



COVERAGE FOR CONTRACTUAL RISK TRANSFER AND ADDITIONAL INSURED ISSUES

**Kevin P. Dean, Saxe Doernberger & Vita
Beth Bradley, Tollefson Bradley Ball & Mitchell**

October 19, 2006

“Advocates For Policyholders in Insurance Coverage Disputes”

www.sdvlaw.com

© 2007 Saxe Doernberger & Vita, P.C.



Outline

- Contractual Risk Transfer
- Additional Insureds
- The Big AI Issues
- “Arising Out Of”
- Coverage for Completed Operations
- Contractual Liability v. AI Coverage
- “Other Insurance” Issues
- Contractual Requirements and Certificates of Insurance



Contractual Risk Transfer

- Risk Allocation Through Contract
 - GC/CM contract, subcontract, side agreement
 - Specific paragraphs for indemnity
 - Hidden provisions throughout contract
- Effect of Indemnity Provisions
 - Shifts payment of defense
 - Cost of remedy



Contractual Risk Transfer

- State Law Determines Enforceability of Indemnification Agreements (see handout: State Construction Anti-Indemnity Statutes)
 - Where no anti-indemnity statutes, agreements are enforceable if they clearly reflect an agreement by both parties to transfer liability, and can include indemnification for the indemnitee's sole negligence
 - ◆ *City of Montgomery v. JYD Intern., Inc.*, 534 So.2d 592, 594 (Ala. 1988) (the provisions must be unambiguous and unequivocal)
 - ◆ *N.P.P. Contractors, Inc. v. John Canning & Co.*, 715 A.2d 139, 142 (D.C. App. 1998) (mutual intention of the parties to shift responsibility for indemnitee's negligence should appear with clarity from the face of the contract)



Contractual Risk Transfer

- Certain states prohibit indemnification for a contractor's sole or concurrent negligence
 - ♦ Conn. Gen. Stat. § 52-572k (“Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction ... of any building ... that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property *caused by or resulting from the negligence of such promisee ...* is against public policy and void....”)
 - ♦ *Costin v. Bhandari Constructors & Consultants, Inc.*, 285 F. Supp. 2d 165 (D.Conn. 2003)
- Other states prohibit indemnification only for the indemnitee's sole negligence
 - ♦ Mich. Comp. Laws Ann. § 691.991 (“A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction ... of a building ..., purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee ... is against public policy and is void and unenforceable.”)
 - ♦ *Townes v. DeMaria Bldg Co.*, 2006 Mich. App. LEXIS 2130 (July 6, 2006)



Contractual Risk Transfer

- Insurance Coverage for Contractual Risk Transfer
 - Coverage Through Exception to Exclusion “b”

2. Exclusions.

This insurance does not apply to:

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) Assumed in a contract or agreement that is an “insured contract”....

CG 00 01 10 93



Contractual Risk Transfer

- Definition of Insured Contract
 - ♦ “That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third party or organization....” CG 00 01 10 93
 - ♦ Tort Liability of Another
 - Does not extend to tort liability solely of the indemnitor. *Hankins v. Pekin Ins. Co.*, 713 N.E.2d 1244 (Ill. App. 1999)
 - Does not extend to contract liability of another. *ALEA London, Ltd. v. Central Gulf Shipyard, LLC*, 2006 U.S. Dist. LEXIS 22512 (W.D. La. Mar. 30, 2006)
 - ♦ Invalid indemnity agreement not an insured contract?
 - *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000)



Additional Insureds (AI)

