

**Commentary*****Recurring Problems In Additional Insured Litigation***

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This article discusses recurring problems arising in declaratory judgment litigation seeking interpretation of the existence and scope of coverage afforded to construction industry litigants through the use of additional insured endorsements (AIEs).<sup>1</sup> Its thesis is that endorsement language is often inadequate to accomplish the risk allocation and insuring relationships these litigants have attempted to create, or may have assumed were created, by merely requiring that one party be named an additional insured on another person's policy. This article sets forth strategies and proposals that, if adopted, should help to preclude, minimize or simplify declaratory litigation seeking construction of these endorsements.

Part I introduces general vocabulary, discusses the construction industry players and identifies some of the advantages and disadvantages of using AIEs to allocate risk. Part II identifies three recurrent categories of construction industry additional insured declaratory litigation, focusing primarily on the recent flood of cases in New York's trial and appellate courts, and identifies underlying problems in standard endorsement language. Part III discusses negotiating and contractual-based strategies available to construction industry participants and their counsel to help avoid or minimize the problems discussed and identified in the Part II cases.

***Part I. Advantages And Disadvantages Of AIEs******A. Statement Of Problem And Basic Definitions***

Agreements to procure insurance (APIs) are contractual arrangements in which one party to a contract agrees to procure insurance for another party's benefit. Such agreements are enforceable in New York.<sup>2</sup> In the construction industry, the API is frequently satisfied through inclusion of an AIE in one party's insurance policy. Under the AIE, the party promising to procure the insurance (the "promisor") makes the party for whose benefit insurance is being obtained (the "promisee") an additionally insured person under the promisor's policy (an "additional insured").<sup>3</sup>

Where the promisee negotiates its inclusion as an additional insured on the promisor's policy, it attempts to shift its own risk of loss to the promisor and, derivatively, the promisor's insurance carrier. The additional insured often assumes it has purchased adequate insurance coverage for

its involvement with the named insured on the policy (the "named insured"). Frequently, the carrier providing the additional insured coverage, which is normally the named insured's own carrier (the "additional insured carrier") and the additional insured have very different ideas about the nature and scope of AIE-created coverage.<sup>4</sup>

When a claim is made following what the additional insured may believe to be a covered occurrence, the additional insured carrier may refuse defense or indemnification, or both. It may choose to involve the additional insured's commercial general liability (CGL) carrier in the claim. That carrier probably will have issued a separate policy in which the additional insured is the CGL carrier's named insured.<sup>5</sup> This places the additional insured in exactly the opposite position it expected when it required, through its API, that it be named an additional insured on someone else's policy; its own carrier ends up involved in a claim, and perhaps in declaratory litigation, resulting in an increase in the future costs of an additional insured's own CGL policy premiums.<sup>6</sup>

Such disputes, for reasons discussed below, tend to result in particularly protracted and expensive litigation for all parties. Although AIEs now (and generally) are regarded as a cost effective and adequate means of providing insurance coverage (the "traditional view"),<sup>7</sup> AIEs have not, in many construction cases, been cost effective or adequate contractual mechanisms to shift risk.

### ***B. Construction Industry Players***

The parties to construction industry risk-shifting lawsuits usually include the owner of a property (the "owner"),<sup>8</sup> its general contractor (GC) or construction manager (CM), which coordinates and schedules the construction work, and various subcontractors in the building trades ("subs"), which perform the construction work. Site coordination is usually left to the GC, who maintains a small staff on the premises. Often, the plaintiff is a sub's employee injured on site, who files a (direct) personal injury action against the owner and GC, but not against the employer sub, who is protected from such suits by workers' compensation statutes.<sup>9</sup> The defendant owner and/or GC has filed a third-party action against the plaintiff's employer in the personal injury action seeking contribution and/or indemnification.<sup>10</sup> The sub naturally looks to its insurance carrier to defend the action under its policy.

Prior to the injury and lawsuit, the sub will usually have signed an API with the owner and/or GC as part of the quid pro quo of obtaining its subcontract. The API will have required the sub to name the owner and/or GC as additional insured on the sub's own insurance policy. Thus, the sub's insurer may be insuring two or more parties with potentially adverse interests.

### ***C. Advantages And Disadvantages Of AIEs***

Commentators have identified many positive attributes which recommend AIEs to construction industry participants.<sup>11</sup> These include:

1. They give the additional insured direct rights under the named insured's policy. Such rights would include a right to defense and, where appropriate, indemnification under the named insured's policy. Additional insured status, therefore, permits the additional insured to protect its defense and indemnification rights directly with a second insurer, rather than relying solely on the rights outlined in its own CGL policy. Where the AIE coverage is broader than the additional insured's own CGL insurance, this right ensures coverage where it might otherwise not exist, thus accomplishing more than merely sparing the additional insured from incurring a negative loss history. At a minimum, the existence of the additional insured coverage will avoid recourse to deductibles, retentions or retrospective rating features on the additional insured's own coverage and increase the total pool of insurance available against a claim.<sup>12</sup>

2. They may avoid the effect of standard exclusions in the named insured's own CGL policy, for example, the products exclusion and the failure to perform exclusion, which apply to the named insured only.<sup>13</sup>
3. They put in place a second, distinct protection as part of the risk transfer, backed by a financially sound obligor, the independent value of which is highlighted where the named insured's agreement to contractually indemnify the additional insured fails to afford sufficient protection because (a) the named insured becomes insolvent, or (b) the hold harmless agreement is invalidated by the courts.<sup>14</sup>
4. They generally prohibit the additional insured carrier from seeking to subrogate against the additional insured or its own CGL carrier (at least to the extent of the shared coverage).<sup>15</sup>
5. They potentially provide the additional insured with personal injury coverage that would otherwise be unavailable if the risk transfer was only to encompass a contractual indemnity undertaking, even if the hold harmless is to be accompanied by a requirement that the insured obtain contractual liability insurance. Contractual liability policies generally provide only for bodily injury coverage, which is usually defined as coverage for actual injury to a person. Personal injury coverage, on the other hand, is coverage for enumerated offenses, such as libel, slander, violation of right of privacy, wrongful entry or eviction.<sup>16</sup>

In addition, and most critically, AIEs are generally available for a nominal sum.<sup>17</sup>

They do not require the named insured to procure an entirely separate insurance policy for the additional insured. Initial savings in transactional costs and frequently time involved in procuring coverage clearly recommend the AIE.<sup>18</sup>

AIEs, however, have disadvantages that are not always obvious prior to the outbreak of litigation. For example:

1. From the sub's perspective, the naming of the owner/GC as additional insured on the sub's CGL policy dilutes the sub's policy limits.<sup>19</sup>
2. AIEs eliminate the insurer's subrogation rights against the additional insured and the additional insured's own CGL carrier.<sup>20</sup>
3. [From the additional insured's perspective]: "it may mean the loss of control over the defense, increased likelihood of coverage disputes, as well as exacerbated 'other insurance' disputes."<sup>21</sup>
4. Because the additional insured carrier owes the same obligation to the named insured and additional insured on the policy, and both are entitled to be treated as if they are insured under separate policies, the additional insured carrier's decisions with respect to defense and tender are complex. These problems run the gamut from allocation problems among carriers to issues regarding selection of either outside or in-house counsel to defend the action.<sup>22</sup>
5. The inherent conflict between the additional insured carrier, with its strong interest in using (or crafting) an endorsement that narrowly restricts additional insured coverage to vicarious liability for the named insured's activities, and the additional insured's economic interest in obtaining the broadest possible coverage through its status as additional insured, creates an explosive situation in which declaratory litigation frequently ensues.<sup>23</sup>

This last factor is particularly serious. Carriers naturally proffer strict interpretations of AIEs when additional insureds seek coverage for risks that they (the additional insureds) believed were insured.<sup>24</sup> The AIE is frequently a carrier's form endorsement, written to provide strictly defined coverage. There is rarely arms-length bargaining between the sub and its carrier regarding scope of coverage under the AIE because the sub is not paying for the coverage or is paying only a nominal sum.<sup>25</sup> If the carrier ultimately disclaims coverage, the promisee's only recourse may be to sue the promisor's carrier in a declaratory action seeking construction of the endorsement.<sup>26</sup>

#### **D. Complexity And Expense Of Additional Insured Disputes**

Obtaining declaratory relief in additional insured litigation, however, is complex because the existence of coverage under the AIE frequently turns on factual questions in the underlying suit, an evaluation that must be made in the context of the triangular relationship between the parties and their dual-insuring carrier.<sup>27</sup> In the context of (1) a negotiating process in which there may be little or no real bargaining because of the owner's superior bargaining power relative to its sub, (2) a drafting process in which the additional insured carrier and additional insured have clear, conflicting interests, (3) a review process that all too frequently is non-existent, cursory or uninformed (because the sub is paying only nominal consideration for the owner/GC's additional insured coverage), and (4) the owner/GC frequently receiving only an insurance certificate,<sup>28</sup> but not the policy and, critically, its endorsements, the seeds of future litigation are sown.

