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Additional Insured and Contractual Indemnity Provisions In Liability Insurance Policies

What's Covered?



Presented by Thomas B. Alleman

California | Illinois | Michigan | Minnesota | Texas | Washington, D.C.

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Faculty



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Tom is the Director of Dykema's Insurance Industry Group, a veteran courtroom lawyer described as "really tenacious" by *Chambers USA*, and at home in trial and appellate courts throughout the U.S. His practice focuses on litigation, regulatory proceedings, and advice involving commercial insurance coverage issues ranging from cyberliability and data breach questions to environmental and D&O issues, and the problems of financial institutions. Tom has been involved in hundreds of insurance coverage cases, including CGL, D&O, E&O, OCIPs, CCIPs, umbrella and excess policies, reinsurance disputes and commercial property policies. In addition to wide-ranging litigation experience, Tom assists clients in avoiding pitfalls that can lurk in transactional documents, risk management programs, insurance policies, and indemnification agreements. He is recognized by numerous publications for his outstanding insurance practice including *The Best Lawyers in America*®, *Chambers USA* and *Texas Super Lawyers*®.

Ifs, buts, whereases and provisos

- ***Beware!*** Policy language varies. There are multiple editions of the standard endorsements we will discuss. Some insurers use their own policy language, which may differ from what we discuss.

Always read the policy!
If you have questions, ask for help.

***("Pick me. Pick me."
I'm Tom Alleman and I approved this ad.)***

How it begins . . .

The City of Shifting Sands and ABC Co. enter into a

- Contract
- Lease
- Contract with work orders
- Construction contract
- Equipment lease
- Purchase order or
- Contract for services

or a host of other contract forms – we'll call it “the Contract”

How it begins – cont'd

“The Contract” contains:

- A provision requiring indemnification of some kind.
 - ABC must indemnify Shifting Sands for damages arising out of performance of the contract except if Shifting Sands is “solely” negligent, or
 - ABC indemnifies Shifting Sands for ABC’s percentage of fault, or
 - “knock-for-knock” indemnity – ABC and Shifting Sands agree to indemnify each other for injuries or damage to their respective agents and employees, or
 - A host of other possibilities.

How it begins – cont'd

“The Contract” also contains:

- A requirement that someone buy insurance to support and complement the indemnity requirement.
- Typically ABC must provide insurance of various types covering specified risks in specified amounts in which Shifting Sands is named as an additional insured, or protected against some kind of loss.

How it begins – cont'd

Then ABC goes out to obtain insurance to comply with the requirements:

- Sometimes the insurance complies in all respects with the Contract's requirements.
- Sometimes it doesn't – e.g., limits are off, not all specified coverages are provided, or an insurer declines to provide a coverage.
- Sometimes it's just different – e.g., a different form entirely.
- Sometimes there are mistakes – e.g., incorrect or omitted names or locations.

What this feels like (courtesy S. Leone)



But wait, there's more!

- Chances are “the Contract” between ABC and Shifting Sands requires ABC’s subcontractors to provide the same indemnities and insurance to Shifting Sands that ABC must provide.
- And it is quite likely that ABC will require subcontractors to provide indemnity and insurance – sometimes to the same extent and in the same amounts as in the ABC-Shifting Sands “Contract” . . .
- Or there may be other “Contracts” protecting Shifting Sands for the same work or project (e.g., multiple GCs).
- But sometimes not.

In which case the situation can look like this (courtesy V. McMahon)



Let's briefly deconstruct some parts of this
complex relationship

1. Additional insured coverages

AI coverage – step one – who is an AI?

NAMED INSURED [“NI”]: in ISO-speak, a named insured is a person or organization that is specifically named as being covered in the policy.

- Named insureds generally are covered to the same extent as the First Named Insured, the person or entity that bought the policy.
- Rule of thumb: Named Insureds typically are related to the First Named Insured – affiliated entities, specific officers or directors of private corporations, etc.

ADDITIONAL INSURED [“AI”]: a person or organization that obtains coverage under the policy while having some particular status or while doing some particular activity.

Activities that may qualify for AI status

ISO, the Insurance Services Office, the industry organization responsible for drafting the industry-wide standard forms used by insurers, has issued the following standard endorsements conferring AI status – some insurers have their own forms:

CG 20 10 – owners, lessees and contractors – scheduled
CG 20 11 – managers or lessors of property
CG 20 12 – government entities – permits
CG 20 13 – government entities – authorizations
CG 20 15 – vendors
CG 20 17 – townhouse/condo associations
CG 20 18 – mortgagees
CG 20 21 – volunteer workers
CG 20 22 – church members and officers
CG 20 23 – administrators and executors
CG 20 24 – owners and lessors of land
CG 20 25 – agency board members
CG 20 26 – designated person designated ops
CG 20 27 – co-owners

CG 20 28 – lessor of leased equipment
CG 20 29 – grantors of franchises
CG 20 30 – oil and gas working interests
CG 20 31 – architects, engineers and surveyors hired by insured
CG 20 32 – other architects, engineers and surveyors
CG 20 33 – automatic owners, lessors or contractors when required by contract
CG 20 34 – automatic lessors of equipment when required by contract
CG 20 35 – grantors of licenses
CG 20 37 – additional insured – completed operations

That's a lot of additional insureds but . . .

