Don’t Let a House Land on You: Indemnities and Third Party Insurance Considerations When Drafting Contracts and Pursuing Claims

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A. Introduction

Contracts are mechanisms by which parties agree upon allocation of certain risks; construction contracts are no exception. Often the manner in which risks are transferred to parties on construction projects is by transferring the risk “downstream” from the owner to the contractor, then to the subcontractors, then to the sub-subcontractors, and so on. This includes requiring parties to the applicable construction contract to indemnify other parties for certain risks. In fact, most industry-standard contracts designed for use on construction projects contain several different types of indemnification obligations.\(^1\)

Once a party assumes a risk on a construction project under its construction contract, one of the most common ways of protecting itself against the occurrence of that risk is by procuring insurance. Most industry-standard construction contracts also contain insurance requirements.\(^2\) Therefore, it is important for construction attorneys to have a good understanding of indemnifications obligations, including any applicable state specific restrictions on indemnification provisions, and the more common construction-related insurance requirements, including the various additional insured endorsements that are available in the marketplace.

B. Indemnification Provisions.

1. Common provisions. Almost all owner-contractor and contractor-subcontractor agreements contain indemnification provisions. A commonly used provision appears in the AIA General Conditions:

   Contractor shall, to the fullest extent provided by law with respect to its obligations under the Contract Documents, indemnify, defend, protect and hold harmless owner and Architect and each of their constituent advisors, partners, employers, agents, representatives, trustees,
stockholders, officers and directors, parents, subsidiaries and affiliates, as well as Owner’s tenants and lenders…from and against each and all of the following:


The provision goes on to indemnify against “any claims, liabilities, losses, damages, costs, expenses, including attorney’s fees, awards, fines or judgments…” that arise out of certain enumerated events. Id., § 3.18.1.1. The enumerated events must arise out of the Work, a Default under the Contract Documents, or “any other act or omission” by the Contractor or any entity for which it may be liable. The resulting injury must be, broadly stated, bodily injury or property damage. Id.

In recognition of certain state statutory alterations of contract law relating to indemnity for the indemnitee’s negligence, the provision does not allow indemnity where the claims against the indemnitee are the result of the indemnitee’s negligence or willful misconduct. Id. Further, the provision’s intent is to “adopt the law of comparative fault.” Id.

2. Categories of Indemnity Provisions. Contractual indemnity provisions typically fall into one of three categories:

   a. “Broad” or “fault-free” provisions—the indemnitee is indemnified against claims arising from its sole fault or negligence;

   b. “Intermediate” provisions—indemnitee is indemnified even if claim arises in part from the indemnitee’s negligence;

   c. “Limited” provisions—indemnitee is indemnified where claim arises from the indemnitor’s negligence.

3. **Common Law Indemnity.** Most, if not all, jurisdictions recognize common law or “implied” indemnity. There, the indemnitee must demonstrate that its liability is only “passive” or vicarious, and the indemnitee is 100% at fault. Bruner and O’Connor, at 10:4. As applied at common law, this is an “all or nothing” approach—if the claim results from some negligence of the indemnitee, it is not indemnified.

Indemnity and contribution concepts are often confused. Contribution is primarily a creature of statute, and has no application in the absence of joint tortfeasors. *See*, e.g., N.C. Gen. Stat. § 1B-1 et seq. (North Carolina’s adoption of the Uniform Contribution Among Tort-Feasors Act). Under implied indemnity concepts, however, if the indemnitee is partly at fault, it is not entitled to indemnity—although it may be entitled to contribution. The concept is further muddled by some statutes or indemnity provisions (like the AIA A207 provision) that engraffe comparative fault concepts on the indemnity arena.

Finally, in many jurisdictions, no right of implied indemnity will exist where there is an express indemnity agreement relating to the same subject matter.

4. **Interpretation of Indemnity Provisions.** Indemnity provisions are interpreted in accordance with state law contract principles. For the most part, parties with equal bargaining power may enter into any agreement they desire, and the courts will not interfere with their bargain. At least historically, courts would not interfere with “fault-free” provisions that provided an indemnitee with indemnification for the results of its sole negligence, although some jurisdictions require such provisions to be “clear and unequivocal.” While, as discussed below, state legislatures have enacted statutes on this issue, as a general rule courts will strictly interpret indemnity provisions.

