontributory"

4. Other Insurance
 b. Excess Insurance
 This insurance is excess over:
 (2) 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.



Insurance Issues...CGL
 "Primary and noncontributory"


ISO CG 20 01 04 13
 Primary And Noncontributory – Other Insurance Condition

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

Primary And Noncontributory Insurance


This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

- (1) The additional insured is a **Named Insured** under such other insurance; and
- (2) You have agreed **in writing** in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.




Insurance Issues...CGL
 Primary vs. excess

- Beware of AI endorsements that provide only excess coverage
- Some say they provide excess coverage unless primary coverage is required by written contract
- *Jeffrey M. Brown Assoc., Inc. v. Zurich Am. Ins. Co.*, 2010 N.J. Super. LEXIS 108 (N.J. Super. Ct. App. Div. June 23, 2010)...court upheld excess coverage language under AI endorsement



Insurance Issues...CGL
Endorsement requirement

4. Other Insurance
 b. Excess Insurance
 This insurance is excess over:
 (2) 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.**



Insurance Issues...CGL
Endorsement requirement

ACORD 25:
IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed...A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).



Insurance Issues...CGL
Endorsement requirement

- IRMI citation: *Graphic Arts Mut. Ins. Co. v. Essex Ins. Co.*, 465 F. Supp. 2d 1290 (N.D. Ga. 2006)

www.irmi.com



Insurance Issues...CGL
Endorsement Requirement

One insurer's liability policy:

Additional Insureds When Required By Written Contract or Agreement

The person(s) or organization(s) described below are additional insureds when you have agreed, in a written contract or agreement, that such person or organization be added as an additional insured on your policy.



Insurance Issues...CGL
Endorsement requirement

2013 ISO CGL "Other Insurance" clause change:

This insurance is excess over:

- (2) 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.~~



Insurance Issues...CGL
Endorsement requirement

• **Subcontractor "Special Condition" or "Warranty" Endorsements**

- Require GC to contractually require sub to have a CGL with the GC as an additional insured
- If the sub does not have a CGL policy or it does not extend AI coverage to the GC, the GC's own policy does not cover the claim



Insurance Issues...CGL ISO "or equivalent"

- **NEW YORK, April 24, 2012 (Reuters)**
An insurance company did not violate the law when it issued limited coverage to contractors, even though the contractors then used the policies to secure construction permits improperly, a New York state appeals court ruled Tuesday.
- **Roofing contractor**
Washington Avenue Owners Corporation v. Utica First Insurance Company, (Slip 29443, Sup. Ct. Bronx County, N.Y. 2009)
- **Airport liability**
- **Law enforcement liability**
- **Gun club**
- **Nursery garden**



Insurance Issues...AIs

Is AI status always a good idea?


ISO vs. Proprietary Endorsements

Potential Coverage Gaps




Insurance Issues...AIs Is Being an AI Always Good?

- Pros and Cons of Being an AI
- CGL "Cross Liability" Exclusion
- Mutual AIs
- Triple Net Leases
- Liquor Liability



Insurance Issues...AIs
Pros and cons

- Pros
 - Additional limits, usually on a primary basis
 - Insurer usually can't subrogate against an insured
 - Belt and suspenders for indemnity obligation
 - Preserve good loss history
- Cons
 - Dilution of limits
 - Lack of coverage choice/control
 - Lack of defense choice/control




Insurance Issues...AIs
CGL "cross liability" exclusion


7. Separation Of Insureds
[T]his insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

AI issue...



Insurance Issues...AIs
CGL "cross liability" exclusion

- Insurer adds AI endorsement to GC's CGL policy per agency request
- Insurer unilaterally adds cross liability exclusion endorsement
- Sub's injured employee sues GC
- GC's insurer denies coverage 




Insurance Issues...AIs
Mutual AIs

- Healthcare provider wants healthcare equipment supplier to name it as an AI on its CGL policy
- Healthcare equipment company wants healthcare provider to name it as an AI on its CGL policy
- Claimant sues both parties
- Primacy?
- Beware non-ISO AI endorsements




Insurance Issues...AIs
Triple net leases

- **CONCEALMENT, MISREPRESENTATION OR FRAUD**
This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning....
- **If tenant is named insured...**
 - No landlord coverage
 - No mortgagee coverage (maybe)
- **If tenant is not an insured...**
 - Landlord covered
 - Mortgagee covered