- Who is an Insured
 - Named Insured
 - Omnibus Insured
 - Blanket—as required by contract
 - Specific AI endorsement
- Differences in Policy Application
 - Conditions
 - ♦ AI also required to give timely notice. *City of New York v. St. Paul Fire and Marine Ins. Co.*, 21 A.D.3d 978, 801 N.Y.S.2d 362 (2d Sept. 2005); *Kreckel v. Walbridge Adinger Co.*, 721 N.W.2d 508 (Wisc. App. 2006)
 - Exclusions— “you”; “the insured”; “any insured”
 - ♦ Worker’s Comp/Employer’s Liability exclusions referenced “the insured;” inapplicable to AI. *Penske Truck Leasing v. Republic Western*, 407 F. Supp. 2d 741 (E.D.N.C. 2006)
 - ♦ Employer’s liability exclusion in umbrella policy referenced “any insured;” applied to AI when named insured’s employee injured. *American Econ. Ins. Co. v. Texas Instruments, Inc.*, 2006 U.S. Dist. LEXIS 9754 (N.D. Tex. Mar. 9, 2006)



The Big AI Issues

- “Arising Out Of”
- Completed Operations Coverage: in or out?
- Vicarious Liability Limitations



“Arising Out Of”

- Older Forms

- “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’* for that insured by or for you.”
- CG 20 10 11 85



“Arising Out Of”

■ “Arising out of”

■ Case law

◆ Broader Than Causation

- The term “arising out of” is “broader in meaning than the term ‘caused by’ and mean[ing] ‘originating from,’ ‘having its origin in,’ ‘growing out of,’ ‘flowing from,’ ‘incident to,’ or ‘having connection with.’” *Hagen v. Aetna Cas. & Sur. Co.*, 675 So.2d 963, 965 (Fla. 5th DCA 1996)

◆ Causal Connection

- “But for” causation. *State Auto. Mut. Ins. Co. v. Kingsport Devm’t, LLC*, 846 N.E.2d 974 (Ill. App. 2006) — but for work for GC, employee would not have been present, and would not have been injured
- Minimal connection sufficient. *Acceptance Ins. Co. v. Syufy Enterps.*, 69 Cal.App.4th 321 (1999). Covered injury to AI’s employee, even though on break. See also *Vitton Constr. Co. v. Pacific Ins Co.*, 110 Cal.App.4th 762 (2003)



“Arising Out Of”

- ◆ Insufficient Connection
 - Employee of named insured, a masonry contractor, was in collision on way home, allegedly because AI’s trees blocked view. *Markel Internat’l Co., Ltd. v. Centex Homes, LLC*, 2006 U.S. Dist. LEXIS 4780 (D.N.J. Feb. 2, 2006)
 - Petition did not allege liability arising out of work performed by named insured, even if extrinsic evidence established connection. *D.R.Horton-Texas, Ltd. v. Markel Internat’l Ins. Co.*, 2006 Tex. App. LEXIS 5531 (June 29, 2006)

- ◆ No requirement of actual fault of named insured
 - *Town of Manchester v. Vermont Mut. Ins. Co.*, 2006 Conn. Super. LEXIS 13(Jan. 3, 2006) (citing as majority rule)
 - *Brooklyn Hosp. Center v. One Beacon Ins.*, 2004 N.Y. Misc. LEXIS 2698 (Dec. 14, 2004) (employee of second subcontractor injured using named insured’s ladder)



“Arising Out Of”

- ◆ Mere presence insufficient
 - Minimal or incidental causal connection enough, but mere presence in vicinity was not nexus. *Mutual of Enumclaw Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2006 U.S. Dist. LEXIS 1160 (W.D. Wash. Jan. 4, 2006)
 - *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines*, 101 Cal.App.4th 1038 (2002) — presence entirely incidental to GC’s activity

- Distinction between BI and PD?



