CHANGES IN ADDITIONAL INSURED COVERAGE

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April 7, 2006

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I. INTRODUCTION

Over time, the insurance industry has sought to limit the coverage afforded additional insureds through various changes in the language contained in the endorsements. There is no question that this is a lofty goal given that most additional insured endorsements are sold fairly cheaply. Unfortunately, many attempts to limit the scope of coverage have fallen short. In fact, carriers have afforded more coverage than they ever expected.

Once again, the insurance industry has made changes in an attempt to limit coverage. Only time will tell if the industry has been successful.

There are at least 28 standard ISO form endorsements available in the arena of general liability coverage as a means of securing additional insured status in a variety of business or social related contexts. Many of these endorsements are designed for use in relationships outside of a business context. This paper will focus on the "Owners, Lessees or Contractors" endorsement designed to address the additional insured requirements of construction contracts.

II. THE "ARISING OUT OF" ENDORSEMENT

The majority view throughout the country is that coverage exists for the direct negligence of the additional insured under an endorsement providing coverage for injury or damage arising out of the insured's work or operations. In other words, the additional insured endorsement triggers coverage even when the named insured is not negligent or even sued. Courts find that "arising from" or "arising out of" have broad meaning: not necessarily proximate causation. As the court noted in *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.App.–Houston [1st Dist.] 1999, pet. denied):

> The majority view of these cases is that for liability "to arise out of operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather, it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured.

Id. at 454.

In that case, KD Oilfield Services contracted with Trident to provide crews and equipment to service oil and gas facilities owned by Trident. Pursuant to the contract, KD purchased CGL coverage and named Trident as an additional insured. The additional insured endorsement provided that Trident was an insured "but only with respect to liability arising out of the named insured's [KD's] operations." An employee of KD was unloading tools from Trident's truck when a compressor exploded, seriously injuring the KD employee. Trident made a claim for coverage which was denied by Admiral, the insurance carrier.

Admiral argued that coverage was properly denied because the liability arose out of Trident's operations and that absent an act by KD that caused or contributed to cause the explosion, the endorsement did not provide coverage. The court held, following the majority rule in the United States, that because the accident occurred to a KD employee while he was on the premises for the purpose of performing his job, the alleged liability arose out of KD's operations and was covered by the additional insured endorsement. The court expressly disagreed with the foregoing cases.

In *McCarthy Bros. Co. v. Continental Lloyds Ins. Co.*, 7 S.W.3d 725 (Tex.App.–Austin 1999, no pet.), McCarthy, a general contractor, hired Crouch Electric to provide electrical services for a construction project. Pursuant to the contract, Crouch purchased CGL coverage and had McCarthy named as an additional insured.

The additional insured endorsement provided coverage for McCarthy with respect to liability "arising out of your [Crouch's] work for that insured [McCarthy] by or for you [Crouch]."

An electrical foreman for Crouch was injured when he slipped and fell at the site. At the time, he was walking on an incline to retrieve some electrical equipment. McCarthy sought coverage under the additional insured endorsement, which was denied.

The insurance company argued that no coverage existed because the suit involved only allegations against McCarthy and not on the part of Crouch, and the liability did not arise out of Crouch's work for McCarthy. The court, citing a recent Texas Supreme Court case on the broad construction afforded the phrase "arising out of" in a case involving construction of an automobile policy [boy climbing in rear window of truck accidentally discharge shotgun - court held injury arouse out of use of truck], held that because the injury occurred while the worker was getting tools to perform his job, there was a causal connection between the injury and Crouch's performance of its work for McCarthy and the liability "arose out of" the named insured's work for the additional insured.

In *Mid-Continent Cas. Co. v. Swift Energy* Co., 206 F.3d 487 (5th Cir. 2000), Swift, a well operator, hired Flournoy to drill a well. Flournoy hired Air Equipment to install casing at the site. Pursuant to an agreement between Air Equipment and Swift, Swift was named as an additional insured on Air Equipment's CGL Policy. A supervisor for Air Equipment was injured when gas ignited and exploded. He sued Swift and Flournoy alleging negligence. The additional insured endorsement provided coverage for Swift "but only with respect to liability arising out of your [Air Equipment's] operations performed for that insured [Swift]."