- Each AI endorsement shares common elements:
 1. **Who** is entitled to status as an additional insured?
 2. **What** is the scope of coverage for the additional insured?
 3. **When** does coverage begin and end?

Two standard endorsements – called CG 20 10 and CG 20 37 – provide us with basic steps in the analysis.

NB: These forms come in multiple editions – the last four digits on the form number give month and year of issuance.

Coverage under these endorsements has become more restrictive in more recent editions.

CG 20 10 04 13

INSURED:

POLICY #:

POLICY PERIOD:

TO

CG 20 10 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – SCHEDULED PERSON OR
ORGANIZATION**

This endorsement modifies insurance provided under the following:

Commercial General Liability Coverage Part

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Any person or organization when you and such person or organization have agreed in writing in a contract, prior to an occurrence that causes "bodily injury", "property damage" or "personal and advertising injury", that such person or organization be added as an additional insured on your policy.	All locations for which you and the additional insured have agreed in writing in a contract prior to an occurrence that causes "bodily injury", "property damage" or "personal and advertising injury".
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

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", "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(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 10 04 13

1 of 2

- This is the current edition of a CG 20 10 form.
- Issued April 2013.
- Has a space to include names of persons or organizations to be included – note that in this case there is “blanket” AI status for all persons that the NI is obligated to list as an AI.
- Use of this “blanket” AI language is very common.
- Same for locations – can be specific or “blanket.”
- Insureds like blanket designations – it saves them from having to add AIs with each new contract.

Let's look at the text of CG 20 10 04 13 – part one

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", "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(s) at the location(s) designated above.

- “You” and “your” = the named insured.
- “Your ongoing operations” = while the **named insured** is still working on the job site or contract location. **Coverage under the 20 10 form ends when the job is done.**
- “In whole or part” = the AI’s liability must be based in part or whole on something the Named Insured did or did not do = **no coverage for acts or omissions for which the AI is solely responsible.** (This is an issue when alternative claims rest on vicarious liability (NI’s fault) and failure to supervise (AI’s sole fault?).)

CG 20 10 04 13 text – part two

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

- “To the extent permitted by law . . .” = ***no coverage if an anti-indemnity statute prohibits the indemnitor (NI) from providing insurance for the indemnitee (AI).***
- This provision was added in the 04 13 revision.
- Highly variable in effect – e.g. Texas:
 - TX Oilfield Anti-Indemnity Act (Chapter 127, TCPRC) – purchase of insurance by indemnitor for indemnitee may be permissible
 - TX [Construction] Anti-Indemnity Act (Chapter 151, Tex. Ins. Code) – contracts requiring purchase of AI coverage likely void.

CG 20 10 04 13 text – part two and a half

“Permitted by law” means that in **every** case/contract, it will be necessary to determine:

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

Whether the applicable law permits indemnity and insurance.

Laws vary from state to state.

A lot.

CG 20 10 04 13 – part three

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.
- “Insurance afforded [to the AI] will **not be broader** than that which [the NI is] required by the contract . . . to provide.”
 - Examples: contract requires \$1,000,000 of coverage for AI – policy has limits of \$2,000,000. AI gets \$1,000,000 in coverage.
 - **Open issue:** contract requires “**minimum** of \$1,000,000 in coverage” for AI policy has limits of \$2,000,000. How much coverage for AI?
 - “Not be broader” may take in perils covered as well as limits. *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015).

CG 20 10 04 13 – takeaways

- Als – ask for 11 85 edition; does not include most of what we've talked about. (That doesn't mean you'll get it – ask anyway.)
- Coverage ends when operations end.
- Coverage unlikely for direct claims against AI (complicated).
- No coverage if statute prohibits contractual undertakings to provide insurance (e.g., Chapter 151, Tex. Ins. Code) – state specific.
- Form incorporates limitations on coverage set forth in contract.
- **BEWARE:** Read the contract.

CG 20 37 – the other basic AI form

POLICY NUMBER: _____ COMMERCIAL GENERAL LIABILITY
CG 20 37 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

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 the additional insured and included in the "products-completed operations hazard".

