The Illusions of Additional Insured Coverage

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Design and construction contracts typically require one party to procure and maintain a commercial general liability (CGL) policy with the stipulation that certain parties are to be the additional insureds. The right to additional insured coverage is perceived as a valuable element of consideration for the contract. Additional insureds often believe that so long as the coverage is obtained, they will be covered by the named insured's policy for all claims made against them with respect to the project. That perception is incorrect, as there are meaningful limits to the additional insured coverage, among them coverage limitations and exclusions, the possibility that the duty to procure the coverage is void for violation of an anti-indemnity act, or the situation that in certain jurisdictions coverage is limited to vicarious liability only. This article discusses these limitations and suggests ways to avoid them. Discussion is limited to additional insured coverage on CGL policies in the construction industry, as applied to coverage issues arising out of domestic construction projects.

Additional Insured Coverage: A Short Primer

The insurance policies used in the construction industry are generally standardized form documents mainly provided by the Insurance Services Office (ISO).[1] The ISO is an organization supported by the insurance industry, and one of its primary missions is to develop and issue standardized policy language.[2] Insurers may also draft nonstandard forms, known as manuscript forms, that differ from, but may draw upon, the language contained in the ISO forms. The influence of the ISO on the language contained in CGL policies cannot be overstated, and the majority of CGL policies either follow the ISO forms to the letter or draw heavily on language issued by the ISO.

The ISO issues both a standard CGL coverage form, which includes the basic parameters of the CGL coverage, as well as a number of different endorsement forms, which alter that coverage in various ways. Among the ISO's forms are several endorsement forms that provide coverage for additional insureds. Additional insured coverage is insurance for a person or entity who both the named insured and its insurance carrier agree enjoys status as an additional insured on the named insured's policy. Usually a named insured seeks coverage for an additional insured due to a requirement in the named insured's contract, either with the additional insured or with a third party who requires that the additional insured be given coverage under the named insured's CGL policy. Typically, for instance, in the construction industry, an owner of a construction project requires that the general contractor and any of its subcontractors name the owner as an additional insured on the general contractor's and subcontractors' CGL policies.

A prime example of this issue is found in the American Institute of Architects (AIA) form contract documents. The AIA promulgates form contracts for use in a variety of construction settings, and these form documents are widely used and accepted in the industry. One of the primary documents is the A201, general conditions of the contract for construction. Section 11.1.4 of that document requires additional insured coverage as follows:

> The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.[3]

This provision's lack of specificity opens the door for coverage issues and limitations that will be hidden from the additional insured, some of which are discussed herein. A more detailed set of coverage requirements not only enhances the additional insured's right to coverage, but also provides a basis for a breach of contract claim against the named insured in the event the named insured fails to procure additional insurance that satisfies the requirements of the contract.

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Limitations on Additional Insured Coverage Created by the Terms of the Endorsements Themselves

Additional insureds may well believe that they are entitled to such coverage once they have negotiated a contract requiring that they be named as an additional insured on the named insured's CGL policy. However, a requirement in a contract that the additional insured be given such status is not enough to trigger coverage. Like the named insured, the additional insured's entitlement to coverage is governed by the policy. The named insured's policy must therefore expressly include coverage for the additional insured, generally through endorsement.

Additional insured endorsement forms, whether they be standard ISO forms or manuscript forms, set forth the requirements that must be satisfied in order to trigger coverage for an additional insured. The endorsement's language, and hence the coverage provided to the additional insured, varies by form. Even so, the rule among the ISO standard forms remains the same—the current versions of the ISO endorsement forms generally provide coverage to the additional insured for certain types of liability "caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf."[4]

The variations in the additional insured endorsement forms can have significant effects. For example, the ISO endorsement form CG 20 33 limits coverage to parties in contractual privity with the named insured. It states, in relevant part:

> Section II—Who is An Insured is amended to include as an additional 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 for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> (1) Your acts or omissions; or
>
> (2) The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.[5]

Therefore, an owner could not be an additional insured on a general contractor's subcontractor's policy if this endorsement were used. Another commonly used additional insured endorsement, form CG 20 10, differs:

> 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.[6]

Form CG 20 10, unlike CG 20 33, does not require that the additional insured be in privity with the named insured in order for coverage to trigger.

Thus, an owner who is required by contract to be an additional insured on its general contractor's subcontractor's CGL policy would have no coverage if the named insured's CGL policy contained the ISO form endorsement CG 20 33 but would be covered if ISO form CG 20 10 was utilized. Furthermore, even if the subcontractor's policy used the language of CG 20 10, if the owner was not described in the schedule, again, the owner would be deprived of coverage.

A requirement in a contract that the additional insured be given such status is not enough to trigger coverage.

As the specific language of the additional insured endorsement forms can have significant effects on the additional insured's right to coverage, additional insureds' reliance on certificates of insurance as evidence of their rights to coverage is unwise. Although certificates of insurance may indicate the identity of any additional insureds on the named insured's policies, such certificates are for information only and are not reliable indicators of coverage.[7, 8] Also, because an additional insured's coverage is defined by the language of the policy, it is critical for additional insureds to review the policy.

The limitations on additional insured coverage were recently clarified following the ISO's issuance of major revisions to its endorsement forms last year. Effective April 1, 2013, the ISO issued revisions to 24 of its 31 additional insured endorsement forms, including forms typically used to provide additional insured coverage in connection with construction contracts, such as forms CG 20 10 and CG 20 33, discussed above.[9] There can be no question that the

intent of the 2013 changes is to limit the availability and extent of coverage for additional insureds. The full reach of these revisions are still unknown as they are yet untested in litigation, but some of the ways in which they will affect additional insureds' rights are reasonably evident.

First ISO Revision: Limitation of Coverage to That Required by Contract or Set Forth in the Declarations, Whichever Is Less

Once it is determined that an additional insured in fact enjoys that status, the additional insured may presume that it is entitled to additional insured coverage up to the full limits of the named insured's CGL policy. However, that common practice is due to change as a result of the following new language that the ISO added to its additional insured endorsement forms:

> 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.[10]

The new language may also affect the availability of excess limits to the additional insured.

This new language significantly restricts the coverage available to an additional insured. Under the prior endorsement forms, there was no limitation on coverage based on the amount of insurance required by a contract. If the contract between the additional insured and named insured required the named insured to carry CGL insurance in the amount of $1 million, but the named insured's CGL policy had limits of $2 million, the additional insured would have access to the full value of the policy. Under the 2013 revisions, however, the additional insured would now be limited to $1 million in CGL coverage, which is what was required under the contract.

