Overlapping Insurance: Who Pays When Both Landlord and Tenant Have Liability?

Marie A. Moore
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.
New Orleans, LA

When an accident occurs in leased space, both the landlord and the tenant are likely to be sued, and both parties are likely to have liability policies in place that may cover the accident. In most cases, and if the landlord's lawyer has drafted the indemnity provisions of the lease correctly, the tenant will be obligated to indemnify the landlord for the claims resulting from the accident (although if the accident was caused by the landlord's negligence, there may be contractual or legal bars to this indemnity). In addition, if the landlord's lawyer has drafted the tenant's insurance requirements correctly, the tenant has agreed to indemnify the landlord and to maintain liability coverage in a specified amount, naming the landlord as an additional insured and covering the landlord for liability arising out of "the ownership, maintenance or use" of the space leased to the tenant (ISO CG 20 11 04 13, the additional insured endorsement form for use with manager and lessor additional insureds).

Of course, the landlord should also have its own liability policy for accidents in the common areas and elsewhere in the center. But which insurance company will pay for the accident when the landlord is both an additional insured under the tenant's policy and a named insured under its own policy? When claims are made, each insurance company will eye the other company's policy to determine whether it or the other company must pay the claim, and the positions taken by these insurers may conflict with the parties' agreed risk allocation strategy.

The lawyer who drafts the lease can assist his/her client by understanding the basis for these conflicts and drafting the lease in a way that gives guidance to the insurers and to courts.

The Two Common Bases for Insurer Claims Against Other Insurers
If there is only one insured party, then that party's primary insurance must pay first, before its excess coverage insurance comes into play. But if there are two insureds, each having primary coverage and perhaps excess coverage, then these insurers are likely to consider the priority of payment and whether the liability should be shared. There are two theories under which insurers seek to have another party's insurer bear all or part of the cost of trial and settlement of a claim: (1) "contribution" under the "Other Insurance" clause of the various insurance policies, and (2) legal or contractual "subrogation" to claims that the insured party has against the other party.

Primary and excess coverage insurers seek "contribution" from overlapping insurers under the "Other Insurance" provisions included in most commercial general liability policies. For example, Section IV.4 of the basic ISO Commercial General Liability coverage form CG 00 01 04 13 provides as follows:

> **4. Other Insurance**
> If other valid and collectible insurance is available to the insured for a loss we cover under [the portions of Section I describing covered Bodily Injury and Property Damage Liability and Personal and Advertising Injury Liability], our obligations are limited as follows:
>
> *a. Primary Insurance*
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance [by equal shares or a ratio of limits].
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> *b. Excess Insurance*
> (1) This insurance is excess over: [fire and other property insurance and with respect to the maintenance or use of aircraft, "autos" or watercraft].
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises operations, or the products and completed operations, for which you have been added as an additional insured.
>
> When this insurance is excess, we will have no duty . . . to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
(2) The total of all deductible and self-insured amounts under all that other insurance.

An insurer seeks "contribution" when it invokes this "Other Insurance" provision to ask another party's insurer to satisfy all or part of the obligations that it would otherwise have to the named insured.

An insurer may also proceed by "subrogation" against another party or, in many states, its insurer when the insured party has the right to seek indemnity from the other party for all or a portion of the amounts paid. For example, if a tenant has an obligation to indemnify a landlord for an accident that occurs on the premises but the landlord's insurer pays the claim, then the landlord's insurer is "subrogated" to the rights of the landlord against the tenant or its tenant's insurer, and it may proceed against these parties for the amounts paid.

Convoluted Facts Breed Confusion in the Courts

The following cases demonstrate the problems that arise when there is a lease or other contract that attempts to allocate the risk among the landlord and the tenant and two sets of insurance policies containing provisions that conflict with the contract and with each other. Often courts find that the lease or other contract between the insured parties governs the dispute, but sometimes they give effect to the insurance policy provisions regardless of the contract. See, e.g., Daniel A. Cribbs & Ravi Mehta, "Cover Me," 37 L.A. Law 23 (Nov. 2014).

In *American Indemnity Lloyds v. Travelers Property & Casualty Insurance Co.*, 335 F.3d 429 (5th Cir. 2003), for example, a subcontractor and a contractor were parties to a construction contract in which the subcontractor agreed to indemnify the contractor for injuries arising out of the work even if attributable in part to the negligence of the contractor. The subcontractor maintained liability insurance naming the contractor as an additional insured. The contractor maintained its own liability insurance, but the subcontractor was not an additional insured on this policy. These policies contained identical "other insurance" provisions. Id. at 431. After the subcontractor's insurer settled a personal injury suit that was covered by both policies for an amount that was within the limits of the subcontractor's policy, it sued the contractor's insurer for contribution under the "other insurance" provisions of its policy for one-half of the sums it had paid in settlement and defense of the suit. The contractor's insurer denied liability on the grounds that it was subrogated to the contractor's rights under the subcontractor's indemnity agreement, so all of the costs should be paid by the subcontractor's insurer up to its coverage limits. Each party sought summary judgment without a determination of fault. The court cited *Wal-Mart Stores, Inc. v. RLI Insurance Co*., 292 F.3d 583 (8th Cir. 2002) for the fact that "the clear majority of jurisdictions . . . gives controlling effect to the indemnity obligation of one insured to the other insured over 'other insurance' or similar clauses in the policies of the insurers, particularly where one of the policies covers the indemnity obligation." Id. at 436. For this reason, the court did not permit the subcontractor's insurer to recover contribution under the "other insurance" policy provisions, explaining that the subcontractor's indemnity agreement made the subcontractor's insurance primary and the contractor's insurance only excess coverage. Id. at 444.