The insurance company first argued that the endorsement only provided coverage for liability arising out of the named insured's negligence and excluded liability arising out the independent negligence of the additional insured, relying on *Granite*.

Recognizing the decisions in *Admiral* and *McCarthy*, the Fifth Circuit held that it believed the Texas Supreme Court would follow those decisions instead of *Granite*. Since the worker's injuries occurred while on Swift's premises in connection with Air Equipment's operations, his injuries arose out of Air Equipment's operations. *See also Mid-Continent Cas. Co. v. Chevron Pipe Line Co.*, 205 F.3d 222 (5th Cir. 2000) (court reaching same decision with respect to endorsement containing word work instead of operations).

III. COURTS SUGGEST HOW CARRIERS COULD LIMIT COVERAGE

Several courts have suggested that if insurance companies really desired to exclude coverage arising out of the sole negligence of the additional insured, such language could be easily added into the subject endorsement. *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. Ct. App.), *appeal denied*, 652 N.E.2d 342 (Ill. 1995) (court noting that if carrier had wanted to limit coverage to additional insured, it could have done so by clearly stating level of coverage afforded in its endorsement); *Consolidated Edison Co. of New York, Inc. v. Hartford Ins. Co.*, 610 N.Y.S.2d 219, 221 (N.Y. App. Div. 1994); *see also Maryland Cas. Co. v. Regis Ins. Co.*, No. CIV.A. 96-CV-1790, 1997 WL 164268, at *6 (E.D. Pa. Apr. 9, 1997) (not reported in F. Supp.). Despite this suggestion, however, the courts have failed to clearly identify what language would accomplish this purpose.

In *Maryland Cas. Co., supra*, the additional insured endorsement in question stated:

> It is agreed that the "Persons Insured" provision of this policy is amended to include the person or organization named below but only with respect to liability sought to be imposed upon the Additional Insured as the result of an alleged act or omission of the Named Insured....

The insurance company argued that the endorsement only insured the additional insured for liability imposed as a direct and proximate result of the negligence of the named insured.

In other words, coverage was only afforded for vicarious liability imposed upon the additional insured because of the negligence of the named insured. Therefore, the insurer had no duty to defend or indemnify the additional insured because the underlying suit was premised on independent acts of negligence of the additional insured.

In rejecting the insurance company's arguments because it found the endorsement to be ambiguous, the district court noted that if the insurance company desired to impose a higher level of causation than "but for" causation, it should have explicitly stated such a requirement. The court suggested that the endorsement could have read:

> It is agreed that the "Persons Insured" provision of this policy is amended to include the person or organization named below **but only to the extent of liability vicariously imposed** upon the Additional Insured **as the direct and proximate result of the negligence** of the Named Insured....

Maryland Cas. Co., 1997 WL 164268, at *4 n.3 (emphasis added to reflect suggested changes by the Court).

In *Bonner County v. Panhandle Rodeo Ass'n, Inc.*, 620 P.2d 1102 (Idaho 1980), the additional insured endorsement in question contained the following exclusions:

> [T]his insurance does not apply:
>
> 1. To any occurrence which takes place after the named insured ceases to have use of said premises, facilities or above items;

> 2. To structural alterations, new construction or demolition operations performed by or on behalf of the person or organization as described above.
>
> 3. To liability arising out of the sole negligence of the additional insured hereunder.

The Idaho Supreme Court held that this exclusionary language was ambiguous relying on the existence of language in the underlying contract between the named insured and the additional insured which required that the named insured afford coverage for the additional insured's sole negligence. *Id.* at 1106. The court also focused on the fact that such exclusion was never relayed to the additional insured. The decision by this court is questionable because of its reliance on evidence outside the policy language itself, but is cited because it is one example of how courts have viewed an attempt to limit coverage for the additional insured.

