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**Technical Advisory**

**TA 263**

**October 3, 2007**

**Subject: CGL: Additional Insured Issues.**

**Background:** Fans of the *Star Trek* series will fondly recall that one of Spock's favorite leisure activities was "Three Dimensional Chess." Serious chess players of the human type, who play chess on a flat (2-dimensional) chessboard, spend years learning complex moves, counter-moves, and strategies. The thought of playing chess in 3-D seems almost beyond comprehension.

For insurance agents who insure contractors and subs, the exercise is equally challenging and perplexing. Given the ongoing, complicated and ever-changing interplay between insureds, insurers and the courts, the endeavor seems more like "Three Dimensional Tug of War." And, unlike chess, the losers risk more than reputation – they can suffer catastrophic financial loss.

With insureds, insurers and the courts constantly battling over terms, conditions, definitions, and intent of the CGL and the 30 or so Additional Insured endorsements (that's just from ISO), agents usually end up in the crossfire.

The herd-mentality to be added as an additional insured on the insurance policies of other parties isn't restricted to CGL, or even to commercial lines. In personal lines, similar requests are also becoming more frequent. For example, more and more homeowners are submitting requests to their agents from their Homeowners Associations, who want to be added as additional insureds to each and every homeowner's policy in the association.

In commercial as well as personal insurance, this practice is drawing more and more pushback and criticism from industry and legal experts. There have been numerous articles in national trade publications, outlining some of the pitfalls and problems this practice has, not only for the industry and the named insured, but for the additional insureds, too.

In the meantime, agents must push on with daily life, which means dealing with the myriad issues attendant to the additional insured requests.

**Main Points.** This Technical Advisory is divided into two main parts.

**PART I** discusses five key issues related to CGL additional insured endorsements: **(1) sole negligence, (2) ongoing operations vs. completed operations, (3) contractual liability as it relates to additional insureds, (4) certificates of insurance, and (5) the insurance marketplace.**

**PART II** contains a listing of the excellent articles currently posted on the IIABA Virtual University, which analyze these and other key issues in greater detail.

### **PART I – KEY ISSUES**

**(1) Sole negligence.** The request from an additional insured that they be afforded coverage for their own sole negligence under someone else’s CGL is probably a sign of the times. In a “Litigation Gone Wild” world, everyone runs for cover anyplace and everyplace they can find it.

Philosophically, it is difficult for many observers to understand and accept the fairness or logic in having the sole negligence of an additional insured being covered in the CGL of a separate named insured, who had no action or negligence related to the plaintiff’s injury. In fact, at least 40 states limit or prohibit such coverage under their “anti-indemnity” laws or jurisprudence.

And it is here that the first major tug-of-war has been engaged. Insurers of the named insured abhor the idea, additional insureds love the idea, and courts serve up a crazy-quilt mix of decisions that provide no consistent guiding principles under which all the parties can depend on or operate under.

Louisiana: Anti-Indemnity and the Marcel Exception. 1981, Louisiana enacted such a law (LRS 9:2780), called the Louisiana Oilfield Indemnity Act (LOIA), which is sometimes referred to in insurance and legal articles as the Louisiana Oilfield Anti-Indemnity Act.

As stated in Subsection A, the legislature was concerned *“that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions...contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals...”*

Therefore, Subsection B provides that such agreements are *“void and unenforceable to the extent that that it purports to or does provide for defense or indemnity....to the indemnitee against loss or liability for damages...which is caused by or results from the sole or concurrent negligence or fault...of the indemnitee...”*

Additionally, Subsection G stipulates that *“any provision in any agreement...which requires waivers of subrogation, additional named insured endorsements, or any other*

*form of insurance protection which would frustrate or circumvent the provisions of this Section, shall be null and void and of no force and effect.”*

Numerous legal challenges have been brought against various provisions of the LOIA over the years, ranging from exactly what types of agreements and what types of work were governed by the act, to issues of whether state or federal maritime law was applicable.

