

CHAPTER 2

WHO IS THE INSURED?

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I. Identifying the Insured

The first critical issue in any coverage analysis is whether the person seeking coverage is afforded coverage by the policy. Under the standard commercial general liability (CGL) policy, there are two main types of insureds: named insureds and additional insureds. Named insureds are insureds that are named in the declarations page of the CGL policy and further defined in Section II. Additional insureds are insureds that are not named in the declarations page of the policy, but that are afforded coverage under the policy usually by way of endorsement. With respect to named insureds, Section II of the standard form CGL policy contains the following provisions:

SECTION II—WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your “executive officers” and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

- a. Your “volunteer workers” only while performing duties related to the conduct of your business, or your “employees,” other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these “employees” or “volunteer workers” are insureds for:
 - (1) “Bodily injury” or “personal and advertising injury”:
 - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-“employee” while in the course of his or her employment or performing duties related to the conduct of your business, or to your other “volunteer workers” while performing duties related to the conduct of your business;
 - (b) To the spouse, child, parent, brother or sister of that co-“employee” or “volunteer worker” as a consequence of Paragraph (1)(a) above;
 - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
 - (d) Arising out of his or her providing or failing to provide professional health care services.
 - (2) “Property damage” to property:
 - (a) Owned, occupied or used by,
 - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your “employees,” “volunteer workers,” any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
- b. Any person (other than your “employee” or “volunteer worker”), or any organization while acting as your real estate manager.
- c. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
- d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
 - b. Coverage **A** does not apply to “bodily injury” or “property damage” that occurred before you acquired or formed the organization; and
 - c. Coverage **B** does not apply to “personal and advertising injury” arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

II. Common Issues

A. RULES OF CONSTRUCTION

Identifying who is insured under the insurance contract involves the use of the typical rules of construction. An insurer may define who will be an insured under a policy and the parties to the insurance contract determine this during their contract negotiations.¹ The coverage will only extend to those entities identified or defined as insured parties under the terms of the policy.² Because the insurance company drafts the policy, it bears the obligation to clearly identify who is covered and who is not covered.³

B. NAMING AND IDENTIFICATION ERRORS

An insured may be insured under any name as long as there is no fraud.⁴ The individual seeking coverage bears the burden of proving that he or she is covered by the policy. If the individual seeking coverage is not named, described, or otherwise identified, there is no coverage afforded the individual.⁵ If there is a material error (i.e., more than a simple misspelling), contract reformation may be necessary before a coverage suit may be brought on the coverage dispute. Additionally, if the

1. *Congdon v. Auto. Club Ins. Co.*, 816 A.2d 504 (Vt. 2002).

2. *Catholic Health Servs. of Long Island, Inc. v. Nat'l Union Fire Ins. Co.*, 847 N.Y.S.2d 638 (N.Y. App. Div. 2007).

3. *Fireman's Fund Ins. Co. v. Vordermeier*, 415 So. 2d 1347 (Fla. Dist. Ct. App. 1982).

4. *Roberts v. Mosier*, 132 P. 678 (Okla. 1913).

5. *Kassis v. Ohio Cas. Ins. Co.*, 856 N.Y.S.2d 797 (N.Y. App. Div. 2008).

insurer or its agent is aware of the error, the insurer may be estopped from denying coverage due to its error.⁶

C. EMPLOYEES

CGL policies typically provide coverage for employees. Section II of the CGL policy provides coverage for

“employees,” other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.

To be covered by the policy, it is imperative both that the employee be an employee within the definition of the policy and that the employee be acting within the scope of his or her employment at the time the claim arises. It should be noted that coverage for employees is not always provided in CGL policies. Merely because a corporation is a legal entity and can act only through a person does not necessarily mean that employees are afforded coverage.⁷

1. *Who Is an Employee?*

Section V defines “employee” to include a “leased worker,” but excludes a “temporary worker.” Independent contractors are not considered employees for coverage purposes.⁸ Unless the policy defines independent contractors, different jurisdictions employ different factors to distinguish employees from independent contractors.⁹ For example, in *Curry v. Atlantic Mutual Insurance Co.*,¹⁰ an art dealer who worked exclusively from his own offices, did not have fixed work hours, was not paid a salary or reimbursed for expenses, was not provided any training by the insured, and whose methods used were not controlled by the insured was not an employee of the insured. Moreover, volunteer workers are not employees under Section V of the CGL policy.

