

ADDITIONAL INSURED COVERAGES

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What Is An Additional Insured?

1. A person or entity added to a policy by special endorsement.
2. Always obtain a copy of the contract between the named insured and AI.

Reasons for Additional Insured Status

- Reinforce the risk transfer accomplished with indemnity agreements;
- Provides additional insured with the right to an immediate defense by the named insured's insurer;
- It *may* allow one party to transfer liability arising from its sole negligence to the other party's insurer;

Reasons for Additional Insured Status

- It *may* prohibit the indemnitor's insurer from subrogating against the indemnitee when a loss is caused by the indemnitee's acts or omissions;
- It may avoid having losses impact the loss history of the additional insured;
- It may substantially increase the limits of insurance available to the additional insured for a given project;

Reasons for Additional Insured Status

- It may lessen the chance that the additional insured will be forced to sue the indemnitor directly to be made whole following a claim or suit;
- It *may* avoid the impact of anti-indemnity statutes

Additional Insured Endorsements

- Scheduled Basis – the additional insured is listed either on the endorsement itself or on the declarations page;
- Blanket Basis – the additional insured is determined by whether a “written contract” requires that such insurance be procured

AI Endorsements

- Typically require either “caused, in whole or in part, by” or “arising out of” language.
- Apply to either ongoing operations or completed operations

POLICY NUMBER:

ENDT. #19

COMMERCIAL GENERAL LIABILITY
CG 20 26 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – DESIGNATED
PERSON OR ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

<p>Name Of Additional Insured Person(s) Or Organization(s)</p> <p>Where required by written contract, we will consider our policy to be primary under any other insurance maintained by the additional insured for injury or damage covered by this endorsement and that their policy will be non-contributing with this insurance.</p>
<p>Information required to complete this Schedule, if not shown above, will be shown in the Declarations.</p>

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 your acts or omissions or the acts or omissions of those acting on your behalf:

- A. In the performance of your ongoing operations; or
- B. In connection with your premises owned by or rented to you

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: As required by written contract signed by both parties prior to loss.
Location And Description of Completed Operations:
Additional Premium: <u>Not Applicable</u>

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

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 and described in the schedule of this endorsement performed for that insured and included in the "products-completed operations hazard".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

**ADDITIONAL INSURED – OWNERS, LESSEES
OR CONTRACTORS**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

1. **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 caused, in whole or in part, by your performance of "your work" for that insured.
2. With respect to 1. above the following additional provisions apply:

4. Other Insurance

The insurance afforded by this Coverage Part is primary insurance and we will not seek contribution from any other insurance available to the insured unless the other insurance is provided by a contractor other than the above named additional insured. We shall be considered as excess insurance of any other insurance provided by a contractor other than the above named additional insured.

This amendment applies only when you have agreed by written "insured contract" to designate the person or organization listed above as an additional insured subject to all provisions and limitations of this policy.

All other conditions remain unchanged

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION - ADDITIONAL INSURED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

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 caused, in whole or in part, by your performance of ongoing operations for that insured.

This amendment applies only when you have agreed by written "insured contract" to designate the person or organization listed above as an additional insured subject to all provisions and limitations of this policy.

“Arising Out Of” Language

- Only a moderate connection between the named insured and the injury or damage complained of is required
- Does NOT require proximate causation
- Duty to defend has been determined to have been triggered by pleadings referencing the named insured, or that the injured party was on a project working for the named insured when injury occurred

“Caused In Whole Or In Part By” Language

- Requires proximate causation
- In order to trigger the duty to defend, the named insured’s actions **MUST** be alleged to have caused the injury or damage complained of (in whole or in part).
- Duty to indemnify will trigger when named insured is adjudicated to have caused the injury or damage by even 1%.

What About Certificates of Insurance?

