Landlords and building owners rely on being covered by their tenants' and contractors' commercial general liability (CGL) insurance if there is an accident on the property. To get this coverage, they require that the tenants or contractors name them as additional insureds by an endorsement that amends the policy for this purpose. The fact that a person is listed as a certificate holder on a Certificate of Insurance does not make that person an additional insured – only an endorsement or other policy provision will add this person to the policy.

Over the years, the insurance industry has modified the additional insured endorsement form to limit the coverage provided to additional insureds. Thanks to changes made in 2013, the limits of the additional insured's coverage will not exceed the insurance required in the lease or construction contract. Landlords and property owners now must draft their insurance and indemnity provisions in a way that minimizes the pitfalls created by the new endorsements.

Long ago – in 1985 -- the standard additional insured endorsement used for construction contracts stated that the party named in the endorsement was also an insured under the policy with respect to liability arising out of the activities of the named insured for the additional insured or on the named insured's own behalf. See ISO CG 20 10 11 85 (ISO is the Insurance Services Office, Inc., an insurance industry organization that promulgates the forms customarily used in by insurers, and the last two numbers of the endorsement form show the year of its promulgation). This was "broad form" coverage, and it apparently worked too well. By 2004, the form for owners under construction
contracts covered the additional insured only for liability caused in whole or in part by
the named insured's acts or omissions or the acts or omissions of those acting on the
named insured's behalf (again excluding completed operations). See ISO CG 20 10 07
04. At this point, the owner's own sole negligence and the sole negligence of other
contractors was no longer covered by the contractor's insurance. These changes in
endorsement forms paralleled the enactment of contractor anti-indemnity statutes in many
states. See Marie A. Moore, Construction Contract Anti-Indemnity Statutes: Roadblocks

The endorsement form used for lessors was also changed over the years, though
not as radically. In 1996, this endorsement covered the additional insured for "liability
arising out of the ownership, maintenance, or use of that part of the premises leased to"
the named insured, excluding occurrences that took place after the named insured ceased
to be a tenant in the premises and structural alterations, new construction or demolition
operations performed by or on behalf of the additional insured landlord or manager. See
ISO CG 20 11 01 96.

The new ISO endorsement forms for Additional Insured – Owners, Lessees or
Contractors – Scheduled Person or Organization, ISO CG 20 10 04 13, and Additional
Insured – Managers or Lessors of Premises, ISO CG 20 11 04 13 limit even further the
coverage provided to the additional insured. Endorsement form ISO CG 20 11 04 13 (the
form for use with manager and lessor additional insureds) provides as follows (the 2013
added language is underlined):

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 arising out of the ownership, maintenance or use
of that part of the premises leased to [the named insured] and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after [the named insured] ceases to be a tenant in that premises.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the [additional insured].

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

Whichever is less.

The same language was added to the endorsement form for owners under construction contracts, ISO CG 20 10 04 13.

What does this mean? Clearly this means that lawyers must be more careful in drafting leases and construction contracts. The lessor and construction site owner will be covered by the other party's insurance only to the extent of the insurance limits required
in the lease or construction contract – even if the actual CGL coverage maintained has much higher limits.

This means that if a lawyer represents the landlord, the tenant will agree in the lease to maintain only $1,000,000 of CGL coverage, and the landlord tells the lawyer not to worry because the tenant really maintains $5,000,000 of coverage, the lawyer must advise its client that as an additional insured, the insurance company will be bound to it only for the $1,000,000 required in the lease, not the $5,000,000 limits of the policy. Of course, if the indemnification provisions of the lease require the tenant to indemnify and defend the landlord for all liability caused by the Tenant's operations in the premises, then the tenant should continue to be liable for the liability and defense costs not covered by insurance. But if the tenant has no assets, then this right to proceed against the tenant will not help the landlord.

Tenants and contractors should also want to increase the limits of the CGL coverage that they are required to maintain in their leases and construction contracts to the amount that they actually intend to maintain. The tenant should not want to give its insurance company an argument that it, rather than the insurance company, must pay for defense costs and liability that are within the policy limits but more than the insurance coverage required in the lease or construction contracts. Of course, the general contractual liability language and other provisions of the general CGL policy may and should provide the tenant or contractor with coverage for the additional amounts it owes landlord or owner by reason of its own negligence or its assumed tort liability even if the additional insured endorsement does not convey these rights. At this point however the
new endorsement limitations have not been in place very long, so their interaction with the general CGL policy provisions has not been determined.

These are only the initial questions raised by the new forms. However, these questions demonstrate the increased importance of drafting the insurance requirements of leases, management agreements, and construction contracts very carefully.

Finally, as was the case before the 2013 changes, even if a tenant or contractor agrees to name the landlord or owner as an additional insured, the landlord or owner should still maintain its own independent CGL policy. First, Certificates of Insurance are not reliable, so a landlord or property owner needs to obtain a copy of its tenant's or contractor's CGL policy (or at least its declarations page and endorsements) to confirm that it is actually an additional insured on the policy. See Marie A. Moore, You Can't Rely on a Certificate of Insurance, But What are the Alternatives?, Retail Law Strategist, Vol. __, (__, 2013). Second, an additional insured endorsement in favor of a landlord or construction site owner will still not cover either accidents that occur by reason of the landlord's alteration work or the site owner's sole negligence or accidents that occur after the lease has ended or the contract work has been completed. Third, state laws may also impose liability on a landlord or site owner for its own negligence and the insurer may claim that it has no obligation to the additional insured in this circumstance. [Illinois law cite] A CGL policy maintained and controlled by the landlord or site owner is the best protection from these risks.

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