2. *Scope of Employment*

One of the most fact-intensive and frequently litigated aspects of coverage regarding employees is whether the claim arises while the employee was performing “acts within the scope of their employment by you or while performing duties related to the conduct of your business.” In order for an employee to be covered, the employee

6. N.Y. Underwriters Ins. Co. v. Union Constr. Co., 432 F.2d 182 (10th Cir. 1970).

7. Am. Fam. Mut. Ins. Co. v. Enright, 781 N.E.2d 394 (Ill. App. Ct. 2002); Republic Indemn. Co. v. Schofield, 54 Cal. Rptr. 2d 637 (Cal. App. 1996).

8. Sahli v. Woodbine Bd. of Ed., 938 A.2d 923 (N.J. 2008).

9. See N.E. Ins. Co. v. Soucy, 693 A.2d 1141 (Me. 1997).

10. 723 N.Y.S.2d 784 (N.Y. App. Div. 2001); but see RLI Ins. Co. v. Agency of Transp., 762 A.2d 475 (Vt. 2000) (finding that a person was an “employee” even though the named insured treated him as an independent contractor).

must be acting within the line and scope of his or her employment. Further, the relevant time for determining whether an employee is an insured is the time of the underlying occurrence.¹¹ The employee's status as an insured does not continue when the employee is not performing his or her duties as an employee.¹² For example, in *Rayburn v. MSI Insurance Co.*,¹³ a carpenter who was working on his father's shed was not "acting with respect to the conduct of a business" but rather was acting as a volunteer. Accordingly, the carpenter was not covered by the policy.

Other law, such as constitutional law, may set the contours of what falls within the scope of employment. For example, in *Ohio Government Risk Management Plan v. Harrison*,¹⁴ the court found that a police chief's sexual harassment was not outside the scope of his employment as a matter of law because the police chief could be acting "under color of law." However, in *Doe v. South Carolina State Budget & Control Board*,¹⁵ the court found that the CGL policy did not cover sexual assault by the employee because the employee was not furthering his employer's business through his acts. Whether an employee is acting within the scope of his or her employment or performing duties in furtherance of the named insured's business is highly dependent upon the facts and deserves special scrutiny if it is a potential issue in your case.

D. BUSINESS ORGANIZATIONS

Business organizations and relationships carry their own complexities with respect to CGL policies. This section provides a brief, noncomprehensive overview of issues common to joint ventures, partnerships, parents and subsidiaries, changes in corporate form, and entities that are insured under the name of an entity that does not legally exist.

1. Joint Ventures

Joint venture coverage issues typically stem from questions as to whether an insured's joint venture with a noninsured is covered by the insured's CGL policy. Joint ventures themselves may be named an insured on a CGL policy, but a joint venture entered into by an insured is not typically covered by a CGL policy. An insured's joint venture may be covered by a special endorsement. Unless the joint venture is named, described, or otherwise referred to as an insured in a policy, the joint venture will not be covered by the policy.¹⁶ Further, although one joint ven-

11. *Ridenour v. Reed*, 944 So. 2d 584 (La. Ct. App. 2006).

12. *Russell v. Clapp*, 201 S.W.3d 99 (Mo. Ct. App. 2006).

13. 624 N.W. 2d 878 (Wis. Ct. App. 2000).

14. 874 N.E.2d 1155 (Ohio 2007); *Shrader v. Employers Mut. Cas. Co.*, 907 So. 2d 1026 (Ala. 2005) (finding that a civil rights violation could occur within the scope of a city employee's duties).

15. 494 S.E.2d 469 (S.C. Ct. App. 1997).

