THE CHALLENGES OF NAVIGATING ADDITIONAL INSURED COVERAGE AND CONTRACTUAL INDEMNITY CLAIMS
OVERVIEW

Mechanisms utilized by contracting parties for shifting the risk of loss:

1. Additional Insured Coverage
   - Does your insured have “additional insured” status from another party’s insurer?
   - Additional insured status on a liability policy is an important bargained-for asset in many types of transactions in the construction, oil, gas and energy sectors

2. Contractual Indemnity
   - Found in the written contract between the parties

Two different ways to transfer the risk of loss.
   - Although the additional insured requirement is usually coupled in a contract with contractual indemnity language, the two mechanisms are separate, independent methods of risk transfer
   - Additional insurance becomes a financial “back-up” to the contractual indemnity provisions
OVERVIEW

- Both issues often arise in a variety of cases, including premises liability and construction site accidents.

- Found very often in contracts addressing the relationships between:
  - Owners – General Contractors;
  - General Contractors – Subcontractors;
  - Landlords – Tenants.
OVERVIEW

❖ The key is to recognize that:
  ✓ These issues are separate and require a separate analysis in each case.
  ✓ Each issue needs to be analyzed from an “offensive” and “defensive” perspective.
  ✓ Not doing so can lead to the failure to appreciate a significant source of defense and/or indemnity.
Example of Transfer of Risk in the Construction Context

General Contractor ("GC")

Sub-Contractor ("Sub")

GC’s Corporate Primary Insurance

Sub’s Primary Insurance (GC’s AI Carrier)

Sub’s Excess Insurance (GC’s AI Excess Insurance)

Promise to Indemnify

Promise to Procure Insurance

Al Endorsement

Al Endorsement
What Is An Additional Insured?

- One who enjoys the status of an insured, under the named insured’s policy.

- Has the benefit of enjoying protection under a policy while having no responsibility to pay premiums.
Examples

- Property owner on general contractor’s policy
- General contractor on subcontractor’s policy
- Landlord-Tenant
An additional insured is often entitled to direct rights under the named insured’s policy, which may include:
- immediate coverage for defense costs;
- prevention of subrogation claims;
- standing to sue the insurer for breach of contract;
- prevention of his own insurance carrier from being brought into the suit;
- prevention of depletion of his own liability insurance to defend claims; and
- prevention of increased premiums on future policies.
Key Issues to Focus on When Evaluating a Claim

- On what basis is the party claiming additional insured coverage?
- Has the party been added specifically to the policy? or
- Is the person or entity claiming to be an insured by virtue of a contract with the named insured or because of its status, e.g. an owner or lessor of the property?
AI Coverage Issues

New York Law

Contract Language Prerequisite

❖ Many blanket endorsements provide additional insured coverage to those “whom you have agreed, by written contract prior to an ‘occurrence’ or offense to include as additional insureds” or to “all persons or organizations as required by written contract”.

❖ A provision in a contract should not be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated.

❖ Contract language that merely requires the insured to purchase/maintain insurance will not be read as also requiring that a contracting party be named as an additional insured.
ISO Insurance Services Office

Two types of additional insured endorsements:

1. “Standard Form”: Drafted by ISO
2. “Manuscript Form”: Individually drafted by insurers

✓ ISO has developed over 30 standard form endorsements for additional insured coverage, each tailored to a different risk transfer form

✓ These endorsements have significantly evolved over the past 30 years
WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your work for that insured by or for you. 

(emphasis added)
CG 20 10 (11/85)
Scope of “Arising Out of” and “York Work”

- The phrase “arising out of” broadly construed so to provide the additional insured with broad coverage for both direct and vicarious liability in connection with the named insured’s work, including liability arising out of the additional insured's sole negligence
  - Negates any fault requirement on behalf of the named insured in order for the additional insured to obtain coverage

- The phrase “your work” broadly construed so as to provide the additional insured with coverage for liability arising during the named insured’s ongoing operations, and for “completed operations”, i.e., coverage for claims that arise during the policy period but also after the named insured’s work has been completed.
Interpretation of “Arising out of”: New York


- The focus of the inquiry “is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained.” Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co., 103 A.D.3d 473, 474 (1st Dep’t 2013) (citing Regal Constr. Corp. 15 N.Y.3d at 38); Tishman Construction Corp. v. CNA Ins. Co., 652 N.Y.S.2d 742 (1st Dep’t 1997).