Certain problems are commonly encountered when interpreting indemnity provisions.
The scope of the indemnity can be an issue. While most provisions broadly describe scope, see AIA A207 §3.18.1, the breadth of the indemnity is a matter of contract interpretation. Similarly, the identities of the indemnitors can be an issue—are agents, parents of subsidiaries, officers and directors—entitled to indemnity? Again, unless the contract specifies the identity of the indemnitors, see id., this can present an issue.

Another issue that often arises is the duty to “defend and hold harmless.” Some courts have equated the duty of an indemnitor under this provision with the duty of a liability carrier: if the claim “triggers” coverage or duty, a defense must be provided despite the fact that liability is not established. Other courts hold that there is no duty to defend before contractual liability is established, and the “defend” clause is simply a post-resolution fee-shifting provision.

Finally, there are often issues relating to indemnity for claims of economic loss. Most indemnity agreements in the construction context track CGL insurance coverage—the indemnified claims are those for bodily injury or property damage. Where there is no claim for bodily injury or property damage, it is unlikely that a claim for economic loss alone will be indemnified. But cf. AIA A207 § 3.18.1.1, providing indemnity for “any other economic loss.”

5. Anti-indemnity statutes. Legislators in most, but not all, states have enacted anti-indemnity statutes. See A. Gywn and P. Davis, “Fifty-State Survey of Anti-Indemnity Statutes,” The Construction Lawyer, Vol. 23, No. 3, 2003. Some anti-indemnity statutes bar “fault-free” or “broad” indemnity provisions, where an indemnitee may be indemnified for the results of its sole negligence. Others also bar “intermediate” provisions, where an indemnitee may be indemnified for its own negligence, whether sole or concurrent. Id., at 26.

Some states also have more creative limitations on indemnity provisions. Many bar indemnity of design professionals; see Cal. Civil Code § 2782. Many also specifically bar
indemnification for gross or willful misconduct. *Id.* In Florida, the indemnity obligation must be monetarily capped at a reasonable amount. Fla. Stat. Ann. § 723.06; *see also* L. Leiby, *Florida Construction Law Manual* § 7:22 (2017). Texas, by case law, allows indemnification against an indemnitee’s sole negligence, but only where the indemnity provision is “clear and unequivocal” on that issue.

Note also that many jurisdictions allow severance or “blue-penciling” of indemnity agreements that would otherwise run afoul of anti-indemnity statutes. *See, e.g.*, P. Davis, ed. *North Carolina Construction Law* § 1:23 (2017).

6. **Litigation issues.** By far the most vexing issue relating to the litigation of indemnity claims is timing. The path between premature and time-barred is often short, and sometimes even concurrent. For the trial lawyer, this is an area that requires considerable vigilance.

A claim for indemnity should not accrue until the indemnitee suffers harm. That is typically when the indemnitee is required to answer for the indemnified claim. Most courts follow this accrual rule; indeed, some will dismiss claims filed prior to the indemnitee suffering harm on a ripeness motion. Other courts, however, tie accrual to the date of the claimant’s injury, not the indemnitee’s. Bruner & O’Connor, at § 10.2. In those jurisdictions, the practitioner must be careful to protect against the statute of limitations.

Some states have punitive statutes of repose that bar claims even before they accrue. For example, in North Carolina, claims for defective construction, including indemnity claims, are barred if not filed within 6 years following substantial completion. N.C. Gen. Stat. § 1-50(a)(5)b.7.

Remember also that indemnitors are often added to litigation by way of third party
practice under Rule 14. Limitation is tolled upon filing of the third party complaint; tolling does not relate back to the filing date of the complaint.

C. Commercial General Liability Insurance.

1. Coverage.

Commercial General Liability (CGL) insurance is a “standard insurance policy issued to business organizations to protect them against liability claims for bodily injury (BI) and property damage (PD) arising out of premises, operations, products, and completed operations; and advertising and personal injury (PI) liability.” The BI and PD coverage is addressed in the insuring agreement for “Coverage A” while the advertising and PI coverage is addressed in the insuring agreement for “Coverage B.” Most often, but not always, CGL policies are written on an “occurrence” basis as opposed to a “claims made” basis. All of the more common industry-standard construction contract forms require the contractor and its subcontractors to maintain coverage for claims typically covered by CGL policies.

The typical Coverage A insuring agreement provides:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.

