

What's Loss Got To Do With It? Courts and Commentators' Differing Applications of CG 20 10 Additional Insured Endorsements

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Along with indemnity agreements, contractors and owners use additional insured endorsements as a primary means of protection from third party liability that arises out of work performed under the contract. One of the most commonly used form additional insured endorsements, the Insurance Services Office, Inc. (“ISO”)³ CG 20 10 Automatic Additional Insured endorsement, underwent significant revisions in 2004. Despite the CG 20 10 endorsement being revised over a decade ago, the exact scope of coverage afforded under this form endorsement remains unclear as courts and commentators appear to differ on the proper interpretation of the pertinent language.

Prior to 2004, ISO CG 20 10 endorsements provided additional insured coverage for losses “arising out of” the named insured’s work performed for the ostensive additional insured. Because of the broad interpretation by courts nationwide of “arising out of” language, there was no requirement that the acts or omissions of the named insured play any role in the loss.⁴ In 2004, ISO sought to narrow the scope of coverage afforded to additional insureds by placing significance on the named insured’s acts or omissions. Indeed, it is generally understood that “[t]he 2004 ISO revisions sought to narrow the coverage afforded an additional insured by injecting fault into the analysis [.]” whereas under the pre-2004 ISO revisions, “the mere fact that an employee is working on the job site at the time of the injury would likely be enough to trigger the additional insured coverage.”⁵

Seeking to “inject fault into the analysis,” ISO revised the CG 20 10 endorsement to afford coverage to additional insureds “only with respect to liability for ‘bodily injury’; ‘property

damage’ or ‘personal and advertising injury’ caused, in whole or in part, by: 1. [the named insured’s] acts or omissions; or 2. [t]he acts or omissions of those acting on [the named insured’s] behalf . . .” While most commentators share a uniform interpretation of this language, courts are split on whether the acts or omissions of the named insured must have “caused, in whole or in part” the “liability” of the additional insured or simply the “‘bodily injury’; ‘property damage’ or ‘personal and advertising injury’” of the claimant.

The International Risk Management Institute (“IRMI”) comments advance the position that the named insured’s action or inactions must create or contribute to the additional insured’s liability in order for coverage to be afforded under the CG 20 10 endorsement. In other words, “[t]he 2004 endorsements demonstrate that coverage is only provided to the extent that the named insured had a hand in the liability.”⁶ Likewise, the American Bar Association section on coverage litigation states that “these [2004 CG 2010] endorsements are generally only thought to cover concurrent liability [of the named and additional insured].”⁷ Other commentators also agree with this interpretation, some going so far as to state that “for there to be coverage for the additional insured . . . the named insured must be negligent at least in part.”⁸

The Northern District of Alabama appears to agree with these commentators by holding that a CG 20 10 endorsement limited coverage “as an additional insured to liability resulting from the negligence of the [named insured] contractor.”⁹ Courts around the country have endorsed this interpretation by requiring a showing of negligence of the named insured to afford coverage under the CG 20 10 to an additional insured.¹⁰

However, some decisions are unclear as to whether a named insured must have some liability for additional insured coverage to be afforded. For instance, in *Am. Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.*, the Southern District of Texas seems to ride

both sides of the fence by stating that “the ‘whole or in part’ sentence focuses on whether [the named insured] is partially or wholly responsible for the third party injuries and [the additional insured’s] liability for same . . .”¹¹ Other courts fail to provide clarity by couching the analysis in terms of proximate causation without further explanation. The Eastern District of Pennsylvania holds that “[i]n addition to this commentary on the 2004 ISO additional insured endorsement, other courts have held identical policy language requires a showing of proximate causation in order to trigger the duty to defend.”¹² The District Court of Montana holds that the “caused, in whole or in part, by” language “means that the ‘acts or omissions of the additional insured can be a concurrent or contributing cause of the injury or damage, but a direct causal link to the named insured must be made.”¹³ Providing an even vaguer application, the District Court of Maine holds that “the ‘whole in part’ language of the [] policy specifically intended coverage for additional insureds [] to include ‘occurrences attributable in part to acts or omissions by both the named insured and the additional insured.’”¹⁴

