New Insurance Forms Have Impact On Additional Insureds

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

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

Unfortunately for landlords and building owners, over the years, the insurance industry has modified the additional insured endorsement form to limit the coverage provided to additional insureds. Thanks to changes made in 2013, the limits of the additional insured's coverage will now not exceed the limits of the insurance coverage that the tenant or contractor is required to maintain in the lease or construction contract. This raises issues for landlords and property owners. Now just getting named as an additional insured on the tenant's or contractor's insurance policy is not enough: A landlord or property owner must also be sure that its contract requires its tenant or contractor to maintain CGL insurance with high enough limits and enough types of coverage to give effect to the additional insured endorsement.

Background

Long ago—in 1985—the standard additional insured endorsement used for construction contracts stated that the party named in the endorsement was also an insured under the policy with respect to liability arising out of the activities of the named insured for the additional insured or on the named insured's own behalf. *See* ISO CG 20 10 11 85 (ISO is the Insurance Services Office, Inc., an insurance industry organization that promulgates the forms customarily used by insurers, and the last two numbers of the endorsement form show the year of its promulgation).

This was "broad form" coverage, and it apparently worked too well. By 2004, the form for owners under construction contracts was more limited and covered the additional insured only for liability caused in whole or in part by the named insured's acts or omissions or the acts or omissions of those acting on the named insured's behalf (again excluding completed operations). *See* ISO CG 20 10 07 04. At this point, the owner's own sole negligence and the sole negligence of other contractors were no longer covered by the contractor's insurance. These changes in endorsement forms paralleled the enactment of contractor anti-

indemnity statutes in many states. *See* Marie A. Moore, "Construction Contract Anti-Indemnity Statutes: Roadblocks to Risk Allocation," *Retail Law Strategist*, Vol. 11, Issue 1 (March 2011).

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

The New Limits

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

A. Section II – Who Is an Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the named insured] and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after [the named insured] ceases to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the [additional insured].

However:

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

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

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

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

1. Required by the contract or agreement; or

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

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

What Does This Mean?

Clearly this means that lawyers must be more careful in drafting leases and construction contracts. The lessor and construction site owner will be covered by the other party's insurance only to the extent of the in-

surance limits and the scope of the insurance that the tenant or contractor is required to maintain in the lease or construction contract—even if the actual CGL coverage maintained by the tenant or the contractor has much broader coverage or higher limits.

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

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

These are only the initial questions raised by the new forms, but these questions demonstrate the increased care landlord and property owner attorneys must take in drafting the insurance and indemnity requirements of their leases and construction contracts.

Maintain Your Own Coverage

Finally, as was the case before the 2013 changes, even if a tenant or contractor agrees to name the landlord or owner as an additional insured, the landlord or owner should still maintain its own independent CGL policy. First, certificates of insurance are not reliable, so a landlord or property owner needs to obtain a copy of its tenant's or contractor's CGL policy (or at least its declarations page and endorsements) to confirm that it is actually an additional insured on the policy. *See* Marie A. Moore, "Alternatives to Certificates of Insurance," *Retail Law Strategist*, Vol. 13, Issue 2.

Second, an additional insured endorsement in favor of a landlord or construction site owner will still not cover either accidents caused by the landlord's alteration work or the site owner's sole negligence or accidents that occur after the lease has ended or the contract work has been completed. Third, state laws such as Section 705/1 of the Illinois Landlord and Tenant Act may prohibit the enforcement of provisions exempting a landlord or site owner for personal injury or other claims arising from its own negligence, and the insurer may claim that it has no obligation to the additional insured when a statute of this type prohibits the shifting of these risks. A CGL policy maintained and controlled by the

landlord or site owner is the best protection from these risks—and perhaps having all parties maintain their own coverage for their own negligence is the real goal of the insurers.

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