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This insurance applies to “bodily injury” and “property damage” only if:

(1) The “property damage” is caused by an “occurrence” that takes place in the “coverage territory;” [and]
(2) The “bodily injury” or “property damage” occurs during the policy period.

On its face, this is a broad grant of coverage. However, the coverage granted is limited by numerous exclusions and, at least in the area of coverage for defective construction, by judicial interpretation of language in the insuring agreement.
2. Common CGL Exclusions.

CGL policies contain numerous exclusions, many of which are directed toward excluding coverage for the insured's "business risk." Following is a discussion of two of the more common exclusions that are important to understand in a construction setting.

i. Contractual Liability Exclusion.

Most construction contracts include an obligation for the “downstream party” to indemnify the “upstream party(ies)” (e.g., for the contractor to indemnify the owner, the subcontractor to indemnify the contractor, and often the owner as well, etc.). The contractual liability exclusion, in paragraph 2(b) of the standard CGL policy, states that coverage does not apply to:

“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) That the insured would have in the absence of the contract or agreement; or
(2) Assumed in a contract or agreement that is an “insured contract,” provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. …

In essence, exclusion 2(b) removes coverage for the insured’s indemnity obligation, except in the event it falls within the definition of an “insured contract.” Therefore, the definition of an insured contract becomes critical. The standard CGL policy includes the following in its definition of an “insured contract”:

(f) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement….
Based on this definition, the exception effectively swallows the exclusion. However, because coverage of the insured’s indemnification obligation is predicated on the CGL policy containing both the exception to the exclusion and this (or a substantially similar) definition of an insured contract, it is critical all parties confirm the actual CGL policy has not changed these standard provisions. For example, if the definition of “insured contract” is removed (or possibly even altered), there would be no coverage for the insured’s indemnification obligation.16

ii. Your Work Exclusion.

The "your work" exclusion, in paragraph 2(l) of the standard CGL policy, excludes coverage for:

“property damage” to "your work" arising out of it or any part of it and included in the “product-completed operations hazard.”17

However, the standard 2(l) exclusion contains an exception that states:

[t]his exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.”18

The term “your work” is defined as:

(1) Work or operations performed by you or on your behalf; and
(2) Materials, parts or equipment furnished in connection with such work or operations. … (emphasis added)19

Because the standard definition of “your work” includes the work of the insured’s subcontractors, it is critical that all parties confirm that their respective CGL policies contain the “subcontractor exception” to the 2(l) “your work” exclusion. For example, ISO Form CG 22 94 10 01 modifies the “your work” exclusion by removing the subcontractor exception, effectively eliminating coverage for defective work performed by the insured’s subcontractors.

D. Additional Insured Endorsements.

It is very common in construction contracts to require other individuals and entities to be named as additional insureds under the insured’s insurance policy(ies).20 For the reasons
discussed below, doing so on a certificate of insurance is not effective. Therefore, parties should be added as an additional insured by way of an endorsement. The Insurance Services Office, or “ISO” as it is more commonly referred to in the insurance industry, was established in 1971 to serve the property/casualty insurance marketplace and produces numerous additional insured endorsement forms.\textsuperscript{21} The most common forms of ISO Additional Insured endorsements for a construction project are the CG 20 33, the CG 20 10 and the CG 20 37 Additional Insured Endorsements.\textsuperscript{22} The CG 20 33 additional insured endorsement confers additional insured status on what is referred to as a “blanket endorsement.”\textsuperscript{23} The CG 20 10 and CG 20 37 additional insured endorsements confer additional insured status for the insured’s ongoing operations and completed operations, respectively, on what is often referred to as a “scheduled endorsement.”\textsuperscript{24}

In order to better understand the differences between the various ISO additional insured endorsement forms, it is helpful to have a general understanding how ISO has narrowed the scope of coverage afforded to additional insureds with each previous iteration of these forms from their inception in 1985 to the present.

   \textit{CG 20 10 11 85 – Ongoing Operations and Completed Operations}

   The ISO CG 20 10 11 85 amended the “Who is an Insured” section of the CGL policy to include as an insured:
   
   the person or organization shown in the Schedule [i.e., the entity identified in the endorsement], but only with respect to liability arising out of ‘your work’ for that insured by or for you.\textsuperscript{25}

   The words “arising out of” have been given a consistently broad interpretation by the courts, providing coverage under the endorsement even for the additional insured’s own negligence, “as long as the additional insured’s negligent act had a close and direct connection
with the operations of the named insured.”\textsuperscript{26} It is important to note also that the CG 20 10 11 85 endorsement applies to both ongoing operations and completed operations of the named insured.


