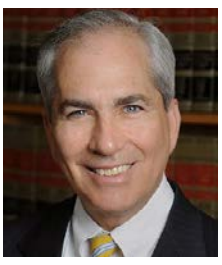
INSURANCE COVERAGE: YOU MAY BE FLYING WITHOUT A PARACHUTE



By Henry L. Goldberg, *Managing Partner, Goldberg & Connolly & STA Legal Counsel*

A recent appellate decision in New York has clarified the rule regarding the commonly utilized provisions to provide additional insured (AI) coverage on construction projects in New York. This case could very well change the insurance coverage landscape for the construction industry.

The issue analyzed by the appellate court was the all too common situation where parties listed as intended AIs in "blanket endorsements"[1] do not all have a direct contract with the party whose carrier is to actually provide the intended AI coverage. In the subject decision, there was no direct contract between the project's GC and CM to provide the CM with AI coverage. As a result, the GC's carrier declined to cover the CM.

As is typical, the owner in this case had required the prime contractor (GC) to provide AI coverage to the CM. Under the GC's liability policy, the blanket AI endorsement provided for AI coverage for:

> "any person or organization **with** whom you [the insured] have agreed to add as an additional insured by **written contract**. "

Some lower courts had arrived at conflicting interpretations of similarly worded AI clauses, finding that coverage was intended not only for those "with whom" the insured agreed (i.e., by direct contract), but also "for whom" the insured agreed to provide coverage. However, this appellate decision firmly resolved this inconsistency among the lower courts, firmly holding that the subject AI clause involved covers only those intended AIs that have direct written contracts with the named insured. However, while in this case the GC was to name the CM as an AI, it only did so with the foregoing "blanket endorsement. "

The court found the AI endorsement "clearly and unambiguously" required the named insured (GC) to execute a contract directly with any parties seeking coverage (i.e., the CM) as an additional insured. The prime contractor's agreement with the project owner to procure coverage for the CM was insufficient to afford the CM coverage as an AI under the GC's policy. The appellate court found the existence of a direct contractual obligation to provide the AI coverage for a third party, and not merely a naming of the party in the "blanket endorsement" in the GC's CGL policy, to be essential.

Thus, the devil (as usual) is in the details. This appellate decision is valuable in interpreting this type of blanket AI endorsement language. It, therefore, provides important and definitive guidance.

However, where such language is used, a clearly dangerous circumstance arises. As such, the CM in this case, not being in direct contract with the GC from whom the coverage was to be provided, was left completely exposed.

Worse, still, is the frequency of the situation where a CM doesn't hold trade contracts, or where it is merely performing a professional service for a fee. They are often in the position of only being in direct contract with the owner, and not with a GC, or the trades.

G&C Commentary

Blanket endorsements,[2] contrary to commonly held belief, are not going to suffice where the AI endorsement requires a written contract between the carrier's named insured and the intended AI.

Unquestionably, there are many construction industry participants that are completely without coverage on current projects, all due to a wrongfully held false sense of security concerning intended AI coverage.

As I said, the devil is in the details. You must immediately review your own policies, as well as those of your subs. Do they utilize an AI endorsement such as that outlined in this case – requiring a direct written contract with the intended AI for the coverage to be effective? If so, you may not be providing the AI coverage you contractually promised to provide, nor receiving the coverage you bargained for from downstream parties. The consequences could be catastrophic. This needs to be immediately rectified, where possible, and scrupulously avoided in the future.

Furthermore, not effectively providing the AI coverage contractually called for could result in the upper tier parties (or other construction project participants for whom you contractually obligated yourself to provide AI coverage), making claims against you for breach of contract or contractual indemnity. In doing so, they may seek to recoup any and all losses caused by the construction accident, or defense costs, and all loss adjustment expenses, for your failure to provide adequate (or any) CGL coverage.

The lesson of this appellate case is clear. The dots have to be connected, and they have to be connected correctly, to effect the intended AI coverage.

As always, please feel free to contact me with any questions.

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1 An endorsement in a CGL policy that automatically grants insured status to a person or organization that the named insured is required by contract to add as an insured.

2 This should go without saying, but I'll state it anyway. Despite this decision, be certain to include any person or entity with whom you have agreed to add as an AI by written contract.