Declaratory judgment litigation tends to be expensive for related reasons. In the face of frequently ambiguous endorsement language, parties may urge very different versions of what the bargain expressed in the API or AIE was meant to be. Evidence of intent that might, in other contexts, be admissible as extrinsic evidence to assist in discerning the intent of the parties may never be reached due to special canons of construction applicable to insurance policies.<sup>29</sup>

### **Part II. Recurring Issues In Additional Insured Cases**

Conflicting interpretations of AIE language have generated many declaratory judgment lawsuits in which carriers, subs, owners and GCs have proffered their own interpretations of clauses that often vague as to whose negligence (and what kind of negligence) the carrier is insuring. A number of different types of declaratory judgment disputes involving AIEs recur in cases litigating the proper interpretation of these clauses. Three are discussed below. These and similar litigations probably could have been avoided by the parties' use of more precise language to express their intended contractual commitments and/or closer attention paid to the negotiation and review of the contractual mechanisms the parties chose to embody their bargain.

#### **A. Nature Of Coverage Disputes**

In most circumstances, the additional insured maintains its own coverage as well as the additional insured coverage. Once it is established that multiple insurance policies cover the same risk, an evaluation is made of the respective "other insurance" clauses. The clauses can be: (1) pro rata sharing of the loss (either by equal shares or proportionately by policy limits), (2) excess clauses (where the policy is excess over the other available insurance) or (3) escape (or non-liability) clauses which provide coverage only in the event that no other insurance is available. Court adjudications regarding the nature of coverage frequently focus on whether an API or AIE provides "primary,"<sup>30</sup> "excess"<sup>31</sup> or "co-insurance" coverage.<sup>32</sup> Generally "Primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability . . . 'Excess' . . . is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted."<sup>33</sup> New York applies "a functional analysis to separate lines of insurance, and an insurance policy should be read in light of the role it is to play,"<sup>34</sup> with policy terms interpreted in light of each policy's purpose(s),<sup>35</sup> to determine, *inter alia*, other insurance issues.<sup>36</sup>

The promisor's carrier, faced with paying the additional insured's liability, generally tries to reduce its coverage responsibilities through a declaratory judgment action against all additional insureds' other liability carriers, arguing that the additional insured's other policies should provide at least some coverage on the underlying occurrence.<sup>37</sup> The nature of coverage cases logically falls into three categories. In the first, the policy under which the insured is named an additional insured is deemed primary and the additional insured's own CGL insurer's policy is deemed to be excess. In the second, the insured's CGL policy is deemed primary and the policy creating additional insured coverage is deemed excess. In the third, both the CGL and additional insured carrier are deemed to both be primary, and they usually are required to prorate contributions based on their relative policy limits.<sup>38</sup>

In Charter Oak Fire Ins. Co. v. Trustees of Columbia University,<sup>39</sup> for example, the question was whether the promisor's carrier had agreed to provide excess or primary insurance. The endorsement did not expressly limit the additional insured's coverage to vicarious liability for the named insured's conduct. It did not specifically state that the insurance was to be deemed anything other than "primary" coverage. The endorsement merely provided coverage "with respect to liability arising out of operations performed for [defendant] by or on behalf of [Berman Plumbing]." The insurance company was held to have agreed to provide "primary" insurance because the endorsement language was not specific enough to have suggested any other intent. Rather than relying on an inference as to whether the intended coverage was primary or excess, however, had the endorsement expressly stated, for example, that its coverage was "excess of all other policies," the declaratory judgment action might have been avoided. This is precisely what the court suggested should have been done, stating, "Plaintiff's endorsement does not limit its coverage to defendant to those situations in which defendant is only vicariously liable, nor does it provide that the coverage for defendant is only 'excess' to other insurance."

In Tishman Interiors Corp. of New York v. Fireman's Fund Ins. Co.,<sup>40</sup> a personal injury plaintiff sued Tishman, a CM, who was an additional insured under the policy of codefendant Industrial Temperature Systems Inc., a HVAC sub and Conte Builders Inc., a masonry sub. Tishman was insured under a general liability policy issued by Travelers Insurance Cos. Tishman's contracts with Industrial and Conte required them to purchase liability insurance naming Tishman an additional insured. Travelers requested that Royal Insurance Co., Industrial's insurer, and Firemen's Fund Insurance Co., Conte's insurer, acknowledge their duty to defend and indemnify Travelers in the underlying personal injury action. When Royal and Firemen's Fund refused to do so, Travelers sought a declaratory judgment regarding their defense and indemnification obligations and moved for summary judgment. The trial court, noting that the Royal policy provided coverage to Tishman for liability "arising out of" Industrial's work for Tishman at the job site, denied summary judgment, concluding an issue of fact existed as to whether the employee was injured while performing work for Conte, Industrial or some other party.

The appellate court reversed. It first noted that the contract required the purchase of a policy requiring coverage for personal injury claims "however such injuries may be caused, whether . . . directly or indirectly by the negligence of the contractor or any subcontractor." Because the personal injury plaintiff was injured while performing sheet metal work that Industrial was contractually obligated to perform for Tishman, the court concluded that the injury must be deemed to have arisen from Industrial's work for Tishman so as to trigger the coverage provided for in the Royal policy. Traveler's policy expressly provided that its insurance was "primary with respect to any other liability insurance available to the insured if such other insurance was purchased by and issued to the named insured specifically to apply in excess hereof." Because Royal failed to produce proof that its policy was intended to provide only excess coverage, the Royal coverage was deemed primary, and the Travelers coverage was deemed excess. By expressly stating the nature of coverage and conditions under which it would obtain, Travelers obtained a significant litigation advantage by not having to rely on an inference, as was the case in Charter Oak.

The additional insured may be able to help ensure that its own policy will be deemed excess by negotiating, with its own CGL carrier, an endorsement that states CGL coverage is excess to any another party's insurance contract through an AIE. This approach was applied in Group v. Turner Constr. Co., wherein the following endorsement modified the terms of the additional insured's own CGL policy:

It is agreed that this policy does not apply to that portion of the loss for which the insured has other valid and collectible insurance, as an additional insured on a liability insurance policy issued to a subcontractor of the named insured whether such policy is on a primary, excess or contingent basis.<sup>41</sup>

This may resolve, in advance, potential ambiguities as to the nature of coverage. If, however, the AIE states that coverage provided under it is to be deemed excess to any pre-existing coverage under the additional insured's CGL policy, a coinsurance question would arise. The owner or GC's counsel should examine all potentially applicable pre-existing policies to determine if their "other insurance" clause(s) create co-insurance situations which could portend future declaratory litigation. If the AIE is silent as to whether coverage provided under it is primary, a pre-existing designation in the additional insured's CGL policy may well be controlling.

Generally, where policies provide coverage for the same interest and against the same risk, concurrent coverage exists and two or more primary insurers will be held to be co-insurers.<sup>42</sup> Where policies have matching "other insurance" clauses which allow for contribution by "equal shares," insurers will be required to contribute equally to the defense and indemnity of their mutual insured.<sup>43</sup> Upon payment of the loss by one co-insurer, that insurer is equitably subrogated to the rights and remedies of the insured to proceed against the co-insurer.<sup>44</sup>

Policies which contain an excess clause, i.e., one making the policy "excess over any other valid and collectible insurance available to the named insured as an additional insured" are enforceable,<sup>45</sup> and the typical excess "other insurance" clause renders a policy excess over standard primary policies. All available primary coverage must be exhausted before excess policies are triggered.<sup>46</sup> Where two excess policies cover the same risk, however, excess clauses negate each other and each excess insurer contributes its proportionate share of the loss, based on policy limits.<sup>47</sup> This is the rule unless one is a catastrophic loss policy which expressly provides it is excess over all other excess policies.<sup>48</sup>

In Pecker Iron Works of New York, Inc. v. Travelers Ins. Co.,<sup>49</sup> Travelers issued a CGL policy to its named insured, Upfront Enterprises, Inc. ("Upfront"), which contained a blanket additional insured provision which provided coverage for any person or entity that Upfront agreed, in a written contract, to name as additional insured.<sup>50</sup> The Travelers' AIE stated:

This insurance is excess over any valid and collectible insurance unless you [Upfront] have agreed in a written contract for this insurance to apply on a primary or contributory basis.