Insurance Issues...AIs
Liquor liability

- Tenant is a BYOB establishment w/o liquor liability ins.
- Lease requires landlord to be an AI on tenant's CGL policy
- Injured patron sues tenant and landlord
- State dram shop law makes landlord liable
- Tenant's CGL insurer denies claim based on liquor liability exclusion which applies to ANY insured, not just the one in the liquor business
- But certificate says he is an AI



Insurance Issues...AIs
ISO vs. Proprietary Forms

- How to Tell the Difference
- What to Look Out For
- Choosing the Correct AI Endorsement
- Sample Endorsements




Insurance Issues...AIs
How to tell the difference

- “© ISO Properties, Inc., 20__” or
“© Insurance Services Office, Inc., 20__”


vs.

- “Includes Copyrighted material of Insurance Services Office, Inc. with its permission”



Insurance Issues...AIs
What to look out for


- AI endorsement number: CG 20 10 11 85
- “Copyright, Insurance Services Office, Inc., 1984”
- But NOT the ISO form
 - Requires written contract
 - Subrogation waiver and primary/noncontributory wording added
 - Vicarious liability only



Insurance Issues...AIs

What to look out for

- “Additional Insured provisions provided in this endorsement contain equivalent language to Insurance Services Office Endorsements CG 20 10 07 04 and CG 20 37 07 04.”
- Except...
 - Requires written contract
 - Professional liability exclusion
 - Restricts recovery to the lesser of policy or contract limit
 - If more than one policy applies, only the highest limit is paid
 - Primary and noncontributory language
 - Subrogation waiver



Insurance Issues...AIs

Choosing the correct form


- Upstream parties require “Owner and architect are additional insureds per CG 20 10 07 04” on a certificate of insurance
- The agent believes the CG 20 07 is the appropriate AI endorsement for the architect
- The CG 20 10 provides AI status only for claims arising “in the performance of your ongoing operations for the additional insured(s).”
- The CG 20 07 applies to engineers and architects “engaged by you”
- The agent should use the CG 20 32



Insurance Issues...AIs

Sample endorsements


- Coverage triggered by certificate of insurance
- Vicarious liability only except no coverage if the claim is based on supervision of work
- Ongoing operations only
- Professional services exclusion
- Excess coverage only
- Limit is lesser of policy limits or contract requirements

 **Insurance Issues...AIs**
Sample endorsements

- “This insurance shall apply as primary and not contributing with any insurance **carried by** such Additional Insured.”

vs.

- “Insurance provided under this policy shall apply on a primary basis and shall not seek contribution from any other insurance **available to** an additional insured added to this policy.”

 **Insurance Issues...AIs**
Sample endorsements


- “**Blanket Additional Insured Protection Endorsement**” says...
- “This insurance does not apply to any person or organization not specifically approved by us as an additional insured.”

 **Insurance Issues...AIs**
Sample endorsements

- “The limits of insurance **applicable to the additional insured** are those specified in the written contract or agreement or in the Declarations for this policy, whichever are less.”


vs.

- “**The insurance provided** will not exceed the lesser of the coverage and/or limits of this policy or the coverage and/or limits required by said contract or agreement.”



Insurance Issues...AIs
Sample endorsements


- “The insurance afforded by this Additional Insured endorsement shall be **limited to the liability required** by the written contract **to which this endorsement is subject.**”
 - What is the “liability required? Could it be interpreted to refer to an unlimited indemnity agreement?
 - The insurance should not be subject to a contract with a third party.



Insurance Issues...AIs
Sample endorsements

From IRMI...

- “No coverage is provided to an additional insured for damages because of **bodily injury to an employee of the named insured**, whether suit is brought or claim is made by the employee or the parent, spouse, child or sibling of such employee or any entity seeking damages because of injury to such employee.”




Insurance Issues...AIs
Sample endorsements

- “This amendment applies only when you have agreed by **written ‘insured contract’** to designate the person or organization listed above as an additional insured subject to all provisions and limitations of this policy.”
- ISO forms have no “insured contract” requirement and simply refer to a “written contract”




Insurance Issues...AIs
Potential Coverage Gaps

- Vicarious Liability Only
- Blanket AI Problems...and More!
- “Who Is An Insured” Problem
- Cross Liability Exclusions
- SIRs and Self-Insurance
- Written Contract Requirement




Insurance Issues...AIs
Vicarious liability only

- Coverage is provided "...only to the extent that 'additional insured' is being held responsible for the acts, omissions and/or negligence of the 'named insured'."
- "The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization."
- "The coverage afforded hereunder is limited to imputed liability resulting solely from the conduct of the named insured for which the additional insured is held responsible and liable."
- "The coverage afforded to the additional insured is limited solely to the additional insured's 'vicarious liability' that is a specific and direct result of your conduct."