California courts have taken a different approach. Reasoning that insurance companies issue and price their policies without regard to the contract between the named and additional insured, they tend to apply the insurance contract terms without regard to the indemnity or other provisions of the lease or other contract requiring the coverage. See Cribbs & Mehta, supra. For example, in *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc.*, 68 Cal. Rptr. 3d 91 (Dist. 1, Div. 3, 2007), a construction contract required the subcontractor to indemnify the contractor for claims arising out of the subcontractor's work. The contractor maintained a primary liability insurance policy with a $1,000,000 per occurrence limit and an excess policy. Both policies named the contractor as an additional insured. The contractor maintained a primary insurance policy with a per-occurrence limit of $1,000,000. A worker was injured, and the jury's award was over $6,000,000. Because the jury found the contractor 20% at fault, the subcontractor's primary insurer paid its $1,000,000 limits and the excess insurer paid the rest, including $866,666.67 on behalf of the contractor. The subcontractor's excess insurer sought to recover this amount from the contractor's primary insurer, relying on a statement in the policy that the carrier was obligated to pay only amounts in excess of the applicable limits of "other insurance maintained by the insured." Id. at 102. The contractor's primary insurer defended this claim by asserting that the subcontractor's indemnity agreement controlled, and reimbursement of the amounts claimed by the subcontractor's excess coverage insurer was due by the subcontractor to the contractor under this indemnity agreement. The court did not agree. It held that the terms of subcontractor's excess insurance policy controlled, and that the limits of the subcontractor's—as well as the contractor's—primary insurance policies had to be exhausted before the subcontractor's excess carrier would have to pay for the contractor's liability. Id. at 104. A similar result was reached in *Continental Casualty Co. v. St. Paul Surplus Lines Insurance Co.*, 803 F. Supp. 2d 1113 (E.D. Cal. 2011).

Drafting to Assist the Additional Insured

In a lease, the lawyer for the party that wishes to obtain the protection of the indemnity and additional insured endorsement—that is attempting to shift the risks to the other party—can take steps to try to provide his or her client with the full benefit of the other party's indemnity and liability insurance coverage.

- First, the lawyer should assure that lease's indemnity language is at least as broad as the coverage provided to an additional insured in most liability policies; in other words, it should include at a minimum indemnity for all liability arising from the indemnitor's acts or omissions or the acts or omissions of those acting on the indemnitor's behalf, and if the client is a landlord under a lease, indemnity for all liability arising out of "the ownership, maintenance or use" of the leased premises. See ISO CG 20 10 04 13 (Owners, Lessees or Contractors as Additional Insureds) and ISO CG 20 11 04 13 (Managers or Lessors as Additional Insureds). To the extent permitted by state law, this indemnity provision should also specify that it includes indemnity for claims arising from the indemnified party's own negligence.
- Second, the lawyer should require that the party providing the liability coverage name the other party as an additional insured in a policy that provides primary and noncontributory coverage to the additional insured. See *3060 Corp. v. Crescent One Buckhead Plaza, L.P.*, 686 S.E.2d 367 (Ga. App. 2009) (the tenant's policy provided that the additional insured's coverage was excess unless the written contract required it to be primary); Cribbs & Mehta, supra.
- Third, the lawyer should require that the party providing the coverage give its insurers notice of the lease's indemnity requirements when its policy is obtained so that the underwriter cannot claim that it didn't know about those requirements; Cribbs & Mehta, supra.
- Fourth, the lawyer should strongly recommend that its client obtain a copy of the other party's policy—or at least the endorsements naming it as an additional insured and the "other insurance" language of the policy—and assure that the provisions satisfy the requirements of its lease. The "other insurance" provisions of insurance policies have changed several times during the last 20 years and vary, depending on the insurer's requirements, so a diligent insured party must read the policy's provisions to be sure that they are consistent with the lease requirements.

Most important, the lawyer should advise his/her client to keep its own liability insurance in place so that it will be covered even if a court decides that state law bars indemnity for a particular type of claim or that by reason of the policy provisions, the other party's policy does not provide full coverage to the additional insured.

Marie A. Moore is a partner in the New Orleans firm of Sher Garner Cahill Richter Klein & Hilbert, L.L.C. She can be reached at (504) 299-2100 or mmoore@shergarner.com.