The new language may also affect the availability of excess limits to the additional insured. Consider, for example, a construction contract between an owner and contractor that requires the contractor to carry CGL insurance with limits of $1 million and excess insurance with limits of $5 million, with the owner named as an additional insured on both policies. If the contractor's CGL limits were $2 million, not only would the owner only be entitled to $1 million in CGL coverage under the new endorsement form, the owner also would not have coverage from the contractor's excess carrier until the contractor's entire $2 million CGL policy was exhausted.

It appears that a simple solution to this problem is to require a combination of CGL and excess limits to a certain amount in the construction contract, rather than setting forth separate required limits for excess coverage. Thus, rather than require CGL insurance with limits of $1 million and excess insurance with limits of $5 million, the contract could require CGL and excess insurance with combined limits of $6 million. If this were the operative language, the owner would likely be entitled to the full value of the contractor's liability insurance, or $6 million.

Second ISO Revision: Coverage Limits to That Required by Contract

Additional insureds also believe they are entitled to all of the coverages available to the named insured on its CGL policy. Prior to the 2013 ISO revisions to the additional insured endorsements, that may have been the case. However, the following new language has a significant limiting effect on additional insured coverage:

> 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.[11]

It is not uncommon for contractual insurance requirements to identify the types of coverages that must be provided; for example, coverage for liability arising out of property damage, personal injury, and the work of independent contractors. The new ISO language suggests that providing a list of the types of coverages required creates a limitation on coverage to the exclusion of other types of coverage available under the CGL policy. This revision may therefore have the effect of severely restricting the types of coverage available to the unwary additional insured that provides, in its contract with the named insured, a limited listing of the kinds of insurance required, not intending for that list to be exhaustive. For instance, a contract requiring CGL insurance providing coverage arising out of property damage, personal injury, and the work of independent contractors, but without mention of liability for products-completed operations, may very well exclude such coverage, even if such coverage is available to the named insured under the CGL policy.

This is not to suggest that additional insureds should no longer specify the types of coverage that must be provided by the named insured. However, additional insureds should take care to not unintentionally limit their rights to coverage. Including language stating that, in addition to the coverages available to the named insured under the CGL policy, the policy shall also include particular coverages is one way of obviating this issue. In this way,

the additional insured retains the ability to identify specific coverages that it requires without arbitrarily limiting its right to seek coverage under other parts of the policy.

Limitations on Additional Insured Coverage as a Result of Void Indemnity Agreements: How the ISO's Third Revision May Make This a Universal Problem

An additional problem that can confound an additional insured is the elimination of its additional insurance coverage as a result of the contractual insurance requirement being tied to a void indemnity agreement. This issue may become more prevalent given the ISO's third revision to its additional insured endorsement forms. The text of the revision simply states, "The insurance afforded to such additional insured only applies to the extent permitted by law."[12]

It is, at best, unclear what the ISO intended to accomplish with the addition of this language. Indeed, it would seem to be the case that one is always bound by the law, and so the foregoing should go without saying. But the ISO added this language for good reason. However, it is uncertain what that reason is.

Some commentators have suggested the addition of this language is clearly an attempt to align the coverage available to an additional insured with the indemnification available to that additional insured under the state's anti-indemnification statute, if one exists.[13] By way of background, at least 45 states have enacted some sort of legislation limiting the availability of indemnification for one's own negligence in connection with a construction project.[14] These laws void, as contrary to public policy, agreements in construction contracts that attempt to indemnify a person for its own wrongdoing and/or negligence.[15] Such statutes can be roughly divided into four groups: (1) those that only bar indemnification for unlawful acts, (2) those that only bar indemnification for the indemnitee's sole negligence, (3) those that bar indemnification for any negligence on the part of the indemnitee, and (4) those that bar indemnification of design professionals.[16]

These statutes may create a bar to coverage where the contractual requirement of additional insured coverage is inextricably tied to an indemnity agreement that is void under the state's anti-indemnity statute. In *Transcontinental Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh*, the Appellate Court of Illinois found that a subcontractor's insurer had no duty to defend or indemnify the contractor due to the fact that the insurance requirement in the contract was tied to a void indemnity provision.[17] In that case, the contract between the contractor and subcontractor contained an indemnity provision in favor of the contractor that was ultimately found void under Illinois's anti-indemnification statute.[18] The contract also contained a provision requiring the subcontractor to obtain insurance sufficient to provide coverage for the subcontractor's indemnification obligations, which the contractor relied on to support its coverage position.[19] There was no separate provision independent of the requirement to provide coverage for the indemnity that required the subcontractor to name the contractor as an additional insured.[20] The court found that the provision requiring insurance coverage was inextricably tied to a void indemnity provision, and, as such, the contractor was not entitled to additional insured coverage.[21]

It may be the case that the ISO's introduction of the language, "The insurance afforded to such additional insured only applies to the extent permitted by law" is an attempt to make applicable in every jurisdiction the holding in *Transcontinental Insurance*. In other words, the additional insured endorsement form would preclude coverage for the additional insured if the insurance required by the contract was tied to a void indemnity provision.

Regardless of the intent of the ISO's third revision to the additional insured endorsement forms, the problem of insurance agreements being tied to void indemnity provisions remains. One way to reduce the risk of losing additional insured coverage due to a void indemnity agreement is to include in the construction contract a separate provision affirmatively setting forth the additional insured requirements.[22] In *W.E. O'Neill Construction Co. v. General Casualty Co. of Illinois*, which followed the *Transcontinental Insurance* decision, the court addressed this precise issue. *W.E. O'Neill* was a declaratory judgment action between a general contractor and its subcontractor's CGL carrier in which the insurer argued that the general contractor was not an additional insured on the policy because the requirement to procure insurance was inextricably tied to a void indemnity agreement.[23]

The contract between the general contractor and subcontractor, like the contract in *Transcontinental Insurance*, required the subcontractor to indemnify the general contractor and to provide insurance sufficient to insure the indemnity.[24] However, it also contained a separate provision requiring the subcontractor to name the general contractor as an additional insured on the subcontractor's CGL policy.[25] Although the *W.E. O'Neill* court found that the indemnity provision at issue did not violate the state's anti-indemnity statute, it held that, even if the indemnity was void, the general contractor would still be entitled to additional insured coverage due to the presence of a separate provision requiring such insurance that was independent of the indemnity.[26]

Without a doubt, the best course of action is to conform any indemnity provisions to the requirements of the anti-indemnification statute in the first place. However, maintaining separation between the additional insured and indemnity provisions in the construction contract can further protect the additional insured's coverage rights. These considerations are of particular importance given the ISO's revised endorsement forms.

Limitations on Additional Insured Coverage Due to Coverage Limitations and Exclusions in the CGL Policy

Additional insureds may assume that once the named

insured procures the proper endorsement and the additional insured's status is determined, that it will be covered for most—if not all—claims arising out of the subject project. This is not the case. Achieving additional insured status is only the first step. Once that hurdle is crossed, the next inquiry is whether the claim at issue is covered by the policy's initial coverage grant. CGL policies typically begin with a broad grant of coverage that provides coverage for claims of "bodily injury" and "property damage" due to an "occurrence."