Insurance Issues...AIs
Blanket AI problems

- **CG 20 33:**
"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."
- **CG 20 38 04 13 adds the following language:**
"Any other person or organization you are required to add as an additional insured under the contract or agreement...."




Insurance Issues...Als
Blanket AI problems

- **New York trial court cases:**
 - *Brooklyn Hosp. Ctr. V. One Beacon Ins/Illinois National Ins. Co. v. American Alternative Ins. Corp.*
 - *Cusumano v. Extell Rock, LLC*
 - *Skanska USA Building, Inc. v. Burlington Insurance Company*
- **Illinois appeals court case:**
Westfield Insurance Company v. FCL Builders, Inc.
<http://www.state.il.us/court/Opinions/AppellateCourt/2011/1stDistrict/March/1100521.pdf>
- Another reason to decline to add “explanatory” language to a certificate of insurance




Insurance Issues...Als
“Who Is An Insured” problem

- Final sentence in the ISO CGL “Who Is An Insured” section:
“No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.”
- *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508 (5th Cir. 2002) (cited by IRMI)




Insurance Issues...Als
Cross liability exclusions

- As discussed earlier...
 - Insurer adds AI endorsement to GC’s CGL policy per agency request
 - Insurer unilaterally adds cross liability exclusion endorsement
 - Sub’s injured employee sues GC
 - GC’s insurer denies coverage
- Some proprietary exclusions apply only to Named Insured vs. Named Insured, but others are broader




Insurance Issues...AIs
SIRs and self-insurance

- ACORD 25 has no place to show this for the CGL
- *Forecast Homes, Inc. v. Steadfast Ins. Co.*, No. G040876, 2010 Cal. App. LEXIS 172 (Jan. 12, 2010), as cited by IRMI Construction Risk Manager, March 12, 2010
- ISO CG 03 00 – Deductible Liability Insurance
- Another reason to decline to add “explanatory” language to a certificate of insurance



Insurance Issues...AIs
Written contract requirement

- Unlike the CG 20 33, the CG 20 10 does not require a written contract
- Many insurer CG 20 10 “equivalent” AI endorsements do require a written contract
- Indemnity agreement insufficient to trigger AI status
- Timing issues (pre-contract work)
- READ the endorsement CAREFULLY
 - “...only if coverage as an additional insured is required by written contract or agreement that is an “insured contract”
 - *Gilbane Building Company v. Admiral Ins. Co.*, December 2011




Insurance Issues...Priority

Priority of Coverage


Horizontal vs. Vertical Exhaustion

Case Law




Insurance Issues...Priority
Case Law

- **New York...Horizontal Exhaustion**
 - *Pecker Iron Works of N.Y. v. Travelers Ins. Co.*, 99 N.Y.2d 391 (2003)
 - *BP Air Conditioning Corp. v. One Beacon Insurance Group*, 8 N.Y.3d 708 (2007)
 - *Bovis Lend Lease LMB Inc. v. Great American Ins. Co.*, 53 A.D.3d 140 (1st Dept. 2008)
 - *Indemnity Ins. Co. of North America vs. St. Paul Mercury Ins. Co.*, 74 A.D.3d 21 (1st Dept. 2010)




Insurance Issues...Priority
Case Law

- **Illinois...Horizontal Exhaustion vs. Targeted Tender Rule**
 - *U.S. Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226 (Ill. App. 1994)
 - *Kajima Constr. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 368 Ill. App. 3d 665, 669, 856 N.E.2d 452, 456 (1st Dist. 2006)




Insurance Issues...Priority
Case Law

- **New Jersey...Vertical Exhaustion**
 - *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994)
 - *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998)
 - *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 843 A.2d 1094 (N.J. 2004)



Insurance Issues...Priority
Case Law

- California...**Combined Approach**
– *Padilla Constr. Co. v. Transportation Ins. Co.*, 58 Cal. Rptr. 3d 807 (Cal. App. 2007)