16. *Catholic Health Servs. of Long Island, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 847 N.Y.S.2d 638 (N.Y. App. Div. 2007).

turer might be insured, its co-joint venturer is not necessarily an additional insured and not necessarily covered by the policy.¹⁷

2. Partnerships

The CGL policy in Section II provides that if the entity designated as an insured is “[a] partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.” “Partnership” is not a defined term under the CGL policy. What constitutes a partnership will be determined by the general usage of the term and the applicable law. Coverage for a partnership may be provided by naming the individual partners or by naming the partnership, but because a partnership cannot exist independently of its partners, it cannot be insured without the partners also being insured as individuals.¹⁸

3. Parents and Subsidiaries

Under the CGL policy, a corporate parent is not afforded coverage as an insured. Subsidiaries are afforded coverage in limited instances. Section II provides coverage for subsidiaries as follows:

Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization.

However, there are two significant limitations on this coverage. First, “bodily injury,” “property damage,” and “personal and advertising injury” that occurred before the acquisition or formation of the subsidiary are excluded. This exclusion is intuitive, as insurance is intended to cover unknown future events. Second, and critically, coverage is only afforded for 90 days after the acquisition or creation of the subsidiary. Additionally, the termination of the policy or expiration of the policy period terminates coverage even if the 90 days since formation or acquisition have not run. If an insured entity acquires a subsidiary that has its own subsidiaries, coverage may not extend to the subsidiary’s subsidiaries. At least one court has distinguished between direct subsidiaries and subsidiaries owned by subsidiaries.¹⁹

4. Subsequent Incorporations and Mergers

A merger or subsequent incorporation of an insured may have little or no effect on the policy. A change in corporate form, such as a subsequent incorporation, may not in itself preclude coverage unless the change in corporate form changes the risk or exposure.²⁰ However, there are some changes to corporate form that may affect

17. *Ohio Cas. Ins. Co. v. Harbor Ins. Co.*, 66 Cal. Rptr. 340 (Cal. Ct. App. 1968).

18. *Cont'l Cas. Co. v. Pro Mach.*, 916 A.2d 1111 (Pa. Super. Ct. 2007).

19. *Liggett Group, Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024 (Del. 2002).

20. *See Capital Glenn Mining Co. v. Indus. Acc. Comm.*, 12 P.2d 122 (Cal. Ct. App. 1932).

the availability of coverage. For example, if a partnership is incorporated, coverage for family members of the partners may be terminated. Corporations cannot have family members because they are legal entities.²¹

Regarding mergers and acquisitions, policies held by an acquired entity may continue in force after the insured company has been acquired. In a situation in which a predecessor insured has a pre-acquisition claim and is acquired by another, the insurance coverage is typically assigned to the acquirer. This can be true even when the insurance contract contains a no-assignment provision.²² As to pre-acquisition occurrences that have not become claims, the merger documents typically assign the insurance to the acquirer by contract. State laws typically provide that all assets and liabilities of a corporation pass to the merged corporation. Accordingly, coverage for pre-acquisition occurrences typically passes to the acquirer entity by contract and operation of state law.²³ It is important to remember that the determination of whether a successor in interest has liability is a separate determination of whether the predecessor's insurance affords coverage.²⁴

5. Trade Names or Alter Egos

Policies may be issued to trade names or alter egos, which do not exist as legal entities separate from their owners. Again, an insured may use any name as long as there is no fraud.²⁵ A policy issued to a trade name or alter ego insures the individual who operates under that trade name or alter ego.²⁶ Listing an alter ego as a named insured does not destroy coverage. In *Providence Washington Insurance Co. v. Valley Forge Insurance Co.*,²⁷ the insured was the sole proprietor in his individual capacity even though the policy listed the sole proprietor as doing business under another name. The inclusion of the fictitious name does not affect or alter the coverage afforded under the policy. Further, even if a person is violating a law by doing business under a fictitious name and the fictitious name is the "named insured," the insurance policy is not necessarily invalid.²⁸ The use of fictitious or trade names has little impact upon the coverage determination as long as there is no fraud involved.

E. CONSTRUCTION ISSUES: CONTRACTORS AND SUBCONTRACTORS

Liability insurance is an integral part of a construction project. Parties to a construction project negotiate the distribution of risks along with the terms and

21. *Rosenberg v. Zurich Am. Ins. Co.*, 726 N.E.2d 29 (Ill. App. Ct. 2000).