Courts taking this position hold the view that faulty workmanship is not an accident, but rather a foreseeable occurrence.

Claims arising out of bodily injury and damage to property due to something other than construction defects are fairly straightforward claims that are generally included in the initial coverage grant. However, the degree to which CGL policies will protect insureds from claims arising out of defective construction is subject to varying decisions, as the jurisdictions are split on this critical issue.

Some courts have found that claims arising out of defective construction constitute "property damage" due to an "occurrence" and are thus included in the initial coverage grant.[27] These courts look to the definition of "occurrence," which is generally defined in a CGL policy as "an accident, including continuous or repeated exposure to substantially the same generally harmful conditions."[28] These courts often will next define "accident," which is not defined in the standard CGL policy, and which has been given a number of definitions, including "not deliberate, intentional, expected, desired or foreseen."[29] The Supreme Court of West Virginia, in finding claims for defective construction to be included in the initial coverage grant, stated that common sense dictated that the construction defects at issue would not have been deliberate or intentional from the standpoint of the insured general contractor and therefore were an "accident."[30] That court and others who have similarly found such claims to be within the initial coverage grant also relied on the fact that the policy exclusions contain an exception for damage to "your work" caused by a subcontractor.[31] Because such exception would be meaningless if defective work was not included in the initial coverage grant, these courts have found claims for defective work to be an "occurrence" giving rise to "property damage."[32]

Other courts, however, have declined to extend the initial coverage grant to claims for construction defects.[33] Courts taking this position hold the view that faulty workmanship is not an accident, but rather a foreseeable occurrence.[34] These courts also lend consideration to the nature of the risk involved in defective construction and the fact that, in the construction industry, performance bonds can be purchased to insure against construction defects.[35] Reasoning that the CGL policy is not intended to be a substitute for such bonds, these courts have found claims for defective work to not be included in the initial coverage grant.[36]

Courts in this faction may, however, include the claim in the initial coverage grant where the defective construction gives rise to property damage to something other than the work itself.[37] For example, a general contractor faced with a claim that a leaking roof resulted in extensive damage to interior home furnishings may have coverage for the furnishings even though there would be no coverage for repairs to the roof.[38]

The issue of CGL coverage for construction defects has been litigated and discussed at length by courts and commentators. For named insureds and additional insureds alike, this issue is of the highest importance—if the claim does not fall within the initial coverage grant, the inquiry ends there and the insured is not entitled to coverage. However, if the claim is included in the initial coverage grant, though the insured still must surpass the hurdles created by the policy exclusions, its chances of obtaining coverage are substantially improved.

Application of the "Your Work" Exclusion to Preclude Coverage for Additional Insureds for Construction Defect Claims

Even in jurisdictions where coverage for construction defects is included in the initial coverage grant, that coverage can be significantly limited or eliminated by the "your work" exclusion. The standard policy exclusions that are typically cited by insurers as support for denials of claims arising out of defective construction are the business risk exclusions, which include exclusions *j* (5) and (6), *l*, and *m*.[39] With respect to claims arising out of post-substantial completion construction defects, exclusion *l* is the primary battleground, and therefore will be the focus of our discussion here.[40]

> Exclusion *l* states that the CGL policy will not provide coverage for
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This 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.[41]

The exception to the exclusion for work performed by subcontractors, in those jurisdictions that include claims for defective construction in the initial coverage grant, can preserve coverage where the damages are due to work performed by a subcontractor.[42] The exception to the "your work" exclusion was added to the ISO standard form in 1986 and resulted in an increase in coverage for claims against contractors due to defective work.[43] Indeed, on many projects, general contractors will perform little, if any, actual construction work and will contract out to subcontractors the totality of such work.

Fifteen years later the pendulum swung back, and the ISO introduced two new exclusion endorsements—endorsements CG 22 94 and CG 22 95—that completely eviscerated the effect of the subcontractor exception by setting forth as an endorsement the precise language of exclusion *l absent* the subcontractor exception.[44] CG 22 94 eliminates the subcontractor exception on a blanket basis, while CG 22 95 does so on a project-specific basis.[45] It took several years for a case involving these endorsements to be litigated and published. Finally, in December 2009, the US District Court for the District of South Carolina had the occasion to evaluate CG 22 94, applying it, as expected, to preclude coverage.[46, 47]

The analysis of the "your work" exclusion can differ slightly where an additional insured is concerned, depending on the court's interpretation of "you" and "your." Some courts interpret "you" and "your" in a CGL policy to refer to the named insured. The Fifth Circuit reached this conclusion in *National Union Fire Insurance Co. of Pittsburgh v. Liberty Mutual Insurance Co.*, a subrogation action in which the court considered whether the "your" in "your work" referred to the work of the named insured or the additional insured.[48] National Union provided insurance coverage for S & B Engineers and Constructors, Ltd. (S & B), and Liberty Mutual provided insurance coverage to S & B's subcontractor, American Pipe Fabricating, Inc. (American Pipe).[49] S & B was an additional insured on American Pipe's policy with Liberty Mutual.[50] S & B was sued by a third party in connection with its work on the project.[51] S & B settled the claim and sought reimbursement therefore from National Union.[52] National Union paid the claim, subrogated to S & B's rights, and filed suit against Liberty Mutual for reimbursement for that portion of the claim that was due to American Pipe's defective work.[53]

In interpreting the "your work" exclusion, the court found that the word "your" in the exclusion referred not to the additional insured, S & B, but rather to the named insured, American Pipe, since the insurance contract defined "you" as meaning American Pipe.[54] The court therefore found that coverage for S & B arising out of American Pipe's defective work was excluded by operation of the "your work" exclusion.[55] The court noted, however, that given this interpretation, claims arising out of the additional insured's work would not have been precluded by the "your work" exclusion.[56] The First and Third Circuits have agreed with this interpretation of "you," relying heavily on the fact that the policies at issue, like most CGL policies, expressly defined "you" as the "Named Insured."[57]

Therefore, where "your work" refers to the work of the named insured, the additional insured will be precluded from coverage for property damage claims arising out of the named insured's work. It follows that, from the additional insured's perspective, inclusion of the subcontractor exception would only be of benefit where the claim is due to work performed by the named insured's subcontractors. For example, in a jurisdiction that recognizes construction defects as an "occurrence," if both a general contractor and a subcontractor are sued due to defects in the subcontractor's work, the general contractor would be precluded from coverage as an additional insured on the subcontractor's policy unless (1) the defects were due to the work of the subcontractor's subcontractor and (2) the policy contained the subcontractor exception to the "your work" exclusion.

