

Insurance Language in Construction Contracts

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Additional Insured



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Additional Insured – In General

- a) Definition: A person or entity that benefits from coverage under another policyholder under certain circumstances.
- b) Intent: To change the 'Who Is An Insured' section of an insurance policy to extend coverage to the additional insured for the negligent acts or omissions of the named insured (or those acting on the named insured's) behalf.

Rights

- a) Many of the same rights as the named insured,
- b) Additional insured does not pay premiums, receive notices of cancellation, or negotiate the terms of the policy.

Benefits

- a) Seeks to place the financial responsibility of a claim onto the policy of the party most likely to cause the claim.
- b) Reduces the impact on the loss history of the additional insured.
- c) The appropriate entities should be held responsible if a loss occurs

Process and Cost

- a) Named insured is responsible and must contact its insurer.
- b) Usually a simple process, typically requiring only the additional insured's name and address
- c) The cost is usually small.

May an additional insured file a claim?

- a) Yes, but the result will depend on the specifics of the endorsement.



Two main points for adequate additional insured coverage

a) Correct Endorsement Form

- i. Will the named party be an additional insured for ongoing operations, completed operations, or both?

b) Language of the Endorsement

- i. The endorsement should be carefully reviewed
- ii. Look for:
 1. Exclusions to covering incidents that were not a result of the named insured's negligence
 2. Limitations on amount for which named insured can be held responsible if a claim is filed.

Not a substitute for primary insurance coverage.

- a) Important in the construction industry when working other entities but not intended to replace your own insurance coverage.
- b) Always maintain your own insurance to cover liabilities that may not be covered as an additional insured.

Certificates of Insurance and Tracking Them



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What is a Certificate of Insurance

- a) A snapshot of insurance policies, coverages, and limits.



Why do we need them if the contract already states the required insurance?

- a) Just because a subcontractor agreed to provide comprehensive insurance in the contract does not mean that they read and understood those requirements or actually have that insurance

Make sure you obtain them

- a) Should be a checklist item with every contract that is signed
- b) Master Subcontractor Agreements – still might need them on a “project specific” basis



Make sure is a real COI

- a) “The COI is not worth the paper is written on” – this can be a true statement
- b) Most certificates state the following at the top
THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS ON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE REPORTED BY THE POLICIES DESCRIBED BELOW
- c) Not hard to fake a COI.
- d) Directly contact the insurance agent to confirm it is real

Also Ask for the Endorsements

a) Don't rely on the COI for those



Tracking COIs

- a) Track concurrently with project timelines, often in a spreadsheet.
- b) Software is available to track them.
- c) Ensure you correct non-compliant COIs and follow up on renewals and obtaining new COIs
- d) Not a “one and done” situation.
 - i. They can expire
 - ii. Polices can be cancelled.

Indemnity Clauses



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Indemnification

- a) **Broad-form indemnity:** the GC requires a Sub to indemnify it for the Sub's *and* the GC's negligence.

- b) **Narrow-form indemnity:** The GC is seeking indemnity only for the Sub's *own* negligence.

Indemnification

- a) Primarily governed by Minnesota statutes Chapter 337 and a long history of court cases.
- b) **GCs are limited to seeking narrow-form contractual indemnity from a Sub (337.02).**
 - i. A GC is not allowed to shift its own liability to the Sub.
- c) GCs *are* permitted to shift their liability to a Sub's *insurer* via an insurance-procurement agreement, i.e. the Sub is required to buy insurance covering the GC (337.05)
- d) If the Sub fails to obtain the required insurance, the GC may seek indemnity from the Sub to the extent of the specified insurance if the requirements of Section 337.05, subd. 2, are met.

Indemnification

a) LH Bolduc Case:

- i. Essentially the court held that the Sub had no duty to indemnify the GC for the GC's own negligence because that would violate the statute. The court stated that the only way the Sub could be required to indemnify the GC without violating the statute is if the GC complied with the requirements of Section 337.05, subd. 2.

Indemnification

Summary of Section 337.05, Subd. 1

- a) Insurance-procurement provisions are enforceable.
- b) But GC cannot require Sub to obtain insurance to cover the GC's own negligence.
- c) Despite the foregoing:
 - i. GC can require Sub to obtain "project specific insurance," and
 - ii. GC can require Sub to obtain insurance to cover GC's "vicarious liability, or liability imposed by warranty, rising out of the acts or omissions of" the Sub.

Indemnification

Summary of Section 337.05, Subd. 2

- a) If the Sub fails to obtain the agreed upon insurance, the GC may seek indemnity ***directly from the Sub to extent of the specified insurance*** if the following elements are met:
- i. The Sub agreed to provide specific types of limits of insurance;
 - ii. The claim arises within the scope of the specified insurance; and
 - iii. The Sub did not obtain and keep the specified insurance in force

Notices of Cancellation



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Notices of Cancellation

- a) Requiring a Notice of Cancellation from a vendor's insurer obligates the insurers to notify you if the coverage is cancelled or not renewed
- b) Over the years the statement on the ACORD form Certificate of Insurance has been watered down to state the following:

Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.

Notices of Cancellation

- c) Insurers' do not want to be responsible for notifying thousands of certificate holders if insurance policies are cancelled.
- d) If the COI contains the “in accordance with the policy provisions” language:
 - i. The insurer is not bound by any statement on the COI that a 30-day notice of cancellation will be provided.
 - ii. The COI provides no evidence that the insurer will give a 30-day notice.
- e) The policy must be endorsed and you should ask for a copy of the actual endorsement.

Umbrella Policies & Excess Coverage



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Umbrella And Excess Liability Coverage: Nobody Ever Regretted Having too Much Protection

- Although “Excess and “Umbrella” are sometime used interchangeably, they are not one and the same.