22. See *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 861 N.E.2d 109 (Ohio 2006) (surveying cases in which the no-assignment provision is not applied to pre-acquisition claims).

23. See *id.* (discussing the operation of law doctrine for coverage of pre-acquisition occurrences).

24. *Westoil Terminals Co. v. Harbor Ins. Co.*, 86 Cal. Rptr. 2d 636 (Cal. Ct. App. 1999).

25. *Roberts v. Mosier.*, 132 P. 678 (Okla. 1913).

26. *Chmielewski v. Aetna Cas. & Sur. Co.*, 591 A.2d 101 (Conn. 1991).

27. 50 Cal. Rptr. 2d 192 (Cal. Ct. App. 1996).

28. *Kusnetzky v. Sec. Ins. Co.*, 281 S.W. 47 (Mo. 1926).

specifications of the construction itself. In most instances, subcontractors are required to have liability policies that name themselves and the general contractor and owner of the project as additional insureds. The general contractor and owner generally list each other as additional insureds. Additional insured endorsements control the scope of the coverage, and the additional insured has direct rights under the policy. On larger projects, some owners obtain all necessary insurance through owner-controlled insurance programs (OCIPs). Also referred to as “wrap-up” insurance, OCIPs allow owners to administer and monitor all of the insurance for the various participants in the project.

Construction contracts also typically include indemnity provisions that function as additional vehicles for transferring risk. A full discussion of the interplay between contractual indemnification and additional insured status is beyond the scope of this volume, but it may be useful to point out that while many states prohibit indemnity clauses that indemnify for one’s own negligence, that is one of the primary functions of liability insurance.²⁹ In such states, additional insured status can offer significantly more protection than contractual indemnity.

There are several commonly used forms of additional insured endorsements that affect the scope of coverage for additional insureds. Some forms limit coverage to claims arising during “ongoing operations” and others provide “completed operations” coverage.³⁰ Additional insured endorsements require a connection between the claim and the named insured’s work for the additional insured. Some endorsements provide additional insured coverage only for claims that are “caused, in whole or in part, by” the insured’s work, and others allow coverage for claims “arising out of” the named insured’s work. The phrase “arising out of” is typically construed broadly to mean any causal connection between the covered occurrence and the performance of the named insured’s work for the additional insured, even if the cause of the injury or damage was the additional insured’s negligence.³¹ Some endorsements require that each additional insured be listed by name, but a “blanket endorsement” grants additional insured status to any subcontractor the named insured agrees by written contract to name as an additional insured.³²

F. CERTIFICATES OF INSURANCE

A party seeking additional insured status under a named insured’s liability policy should receive a certificate of insurance. It is a common misconception that certificates of insurance confer additional insured status on the party named in the certificate. Certificates of insurance provide important information for determining the insurer and the policy periods, limits, and coverages, but they are not sufficient

29. *Roy Anderson Corp. v. Transcon. Ins. Co.*, 358 F. Supp. 2d 553 (S.D. Miss. 2005).

30. *Marathon Ashland Pipe Line LLC v. Md. Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001).

31. *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. Houston 1999).

32. *BP Chems., Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000).

to confer additional insured status, and they usually contain disclaimers that they are issued strictly for informational purposes.³³ To the extent possible, an additional insured should obtain a certificate of insurance, a copy of the policy declarations, and either an additional insured endorsement naming that party as an additional insured or a blanket endorsement.

III. Unique Issues

In addition to the more common issues addressed in Section II, other unique issues may arise in determining those parties or individuals entitled to available coverage under the CGL policy. This final section provides several examples of other issues that courts have wrestled with in this context. Of course, multiple issues beyond those discussed here may arise and this is by no means an exhaustive list. Moreover, the particular “named insured” or “additional insured” issues at hand in any individual coverage dispute will be dictated by the specific underlying facts and the actual terms of the policy at issue.

