

BULLETIN 20 – Part II

ADDITIONAL INSUREDS

February 2017

This bulletin is the second of two CCDC bulletins with respect to additional insured status on another party's insurance policy and indemnification obligations and the effect on insurance coverage. Part I pertains to Indemnification Agreements and Risk (Liability) Transfer and Part II pertains to Additional Insureds. This bulletin is intended to highlight the issues; it is strongly recommended the contents be discussed with your insurance representative.

Many contracts require third parties to be included under a Commercial General Liability (CGL) policy as an "additional insured". Insurers respond by using additional insured endorsements in varying shapes and forms, which do not always achieve what is required in a contract. For example, some insurers intend to provide coverage to additional insureds for defence costs only, and others for liability arising out of vicarious liability¹. The phrase most often used by the insurance industry on an additional insured endorsement or on a Certificate of Insurance is "ABC Company is added as an Additional Insured but only with respect to the operations of the Named Insured".

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Many CCDC contracts require a contractor's CGL policy to include the consultant and owner as additional insureds. CCDC 2 and 5B require the contractor to add the consultant and owner as additional insureds, but not for losses arising out of the consultant's or owner's "sole negligence", meaning that the contractor's policy does not have to respond if the injury or damage resulted only from the negligence of the consultant or owner. For example, if a consultant's employee leaves his briefcase on the steps of his employer's trailer and a visitor, while exiting the trailer, steps on the briefcase, falls, and is injured, the loss has arisen from the sole negligence of the consultant's employee. The consultant's own CGL and not the contractor's CGL should respond in this situation. CCDC 14 does not contain this "sole negligence" exception.

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Contractors should ask their insurance broker to review the additional insured requirements of their contracts to make sure the additional insured endorsement fully meets the requirements. If the requirements cannot be met, the contractor should be advised prior to signing the contract. Unlike in the United States where additional insured endorsements are more standardized, in Canada a variety of clauses are used. Insurers are free to use their own clauses such as:

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- "... with respect to the operations of the Named Insured under contract";

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¹ Vicarious liability is liability imposed based upon a relationship. For example, in most cases an employer is vicariously liable for the acts of its employee and a principal is vicariously liable for the acts of its agent.
<http://assets.ibc.ca/Documents/Resources/Glossary.pdf>

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- “... but only with respect to the operations of the Named Insured”;
- “... but only with respect to the contractor’s operations”; and
- “... but only insofar as their legal liability arises vicariously out of the negligent operations of the Named Insured”.

The use of phrases that do not meet those specified in the contract often lead to an adversarial relationship with an owner that may impact future contracts, or worse results in needless and expensive litigation for breach of contract. Know what the contract requires and compare it to what the insurance representative provides; any differences should be questioned.

First, it is important to understand that a CGL policy does not define “additional insured.” Under a CGL policy an entity or person is either a *Named Insured*, which may be one or more policyholders stated (named) in the policy declarations, or an *Insured*, such as employees or shareholders, as stated in the *IBC CGL 2100 Section II - Who Is An Insured*. Only those falling under the category of classes of members ascribed in Section II are covered for their liability, provided it results from a connection to the *Named Insured*. For example, if an employee is named in a lawsuit, coverage under the CGL is triggered only if it is as a result of the employee’s activities relating to his or her employment by the Named Insured. There is no coverage for the employee if the suit arose from attending a personal event unrelated to his or her employment.

Second, it is important to understand that the word “operations” used in the phrase cited in the first paragraph is used as a noun and not a verb. Therefore, when insurance companies add someone as “...an Additional Insured but only with respect to the operations of the Named Insured”, they mean the named insured’s contract. It is a common misconception in the insurance industry that the use of the word “operations” means the named insured must have performed the operation that led to the injury or damage in order for coverage to apply to the additional insured’s actions, and therefore the additional insured status only provides insurance for defence costs or vicarious liability. Court cases pertaining to the cited phrase have proven this wrong, establishing that the negligent acts of an additional insured are indeed covered, provided such negligent acts are related to the named insured’s contract.

Two precedent-setting cases are “*McGeough v. Stay’N Save Motor Inns Inc.*” and “*Board of S.D. 79 v. Underwriters and Members of Lloyds*”, 2003 BCSC 1303. These cases established that the interpretation of the additional insured phrase means that the additional insured is entitled to more than just coverage for defence; they have coverage as if they fell into the category of insured under a CGL, and therefore have full coverage. Reported cases involving contractors are few, but many go unreported. The ones that are usually reported are those where the additional insured did not have a CGL policy of their own or if they had one, it had a substantial deductible, which they wanted to avoid. Others have gone to trial for determination of coverage, in particular to seek whether the named insured’s insurer was obligated to defend the additional insured.

