

Determining Additional Insured Status In Construction Defect Claims

Typical Construction Contract Language

Insurance Requirements:

–Before monthly payment can be made, a certificate of insurance must be submitted in the amount of one million dollars coverage for automobile and two million dollars for general liability coverage. Proof of workers compensation is required. The general liability policy must provide for Products and Completed operations coverage. The certificate for liability insurance must provide as follows:

–Additional Insured Endorsement: (Owner/Contractor) and their allied entities are included as additional insured under this policy. With respect to the liability of any such additional insured arising out of your work for that insured by you or for you, this insurance is primary.

Blanket Policy Endorsement

–9S2001 Ed. 4-99 Policy Language, or
–760204 Ed. 6-96 Policy Language as follows:

Each of the following is also an insured:

–Any person or organization other than an architect, engineer or surveyor, which requires in a “work contract” that such person or organization is made an insured under this policy. However such person or organization shall be an insured only with respect to covered “bodily injury”, “property damage”, “personal injury” and “advertising injury” which results from “your work” under that “work contract”.

The coverage afforded to such a person or organization does not apply to “bodily injury” or “property damage” occurring after the earliest of the following times:

–When “your work” under the “work contract” (other than service, maintenance or repairs) has been completed.

–When that portion of “your work” under the “work contract” out of which any injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

–When our coverage for you under this policy or a renewal of this policy terminates and is not continued by other insurance provided by us.

Products-Completed Operations Coverage

•The noticeable distinction between the two policy forms is that the 760204 form excludes coverage for losses that occur after the named insured has left the job-site. When coverage is afforded under this policy form, additional insured coverage for claims with injury-in-fact or continuous triggers requires a separate endorsement.

•This coverage is known as “Products-Completed Operations Coverage” and it provides coverage for damage occurring after the named insured has completed his operations at a given site. Depending on the type of endorsement issued, it may convey coverage under policies issued after the insured completed work at the given job-site.

Additional Insured Endorsements
(Also refer to Quick Reference and Schedule Handouts)

•Broad Form Endorsements

GC2010 (11/85)

Conveys additional insured status to “Owners, Lessees or Contractors-Scheduled Person or Organization for liability arising out of “your work” for the (named additional insured) by or for you.

CG2016/2026 (11/85)

Conveys additional insured status to the “Designated Person or Organization” for liability arising out of “your” operations or premises owned by or rented to you. Broad form additional insured coverage.

•Coverage Limited to on-going operations

CG 2009 11/85

Conveys additional insured status only until the work out of which the injury or damage arises has been put to its intended use. Excludes coverage for property owned, occupied or rented to the additional insured. Excludes coverage for the named insured’s work for the additional insured.

CG2010 (10/93)

Limits coverage to liability arising out of (named insured’s) ongoing operations. No coverage for completed operations.

Trigger Of Coverage in Construction Defect Claims

In construction defect cases the parties agree that damage was not caused by a single, identifiable event, but by repeated exposure to the same condition, i.e., water intrusion, occurring over an extended period of time, with continual, progressive, and indivisible damage. Individual state courts have determined the “trigger” theory used in their particular state.

The three most applicable to construction defect claims are known as:

- Manifestation Theory**
- Injury-in-Fact Theory**
- Continuous Trigger Theory**

•Manifestation Theory: The policy is triggered when the injury or damage is discovered or manifests itself (or in some cases is capable of being discovered) during the policy period. The injury or damage may be been occurring prior to discovery may not be taken into account in this theory.

•Injury-in-Fact Theory: All policies are triggered if they are in effect during the time the injury or damage is shown to have actually taken place. Since the theory in construction defect is that damage has been occurring since the date the work was completed, it is assumed that damage occurred in each policy period.

•Continuous Trigger Theory: All policies are triggered if they are in effect during any of the following times: exposure to harmful conditions; actual injury or damage; and upon manifestation of the injury or damage.

Construction Defect Example

Commercial King is the Owner/Developer of a strip-mall. They retain Big Construction as the general contractor. Big Construction hires Randy's Roofing, A-Frame Framing, Best Stucco and All Weather flashings as subcontractors. The building is completed in 2001. In 2006 the mall begins to experience water intrusion through the roof & around the windows. Commercial King sues Big Construction for, among other things, negligent construction.

Big Construction tenders its defense and indemnity to the subcontractor's insurers. However, they are unable to produce copies of written contracts.

Insurer History:

- Randy's Roofing
 - Able Insurance 1999-2000
 - Dependable Insurance 2001-2003
 - Safe Insurance 2003-2007
- A-Frame Framing
 - Dependable Insurance 2001-2005
 - Safe Insurance 2005-2007
- Best Stucco
 - Able Insurance 2001-2003
(insured out of business after 2003)
- All Weather Flashings
 - Safe Insurance 2001-2002
 - Dependable Insurance 2002-2006
 - Able Insurance 2006-2008

In support of the tender Big Construction provides:

- Randy's Roofing
 - CG2026-11/85 issued by Dependable Insurance
 - CG2010-11/85 for "all operations" of contractor issued by Safe Insurance
- A-Frame Framing
 - GC 2009-10/93 issued by Dependable Insurance
- Best Stucco
 - Certificate of Insurance naming Big Construction as Additional Insured issued by Able Insurance
- All Weather Flashings
 - CG2010-11/85 issued by Safe Insurance

Who has a duty to defend?

- Dependable Insurance for Randy's Roofing – CG2026-11/85
- Safe Insurance for Randy's Roofing – even though the endorsement was issued after the work was completed a CG2010-11/85 issued for "all operations" confers additional insured status on the holder.
- However, Dependable and Safe Insurance will share the defense allocation for Randy's Roofing, each paying one-half.
- Safe Insurance for All Weather Flashings – CG2010-11/85
- Big Construction's coverage under A-Frame's policy ended when A-Frame's work at the project was completed. No completed operations coverage.

•While Best Stucco issued a Certificate of Insurance naming Big Construction as an additional insured, they did not issue the accompanying endorsement conveying coverage.

Multiple Carrier Share Allocation Methods

•Equal Shares

–The theory that all applicable CGL policies pay an equal share of the defense costs regardless of the ultimate share of damages assessed to each policy.

•Pro-rata

–The theory that each CGL policy should only bear a percentage of the defense costs equal to the eventual percentage of damage that will be attributed to the named insured.

–Pro-Rata allocation goes against the insurer’s duty to provide a complete defense

–An insurer is required to defend covered claims even if the insured is ultimately found in a trial or other civil proceeding to have no legal obligation to pay damages

–The insurer’s obligation to defend is determined by the allegations contained in the suit and not by facts that may later be established that ultimately show the claim is not covered by the CGL policy

–A complete defense requires that an insurer defend the insured for all allegations both covered and uncovered

Evaluating Additional Insured Claims

1. Obtain complete copy of Your Policy
2. Is the proposed defendant a named additional insured or an additional insured by endorsement?
3. Does other insurance exist?
4. Obtain complete copy of other policies and compare “Other Insurance” clauses.
5. Other Insurance Clauses
 - “excess over any other insurance”
 - “excess over any valid and collectible insurance unless you have agreed in a written contract for this insurance to apply on a primary or contributory basis.”
 - “we will share will all . . .other insurance . . .by equal shares.”