Judge Richard Posner, formerly of the Seventh Circuit Court of Appeals, once wrote: “Disinterested legal-doctrinal analysis of the traditional kind remains the indispensable core of legal thought, and there is no surfeit of such analysis today. I daresay that many legal scholars who today are breathing the heady fumes of deconstruction, structuralism, moral philosophy, and the theory of the second best would be better employed studying the origins of the Enlow-Ettleson doctrine or synthesizing the law of insurance.”\(^1\)

We, the editors of the *Handbook on Additional Insureds*, do not fancy ourselves legal scholars, but through our own experience as insurance practitioners, we have assembled a group of other insurance practitioners to synthesize at least one part of the law of insurance—the current state of the status, rights, obligations, and disputes concerning additional insureds. This area of the law and business of insurance is still developing, and, in some instances, readers will note the divergent paths taken in different jurisdictions. The pace of evolution has not slowed since the original edition of this handbook several years ago. Even though Judge Posner wrote that “disinterested legal-doctrinal analysis of the traditional kind remains the indispensable core of legal thought,” the *Handbook on Additional Insureds* aims to be anything but disinterested legal-doctrinal analysis. As with the original edition, this is a resource for the real world of insurance lawyers written by practitioners steeped in the daily business and legal realities of insurance, dealing with the important position and role of additional insureds.

At its most fundamental nature, “the purpose of additional insured coverage is to protect the additional insured from claims of vicarious liability, that is, liability based entirely on the relationship between two insureds, as opposed to any active negligence on the part of the additional insured.”\(^2\) Some jurisdictions have expanded the status of additional insureds beyond vicarious liability, and it is the

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more nuanced contours, exceptions, and alternative approaches taken across the country and internationally that have created a need for a resource such as this handbook.

We are pleased that our colleagues have taken up the task of revising the original edition. All chapters have been updated to include citations to additional jurisdictions for topics covered in the original edition and to include citations to decisions rendered since the original edition was published. Because the law changes, the prevailing rule in jurisdictions are updated where appropriate with citations to new case law, new statutes or regulations, and new policy wordings. In some instances, entire chapters have been rewritten. Among the chapters with significant revisions are Chapter 3 and its discussion of deductible and SIRs, Chapter 7 and its discussion of the employer’s liability exclusion, Chapter 8’s treatment of subrogation issues, Chapters that have received near-complete rewrites include Chapter 4, “Memorializing Additional Insured Status” and Chapter 11, “Limits Issues.”

Once again, we have included chapters addressing the law of Canada (Chapter 13) and the United Kingdom (Chapter 14), both of which have been fully updated and rewritten. We especially thank our Canadian and English colleagues for their contributions.

Overview of Contents

Chapter 1—Definitions and Comparisons of Commonly Used Titles. The first portion of the Handbook on Additional Insureds focuses on foundational matters; specifically, this chapter defines who/what is an additional insured. This chapter explains and compares the commonly used titles of “named insured,” “additional named insured,” “first named insured,” “automatic insured,” “additional insured,” “loss payee,” and “mortgagee.” Certainly, these terms are not always used consistently throughout the industry or by the courts, but at a fundamental level these terms have different meanings. Consequently, knowing the differences and similarities between these different types of insureds informs an understanding of the implications of additional insured status. For example, this chapter discusses who bears the responsibility for premium payments, who may cancel the policy, and who may agree to changes in policy terms.

Chapter 2—Common Provisions. This chapter addresses risk shifting accomplished by two different but related methods—indemnity agreements and additional insured requirements. Contractual indemnifications, often referred to as “hold harmless” provisions, do not constitute insurance in a technical sense; they do, however, generally establish which party will bear losses stemming from the performance of a contract. No doubt, these indemnity provisions can be effective in transferring risk. Moreover, that goal is the same for contractual requirements to add another as an additional insured, but it is accomplished differently, and courts
view them differently. They are distinguishable in a number of respects. Where contractual indemnification between parties shifts financial responsibility from the indemnified party to the indemnifying party and depends on the financial viability of the indemnitor, insurance shifts the risks to a third party, an insurer, which is (hopefully) financially stable. The interplay between these two methods of risk shifting is the focus of this chapter, which also touches on familiar scenarios in which these interactions play out.

Chapter 3—Hold Harmless and Indemnification Agreements and the Obligation to Procure and Maintain Insurance. This chapter deals with issues surrounding named insureds' indemnity obligations and duties to name other parties as additional insureds. Among the issues discussed are whether a party who promises but fails to name another as an additional insured is required to provide substitute performance, that is, defend and indemnify the intended additional insured. This chapter also addresses self-insured retentions and the relationship between an “insured contract” and an additional insured.