- No coverage conferred
 - *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006)
- Claim against contracting party
- Claim against agent

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YY)

PRODUCER
Broker Name
Broker Address

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

COMPANIES AFFORDING COVERAGE

INSURED

Contractor Name
Contractor Address
City/State/Zip code

COMPANY Insurance Carrier Name
A
COMPANY Insurance Carrier Name
B
COMPANY Insurance Carrier Name
C
COMPANY
D

COVERAGES

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOT WITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENTS WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

Co Ltr	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
A	<input checked="" type="checkbox"/> GENERAL LIABILITY				GENERAL AGGREGATE \$2,000,000
	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY				PRODUCTS-COMP/OP AGG \$2,000,000
	<input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR				PERSONAL & ADV INJURY \$1,000,000
	<input type="checkbox"/> OWNER'S & CONTRACTOR'S PROT				EACH OCCURRENCE \$1,000,000
	<input checked="" type="checkbox"/> GENERAL AGGREGATE PER PROJECT				FIRE DAMAGE (Any one Fire)
A	<input type="checkbox"/> AUTOMOBILE LIABILITY				MED EXP (Any one Person)
	<input type="checkbox"/> ANY AUTO				COMBINED SINGLE LIMIT \$1,000,000
	<input checked="" type="checkbox"/> ALL OWNED AUTOS				BODILY INJURY (Per Person)
	<input type="checkbox"/> SCHEDULED AUTOS				BODILY INJURY (Per Accident)
	<input checked="" type="checkbox"/> HIRED AUTOS				PROPERTY DAMAGE
A	<input checked="" type="checkbox"/> NON-OWNED AUTOS				AUTO ONLY - EA ACCIDENT
	<input type="checkbox"/>				OTHER THAN AUTO ONLY:
	<input type="checkbox"/>				EACH ACCIDENT
A	<input type="checkbox"/> GARAGE LIABILITY				AGGREGATE
	<input type="checkbox"/> ANY AUTO				EACH OCCURRENCE
A	<input type="checkbox"/> EXCESS LIABILITY				AGGREGATE
	<input type="checkbox"/> UMBRELLA FORM				
A	<input type="checkbox"/> OTHER THAN UMBRELLA FORM				
	<input type="checkbox"/>				
B	<input type="checkbox"/> WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY				<input checked="" type="checkbox"/> STATUTORY LIMITS
	<input type="checkbox"/> THE PROPRIETOR/PARTNERS/EXECUTIVE OFFICERS ARE: <input type="checkbox"/> INCL <input type="checkbox"/> EXCL				EACH ACCIDENT \$ 1,000,000
					DISEASE - POLICY LIMIT \$ 1,000,000
					DISEASE - EACH EMPLOYEE \$ 1,000,000
OTHER					

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS WORK PROJECT: PROJECT:
The Port of Seattle, Parsons Transportation Group, Inc. their respective officers, agents and employees, and any additional entities the Port may request are added as Additional Insured per endorsements equivalent to ISO Form 2010 (11/85)
Coverage is primary and non-contributory. Waiver of Subrogation is included for General Liability, Workers' Compensation and Automobile Liability per Endorsement #

CERTIFICATE HOLDER

CANCELLATION
SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL MAIL 45 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT

AUTHORIZED REPRESENTATIVE 209250000

Issues with AI Coverage

- Primary and Non-Contributory;
 - Other insurance
- Use of extrinsic evidence to trigger AI status;
- Application of exclusions to additional insureds;
 - “You”
 - “The Insured”

Refresher On Duty To Defend

- In Texas, we follow the Complaint Allegation Rule or 8 Corners Doctrine
- Exception for duty to defend AI
- Only documents needed to determine duty to defend an AI are:
 1. The contract between the named insured and AI, depending on language of AI endorsement
 2. The pleadings
 3. The policy

What About the Duty to Indemnify?

The “actual facts determined in the underlying litigation, or otherwise made available, determine whether the insurer has the duty to indemnify.” *Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, LLP*, 276 F. Supp. 2d 601, 625 (E.D. Tex. 2003).

