

# Your Additional Insured Endorsements: How Coverage May Be Narrowing

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## Introduction

A common feature of most construction contracts and subcontracts is a requirement that the contractor or subcontractor name the owner or contractor as an additional insured under the contractor's or subcontractor's general liability insurance policy. However, there is a widespread misunderstanding of what such additional insured endorsements ("AIE") actually accomplish. And, the type of endorsement issued by the insurance company - there are many different types - will have a great impact on the scope of coverage afforded to the additional insured party.

## What the Endorsement Accomplishes

The AIE must be contrasted with a certificate of insurance. A certificate of insurance simply is "information" regarding the insurance policy, usually the type and amounts of insurance. Such certificates usually have language in the upper right hand corner stating that the certificate "is issued as a matter of information only and confers no rights." The certificates also usually provide that the insurer will give 30 days notice of the cancellation of the policy, but they typically go on to disclaim any liability arising from failure to give such notice.

The AIE is a separate document, usually issued in conjunction with the certificate of insurance, and it makes the additional insured party an insured party under the subcontractor's general liability insurance and generally makes the subcontractor's insurance policy primary over the contractor's (or owner's) general liability insurance. *Rossmoor Sanitation v. Pylon*, 13 Cal.App.3d 622 (1975). This in turn typically means that in the event of a claim against the contractor arising out of the subcontractor's work, the subcontractor's insurance limits will be depleted before the insurance of the general contractor comes into play, helping to ensure that the general contractor has available insurance coverage for future claims that may be made against the same policy. Further, to the extent that the subcontractor's insurance covers the claim, this will improve the general contractor's claims history, with the result of lower CGL insurance premiums.

Another important aspect of being an additional insured is that the additional insured has bad faith rights against the insurer. This can be a very powerful tool. The most important scenario involves the bankrupt or out-of-business subcontractor. Even though the subcontractor is gone, the subcontractor may have insurance that provides coverage for a claim when the damage manifests several years later.

If the subcontractor is out of business, the insurance company has no incentive to provide a defense for the subcontractor. There is no potential liability for bad faith to the out-of-business subcontractor. But, if the general contractor is an additional insured, the insurance company may be exposed to bad faith and typically will undertake the defense of the contractor and subcontractor, even though the subcontractor is out of business.

## Ongoing Operations

**A very important issue is whether the AIE provides coverage for "products/completed operations," or whether it only provides coverage for "ongoing operations."** All of the AIE forms in use at least provide coverage for "ongoing operations." This means, for example, that if

there is an accident arising out of the subcontractor's work while the project is under construction, the subcontractor's general liability insurer will take responsibility, assuming it is a covered claim.

**Even when the coverage is limited to "ongoing operations," this does not mean that the subcontractor does not have insurance coverage for claims arising after the subcontractor's work is completed.** The subcontractor still has insurance, and such insurance probably includes "products/completed operations" coverage. But in such case, the general contractor (and owner) will be unable to assert their status as additional insureds for the construction defect claims that typically come up years after project completion.

### **Different Additional Insured Forms**

There are many different AIE forms in use, and the coverage afforded by the forms varies dramatically. Not surprisingly, the trend in the industry is to reduce the coverage afforded to the additional insured.

The most widely used standard endorsement to create additional insured status is the "CG 20 10-Additional Insured-Owners, Lessees or Contractors-Scheduled Person or Organization." The original version of CG 20 10 was dated November 1985 (hence its designation as CG 20 10 11 85), and it encompassed liability not only while the named insured's work was in progress but for the named insured's completed operations. It also extended coverage to all claims "arising out of the named insured's work." The form stated as follows:

Name of Person or Organization

WHO IS AN INSURED (Section II) 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" for that insured by or for you.

Very few CG 20 10 11 85 additional insured endorsements are being issued now by insurance companies in California. **After 1985, insurance companies began issuing AIEs that limited coverage to ongoing operations**, as noted above. A typical example of such an endorsement is as follows:

A. 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 ongoing operations performed for that insured.

Between 1985 and 2004 there were several decisions by California courts clarifying that the "arising out of" language required the insurance company to defend and indemnify the additional insured, even from claims that were the result of the sole negligence of the additional insured and even when the named insured was not at fault. *See, e.g., Vitton Construction Co. v. Pacific Insurance Co.*, 110 Cal.App.4th 762 (2003). Some insurers began to issue additional insured endorsements that sought to prevent this result, sometimes by adding a sentence that stated: "The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization."

In 2004, the CG 20 10 form was re-issued again, this time with major changes. This form provides much more limited coverage to the additional insured than the CG 20 10 11 85 form. It provides as follows:

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 for "bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

First, it is clear that this form is limited to ongoing operations. Thus, a general contractor will be unable to make a claim as an additional insured under the subcontractor's "products/completed operations" coverage.

Second, the **"arising out of" wording has been eliminated, and the claim in question must be caused by the acts or omissions of the named insured or its subcontractors. Thus, coverage may be eliminated for the additional insured's sole negligence.** This depends on how courts interpret "caused in whole or in part." This does not require that the act of the subcontractor be a negligent one, simply that the act "caused" the accident, in part. If a non-negligent act of the subcontractor partially "caused" the accident, there still could be coverage for an accident caused solely by the negligence of the additional insured.

Third, the named insured now must be at least a partial "cause" of the injury or damage. The elimination of coverage for the additional insured's sole negligence did not automatically impose a requirement of subcontractor responsibility.

### **Conclusion**

The 2004 CG 20 10 AIE has reduced coverage for additional insureds significantly, in comparison to the coverage afforded under the CG 20 10 11 85. And, it appears that the 2004 CG 20 10 is, or will become, the predominant AIE form in the industry. Certainly it is important for owners and contractors who expect to benefit by being named additional insureds to understand just what they are, and are not, receiving as a result of being named an additional insured.