An API in a subcontract between Upfront and Pecker Iron Works ("Pecker") provided that Upfront would procure insurance naming Pecker an additional insured, but did not include any express requirement that Upfront obtain primary coverage. An Upfront employee was injured while working at a construction site and Pecker tendered its defense and indemnification to Travelers, which agreed to indemnify Pecker only on an excess basis. Pecker filed a declaratory judgment action against Travelers and Pecker, and Travelers moved for summary judgment.

The trial court held Travelers was only obligated to indemnify Pecker on an excess basis because the Pecker-Upfront subcontract did "not expressly provide that the insurance to be procured is to be primary rather than excess." The Appellate Division reversed, finding primary (not excess)

coverage, in part, because Travelers had provided a Certificate to Pecker, creating a reasonable expectation that the subcontract required procurement of primary coverage.<sup>51</sup> It held Travelers was required to defend and indemnify Upfront in the underlying employee personal injury action: “[A]bsent a showing that the plaintiff was seeking excess coverage,” Travelers was required to provide primary coverage.<sup>52</sup> The Court of Appeals affirmed that Travelers was required to provide primary coverage to the additional insureds, citing the definition of “additional insured” as primary support for its holding:

‘Additional Insured’ is a recognized term in insurance contracts. . . . As cases have recognized, the ‘well-understood meaning’ of the term is ‘an entity engaging the same protection as the named insured’.<sup>53</sup>

Because Travelers was required to provide Upfront with primary coverage, each additional insured under that same policy was entitled to primary coverage. The Court cited Wong v. New York Times Co.,<sup>54</sup> wherein the First Department, itself relying on the intermediate appellate Pecker decision, had held that where an API required a named insured to purchase “reasonable” insurance for its additional insureds, the named insured’s purchase of only excess insurance was not “reasonable.”<sup>55</sup> Pecker did not include any discussion of an excess or umbrella policy, and there was no holding that a subcontractor’s insurer must exhaust its policy before the general contractor’s insurer’s obligation is triggered.

The only issue before the Court of Appeals in Pecker was the meaning of the Travelers additional insured clause. Notably, it cited Jefferson Ins. Co. v. Travelers Indem. Co.,<sup>56</sup> with approval, a case which held an excess policy excess over a primary policy with an excess “other insurance” clause.<sup>57</sup> Pecker neither expressly nor implicitly overruled Jefferson Ins. Co., nor altered the law on the functional analysis of separate coverage lines and should not be interpreted as standing for the proposition that all subcontractor insurance must be exhausted before the general contractor’s insurance. Pecker merely interpreted Travelers “additional insured” provision, in the absence of excess or umbrella policies. Though not readily discernible from the text of the decision in Pecker, the issue before the court did not present a question as to the interplay between multiple policies providing primary coverage. That question was not in dispute between the parties and the case settled after the ruling by the Court of Appeals with both primary carriers contributing equal shares of coinsurance.

Questions regarding the type of coverage required to be obtained should be raised, if possible, prior to the sub’s obtaining endorsement coverage. If the additional insured demands primary coverage as a condition of its contract with the named insured and the named insured’s carrier will not issue an endorsement providing primary coverage unless additional premiums are paid, that issue may become a subject of negotiation. Nevertheless, the owner/GC, sub and additional insured carrier at least will know what is really being bargained for and what is being purchased. If the additional insured carrier is expected to take on additional risk, it may reasonably seek additional compensation.

Pre-issuance negotiation may prevent later litigation. The additional insured should convey its expectations, in writing, to the named insured, and the named insured should convey these expectations to the additional insured carrier. If possible, the named insured may wish to provide the name of its agent to the additional insured so it can discuss the matter directly with the additional insured carrier. In doing so, they will have acted to minimize future litigation.

If the API merely demands that the owner/GC be named an additional insured on the sub’s policy, the sub may name the owner/GC by ISO standard form endorsement. A form endorsement, as discussed below in Part III, may not make unequivocal the nature of additional insurance coverage. Using a standard form endorsement may save the sub some money, particularly if no litigation ensues. If litigation does ensue, it could well involve the owner/GC’s CGL carrier and the additional insured carrier, as well as the parties, in an expensive, declaratory coverage

litigation.<sup>58</sup> Prudent use of an API, as in Tishman Interiors, may, however, place the more careful party in a superior motion posture and or even bolster the chances of receiving a favorable summary decision.<sup>59</sup>

### **B. Who Are Additional Insureds?**

A second problem that arises in additional insured litigation is determining who should be deemed an additional insured under policy language.

In Consolidated Edison Co. v. Hartford Ins. Co.,<sup>60</sup> for example, Con Ed was the additional insured seeking coverage under the AIE of its sub's carrier, Hartford. Hartford, attempting to take advantage of what was ultimately held to be an ambiguous AIE, disclaimed coverage. The endorsement stated: "The 'persons insured' provision is amended to include as an insured [Con Ed] but only with respect to liability arising out of operations for such insureds by or on behalf of the named insured [Tara]."

Hartford successfully argued in the trial court that the endorsement excluded coverage because the plaintiff in the underlying personal injury action was not an employee of the named insured, Tara, but rather an employee of one of Tara's subs—that is, an employee of one of the sub's subs. Because the AIE provided coverage to Con Ed as an additional insured for liabilities arising out of operations performed by insured subs, such as Tara, but not the subs' own subs, it was urged that there was no coverage. Hartford further argued that because the plaintiff's injury occurred while he was conducting operations on behalf of Con Ed, the additional insured, it was not incurred during work performed on behalf of the named insured. Because the AIE language limited coverage to liabilities arising out of operations performed on behalf of the named insured, Hartford argued there was no coverage.

Although the trial court agreed with Hartford's AIE interpretation, the appellate court did not. It interpreted the AIE broadly to include the personal injury plaintiff's situation because he was working in furtherance of the utility's and its subcontractor's (Tara's) operations at the job site. It held that the AIE language "for such insureds" was ambiguous because it arguably could be construed to cover subs or subs' subs. It further held the language "on behalf of" was ambiguous and might have permitted coverage for subs' subs. It construed the language against the additional insurance carrier that drafted the AIE, noting that if Hartford had wanted to exclude coverage for Con Ed's alleged negligence or the injuries of its sub's subcontractor's employees, it could and should have used unambiguous AIE language.

The moral of the story is that any lack of clarity in AIE language may end up being litigated. The litigation cost incurred to reach the result in Hartford might have been avoided by, as the court rightly stated, simply incorporating appropriate language in the endorsement. The Hartford AIE many not even have been reviewed by counsel. Most likely, the additional insured did not even receive the policy or endorsement, but rather a certificate, indicating its inclusion as additional insured.<sup>61</sup> The mere use of the phrase "additional insured" in an insurance certificate, however, does not ensure that an "additional insured" relationship will be created.<sup>62</sup>

Certificates are form documents, most always prepared by a broker or agent on an "ACORD" form. Certificates do not modify policies and generally are issued for informational purposes. Although certificates evidence contracts of insurance, they are not, in themselves, contracts to insure.<sup>63</sup> Although some courts have held that a certificate which lists a party as an additional insured may raise an issue of fact as to the existence of coverage,<sup>64</sup> ultimately, the purported additional insured will have to show it reasonably relied on the certificate to its detriment, for example, by permitting a subcontractor to continue working on a site,<sup>65</sup> or showing a broker or agent had authority to issue the certificate.<sup>66</sup> Certificates covering different policy periods or post-dating an accident lack evidentiary weight,<sup>67</sup> but a certificate issued after a loss which designates a policy period commencing prior to the occurrence may evidence an intention to provide coverage.<sup>68</sup>

In Public Admin. v. Equitable Life Ins. Co.,<sup>69</sup> for example, a “dubious” reference in an insurance certificate to the general contractor as “additional insured,” was held not to have created an “additional insured” relationship. The court reasoned that notwithstanding the certificate language, the subcontract’s language did not require the electrical subcontractor to provide the GC with coverage. It held GC was not intended to be an additional insured.