Vicarious Liability

- Older forms not restricted
 - *Turner Constr. Co. v. Kemper Ins. Co.*, 2006 U.S. App. LEXIS 8489 (2d Cir. Mar. 22, 2006) – “arising out of” named insured’s work does not require named insured to be negligent
 - *State Auto. Mut. Ins. Co. v. Kingsport Devm’t, LLC*, 846 N.E.2d 974 (Ill. App. 2006) – without language excluding AI’s negligence, “arising out of” language not limited to vicarious liability
 - *Ryder Integrated Logistics v. BellSouth Telecom., Inc.*, 627 S.E.2d 358 (Ga. App.), *cert. granted*, Docket No. S06G1133 (July 14, 2006) – covered AI’s own negligence
- Newer forms further restrict coverage for additional insured’s own negligence
 - *Evanston Ins. Co. v. ATOFINA Petrochem., Inc.*, __ S.W.3d __, 2006 Tex. LEXIS 439 (2006)
 - ♦ Primary covered AI for “liability arising out of ongoing operations” but excluded AI’s sole negligence. Court found excess also limited, as following form clause was more specific than generic AI provision. As named insured was non-suited, and AI settled, issue of fact still existed as to sole negligence.
 - *ATOFINA Petrochem., Inc. v. Continental Cas. Co.*, 185 S.W.3d 440 (Tex. 2005)
 - ♦ Exclusion of “liability arising out of any act, error or omission” of the AI excluded sole negligence, but did not limit to vicarious liability; otherwise, would be illusory



Vicarious Liability

- *United National Ins. Co. v. Motiva Enterp., L.L.C.*, 2006 U.S. Dist. LEXIS 2561 (S.D. Tex. Jan. 12, 2006)
 - ♦ Excess policy limited coverage to liability “imposed or sought to be imposed ...because of an alleged act or omission of the named insured;” excluded liability for liability for AI’s “own acts or omissions.” Allegation of vicarious liability for named insured’s conduct was sufficient.

- *American Econ. Ins. Co. v. Texas Instruments, Inc.*, 2006 U.S. Dist. LEXIS 9754 (N.D. Tex. Mar. 9, 2006)
 - ♦ Policy provided coverage for AI “only to the extent that you [named insured] are held liable due to ongoing operations for ...[AI]. No coverage for injury to named insured’s employee; named insured could not be held liable because of exclusive remedy of worker’s comp.

- *But see American Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 2006 U.S. Dist. LEXIS 33556 (S.D. Tex. May 23, 2006)
 - ♦ Where policy provided coverage for damage caused “in whole or in part” by named insured, and excluded only AI’s sole negligence, coverage was not limited to vicarious liability



Completed Operations

- Completed Operations Coverage addresses continuing liability for an additional insured from the indemnitor's work after that work is completed
- AI Endorsements over the years changed to address completed operations coverage
- 1986 Version (CG 20 10 11 85)
 - “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.”
 - “Your work” is defined in such a way as to include work that had been completed
 - *Pardee Constr. Co. v. Ins. Co of the West*, 77 Cal.App.4th 1340 (2000)
 - Covered completed operations; court distinguished “ongoing operations” or specific exclusions
- 1993 Version (CG 20 10 10 93)
 - “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.”
 - Still includes completed operations coverage, for example, when property damage occurs after work is completed. Language focuses on the source of the liability, which can be traced to the named insured's operations



Completed Operations

- Newer forms

- CG 20 10 07 04

“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.



Completed Operations

- CG 20 10 07 04 (cont'd)

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."



Completed Operations

■ Other Endorsements

- CG 20 26 07 04 – Additional Insured – Designated Person or Organization
 - ◆ Follows CG 20 10. However, revision in 2004 did not incorporate the “completed work” exclusion of the CG 20 10 07 04 form

- CG 20 33 07 04 – Additional Insureds – Owners, Lessees and Contractors – Automatic Status When Required In Construction Agreement With You
 - ◆ Includes unique limitation: “A person’s or organization’s status as an insured under this endorsement ends when your operations for that insured are completed.”
 - ◆ Unclear what this means for completed operations coverage

- CG 20 37 07 04 – Additional Insureds – Owners, Lessees and Contractors – Completed Operations
 - ◆ Explicitly provides completed operations coverage