An interesting and legally significant issue regarding the scope of Subsections B and G was brought when Jeffrey Marcel slipped in a large puddle of oil that had spilled onto the deck of South Marsh Island platform 281-C on January 3, 1990 in the Gulf of Mexico. The ensuing litigation (*Marcel v. Placid Oil Co.*, 11 F.3d 563 – 5<sup>th</sup> Cir. 1994) created what has become known as the “Marcel Exception,” or the “Marcel Rule.”

At issue was the status of the oil company as an additional insured (“indemnitee”) in the insurance of SEE – an oilfield services contractor – (“indemnitor”), who was Mr. Marcel’s employer. In seeking to retain its status as an additional insured under the oilfield services contractor’s insurance for the injury to Marcel, Placid Oil raised the issue that the agreement between itself and SEE provided that Placid would pay the premium for the additional insured endorsement.

Interestingly, very similar circumstances were present in an earlier case, *Patterson v. Conoco, Inc.*, 670 F.Supp. 182 (W.D. La. 1987). In *Patterson*, the court concluded that the agreement was not void under LOIA because the indemnitee (Conoco) had paid for its own insurance.

The court in *Marcel* drew upon the reasoning and the decision in *Patterson*, and held the following:

“We now adopt the exception created in *Patterson* as law of this Circuit and find that it has potential application here. The LOIA is aimed at preventing the shifting of the economic burden of insurance coverage or liability onto an independent contractor. If the principal pays for its own liability coverage, however, no shifting occurs. We see no need to prevent such an arrangement in order to give effect to the LOIA. Indeed, agreements such as the one in *Patterson* may be economically desirable in situations where it is less expensive for the independent contractor to add the principal as an additional insured than for the principal to obtain its own insurance on a particular operation.”

“In approving the exception, however, we stress that the exception does not apply if any material part of the cost of insuring the indemnitee is borne by the independent contractor procuring the insurance coverage.”

Mainstreet Issues. While Sir Isaac Newton was not known as one of the great insurance thinkers, his Third Law of Motion is most apropos to the situation of sole

negligence: *"For every action there is an equal and opposite reaction."* First came the legal strategy of "sue everybody." The natural reaction of the legal targets being sued was to either get out of the line of fire, or seek protection from any and every source available. This included seeking additional insured status under the insurance of others.

Insurers reacted by denying coverage to additional insureds for their own sole negligence, believing that the practice was philosophically questionable, and at the same time clearly not covered by the standard additional insured endorsements in use at the time.

That rejection of coverage status for additional insureds for their own negligence brought the matter into litigation, and the courts overlaid their own reading of the endorsement language and the law, often in support of the additional insureds.

This of course led insurers to go back to the drawing boards and revise the additional insured endorsements. More litigation in re-interpreting the new language ensued, which has become a repetitive pattern over the last few decades.

The workhorse additional insured endorsement is the CG 20 10. In the 11/85 edition, three words have been the focus of enormous disagreement and litigation. (It should not be surprising for so much discourse to spring from so few words. The First Amendment to the U.S. Constitution consists of only 45 words, but has generated oceans of ink and thousands of court cases over our history.)

For the CG 20 10 11 85, the additional insured is afforded coverage for their liability *"arising out of"* the work of the named insured. This was generally thought to provide the additional insured with coverage under the named insured's CGL for the additional insureds' vicarious or contributory negligence.

However, a number of court cases held otherwise, by reading the *"arising out of"* phrase broadly enough to find coverage for the additional insureds where there was merely an *indirect causal relationship* between the named insured and the additional insured's liability. That is, the fact that the named insured was performing work for the additional insured was sufficient to trigger coverage for the additional insured, even if the plaintiff's injury was the result of the additional insured's sole negligence.

The *"arising out of"* language remained in place through numerous revisions to the CG 20 10, including the 10/93, 3/97, and 10/01 editions. It also appears in almost all ISO Additional Insured endorsements issued prior to July 2004.