Gilbane Bldg. Co. v. Admiral Ins. Co. (5th Cir. 2011)

- FACTS:
- PARR SUSTAINED INJURY ON JOB SITE WHILE CLIMBING DOWN A LADDER
- GILBANE -- GENERAL CONTRACTOR
- BAKER CONCRETE-INSTALLED LADDERS
- EMPIRE STEEL-PARR'S EMPLOYER

Gilbane Cont'd

IN TRIAL COURT:

- **PARR SUED GILBANE AND BAKER CONCRETE**
- **ALLEGED THAT RECENT RAINSTORMS HAD CAUSED THE WORKSITE TO ACCUMULATE MUD AND GILBANE WAS NEGLIGENT IN FAILING TO KEEP WORKPLACE CLEAN**

Gilbane Cont'd

- EMPIRE, PARR'S EMPLOYER, INSURED BY ADMIRAL
- GILBANE REQUESTED DEFENSE AS ADDITIONAL INSURED FROM ADMIRAL
- THE ADMIRAL ADDITIONAL INSURED ENDORSMENT PROVIDED:

Gilbane Cont'd

- **SCHEDULE**
- **Name of Additional Insured Person(s) or Organization(s):**
 - Any person or organization that is an owner of real property or personal property on which you are performing ongoing operations, or a contractor on whose behalf you are performing ongoing operations, *but only if coverage as an additional insured is required by written contract or written agreement that is an "insured contract,"* and provided that the "bodily injury," "property damage" or "personal & advertising injury" first occurs subsequent to execution of the contract or agreement

Gilbane Cont'd

- **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 & 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*

Gilbane Cont'd

- Gilbane requested AI coverage under Admiral policy pursuant to Trade Contractor Agreement (TCA) between Gilbane and Empire Steel
- In the TCA, Empire Steel had agreed to secure AI coverage for Gilbane
- Admiral denied coverage (presumably because Parr never sued Empire Steel or alleged its liability as opinion is silent as to reasons for denial.)

Gilbane Cont'd

- Gilbane settled with Parr, then filed suit against Empire Steel and Admiral
- Gilbane sought the Court to declare that Admiral had both a duty to defend and to indemnify
- Trial court found that Admiral had a duty to defend and indemnify Gilbane

Gilbane Cont'd

- The 5th circuit began by analyzing Gilbane's duty to defend claim.
- It found that Parr never alleged that he or Empire Steel caused his injuries.
- Although Gilbane argued that the Court should look to extrinsic evidence, the 5th circuit rejected the argument

Gilbane Cont'd

- Ultimately, the 5th Circuit found that Admiral owed no duty to defend Gilbane because Parr's pleadings did not allege that either Parr or Empire Steel caused his injuries.
- The holding is tied directly to the language of the AI endorsement containing the "caused, in whole or in part, by" language

Gilbane Cont'd

- CONSIDER: Would the holding on Admiral's duty to defend be different had Empire Steel's AI endorsement contained the "arising out of" language? Why?

Gilbane Cont'd

TURNING TO DUTY TO INDEMNIFY

- Trial Court found that Parr fell while climbing down a ladder and carrying an extension cord.
- He told another employee that his feet became entangled in the extension cord when he fell.
- The trial court concluded that a jury would have found Parr or Empire Steel at least 1% at fault for Parr's injuries.

Gilbane Cont'd

- Based on the trial court's determination that a jury could have found Parr or Empire Steel at least 1% at fault, the 5th Circuit ruled that Admiral had a duty to indemnify.
- Holding implies that Admiral would 100% indemnify even if Empire Steel was only 1% liable.

Considerations from *Gilbane*

- Would Texas Courts ever allow a percentage of indemnity to equal the percentage of the named insured's fault?
- Dividing causation in bodily injury cases vs. property damage cases.