Chapter 4—Memorializing Additional Insured Status. Next, this handbook discusses how insurers and insureds memorialize a person's or entity's status as an additional insured. This topic necessarily includes a discussion on the use of and reliance on certificates of insurance. As discussed in this chapter, it is clear that insureds should not rely on them as substitutes for reviewing the actual policy. Certificates of insurance cannot grant coverage where none is afforded by the actual policy, nor can they expand coverage terms, and additional insureds are often held “to the same obligation as a named insured to review a policy of insurance on which it seeks to rely.”

Chapter 5—Development of Common AI Endorsements. Over many years, courts have interpreted additional insured provisions and, in response, the industry has modified them. Here, the author discusses how these provisions have developed and those endorsements that have traditionally been used and that are in use today. For example, among the most commonly disputed, litigated, and discussed issues concerning coverage afforded to additional insureds is the phrase “arising out of,” used in many policy terms addressing when coverage is afforded to an additional insured. Additional insureds are generally entitled to coverage under the insured's policy when they face liability “arising out of” the acts or omissions of the insured, and it has been argued that this term should be interpreted broadly. However, “the phrase ‘arising out of’ is not without limitation. . . . ‘[A]rising out of’ in the

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additional insured context implies a tighter connection than mere 'but for' causation. As Judge Posner put it, 'Maybe if Columbus hadn’t discovered America the federal courts of appeals would not have been created in 1891; but it would be odd to say that the federal appellate judiciary ‘arose from’ Columbus’ voyages.'

Clearly, there has been a spirited tug-and-pull between the insurance industry trying to limit exposure and policyholders looking to gain coverage to the fullest extent. Particularly when dealing with claims-made policies that provide coverage for harms that may have occurred long ago, knowing how the specific language of an additional insured provision has been interpreted is a necessity.

Chapter 6—Duty to Defend/Duty to Indemnify. This chapter focuses on the familiar topics of the duty to defend and the duty to indemnify. The four-corners rule is applicable to additional insured coverage questions, just as it is in the context of named insureds. That and other defense and indemnity issues are addressed here.

Chapter 7—Scope of Coverage. Here, the authors examine the scope of coverage afforded additional insureds. The chapter compares the coverage afforded additional insureds and named insureds under general liability policies, how they are the same, and situations in which their coverage differs. This chapter also focuses on those policy terms and exclusions most frequently discussed by courts and commentators when comparing and defining the coverages afforded additional insureds and named insureds. For example, “separation of insureds” provisions, which are commonly found in liability policies, are discussed along with the applicability of exclusionary language to an additional insured. Policy rescission is discussed, particularly in situations where only the conduct of a named insured is at issue, and the innocent additional insured is unaware of any wrongdoing or mistake. And, the chapter includes a discussion of cross liability exclusions.

Chapter 8—Subrogation and Antisubrogation. Insurers’ rights of subrogation are treated in this chapter. The doctrine of subrogation entitles insurers to stand in the shoes of insureds to seek indemnification from a party whose wrongdoing has caused the loss for which the insurer is bound to provide coverage. This chapter also deals with the related antisubrogation doctrine, which essentially provides that an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured is covered. The antisubrogation rule is implicated when an insurer has a duty to indemnify its insured and when it has a broader duty to defend its insured. The purpose of the rule is to prevent prejudice to the insured in light of potential conflicts between the interests of insured and insurer. These conflicts are further complicated by the interests of an additional insured. Finally, the waiver of subrogation clause is discussed.

Chapter 9—Choice of Law; Anti-indemnity Provisions; Insurability of Punitive Damages. Because insurance is fundamentally a state-regulated matter, there are, no doubt, significant differences in the way the states approach issues concerning additional insureds. The topic in this chapter is choice of law, anti-indemnity rules, and the insurability of punitive damages. Among other issues, highlighted here is the common scenario where the additional insured is domiciled in one jurisdiction, with the named insured domiciled in another. Also, how courts treat situations in which the risk is located in yet another jurisdiction is addressed. With regard to anti-indemnity rules, some states prohibit one person from indemnifying another for its “sole negligence.” Those laws, however, may not affect the would-be indemnitee’s position as additional insured. Some contractual indemnity clauses purport to require indemnification for the additional insured’s own negligence. In many cases, state legislatures have adopted anti-indemnity legislation to prohibit such arrangements. Finally, whether punitive or exemplary damages can be insured is a dispute with a long history in the law. As discussed in this chapter, the law continues to develop in this area and the law varies in terms of what, if any, circumstances make punitive damages insurable. While the law of many states precludes insurance of punitive damages altogether, sometimes as a matter of state statute, often there is an exception for vicarious liability when the insured is held liable for such damages but for no fault of its own. Similarly, many courts lift the prohibition when the individual causing the damage is not the named insured to whom the policy is issued (such as an additional insured). For this reason, the insurability of punitive damages has a special relevance to additional insureds.