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 632 N.E.2d 1039 (Ill. 1994), the additional insured endorsement provided:

> The Persons Insured provision of this policy is amended to include as an Insured any Person or organization whom the Named Insured has agreed by contract, either oral or written, prior to loss, to include as an Insured with respect to operations performed by or on behalf of the Named Insured. **Such Insureds included by contract shall hereinafter be referred to as Additional Insureds, and the insurance afforded [herein] shall not apply to damages arising out of the negligence of the Additional Insured(s)**.

Id. at 1040-41 (emphasis added).

On appeal, the court was faced with the question of whether the endorsement excluded from coverage allegations that the additional insured was negligent. The court bypassed the question of whether the provision was valid, finding that because of an allegation of a statutory violation, a duty to defend existed because the endorsement did not explicitly refer to statutory violations, only negligence.

Additionally, the court left open the question of whether any duty to indemnify existed because the underlying suit had not been decided. The court also avoided the question of whether this provision violated public policy finding that any such decision was unnecessary because of its holding that a duty to defend existed.

The dissent in the case squarely faced the public policy argument, however. The additional insured argued that the endorsement violated public policy because any coverage under the policy was illusory. The insurance company, on the other hand, argued that the endorsement clearly and unambiguously afforded coverage only for vicarious liability. The dissenting judge argued that the exclusion violated public policy because it undercut the entire coverage that CGL policies purport to insured - coverage for the insured's negligence. *Id.* at 1046 (Bilandic, C.J., dissenting). The judge further found that the endorsement purported to insure the additional insured under a comprehensive liability policy, and not under a policy for vicarious liability.

> The [additional insured] does not need, nor did it seek, coverage for vicarious liability in connection with the NDS painting contract. [The named insured] is an independent contractor and the [additional insured] cannot be held vicariously liable for its acts except under a narrow exception. Even if it was to be held vicariously liable for the acts of [the named insured], the [additional insured] would have an action for indemnity against [the named insured] and, therefore, would have no need for vicarious liability coverage on the painting contract. The endorsement is illusory and provides no coverage at all. Since the negligence exclusion deceptively affects the general liability risks that the endorsement purports to assume, the endorsement's exclusion violates public policy and should not be enforced.

Id.

However, in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000), the court, applying Texas law, noted that the additional insured endorsement limited coverage to the additional insured's vicarious liability for the acts of the named insured by including the language "but excluding any negligent acts committed by such additional insured."

What the foregoing cases tell us is that despite what some courts have indicated, the ability to limit an additional insured's coverage may not be as easy as they would have the insurance industry believe.

IV. THE CAUSED IN WHOLE OR IN PART ENDORSEMENT

In the latest attempt to accomplish what the courts seem to believe is so easy, the ISO has changed the causation language in several endorsements.

A. **The Latest Endorsements**.

The CG 20 10 07 04 endorsement (Additional Insured - Owner, Lessees or Contractors) now provides:

> 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.
>
> 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.

The CG 20 37 07 04 endorsement (Additional Insured - Owners, Lessees or Contractors - Completed Operations) now provides:

> 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."

B. **The Intent Of The Endorsements Is To Do Away With Coverage For The Additional Insured's Sole Negligence - The Language And Case Law Suggest That The ISO Should Be Successful**.

According to the National Underwriter, ISO made the changes in response to what it perceived to be a "straightforward" problem with the courts' interpretation of "arising out of" endorsements. In its Explanation of Changes section of the filing memorandum, ISO stated:

> Because the phrase "arising out of" has been interpreted broadly by some courts, we are revising several of the additional insured endorsements to add specific language to provide an additional insured with coverage for their vicarious liability or contributory negligence only. The additional insured will have only coverage for bodily injury, property damage or personal and advertising injury that is caused in whole or in part by the acts or omissions of either the named insured or those acting on behalf of the named insured. A major effect of that wording will be to prevent any alleged coverage for the additional insured's sole negligence. These revisions will better reflect the intent of the endorsements.

The National Underwriter, FC&C Bulletins, "ISO's Solution: Granting Additional Insured Coverage Based on Fault," (citing "Revisions to Additional Insured Endorsements," ISO Commercial General Liability Forms Filing GL-2004-OFGLA, at 2-3).