There is no clearer example of this split of authority than the holding of the Fourth Circuit Court of Appeals in *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd’s London*.¹⁵ In *Capital City*, the Court discusses the differing interpretations of courts and commentators before appearing to reconcile them and concluding without analysis that additional insured coverage is afforded because the property damage (without regard to the liability therefor) was caused by the named insured.¹⁶

The Fifth Circuit has construed the exact Endorsement language at issue here to mean that an insurer has a duty to defend an additional insured “only if the underlying pleadings allege that” the named insured, “or someone acting on its behalf, proximately caused” injury or damage. *Gilbane Bldg Co. v. Admiral Ins. Co.*, 664 F.3d 589, 598 (5th Cir. 2011). Insurance law commentators have also examined the language at issue and concluded that an additional insured is covered where a named insured is at least partially negligent. See e.g. Scott C. Turner, Insurance Coverage of Construction Disputes § 42:4 (2015)(stating that

when the “ISO issued revised versions of its additional insured endorsements” in 2004, it “attempt[ed] to narrow coverage for additional insureds” such that “for there to be coverage for the additional insured . . . the named insured must be negligent at least in part.”) We thus conclude that the plain language of the Endorsement provides for exactly what is (sic) says: coverage to Capital City for property damage caused by Marquez, either in whole or in part.

One court, however, has firmly decided the issue of whether “caused, in whole or in part, by” modifies “liability” or “‘bodily injury’, ‘property damage’ or ‘personal and advertising injury.’” In *Thunder Basin Coal Co., LLC v. Zurich Am. Ins. Co.*, Thunder Basin Coal Company, Inc. (“Thunder Basin”) entered into a contract with The Industrial Company of Wyoming, Inc. (“TIC”) to construct a coal handling railway in a mine owned by Thunder Basin.¹⁷ The contract required TIC to obtain commercial general liability insurance naming Thunder Basin as an additional insured. During the project, a crane collapsed causing injury to two TIC employees. Upon the TIC employees suing Thunder Basin and the crane operator, Thunder Basin sought coverage as an additional insured under the policy issued to TIC. The insurer argued “that Thunder Basin’s liability was not caused by TIC’s acts or omissions, as required under the [] policy.”¹⁸ Thunder Basin, in turn, argued that because the plaintiffs in the underlying suits alleged that a party acting on behalf of TIC (the crane operator) caused plaintiff’s injuries, additional insured coverage was afforded.¹⁹ Applying Wyoming law, the Court held that:

The key term in the contract provision at issue is the “bodily injury” caused by TIC or those working on its behalf. National Union’s attempt to focus on the term ‘liability’ converts the plain meaning of the language at issue. . . . Because I have concluded that the policy provides coverage for bodily injury caused by the insured, rather than liability caused by the insured, National Union’s arguments concerning vicarious liability and comparative fault are irrelevant to this analysis.²⁰

Despite focusing its analysis on whether “caused, in whole or in part, by” modified “bodily injury” or “liability,” the Court in *Thunder Basin Coal* recognized the existence of

multiple other cases interpreting the same language and found that “no unifying principles may be drawn from the holdings of these cases.”²¹

Appearing to directly conflict with *Thunder Basin*’s shunning of comparative fault analysis, the Southern District of Texas in *Gilbane Bld. Co. v Admiral Ins. Co.* interpreted the pertinent CG 20 10 language and held that additional insured coverage was afforded because “under Texas’s comparative responsibility statute, [the named insured’s employee’s] negligence would have been at issue should [the additional insured] have been found liable in the underlying suit.”²² On appeal, the Fifth Circuit Court of Appeals affirmed the district court’s finding of a duty to indemnify because the district court held that a jury in the underlying lawsuit would have found that the injured employee contributed to his own injury and therefore was concurrently negligent with the additional insured under Texas’s comparative fault law.²³