The analysis differs where "your work" refers to the work of the additional insured. The Tenth Circuit, in *Marathon Ashland Pipe Line LLC v. Maryland Casualty Co.*, determined that "you" and "your" in a CGL policy refer to both the named insured and the additional insured.[58] The court reasoned, in part, that the paragraph of the policy defining "you" and "your" as the named insured and "we," "us," and "our" as the insurance company was not meant to draw a distinction between the named insured and the additional insured, but rather to distinguish the named insured from the insurer.[59] The Tenth Circuit also relied on the presence of a separation of insureds provision; such provisions are discussed in further detail *infra*.[60] The court observed that the separation of insureds provision referred to the "first named insured," indicating that additional insureds were a type of named insured.[61] The court also looked to the language of the additional insured endorsement, noting that it added Marathon as an "insured" and did not indicate any lesser coverage or status.[62] Finally, the court found that, at a minimum, "you" was ambiguous, and as such needed to be interpreted in a light most favorable to the additional insured.[63]

If "your work" refers to the work of the additional insured, then the subcontractor exception may become more relevant depending on the parties' roles and the genesis of the claim. In the example of the general contractor who is an additional insured on the subcontractor's policy, the general contractor would be eligible for coverage for the subcontractor's construction defects if the subcontractor exception to the "your work" exclusion was preserved. In other words, the subcontractor's CGL policy would operate nearly identically to the general contractor's CGL policy where the general contractor's coverage was concerned.

It is evident that additional insureds cannot assume that they will be covered for claims arising out of construction defects. Even if such claims are covered by the initial coverage grant, the "your work" exclusion may very well

preclude them, and the likelihood of such preclusion is bound to increase given policy endorsements that abolish the subcontractor exception. Unfortunately, unless the additional insured has significant leverage in which to negotiate a manuscript endorsement that would provide coverage for construction defect claims, there is little that can be done from a contract drafting perspective to prevent a reduction in coverage due to the "your work" exclusion.

Application of the "Professional Services" Exclusion to Preclude Coverage for Additional Insureds

Another roadblock to coverage for additional insureds is the professional services exclusion. Most CGL policies contain an exclusion for professional services along the lines of the following: "This insurance does not apply to . . . 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' due to rendering or failing to render any professional services by or on behalf of any insured."[64] The purpose of the professional services exclusion is to exclude from the purview of the CGL policy those services that are meant to be covered by a professional liability errors and omissions policy.[65]

The court observed that the separation of insureds provision referred to the "first named insured," indicating that additional insureds were a type of named insured.

This exclusion limits additional insured coverage in two significant ways. First, the additional insured who does not believe it is performing "professional services" may nonetheless be precluded from coverage under this exclusion due to its breadth. Second, the additional insured who is seeking additional insured coverage under a CGL policy issued to a provider of professional services may be precluded from coverage due to the named insured's performance of professional services.

Professional services are often viewed, in the general sense, as those provided by engineers and architects or other professionally licensed individuals. However, the professional services exclusion applies to a much wider range of services than those provided solely by licensed professionals. CGL policies will frequently identify particular services that constitute "professional services," the performance of which precludes coverage. These lists can include a wide variety of tasks, such as consulting services; supervisory services; inspection services; and preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, shop drawings, designs, or specifications.[66]

Courts that have interpreted the professional services exclusion have "adopted an expansive definition of the term 'professional service.'"[67] The Seventh Circuit has found that the term *professional service*

> is not limited to services performed by persons who must be licensed by a governmental authority in order to practice their professions. Rather, it refers to any business activity conducted by the insured which involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature.[68]

Similarly, the D.C. Circuit has held:

> The exclusion clearly refers to the nature of the service provided, not to the nature of the service provider; and whether a particular service is professional in nature is not determined by whether the entity responsible for it also performs related nonprofessional work.[69]

The expansive view of "professional services" creates particular problems for insureds that provide a combination of professional and nonprofessional services. A prime example is subcontractors whose scope of work includes incidental professional services such as preparation of shop drawings. The D.C. Circuit, in *Harbor Insurance Co. v. Omni Construction, Inc.*, addressed this precise issue, finding that the professional services exclusion includes such services.[70]

Omni Construction arose out of damages sustained to other property in connection with the construction of an office building and parking garage by defendant Omni Construction, Inc. (Omni). Omni's excavation of the site resulted in settlement damage to an adjacent building. Omni paid to repair such damage and sought reimbursement from its insurance carrier. The carrier refused to reimburse Omni based on the professional services exclusion because the carrier alleged that an error in the design of the sheeting and shoring system, which was designed and installed by one of Omni's subcontractors, was the cause of the property damage.[71]

Omni asserted that, in the construction industry, "professional services" may be performed by a subcontractor as part of the "means and methods of construction," and that in this context, such services are not "professional services" excluded by the CGL policy.[72] The DC Circuit rejected Omni's arguments, finding that the professional services exclusion included design of the sheeting and shoring system, even if such design was only incidental to the performance of construction work.[73]

The broad interpretation of "professional services" also creates problems for insureds, such as construction managers, who engage in supervisory services on a project. In

Auto-Owners Insurance Co. v. State Farm Fire and Casualty Co., the Georgia Court of Appeals found the performance of supervisory services on a construction project sufficient to preclude coverage under the professional services exclusion.[74] That case arose out of an urban renewal project in Dougherty County, Georgia.[75] Dougherty County engaged Albany Tomorrow, Inc. (ATI), which was a not-for-profit group of private citizens interested in the revitalization of downtown Albany, to provide oversight and management services on the project.[76] ATI contracted with Construction Technologies, Inc. (CTI) to be the construction manager.[77]

During the course of construction, Water Gas and Light Commission of Albany (WGLC) was called to the site to provide a water source for the workers.[78] In connection with this request, a conduit was damaged and WGLC asked CTI whether the damaged conduit contained WGLC lines.[79] CTI advised WGLC that the conduit belonged to WGLC, and WGLC therefore instructed one of its employees to repair the damaged conduit.[80] The employee was seriously injured when he hit a live electrical line embedded in the conduit, which caused an explosion.[81] The injured WGLC employee filed suit against ATI and CTI.[82]

ATI's and CTI's insurance carriers both denied their insureds' requests for coverage due to the professional services exclusions in their respective policies, which precluded coverage for damages arising out of supervisory services.[83] The Georgia Court of Appeals agreed.[84] With respect to CTI, the court found that CTI should have drawn upon its professional knowledge, experience, and training in advising WGLC of the components of the conduit, and the professional services exclusion therefore precluded coverage.[85] Of particular note, however, was the court's decision that ATI also was not entitled to coverage, given that it was CTI, and *not* ATI, that provided the faulty instruction to WGLC.[86] The court reasoned that because the complaint against ATI alleged failure to properly supervise and manage construction, coverage for ATI was precluded by the professional services exclusion.[87]

These decisions from the DC Circuit and Georgia Court of Appeals highlight the danger posed to insureds by the professional services exclusion. Given the reach of the exclusion, additional insureds who are performing services that they do not consider to be professional in nature may nonetheless be barred from coverage under the named insured's CGL policy.[88]

The second problem that the professional services exclusion causes for additional insureds is that, regardless of whether the additional insured performed professional services, coverage may be precluded due to the named insured's performance of such services. This scenario is present in instances where the additional insured, in its contract with a professional services provider, such as an engineer or architect, obtains the right to additional insurance under the professional's CGL policy. In the event the additional insured calls upon that policy to obtain a defense and indemnity for a potentially covered claim, the insurer may attempt to deny coverage to the additional insured based on the professional services exclusion, despite the fact that the additional insured did not perform any professional services.