A. “MEMBERS,” “MANAGERS,” AND “REAL ESTATE MANAGERS”

The CGL policy contemplates coverage for “members,” “managers,” and “real estate managers” in Section II at (1)(b), (1)(c), and (2)(b). Under this policy language, there are two primary hurdles to coverage for such individuals. First, the party seeking coverage must qualify as a “member,” “manager,” or “real estate manager.” Significantly, none of those terms are defined by the CGL policy. Second, the subject “occurrence” must bear some relation to the named insured’s business.

The determination of who constitutes a “member,” “manager,” or “real estate manager” may depend on the rules of insurance policy construction in the jurisdiction deciding the dispute. On one hand, the issue may be governed by a particular state’s business law (e.g., the limited liability company statute) instead of the dictionary. On the other hand, because “real estate manager” does not have “limited liability company” as its antecedent, a court may rely upon the most universal definition of that term as found in a dictionary.³⁴ Courts may also look to extrinsic evidence when allowed to do so by state law. For example, in *Crawford v. GuideOne Mutual Insurance Co.*,³⁵ the court found coverage did not exist when the named insured was a corporation, rather than a joint venture, limited liability company, or partnership and when its minutes reflected that it had no members.

33. *United Stationers Supply Co. v. Zurich Am. Ins. Co.*, 896 N.E.2d 425 (Ill. App. 1 Dist. 2008) (contractor’s client could not obtain additional insured status by virtue of mistakenly issued certificate of insurance that contained disclaimer).

34. *Brown v. MR Group, LLC*, 693 N.W.2d 138 (Wisc. Ct. App. 2005).

35. 420 F. Supp. 2d 584 (N.D. Tex. 2006).

This issue may also arise in relation to CGL endorsements that further define or limit “additional insured” coverage under the policy. In *Wehner v. Weinstein*,³⁶ the court addressed the ambiguity between the named insured coverage for “members” and the limitations on additional insured coverage under an “Additional Insureds—Club Members” endorsement. Since fraternity members and pledges were already named insureds, their inclusion as additional insureds was unnecessary and could not be used to preclude coverage. “It is simply unreasonable and internally inconsistent to postulate that members and pledges are to be characterized as both named insureds with full coverage and additional insureds with limited coverage.”³⁷

Even if the party seeking coverage is a “member” or “manager,” he or she must also be engaged in the right kind of activity to qualify for coverage. The policy language provides that coverage for “members” and “managers” will exist only if the conduct at issue related to the named insured’s business. A particularly interesting decision on this point is found in *Laborde v. Scottsdale Insurance Co.*³⁸ There, the court held hunting was not the “business” of a hunting club and therefore a member of the hunting club was not entitled to coverage under the club’s CGL policy. “As a recreational activity, hunting is not the ‘business’ of the club. As with any country club, swimming club, or golf club, there are business activities, such as collecting dues, paying rent and utilities, and providing maintenance and upkeep for the purpose of supporting recreational activities of the club.”³⁹ Moreover, the party seeking coverage must be engaged in the proper activity at the right time. If an individual is arguably a “real estate manager” but is off work and watching television inside his or her home at the time of injury, the individual’s conduct is not within the scope of the CGL policy.⁴⁰

B. “VOLUNTEER WORKERS”

In addition to coverage for volunteers that may be provided by separate endorsement, the CGL policy contemplates coverage for “volunteer workers” in Section II at (2)(a). In determining whether a “volunteer worker” is covered, there are typically three questions that must be addressed: (1) whether that individual falls within the definition of “volunteer worker”; (2) whether that volunteer worker was “performing duties related to the conduct” of the named insured; and (3) whether the occurrence at issue falls within the scope of one of the exclusions set forth in Section II, (2)(a)(1)–(2).

The first step in this analysis is to turn to the definition of “volunteer worker.” That definition provides that “‘volunteer worker’ means a person who is not your

36. 607 S.E.2d 415 (W. Va. 2004).

37. *Id.* at 422.

38. 704 So. 2d 247 (La. App. 3 Cir. 1997).

39. *Id.* at 250.

40. *Russell v. Clapp*, 201 S.W.3d 99 (Mo. App. 2006).

‘employee,’ and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.” Thus, the scope of the volunteer’s work is critical and the volunteer must fall outside the separate definition of an “employee” in the CGL policy.