As most jurisdictions adhere to comparative fault principles, inquiry of whether or not the named insured partially caused the loss or the additional insured’s liability for that loss tends to be one and the same. This appears to explain the judicial opinions loosely supporting the notion that CG 20 10 endorsements provide coverage when the named insured partially caused the loss. Unfortunately for jurisdictions that utilize a contributory negligence standard, this unclear analysis does not aid in their application of CG 20 10 endorsements. Thus, the significance of differing interpretations of CG 20 10 language is most prevalent in states that utilize pure contributory negligence as a complete defense to liability.²⁴ Consider the following fact pattern:

A contractor contracts with a premises owner in a pure contributory negligence state and agrees to provide an additional insured endorsement with CG 20 10 language covering the premises owner. The contractor sends an undisputedly fully qualified and credentialed employee to the job site. The contractor’s employee injures himself after crossing an unmarked barricade and falling into an unmarked opening. The contractor’s employee sues the premises owner in tort and the contractor for workers’ compensation. The premises owner asserts the complete defense of contributory negligence based on the fact that the employee crossed a

barricade, but ultimately makes a business decision to settle the case prior to trial. The premises owner seeks indemnity for the settlement from the contractor's insurer by arguing that the contractor's employee (who was acting on behalf of the contractor) caused, at least in part, his injury.

In the strictest possible sense, the premises owner is correct that the contractor's employee at least partially caused his own "bodily injury" by stepping into the opening. However, the acts of the contractor's employee did not cause the premises owner's "liability for . . . bodily injury." This is so because if the jury found that the contractor's employee even partially caused his own injury, the premises owner would have no liability under the jurisdiction's contributory fault standard. Conversely, if a jury were to hold the premises owner liable, such a finding would necessarily be premised on a finding that the contractor's employee did not cause, even in part, his own injury.²⁵ Stated otherwise, in contributory negligence states, a named insured's employee's acts in causing his own injury is a *defense* to the additional insured's liability rather than a contributing *cause* of liability. As no acts or omissions of the named insured caused the additional insured's "liability for . . . bodily injury," a determination of coverage under the CG 20 10 language requires a determination of whether "caused in whole or in part, by" modifies "liability" or "bodily injury."

In addition to conflicting authority, general principles of contract interpretation fail to definitively decide the proper interpretation of CG 20 10 endorsements. On one hand, the words "liability for" in the CG 20 10 language must be given effect and not be rendered meaningless. Without those words, the debate concludes as the CG 20 10 language would provide coverage for additional insureds "but only with respect to 'bodily injury', 'property damage' or 'personal advertising injury' caused, in whole or in part, by: 1. [the named insured's] acts or omissions; or 2. [t]he acts or omissions of those acting on [the named insured's] behalf." On the other hand, the "rule of last antecedent" requires that a "limiting clause or phrase . . . should ordinarily be read

as modifying only the noun or phrase that immediately follows.”²⁶ Under this rule, it can be argued that the modifier “caused, in whole or in part, by” modifies the last antecedent phrase of “‘bodily injury,’ ‘property damage’ or ‘personal and advertising injury.’” Of course, it can also be argued that the last antecedent phrase being modified is “liability for ‘bodily injury,’ ‘property damage’ or ‘personal and advertising injury.’”

Despite conflicting authority, the proper application of CG 20 10 language may be easier than it appears. CG 20 10 endorsements are attached to *liability* insurance policies that only “pay those sums that the insured [named or additional] becomes legally obligated to pay as damages.” Thus, courts that hold that “caused, in whole or in part, by” modifies “bodily injury” rather than “liability” fail to see the forest through the trees. Indeed, if the fact pattern set forth above was modified to where the employee damaged the premises owner’s property rather than injuring himself, the additional insured endorsement would have no application as the purported additional insured premises owner would not be “legally obligated to pay [] damages.” This same principle should apply where the acts or omissions of the named insured that purportedly impute coverage (a claimant injuring himself in a contributory negligence jurisdiction) cannot result in legal liability for the claimed additional insured. At the end of the day, courts need to step back and remember what is being insured – liability. Therefore, the more well-reasoned interpretation is that the named insured must contribute to the purported additional insured’s liability, not merely the claimant’s injury, in order for additional insured coverage to be afforded under ISO CG 20 10 endorsement language.

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³ ISO is the leading insurance policy language drafter in America. Indeed, “most [commercial general liability] insurance written in the United States is written on these [ISO] forms.” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993).