Additionally, according to the National Underwriter, ISO's latest version of the CG 20 series of additional insured endorsements attempts to achieve a fault based coverage by linking the potential coverage to the acts or omissions of the named insured. In other words, the basis for the additional insured's liability must be vicarious or if the additional insured is liable for contributory negligence, it will only be covered provided that the named insured, and not some other party, is also at fault.

See 2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI.H.12 (International Risk Management Institute, Inc. 2005).

The ISO takes the position that "caused in whole or in part by" expresses a stronger causal connection than "arising out of." DONALD S. MALECKI, PETE LIGEROS & JACK P. GIBSON, THE ADDITIONAL INSURED BOOK at 179 (5th ed. 2004). At least one court, in discussing the application of an exclusion, suggested the ISO may be right in its conclusion. *See New England Mut. Life Ins. Co. v. Liberty Mut. Ins. Co.*, 667 N.E.2d 295, 298 (Mass. App. Ct.), *rev. denied*, 671 N.E.2d 952 (Mass. 1996) ("arising out of" much broader than "caused by").

The Massachusetts court is not alone in this regard. The Fifth Circuit, the Eastern District of Texas, and the Texas Supreme Court have agreed that "caused by" is much more restrictive in scope that "arising out of." *See American States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998); *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951); *State Farm Lloyds v. Chandler*, 2005 WL 2467071, at *3 (E.D. Tex. 2005); *Utica Nat'l Ins. Co. v. American Indem. Co.*, 141 S.W.3d 198, 202-203 (Tex. 2004).

A number of courts that have construed the phrase "caused in whole or in part by" in a different context have determined that no coverage is afforded for the sole negligence of the party seeking coverage from the named insured/indemnitor. In *Continental Cas. Co. v. Auto-Owners Ins. Co.*, 238 F.3d 941 (8th Cir. 2001), the indemnity provision required Hulcher to indemnify Burlington Northern only for

liability for an injury "caused, in whole or in part, by the negligence of [Hulcher]." *Id.* at 944. The court held that since there was no evidence presented that Hulcher was negligent or that Hulcher's negligence caused the employee's injuries, Burlington Northern had no right to indemnity from Hulcher and the indemnity agreement did not constitute an insured contract. *Id.*

In *Hernandez v. Big 4, Inc.*, 241 F. Supp. 2d 715 (S.D. Tex. 2003), the indemnity provision at issue contained this phrase. The court noted that said language obligated the subcontractor to indemnify the general contractor only for the fault that was attributed to the subcontractor. *Id.* at 719-20.

In *Hagerman Constr. Corp. v. Long Elec. Co.*, 741 N.E.2d 390 (Ind. Ct. App. 2000), *transfer denied*, 761 N.E.2d 422 (Ind. 2001), the court concluded that an indemnity provision containing the "caused in whole or in party by" language did not expressly state, in clear and unequivocal terms, that it applied to indemnify the indemnitee for its own negligence. Instead, the clause explicitly indemnified the indemnitee for the acts of the subcontractor and anyone for whom it might be liable. *Id.* at 393.In *Tri-States Ins. Co. v. Rogers-O'Brien Constr. Co.*, 1997 WL 211534 (Tex.App.–Dallas 1997, writ denied) (not designated for publication), the court noted that the subcontractor never intended to indemnify the general contractor for its own negligence as evidenced by the parties' usage of the limiting language "to the extent caused in whole or in part by any negligent act or omission" of the subcontractor. The court held that said language left no doubt as to the intention to indemnify the general against only the subcontractor's negligent acts. *Id.* at *5.

Finally, in *Adams v. Spring Valley Constr. Co.*, 728 S.W.2d 412 (Tex.App.–Dallas 1987, writ ref'd n.r.e.), the court likewise determined that an indemnity agreement that limited coverage to injury or damage caused in whole or in part by a negligent act or omission of the indemnitor did not afford coverage for the indemnitee's sole negligence. *Id.* at 412.