The scope of work question will not always be simple. The Wisconsin Court of Appeals addressed that issue in an unreported decision in *Lampe v. Allstate Insurance Co.*⁴¹ The court reversed summary judgment and remanded further proceedings as there were fact issues related to the scope of the potential insured’s activities. That potential insured was undeniably a volunteer wrestling coach for the named insured’s school district. On one hand, there were facts that suggested his activities were beyond the scope of coverage provided by the policy. Specifically, at the time of the underlying injury, the coach was engaged in an “extra” practice. On the other hand, there was an equally reasonable inference that the underlying injury occurred while he was helping to instruct the wrestling team, which was arguably within the scope of his “duties” as assigned by the insured school district. The court found that a jury would have to answer those fact questions before the coverage issue could be decided.

In addition to the scope of work issue, the distinction between a “volunteer worker” and “employee” can be critical, particularly with respect to exclusions. Moreover, that distinction can be important with respect to the parties seeking the coverage or the underlying party injured by the party seeking coverage. For example, in *St. Paul Surplus Lines Insurance Co. v. Clyde Brothers Johnson Circus Corp.*,⁴² an unreported decision from the federal court in the Northern District of Texas, the court noted the significance of this distinction in evaluating potential coverage related to the death of an individual caused by a circus elephant. In analyzing the exclusions following the coverage grant for volunteer workers and employees, the court determined that no coverage existed unless the deceased was a volunteer worker because “no employee is covered for an injury to a fellow employee and no volunteer is protected for injury to either a fellow volunteer or an employee.”⁴³

C. OWN NEGLIGENCE

Another interesting issue under the umbrella of this chapter is whether an additional insured is covered for liability arising out of its own negligence. Additional insureds are frequently added to insurance policies pursuant to an indemnity agreement between that additional insured and the named insured. While the additional insured endorsement may sometimes address this “own negligence” problem, many

41. 2008 WL 2885787 (Wis. Ct. App. July 29, 2008).

42. 2002 WL 2030857 (N.D. Tex. 2002).

43. *Id.* at 5.

endorsements do not. Not surprisingly, different jurisdictions have handled this in different ways.

The issue may turn on the interpretation of specific language in an additional insured endorsement.⁴⁴ On the other hand, some policies or endorsements may not address the own negligence issue expressly. In that event, some courts have turned to the underlying indemnity provision for guidance. For example, in *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*,⁴⁵ the additional insured provision in the policy was silent on the own negligence issue. The court focused on that silence in reaching its decision. Because the underlying employment contract that provided the indemnity agreement contemplated protection for all risks and the insurance policy was silent, the court found there was coverage. Viewed from another angle, the court's holding was that unless the policy expressly excludes liability arising out of the additional insured's own negligence, there will be coverage.

D. IMPLIED COVERAGE

An extreme example of a unique issue comes from the Ninth Circuit's decision in *United States v. CNA Financial Corp.*⁴⁶ In *CNA Financial*, the court held that the United States was an "implied additional insured" and therefore entitled to coverage under the CGL policy at issue. Per the 1990 amendments to the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), the United States assumed tort liability for the negligent acts of ISDEAA-Authorized Organizations' employees under the Federal Tort Claims Act (ISDEAA). The named insured, which was an ISDEAA Authorized Organization, never had the policy amended to contemplate this change in the law. Nonetheless, the court found that the United States was an "implied insured beneficiary" under Alaska law, which permits an unnamed party to recover insurance if the insurer's risk is unchanged and where the unnamed party is within the class intended to be benefited. Since the United States was the only party that could have been liable after the change in the law for the negligence of the named insured's employees, the CGL carrier's risk was not broadened. The court found that it was inequitable that the insurer could avoid liability simply because of the change in the law. Accordingly, the United States was entitled to the insurance proceeds as an implied insured.

44. *Granite Constr. Co., Inc. v. Bituminous Ins. Co.*, 832 S.W. 2d 427 (Tex. Ct. App. 1992).

45. 225 Cal. Rptr. 742 (Cal. Ct. App. 1986).

46. 113 Fed. Appx. 205 (9th Cir. 2004).