In the additional insured context, the question therefore becomes whether the professional services exclusion applies to the performance of services by the named insured or the additional insured. Of course, from the additional insured's perspective, the preferred interpretation is that the exclusion only applies to the additional insured to the extent of the additional insured's performance of professional services. One way to achieve this result, or at least enhance the additional insured's ability to effectively advocate for this interpretation, is to include as a contractual requirement that the named insured procure CGL coverage containing a "separation of insureds" provision.[89]

The expansive view of "professional services" creates particular problems for insureds that provide a combination of professional and nonprofessional services.

A separation of insureds provision means that the terms and conditions of the insurance policy apply to each named insured and additional insured separately and independently.[90] Where both a professional services exclusion and a separation of insureds provision are present, the argument can be made that the CGL policy applies to the additional insured independently of the named insured, and, therefore, the named insured's performance of professional services has no effect on the additional insured's right to coverage.[91] CGL coverage forms contain a separation of insureds provision as a condition to CGL coverage, which is a provision that additional insureds should attempt to preserve.

The Seventh Circuit recently applied the separation of insureds provision to affirm coverage in favor of an additional insured on an architect's CGL policy. *National Union Fire Insurance Co. (National Union) v. American Motorists Insurance Co. (AMICO)* arose out of a tragic accident in which scaffolding on a high-rise building in Chicago fell from the building, injuring several people below.[92] The scaffolding had been erected in connection with a construction project, and the architect for the project agreed to include the owner of the building as an additional insured on the architect's CGL policy.[93] Following settlement of the underlying claims, the architect's CGL carrier rejected the owner's demand for indemnity, citing the professional services exclusion in the CGL

policy.[94] The owner's insurer, National Union, paid the settlement and filed suit against AMICO for equitable subrogation.[95]

The district court granted summary judgment in favor of National Union, finding that, despite the professional services exclusion, the owner was entitled to coverage as an additional insured under the AMICO policy due to the presence of a separation of insureds provision.[96] The separation of insureds provision in the policy stated, in relevant part: "[T]his insurance applies . . . [s]eparately to each insured against whom claim is made or 'suit' is brought."[97] The court found that the separation of insureds provision required the policy's provisions to be applied to the owner independently of the architect.[98] The court further held that under such interpretation, the mere fact that the named insured is deprived of coverage under its CGL policy due to its performance of professional services does not so deprive the additional insured of coverage under the same policy—the professional services exclusion applies only with respect to the additional insured's own conduct.[99]

Given the numerous potential obstacles to additional insured coverage, for many additional insureds such coverage is only an illusion.

The Seventh Circuit affirmed this ruling, finding that because the additional insured did not perform professional services, and due to the presence of a separation of insureds provision, the additional insured was entitled to coverage under AMICO's CGL policy.[100, 101] While the analysis from the Northern District of Illinois and the Seventh Circuit's acceptance thereof provides a well-reasoned argument in support of coverage for additional insureds on professionals' CGL policies, it is by no means the majority rule. Contrary to these holdings, other courts have applied the exclusion to the services of the named insured, thereby precluding coverage for the additional insured, regardless of whether the additional insured engaged in professional services.[102]

Given the scope of the services included in the professional services exclusion, coupled with the fact that additional insureds not performing such services may nonetheless be barred from coverage due to the services of the named insured, it is evident that the professional services exclusion provides a significant obstacle to coverage of which additional insureds should be aware.

Limitation on Additional Insured Coverage to Claims for Vicarious Liability Only

Additional insureds may assume that they are entitled to coverage under the named insured's policy for all liability, so long as it arises out of the named insured's work on the project. To the contrary, there are a handful of jurisdictions that have read additional insured endorsements as providing coverage for vicarious liability of the additional insured only.[103] One such jurisdiction is Ohio. In *Davis v. LTV Steel Co., Inc.*, the owner of a plant retained an independent contractor to provide industrial cleaning services at the facility.[104] The contract between the owner and the contractor required the contractor to name the owner as an additional insured on the contractor's liability policy.[105] The additional insured endorsement to the contractor's policy stated: "WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to *liability arising out of your operations or premises owned by or rented to you*."[106]

One of the contractor's employees was subsequently injured while performing cleaning services at the plant.[107] The injury occurred when an employee of the owner asked the contractor's employee to perform a task outside of the contractor's normal scope of services.[108] The employee filed a lawsuit against the owner, and the contractor's insurer sought a declaration that it did not owe coverage to the owner for the contractor's employee's injury.[109] The Ohio Court of Appeals agreed, finding that the purpose of the additional insured endorsement was to protect the owner from being vicariously liable for the tortious acts of the insured contractor.[110] Because the underlying plaintiff's injuries were not caused by negligence of the contractor, the court found that there was no additional insured coverage for the owner on the contractor's policy.[111]

The Third Circuit, applying Pennsylvania law, also adopted the minority position in the more recent case of *Lafayette College v. Selective Insurance Co*.[112] In that case, the owner, Lafayette College, hired a general contractor to renovate part of the owner's campus.[113] As required by the construction contract, the general contractor named the owner as an additional insured on the general contractor's liability policy.[114] The general contractor subcontracted part of the work.[115]

During the course of construction, one of the subcontractor's employees was seriously injured when he fell from scaffolding at the site. He filed suit against, among others, the owner. The owner tendered the claim to the general contractor's insurer, which denied coverage. The injured worker ultimately obtained a judgment at trial against the owner. The owner filed a declaratory judgment action against the insurer, seeking recovery due to its failure to defend and indemnify the owner.[116]

The additional insured endorsement in the general contractor's policy stated: "That person or organization is only an additional insured with respect to liability *caused by your negligent acts or omissions* at or from your ongoing operations performed for the additional insured at the

job indicated by written contract or written agreement."[117] The Third Circuit interpreted this language, finding that it only covered vicarious liability of the owner due to the acts of the general contractor.[118]