In 2004, ISO filed new editions of many additional insured endorsements. In the CG 20 10 07 04, *"arising out of"* was replaced with a coverage trigger on behalf of the additional insured for their liability *"caused in whole or in part by your [the named insured's] acts or omissions; or the acts or omissions of those acting on your behalf."*

While this change is often characterized in the insurance literature as excluding the sole negligence of the additional insured, no such actual phraseology appears in the new endorsement. Certainly the intent is there, and ISO states that in no uncertain terms in its filing memorandum.

Interestingly, ISO originally filed the new additional insured endorsements with an edition date of 06 04, in which the sole negligence of the additional insured was specifically excluded. For example, in the CG 20 10 06 04, the following sentence was included: *“There is no coverage for the additional insured for bodily injury, property damage, or personal and advertising injury arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured.”*

In announcing the withdrawal of the 06 04 edition and the replacement with the 07 04 edition, ISO described the inclusion of the sole negligence exclusion as having possible “unanticipated consequences.”

One obvious problem the exclusionary language had was the potential narrowness of the exclusion. Numerous industry experts pointed out that under that wording, it could be read as excluding *only* the additional insured’s *sole negligence*, but not excluding the *joint* negligence of the additional insured and some other party unrelated to the named insured, with no involvement by the named insured.

With the 07 04 wording, it is clear that the intent is for the additional insured to be covered under the named insured’s CGL only in circumstances where the named insured (or those acting on its behalf) is at least partially an actor. The intended net effect is to provide the additional insured with vicarious liability, as well as contributory liability, where the additional insured and named insured (or those acting on its behalf) are jointly involved in the plaintiff’s injury.

**(2) Ongoing operations vs. completed operations.** Another contentious issue in the ongoing tug-of-war among insureds, insurers and the courts is how long coverage lasts for the additional insureds under the named insured’s CGL. That is, does the additional insured have coverage for both ongoing operations and completed operations under the named insured’s CGL?

In the CG 20 10 11 85, the additional insured was granted coverage in the named insured’s CGL for liability arising out of *“your [the named insured’s] work.”* The extent of coverage provided to an additional insured arising out of the named insured’s *“work”* was soon the subject of dispute. While the CG 20 10 11 85 never used the phrase *“completed operations,”* the definition of *“completed operations”* in the CGL includes a reference to your *“your work.”*

In the CGL, *“your work”* is defined as:

*(1) Work or operations performed by you or on your behalf; and*

*(2) Materials, parts or equipment furnished in connection with such work or operations.*

Likewise, a pertinent excerpt from the definition of "products-completed operations hazard" provides:

*a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work"*

Given the frequency in construction contracts of requiring coverage for additional insureds for ongoing operations as well as completed operations of the named insured, interpretive issues and litigation soon followed. With a substantial body of case law holding that additional insureds did have coverage arising out of both ongoing operations as well as completed operations, the language was soon amended.

In the 10/93 edition, the phrase "your work" was replaced with "your ongoing operations." While ISO's intent seems clear, some experts opined that this language was insufficient to decisively exclude coverage for additional insureds for their liability arising out of the named insured's completed operations. However, in the 3/97 revision to the CG 20 10, no change was made to this language.

In 2001, the CG 20 10 10 01, however, additional language was added to clarify when coverage for the additional insured was intended to cease. A new exclusion was added which stated in pertinent part:

*"This insurance does not apply to bodily injury or property damage occurring after: (1) All work...to be performed by or on behalf of the additional insured at the site of the covered operations has been completed; or (2) That portion of your work...has been put to its intended use..."*

This language was retained in the 2004 revision to the CG 20 10. As noted above, the principal change in 2004 was the replacement of "arising out of" with "...caused in whole or in part by your [the named insured's] acts or omissions; or the acts or omissions of those acting on your behalf..." (See discussion in the "sole negligence" section.)