- All that is required is “that there be some causal relationship between the injury and the risk for which coverage is provided.” Regal Constr. Corp. 15 N.Y.3d at 38; see also QBE Ins. Co., 934 N.Y.S.3d at 39 (the Court will “infer a causal nexus whenever it finds a reasonable possibility that liability arose out of, or was caused in whole or in part by operations of a named insured….”)
Interpretation of “Arising out of”: New York

- In the construction arena, when an employee of a named insured or a subcontractor is injured while performing work for the additional insured, the “arising out of” language is satisfied regardless of fault. Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 904 N.Y.S.2d 52 (1st Dep’t 2010).
Interpretation of “Arising out of”: New Jersey

- New Jersey courts broadly interpret the “arising out of” language and have construed the words “arising out of” in accordance with this common and ordinary meaning as referring to a claim ‘growing out of’ or having its ‘origin in’ the subject matter…. “Agostinho v. Damon G. Douglas Co., 301 N.J. Super. 187, 193 (App. Div. 1997)


- While each of these definitions implies a causal link between the act and the injury, none requires proximate cause. See Flomerfelt v. Cardiello, 202 N.J. 432, 454 (2010).

Substantial Nexus: “Arising out of”: New Jersey

- Must show substantial nexus between the accident and use of leased premises or work for coverage to attach.
- The inquiry is whether the accident:
  - Was in contemplation of parties to insurance contract;
  - Natural and reasonable incident or consequent of use of leased premises;
  - A risk for which an additional insured may reasonably expect those insured under a policy would be protected.
Substantial Nexus: “Arising out of”: New Jersey

- The substantial nexus need not be based on the negligence of the named insured.

- Nor is it destroyed by additional insured’s negligence.

- There is no requirement of physical proximity.

- “Work” is not limited to actual physical work, but includes operations and administrative duties related to the performance of contracted work.
WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

(emphasis added)
Form CG 20 10 (10/93)

“ONGOING OPERATIONS”

- The revision narrowed the scope of coverage to liability arising during a named insured’s “ongoing operations”.

- The revision continues to utilize the broad “arising out of” language; coverage remains available for claims arising out of the named insured’s work regardless of cause, and, arguably, for an additional insured’s sole negligence.
Scope of “Ongoing Operations” with Form CG 20 10 (10/93)

Courts in different jurisdictions interpret the phrase “ongoing operations” differently.

- Some courts have broadly construed an operation as on-going as long as the obligations under the contract still exist.

- Other courts narrowly construe the phrase as providing coverage only for liability that arises while the work is in progress. Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn. App. 765 (2008).

- At least one court has held that the phrase is ambiguous as to whether there is a temporal limitation on coverage. McMillin Construction Servs., L.P. v. Arch Specialty Ins. Co., 2012 U.S. Dist. LEXIS 8339 (S.D. Cal. 2012).
“Ongoing Operations”: New York Law

New York interprets “ongoing operations” broadly. It means more than “actions currently in progress” and “active work.” Town of Fort Ann v. Liberty Mutual Ins. Co., 689 A.D.3d 1261, 1262-63 (3d Dep’t 2010).


- includes time needed to conduct testing designed to assure proper performance where such testing is an essential element of the work by the insured. Town of Fort Ann, 689 A.D.3d at 1262; Perez v. N.Y.C. Housing Authority, 302 A.D.2d 222 (1st Dep’t 2003).

- where there is evidence indicating that work remains to be done, the court may find a material question of fact as to coverage so as to defeat summary judgment motions. One Beacon Ins. v. Travelers Property Cas. Co., 51 A.D.3d 1198 (3d Dep’t 2008).
Additional Insured Coverage

“Ongoing Operations”: New Jersey Law

The fact that a named insured was not on the property at the moment of the accident is not determinative. Coverage for the additional insured does not end where a named insured’s operations were not yet complete but only interrupted. Hartz Mtn. Indus. Inc. v. Preserver Ins. Co., 2008 N.J. Super. Unpub. LEXIS 1290 (App. Div. 2008).
Who is an Insured (Section II) is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person’s or organization’s status as an insured under this endorsement ends when your operations for that insured are completed.
Form CG 20 33 (03/97)

Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in a Contact or Agreement With you For Ongoing Operations

- comparable to CG 20 10

- extends additional insured status automatically without the named insured having to specifically name the additional insured on a schedule

- requires written contract or agreement

- provides the additional insured with coverage only for liability arising out of the named insured’s ongoing operations.