As the foregoing discussion reveals, commentators and many courts have generally agreed that the phrase "in whole or in part" is limiting language designed only to provide coverage where the additional insured seeks coverage for vicarious liability or for concurrent responsibility with the named insured.

If this trend translates over to case review of the new endorsements, adding same to liability policies would have the effect of limiting coverage for additional insureds. No longer would coverage be owed for the additional insured's sole negligence or in any case in which the additional insured was not also sued (or, as discussed in the next section, there is no allegation that the named insured is at fault).

C. The 20 37 Additional Insured Endorsement Provides Coverage Only For Completed Operations

The CG 20 37 endorsement provides that coverage applies to the named insured's work, at a particular location designated and described in a schedule attached to the policy, performed for the additional insured and included in the products completed operations coverage. In other words, this endorsement provides the additional insured coverage, if at all, only for completed operations claims. In order to obtain premises and ongoing operations coverage, the additional insured would have to contract for a separate additional insured endorsement, such as the CG 20 10. What this endorsement does accomplish, however, is to provide the completed operations coverage many general contractors require in their contract agreements with subcontractors.

V. POSSIBLE LIMITS ON THE EFFECTIVENESS OF THE NEW ENDORSEMENTS

Commentators have suggested, however, that it is not clear that the 2004 edition of the endorsements will not respond to injury or damage for which the additional insured/indemnitee is solely liable. The commentators note that the named insured's act or omission that must be a partial cause of the injury or damage does not have to be a negligent act, or any sort of act that could impose legal liability on

the named insured. For example, a named insured's act of assigning a worker to a specific task, in the course of which the worker is injured through the negligence of the additional insured's acts or omissions could be enough to trigger the insuring agreement, if "caused by" is given a broad meaning by the courts. *See* 2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI.H.12.

Given that courts often go out of their way to find coverage, a broad reading of this phrase may result given the right set of facts. Additionally, another commentator has suggested that it will be the insurance company's burden to prove that the named insured is not responsible in any way. DONALD S. MALECKI, PETE LIGEROS & JACK P. GIBSON, THE ADDITIONAL INSURED BOOK at 178.

One area that suggests that the new language might end up being given broad interpretation by the courts is the area of third party over suits: injured employee of named insured, barred by the workers' compensation exclusion from suing his employer, brings a third party action against the additional insured. Commentators suggest that insurers and the courts should be guided by the following considerations in determining whether the additional insured should have coverage in this arena:1.

Coverage under the new endorsement is not dependent upon alleging negligence of the named insured - "acts or omissions"[1] does not say anything about negligence;

2. Allegations of negligence against one party imply nothing necessarily about the possibility of other concurrent causes of injury; and

3. The coverage intent of the new endorsement language does not seem to encompass a blanket exclusion of third party over suits.

2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI.H.13-4.

[1] The newest version of the CG 20 10 additional insured endorsement uses this language. There should be no difference in how this phrase is treated as when compared to "your work" in CG 20 37 or "you or those acting on your behalf" in CG 24 26.

Additionally, some risk management professionals have suggested that the phrase "those acting on your behalf" may constitute an additional argument for coverage in these type of actions. The allegation that an additional insured failed to maintain a safe workplace could be viewed as an allegation of acts or omissions by the named insured or that the additional insured was or should have been acting "on behalf of" the employer and its employees since as the employer, the named insured has a non-delegable duty to provide a safe workplace. DONALD S. MALECKI, PETE LIGEROS & JACK P. GIBSON, THE ADDITIONAL INSURED BOOK at 183.

In this discussion, the commentators also note that the ISO left out any specific mention of the additional insured's sole negligence as an exception to coverage because its inclusion might have created the impression that only three possible negligence scenarios exist in a construction accident:

1. sole negligence of the additional insured;
2. sole negligence of the named insured; and
3. shared negligence of the named and additional insured.