When the additional language was added to the CG 20 10 in 2001, essentially eliminating coverage for an additional insured for the named insured's completed operations, ISO introduced a new endorsement to provide this coverage for additional insureds. The CG 20 37 10 01 provided the following coverage for the additional insured:

*Section II – Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" at the location designated and described in the schedule of this endorsement performed for that insured and included in the "products-completed operations hazard".*

As a part of ISO's revised efforts in 2004 to eliminate interpretive problems with the "arising out of" language (discussed above), the CG 20 37 07 04 incorporated the new approach by including the "caused in whole or in part" phraseology. The CG 20 37 now provides coverage for the additional insured as follows:

*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" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".*

**(3) Contractual liability as it relates to additional insureds.** There are several important issues involving additional insureds that arise in the context of the contractual liability coverage in the CGL.

First, here is the portion of the CGL that provides the relevant coverage (part of the definition of "insured contract"):

*"Insured contract" means:*

*f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.*

Issue #1 – Additional insured status. Many contracts executed in business transactions today, and almost all of those involving construction, include a requirement that one party be named as an additional insured in the other's CGL.

Which party enjoys additional insured status on the other's insurance usually depends on the business version of "the golden rule" – "He who has the gold makes the rules." That is, the party with the superior bargaining power is able to successfully make the demand. Typically, the building owner can demand it of a general contractor, and a general contractor can demand it of a sub-contractor.

However, just because a sub has signed a contract in which the sub is contractually required to name the general contractor as an additional insured, does not in itself give the GC additional insured status in the sub's CGL. At the same time, showing the GC as an additional insured on the Certificate of Insurance does not confer such status to the GC. In other words, just because it's on the Certificate doesn't mean it's true. The only way to provide additional insured status is to use one of the additional insured endorsements (CG 20 10, for example).

Where a contract requires additional insured status, and this is not provided through an additional insured endorsement, industry commentators often refer to this party as an “uninsured indemnitee.” While the term does not appear in the CGL, it aptly distinguishes that this entity (the GC, for example) is not an insured in the other’s (sub’s) CGL. [Editor’s Note: In contracts where the GC requires that the sub hold the GC harmless and indemnify him, the sub is the “indemnitor” (granting indemnity), and the GC is the “indemnitee” (receiving indemnity).]

One of the primary differences between an insured and an indemnitee is defense costs. While insureds are provided a defense outside limits, defense for indemnitees is within limits, unless the indemnitee complies with several specific requirements in the “Supplementary Payments – Coverages A and B” provision. Often, these requirements are resisted by indemnitees.

Issue #2 – Sole negligence. Likewise, a contractual requirement that the sub provide the GC with coverage for the GC’s sole negligence does not overcome the limitations in the specific additional insured endorsements (discussed above). In fact, whether or not a GC can obtain sole negligence coverage in a sub’s policy is a matter of state law and/or jurisprudence, as discussed above.

At the same time, in jurisdictions and under circumstances where the transfer of sole negligence is permitted, the fact that such coverage is outside the scope of the additional insured endorsement does not preclude the GC from seeking such protection through the contractual mechanism, and as such, the contractual liability coverage under the sub’s CGL might in fact apply to the GC’s sole negligence.

For additional discussion, see Issue #4 below.

Issue #3 – Completed Operations. Construction contracts routinely require that the additional insured (the GC in our discussion) be provided with a certain number of years of coverage under the named insured’s (the sub’s) CGL, in order to pick up the completed operations exposure.

As noted above, the 2001 changes to various additional insured endorsements added exclusionary language to prohibit coverage for the additional insured after the work was effectively completed. In addition, new endorsement CG 20 37 was introduced to provide such coverage for completed operations.

However, this raises an interesting question, in which the GC does not have completed operations coverage through the additional insured route (which was excluded in 2001 and later editions of the additional insured endorsements), but might find such coverage through the sub’s contractual coverage (but as an indemnitee and not an additional insured).

Some industry experts have commented about the seeming disparity of coverage afforded an entity (such as a GC) between having additional insured status vs. being an



indemnitee under the sub's contractual coverage. At the same time, being an additional insured provides defense outside limits, whereas defense for an indemnitee who does not comply with the numerous requirements in the Supplemental Payments provision would be inside the policy limits.