   \textit{CG 20 10 10 93 – Removal of Completed Operations}

   ISO modified the CG 20 10 in 1993, and the resulting CG 20 10 10 93 amended the “Who is an Insured” section of the CGL policy 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.\textsuperscript{27}

   This language effectively cuts off additional insured status at the completion of the insured’s ongoing operations. Therefore, if a construction contract required the contractor to name the owner as an additional insured with respect to the contractor’s completed operations, the CG 20 10 10 93 would not have been sufficient and the contractor would have needed to convince the insurer to issue the CG 20 10 11 85.


   \textit{CG 20 10 10 01 – Ongoing Operations}
   \textit{CG 20 37 10 01 – Reinstatement of Completed Operations through Creation of New Form}

   In 2001, ISO again modified the CG 20 10, creating the CG 20 10 10 01. In order to reinstate coverage to the additional insured with respect to completed operations excluded in the CG 20 10 10 93, and because that “completed operations” exclusion was carried forward into the CG 20 10 10 01, ISO introduced a new additional insured endorsement, CG 20 37, in 2001, creating the CG 20 37 10 01. This endorsement provided additional insured status only with respect to the completed operations of the named insured’s work by amending the “Who is an Insured” section of the CGL policy to include as an insured:
Similarly, ISO modified the language of the CG 20 10 endorsement in 2001 by amending the “Who is an Insured” section of the CGL policy to include as an insured:

[the identified persons or organizations,] but only with respect to liability arising out of your ongoing operations performed for that insured.

Both the ISO CG 20 10 01 and the CG 20 37 01 contain the “arising out of” language contained in the CG 20 10 11 85 and, therefore, they continued to afford the additional insured the same broad coverage associated with that language as noted above. However, as a result of the division of ongoing operations and completed operations into two separate forms, in order to achieve similar coverage as the CG 20 10 11 85 (which provided coverage for both ongoing operations and completed operations), it was now necessary for the additional insured to require both the CG 20 10 and CG 20 37 forms.


CG 20 10 07 04 – Ongoing Operations
CG 20 37 07 04 – Completed Operations

In 2004, ISO narrowed the coverage afforded by the “arising out of” language under both the CG 20 10 and the CG 20 37 by limiting the coverage under those forms to liability at least caused in whole or in part by the named insured (i.e., eliminating coverage for the additional insured’s sole negligence). ISO modified the CG 20 37 by amending the “Who is an Insured” section of the CGL policy to include as an insured:

the identified persons or organizations, “but only with respect to liability for ‘bodily injury’ or ‘property damage’ caused, in whole or in part, by ‘your work’ at the location designated and described in the schedule of [the endorsement] performed for that additional
insured and included in the “products-completed operations hazard.”

Similarly, ISO modified the CG 20 10 by amending the “Who is an Insured” section of the CGL policy to include as an insured:

the identified persons or organizations, “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 locations designated [in the endorsement].”

Replacing the “arising out of” language with the “caused in whole or in part” language was an attempt by ISO to narrow the coverage afforded to an additional insured by requiring the claim to have been caused at least in part by the named insured or someone acting on the named insured’s behalf. As with the 2001 versions of these forms, it still was necessary to use the CG 20 10 07 04 and CG 20 37 07 04 forms together in order to provide coverage to the additional insured for both ongoing operations and completed operations.

Going a step further, New York’s highest court, in *Burlington Ins. Co. v. New York City Transit Authority*, cited to this ISO form amendment, stating that the replacement of “arising out of” with “caused, in whole or in part” was intended to provide coverage for an additional insured’s vicarious or contributory negligence and to prevent coverage for the additional insured’s sole negligence. The court interpreted that this policy language does not extend coverage to any injury causally linked to the named insured and rejected “but for” causation in favor of proximate causation.

In this case, the New York City Transit Authority (“NYCTA”) contracted with BSI to perform tunnel excavation work on a City subway project. Burlington Insurance Company (“Burlington”) issued a CGL policy to BSI with an endorsement that listed NYCTA as an
additional insured. During the coverage period, a NYCTA employee fell off an elevated platform as he tried to avoid an explosion after a BSI machine touched a live electrical cable buried in concrete at the excavation site. The court found that the employee’s injury was due to NYCTA’s sole negligence in failing to identify, mark, or de-energize the cable. The court reasoned that BSI’s machine coming into contact with the live cable was not the proximate cause of the employee’s injuries because BSI was not at fault in operating the machine in the manner that led it to touch the live cable.