However:

1. The insurance afforded to such additional insured only applies to the extent provided by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the limit we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limit of Insurance shown in the Declarations, whichever is less.

This endorsement shall not increase the applicable Limit of Insurance shown in the Declarations.

CG 20 37 04 13 © Insurance Services Office, Inc., 2012 Page 1 of 1

- This is the CG 20 27 form, also in the 04 13 edition.
- It is set up like the CG 20 10.
- The space allows specific names and locations to be inserted but it can also be used to provide "blanket" AI or location coverage.
- This form contains "to the extent permitted by law" and "not be broader" terms also found in the CG 20 10 04 13 form. (Similar language appears in all current versions of the AI forms.)

CG 20 37 04 13 – the biggest difference

CG 20 10

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;

CG 20 37

"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".

What's different about “your work?”

22. “Your work”:

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

- “Your work” is a defined term – the definition is in the CG 00 01 insuring agreement.
- “Your work” refers to a **project** while “your acts or omissions” refers to **people**.
- Assume Q sues Shifting Sands a year after a job is completed for injuries allegedly caused by something that allegedly was done improperly – let’s say a floor collapsed. Is Shifting Sands covered under the ABC policy’s CG 20 37 provision even if ABC is not sued?

Your work – cont'd

- Many decisions say yes.
- They draw the same distinction between project and people that we just pointed out.
- Where do we look to see where “your work” can be found?
 - Scope documents
 - Bid packages
 - Anything else that explains what the named insured was to do
- If the alleged injury is within the scope of the NI’s work, that AI may be covered – even for its own negligence if the NI isn’t.
- **ONCE AGAIN:** Beware – contract specific.

CG 20 15 – the vendor endorsement

A. Section II – Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) (referred to throughout this endorsement as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business.

- Under this endorsement, a person or organization that distributes or sells "your products" is an AI for injuries or damage from those products.
- This form contains multiple exclusions specific to products – basically the vendor does not have coverage under the endorsement if it modifies or changes the product.
- This endorsement also includes the "to the extent permitted by law" and "not be broader" terms we've talked about.

CG 20 30 – Oil Patch – Quick Check

A. Section II – Who Is An Insured is amended to include as an additional insured any owner, co-owner, party of joint venture, mining partner or limited liability company having a nonoperating working interest in any oil or gas lease of which you are the operator, but only with respect to their liability arising out of such nonoperating working interest.

- Here is the core of the ISO AI provision used for onshore operations.
- The named insured must be the operator.
- Applies only to oil and gas leases.
- Limited to liability arising out of the specific “nonoperating working interest.”
- This endorsement also includes the “to the extent permitted by law” and “not be broader” terms we’ve talked about.

You should pay attention to this – there is oil and gas production in Michigan.

Before moving on . . .

- These are standard ISO provisions.
- Many insurers use their own manuscript forms for AI questions. Check and compare.
- ***Do not rely on certificates.***
 - Certificates are “for information only” and generally do ***NOT*** convey any substantive rights to the holder.
 - Certificates do ***NOT*** convey the nuances or limitations on coverage.
- Remember that an insurer may have duties to settle claims against an AI that could reduce limits available for the NI.
- Which policy/coverage is primary? Multiple policies – same AI.

2. Contractual Indemnity Coverages

A change of focus

- In discussing additional insured coverages, we have focused on the person or organization being added – the AI.
- Now we change perspectives – contractual indemnity coverage provides specified protection for an indemnitor, usually for the Named Insured's contractual indemnity obligations.
- Our focus is also on the contract itself and what the named insured is liable for.
- Under MCL § 691.1409, “governmental agencies” (that’s you) are authorized to purchase liability insurance

Contractual indemnity coverage

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. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

... ..

- Starts as an exception to an exclusion – i.e., the policy does not provide coverage for **X** unless **Y** occurs.
- "**X**" (what is not covered) is bodily injury or property damage an insured must pay as damages because it agreed to do so in a contract.
- This language gives us two possibilities for "**Y**" – (i) the insured would be liable for the same injury or damage even without a contract; and (ii) it is an "insured agreement."

Contractual indemnity coverage – cont'd

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- 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.

- Definitions of "insured contract" are flexible – many policies contain industry-specific broadening endorsements that can impact this definition.
- Most of the definitions of "insured contract" contain provisions that look like subparagraph f – the key term is "pertaining to your business."
- Note the words "you" and "your" in the highlighted excerpt. ***Contractual indemnity coverage applies to the insured that is being asked to indemnify another party.*** In our hypothetical, we look here if ABC is asked to indemnify XYZ.

