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US construction risks on the rise as business grows

The US construction boom has shone a spotlight on the minutiae of associated insurance law

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Construction is booming in the US and so are the inherent risks presented to owners, contractors and sub-contractors alike.

Traditional risks such as slips and falls, workmanship and product defects are compounded by a skilled labour shortage, an ageing workforce and an influx of inexperienced workers. As a result, owners, contractors and sub-contractors continue to seek to shift liability among themselves through indemnification and insurance requirements clauses in contracts.

Most construction contracts include clauses among the parties requiring specific types and amounts of insurance and also require such policies name the project owners, architects, general contractors and/or sub-contractors as "additional insureds".

Generally speaking, status as an additional insured effectively means coverage is available but only with respect to liability caused in whole or in part by the ongoing operations of the named insured.

Having a contract that requires a party be named as an "additional insured" is only the tip of the proverbial iceberg, as the question of whether and to what extent an insurance policy provides coverage for an additional insured is one of the most complex issues in construction risk and insurance. The scope of additional insured coverage can be influenced by many factors including policy language, contract language, public policy and state laws. Indeed, the law regarding additional insured coverage varies significantly depending on the controlling state law. Consequently, risk managers and insurance agents must continually apprise themselves of the ever-evolving status of the law.

By way of example, two US courts recently provided clarity concerning important issues affecting the scope of additional insured coverage in the construction industry. In *McMillin Homes Construction v National Fire & Marine Insurance Company*, the California Court of Appeals ruled the "care, custody and control" exclusion applicable to additional insureds only applied to damage to property that was in the exclusive control of the general contractor. In *Bacon Construction Company v Areball Protection Insurance Company*, the Rhode Island Supreme Court affirmed a denial of coverage for a general contractor where the claims for which it sought coverage were not alleged to have been "caused in whole or in part" by the named insured.

A shortage of skilled labour and an ageing workforce are increasing risks in the US construction sector

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McMillin Homes

In *McMillin Homes*, a general contractor sought coverage as an additional insured under a general liability policy issued to its roofing sub-contractor for claims asserted by homeowners relating to defective roofing. The insurer denied coverage for the claims on the basis that the policy excluded coverage for damage to "property in the care, custody or control of the additional insured" and the defects purportedly occurred during the project while the homes were in the care and control of the general contractor. Following a bench trial, the trial court agreed with the insurer and entered judgment in its favour.

The Court of Appeals overturned that ruling, saying the exclusion required exclusive control of the property, which the facts did not support. In its decision, the Court of Appeals pointed out the additional insured endorsement provided coverage to the general contractor for the sub-contractor's "ongoing operations" and said California courts "broadly construe a general contractor-additional insured's right [to coverage] under the 'ongoing operations' coverage provision".

The Court of Appeals then affirmed previous interpretations of the care, custody and control exclusion as requiring the damaged property be within the exclusive control of the general contractor. The court reversed the trial court, saying the facts demonstrated the general contractor and sub-contractor shared control and responsibilities over the homes during the pendency of the project and it was well within the reasonable expectations of the general contractor to believe coverage existed for defects caused to property during the sub-contractor's "ongoing operations".

Bacon Construction

In *Bacon Construction*, a general contractor was sued for personal injuries suffered by an employee of its sub-contractor while working on a construction project. The sub-contractor had entered into a contract with the general contractor requiring it obtain liability insurance naming the general contractor as an additional insured. The policy included a standard additional insured endorsement that provided coverage "with respect to liability... caused in whole or in part... in the performance of your ongoing operations for the additional insured".

The employee filed a lawsuit against the general contractor alleging the general contractor's negligence was the sole cause of his injuries, but he did not assert any claims against his employer – the sub-contractor. Accordingly, the insurer denied coverage because the liability for which the general contractor sought coverage was not caused in whole or in part by the named insured's conduct.

The Rhode Island Supreme Court agreed and affirmed a trial court's dismissal of the general contractor's claim. In its ruling, the Rhode Island Supreme Court reasoned the additional insured endorsement contained a "significant limitation on the availability of coverage" in that it included a negligence or fault trigger. Specifically, the court reasoned the general contractor was only entitled to coverage upon a showing of fault attributable to the general contractor or its agents.

The rulings in *McMillin Homes* and *Bacon Construction* are further proof that merely including insurance requirements language in a construction contract and obtaining additional insured status does not automatically equate to an unfettered ability to transfer liability to one's sub-contractors.

Rather, the facts of each case and the law of the applicable jurisdiction will have a significant impact on the availability of coverage. ■

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