One argument in contravention of the minority position is that it results in additional insured coverage that is illusory and therefore invalid.[119] Indeed, if the named insured's policy will not provide additional insured coverage where there are allegations of the additional insured's own negligence and will only be triggered where the additional insured is vicariously liable, the policy is essentially useless once a lawsuit is brought against the additional insured.[120]

Moreover, contracts that contain an additional insured requirement will typically also contain an indemnity provision in favor of the additional insured. In a scenario where the additional insured is vicariously liable for the acts of the named insured, the additional insured would already be protected by the indemnity. As the courts of Wisconsin and the Tenth Circuit have observed:

> Where the additional insured is held no more than vicariously liable for the acts of the named insured, the additional insured would have an action for indemnity against the primary wrongdoer. Thus, an endorsement that provides coverage only for the additional insured's vicarious liability may be illusory and provide no coverage at all. In this light, it is obvious that additional insureds expect more from an endorsement clause than mere protection from vicarious liability.[121]

The problem of courts limiting additional insured coverage to vicarious liability was improved by the ISO's 2004 revisions to the additional insured endorsement form. Those revisions changed the standard language "but only with respect to liability arising out of your ongoing operations performed for that insured," to "but only with respect to liability . . . caused *in whole or in part*, by your acts or omissions or the acts or omissions of those acting on your behalf."[122] The newer language clearly covers a broader range of liability than that which is solely vicarious in nature. In those jurisdictions that have adopted the minority position, however, the 2004 ISO language is only useful if it is actually included in the policy.

Regardless of the jurisdiction in which the policy is interpreted, if the policy expressly limits additional insured coverage to vicarious liability only, courts will apply the language as written. To be sure, courts that adopt the majority position have observed that if insurers wanted to limit an additional insured's liability to vicarious liability only, the language of the endorsements could easily be changed to express such a limitation.[123] Some insurers have heeded this suggestion, and manuscript endorsements limiting the coverage of additional insureds to vicarious liability have been issued and litigated.[124] This fact, coupled with the reality that some courts interpret seemingly broad additional insured endorsements to cover vicarious liability only, further emphasizes the need for additional insureds to review the actual endorsements and/or policies prior to the commencement of construction to confirm that they are receiving the intended levels of coverage.

Closing Remarks

Additional insured coverage problems range from the very straightforward to the incredibly complex. Issues pertaining to additional insured coverage that have been prevalent for decades continue to garner attention by the courts. Other issues that have only recently come to light due to changes to the ISO's additional insured endorsement forms are certain to generate a significant amount of litigation in years to come. Given the numerous potential obstacles to additional insured coverage, for many additional insureds such coverage is only an illusion. Because additional insured coverage can be severely limited—or even eliminated—additional insureds must be aware of these obstacles and educated regarding how they can be mitigated so that additional insureds may properly assess the risk profile of any particular project *before* they are subject to a potentially covered claim.

Endnotes

1. 4 Steven G.M. Stein, Construction Law ¶ 13.01[5] (LexisNexis Matthew Bender); Dale Corp. v. Cumberland Mut. Fire Ins. Co., No. 09-1115, 2010 WL 4909600, at *5, n.4 (E.D. Pa. Nov. 30, 2010) (quoting 4 Philip L. Bruner & Patrick J. O'Connor Jr., Bruner and O'Connor on Construction Law § 11:6 (2010)).

2. *Dale Corp.*, 2010 WL 4909600, at *5, n.4.

3. Westfield Ins. Grp. v. Affinia Dev., L.L.C., 982 N.E.2d 132, 137 (Ohio Ct. App. 2012) (setting forth language of Am. Inst. of Architects, AIA Document 201-2007, § 11.1.4).

4. *See*, *e.g.*, Gilbane Bldg. Co. v. Empire Steel Erectors, L.P., 691 F. Supp. 2d 712, 719 (S.D. Tex. 2010) (setting forth the text of CG 20 10 07 04); Hobbs v. Shingobee Builders, Inc., No. 10-002508, 2013 WL 5951707, at *4 (Mich. Ct. App. Nov. 7, 2013) (setting forth the text of CG 20 33 07 04).

5. *Hobbs*, 2013 WL 5951707, at *4 (emphasis added).

6. *Gilbane Bldg. Co.*, 691 F. Supp. 2d at 719 (emphasis added).

7. Westfield Ins. Co. v. FCL Builders, Inc., 948 N.E.2d 115, 118 (Ill. App. Ct. 2011) (general contractor not entitled to additional insured coverage on sub-subcontractor's CGL policy despite certificate of insurance indicating such coverage); Main St. Am. Grp. v. Everest Nat'l Ins. Co., 918 N.Y.S.2d 283, 285 (2011) ("A certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure.").

8. Of course, if the promised additional insured coverage were not available when called upon by the additional insured, the additional insured would have a breach of contract action against the named insured. This would be the case even if the additional insured and named insured were not in contract, as the contractual requirement of coverage for the additional insured in the named insured's contract would likely give rise to third-party beneficiary status on the part of the additional insured. But it is, of course, better to have insurance coverage than a breach of contract action against the named insured.

9. Roberta Anderson, *ISO's 2013 "Additional Insured" Endorsement Changes Merit Close Attention*, 23 A.B.A. Sec. Ins. Coverage Litig., no. 3, May–June 2013.

10. *Id.*

(Continued on page 48)

The Illusions of Additional Insured Coverage

(Continued from page 23)