Issue #4 – Restrictive endorsements. In order to close the back door as it were, and preclude the contractual liability provisions in the named insured's policy from providing unwanted exposures such as sole negligence or completed operations for additional insureds or indemnitees, ISO has two restrictive endorsements available to insurers – the CG 24 26 and the CG 21 39.

The CG 24 26 was first introduced in 2004, in the same ISO filing that contained revisions to various existing additional insured endorsements. The purpose of the CG 24 26 was to conform the contractual coverage to the same limitations contained in the additional insured endorsements. Specifically, to eliminate sole negligence of an indemnitee from being considered within the scope of an "insured contract," to exactly follow the same restriction afforded in the additional insured endorsements.

The CG 24 26 amends the definition of "insured contract," by adding the "*caused in whole or in part*" language that was also added to additional insured endorsements in the same filing. Here is the pertinent excerpt:

*Paragraph 9. of the Definitions Section is replaced by the following:*

*9. "Insured contract" means:*

*f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, **provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf.** Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. [Emphasis added.]*

In the 2004 filing, ISO commented that the endorsement would "amend the definition of an insured contract in the CGL to remove coverage for an additional insured's sole negligence." Industry observers commented that the CG 24 26 actually attempts to remove sole negligence coverage for *indemnitees* under the contractual provision, and for *additional insureds* through the revised additional insured endorsements.

It is important to note that with the attachment of this endorsement, along with the additional insured endorsements of 2001 edition or later, there is no intended coverage for the sole negligence of either an additional insured, or an indemnitee (in construction contracts, especially, the GC is usually both). However, that does not negate the fact that the sub might have a contractual obligation to a GC which is not covered by the sub's CGL.

The CG 21 39 is another endorsement which insurers could use to bar coverage for an indemnitee under the contractual liability provisions of a named insured's CGL. It was originally introduced with an 11/85 edition date, and was revised 11/88 and 10/93, which is the current edition.

The CG 21 39 takes the sledgehammer approach, and simply eliminates category "f." from the definition of "insured contracts." This leaves the named insured with contractual coverage only for what is often called "incidental contracts" such as lease of premises, etc.

**(4) Certificates of insurance.** With Internet usage so prevalent these days, its open forum and wide access to information has caused the novice, unwary user to mistakenly believe, "If it's on the Internet it must be true."

Likewise, the untrained agent or uninformed insured might conclude, "If it's on the Certificate of Insurance, it must be true."

Industry studies show that approximately 75% of E&O claims involving Certificates of Insurance arise from the CGL. In addition, while 1 in 25 E&O claims overall originate with Certificates, in the last year, the frequency has increased by 28%. (Cited in "*Certificates of Insurance – Issues and Answers*," posted on the IIABA's Virtual University web site – see PART II below.)

Returning to "just because it's on the Certificate doesn't make it true," discipline and consistency must be applied by the agency in issuing Certificates of Insurance.

Legal and insurance requirements in some construction contracts today are challenging, to say the least. Actually, some are absurd, and must be pushed back in some way, lest the agency end up holding the hot potato. These requirements often demand all sorts of amendments to the standard ACORD Certificate, as well as insurance requirements that cannot be fulfilled (sole negligence, completed operations, etc.). For a detailed discussion, see PART II.

It is likewise not unusual for some larger construction firms to require that the agency submit a letter on its own letterhead, stipulating that each and every insurance requirement of the contract has been met. Not only do E&O experts emphatically urge agents not to comply with such requests, some E&O carriers raise the issue of whether or not any resulting litigation against the agent would even be covered by the agent's E&O policy.

As one E&O carrier commented, "This could cause coverage problems under their Errors and Omissions Policy if knowingly done." In addition, some experts suggest that

criminal prosecutions could result where an agent stated in writing something (such as this required letter) that they knew was not true.