Excess Liability Coverage

- An Excess Liability Policy provides additional dollars that exceeds the limits of the underlying liability policy.
- For example, if your primary policy has a policy limit of \$1 million you might take out excess coverage for an additional \$2 million in coverage which would only apply if you were sued and the underlying policy was exhausted

Excess Liability Coverage

- While all Umbrella Coverage is Excess coverage, not all Excess Coverage is Umbrella Coverage.
 - Some Excess Coverage includes additional “Exclusions” to the underlying policy. (Example: underinsured/uninsured motorists)
 - Some Umbrella policies provide broader coverage than the underlying policy.
 - Some Umbrella Policies apply to First party claims (claims against your own insurer made by you.)

Umbrella Coverage

- An **Umbrella** policy provides additional protection to **contractors** by supplementing the policy limits of liability offered by underlying liability **policies** such as Business Auto, General Liability.
- It becomes crucial when you are sued and the policy limits of your primary policy is exceeded. The umbrella policy provides additional dollars for your other policies in case their limits are exceeded. One umbrella policy can apply to several different underlying policies.

Umbrella Coverage Cont.

- In addition to its role in providing additional dollars when policy limits are exceeded some Umbrella Liability insurance policies offer “drop down” protection and actually cover some claims that may be excluded under General Liability and policies.
- When this happens, your Umbrella coverage may be subject to a self Insured Retention which acts like a deductible.



Excess Coverage Can be an Effective Tool For adding Protection on your various policies at lower premiums

- However, as judgement amounts continue to climb and the construction industry continues to face high risk exposures, the excess/umbrella markets are going to begin to respond with higher costs.



Waivers of Subrogation



Waivers of Subrogation

- Black’s Law Dictionary (8th ed. 2004) defines “subrogation” as “[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”



Waivers of Subrogation Cont.

- Subrogation in non legalese: If your customer suffers a property damage loss and its insurer pays for that loss, It's insurer may subrogate and seek damages from the contractor who built the structure and caused the property damage by defective work. Subrogation allows the insurer to sue the contractor to recover the amounts paid to its insured



Waivers of Subrogation:

A Contractual Method to avoid claims by an Insurer who has paid a loss.

- Many construction contracts contain a “waiver of subrogation” provision in the contract’s “Insurance Requirements” section. This type of provision is included to prevent an insurance company, that has paid for a loss, from suing another party involved with the project that may have actually caused the loss.

Waivers of Subrogation Cont.

- The American Institute of Architects (“AIA”) A201 Waiver of Subrogation provides (paraphrase) that:
- The Owner and Contractor waive all rights against (1) each other and any of their Subcontractors, Sub-subcontractors, Agents and Employees, each of the other, and (2) the Architect, Architect’s Consultants, Separate Contractors, for damages caused by fire or other causes of loss to the extent covered by property applicable to the Work.....

Risks for Contractors Signing Waiver of Subrogation Clauses

- You must check with your insurer before you sign any contract with one of these clauses because some insurance policies become void if you waive your insurer's subrogation rights.
- Because these provisions are becoming more common it is important that you confer with your insurance broker (in writing) about this issue so that your policy provides proper protection.
- You may be able to obtain consent from your insurer



Benefit of Waivers of Subrogation

- The Central Benefit of a Waiver of Subrogation Clause is that it can help avoid costly litigation from counterclaims or cross-claims filed after the insurer pursues the negligent party.
- Even if you are covered, “Time is Money” and “Stress is priceless”



The Benefit of A Subrogation Waiver Clause Applied.

- An owner contracts with a builder for a project and all contracts with the owner, contractor and subcontractors contain a waiver of subrogation clauses for any claims for damage covered by insurance, including the subrogation rights of their insurers.
- Later, in the midst of the construction project, a subcontractor starts a fire that destroys the property
- If the owner has a builder's risk policy which permits the owner to waive subrogation rights, then the owner's builder's risk insurer will pay the loss but will not be able to sue the general contractor or subcontractor. The risk of loss stays with the insurance company.

Primary & Non-contributory Endorsements



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Primary and Non-Contributory Endorsements

- Primary and Non Contributory Endorsements decide The “Priority” of insurance Coverage. It decides whose policy will be primary and whose will be excess or whose will be first to pay and whose will pay whatever else is owed.



Primary and Non-Contributory Endorsements Cont.

- These Endorsements are included in insurance policies and apply in contracts with “additional insureds” provisions.
- A Primary Endorsement specifies the order in which the policies purchased by these parties apply. The Primary policy contributes the first dollars and the noncontributory endorsement dictates whether other parties or policies must also contribute.

Example of Application:

- A builder hires plumber work on a building. A realtor trips on a loose pipe that was to be secured by the plumber and breaks his leg. The realtor sues the plumber and the builder for the injury.
- The agreement between the builder and the plumber included an additional insured endorsement, the builder will seek coverage under the plumber's policy
- The plumber is designated the primary and, is responsible for responding to the claim first.
- The degree of responsibility will be determined by noncontributory language in the endorsement.
- If the endorsement includes noncontributory language The plumber, not the builder pays anything in excess of the plumbers coverage.

Primary and Non-Contributory Endorsements vs. Waivers of Subrogation

- Primary and Non-Contributory Endorsements may seem similar to Waivers of Subrogation in that they both seem to bar claims and relieve one party from ongoing litigation, but there are key differences. A waiver of Subrogation prevents an insurer from recovering funds it has paid, Primary and Non-Contributing Endorsements protect additional insureds from having to contribute to a claim either through their insurer.

Questions?

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