Thus, the court concluded that where an insurance policy is restricted to liability for any bodily injury “caused, in whole or in part” by the “acts or omissions” of the named insured, the coverage applies to injury proximately caused by the named insured.

5. **Limited Form Coverage – (2013) – “Personal Injury and Property Damage” / “Caused In Whole or In Part” (And Additional Limitations)**

   **CG 20 10 04 13 – Ongoing Operations**
   **CG 20 37 04 13 – Completed Operations**

In April 2013, ISO made several substantive changes to the CG 20 10 and CG 20 37 additional insured endorsement forms (the “2013 AI Forms”) significantly narrowing the scope of coverage under those forms. Generally, the changes to the 2013 AI Forms amount to the following three changes: (1) limiting coverage to the additional insured “only to the extent permitted by law”; (2) providing that coverage to the additional insured will not be broader than that which the named insured is required by the contract or agreement to provide; and (3) limiting the amount the insurer is required to pay out to the amount of insurance (a) required by the contract or (b) available under the applicable limits of insurance, whichever is less.

   i. **Only To The Extent Permitted By Law:**

ISO added the following language in the 2013 AI Forms:
The insurance afforded to such additional insured only applies to the extent permitted by law.\textsuperscript{33}

The intent of this language is to act as a “savings clause” in states that have enacted “anti-indemnity” statutes that extend to naming a party as an additional insured in addition to preventing or otherwise limiting the extent to which an indemnitor may be required to indemnify an indemnitee from the indemnitee’s own negligence. For example, these statutes typically prevent a party from being named as an additional insured to the extent doing so would provide coverage to the additional insured for damage caused by the additional insured’s own negligence.\textsuperscript{34} This new change by ISO appears to be an attempt to ensure that the additional insured endorsement forms will not be determined to run afoul of those types of anti-indemnity statutes.

\textit{ii. Coverage Not Broader Than What Is Required By Contract:}

ISO also added the following language in the 2013 AI Forms:

\begin{quote}
[i]f 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 [the insured] are required by the contract or agreement to provide for such additional insured.\textsuperscript{35}
\end{quote}

Based on this language, if the contract between a contractor and an owner, as an additional insured, requires the contractor to maintain insurance coverage that is narrower in scope than what the contractor actually carries, the owner, as an additional insured, will be limited to what is actually required by the contract. In other words, it is possible there could be a scenario where the contractor’s insurance might have been broad enough to cover a claim in whole, but because the contract between the contractor and the owner required less coverage, the owner (as an additional insured) only would be entitled to collect part of the total amount of that claim. Therefore, if the 2013 AI Forms are utilized, the parties should be extremely careful when negotiating and drafting
the terms and conditions of the insurance requirements to ensure they fully and accurately reflect
the bargained-for coverage.

iii. **Limits Equal To The Lesser Of Policy Limits or Limits Required By
Contract:**

The final change to the 2013 AI Forms by ISO was to add a new provision that modifies
the limits of insurance as follows:

If coverage to the additional insured is required by a contract or
agreement, the most [the insurer] 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.

This endorsement shall not increase the applicable Limits of
Insurance shown in the Declarations.\(^\text{36}\)

Consider a case where a contractor’s commercial general liability policy contains limits of
$5,000,000 each occurrence and aggregate, but the contract between the contractor and the owner,
as an additional insured, requires the contractor only to maintain commercial general liability
insurance with limits of $2,000,000 each occurrence and aggregate. If there is a loss valued at
$4,000,000 and the owner has been named an additional insured utilizing any of the pre-2013 ISO
additional insured endorsements, assuming there is coverage under the policy, the owner generally
would be entitled to make a claim against the policy for the entire $4,000,000. However, under
the 2013 AI Forms, the owner’s claim would be limited to the amount of insurance required by its
contract with the contractor (i.e., $2,000,000). Therefore, if the 2013 AI Forms are utilized, it is
more important than ever that the additional insured negotiate, and include in its contract,
insurance requirements that accurately reflect the limits of coverage for which the additional
insured is paying (i.e., the limits of coverage that have been included in the insured party’s compensation).