- limits the term of the additional insured coverage to the time during which the named insured is actually performing operations for the additional insured; there is no mention of completed operations.
Coverage Limited to Contracting Parties

- Form CG 20 33 and similar forms provide additional insured coverage to organizations when the named insured and such organization “have agreed in writing in a contract or agreement” that such organization shall be added as an additional insured.


- Owners do not qualify as additional insureds if they are not signatories to the contract between the general contractor and the subcontractor requiring additional insured coverage.
WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

With respect to the insurance afforded to these additional insureds, the following exclusion is added:

2. Exclusions:
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 site 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.
Form CG 20 10 (10/01)

- Continues to utilize the “arising out of” language, and therefore, arguably, provides broad additional insured coverage.

- Further limits additional insured coverage for completed operations by providing coverage only for claims that arise during the actual construction.
Section II – Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” at the location designated an described in the schedule of this endorsement performed for that insured and included in the “product-completed operations hazard.”
Form CG 20 37 (07/04)
“Additional Insured – Owners, Lessors or Contractors – Completed Operations”

- Provides additional insured coverage for the “products-completed operations hazard” arising out of the named insured’s work.
- Applies to completed operations.
- When used in conjunction with CG 20 10 (10/01), this new form provides coverage for ongoing and completed work - similar to the CG 20 10 (11/85).
Section II – Who Is An Insured is amended to include as an insured the person or organization 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.
Form CG 20 10 (07/04)

“Acts or Omissions”

- replaces the phrase “arising out of” with the phrase “caused in whole or in part” by “acts or omissions” of the named insured in the performance of the named insured’s ongoing operations.

- removes coverage for the additional insured’s sole negligence, and adds a fault requirement for the named insured.

Issues with CG 20 10 (07/04)

- Courts have interpreted the temporal limitation of the phrase caused, in whole or in part by your acts or omissions in performance of on-going operations differently.

- Some courts have broadly construed an operation as on-going as long as the obligations under the contract still exist.

- Other courts narrowly construe the phrase as providing coverage only for liability that arises while the work is in progress. Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn. App. 765 (2008).

- At least one court has held that the phrase is ambiguous as to whether there is a temporal limitation on coverage. McMillin Construction Servs., L.P. v. Arch Specialty Ins. Co., 2012 U.S. Dist. LEXIS 8339 (S.D. Cal. 2012).
“Caused by”: New York Law

Broad Scope of Caused By Acts or Omissions

- Historically, language requiring a causal connection between the potential liability and the named insured’s conduct was found to provide more limited fault based coverage than the ubiquitous “arising out of” language.

- The Appellate Division has more recently held “caused by” equated with “arising out of”. W & W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3D 530 (1st Dep’t 2012).
  - The First Department explicitly rejected the insurer’s argument that the “caused by” language must be construed more narrowly than the phrase “arising out of”, holding that the “caused by” language “does not materially differ” from the “arising out of” language.
  - The First Department ruled that the “caused by” language does not require negligence on the part of the subcontractor in order to trigger coverage for the general contractor.

- In Strauss Painting Inc. v. Mt. Hawley Ins. Co., 105 A.D. 3d 515 (1st Dep’t 2013) the First Department held that the term “acts or omissions” does not require negligence for additional insured coverage.

“Caused by”: New York Law

NARROW INTERPRETATION

- In contrast, a New York federal court previously held in National Union Fire Insurance Company of Pittsburgh, PA v. XL Insurance America, Inc., 2013 U.S. Dist. LEXIS 68467 *21 (S.D.N.Y. 2013) that “caused by” is “narrower” than “arising out of” and requires a showing that the named insured’s operations “proximately caused” the bodily injury for which indemnity was sought.