In both Morrison-Knudsen Co. v. Continental Cas. Co.,<sup>70</sup> and Horn Maintenance Corp. v. Aetna Cas. & Surety Co.,<sup>71</sup> the court held that while certificate language is evidence of an agreement to insure, it is not an insurance contract and not dispositive of the creation of an “additional insured” relationship. If a policy has not been delivered, however, insureds have been permitted to assert rights as “additional insured” parties on reliance principles.<sup>72</sup>

If contracting parties intend to create an “additional insured” relationship, that intent must be clearly set forth in the contract between the GC and sub, not an ancillary document such as an insurance certificate. Although inclusion of the phrase “additional insured” in an API is not an absolute guarantee that such a relationship will be later deemed to have been created, unambiguous identification of the additional insured party, as such, may go a long way to avoiding coverage litigation on this issue. If there is litigation, the court may decide that the intent of the parties, if unambiguously stated in the API, is controlling.

### **C. What Is Scope Of AIE Coverage?**

Certain language commonly found in AIEs has been a recurrent object of declaratory litigation. Some of this language is found in form endorsements widely used in the construction industry. Three phrases which repeatedly have been at the storm center of the interpretive battles waged in additional insured cases are “by or on behalf of,” “arising out of” and “with respect to.”

#### **1. ‘By Or On Behalf Of’**

In Travelers Indemnity Co. v. LLJV,<sup>73</sup> for example, the Appellate Division, First Department, addressed the scope of coverage of an AIE using virtually the same wording as the AIE in Consolidated Edison, discussed above. The promisor-general contractor’s carrier, Continental, drafted an AIE naming the promisee-construction manager and its affiliates, servants and employees additional insured. The AIE stated that coverage would be provided for “operations performed for such insured by or on behalf of the named insured.”<sup>74</sup> The expression “such insured” referred to the CM, Tishman. The plaintiff in the underlying personal injury action, a Tishman employee, was injured at the site and Continental disclaimed coverage.

The trial court held there was coverage, and Continental appealed. Continental, focussing on the word “by” and ignoring the phrase “or on behalf of,” argued that coverage could only exist for work performed for the additional insured construction manager by either of the named insureds, i.e., either the general contractor or owner. Because the work at issue was performed by an employee of the additional insured, rather than either of the two named insureds, Continental argued there was no coverage. The First Department held that Continental’s restrictive AIE interpretation ignored the AIE’s language which created coverage not only for operations by the named insureds, but also for operations on behalf of the named insureds. This language, it held, included the additional insured’s employees’ operations.

LLJV has important implications with respect to the language used to restrict or broaden the scope of an AIE. If the additional insured carrier wants additional insured coverage to be limited to liability arising only from activities performed by named insureds, it should use the words “operations performed for the additional insured by the named insured.” The use of the word “by” restricts coverage to activities of the named insured(s) and does not create coverage for liabilities arising from the activities of the additional insureds (or their employees).<sup>75</sup> Continental could have clearly identified the intended scope of additional insured coverage by adding the

sentence: "Additional insured coverage created by this endorsement does not extend to acts or omissions of the additional insured, its employees or agents."

Cases have broadly construed the language "on behalf of."<sup>76</sup> In Charter Oak, discussed above, the First Department broadly construed the "by or on behalf" language in the face of the argument that coverage should be limited only to the owner's vicarious liability for acts of the named insured. Although commentators on Charter Oak have noted that many insurance professionals would have argued that where, as in Charter Oak, an owner was the additional insured party: "any liability it may have which is nonvicarious in nature, cannot be 'by or on behalf of' the contractor (the named insured) . . . 'by or on behalf of' must mean work performed by the named insured or a subcontractor they retained,"<sup>77</sup> the First Department refused to limit coverage to vicarious liability. It construed the AIE broadly to "indemnify the additional insured for any action arising out of the work being performed at the job site regardless \*of on whom the liability will ultimately rest."<sup>78</sup>

Other cases have reached the same conclusion. For example, in Dayton Beach Park No. 1 Corp. v. Nat'l Union Fire Ins. Co.,<sup>79</sup> New York's Appellate Division, Second Department, ruled that where an insurer had failed to provide a policy whose coverage was limited to "liability imposed solely upon a respondent superior theory" but rather broadly created coverage for liability "arising out of operations," it would not limit coverage to vicarious liability. One commentator notes:

Absent an extremely clear and unambiguous restriction on an AIE, it is clear that the courts will interpret such endorsements to provide full coverage for the additional insured not only for vicarious liability, but also for acts of its own negligence, as long as they are related to the work contemplated in the underlying agreement.<sup>80</sup>

If broad coverage is intended, for example, extending to acts or omissions of the named insured or its agents or employees, as the construction manager wanted in the LLJV case, the API should provide that coverage extend to "operations performed by or on behalf of the named insured." This coverage could be made even clearer by adding the sentence, "Coverage under this endorsement extends to acts or omissions of the additional insured and named insured, and their employees or agents, acting by or on behalf of the additional insured."

If an additional insured carrier wishes to limit coverage to the additional insured's vicarious liability for the named insured's activities, the AIE must, as the Charter Oak court suggested, expressly so provide, for example, by stating, "Coverage under this endorsement extends only to vicarious liability for the acts or omissions of the named insured, and does not provide coverage for the acts of the additional insureds' own employees or agents."

## 2. 'Arises Out Of'

Litigation frequently involves disputes over whether an accident "arises out of" "maintenance" and/or "use" of premises or "operations." Historically, the phrase "arises out of" has been construed, in the words of one commentator, to be "so broad and general" as to cover "virtually anything having the least bit to do with the named insured's work."<sup>81</sup> Broad interpretation of this phrase in New York construction cases is typified in Consolidated Edison, Charter Oak and Dayton Beach Park, discussed above. Recent cases continue to broadly construe this language.<sup>82</sup> Cases construing the "arising out of" language occur in a number of other contexts. In Nuzzo v. Griffin Tech. Inc.,<sup>83</sup> the plaintiffs were cashiers employed by defendant Syracuse University. They alleged they were injured while attempting to plug in a cash register manufactured, supplied and serviced by defendant Griffin Technology. The AIE provided that Syracuse was insured for liability "arising out of [Griffin's] work" for Syracuse. The Fourth Department rejected the insurer's argument that there was no coverage because liability arose out of Syracuse's own negligence. Broadly construing the AIE language, it concluded that the AIE's language did not focus on the

precise cause of the accidents but rather on the “general nature of the operation in the course of which the injury was sustained.”

This phrase has been liberally interpreted in the leasing liability context. In Moskowitz v. CIGNA Prop. and Cas. Co.,<sup>84</sup> for example, the plaintiff landlord, seeking insurance coverage, argued that a bank drive-through window was a permissible “operation” under a lease. The plaintiff further argued that, because the drive-through windows necessarily utilized driving space outside the bank building when approaching the window, an accident in the outside space approaching the window could be deemed to have arisen “out of” the “use” of that outside space adjacent to the window. Denying judgment as a matter of law, the court held that, depending on exactly where the accident occurred, the insurance policy naming the plaintiff landlord an additional insured might cover the accident.

In ZKZ v. CNA Ins. Co.,<sup>85</sup> the plaintiff was the owner of a building which leased space to Guardian Pearl Street Garage Corp. The owner was an additional insured on Guardian’s policy, which covered Guardian “only for liability arising out of the ownership, maintenance and use of that part of the described premises which is leased to Guardian.” Affirming the intermediate appellate court, the New York Court of Appeals determined that the AIE was ambiguous. The personal injury plaintiff had tripped on a sidewalk outside the demised space, but the sidewalk was necessarily used for access in and out of the garage operated by the additional insured. Because the sidewalk was necessary to the use of the demised premises, the Court of Appeals held that the sidewalk was “by implication” “part of the premises” leased to Guardian, and the claim therefore “arose out of” the ownership, maintenance or use of the garage.<sup>86</sup>

In Daily News, L.P. v. OCS Security, Inc.,<sup>87</sup> plaintiff Daily News was an additional insured under a policy insuring OCS Security. A visitor to the Daily News facility was injured when he was struck by a descending elevator door, operated by an OCS employee who was then on lunch break. The relevant policy provided that that Daily News was an “additional insured” but only “with respect to . . . liability arising out of ‘your work’ for that insured or for you.” The phrase “your work” was defined as work or operations performed “by you or on your [be]half.” The Second Department concluded that despite the fact the plaintiff was injured by an employee on his lunch break, because the employee’s work necessarily required him to use the elevator to perform his job and reach and leave his workplace, the injuries plaintiff suffered “arose out of” the work that the OCS employee performed for the Daily News.