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. 4 Stein, *supra* note 1, ¶ 13.17[2].
16. *Id.* ¶ 13.17[2][a][i]–[iv].
17. 662 N.E.2d 500, 505–06 (Ill. App. Ct. 1996).
18. *Id.* at 505.
19. *Id.* at 503.
20. *Id.* at 506.
21. *Id.* at 506–07.
22. Roy Anderson Corp. v. Transcon. Ins. Co., 358 F. Supp. 2d 553, 567 (S.D. Miss. 2005) ("when an agreement to procure insurance coverage is a separate obligation from the indemnity obligation, Miss. Code Ann. § 31-5-41 does not void the agreement to procure insurance coverage") (interpreting Mississippi law); W.E. O'Neil Constr. Co. v. Gen. Cas. Co. of Ill., 748 N.E.2d 667, 672–73 (Ill. App. Ct. 2001) (because the agreement to provide additional insured coverage "stands separate and apart from the indemnity agreement as an agreement to purchase insurance for the general contractor[,] . . . the insurance provision is not tied inextricably to the indemnity agreement").
23. *W.E. O'Neil Constr. Co.*, 748 N.E.2d at 668–69.
24. *Id.* at 670.
25. *Id.*
26. *Id.* at 672–73.
27. *See*, *e.g.*, Cherrington v. Erie Ins. Prop. & Cas. Co., 231 W. Va. 470, 521–22 (2013) (further summarizing at note 19 cases from other jurisdictions finding construction defects constitute an "occurrence"); K&L Homes, Inc. v. Am. Family Mut. Ins. Co., 829 N.W.2d 724, 736–37 (N.D. 2013).
28. *See*, *e.g.*, *Cherrington*, 231 W. Va. at 520; *K&L Homes, Inc.*, 829 N.W.2d at 729.
29. *Cherrington*, 231 W. Va. at 520; *see also K&L Homes, Inc.*, 829 N.W.2d at 729.
30. *Cherrington*, 231 W. Va. at 520.
31. *Id.*; *see also K&L Homes, Inc.*, 829 N.W.2d at 736.
32. *Cherrington*, 231 W. Va. at 520–21; *K&L Homes, Inc.*, 829 N.W.2d at 736.
33. *See*, *e.g.*, Westfield Ins. Co. v. Custom Agri Sys., Inc., 979 N.E.2d 269, 274 (Ohio 2012); Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69, 76 (Ky. 2010).
34. *Westfield Ins. Co.*, 979 N.E.2d at 274; *Cincinnati Ins. Co.*, 306 S.W.3d at 76; *see also*, *Cherrington*, 231 W. Va. at 519, n.21 (listing of jurisdictions that do not consider claims for defective construction to arise out of an occurrence).
35. *E.g.*, *Cincinnati Ins. Co.*, 306 S.W.3d at 74–75.
36. *See*, *e.g.*, *id.* 37. Builders Mut. Ins. Co. v. Kalman, No. 07-cv-3609, 2009 WL 4807003, at *4 (D.S.C. 2009) (defective construction alone was not an "occurrence," but resultant damage to property other than the work itself was sufficient to meet requirements of initial coverage grant); CMK Dev. Corp. v. W. Bend Mut. Ins. Co., 917 N.E.2d 1155, 1164 (Ill. App. Ct. 2009) ("construction defects that damage something other than the project itself will constitute an 'occurrence'").
38. *See CMK Dev. Corp.*, 917 N.E.2d at 1164–65.
39. *See* 9A Steven Plitt et al., Couch on Insurance §§ 129:16, 129:20–21 (West 2013); *see generally* R. Steven Rawls & Rebecca Appelbaum, *Cover Me: The Subcontractor Exception to the Your [Completed] Work Exclusion*, IRMI Online (Apr. 2007), http://www.irmi.com/expert/articles/2007/rawls04.aspx; Rebecca DiMasi, *Clarifying the Confusion Over the "Business Risk" Exclusions and Other Related Construction Defect Topics*, 11th Annual Insurance Law Institute (Dec. 7–8, 2006), *available at* http://www.vbllp.com/pdf/WebRDBusinessRiskPresentation.pdf.
40. *See* 9A Couch on Insurance, *supra* note 39, §§ 129:16, 129:20–21; DiMasi, *supra* note 39.
41. *See Cherrington*, 231 W. Va. 470, 523–24 (2013).
42. *See id.* at 520, 522.
43. *Builders Mut. Ins. Co.*, No. 07-cv-3609, 2009 WL 4807003, at *6.
44. Patrick J. Wielinski, *Full Circle Regression: The New ISO "Your Work" Endorsements*, IRMI Online (Jan. 2002), http://www.irmi.com/expert/articles/2002/wielinski01.aspx.
45. *Id.*
46. *Builders Mut. Ins. Co.*, 2009 WL 4807003, at *6.
47. Even in situations where the subcontractor exception was preserved and the work was in fact performed by subcontractors, however, courts have found no coverage due to the "your work" exclusion. The Supreme Court of Texas addressed application of the "your work" exclusion and, despite extrinsic evidence demonstrating that the defective work was performed by the insured's subcontractors, the court found there was no duty to defend due to the fact that the complaint itself did not allege the subcontractors' fault. Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co., 279 S.W.3d 650, 654–55 (Tex. 2009).
48. No. 06-30489, 2007 WL 1455961, at *1–2 (5th Cir. May 18, 2007).
49. *Id.* at *1.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at *2.
55. *Id.*
56. *Id.*
57. Wright-Ryan Constr., Inc. v. AIG Ins. Co. of Can., 647 F.3d 411, 416–17 (1st Cir. 2011); Alexander v. Nat'l Fire Ins. of Hartford, 454 F.3d 214, 226–27 (3d Cir. 2006).
58. 243 F.3d 1232, 1241–42 (10th Cir. 2001).
59. *Id.* (citing Marathon Pipeline Co. v. Maryland Cas. Co., 5 F. Supp. 2d 1252, 1256 (D. Wyo. 1998), *aff'd in part, rev'd in part*) (the Tenth Circuit adopted the reasoning of the district court on this subject and added its own as well).
60. *Id.* (referring to the district court's reasoning).
61. *Id.* (referring to the district court's reasoning).
62. *Id.*
63. *Id.*
64. *See*, *e.g.*, U.S. Fid. & Guar. Co. v. Shorenstein Realty Servs., L.P., 700 F. Supp. 2d 1003, 1007 (N.D. Ill. 2010).
65. *See id.* at 1009.
66. *Id.*; *see also* Patrick Eng'g, Inc. v. Old Republic Gen. Ins. Co., 973 N.E.2d 1036, 1041 (Ill. App. Ct. 2012); Walgreen Co. v. RDC Enters., LLC, No. 07-023023-CK, 2011 WL 3689152, at *4 (Mich. Ct. App. Aug. 23, 2011).
67. Hurst-Rosche Eng'rs, Inc. v. Commercial Union Ins. Co., 51 F.3d 1336, 1343 (7th Cir. 1995).
68. *Id.*
69. Harbor Ins. Co. v. Omni Constr., Inc., 912 F.2d 1520, 1525 (D.C. Cir. 1990); *see also* Cochran v. B.J. Servs. Co. USA, 302 F.3d 499, 506 (5th Cir. 2002) ("We further note that, contrary to the parties' assertions, although such information is relevant to this determination, the title or trade of the insured contractor or its employees, or the contractor's overall job description, is not the determinative factor in this inquiry. Rather, it is the nature of the particular service allegedly negligently performed (or not performed), and whether that service is recognized as requiring specialized training or expertise, that determines whether a professional services exclusion in a CGL policy applies under Louisiana

law."); Nat'l Ben Franklin Ins. Co. of Ill. v. Calumet Testing Servs., Inc., No. 98-3934, 1999 WL 594926, at *8–9 (7th Cir. Aug. 6, 1999).

70. 912 F.2d at 1525.

71. *Id.*

72. *Id.* at 1522.

73. *Id.* at 1525.

74. 678 S.E.2d 196, 200–01 (Ga. Ct. App. 2009).