Chapter 10—Notice/Late Notice. In this chapter, the authors cover notice of claims. Whereas insurers are often said to owe independent duties to separate insureds without regard to whether they are named insureds or additional insureds, the obligations of those named insureds and additional insureds are, in some instances, satisfied when only one acts. For example, in New York, an additional insured may rely on the named insured’s notice of a claim to the insurer for compliance with notice obligations, particularly where the interests of the named and additional insureds are not adverse; but, of course, where the named insured does not provide notice to the insurer, the additional insured has a duty to comply with the notice requirements in the policy. Because the duties that insurers owe to named insureds and additional insureds are separate, coverage for one does not always mean coverage for all. However, the scope of the notice obligation will be determined based on the construct of any relevant language used in the insurance contract. Moreover, the effect of particular language may vary from jurisdiction to jurisdiction. There are differences between how this plays out with “claims-made”

Chapter 11—Limits Issues. This chapter deals with limits issues. Policy limits may present problems for additional insureds, such as when policy limits have been diluted beyond what an insured expects due to the fact that there are multiple insureds claiming the same limits. Named insureds assume the risk that available policy limits on their insurance policy will be diluted when they include others as additional insureds. Similarly, additional insureds may find that although named insureds carry insurance with seemingly sufficient limits, there may be only a fraction of the coverage available when multiple insureds (named or otherwise) are covered under one policy.

In contrast, insureds may find that they have coverage from multiple policies for the same loss. Among the issues discussed in this chapter is “other insurance” clauses. Insureds will sometimes not care which insurer is providing a defense or indemnity, but they certainly care that someone is providing a defense or indemnity. When insurers are fighting as to whom should provide that defense, the insured can feel like piggy-in-the-middle. As one court wrote:

On facts, strikingly simple, neither complex nor conflicting, we have again the problem of an insurer who has written a policy and taken assured’s premium urging him to go elsewhere, tentatively, if not finally, because another insurer is, or ought to, or may be, liable for the whole, half, or part a loaf. In the process the moving insurer generally garbs itself in the appealing robes of some assured so that, casting itself in a strange role, it asserts what it so often denied that the policy should be liberally construed and, by a bare toe hold manages to make itself enough of a party to force a construction of another contract made by another insurer with another assured and which, under no circumstances, was made for its benefit.

So it is here. Coming as it does the accident and the assureds seem all but forgotten as the two insurers match clause against clause, coverage against exclusion, claim against denial, in this batter between fortuitous adversaries.7

Certainly, the implicated insurers have an interest in which insurer(s) responds on the primary level and which on an excess basis. Over the past several years, this primary vs. excess dispute has been a constant issue before courts and the source of much analysis and case law.

Chapter 12—Ethical Issues for Insurance Defense Counsel. Ethical issues facing insurers and attorneys are discussed in this chapter. When an insurer undertakes the defense of an insured pursuant to a policy, the insurer generally provides the insured with representation by outside counsel. The relationship between the insurer, the insured, and the attorney hired by the insurer to represent the insured is often called a “tripartite relationship.” This relationship is unique to the insurance

context. One court stated that the ethical dilemma created by the relationship among insurer, insured, and defense counsel “would tax Socrates, and no decision or authority . . . furnishes a completely satisfactory answer.” The tripartite relationship has a tendency to lead to conflict-of-interest issues. This chapter addresses the ethical issues arising from relationship between the insurer, the insured (or additional insured), and defense counsel.

Because the goal of this handbook is to provide a broad treatment of the law surrounding additional insureds, it includes a discussion of the law of Canada in Chapter 13 and that of the United Kingdom in Chapter 14.

Chapter 15 highlights additional insureds in specific industries, lines, or contractual relationships: A—Architects and Engineers; B—Directors’ and Officers’ Liability; C—Owners, Contractors, and Subcontractors; D—Landlord Tenant; E—Commercial/Business Auto Policy; F—Marine and Aviation Insurance; G—Construction Wrap; H—Vendors/Vendees.

Finally, we include in Chapter 16 a discussion of additional insureds from the vantage of forensic consultants.