In Structure Tone Inc. v. Component Assembly Sys.,<sup>88</sup> the sub-sub contractor issue again arose. General contractor Structure Tone Inc. hired Component assembly Systems to do carpentry on a job and Component hired Ledgerrock Associates to some of the carpentry. The contract between Structure Tone and Component included an API requiring Component to purchase insurance for Structure Tone as an additional insured for all claims “arising out of” Component’s work at the site and Component procured such insurance from Royal Insurance. The Royal policy limited coverage for Structure Tone “to liability arising out of ‘your work’ . . . by or for you.” A Ledgerrock employee, Lane, slipped on electrical cable and sued Structure Tone which impleaded Ledgerrock and demanded a defense and indemnification under the Structure Tone/Component contract.

Royal declined coverage on the ground that the injury did not “arise out of” work performed by Component for Structure Tone and Structure Tone filed a declaratory action. The trial judge found issues of fact as to whether the employees injuries arose out of Structure Tone’s work, Component’s work or a subcontractor’s work. On appeal, Structure Tone argued coverage was sufficiently broad to cover the injury. Citing Tishman Constr. Corp. of New York v. CNA Ins. Co.,<sup>89</sup> The Appellate Division held: “The sole focus in determining whether coverage under the additional insured endorsement was triggered, thus obligating Royal to indemnify Structure, is whether the accident arose out of Component’s work or its subcontractor Ledgerrock’s work performed by them for Structure at the construction site. Even though Lane was a carpentry subcontractor who fell on an electrical cable, the language of the endorsement is sufficiently broad to cover the present situation.”<sup>90</sup>

In cases where the liability arises out of an activity necessary to the use of premises, courts have liberally viewed liabilities "arising out of" such activity. In Commerce & Indus. Ins. Co. v. Admon Realty Inc.,<sup>91</sup> for example, the First Department reviewed an AIE limiting coverage to "liability arising out of the ownership, maintenance or use of that part of the premises . . . leased to the named insured." The plaintiff insurer argued that the claim was not covered because the damage to the property occurred when pipes froze and broke due to a nonfunctioning boiler located outside the premises. Loss was also alleged as a result of a fire that had spread because a sprinkler pump, not located on the leased premises, was turned off. Despite the fact that boiler and pump were not located on the leased premises the court liberally construed the AIE and denied summary judgment based on an additional insured argument.

The phrase "arising out of" has, however, been strictly construed where there is a clear demarcation between the demised premises and the rest of the world, and the subject matter at issue does not appear, as a factual matter, to be necessary to the "use" at issue. For example, in Rensselaer Polytechnic Institute v. Zurich Amer. Ins. Co.,<sup>92</sup> an owner of a fieldhouse had sought a declaration that the insurer of an ice show's owner was obligated to defend and indemnify an action brought by patron who was injured while leaving the fieldhouse after a show. The defendant insurer had issued a certificate naming the ice show owner an additional insured under an endorsement which limited coverage to liability "arising out of the ownership, maintenance or use of that part of the premises . . . leased to the named insured." The trial court concluded the insurer had no duty to defend the owner and the owner appealed.

The Third Department affirmed. It rejected the owner's contention that the leased premises included the walkway immediately adjacent to the fieldhouse, where the accident took place. It wrote, "Under the clear terms of the contract with plaintiff, Ice Capades leased only space located within the fieldhouse and not areas external to the structure."<sup>93</sup> It further rejected the owner's argument that while the accident "may not have taken place within the premises leased to Ice Capades, it did arise out of the use of the leased premises," within the meaning of the AIE. It noted that the same conclusion had been reached in General Accident Fire & Life Assurance Corp. v. Travelers Insurance Co.<sup>94</sup> Apparently, no argument was made that the external area where the accident occurred necessarily had to be traversed to use the fieldhouse.

In Light v. Robert Martin Corp.,<sup>95</sup> a tenant additional insured sued to recover for an accident which had occurred on a driveway leading from the loading dock of defendants' building. The First Department concluded that the ground-level area at issue could not reasonably be construed as being "in, upon or adjacent" to the tenants "demised premises," which were specifically described in the lease as the upper level of the building. It further concluded that the accident did not "arise out of" "conduct and operation of tenant's use or occupancy of the demised premises." Apparently, no argument was made that the external area where the accident occurred necessarily had to be traversed to use the insured premises or that the loading was necessarily related to the use of the tenant's premises.

On the other hand, in Future Dev. Corp. v. U.S. Underwriters Ins. Co.,<sup>96</sup> the Second Department affirmed the trial court's refusal to grant summary judgment to an insurer, concluding that the insurer must defend an action by a plaintiff additional insured who alleged he was injured on the outside step of certain demised premises, which apparently had to be used to enter the premises. The rule seems to be that courts will construe the "arising out of" relationship liberally unless they perceive that there is an extremely clear separation between "use" and coverage. In the leasing cases, where there is any sort of necessary relationship between the demised space and location of injury, (i.e., the step connecting the demised premises to the rest of the world, an area which must necessarily be traversed to use the demised premises, or where there is unclarity between the demised space and the rest of the world which impinges on it), an extremely liberal approach will be taken to the liability issue, at least for motion purposes.

The concept of “arising out of,” while expressing the necessity of the existence of a causal relationship, does not, in itself, indicate what type of causal relationship will result in liability or how direct that relationship must be.<sup>97</sup> While negligence-based tort liability frequently involves findings of proximate causal relationships, the “arising out of” concept has been applied in the presence of substantially less rigorous “but for” causal relationships.<sup>98</sup> As one federal court has stated:

The phrase ‘arising out of’ is more expansive than the words ‘caused by’ used in some policies. When the former phrase is used in a liability policy, an unbroken chain of events need not be established but rather a simple causal relationship must exist between the accident or injury and the activity of the insured. The causation standard is not elevated to the strict ‘direct and proximate cause’ standard of general tort law.<sup>99</sup>

Judicial construction of the phrase “arising out of” should, therefore, be an important consideration for additional insured carriers who may wish to consider clarifying the scope of their insuring relationships.

Notably, cases interpreting the phrases “arising out of your work” or “arising out of your operations” focus “not upon the precise cause of the accident . . . but upon the general nature of the operation in the course of which the injury was sustained.”<sup>100</sup> Courts have treated the phrases “your work” and “your operations” as equivalent.<sup>101</sup> The standard endorsement is not limited to the vicarious liability of the additional insured but also covers the additional insured’s own negligence.<sup>102</sup> Where the injured party is an employee of the named insured contractor or the named insured’s subcontractor, the “arising out of your work” requirement is automatically satisfied as a matter of law.<sup>103</sup>

When the injured party is not an employee of the named insured or its subcontractor, however, there must be a causal relationship or “nexus” between the accident and the work. For example, in Impulse Enter./F&V Mech. Plumbing & Heating v. St. Paul Fire & Marine Ins. Co.,<sup>104</sup> the MTA hired Impulse as general contractor to perform subway renovations. Impulse subcontracted the job to Nicholson, who was required to obtain primary coverage for Impulse and the MTA. Nicholson obtained a policy from St. Paul fire & Marine Ins. Co. Plaintiff, in the underlying action, tripped over equipment belonging to Nicholson in a staging area reserved for Nicholson. St. Paul argued that the underlying action resulted not from any work that Nicholson was doing for Impulse, but from Impulse’s failure to maintain and protect pedestrian traffic, as it was required to do under the Impulse/Nicholson contract. Therefore, St. Paul argued, it should not have to pay. The First Department was not persuaded:

The focus of a policy clause such as St. Paul invokes is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained . . . we have consistently held that any negligence by the additional insured in causing the accident underlying the claim is not material to the application of the additional insured endorsement.<sup>105</sup>