  - see also International Business Machines v. United States Fire Insurance Co., 2007 NY Slip Op 51871U (Sup. Ct. 2007) (holding that it was not enough for plaintiffs to show merely that the underlying action “arose out of” the employer’s work but rather, the plaintiffs had to identify allegations or evidence of the employer’s negligent acts or omissions).
“Caused by”: New Jersey Law

- The phrase “caused by” is interpreted more restrictively than the phrase “arising out of”.

- The phrase “caused by” in an additional insured endorsement grants coverage only if the liability was caused by the named insured’s acts or omissions.

- As a result, this type of additional insured endorsement “provides coverage for a claim asserted against [the additional insured] for vicarious liability; it does not provide coverage for a claim against [the additional insured] for its own direct negligence.” Schafer v. Paragano Custom Bldg., Inc., 2010 N.J. Super. Unpub. LEXIS 356 (App. Div. Feb. 24, 2010).
Duty to Defend: “Arising out of”

- If there is an allegation connecting this loss to the work of the Named Insured, then a defense is owed by the named insured’s carrier even though indemnity has not been determined.

- A named insured need not be a named defendant in the underlying complaint in order to trigger coverage for an additional insured under an endorsement employing the “arising out of” language, nor does the complaint need to contain explicit allegations of negligence on the part of the named insured. See Regal Constr. Corp., 15 N.Y.3d at 39; W&W Glass Systems, Inc., 91 A.D.3d at 531 (noting that the language in the additional insured endorsement granting coverage does not require a negligence trigger); QBE Ins. Co., 934 N.Y.S.3d at 38 (noting that if insurers “intended to limit coverage only to cases where a claimant made express accusations against the named insured, or where the named insured was made a defendant” than the insurers could have done so).
Other AI Coverage Issues

Issues with Duty to Defend

Duty to Defend: “Caused By”

- In New Jersey a complaint must allege some negligence on the part of the named insured to trigger defense for the additional insured. The absence of fault on behalf of the named insured may result in a finding of no coverage for the additional insured.

- In New York no fault needed.

- A common issue in the construction arena arises where coverage is sought for claims brought against an additional insured by an injured employee of the named insured/subcontractor. The claims of the injured employee usually lack allegations of negligence or fault on the part of the named insured/subcontractor because it is not sued due to the Workers’ Compensation system, which bars an injured employee from bringing a claim against its employer (oftentimes the named insured/subcontractor).
Other AI Coverage Issues

New York & New Jersey Law

Duty to Indemnify

- When an endorsement is fault-based and Named Insured’s negligence is not determinable at outset.

- Must await fact finding or judgment.
Other AI Coverage Issues
Claims of Breach of Contract

- Becoming a standard cross-claim served on defense counsel and can put an insurer and insured in adverse positions.
- Cross-claim alleges a failure to procure additional insured coverage as well as failure to procure on a primary, non-contributing basis.
- Insurer must review cross-claim for breach claim and evaluate whether to deny coverage or defend under reservation of rights (include mandatory language that the insured is free to accept or reject).
Other AI Coverage Issues

New York Law

Other Insurance

- In order to determine the priority of coverage among different policies, New York courts review and consider all of the relevant policies at issue.

- “This determination ‘turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance.’” Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co., 855 N.Y.S.2d 459 (1st Dep’t 2008).
Other AI Coverage Issues

New York Law

Other Insurance

❖ When two insurers contract to cover the same risk on the same level and have employed essentially mirror-image excess clauses in their policies, the excess clauses cancel each other out and both carriers are required to contribute on a primary basis.

Other AI Coverage Issues

New York Law

Example of Other Insurance Clause in Additional Insured Endorsement

“This insurance is excess over any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.”

- Generally, renders Additional Insured insurance primary
Other AI Coverage Issues

New Jersey Law

Other Insurance

- An insurance company has a right to impose a condition that its policy shall be primary to or excess over other collectible insurance, and how it will contribute with such other insurance.


CHECKLIST  
Additional Insured

- Identify the endorsement/policy language that affords additional insured coverage.

- Obtain and review the underlying contract or agreement. Was the insured contractually required to procure insurance?

