



ADDITIONAL INSURED, MULTIPLE COVERAGE, ETC. BASIC TENETS OF PRACTICE

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In the construction context, commonly an owner or general contractor will require that a subcontractor name the owner or general contractor as an "additional insured" on a policy of general liability insurance acquired and paid for by the subcontractor. Through the insurance, the subcontractor is "indemnifying" the owner or general contractor for his negligence that causes injury to persons on the site, including the employees of the subcontractor or other subcontractors. Accordingly, upon notice of an accident, the general contractor or owner usually has an array of coverage from which to elect the carrier to cover the loss.

In such a setting, upon receipt of summons and a lawsuit, the owner or general contractor may tender its defense to the insurer of the subcontractor who employed the injured party. However, the owner or general contractor almost always has its independent policy of insurance and may also be named by several additional subcontractors as an additional insured. Accordingly, issues involving coverage often arise.

The primary issue focuses upon who will defend or indemnify in the sea of coverage? In general, an insured faced with multiple policies of insurance, all providing coverage, has the right to appoint one carrier to provide defense and indemnity. The apportionment is to the chagrin of "co-insurers" whose rights to equitable apportionment may be destroyed by its own insured's unilateral election. This article will discuss some basic tenets of practice and procedure.

An "additional insured" is a person or entity named on a certificate of insurance, policy, or policy endorsement at the request of the policy's original named "insured." The "additional insured" stands in the shoes of the insured as if it were named as the initial "insured." Unless otherwise qualified or limited by the policy or certificate, the rights and duties existing between the insurer and the additional insured are identical to those of the insured and the insurer. Generally, standing as an additional insured is created by the designation of person or entity on the policy, endorsement or certificate. Typical language is as follows:

"Additional Insured:"

"The persons insured provision is amended to include as insured the person or entity named below..."

Do not confuse the designation of certificate holder with additional insured. A certificate holder is not an additional insured unless specifically designated as such.

The problems associated with additional insured endorsements and certificates naming additional insured are a growing area of concern. Generally, the purpose of such an endorsement is to provide coverage for a person or entity for whom the named insured is performing work. One must distinguish

between a full coverage certificate or endorsement from a limited certificate or endorsement. An example of full coverage endorsement is as follows:

"The 'person insured' provision is amended to include as an insured the person or organization named below:"

Two examples of a limited coverage endorsement or certificate is as follows:

The "persons insured" provision is amended to include as an insured the person or organization named below, but only with respect to liability arising out of operations performed for such insured by or on behalf of the named insured.

or

The "persons insured" provision is amended to include as an insured "any person ...with whom [insured]... agreed, because of a written contract or agreement, to provide insurance such as is afforded under this policy."

An insurer can limit its coverage to the additional insured by express contract. The contract (policy, endorsement, certificate) must identify both who is an additional insured and the level of coverage. Any ambiguities in limitations are construed against the insurance company. Absent express limitations to coverage, the additional insured stands in the shoes of the insured as to all policy coverage. *J.A. Jones Construction v. Hartford* (1995), 269 Ill.App.3d 148, 645 N.E.2d 980. Once a person or entity has been named as an additional insured, the court must determine whether the insurance policy in which the person or entity is named as an additional insured is a primary or an excess policy.

The additional insured stands in the shoes of the insured. No greater or lesser rights or obligations are created. *Casualty Insurance Co. v. Northbrook Property & Casualty Insurance Co.*, 150 Ill.App.3d 472, 501 N.E.2d 812, 103 Ill.Dec. 495 (1st Dist. 1986); *Northbrook Property & Casualty Insurance Co. v. United States Fidelity & Guaranty Co.*, 150 Ill.App.3d 479, 501 N.E.2d 817, 103 Ill.Dec. 500 (1st Dist. 1986). Accordingly, a tender by an additional insured to an excess insurer for a primary risk is improper. Moreover, in the event of a tender by the (additional) insured to multiple insurers, equitable apportionment or co-insurance, only exists as to insurers of the same class of risk.

Illinois courts generally follows the rule announced by the Appellate Court in *Institute of London Underwriters v. Hartford Insurance* (1992), 234 Ill.App.3d 70, 599 N.E.2d 1311, as affirmed by our Supreme Court in *Cincinnati Companies v. West American Insurance Company* (1998), 183 Ill.2d 317, 233 Ill.Dec. 649; and *John Burns Construction v. Indiana Insurance*, 2000 WL 46031. This rule holds that an insured has an absolute right to elect exclusive coverage from one of its insurers by tendering the defense and indemnity of a claim to one insurer and not the other. This election forecloses the settling insurer from obtaining contribution from the other insurer(s).

In a nutshell, the current cases stand for the proposition that an insured may tender its defense and indemnity to any company with which it has coverage, thereby not only retaining the exclusive right to select coverage, but also precluding the company to which the tender was made from seeking equitable contribution or apportionment from any other policies in the possession of its insured.