Expert opinions vary as just what should and should not appear on the ACORD Certificate. Regarding the issue of the agency trying to document that the insurance provided does not meet all the requirements of the contract their insured (a sub, for example) has agreed to in a contract with another party (a general contractor), two prominent agency consultants provided the following advice:

Comment #1: *“What we recommend to our clients is that they include with the certificate, when sending the insured's copy, a form letter that says that the certificate and the coverage represented on it, do not necessarily comply with every contractual assumption of liability in the construction contract, and that they should check with their attorney. There's always been an assumption by our insured, and the certificate holder, that EVERYTHING covered by the construction contract is also covered by the insurance policy. We all know that's hardly the case. Sole negligence is but one of those issues.”*

Comment #2: *“I would never add wording to a certificate. If you add one thing, then you leave an opening for what else you didn't put on. The certificate (as you and I both know) just certifies coverage that is explained better and with great contractual integrity ELSEWHERE in other documents - oh, say, like the policy!*

*What I do recommend is that the agency has a letter that goes out to any named insured who adds an additional insured (and it is really the additional insured endorsement that is more important than the cert, anyway) that clarifies that the A.I. is being added to cover only the primary liability of the insured, and specifically NOT the additional insured's primary liability. I even suggest that the A.I. go into the agency's prospect database as a prospect with an immediate letter to offer them assistance in securing coverage (or replacing who ever IS getting them coverage) for their primary liability. That way, any court would likely see that the A.I. was given ample "heads up" that they needed primary liability cover, rather than being able to rely on their status on the other party's insurance.”*

**(5) The insurance marketplace.** As if the “Three Dimensional Tug-of-War” between insurers, insureds and the courts was not complicated enough, there is actually a fourth very muscular player in all this – the insurance marketplace.

The insurance marketplace is a driving force in several key areas.

Availability of coverage. In a contentious issue such as providing an additional insured with completed operations coverage, insurers and ISO have acted and reacted to myriad developments over the years.

The initial battle in the completed operations debate was over the intent of “*your work*,” which was the key language in the CG 20 10 11 85. In 1993, this was replaced with “*your ongoing operations*.” In 2001, an exclusion was added, clarifying when coverage for the additional insured ceased. This language was retained in the 2004 changes to the CG 20 10.

When the change to the CG 20 10 was made in 2001, ISO introduced in the same filing a new endorsement which was designed to provide completed operations coverage for additional insureds – the CG 20 37 07 04.

However, many agents report very restricted availability of CG 20 37 in the marketplace. At the same time, there remains a strong demand for the coverage in many construction contracts, creating something of a train wreck in the marketplace.

Standard markets. Another availability problem exists for standard markets, which use filed forms, whether ISO or proprietary. Countless contracts, especially in construction, not only require certain coverages be provided, but often include a requirement for a specified edition date of certain endorsements, the CG 20 10 11 85 being one of the most prominent.

For the most part, standard markets cannot attach out-of-date endorsements, so another roadblock is created. However, some standard markets have created excellent proprietary endorsements that provide agents and insureds with helpful tools to work with.

Surplus markets. Generally, more flexibility exists with surplus markets. For example, a few still use the CG 20 10 11 85. Others have well-designed, effective and useful endorsements. Some, however, have more restrictive endorsements, with language, terms and conditions quite different from ISO. Therefore, agents must always use great care when placing business with surplus markets.

Louisiana Department of Insurance. While some individual standard and surplus markets have revised their additional insured endorsements to reflect the 2004 ISO changes, the Louisiana DOI has not formally adopted the 2004 ISO filing regarding sole negligence, as of this date. Discussions between LDOI and ISO on this issue are ongoing.

Role of agents. Francis Bacon is often quoted for his famous line, *Nam et ipsa scientia potestas est* – “knowledge is power.” While the many complex issues surrounding CGL additional insureds can be challenging, agents who educate themselves about these matters will have a substantial advantage in the insurance marketplace.

At the same time, agents who are well-versed in the myriad additional insured issues understand the critical need to exercise care, caution, and sound E&O loss control procedures.

As noted above, it is highly likely that the insurance requirements of many contracts insureds sign these days cannot be met by the insured's insurance. Some experts (quoted above) recommend agents have standard letters they send to the contracting parties, documenting this fact.