- Consider any limitations in the endorsement or definition of insured, e.g., “arising out of,” “results from”, “ongoing operations,” “caused by” your “acts or omissions.”
- Identify the known facts of the claim.

- Determine whether there is a possibility for the insured to be liable for contractual indemnity.

- Tender to other carriers and, if necessary, join them as parties to action.

- Consider exposure for or reimbursement of fees for defense of additional insured and prosecution of declaratory judgment action.
Contractual Indemnity

Definition

An agreement that determines which party will bear the cost and expense of accidents.
Indemnitor vs. Indemnitee

- **Indemnitor:** one who agrees to provide indemnity
- **Indemnitee:** receives the indemnity
Contractual Indemnity

- Contractual indemnity is governed by the contract between the insured and some other party to the action. Examples of such contracts are leases and construction agreements.
Three Forms of Indemnity Agreement

1. Only indemnified for indemnitor’s own negligence.

2. Indemnify for all liability, except indemnitee’s own negligence.

3. Indemnify for all liability, including indemnitee’s own negligence.
Contractual Indemnity

Indemnity Rules

- Think “offense” and “defense.”

- Does agreement tie indemnity obligation to negligence or act or omission of party owing indemnity rather than “arising out of” work or use of premises?

- Does the agreement specifically mention the fault or negligence of the party to be indemnified?
What is the Scope of the Indemnity Provision?

- Check the words used.

- Does it limit the circumstances for assuming liability?
What is the Scope of the Indemnity Provision?

EXAMPLE

Indemnity may only be required for liability for damages:

- “in connection with,“
- “arising out of,“
- “resulting from,“ or
- “occurring in the course of”

- When such limiting language exists, it is important to ascertain whether the liability for which indemnity is sought falls within the scope of the specific language of the indemnity agreement.
Contractual Indemnity

New York Law

- Indemnification agreements are strictly construed and ambiguities are construed against the indemnitee.

- Interpretative goal as with any contract is to give effect to the parties’ intentions.
Contractual Indemnity

New York Law

Construction Contracts

- General Obligations Law § 5-322.1 prohibits indemnity agreements in which indemnitees seek to pass along the risks for their own negligent actions to indemnitors, even if the accident was caused only in part by the indemnitees’ negligence.

- However, pursuant to New York case law, the use of the phrase “to the fullest extent permitted by law…” can cure an otherwise voidable clause.
Contractual Indemnity

New York Law

Construction Contracts (cont.)

- With the use of such language, the indemnitee will be entitled to partial indemnity from the indemnitor for that portion of the injuries attributable to the indemnitor’s negligence, so long as the liability is not the result of the indemnitee’s sole and exclusive negligence.

- When an indemnification clause does not include such language and provides indemnification to an indemnitee for its own negligence, it is void and unenforceable if the indemnitee is found to be partially or solely negligent.
Contractual Indemnity

New York Law – Subrogation

- Insurer providing coverage can seek subrogation based upon indemnification obligation of indemnitee.

- A party who has been provided additional insured coverage can still pursue a claim for contractual indemnity, even against a party who provided the additional insured coverage, except to the extent such claim is barred by the anti-subrogation rule. That rule provides that an insurance carrier cannot recover from its own insured for the risk for which the insured was covered.

- The anti-subrogation rule does not bar an insurer from pursuing an indemnitee if that insurer did not insure the indemnitee. Subrogation can be obtained to the extent of the insurer’s payment. Flowers v. K.G. Land New York Corp., 219 A.D.2d 579 (2d Dep’t 1995).
Contractual Indemnity

New Jersey Law

- Like New York, indemnity agreements are strictly construed under New Jersey law.

- Ambiguities are construed against the drafter and against the party to be indemnified.
Contractual Indemnity

New Jersey Law

- Agreements to indemnify parties for their sole negligence are generally unenforceable under N.J.S.A. 2A:40A-1.

- This Statute is applicable to contracts pertaining to construction, alteration, repair, maintenance, servicing, or security of a building, structure, highway, railroad, appurtenance and appliance.

- If the party to be indemnified is less than 100% at fault, the agreement is enforceable.