⁴ See *W. World Ins. Co. v. Resurrection Catholic Mission of the S., Inc.*, 2006 U.S. Dist. LEXIS 51119 at *28 (M.D. Ala. 2006 July 25, 2006)(“The words ‘arising out of’ are broad, general, and comprehensive terms effecting broad insurance coverage, and the words are understood to mean originating from, having its origin in, growing out of or flowing from . . . ‘arising out of’ means causally connected with, not proximately caused by.”)(citations omitted); See also *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 42 F. 3d 1317, 1327 (11th Cir. 2005).

⁵ See *Gilbane Bldg. Co. v. Empire Steel Erectors, LP*, 691 F. Supp. 712, 722 (S.D. Tex. 2010).

⁶ Bell, Mark, INTERNATIONAL RISK MANAGEMENT INSTITUTE Expert Commentary: *2013 ISO Additional Insured Endorsements: Putting the Changes into Context for the Construction Industry*.

⁷ Nierengarten, Nicholas N., AMERICAN BAR ASSOCIATION *New ISO Additional Insured Endorsements* 44 The Brief 30, 32 (2014)

⁸ See e.g. Turner, Scott C., Insurance Coverage of Construction Disputes § 42:4 (2015).

⁹ *Amerisure Mut. Ins. Co. v. QBE Ins. Corp.*, 2012 U.S. Dist. LEXIS 125811 *at 20 (N.D. Ala. Sept. 5, 2012).

¹⁰ *Friedland v. First Specialty Ins. Corp.*, 2016 N.J. Super. Unpub. LEXIS 1841 *at 17 (N.J. Super. Ct. Aug. 3, 2016)(“Thus, the overwhelming and indeed uniform interpretation of the ‘caused, in whole or in part, by’ language holds that the language is triggered where the allegations of the complaint allege negligence on the part of both the named insured and additional insureds.”); *Westfield Ins. Co. v. Nautilus Ins. Co.*, 154 F. Supp. 3d 259, 267 (M.D.N.C. 2016)(“the purpose of an additional insured endorsement is to provide protection to the additional insured where the named insured is at least partially negligent.”)

¹¹ *Am. Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 2006 U.S. Dist. LEXIS 33556 * at 22 (S.D. Tex. May 23, 2006)(underline added).

¹² *Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 127126 (E.D. Pa. Nov. 30, 2010).

¹³ *WBI Energy Transmission, Inc. v. Colony Ins. Co.*, 56 F. Supp. 3d 1194, 1202 (D. Mon. 2014). The unclear nature of the analysis provides even less guidance when courts decide only the duty to defend – a duty premised on the allegations of the injured party’s complaint rather than facts and arises when there is merely the possibility of covered damages. See *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 831 F. Supp. 2d 367, 373 (D. Me. 2011)(finding duty to defend under CG 20 10 endorsement where named insured’s employee fell from a ladder because “a possibility clearly existed that [the named insured employee’s] complaint embraced a claim covered by the Interstate policy.”)

¹⁴ *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 831 F. Supp. 2d 367, 375 (D. Me. 2011).

¹⁵ 788 F.3d 375 (4th Cir. 2015)

¹⁶ *Id.* at 380.

¹⁷ 943 F. Supp. 2d 1010, 1011 (E.D. Mo. 2013).

¹⁸ *Id.* at 1012.

¹⁹ *Id.* at 1014.

²⁰ *Id.* at 1015.

²¹ 943 F. Supp. 2d 1014, n. 5.

²² *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp. 2d 712, 721 (S.D. Tex. 2010).

²³ *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 601 (5th Cir. 2011).

²⁴ In the United States, pure contributory negligence as a complete bar to a Plaintiff’s recovery applies in Alabama, Maryland, North Carolina, Virginia and the District of Columbia.

²⁵ While some will argue that juries in contributory negligence states apply a comparative fault standard rather than the pure contributory negligence standard, such is beyond the scope of this article.

²⁶ William Strunk Jr. and E.B. White, *The Elements of Style*, at Sec. 20, p. 30 (4th Ed. 2000).