

Additional Insureds: Wording Revisions Are Needed

BY JUDITH KENNEDY

It is a common requirement of construction contracts, leases and manufacturer/vendor agreements that one party be obliged to place insurance coverage on behalf of the other contracting party. When, as is frequently the case, this obligation is not complied with, the court, in the ensuing litigation between the parties, seeks to define the scope of the coverage that was required to be obtained. This is completed through a review of the provisions of the underlying contract between the parties. In such case, the "proposed" additional insured has the onus to show, on the balance of probabilities, that the nature of the claims made against it would be within the category of risk for which coverage was required to be obtained: *Mercer v. Paradise (Town)*, 1991 I.L.R. 1-2740 (Nfld. S.C. (T.D.)); *Clark v. Greater Anchorage, Inc.*, 780 P.2d 1031 (Alaska S.C. 1989); *Tinkess v. N.M. Davis Corp.*, [2007] O.J. No. 1026 (S.C.J.) (QL).

When the covenant to insure is complied with, and an additional insured endorsement is obtained, the scope of coverage provided to the additional insured is determined by the wording of the endorsement in conjunction with the named insured's policy wording. The provisions of the underlying contract are not considered, unless the additional insured endorsement uses language which limits the coverage to that which was required by the contract, as was the case in *Kocherkewych v. Greyhound Transportation Corp.*, [2006] B.C.J. No. 723 (S.C.) (QL).

Aside from the issuance of an endorsement, an additional insured may also acquire that status by means of the definition of "insured" within the named insured's policy. In some policies, this extends the coverage afforded to "persons or entities for whom the named insured is contractually obliged to place cover." If such wording does not specifically limit the coverage to that required by the contract, it can have the unintended effect of extending much broader coverage than was contracted for.

In *Daigle Estate v. Cape Breton Rentals Ltd.*, [1987] N.B.]



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No. 17 (C.A.) (QL), the plaintiff contracted with F. for the supply and operation of two cranes. F. contracted with CB for the supply of the cranes. The lease between F. and CB required F. to provide insurance "for loss or damage to the equipment" with CB to be named as additional insured. F.'s CGL policy defined "insured" to include the named insured as well as "owners of property leased to the named insured, where the terms of the agreement require the named insured to provide insurance on behalf of the owner, and then only with respect to liability which arises out of the operations of the named insured." Because the lease required F. to provide insurance for CB (albeit only for loss or damage to the cranes), CB was held to be "an owner for whom the named insured was obliged to place coverage." Therefore, CB was to be an additional insured within the full scope of coverage afforded by F.'s liability policy.

The grant of coverage to an additional insured always provides coverage for claims made against it because of the activities of the named insured. This is usually referred to as vicarious liability. Controversy arises, however, when the additional insured seeks coverage for its own negligence. A review of the case law suggests there to be a misunderstanding as to the scope of coverage provided by the wording of the additional insured endorsement commonly in use.

The version of additional insured endorsement which is most frequently the subject of litigation, utilizes wording which limits the additional insured's coverage to "liability arising out of the operations (or in the case of manufacturers, the product) of the named insured." In the litigation, the additional insured argues that it has coverage within the full scope of the named insured's policy, as though it had been provided with its own separate CGL policy. The insurer contends the coverage afforded is restricted to the vicarious liability of the additional insured for the acts of the named insured and does not extend to the additional insured's own negligence.

The majority of the cases that have construed this wording held that an endorsement that extends coverage for "liability arising out of the operations of the named insured" extends coverage to the additional insured for its own negligence, as long as the loss was connected in some way with the named insured's operations.

For example, in *Ohio Casualty Insurance Co. v. PetsMart Inc.*, 2003 WL 22995160 (N.D. Ill., 2003) (WeC), the vendor's additional insured endorsement extended coverage to: "any person or organization . . . but only with respect to 'bodily injury' or 'property damage' arising out of 'your products'." The additional insured (retailer) was held to be covered for allegations relating to the negligent storage and display of the named insured's product which fell from the retailer's shelf and injured the plaintiff. Because the plaintiff's injury was caused by the product, the Court concluded the claim arose out of, was connected with or flowed from the named insured's product, thereby satisfying the causal connection and triggering coverage for the retailer's own negligence — in circumstances where there was no negligence on the part of the named insured.

In *McGeough v. Stay'N Save Motor Inns Inc.*, [1993] B.C.J. No. 1221 (S.C.) (QL), the additional insured (the parking lot owner) was held to have coverage under the named insured's (a restaurant) policy when a patron, en route to the restaurant, slipped and fell on the parking lot which the additional insured had the sole obligation to maintain.

In *Cowichan Valley School District No. 79 v. Lloyd's Underwriters*, 2003 BCSC 1303, 2 C.C.L.I. (4th) 170, the additional insured (District) was held to have coverage for occupier's liability allegations brought against it as owner of the baseball field. District had allowed the named insured (a hockey club) to utilize the field for purposes of a baseball tournament.

In *Lacombe v. Don Phillips Heating Ltd.*, [2005] O.J. No. 3936 (S.C.J.) (QL), the additional insured was held to have coverage under the named insured's policy for its independent failure to inspect a furnace improperly installed by the named insured. The Court held that so long as the additional insured's liability had any connection to the actions of the named insured, coverage would be available.

In *Daigle Estate v. Cape Breton Rentals Ltd.* discussed previously within the context of the policy definition of "insured," the additional insured endorsement was held to extend coverage to the additional insured owner of two cranes which had been leased to the named insured and

which failed while in use by the named insured. The additional insured's independent liability arose from a failure to inspect and maintain the cranes prior to being provided to the named insured. However, because they failed while in use by the named insured, the loss was held to "arise out of the operations" of the named insured, thereby triggering coverage under the named insured Policy for the additional insured's own negligence.

In all of these cases, the "arising out of the operations of the named insured" wording was held to extend coverage to the additional insured for its alleged own negligence. The judicial treatment of the additional insured endorsement is often at variance with the intention of the issuing underwriters. In the usual case an underwriter does not charge any additional premium for the grant of coverage, under the named insured's policy, to an additional insured. The practice of affording coverage to an additional insured without premium charge, may make commercial sense when the coverage afforded is limited to vicarious liability arising out of the acts or omissions of the named insured. However, the insurer's bottom line can be seriously affected by the increase in risk, without corresponding consideration, when the coverage provided extends beyond vicarious liability to include the additional insured's own negligence.

If coverage is meant to be limited to vicarious liability, then the "arising out of" language should be abandoned in favour of wording which clearly reflects that underwriting intention. Examples of such wording would include:

"The following are hereby added to the policy as additional insureds but only with respect to liability arising out of the operations performed by or for the named insured but excluding any negligent acts committed by such additional insured" or "the following are added as an additional insured but only for vicarious liability arising from the acts or omissions of the named insured."

It is suggested that Canadian insurers review their definitions of "insured" and "addi-

tional insured endorsement" wordings to ensure that the coverage afforded is consistent with the underwriting intent. ☘

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