Another approach recommended by other experts is for the agency to include in the letter something of a checklist of the major insurance requests that can and cannot be met, such as sole negligence, completed operations, etc. In Part II below, the last page of the "Certificates of Insurance – Issues and Answers" (White Paper) posted on the IIBA Virtual University contains a sample checklist.

See also the above discussion about the risks of complying with the unacceptable demand by insureds and others, that the agency submit a letter on its own letterhead, stating that insurance every requirement of the contract has been met.

In a broader context, the necessity of reading contracts that insureds sign is itself a possible source of trouble for agents – from both an E&O and legal standpoint (some experts caution that this could border on practicing law without a license). One recommendation often made by legal and E&O commentators is for the agency to provide all parties with a written disclaimer when contracts are being reviewed, to document that the agency is only reviewing the insurance provisions of the contract.

The Virtual University has an article on this subject, which includes sample disclaimer language. The title of the article is, "*Should Agents Review Contracts for Insureds?*" It is found in the "Business" section of the VU Library, under "Agency Management," and then "Procedures." (Alternatively, this or any article, or specific subject, can be found on the Virtual University by simply using the Search feature on the VU web site.)

Agency consultants often recommend that an agency find and capitalize on its "competitive advantage." The same dynamic would work as well for agents. Mastering such complex issues as CGL additional insureds, which benefits both insureds and insurers, is exactly the kind of competitive advantage independent agents are most known and respected for.

## **SUMMARY OF KEY ISSUES – ENDORSEMENTS**

### **CG 20 10 – Additional Insured – Owners, Lessees or Contractors**

#### **11/85 edition:**

**In the named insured's CGL, the additional insured is covered for:**

**“...liability arising out of ‘your work’... “**

Comment: These six words have been the source of extensive debate and litigation, over two fundamental issues involving the scope of coverage provided to the additional insured:

- (1) Does “*arising out of*” provide the additional insured with coverage for its sole negligence?
- (2) Does “*your work*” include completed operations coverage for the additional insured?

**10/93 edition:**

**In the named insured’s CGL, the additional insured is covered for:  
“...liability arising out of your ongoing operations... “**

Comment: The phrase “*your work*” is replaced with “*your ongoing operations*” in response to claims by additional insureds for completed operations coverage in the named insured’s CGL.

In addition, the phrase “*arising out of*” is retained.

**CG 20 10 – Additional Insured – Owners, Lessees or Contractors  
- continued-**

**03/97 edition:**

**Same language as in the 10/93 edition.**

**10/01 edition:**

**In the named insured’s CGL, the additional insured is covered for:  
“...liability arising out of your ongoing operations... “**

**In addition, the following exclusion is added:**

**“Exclusions. [excerpt]: *This insurance does not apply to bodily injury or property damage occurring after: (1) All work...to be performed by or on behalf of the additional insured at the site of the covered operations has been completed; or (2) That portion of your work...has been put to its intended use...*”**

Comment: This edition retains the same language as the 10/93 and 03/97 editions for an additional insured’s exposure for “*liability arising out of your ongoing operations.*” However, an exclusion was added to bar coverage for the additional insured for completed operations coverage in the named insured’s CGL.

**07/04 edition:**

In the named insured's CGL, the additional insured is covered for:

***"...liability caused in whole or in part by your acts or omissions, or the acts or omissions of those acting on your behalf...in the performance of your ongoing operations..."***

The exclusion introduced in 2001 is retained:

***"Exclusions. [excerpt]: This insurance does not apply to bodily injury or property damage occurring after: (1) All work...to be performed by or on behalf of the additional insured at the site of the covered operations has been completed; or (2) That portion of your work...has been put to its intended use..."***

Comment: In reaction to adverse interpretations over the implications of "arising out of," and in an attempt to eliminate sole negligence coverage for an additional insured in the named insured's CGL, a completely new approach was introduced in 2004.

**CG 20 10 – Additional Insured – Owners, Lessees or Contractors  
- continued-**

The intent is to require some ("in whole or in part") action or involvement by the named insured (or those acting on its behalf) for coverage to extend to an additional insured who might also be included in litigation.