- Even 1% liability assessed against any other party will suffice to make the Statute inapplicable.
Contractual Indemnity

New Jersey Law

- A contract will not be construed to indemnify a party for its own negligence unless that intention is expressed in unequivocal terms.

- The agreement must specifically refer to the “negligence or fault” of the party to be indemnified. Azurak v. Corp. Prop. Investors, 175 N.J. 110 (2003).

- If an indemnification agreement is not Azurak compliant, the party being indemnified cannot seek indemnification based on its own negligence.
Example Indemnity Provision

• Does not indemnify for indemnitee’s own negligence:

• Contractor shall indemnify, defend and hold harmless each Indemnitee from and against any claim (including any claim brought by employees of Contractor), liability, damage or expense (including attorneys’ fees) that such Indemnitee may incur relating to, arising out of or existing by reason of (i) Contractor's performance of this Agreement or the conditions created thereby (including the use, misuse or failure of any equipment used by Contractor or its subcontractors, servants or employees) or (ii) Contractor's breach of this Agreement or the inadequate or improper performance of this Agreement by Contractor or its subcontractors, servants or employees.
Example Indemnity Provision

• Does not indemnify for indemnitee’s own negligence:
  
• [T]o the fullest extent permitted by law, [Indemnitor] shall indemnify and hold harmless [Indemnitee] . . . and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of [Indemnitor’s] Work under this Sub-contract, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, to the extent caused in whole or in part by any negligent act or omission of [Indemnitor] or anyone directly or indirectly employed by [Indemnitor] or anyone for whose acts [Indemnitor] may be liable, regardless of whether it is caused in part by a party indemnified hereunder....
Contractual Indemnity: Different Scope from Additional Insured Coverage

- More limited than Additional Insured coverage because defense usually not owed at outset.

- Defense and indemnity contingent upon fault of indemnitee established.

- Amount of protection potentially greater as the scope of indemnity is not limited by policy limits.

- Once indemnity established, takes priority over insurance.
Key Differences Between Contractual Indemnity and Additional Insured Coverage

- Duty to defend
- Ability to transfer risk for one’s own negligence
- Priority of coverage
CHECKLIST
Contractual Indemnity

☐ Think “offense” and “defense.”

☐ Obtain and review the contract to determine whether there was an indemnity provision.

☐ Consider the scope of the indemnity provision.

☐ Determine whether the indemnity provision is enforceable.

☐ Confirm that the damage occurred after the execution of the contract.
Evaluate any limiting language:
✓ “in connection with”
✓ “resulting from”
✓ “occurring in the course of”

Determine whether the indemnity provision includes a negligence trigger.
Consider whether the indemnity obligation is tied to negligence, an act or omission of party owing indemnity, rather than “arising out of” work or use of premises.

Determine whether the agreement specifically mentions the fault or negligence of the party to be indemnified.

Analyze whether there are any statutes or other law prohibiting or limiting indemnity.
In re: Deepwater Horizon
710 F.3d 338 (5th Cir. 2013)

• BP granted a potentially enormous windfall of approximately $750 million at the expense of Transocean and its insurers
• Fifth Circuit extended coverage beyond the scope of liabilities assumed by BP and Transocean in the underlying contract, but then retreated
• Question now certified to Texas Supreme Court
• Exemplifies the uncertainties surrounding contractual indemnification and additional insured status.
In re: Deepwater Horizon

• A determination of any rights or obligations of BP or Transocean to each other under any provisions of the contract was unnecessary.

• Only the policy itself may establish limits on the extent to which an additional insured is covered so long as the additional insured provision is separate form the indemnity provisions in the contract.
Have Courts Gone too Far?

The Court of Appeals of Louisiana, Fourth Circuit recently commented:

"While the insurance industry believed that this coverage would extend no further than instances where the additional insured is vicariously liable for the wrongs of the named insured, many courts have interpreted the language as providing a broader coverage grant."

*Jones v. Capital Enterprises, Inc.*, 89 So. 3d 474 (La. App. 4 Cir 2012)
Reactions to *Deepwater Horizon* and Judiciary's Expansive Interpretations

- ISO and state legislatures have independently enacted certain mechanisms in an attempt to:
  - confine the judiciary’s seemingly unlimited expansion of additional insured coverage to that assumed in the operative contract; and
  - ensure that contracting parties are unable to transfer risk for their sole and/or concurrent negligence
ISO’s RESPONSE

- Effective April 1, 2013, ISO revised twenty-four additional insured endorsements as part of its overall revisions to the standard commercial general liability policy.