In New York City Transit Authority v. Fireman’s Fund,<sup>106</sup> the underlying personal injury action charged plaintiff with common law negligence, which the court held would not have been covered by Fireman’s Fund’s Owners and Contractors Liability policy (“OCP Policy”). The OCP policy provided coverage only for negligence in the insured’s general supervision of its contractor, not for the insured’s own affirmative negligence in connection with the performance of the contracted for work, as alleged against it in the underlying action.<sup>107</sup> This is analogous to restrictive manuscript additional insured endorsements excluding coverage for additional insured’s own negligent acts or omissions.<sup>108</sup>

Often, resolution of the “arising out of” question is an issue of fact that may depend on the roles and responsibilities of each contractor under the trade contracts and in actual practice.<sup>109</sup> When an employee is injured while on the job, generally, it does not matter if he or she was actually working at the time.<sup>110</sup>

### **3. ‘With Respect To’**

In Long Island Railroad Co. v. Interboro Mut. Indem. Ins. Co.,<sup>111</sup> the plaintiff had leased land to Farmers Feed Co. By agreement, Farmers Feed purchased an insurance policy from defendant. The policy contained an AIE which provided for coverage “with respect to liability arising out of the ownership, maintenance or use” of land leased to Farmers Feed. A Farmers Feed employee was injured while working on the leased premises. Although the trial court rejected the insured’s motion for summary judgment, the First Department, relying on the principle that ambiguous clauses in policies must be resolved in favor of the insured, concluded that the insured was entitled to summary judgment.

While there was apparently a question as to whether the employee’s injury “arose out of” the ownership, maintenance, or use of the leased premises, coverage was not provided merely for liabilities “arising out of” ownership, maintenance, or use. Rather, coverage existed for a wider class of liabilities, i.e., those “with respect to” liabilities which “arise out of” the ownership, maintenance, or use of the leased premises. While the court did not identify what specific language was ambiguous or what language inclined it to broadly construe the AIE at issue, the “with respect to” language resulted in a broad construction.

In Lim v. Atlas-Gem Erectors Co.,<sup>112</sup> a named insured third-party plaintiff subsued a third-party defendant CM that was an additional insured under the sub’s CGL policy in connection with an injury incurred by an employee of construction manager Lehrer McGovern Bovis Inc. (“LMB”). The trial court denied LMB’s dismissal motion, and LMB appealed. The endorsement at issue provided that there would be coverage for liabilities “only with respect to operations performed by or on behalf of the named insured.” The complaint had alleged that the injured plaintiff had fallen in the named insured’s work area. The First Department concluded, on that basis, that “there can be no dispute that the plaintiff was injured while acting ‘with respect to operations performed by or on behalf’ of the [the named insured].”<sup>113</sup>

The First Department, examining the endorsement in light of Consolidated Edison and Charter Oak, concluded that the endorsement language was focused not on the precise cause of the accident, as but rather on the general nature of the operation in the course of which the injury was sustained.<sup>114</sup> It further concluded: “Therefore, under the terms of the endorsement, and contrary to the view of the third-party plaintiff, the fact that the cause of the injury may have been the result of LMB’s negligence, or that of any other ‘additional insured’ for that matter, is immaterial with respect to the issue of whether LMB is covered by the policy in question.”<sup>115</sup> The court expressly refused to interpret the endorsement as an exclusion limiting coverage and noted that, in any event, any “ambiguity” would be construed against the insurer and in favor of coverage.<sup>116</sup>

### **D. Interim Conclusions Regarding Recurrent Issues**

Questions regarding scope of coverage frequently result in litigation because policy and endorsement drafters fail to incorporate language effectively expressing the additional insured carrier’s intent.<sup>117</sup> As indicated above, however, inclusion of certain AIE language, for example, “by or on behalf of” or “with respect to” inclines courts to broadly construe coverage obligations. In the absence of additional language clarifying precisely the scope of coverage, the potential for litigation increases. Because similar types of interpretive issues recur, contracting parties and their counsel may act prophylactically to avoid them, precluding costly declaratory actions.

**Part III. Current Problems And Recommendations****A. Problems In Standard AIE Clauses**

The Insurance Service Organization has generated two standardized form AIEs, Form A and Form B, for owners' or contractors' use. Although specially tailored endorsements can be negotiated, and, under this article's analysis, should be negotiated where possible, most AIE's being used today incorporate the standardized ISO language.<sup>118</sup> Unfortunately, the language of these forms has inadvertently fostered the recurrent problems described in Part II above.

**1. ISO Form A**

Form A, known as the long form, in its 1993 version provides, in part:

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization (called additional insured) shown in the Schedule but only with respect to liability arising out of;
  - a. Your ongoing operations performed for the additional insured(s) at the location designated above, or
  - b. Acts or omissions of the additional insured(s) in connection with their general supervision of such operations.
2. With respect to the insurance afforded these additional insureds, the following additional provisions apply . . .

The coverage language in Section 1.A specifies that the additional insured will be covered only "with respect to" liability "arising out of" the named insured's operations "for" the additional insured. The coverage language in Section 1.B specifies that the additional insured will be covered only "with respect to" liability "arising out of" the additional insured's acts or omissions in connection with its "general supervision" of the named insured's operations.

Form A has a number of weaknesses.

First, it does not expressly indicate whether the nature of coverage created by the endorsement is excess, primary or pro-rata coverage vis-a-vis the owner's CGL coverage or other insurance. Second, its language does not deal with, for example, problems like the sub's-sub problem discussed in Part II. Third, the expression "with respect to" together with the expression "arising out of" inclines courts to construe coverage broadly, as discussed in Part II, Section C.(2) and (3). Fourth, Form A includes at least five enumerated exclusions, any one of which could lead to a declaratory judgment action.

Neither Section 1.A nor 1.B provides the additional insured with the same coverage for its own negligent ongoing operations as provided to the named insured, but rather limit the insuring relation to "general supervision coverage." Such standard restrictive coverage language may, however, be inconsistent with well-crafted API language requiring wider coverage. It may be directly at odds with the owner or GC's understanding of what has been purchased for it, by its Sub, under the API.

**2. ISO Form B**

Form B, known as the short form, provides in relevant part:

1. 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 ongoing operations performed for that insured.

Form B covers the additional insured for liability arising from the named insured's ongoing operations for the additional insured, eliminating all Form A exclusions. It also provides coverage for liabilities arising from the additional insured's "general supervision" of the named insured. It does not provide coverage for risks arising from the additional insured's own operations. It does not specify the nature of coverage, or deal with subs-subtype issues.

One commentator describes the difference between Form A and Form B as follows:

Form A is a longer and more complex document, expressly covering the additional insured's "general supervision" of the named insured, deleting exclusions in the body of the policy, and adding new exclusions. Form B takes a very different drafting approach and simply adds the additional insured to the policy but limits that coverage to liability "arising out of" the named insured's operations. Form B does, however, contemplate contractual liability coverage for the additional insured, whereas Form A does not.<sup>119</sup>

Some commentators have observed that if the AIE does not contain specific language limiting coverage to the "acts or omissions" or "negligence" of the named insured, courts will likely construe the additional insured coverage broadly. With respect to the ISO, one commentator notes:

Language in the ISO forms that attempt to limit liability to exposure 'arising out of' the negligence of the named insured will provide broad protection to the additional insured, as long as there is a nexus between the injury and the activities of the named insured. If the injured party is an employee of the named insured and the 'arising out of' language is used, it is almost certain that coverage will be extended to the additional insured for both defense and indemnity provisions.<sup>120</sup>

Counsel's careful review and understanding of the API and AIE are a prerequisite to avoidance of the problems discussed in Part II. Uncritical use of Form A or Form B may foster litigation, particularly where such use is inconsistent with the API or the intent of the additional insured and additional insured carrier. Prophylactic steps, discussed below, should be taken to avoid the cost of litigation.

### ***B. Reviewing The API With Client***

Because the API is within the promisee's control, the owner/GC (or its counsel) has the capability to help ensure the policy under which it is being named as an additional insured will provide the coverage it seeks, as was done by the CM in Tishman Interiors, and as the Charter Oak court suggested could have been done. Litigation over ambiguous APIs, however, suggests that attention to detail in the contractual specifications is too frequently ignored or given only cursory treatment.<sup>121</sup> What should counsel be looking for when confronted with a contract containing an API or questions regarding construction risk allocation? To a large extent, it depends upon who is being represented.