Because not all versions of additional insured endorsements provide the same coverage to the additional insured, requiring the appropriate version of additional insured endorsement from the named insured is critical. Therefore, it is extremely important to carefully review the additional insured endorsement forms and draft the insurance requirements within the construction subcontract to reflect the full and accurate coverage and limits intended by the parties.

6. **Beware of Ambiguity in Additional Insured Endorsements.**

A recent California Court of Appeals decision, *Pulte Home Corp. v. American Safety Indemnity Co.*,37 found ambiguity in the additional insured endorsements in American Safety’s CGL policies to three of Pulte’s subcontractors regarding coverage for the subcontractors’ completed operations. Pulte was named as an additional insured “but only with respect to liability arising out of ‘your work’ which is ongoing and which is performed by the Named Insured for the Additional Insured on or after the effective date of this Endorsement.”

The various additional insured endorsements in the policies had substantially similar language. For example, another version stated Pulte was an additional insured “but only with respect to liability arising out of ‘your work’ and only as respects ongoing operations performed by the Named Insured for the Additional Insured on or after” the endorsement’s effective date.

The definition of “your work” in the policy included warranties as to fitness and quality and within the “products-completed operations hazards” definitions, “your work” was completed either when the work (a) called for in the contract is complete; (b) at a particular job site is complete; or (c) is put to its intended use.
American Safety argued that the language “ongoing operations” immediately following “your work” in the additional insured endorsements must be read as a limitation upon “your work” excluding completed-operations coverage, and that construction defect claims are excluded as completed operations claims because the product has been completed and put to its intended purpose, having been sold to homeowners who are now suing. The California appellate court disagreed, finding that the language in the additional insured endorsements can reasonably be read as a grant of coverage for the insured’s completed operations, if property damage ensued. The court also found that because “your work” is also defined in the policy as including warranties and representations, liability arising out of such work inherently involves completed work, not work in progress.

The court instructed that if the “ongoing operations” language was meant by American Safety to preclude coverage for completed operations losses for an additional insured, it could have expressly stated that. Because the language of American Safety’s additional insured endorsements created ambiguities on the potential for coverage in the construction defect lawsuits, American Safety was required to provide Pulte with a defense.

E. Miscellaneous Issues.

1. Certificates of Insurance.

A certificate of insurance is a document that summarizes the insured’s current insurance coverage and is requested by the insured to provide evidence to another party as proof of compliance with contractual insurance requirements. The Association for Cooperative Operations Research and Development, or “ACORD,” creates standard certificates of insurance that are frequently utilized on construction projects. It is important to note that these certificates of insurance cannot be relied upon in the same way as the actual insurance policy because they
contain numerous disclaimers that effectively limit the certificate holder’s ability to rely upon the information within them.\textsuperscript{38} Given these disclaimers, a certificate of insurance is, at best, merely evidence that the policies identified within it are in force at the time the certificate of insurance is issued. It should be viewed as a “snapshot in time,” with no assurance that the coverage identified within it will not be modified or cancelled. Because of this, the parties to a construction contract should obtain and review copies of the actual policies to be provided in order to evidence required insurance coverage.

2. \textbf{Waiver of Subrogation.}

It is common in the construction industry for project participants to include what is referred to as a waiver of subrogation in their respective contracts. Without a waiver of subrogation, if an insurer pays out on a claim, it generally has the right to subrogate to the rights of the insured and pursue an action against the party it believes is responsible for reimbursement of all or a portion of the amount of that claim. Most of the industry standard construction contract forms contain waivers of subrogation.\textsuperscript{39} Generally, insurance policies do not bar coverage if an insured waives subrogation against a third party before a loss.\textsuperscript{40} However, in case that policy does prohibit the insured from limiting the insurer’s rights of subrogation, each party should be required to obtain an appropriate endorsement to the corresponding policy.

3. \textbf{Notice of Cancellation Endorsement.}

Of importance to any party requiring another party to provide insurance is ensuring the other party not only obtains, but continues to maintain, the required insurance during the term of the construction contract. Therefore, each party will want to be notified in the event any of the other party’s insurance coverage is modified, cancelled, or not renewed before the expiration date of the policy. However, relying on the insured to provide that notice may be problematic.
For example, if the policy is cancelled because the insured fails or refuses to pay the required premium, it is unlikely the insured will be very keen on notifying the certificate holder of that cancellation.