OCPs

Named Insured Advantages


Named Insured Disadvantages

Designated Contractor Impact




OCPs
Advantages to Named Insured

- Premium Paid by Designated Contractor
- Separate Unshared Set of Limits
- Primary Coverage Over Named Insured's CGL (true "primary and noncontributory" coverage)
- Notice of cancellation
- Control of Claims Process




OCPs
Disadvantages to Named Insured

- Additional Premium
- Coverage Likely Inferior to AI Status on Other Party's CGL Policy
- Only Covers Named Insured's Vicarious Liability for Designated Contractor
- No Products/Completed Operations Coverage



OCPs
Designated Contractor Impact


- **Advantage**...Designated Contractor's Own Insurance Not Adversely Impacted If Loss Sensitive/Large Deductible
- **Disadvantage**...Additional Cost to Designated Contractor



Certificate Issues

***“It is a tale, told by an idiot,
full of sound and fury,
signifying nothing.”***

Macbeth




Certificate Issues
Primary and Noncontributory

- What is “primary”?
- What is “noncontributory”?
- The upstream party’s CGL is usually controlling
- The danger:
 - *The Premcor Refining Group v. National Fire Insurance Co. of Hartford*, 2012 U.S. Dist. LEXIS 49097 (D. Del. Apr. 6, 2012)
 - Certificate included “primary and noncontributory” language alleged to override disclaimers



Certificate Issues
Requirement to Insure Contract

- Presumption that “contractual liability” coverage applies to all indemnity agreements
- “Contractual liability coverage provided for all indemnity obligations of Subcontractor.”
- “General liability insurance includes blanket contractual.”
- “Policy includes Contractual Liability coverage for contract with XYZ.”
- “All the requirements from Project Manual are covered by the Insurance Certificate.”
- “AI status is provided as per written contract.”




Certificate Issues
Broad, Vague References

Broad, vague, ambiguous, imprecise, misrepresentative, obsolete, impossible, or outrageous requirements...

- “Comprehensive form of general liability provided which includes personal injury with Employment Exclusion deleted.”
- “Insurer will provide written notice of **any** reduction of coverage with reasonable promptness.”
- “Commercial insurance for “any auto” provided at \$1,000,000 **per occurrence** limit.”

More...



Certificate Issues
Broad, Vague References

- “Property insurance provided **without limitation**.”
- “General liability insurance includes broad form property damage and coverage for independent contractors.”
- “Insurance is primary and **all others** are non-contributory.”
- “A properly executed copy of this document shall be **legally binding**....”
- “Location of contract operations is within the territorial limits of all policies.”


More...



Certificate Issues
Broad, Vague References

- “Policy includes Pollution Liability.”
- “Policy covers Certificate holder **without restrictions or limitations** based on negligence.”
- “Other Insurance clause in the policy states that this insurance is primary (standard ISO wording).”
- “There are no claims (**pending** or paid) that could significantly reduce the aggregate.”
- “Policy is an **all risk** form.”


More...



Certificate Issues
Broad, Vague References

- “Coverage is inclusive of construction means, methods, techniques, sequences, and procedures employed in the capacity of a construction contractor.”
- “Coverage for additional insureds shall not be impacted by any breach of the insurance policy by the named insured.”
- “The insurer agrees to defend, indemnify and hold harmless the City of Newark, NJ, its agents, servants and administrator from **any and all** complaints claiming liability and **damages** for injuries arising out of work and/or duties to be performed under **entire contract**.”


More...



Certificate Issues
Broad, Vague References

- “We hereby certify that said Contractor is in compliance with all insurance coverage required under **this Contract** with the Owner. We hereby certify that said Contractor is in compliance with **all** insurance requirements, whether or not so evidenced on the certificate of insurance.”
- “Assault and Battery is not excluded.”
- “Excess or umbrella liability policy is **follow-form** with no additional exclusions.”


More...



Certificate Issues
Broad, Vague References

- “Carriers will notify [hotel] in writing 60 days prior to **any** cancellation, alteration or non-renewal of policies.”
- “Named Perils Pollution Coverage is provided.”
- “Building covered at 100% replacement cost.”
- “Business income limit is adequate to cover full recovery of the net profits and continuing expenses of the Hotel (including rental value) for a 12 month period.”


More...