Since injury or damage on a project can be caused by the negligence of persons and entities that are not insureds under the policy at all, ISO wanted the key to coverage to be not just the partial or sole negligence of someone else besides the additional insured, but rather the partial or sole negligence of the named insured. Including that exclusion could conceivably have obscured the point. *Id.* at 179-80. To illustrate, the commentator offers the following situation:

> [I]magine an injury caused by a parcel delivery driver bringing a shipment to a construction site. Negligence is attributed 50 percent to the driver and 50 percent to the general contractor, who failed to take precautions that would have prevented the accident. Language suggesting that the additional insured general contractor has coverage - *except for injury or damage arising out of its sole negligence* - could be used to make a case for coverage in this instance, since the additional insured was not solely negligent.

Id. at 180 (emphasis in original).

While it seems clear that the inclusion of the "caused in whole or in part" language should accomplish what the ISO set out to do, third party over suits may cause some courts to try to find a way around the limiting language. Only time will tell how much of a change this new language produces.

VI. CONTRACTUAL LIABILITY COVERAGE

A. **A Brief Primer**.

Contractual liability coverage provides coverage for the named insured's contractual assumption of the tort liability of another party. *Musgrove v. Southland Corp.*, 898 F.2d 1041, 1044 (5th Cir. 1990). This assumption of tort liability is typically in the form of an indemnity agreement. *Id.*Under Coverage A of a typical CGL Policy, the policy provides that "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Under this broad coverage grant, an insured is covered for any liability arising from its contractual obligation to indemnify another. Jill B. Berkeley, *Six Myths Concerning Contractual Liability Coverage*, CGL REPORTER, Spring 1995, at (7) 310-5 [hereinafter *Six Myths*]; *see also Hart Const. Co. v. American Family Ins. Co.*, 514 N.W.2d 384 (N.D. 1994).. This promise to indemnify is restricted by the standard "contractual liability" exclusion. Berkeley, *Six Myths*, CGL REPORTER, at (7) 310-5. That exclusion provides that Coverage A does not apply to damages for which the insured is obligated to pay by reason of the assumption of liability in a contract or agreement.

There is, however, an exception to the exclusion. The CGL Policy provides that the exclusion does not apply to liability of others assumed by the named insured under an "insured contract." An "insured contract" is defined to include:

> 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....

Therefore, under the terms of the typical CGL Policy, the insured/indemnitor would have coverage for the liabilities it might incur as a consequence of the indemnity provision of a construction contract or other Agreement. *See Gibson & Assoc., Inc. v. Home Ins. Co.*, 966 F. Supp. 468, 476 (N.D. Tex. 1997).

Of course, if the indemnity agreement satisfies the fair notice requirements, the indemnitee would once again have coverage for its sole negligence.

B. **The New Contractual Liability Coverage Language**.

Endorsement CG 24 26 07 04 provides in pertinent part:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> Paragraph 9. of the Definitions Section is replaced by the following:
>
> 9. "Insured contract" means:
>
> ...
>
> 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, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

C. This Change To The Definition Of Insured Contract Was Added As Part Of The Overall Revision To The Response To Contractual Risk Transfer.

Endorsement CG 24 26 was introduced by the ISO in conjunction with the revisions to the additional insured endorsements to provide insurers with an endorsement that would tailor contractual liability coverage to match more closely the protection provided to the named insured's indemnitee as an additional insured. ISO has linked this endorsement to the additional insured endorsements not just by filing them together but by explaining them as components of a single overall revision of the CGL policy's response to contractual risk transfer. ISO has characterized the endorsement as one that will "amend the definition of an insured contract in the CGL to remove coverage for the additional insured's sole negligence." 2 JACK P. GIBSON ET AL., COMMERCIAL LIABILITY INSURANCE § VI, at VI..36. This is not to suggest that the endorsements must be used together. Instead, a carrier could utilize CG 24 26 as a stand alone addition to its policy.

VII. CONCLUSION

It would appear that the industry may have finally gotten it right. Of course, as the commentators have noted, not even the most recent changes may work in every situation. If history is any indicator, courts may once again find a way around the new language.

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Craig L. Reese – Partner of the firm, Craig leads the appellate and coverage practice group. He has over 23 years practice experience including appeals at the federal and state level, insurance coverage/defense, and commercial litigation. His appellate experience includes cases before every level of the state courts of appeals and appeals to the Fifth Circuit Court of Appeals.