In *Institute of London Underwriters v. Hartford Fire Insurance Co.*, 234 Ill.App.3d 70, 599 N.E.2d 1311, 175 Ill.Dec. 297 (1st Dist. 1992), the insured contractor entered into a construction contract with a dock owner, naming the dock owner as an additional insured on its policy. When the insured's employee was injured and brought suit against the dock owner, the dock owner informed its own

insurer of the suit but advised it not to respond and tendered the suit to the contractor's insurer. The contractor's insurer settled the case and then sought a 50 percent share of the settlement from the dock owner's insurance carrier. The court found that since the dock owner did not tender defense to its own insurer, coverage was not triggered. "[I]f the policy is never triggered, the issue of liability . . . does not arise." 599 N.E.2d at 1315. Thus, the court held that when two policies cover a loss, the insured can elect which of its insurers will defend the claim by tendering its defense to one and not the other. The defending insurer is then foreclosed from obtaining contribution from the nondefending insurer.

If an insured is without knowledge of coverage as an insured or additional insured, it cannot knowingly decide against an insurer's involvement and its rights are reserved against said insurer. *Cincinnati Insurance v. West American Insurance* (1998), 183 Ill.2d 317, 701 N.E.2d 499.

Assuming all policies to apply to the loss, contribution or equitable apportionment exists between the insurers. In insurance law, contribution is an equitable principle arising among co-insurers which permits one who has paid the entire loss to be reimbursed from other insurers who are also liable for the loss. *Royal Globe Insurance Co. v. Aetna Insurance Co.*, 82 Ill.App.3d 1003, 1005, 403 N.E.2d 680 (1980), citing 6 Appleman, *Insurance Law & Practice* § 3902, at 422 (1972). The reason for this rule is that one insurer has paid a debt which is equally owed by the other insurers. *Royal Globe*, 82 Ill.App.3d at 1005, citing 16 *Couch on Insurance* § 62:141, at 560-61 (2d ed. 1966).

In order for an insurer to recover under a theory of equitable contribution, the insurer seeking contribution must prove: (1) all facts necessary to the claimant's recovery against the insured; (2) the reasonableness of the amount paid to the insured; and (3) an identity between the policies as to parties and insurable interests and risks. *Royal Globe*, 82 Ill.App.3d at 1005; *Hall v. Country Casualty Insurance Co.*, 204 Ill.App.3d 765.

In *Cincinnati Insurance Co. v. West American Insurance Co.*, 183 Ill.2d 317, 701 N.E.2d 499 (1998), the court determined that insurers have an affirmative duty to contact their insureds when they have knowledge that the insured may be covered by a policy issued by the insurer. The court found a "constructive" tender where an insured was unaware of coverage and the insurer was already defending another named insured on the same policy for the same loss. The court stated that requiring actual tender: "requires an insured to jump through meaningless hoops towards an absurd end: telling the insurer something it already knows. Such a rule injects a degree of gamesmanship into the insurer-insured relationship without providing any valid corresponding benefit. In fact, the only benefit of such [a] rule is to create a possibility & where none would otherwise exist & for an insurer to escape an obligation it otherwise owes its insured." *Cincinnati Insurance Co.*, 183 Ill.2d at 328-29, quoting *Federal Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 282 Ill. App.3d 716, 725 (1996).

With regard to the reasonableness of an insurer presuming that its insured has decided to forgo coverage in the absence of written notice, the court stated: "The duty to defend may be discharged simply by contacting the insured to ascertain whether the insurer's assistance is desired. If the insured indicates that it does not want the insurer's assistance, or is unresponsive or uncooperative, the insurer is relieved of its duty to defend." *Cincinnati Insurance Co.*, 183 Ill.2d at 326.

Accordingly, a co-insurer will be able to invoke equitable apportionment when an Institute of London election is made without actual knowledge of other policies.

The arena involving additional insureds and multiple coverage is extremely complex. While the aforementioned commentary is by no means exhaustive, some basic logic can be applied to maximize an insurer's subrogation rights or contribution for equitable apportionment by the careful review of all contractual and insurance documents. In all cases involving multiple insurance coverage, at a minimum, the following investigation should be performed:

1. Obtain copies of all certificates of insurance naming your insured for the project in question.
2. Obtain all contractual documents involving the job including insurance requirements.
3. Demand from the owner, general contractor, or architect, copies of all insurance certificates for the entire project.
4. Obtain copies of all insurance policies naming your insured as an additional insured or insured and compare standing: primary vs. excess; qualified vs. unqualified coverage.
5. Investigate with your insured all companies to which it tendered the loss.
6. Investigate with your insured the results of all such tenders.
7. Encourage your insured to tender to all insurers on which it is named as an insured or additional insured (or in the alternative, confirm that your insured's election was done with the knowledge to the exclusion of other coverage).
8. Tender your insured's defense and/or make a claim for equitable contribution or apportionment to any other carriers of whom your insured did not have knowledge of the coverage while the company had superior knowledge of same.
9. Investigate any claims of your insured against other parties for their failure to provide your insured with coverage.
10. Continue to repeatedly apply the above analysis as additional information is uncovered or discovered during the litigation process and pursue declaratory judgments as needed.

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