In addition, the exclusion introduced in 2001 to bar completed operations coverage for the additional insured is retained.

**CG 20 37 – Additional Insured – Owners, Lessees or Contractors –  
Completed Operations**

**10/01 edition:**

In the named insured's CGL, the additional insured is covered for:

***"...liability arising out of 'your work'...and included in the 'products-completed operations hazard'."***

Comment: The CG 20 37 was introduced in 2001, in conjunction with a revision to the CG 20 10 – which added an exclusion to prohibit coverage for completed operations for additional insureds under the named insured's CGL. ISO introduced the CG 20 37 as a method to provide this coverage under a mechanism separate from the CG 20 10.

**07/04 edition**

**In the named insured's CGL, the additional insured is covered for:  
“...liability caused in whole or in part by ‘your work’... and included in the  
‘products-completed operations hazard’.”**

Comment: In reaction to adverse interpretations over the implications of “*arising out of*,” and in an attempt to eliminate sole negligence coverage for an additional insured in the named insured's CGL, a completely new approach was introduced in 2004. The intent is to require some (“*in whole or in part*”) causation of the named insured's work for coverage to extend to an additional insured that might also be included in litigation.

**CG 24 26 – Amendment of Insured Contract Definition**

**07/04 edition:**

**In the named insured's CGL, definition “f.” of “insured contract” is deleted and replaced with a new definition which incorporates the following language:  
“...provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or by those acting on your behalf.”**

Comment: This endorsement was filed by ISO in 2004, as part of a broader effort to eliminate the sole negligence coverage for an additional insured under a named insured's CGL. However, even where such coverage has been successfully eliminated from additional insured endorsements, an additional insured still might find coverage through the “insured contract” provisions of a named insured's CGL.

The revision to the definition of an “insured contract” incorporates the “*in whole or in part*” language used in other endorsements – discussed above.

**CG 21 39 – Contractual Liability Limitation**

**11/85, 11/88, 10/93 editions:**

**In the named insured's CGL, definition “f.” of “insured contract” is deleted.**

Comment: While the CG 21 39 has been in existence since 11/85, its use has usually been focused on specific, high-risk construction insureds. However, in the ongoing tug-of-war between insureds, insurers and courts over various risk transfer mechanisms discussed throughout this article, this endorsement can be utilized to completely eliminate any undesired coverages for additional insureds (especially sole negligence



and completed operations). This is done by simply deleting the broader form of contractual liability coverage in the CGL, and restricting coverage to what is commonly referred to as "incidental contracts" only.

## **PART II – REFERENCES & RESOURCES**

The Virtual University of the Independent Insurance Agents & Brokers of America (IIABA) has an extensive library of articles on all the major coverage lines in Property & Casualty. In addition, the library includes articles on agency management, E&O, customer service, automation and other related topics.

Best of all, access to the VU is free to all member agency employees. Log on to the VU web site at <http://www.iiaba.net/VU> to obtain a free password.

In the General Liability section of the VU library there are currently over 80 excellent and informative articles. Of those, here are the ones that deal with various aspects of CGL additional insureds. Within most of the articles are links to other resource information.

***“Certificates of Insurance – Issues and Answers” (White Paper)***

[Editor’s Note: This 53 page report is one of the most informative documents available on the myriad issues dealing with certificates.]

***“Additional Insureds and Certificates”***

***“Additional Insureds vs. Additional Named Insureds”***

***“Certificates of Insurance Court Cases”***

***“CGL Additional Insureds...A Risky Business”***

***“The CGL ‘No Occurrence’ Claim Denial”***

***“CGL ‘Primary and Noncontributory’ Certificate Requirements”***

***“Contractual Liability vs. Additional Insured Status”***

***“Insuring the Sole Negligence of Third Parties”***

***“ISO’s New Additional Insured Endorsements”***

**Editor’s Note:** Special thanks to Virginia Bates, John Eubank, Cheryl Koch, and Bill Wilson for their assistance with this article.

**Necessary Action:** Circulate this Technical Advisory to all appropriate agency staff.