The case of *“Minto Developments Inc. v. Carlsbad Paving”* is an excellent example. Carlsbad was hired by Minto to perform ice and snow removal at a condominium complex managed by Minto. In addition to an indemnification obligation, the contract required that Minto be added to Carlsbad’s CGL policy as an additional insured, and that with respect to Minto, Carlsbad’s insurance was primary insurance (in other words Minto would not have to rely on its own CGL, nor have to pay its \$50,000 deductible, unless Carlsbad’s policy limit was exhausted). The injured party made a number of allegations including others not concerning inadequate snow removal. As a result, Carlsbad’s insurer refused to grant Minto additional insured status. Minto brought to court an application that the insurer and Carlsbad were obligated to defend and indemnify Minto; the court agreed.

Another example is *“Carneiro v. Durham (Regional Municipality)”*, 2015 ONCA 909. This was a claim involving a person injured on a highway during a winter storm. Durham had contracted snow removal services to Miller Maintenance Limited and obligated Miller to add Durham as an additional insured on Miller’s CGL policy. Numerous allegations in the claim made against Durham included poor road design in addition to inadequate snow removal. Miller’s CGL insurer refused to defend Durham for the allegations not related to Miller’s snow removal contract. Durham sued the insurer for the defense to apply to all of the allegations. The Ontario Superior Court agreed with the insurer. Durham then appealed to the Ontario Court of Appeal and Durham was successful in its appeal. The court concluded that despite the additional insured endorsement used by Miller’s insurer, the CGL’s duty to defend provision required the insurer to defend all allegations made against the additional insured, even though some had no connection to Miller’s snow removal contract. Miller’s insurer was required to appoint separate legal counsel for Durham, but *“is entitled to seek apportionment of the defense costs to the extent they deal solely with uncovered claims”*. In other words, once the action is settled and cause of the loss ascertained, the insurer could recoup defense expense related to losses not covered by Miller’s CGL.

These examples not only demonstrate the obligation of an insurer to afford coverage to an additional insured for the additional insured’s actions in relation to the named insured’s contract, it also demonstrates the need for those additional insureds to have their own CGL insurance. The allegations in a writ or a Statement of Claim can be quite varied, and until proven, the extent of additional insured coverage cannot be properly determined.

The last important issue is that in order to save costs, most insurers do not add additional insureds by an endorsement form in Canada, despite CGL policy conditions expressly stating that amendments to the policy can only be made by endorsement. It is less costly to issue Certificates of Insurance with additional insured verbiage added. This poses a dilemma because most insurance certificates drafted by an insurance broker contain a statement to the effect that the certificate is issued as a matter of information only and the certificate does not amend, extend or modify the policy. As such, some owners insist on the use of their own certificate form not using this wording. While a few recent Canadian decisions have ruled additional insured wording added to a Certificate of Insurance to be equivalent to an endorsement, it is suggested the aforementioned wording on the Certificate of Insurance be modified along the lines of *“Except with respect to additional insured clauses, this*

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Certificate of Insurance is issued as a matter of information only and does not amend, extend, or alter the policy.”

The IBC CGL (IBC 2100) incorporates many items contained in the American ISO CGL (Insurance Services Office ISO CGL). Among them is an amendment to the “Other Insurance” Condition that states (paraphrased) “*your CGL is excess insurance over any other primary insurance available to you ... for which you have been added as an additional insured by the attachment of an endorsement*”. This means that on a contractor’s CGL where the owner is added as an additional insured, the owner’s policy will not be drawn in to protect the owner unless the contractor’s limit is insufficient; the contractor’s policy is primary insurance for both contractor and owner.

Some insurers offer blanket additional insured coverage. This endorsement is often referred to as “*Additional Unnamed Insured Coverage*”. Forms vary, including more restrictive forms requiring notification by the broker to the insurer when a Certificate of Insurance is issued. The true blanket form is very good coverage to have, more particularly because the CCDC 2 contract requires the owner and consultants to be included as additional insureds for six years after substantial completion of a project.

The IBC CGL also addresses the defence costs for any entities who the named insured contractually agrees to indemnify for legal costs; “*reasonable legal fees and litigation fees*” are now expressly covered. This would apply only to those not added as an additional Insured, because additional insureds must be defended by the named insured’s insurer.

It is very important that the insurance broker or agent obtain the insurance required by CCDC contracts. With respect to liability other than 5A (requires a Wrap Up liability policy for the project), one of the required CCDC coverages is the IBC 2320 endorsement. With respect to CCDC additional insured coverage requirements it meets the various requirements of CCDC 2, 5B as well as 14 and 17.

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