Intersection and Conflict Between Contractual Liability and AI Coverage

- AI vs. Indemnity
 - AI coverage and indemnity operate independently
 - ◆ *Evanston Ins. Co. v. ATOFINA Petrochem., Inc.*, __ S.W.3d __, 2006 Tex. LEXIS 439 (2006)
 - ◆ Although, sometimes AI limited or defined by scope of indemnity. *See United National Ins. Co. v. Motiva Enterp., L.L.C.*, 2006 U.S. Dist. LEXIS 2561 (S.D. Tex. Jan. 12, 2006)
 - ◆ *But see Westchester Fire Ins. Co. v. Continental Cas. Co.*, 2006 Minn. App. Unpub. LEXIS 274 (Mar. 28, 2006), finding hold harmless language, requiring insurance, sufficient to trigger blanket AI endorsement
 - Indemnity covered as contractual liability
 - AI coverage determined by policy and AI endorsement
 - AI coverage still exists, even if indemnity limited by State Law
 - ◆ *Royal Indem. Co. v. Terra Firma*, 2006 Conn. Super. LEXIS 2290 (July 25, 2006) – anti-indemnity statute did not preclude AI requirement
 - ◆ *American Cas. Co. v. General Star Ind. Co.*, 125 Cal.App.4th 1510 (2005) – statutory limitation on indemnity for sole negligence did not limit AI coverage
 - ◆ But, some anti-indemnity statutes preclude circumvention by AI requirements. *See, e.g., Mears v. Comm. Gen'l Liab. Ins.*, 926 So.2d 754 (La. App. 2006)



Contractual Liability vs. AI

- Selection of counsel
- Notice requirements/pre-tender costs
- Defense in or out of limits
- Other Insurance



“Other Insurance” Issues

- Contractual vs. AI Endorsement
- Priority
 - Newer forms expressly address AI
 - ◆ Excess for AI. *Englert v. Home Depot*, __ A.2d __, 2006 N.J. Super. LEXIS 265 (2006)
- Allocation
 - With AI’s insurer
 - ◆ Umbrella policy still excess of AI’s primary. *Cincinnati Ins. Co. v. Boller Constr., Inc.*, 2006 U.S. Dist. LEXIS 10764 (N.D. Ill. Mar. 15, 2006)
 - ◆ Both included excess language; required to prorate. *Fireman’s Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009 (D. Neb. 2006)
 - With other subcontractors
 - ◆ *BP Air Cond’g Corp. v. One Beacon Ins. Group*, 821 N.Y.S.2d 1 (N.Y. App. 2006)
 - Defense v. indemnity



Contract Requirements and Certificates

- Contract requirements
 - Form not available
 - Form not purchased
 - Completed ops – length of coverage required
 - Impact on limits
 - ◆ *United National Ins. Co. v. Motiva Enterp., L.L.C.*, 2006 U.S. Dist. LEXIS 2561 (S.D. Tex. Jan. 12, 2006) – limited by dollar amount, but did not limit to primary coverage



Contract Requirements and Certificates

■ Certificates

- Not specific as to scope
- May misrepresent actual coverage
- Create coverage?
 - ◆ ACORD language—does not amend, extend, or alter the terms of the policy
 - ◆ Did not create AI coverage
 - *TIG Ins. Co. v. Sedgwick James of Washington*, 184 F. Supp. 2d 591 (S.D. Tex. 2001), *aff'd*, 276 F.3d 754 (5th Cir. 2002)
 - *Cincinnati Ins. Co. v. Boller Constr., Inc.*, 2006 U.S. Dist. LEXIS 10764 (N.D. Ill. Mar. 15, 2006)
 - *Alabama Elec. Coop. v. Bailey's Constr. Co.*, ___ So.2d ___, 2006 Ala. LEXIS 178 (2006)
 - ◆ Still required written contract
 - *St. Paul Fire & Marine Ins. Co. v. Tip Top Bldrs, Inc.*, 2006 U.S. Dist. LEXIS 29928 (N.D. Ill. May 5, 2006)
 - *True Oil Co. v. Mid-Continent Ins. Co.*, 173 Fed.App. 645 (10th Cir. 2006)
 - ◆ Did not alter excess status. *Benderson Dev't Corp. v. Transcontinental Ins. Co.*, 12 Misc.3d 257, 813 N.Y.S.2d 646 (N.Y. Sup. 2006)
 - ◆ Issues of Authority
- Liability for Misrepresentation
 - ◆ Common Law
 - ◆ Statutory