ACORD’s certificate of insurance contains language that in the event of any of the policies identified in the certificate are cancelled before the expiration date thereof, “notice will be delivered in accordance with the policy provisions.” However, most CGL insurance policies require only that the insurer provide notice to the primary insured, meaning the insurer has no obligation to provide notice of cancellation to the certificate holder. Therefore, if a party wants to ensure it receives notice of cancellation from the insured party’s insurer, it is necessary to obtain a specific “notice of cancellation” endorsement.

4. Reasonable Expectations of an Additional Insured v. Named Insured

California courts have recently made a distinction between the reasonable expectations of coverage of a named insured and those of an additional insured. In a declaratory relief action regarding a 1981 excess and umbrella policy, the trial court ruled that the term “underlying insurance” should be interpreted to include all primary policies in effect at any time during the period of a continuous loss, not only those listed in the schedule of underlying insurance in the Transport Insurance Company (“Transport”) policy. The court of appeal, in Legacy Vulcan Corp. v. Superior Court, disagreed and found that the term “underlying insurance” in the policy was ambiguous with respect to umbrella coverage, and thus, the term must be interpreted in favor of the reasonable expectations of the insured, Vulcan, to encompass only the policies described in the schedule of underlying insurance in the Transport policy.

Four years later, in Transport Insurance Co. v. Superior Court, the court of appeal addressed the issue of whether the trial court would be bound by the ruling regarding the
objectively reasonable expectations of coverage of Vulcan in determining whether there was a duty to defend an additional insured. The appellate court held that “for purposes of determining whether an additional insured to an excess and umbrella general liability insurance policy is entitled to a defense by the insurer, the reasonable expectations of the additional insured may be different than the reasonable expectations of the named insured.”^45 Because the issue was an additional insured’s and not a named insured’s objectively reasonable expectations of coverage, the trial court was not bound by collateral estoppel to rely on the court’s prior findings regarding the named insured’s objectively reasonable expectations.  

^46 The court of appeal agreed with an analysis that although the additional insured is not a party to the insurance contract, its intent is relevant to the construction of that contract because the intent of the named insured in requesting the added coverage is directly dependent on the bargain that the additional insured made with the named insured.  

^47 F. Conclusion.

It is important for parties on a construction project to understand both what insurance requirements they are obligated to satisfy under their respective construction contracts and what insurance requirements they should require of other parties. Parties should work closely with their legal counsel and insurance consultants in order to confirm whether or not their current insurance satisfies those requirements and to ensure the construction contract is properly drafted to reflect the intended coverage. In most cases, the parties should obtain and review copies of the insured party’s insurance policies (as opposed to simply requesting a certificate of insurance), as well as any other project-specific policies that may have been obtained, such as a builders risk insurance policy or a wrap-up. It should go without saying that this should be done prior to executing the construction contract. Otherwise, a party could be in breach of the contract as soon
as it is executed and, even worse, if a flaw in insurance coverage is not identified prior to a claim, the insurance the parties intended to be available might not be. If parties take the time to fully understand how risks have been allocated under their respective construction contracts (e.g., indemnity, protection of property, design liability, etc.) and ensure those risks have been properly addressed within the respective insurance coverages, parties will be better protected in the unfortunate event one of those risks occurs.

1 See Sections 3.18 and 10.3, AIA Document A201-2007 General Conditions of the Contract for Construction; Section 10.1, Consensus DOCS 200, Standard Agreement and General Conditions Between Owner and Constructor.
3 For example, several courts have held that “all claims” does not include intentional torts.
4 Generally, however, one cannot be a third party beneficiary of an indemnity agreement absent specific identification in the agreement.
5 An issue that may arise is whether a contractual requirement that a party be named as an additional insured violates an anti-indemnity statute. For the most part, the answer has been no; some states even expressly validate the requirement. See id.
6 See definition of “commercial general liability (CGL) policy,” http://www.irmi.com/online/insurance-glossary/terms/c/commercial-general-liability-cgl-policy.aspx (last visited September 3, 2017). CGL insurance is what is referred to as third-party insurance coverage because it insures the insured against claims and suits by third parties against the insured. This is different than first-party insurance coverage, such as property insurance, which insures the insured against loss or damage to the insured property.
7 Because the coverage under the insuring agreement for Coverage A addresses claims for bodily injury and property damage (e.g., the insurance that will provide coverage for most indemnification obligations), this chapter focuses on the insuring agreement for Coverage A rather than the insuring agreement for Coverage B, and references to the CGL policy in this chapter refer to the insuring agreement for Coverage A.
8 Generally speaking, in order to trigger coverage under a policy written on an “occurrence” basis, that policy must be in effect on the date that the accident causing the damage “occurred,” whereas under a policy written on a “claims made” basis, the trigger for coverage is the date the “claim is made” against the insured.
§ 9.2, ConsensusDOCS 750, Standard Agreement Between Constructor and Subcontractor [hereinafter, “CD750”].