Counsel representing owners, GCs or other additionally insured parties should immediately attempt to obtain a copy of the contract containing the API. If counsel is consulted before the client enters a contract containing an API, he or she should make sure the API's language reflects the client's interests. A conference with client should be conducted to discuss, among other things:

1. The client(s)'s negotiating ability to effectively shift risk to the Sub's (or another party's) CGL carrier;
2. Whether there are any other agreements affecting the API and subcontract; in particular, whether the Client's "other insurance" might result in potential coverage litigation;
3. The potential cost of coverage litigation to Client;
4. The effect of potential litigation on continuing business relationships between Client and the named insured; and
5. That the API should require that the named insured provide the subcontract containing the API to the additional insured carrier. This will help maximize the probability that if litigation occurs, the carrier will be deemed to have been on notice of what type of coverage was mandated by the contract.<sup>122</sup>

Counsel representing a sub (or another party that is required under an API to purchase insurance for the benefit someone else) should determine whether the API merely requires that the owner or GC be named additional insured parties. If so, client should be advised that, while it may consistently purchase a form endorsement, for a nominal cost, if a coverage dispute occurs, the owner or GC may end up suing Client for obtaining improperly restrictive coverage. If no litigation ensues, the cost of additional insurance, through form endorsement, will turn out to be, as advertised, nominal.

In the context of a potentially ongoing business relationship between the named insured and additional insured, the sub may make a business decision whether to clarify the nature and scope of coverage, prior to purchasing endorsement coverage, by form endorsement. If the sub chooses to take advantage of vague API language, it may suggest to the additional insured carrier that it add language, consistent with the bare requirement that the owner/GC be named an additional insured, that AIE coverage be expressly designated excess to all the additional insured's "other insurance." The additional insured carrier may even consider sending the policy and endorsement to the owner/GC. If no objection is made, a ratification will probably have been effected, precluding later disputes on this issue.<sup>123</sup> If, on the other hand, upon receipt, the owner/GC determines the endorsement does not reflect its intentions, the client may end up back in negotiation — a risk which may not be worth his while.

Carriers writing additional insured coverage should, among other things, insist on reviewing API language to determine what is really being demanded with respect to additional insured coverage. With respect to the underwriting process, at least the following should be kept in mind:

- Limit AIE coverage so it covers the additional insured's vicarious liability for the named insured's acts or omissions, but not the additional insureds independent acts of negligence;
- Provide that additional insured coverage is excess to other insurance available to the additional insured, whether as a named insured or an additional insured, on any other policy;
- State, if there is an SIR or deductible, that its terms apply to all insureds, including additional insureds, and that the additional insured is responsible for payment of the SIR or deductible;
- Include a provision that Certificates of Insurance are not binding on insurer unless issued by the insurer's agent;

- Provide, in blanket additional insured endorsements, that the API for an additional insured must be in writing;
- Make sure that any API naming a party as an additional insured is executed prior to the loss as an express condition of additional insured coverage;
- If coverage is on an umbrella level, provide that the insurance limits available to the additional insured are either (1) the limits stated in the policy or (2) the amount of insurance specified in a contract signed by the named insured, whichever is less and states that the umbrella coverage afforded to the additional insured is excess to all other primary insurance available to the additional insured, from any source, whether as a named or additional insured;
- Avoid using language in additional insured endorsements referring to “schedule on file” with the insurer; and
- In drafting manuscript endorsements, avoid ambiguities that may be construed against the insurer.

### ***C. Reviewing The AIE And Discussions With Client***

If you represent owners, GCs or other additionally insured parties, you should make every effort to obtain a copy of the insurance policy that is supposed to be providing your client(s) with additional insured coverage. You should do so at the earliest possible time so that you can review all endorsements. Problems that may be encountered in this regard are discussed below, this point, Subsection 4. Assuming that the policy has been obtained, counsel should determine, among other things, whether the nature of coverage contracted for in the API and actual coverage provided by the AIE are consistent, focusing on the problems discussed in Part II.

If the AIE does not comport with the API's requirements, the sub and additional insured carrier should be notified immediately. If additional negotiation is required, the sooner the issue is raised, the better. If practicable, performance of subcontracted for services should not be allowed to proceed until the matter is resolved. If performance is necessary, a reservation of rights should be effected to ensure contract rights are preserved, and efforts made to ensure no inadvertent ratification takes place with respect to insurance matters inconsistent with the client's intent.

If you represent the purchaser of additional insured coverage, you should determine whether the endorsement provides coverage consistent with the API. If it does not, you should immediately explain this to the client. If the API, for example, demands primary coverage or coverage beyond that set forth in the insuring instrument, the client can either do nothing, which is, in effect, to take the risk of declaratory litigation, including potential breach of contract damages for failure to provide contracted for insurance, or attempt to negotiate (or renegotiate) with the owner/GC, additional insured carrier, or both.

If you represent the additional insured carrier, its employees should be sensitized to the recurring problems associated with APIs and AIEs. If practicable, insurer clients and their employees should be directed to obtain and carefully review the relevant policy and APIs to determine if there are special requirements, e.g., primary coverage, contractually required and incorporated into the AIE, so as to create an obligation on the part of the insurer. Because the sub which is requesting additional insured coverage will have a copy of its own subcontract with its API, the insurer should, in the usual case, have no trouble obtaining the API for review. Questions as to whether AIE language is adequate under an existing API should be directed to counsel. Of course, consideration should always be given to the identification of other contractors (and their insurers) that might have a coextensive obligation to the GC/CM or owner (or a separate obligation to the sub), so as to ensure that timely notification of the occurrence or suit is provided to all potentially implicated parties.

#### **D. Problems Determining What Has Been Purchased**

The review considerations discussed above presuppose that the terms of the insurance-creating instrument are available for counsel's scrutiny. Unfortunately, policies are not always available for review. Construction participants frequently go to great lengths to attempt to ensure that they will have the opportunity to review the instruments that are governing their rights. Three different approaches are discussed below.

##### **1. Production Of The Policy**

The ability to review the policy under which additional insured coverage is being purchased is fundamental to the additional insured's ability to ensure its intent has been properly embodied in contractual terms. It is crucial, therefore, that the additional insured demand, in the API which it controls, that the named insured produce a copy of the policy, with all endorsements.<sup>124</sup> The additional insured who wishes to review the AIE, unlike the insurer who wishes to review the API, may have substantial problems obtaining the relevant document(s), even where the named insured is required to produce such documents, under the API.

First, policies are not always issued promptly. Sometimes months go by without delivery of the policy to the named insured, who merely receives a certificate. By the time the additional insured carrier actually has the policy available, the additional insured or the additional insured carrier, probably both, in the presence of other business exigencies, frequently forget to follow up on policy delivery or review. Second, in many cases, policies, with all endorsements, may be so voluminous that the insurer will simply refuse the named insured's request to send the additional insured the policy. Third, confidentiality considerations may provide a further disincentive to the additional insured carrier who might otherwise have, albeit in rare cases, been amenable to producing a policy.

Notwithstanding these potential, very practical problems, the additional insured may obtain a number of tactical and legal advantages by contractually requiring the named insured to produce the policy containing the AIE. First, if the carrier actually complies, the additional insured may confirm coverage, as set forth above. Second, if the additional insured has defined failure to produce the policy as a material breach of agreement, the additional insured may be in a superior settlement or litigation posture. Just as the Tishman Interiors Court issued a summary decision where contractually required primary insurance was not purchased, so too, if the additional insured builds into the subcontract indemnification obligations triggered on the named insured's failure to satisfy a material condition of the contract, particularly one which would enable the additional insured to protect its own interests, i.e., production of the insuring instrument, courts might well be inclined to rule favorably, on motion.

##### **2. Certificate Incorporation Of AIE Terms**

A second alternative open to the additional insured is to require the named insured, by contract, to obtain a certificate which incorporates by reference the indemnification language the carriers and named insureds included in the underlying contract. This may appear to provide comfort to the additional insured by ensuring that identical coverage is obtained as between the certificate and policy endorsement while permitting the additional insured to review the endorsement language without imposing the task of sending out another policy and endorsements on the additional insured carrier.