***Am. Empire Surplus Lines Ins.
Co. v. Crum & Forster Spec.
Ins. Co. (S.D. Tex. 2006)***

- Finger was a general contractor that hired Multi as a framing subcontractor
- Entered into a Contractor-Subcontractor Agreement whereby Multi was required to name Finger as an AI to its policy
- Crum & Forster was Multi's insurer, and issued an AI endorsement

Am. Empire Cont'd

■ The AI Endorsement stated:

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 [Multi's] acts or omissions; or
2. The acts or omissions of those acting on your [Multi's] behalf; in the performance of the ongoing operations for the additional insured at the location(s) designated above. There is no coverage for the additional insured for "bodily injury", "property damage" or personal and advertising injury" arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured.

Am. Empire Cont'd

- Two employees were injured (one died) and both made allegations against Multi and Finger.
- Finger's insurer, American Empire, demanded that Crum & Forster defend Finger. Crum & Forster refused.
- American Empire then filed a declaratory judgment action against Crum & Forster.

Am. Empire Cont'd

- Crum argued that the policy only covered Finger if Finger is found vicariously or derivatively liable for the acts of Multi
- Because the Petition did not allege facts indicating that Finger was vicariously liable, Crum argued that there was no coverage for Finger
- American Empire argued that Finger's liability was irrelevant – only Multi's was relevant

Am. Empire Cont'd

- The Court disagreed with Crum's argument, and found that the AI coverage could trigger for joint liability, not just vicarious liability
- "The focus . . . is on whether Plaintiffs allege a theory in the operative pleading in the Underlying Lawsuit under which Finger could be held liable for conduct by Multi that 'caused' injury to a third party in any way. The sentence does not address the conduct of the other wrongdoer or wrongdoers, whether they be the additional insured (Finger) or not."

Am. Empire Cont'd

- As the pleadings in the underlying suit could easily be interpreted as alleging that Multi's acts or omissions, in whole or in part, caused the injuries, Crum had a duty to defend.
- Crum also argued that the AI coverage would not apply where Multi and Finger were alleged to have committed independent acts of negligence that caused the injuries.

Am. Empire Cont'd

- The Court noted that it was not persuaded by Crum's argument because it relied on a narrow interpretation of the underlying pleadings.
- BUT: The Court declined to decide the viability of Crum's linguistic interpretation of the policy.
- Could it be possible for AI coverage (indemnity) to be limited to the liability caused by the named insured?

BP Air Condition Corp. v. One Beacon Ins. Group (N.Y. 2007)

- Henegan Construction Company subcontracted HVAC work to BP Air Condition Corp.
- BP then subcontracted out HVAC-steam fitting work to Alfa Piping Corp.
- Alfa was required to sign indemnity agreement and name BP as an AI to its policy. One Beacon was Alfa's insurer.

BP Air Condition Corp. Cont'd

- **Alfa's AI endorsement stated:**

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.

BP Air Condition Corp. Cont'd

- An employee of another subcontractor of BP's was injured when he slipped on an oil slick.
- The employee sued Hennegan, and Hennegan brought 3rd party claims against BP and Alfa.
- Although One Beacon agreed to defend Alfa, it declined to defend BP as an AI.

BP Air Condition Corp. Cont'd

- BP then filed a 4th Party action against One Beacon seeking a declaration of coverage
- One Beacon opposed by arguing that it owed no defense obligation to BP until it was shown that the injuries arose out of Alfa's activities.
- Court took note that NY is also a complaint allegation state

BP Air Condition Corp. Cont'd

- Court found that an AI is entitled to the same coverage as a named insured, so the defense obligation does not hinge on proven liability.
- Moreover, duty to defend analysis is the same for an AI as the named insured and is based on pleadings and policy.
- The Court held that the allegations raised the possibility that the injuries arose from Alfa's work for BP. Duty to defend existed.

Important Considerations

1. Obtain the contract between named insured and potential AI
2. Review AI endorsements and determine which triggering language is used
3. Determine if AI endorsement applies to ongoing or completed operations
4. Apply the language of the endorsement to the pleadings to determine if triggered
5. Percentage of indemnity owed could be undecided.