10 ISO CGL Form CG 00 01 12 07. For a more extensive discussion of the history and interpretation of the standard CGL insurance policy see CONSTRUCTION INSURANCE, A GUIDE FOR ATTORNEYS AND OTHER PROFESSIONALS, (Stephen D. Palley, et al. eds., American Bar Association 2011).

11 For an extensive analysis of defective construction coverage issues see James Duffy O’Connor, What Every Court Should Know About Insurance Coverage For Defective Construction, 5 AMERICAN COLLEGE OF CONSTRUCTION LAWYERS JOURNAL, 1 (Winter 2011).


13 See § 4.6, A401; § 9.1, CD750.

14 ISO CGL Form CG 00 01 12 07.

15 Id. ISO CGL Form CG 24 26 07 04 modifies subpart (f) by adding an element of fault by inserting to the end of the first sentence the words “provided the ‘bodily injury’ or ‘property damage’ is caused, in whole or in part, by you or by those acting on your behalf.”

16 ISO CGL Form 21 39 10 93 removes subpart (f) in its entirety from the definition of an “insured contract.”

17 ISO CGL Form CG 00 01 12 07.

18 Id.

19 Id.

20 See § 11.1.4, A201; § 13.4, A401; § 10.5.2, CD200; § 9.2.11.1, CD750


22 Appendix 1 contains a more detailed summary of the 20 10 and 20 37 versions of ISO additional insured endorsements and the coverage afforded by each of them. ISO assigns number designations to its Additional Insured Endorsements as follows: the “CG” prefix identifies the endorsement as part of the ISO CGL program; the first set of numbers identifies the endorsement group; the second set of numbers identifies the endorsement number within that group; and the final four numbers identify the endorsement edition date (e.g., 04 13 indicates an edition date of April, 2013).

23 A “blanket endorsement” is an endorsement that automatically grants additional insured status to a person or organization that the named insured is required by contract to name as an additional insured.

24 A “scheduled endorsement” is an endorsement that grants additional insured status to the person or organization specifically identified in the applicable additional insured endorsement. Because the CG 20 10 covers only ongoing operations and the CG 20 37 covers only completed operations, in order for the additional insured to receive full coverage (i.e., coverage for both ongoing and completed operations), both of these additional insured endorsements must be obtained.

25 ISO Additional Insured Endorsement Form CG 20 10 11 85.


27 ISO Additional Insured Endorsement Form CG 20 10 10 93.

28 ISO Additional Insured Endorsement Form CG 20 37 10 01.
ISO Additional Insured Endorsement Form CG 20 10 10 01.

ISO Additional Insured Endorsement Form CG 20 37 07 04.

ISO Additional Insured Endorsement Form CG 20 10 07 04.

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ISO Additional Insured Endorsement Form CG 20 10 04 13.

See § 151.104, Tex. Stat. (generally rendering a provision within a construction contract requiring one party to name the other party as an additional insured void and unenforceable to the extent such provision requires or provides coverage that is prohibited by the anti-indemnity statute in section 151.102, Texas Statutes).

ISO Additional Insured Endorsement Form CG 20 10 04 13.

ISO Additional Insured Endorsement Form CG 20 10 04 13.

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For example, ACORD Form 25 contains the following disclaimers: (1) the certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder; (2) the certificate of insurance does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies identified within it; (3) the certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder; (4) the certificate of insurance certifies that the policies identified within it have been issued to the insured for the policy period indicated; and (5) notwithstanding any contract or other document for which the certificate of insurance is issued, the insurance afforded by the policies identified within the certificate is subject to all of the terms, exclusions and conditions of such policies.

See § 11.3.7 A201; § 13.9, A401; § 10.3.3, CD200; § 9.2.8, CD750.


Id. at 690-91.


Id. at 1219.

Id. at 1226.

Id. at 1225-26.