75. *Id.* at 198.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 198–99.

83. *Id.* at 199.

84. *Id.* at 200–01.

85. *Id.* at 201.

86. *Id.* at 198, 200.

87. *Id.* at 200.

88. *See also* Hurst-Rosche Eng'rs, Inc. v. Commercial Union Ins. Co., 51 F.3d 1336, 1339,1343–45 (7th Cir. 1995) (report to bonding company regarding issues with contractor performance constituted professional services).

89. U.S. Fid. & Guar. Co. v. Shorenstein Realty Servs., 700 F. Supp. 2d 1003, 1011, 1022 (N.D. Ill. 2010), *aff'd sub nom.* Nat'l Union Fire Ins. Co. of Pittsburgh v. Am. Motorists Ins. Co., 707 F.3d 797, 802 (7th Cir. 2013) (finding that the presence of both a professional services exclusion and a separation of insureds provision required that the professional services exclusion be applied to the additional insured independently of the named insureds, which had been retained to perform professional services for the additional insured).

90. *Id.* at 1011.

91. *Id.*

92. 707 F.3d at 799; *see also U.S. Fid. & Guar. Co.*, 700 F. Supp. 2d at 1004.

93. *U.S. Fid. & Guar. Co.*, 700 F. Supp. 2d at 1004, 1020.

94. *Id.* at 1021.

95. *Id.*

96. *Id.* at 1021–22.

97. *Id.* at 1021.

98. *Id.* at 1011, 1020.

99. *Id.* at 1014–15.

100. *Nat'l Union Fire Ins. Co. of Pittsburgh*, 707 F.3d at 802 (7th Cir. 2013).

101. While not addressed by the Seventh Circuit, the district court further supported its ruling by observing that a contrary reading of the policy language would result in illusory coverage for the additional insured. *U.S. Fid. & Guar. Co.*, 700 F. Supp. 2d at 1011, 1022. Because the architect was hired to perform professional services, if the owner were not covered for injuries arising out of the architect's services, the policy would not provide any protection to the owner at all for injuries on account of the architect's work, rendering it virtually illusory. *Id.* at 1011; *see also* 4 Stein, *supra* note 1, ¶ 13.16[5].

102. *See* Evanston Ins. Co. v. Clark Cnty., No. C10-5625, 2011 WL 5563284, at *4–5 (W.D. Wash. Nov. 14, 2011) (named insured's CGL carrier did not owe any coverage obligations to additional insured for claims arising out of medical professional services performed by named insured due to professional services exclusion); Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am., 181 P.3d 303, 307 (Colo. Ct. App. 2007) (additional insured not entitled to coverage on named insured's policy where named insured performed professional services and policy contained professional services exclusion); *compare* Patrick Eng'g, Inc. v. Old Republic Gen. Ins. Co., 973 N.E.2d 1036, 1044 (Ill. App. Ct. 2012) (reversing summary judgment in favor of insurer, finding coverage for additional insured despite the professional services exclusion and fact that named insured was retained to perform professional services).

103. Lafayette Coll. v. Selective Ins. Co., No. 08-1522, 2011 WL 5433698, at *2 (3d Cir. Nov. 10, 2011) (court found additional insured endorsement only covered vicarious liability of additional insured but interpreted the complaint to potentially allege vicarious liability); Neb. Utils. Serv. Co. v. St. Paul Fire & Marine Ins. Co., No. 08-cv-01673, 2012 WL 2872810, at *9 (D. Conn. July 12, 2012) (finding additional insured endorsement only provided coverage for vicarious liability, which is "consistent with the common purpose of such policies"); G.E. Tignall & Co., Inc. v. Reliance Nat'l Ins. Co., 102 F. Supp. 2d 300, 306 (D. Md. 2000) (called into doubt by *Red Roof Inns, Inc. v. Scottsdale Ins. Co.*, Nos. 09-1697, 09-1760, 2011 WL 994422, at *8, n.8 (4th Cir. Mar. 22, 2011)); Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc., 825 N.W.2d 695, 707 (Minn. 2013) ("Based on the language of the additional insured endorsement, interpreted as a whole in light of its place within a liability insurance policy, we conclude that the language 'caused by the acts or omissions of [Bolduc]' provides coverage to ECI as an additional insured only in instances of ECI's vicarious liability for Bolduc's negligent acts or omissions."); Davis v. LTV Steel Co., Inc., 716 N.E.2d 766, 769 (Ohio Ct. App. 1998) ("The phrase 'arising out of your operations' in the endorsement was intended to protect LTV from any liability for the negligence of Shafer's employees who would be performing the industrial cleaning at the LTV plant. In other words, the purpose of the additional-insured endorsement was to protect the additional insured (*i.e.*, LTV) from being vicariously liable for the tortious acts of the named insured (*i.e.*, Shafer).").

104. 716 N.E.2d at 767.

105. *Id.* at 768.

106. *Id.*

107. *Id.*

108. *Id.* at 768–69.

109. *Id.* at 768.

110. *Id.* at 769.

111. *Id.*

112. No. 08-1522, 2011 WL 5433698, at *2 (3d Cir. Nov. 10, 2011).

113. *Id*. at *1.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at *2.

119. *See* 4 Stein, *supra* note 1, ¶ 13.16[5]; Marathon Ashland Pipe Line LLC v. Md. Cas. Co., 243 F.3d 1232, 1240, n.5 (10th Cir. 2001); Mikula v. Miller Brewing Co., 701 N.W.2d 613, 623 (Wis. Ct. App. 2005).

120. 4 Stein, *supra* note 1, ¶ 13.16[5].

121. *Mikula*, 701 N.W.2d at 623 (quoting *Marathon Ashland Pipe Line LLC*, 243 F.3d at 1240, n.5).

122. Joseph P. Postel, *How Will Courts Construe ISO's New Additional Insured Endorsements?*, IRMI Online (July 2004), http://www.irmi.com/expert/articles/2004/postel07.aspx.

123. *See* Lancaster v. Ferrell Paving, Inc., 397 S.W.3d 606, 617 (Tenn. Ct. App. 2011) ("Had the parties intended to insure Ferrell for vicarious liability only, the policy could have easily referred to vicarious liability or specified whose negligence was covered and whose negligence was excluded from coverage.").

124. *See* Ill. Emcasco Ins. Co. v. Waukegan Steel Sales Inc., No. 1-12-0735, 2013 WL 5146582, at *2 (Ill. App. Ct. Sept. 13, 2013) (additional insured endorsement at issue included language stating: "The coverage afforded to the additional insured is limited solely to the additional insured's vicarious liability that is a specific and direct result of your conduct. Vicarious liability as used in this endorsement means liability that is imposed on the additional insured solely by virtue of its relationship with you, and not due to any act or omission of the additional insured.").