- The revised ISO endorsements generally attempt to tie, and thereby limit and/or reduce, the scope of additional insured coverage to match the underlying contractual requirements.

- The precise reason for ISO’s modification is not specified in any of the endorsements.
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[.]**

(emphasis added)
ISO’s revision leaves intact the “caused in whole or in part” language, so that, arguably, the additional insured continues to be entitled to coverage for its own liability, provided that the named insured’s (or someone acting on its behalf) played at least some part, however trivial, in causing the injury/damage at issue.

As it relates to contractual indemnity, this language allows an indemnitee to maintain additional insured coverage for its own negligence, even though the state anti-indemnification law might prohibit the transfer of any of the indemnitee’s negligence through contractual indemnification.
In the construction context, the addition of this clause appears to be ISO’s attempt to address those circumstances in which:

- a general contractor requires a subcontractor to both contractually indemnify it and procure additional insurance coverage for it;
- the general contractor subsequently bears sole liability for a workplace accident or other loss;
- a state anti-indemnification statute prevents that general contractor from obtaining contractual indemnity but is silent as to additional insured coverage – even with respect to the additional insured’s sole negligence; and
- the general contractor, therefore is entitled to broader coverage than is allowed under the state’s specific anti-indemnification law.
Possible Reasons for Revision?

1. An attempt to address judiciary’s trend of interpreting ISO’s post-2004 language as providing for broader coverage than is allowed by specific state anti-indemnification statutes, e.g., where a state anti-indemnification statute prohibits the transfer of any liability. Under that scenario, additional insured coverage under this revised endorsement would be limited to vicarious liability arising solely out of the named insured’s acts or omissions.

2. An attempt to address anti-indemnification and anti-additional insured legislation that voids contractual provisions seeking to transfer risk via additional insured coverage, without the need for state-specific endorsements.
Form CG 37 10 (04/13)

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 that additional insured and included in the “products-completed operations hazard”.

However:

****

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.*

(emphasis added)
New language incorporates into the insurance policy any express limits on additional insured coverage that the parties have specified in the contract, e.g., where the contract specifies that the additional insured coverage will only extend to vicarious liability.

For example, where a policy contains language stating that if the additional insured coverage is required by a contract or agreement, the insurance afforded to the additional insured “will not be broader than” the coverage that the insured is “required by the contract or agreement to provide”, a court may be forced to look beyond the policy to determine if there were any underlying contracts between the named insured and the additional insured, and, if so, what those contracts or agreements required in terms of coverage. In the event that those contracts or agreements contain limited insurance procurement provisions and/or provisions cross-referencing any indemnity provisions in the same contracts or agreements, a court would likely have to recognize such limitations under this endorsement.
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 most 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 Limits of Insurance shown in the Declarations;**

   whichever is less.

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

(emphasis added)
Thwarts an additional insured’s ability to gain access to the named insured’s full limits of liability where the underlying contract or agreement requires that the named insured provide an amount less than the policy’s limits or where the declarations of the policy show a lesser amount.
State Anti-Indemnification Statutes

• 45 states have some form of anti-indemnity statute

• A majority of these states prohibit broad form indemnity agreements, *i.e.*, agreements providing indemnification for any loss arising from a project, including loss caused by the sole or concurrent negligence of the indemnitee
Example of the “Loophole”

• Subcontract includes an additional insurance procurement provision
• Certificate of insurance is issued confirming additional insured status
• Injury or Damage is caused by the sole negligence of the additional insured
• Anti-indemnification statutes may void indemnity provision, but have no effect on additional insurance provisions
• Additional insurance provided
Legislative Response

- Handful of states, including TX and CA, enacted anti-additional insured legislation
- Growing trend spearheaded by national subcontractor trade associations
- Coupled with anti-indemnification legislation, the states create dual restrictions on a party’s ability to indemnify and insure the general contractor for that party’s own negligence.
QUESTIONS
THANK YOU

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