Two views of contractual indemnity coverage

- Some states hold that this exclusion applies only to indemnity or hold-harmless agreements. See, e.g., *Gibbs M. Smith, Inc. v. U.S. Fid. & Guar. Co.*, 949 P.2d 337 (Utah 1997).
- However, others hold that the exclusion applies to indemnity or hold-harmless agreements **and** situations where the insured assumes an obligation itself that it would not have in the absence of a contract – e.g., the insured agrees to use the “highest degree of care” rather than ordinary care and is sued for failing to do so. See, e.g., *Gilbert Texas Constr., L.P. v. Certain Underwriters at Lloyd’s, London*, 327 S.W.3d 118 (Tex. 2010).
- **Beware:** Highly state specific.

So what do you get?

- Remember how this comes up – Plaintiff sues ABC, which files a cross-claim against Shifting Sands (assume S.S. has insurance) for indemnity. Shifting Sands tenders the claim to its insurer.
- If the claim against Shifting Sands might be covered:
 - Shifting Sands may receive a defense from its insurer on the ABC v. Shifting Sands claim if permitted by the policy.
 - What Shifting Sands is obligated to pay ABC for “bodily injury” or “property damage” awarded to Plaintiff may be covered.
 - ABC’s defense costs may also be covered (see policy excerpt above).

Concerns

- Exclusions in insurance policies apply independently of each other. See, e.g., *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979).
- So even if Shifting Sands surmounts the obstacles and brings its situation within the exception for contractual indemnity, other exclusions may apply.
- Limits. What Shifting Sands pays for ABC's defense costs may reduce limits available for judgments or settlements against S.S. (Caveat: where both ABC and S.S. can be defended by the same counsel, some policies do not reduce limits.)
- Specialized policies (E&O, pollution) policies often do not contain any coverage for contractual indemnification.

Summing up contractual liability

- Construction of these provisions varies from state to state.
- Analysis of whether coverage exists will be fact specific – is it really liability the indemnitor (Shifting Sands) would have in the absence of the contract? Is it really “a contract pertaining to [ABC]’s business?”
- What impact on limits? Insurer’s obligations to settle?
- Ordering issues? What if there are multiple policies involving indemnification of the same party – e.g., large construction projects? Indemnity chains – e.g., supply chains? (A indemnifies B indemnifies C indemnifies D etc.)

Final thoughts

- Much of what we have discussed today is fact specific
 - Contract language
 - Policy language
 - Facts/allegations

Especially so if there are multiple parties or agreements
- It also is state specific
 - Court construction of provisions
 - Anti-indemnity statutes
 - “Specific?!?” – in large transactions, multiple state laws may apply to different issues

Final final thoughts

Don't deal with these issues casually during contract negotiations or when a claim comes in.

These issues can be highly complex.

Read the contracts.

Read the policy.

Get assistance from brokers or counsel.

The image shows a single page of handwritten mathematical equations, likely from a physics or engineering textbook or lecture notes. The equations are written in various colors (green, blue, red) and cover a wide range of topics, including electromagnetism, mechanics, and thermodynamics. Some of the visible equations include:

- $k = \frac{1}{4\pi\epsilon_0\epsilon_r} \frac{q_1q_2}{r^2}$
- $\log \frac{L}{L_0} = 4 \log \frac{T_{ef}}{K} + 2 \log \frac{R}{R_0} - 4 \log \frac{T_0}{K}$
- $v_k = \sqrt{\frac{3kT}{m_0}} = \sqrt{\frac{3kT N_A}{M_m}} = \sqrt{\frac{3R_m T}{M_m \cdot 10^{-3}}}$
- $I_m^2 = U_m^2 \left[\frac{1}{R^2} + \left(\frac{1}{X_c} - \frac{1}{X_L} \right)^2 \right]$
- $R = R_0 \sqrt[3]{A}$
- $M_0 = \frac{4\pi^2 r^3}{3T^2}$
- $F_d = M_k \frac{v^2}{r} = M_k \frac{4\pi^2 r}{T^2}$
- $v_k = \sqrt{\frac{R M_2}{R_2}}$
- $F_v = \oint \frac{F_n}{R} 1_{pc} = \frac{1}{R} \oint \frac{1}{q} \sin(\omega t + \phi) dy$
- $\mu = U_m \sin \omega(t - T) = U_m \sin 2\pi \left(\frac{t}{T} - \frac{x}{\lambda} \right)$
- $\int \vec{E} d\vec{l} = - \oint \frac{\partial \vec{B}}{\partial t} \cdot d\vec{S}$
- $E = \frac{F_e}{q_0} = k \oint \frac{q}{r^2} d\vec{l} = \mu \oint \vec{J} d\vec{S}$
- $E_y = E_0 \sin(k_x x - \omega t)$

That's the end of our ride. Please watch your step as you exit.



Thank you.
Questions are welcome.

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