

# Ensure That You Receive Additional Insured Coverage

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Well drafted construction contracts attempt to shift insurance and indemnity obligations down from the owner and/or higher tiered general contractor down to the subcontractor and each successive lower tiered subcontractor in such a way that, in the event of a construction workplace accident/injury, the lower tiered contractor's insurance policy provides additional insured defense and indemnification coverage (including being responsible for any potential judgment and defense costs) for the upper tiered contractors and owner. Hand-in-hand with this scheme, contractors and owners also attempt to make the lower tiered subcontractor's insurance (including excess/umbrella coverage) be primary and to be fully exhausted before the upper tiered contractor's insurance policy is triggered. As many contractors are aware, this type of scheme is called horizontal exhaustion.

While this "push down" of insurance requirements through additional insured defense and indemnity obligations often works for lower tiered contractors with whom the general contractor and/or subcontractor are in direct contract, often times, this arrangement breaks down when the injured worker is more than one tier removed and not in direct contract with the upper tier general contractor and/or owner. In a recent case, the court was faced with a declaratory judgment action by the project owner and general contractor seeking additional insured coverage from a second tier subcontractor's insurance company.

The owner/general contractor agreement required the general contractor to provide additional insured coverage to the owner and required all subcontractors to indemnify, defend and hold the owner harmless from, among other things, all actions arising from any act that resulted in bodily injury. Consistent with the requirements of the owner/general contractor agreement, the general contractor/subcontractor agreement required the subcontractor to indemnify, defend and hold harmless the owner and general contractor from any claims and damages arising out of and in connection with injuries arising out of the subcontractor's work including sub-subcontractors of the subcontractor. Notwithstanding the requirements in the general contractor/subcontractor agreement, the subcontractor/sub-subcontractor agreement only required the sub-subcontractor to obtain liability insurance with an endorsement naming the subcontractor (only) as an additional insured on a primary and non-contributory basis and to indemnify, defend and hold harmless the subcontractor.

After an employee of the sub-subcontractor was injured on the project and commenced a personal injury action (which included claims against the owner and general contractor), the sub-subcontractor's insurance company accepted the tender of defense and indemnification of the subcontractor as an additional insured. The sub-subcontractor's insurance company, however, refused to defend the owner and general contractor. A

separate declaratory judgment litigation ensued where the owner and general contractor sought additional insured coverage from the sub-subcontractor's insurance company. In this decision, the court was faced with dueling motions. The sub-subcontractor's insurance company moved for summary judgment dismissing the complaint based upon the terms of the insurance policy. The owner and general contractor cross-moved for summary judgment seeking a declaration that they were entitled to defense and indemnification in the underlying personal injury action. In the alternative, the owner and general contractor argued that they were entitled to contractual defense and indemnification from the sub-subcontractor.

The sub-subcontractor's insurance company argued that it had no duty to defend the owner and general contractor as additional insureds based upon the terms of the insurance policy. The insurance policy defined who was an insured under the policy and it limited the additional insured coverage to "any person or organization for whom you are performing operations only as specified under a written contract... that requires that such person or organization be added as an additional insured on your policy." Additionally, the endorsement to the policy provided that the insurance did not apply to the additional insureds that the subcontractor was required to indemnify, defend and hold harmless, namely the owner and the general contractor.

In reviewing the insurance policy, the Court held that the owner and general contractor did not qualify as additional insureds because there was no allegation that the sub-subcontractor was performing work under a written contract with either the owner or general contractor. Additionally, because there was no written contract with either the owner or general contractor (no privity) the sub-subcontractor was under no contractual duty to defend or indemnify the owner and general contractor.

### **Commentary**

At the very beginning of a project, through careful contract drafting, an owner and general contractor attempt to set up an insurance program, where no matter what tier contractor's employee is involved in a workplace accident/injury, they always obtain additional insured defense and indemnity. However, in the rush to start and, ultimately finish a project, less attention is given to ensure that the proper insurance coverages are being procured by the lower tiered contractors. The result of this lack of attention is the scenario that the owner and general contractor is facing in this case. They are now left to defend themselves, without insurance coverage for an event that should have been covered.

Importantly, the court noted that, in the case of additional insured coverage there is no requirement that an insurance company (here, the sub-subcontractor's insurer) provide timely disclaimer of coverage. The court noted that an additional insured endorsement is an addition, rather than a limitation, of coverage. Therefore, if a claim falls outside of the policy's coverage, the insurer is not required to disclaim.

It is important that every owner, contractor and subcontractor review the lower tier contracts and the insurance policies being provided to make sure that the required

additional insured coverage is being obtained. Owners, contractors and subcontractors must be mindful that the insurance policy is a separate contract and that the insurance company's additional coverage obligations are set forth in the policy. This means that the owner, contractor and subcontractor cannot rely solely on a Certificate of Insurance. As a matter of practice, an owner, contractor and subcontractor's risk management team should obtain copies of the insurance policies including, all declarations and endorsements. No subcontractor should ever be allowed on a project site without producing such documentation.

Feel free to contact me to discuss insurance coverage and setting up a risk management team to ensure that you are never faced with an uninsured event.