Certificate Issues
Broad, Vague References

1. 2004 CGL policy with \$1M/\$2M Coverage A limits including P/CO coverage, \$1M Coverage B, \$5K Coverage C, and **\$50K FDLL**
2. Blanket contractual coverage (including coverage for the indemnity agreement signed by the contractor)
3. P/CO coverage to be maintained 2 years following completion of work
4. Deletion of employee and contractual exclusion from PI coverage
5. Broad Form Property Damage liability
6. Independent Contractor liability
7. Waiver of subrogation using CG 24 04 11 85 or equivalent
8. At least 30 days notice of cancellation or material change


Continued...



Certificate Issues
Broad, Vague References


9. Modification of "Other Insurance" clause of contractor's CGL policy to clarify that it is primary and noncontributory to any insurance carried by the requestor or its customers
10. Additional insured endorsement to be maintained for 2 years following completion of work identifying the following as additional insureds: "XYZ and its customers and all respective directors, officers, employees, agents, subsidiaries, divisions, affiliates and successors with respect to liability for bodily injury, property damage or personal and advertising injury caused in whole or in part by the acts or omissions of either you or the additional insureds." (Note: This requires that the sole negligence of the AI be covered.)

One more...




Certificate Issues
Broad, Vague References

- "XYZ Catering, Inc. (d/b/a XYZ Creations), ABC Sports & Entertainment LLC, ABC Holdings LP, the DEF Center, their respective principals, members, officials, officers, directors, shareholders, employees, and agents, their respective parent and affiliate companies and their respective Successors or Assigns as now or hereafter may be constituted and the Centennial Authority, the City of Raleigh, North Carolina, the State of North Carolina and their departments, divisions, commissions, and boards and their respective principals, members, officials, officers, directors, shareholders, employees, and agents have been named as additionally insured's under said policy with respect to any legal liability arising out of the Licensee's performance hereunder."




Certificate Issues
Sending Certificates to Insurers

- *Marlin v. Wetzel County Board of Education*, 569 S.E.2d 462 (West Virginia Ct. App., 2002)
- "[T]he insurance company asserted that it never received the certificate of insurance or any other documents suggesting the insurance policies needed to be amended."
- "[T]he insurer argues that it had no knowledge of the certificate's existence...."




Certificate Issues
Sending Certificates to Insurers

- *Erie Insurance Group v. National Grange Mutual Ins. Co.* (NY Sup. Ct., June 2009)
- “Each of the following is added as an Additional Insured...[a]ny general contractor, subcontractor or owner for whom you are required to add as an additional insured on this policy under a written construction contract or agreement **where a certificate of insurance showing that person or organization as an additional insured has been issued and received by [NGM] prior to the time of loss.**”



Certificate Issues
Policy vs. Contract Limits

- ACORD Forms Instruction Guide (FIG):
“Enter limits corresponding to those found on the policy declarations page.”
- A COI reflects *policy* terms and conditions, not contract provisions
- State laws, regulations, and DOI directives
- Insurer endorsement...policy pays the lesser of policy limits or “limits required by the contract”



Certificate Issues
“Description of Operations”


- ACORD Forms Instruction Guide (FIG)
- **Description of Operations/Locations/Vehicles**
As used here, records information necessary to identify the operations, locations and vehicles for which the certificate was issued.
- “The following are included as Additional Insured in regards to General Liability and Auto liability as required by written contract until the expiration of the statute of repose.”



Certificate Issues

Auto AI Requirements


- **CA 20 48 – Designated Insured**
“Each person or organization shown in the schedule is an ‘insured’ for Liability Coverage, but only to the extent that person or organization qualifies as an ‘insured’ under the Who Is An Insured provision contained in Section II of the Coverage Form.”
- Vicarious liability only
- Primacy governed largely by ownership unless specified in an “insured contract”



Certificate Issues

Umbrella AI Requirements

- AI extension may be included in the policy if provided by the underlying policy(ies)
- Less likely for standalone umbrella/excess forms



Certificate Issues

Refusal to Pay

- IRMI “Waiver of Certificate/Insurance Requirements” article
- “A party to a contract may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for noncompliance.”
- *Whalen v. K-Mart Corp.*, 166 Ill. App. 3d 339, 116 Ill. Dec. 776, 519 N.E.2d 991 (App. Ct. 1st Dist. 1988)



Certificate Issues

Others?

- **Agency staff qualifications**
"XYZ is an Additional Insured on a primary, non-contributory basis, including completed operations."



Questions?



bill.wilson@iaba.net