The problem, however, is that the comfort afforded the additional insured may be false. First, the typical use of a provision requiring the named insured to endorse the policy to reflect a contractual indemnification provision is to ensure that the named insured has coverage for its contractual indemnity exposure. Furthermore, too closely linking the insurance requirement to the indemnity undertaking threatens to diminish the promisee's ability to argue that the provi-

sions call for two distinct protections, and in some jurisdictions the courts will construe one commitment as subsuming the other or circumscribing its scope. Lastly, too much reliance on a certificate of insurance is ill-advised. The widespread use of certificates of insurance is, to be sure, a matter of convenience for insurers and insureds alike, but certificates are usually insufficient to accomplish a change in policy coverage.<sup>125</sup>

### **3. Manuscript Certificates**

Additional insureds sometimes attempt to have their carriers execute a manuscript certificate which they prepare. Depending on the business relationships involved, there may be circumstances in which it makes sense to draft and attempt to have the insurer issue a manuscript endorsement.

If the insurer is comfortable with the insuring relationship and/or perceives a business basis for issuing a manuscript endorsement, use of the insured's own form should provide comfort that coverage will conform to the additional insured's intent. On the other hand, if the additional insured drafts the endorsement, care should be taken to ensure that it is clear and unambiguous, for the usual rules of construction against the insurer may not apply. Each strategy attempts to impose on the insurer requirements that are not only difficult to enforce, but which may be contrary to the additional insured carrier's own economic interests.<sup>126</sup>

### **Conclusion**

Although standard form endorsement AIEs have been and continue to be used as a matter-of-course to shift construction industry risks, costly coverage litigation and an unprecedented number of litigated cases suggest a closer examination of this risk allocation mechanism is now appropriate. While form endorsements have their place, they are not an adequate substitute for careful negotiation and review of the language being used to create complex additional insured relationships. In the absence of more careful crafting of APIs and AIEs, there is no basis for believing that the flood of declaratory litigations seeking judicial construction of these contractual provisions will soon abate.

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### **ENDNOTES**

1. An early version of this article titled "Construction Industry AIEs: Problems of Contract Interpretation and Solutions" was previously published at 65 Defense Counsel J. 78 (January 1998). This article updates and expands that publication. An endorsement is a contractual provision that modifies a policy's terms. COUCH, 1 CYCLOPEDIA OF INSURANCE LAW 2d (rev. ed.) § 4:32, at 394 defines "endorsements" as "matter [that] may be added to, and become a part of a contract of insurance by way of [e]ndorsements or marginal notations or references made on the policy itself, particularly when the endorsement or reference is expressly referred to in the policy."
2. See *Kinney v. G.W. Lisk Co.*, 76 N.Y. 215, 557 N.Y.S.2d 283 (1990). Generally, the process of underwriting commercial liability insurance begins with an examination of the named insured's operations. Liability insurance frequently allows a company flexibility in accomplishing the transfer of risk. The most typical arrangements by which a named insured undertakes to provide insurance for a third-party take place in: (1) construction trade agreements (typically involving owner, general contractor/manager and subcontractors); (2) real estate leases; (3) equipment leases; or, (4) agreements to provide services (such as security guard services, maintenance and cleaning service contracts). Risk transfer through the use of insurance has long been a standard commercial practice sanctioned by the courts of New York, especially in the context of the construction industry. Indeed, it is generally recognized that the allocation of risk to a subcontractor serves a laudable pur-

- pose in vesting the party with the most control over the risk with responsibility for economic loss caused by unsafe work conditions. See DONALD S. MALECKI, THE ADDITIONAL INSURED BOOK, at 46 (3rd Ed. 1995). As such, risk transfer fosters safety both directly and indirectly.
3. See SCOTT C. TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES, § 40.01, at 391 (Shepard's/McGraw-Hill, 1992) ("owners usually require that contractors of every tier name the owner as an additional insured under their CGL policies. General contractors, in turn, often require that their subcontractors of every tier name the general contractor as an additional insured under their CGL policy"); Gary D. Nelson, Additional Insured Endorsements-Conflicting Expectations, 24 BRIEF 28, 29 (Summer 1995) (use of additional insured endorsements in commercial general liability policies has steadily increased in construction industry). Although insurance and risk management industry participants, by convention, refer to the promisor and the promisee as the "indemnitor" and "indemnitee," this article uses the terms "promisor" and "promisee" to avoid confusion with respect to New York state decisions in which the terms "indemnitor" and "indemnitee" also refer to contractual or implied indemnification situations. See Mas v. Two Bridges Associates, 75 N.Y.2d 680, 689, 555 N.Y.S.2d 669, 674, 554 N.E.2d 1257, 1261-1262 (1990).
  4. See Nelson, supra note 3, at 29 (expectations of additional insureds frequently in conflict with coverage generally available; price of coverage is nominal, reflecting carrier's intention that coverage be limited in scope); Thomas M. Hamilton, Problems Arising from Additional Insureds Endorsements, 62 DEF. COUNS. J. 384, 384 (July 1995) (problems resulting from naming additional insureds on commercial general liability insurance policies are becoming increasingly common in construction and other types of litigation). See generally David R. Hendrick, Insurance Law: Understanding the Basics Regarding "Additional Insureds" in INSURANCE LAW 2003: UNDERSTANDING THE ABC's, 690 PLI/Lit 592, 598 (2003) ("Insurance allows transference of a specific peril or risk to the insurer that, in turn, agrees to assume the risk and its attendant financial burdens in exchange for payment of the premium. This effects a pooling of the risk by all of the parties insuring against the particular risk so that all involved bear a small part of the anticipated cost should the risk materialize and affect some but not all the insureds. Particularly in commercial business relationships, such direct insurance coverage is often supplemented by certain forms of contractual risk allocation in which the parties to a contract agree to shift or share certain types of risks that may arise in the context of the contractual relationship.").
  5. In additional insured cases, the additional insured generally has its own, separate CGL policy and other kinds of insurance through its own CGL carrier. See Kane, Indemnification and Additional Insured Provision: A Primer, 6 COVERAGE, 1 No. 3 (May/June 1996). See Hendrick, supra note 4 at 599-600 ("These relationships frequently arise in the construction industry. . . the project owner often seeks protection from risks arising out of the work on the project and reallocation of those risks to the contractor (as does the contractor from and to its subcontractors) by way of an indemnification provision the obligations of which are to be correspondingly covered by the contractor's contractual liability coverage as an "insured contract." Typically, a claim situation arises when an employee of a contractor (or one of its subcontractors), or even a third party "passer-by," suffers injury or death, or property damage, arising out of or relating to the work being performed on the site. The injured party then often brings an action against the owner, and perhaps others, seeking recovery for the resulting damages. The owner then usually demands that the contractor indemnify, defend and hold it harmless from such claims and perhaps also makes a direct demand against the contractor's CGL insurance carrier for a full defense and indemnity from such claims on the theory that the CGL carrier will ultimately owe a duty, if not of direct coverage of the indemnitee, of full indemnity to the named insured for the liabilities assumed under the indemnity agreement so it may as well step in at the threshold and seek to mitigate such exposure." (note omitted)).
  6. See Nelson, supra note 3, at 29 ("Typically, the owner purchased the 'additional insured' endorsement so he could avoid having to involve his own carrier in a claim, which would increase the owner's loss history and, consequently, his premium."). See also Hendrick, supra note 4 at 606-607 ("The underlying rationale for such risk reallocation is that the risk and the cost of insuring the risk attendant to such operations should be shifted to and borne by the party that is undertaking independent and unsupervised operations and activities on the premises or property as the party exercising, at least theoretically, relatively more control over the factors influencing the risks involved. In fact, however, this "additional insured" relationship often arises merely as a result of the superior bargaining power of one contracting party over another which allows imposition of this type of risk reallocation irrespective of other supporting rational. If one party to a contract can leverage

agreement of the other to furnish insurance coverage of certain risks under the other party's insurance policy rather than its own, why not do so.").

7. Nelson, supra note 3, at 29, n.3.
8. For purposes of simplicity and because landlords and owners are normally in the same risk-allocation relationship vis-a-vis general contractors and subcontractors, they are generically referred to herein as "owners." By "risk-allocation relationship," we mean that both owners and landlords have legal title to the property but usually do not control or direct construction on it. Owners have been held liable for various statutory violations, despite their lack of control, under New York statutes. See, e.g., Haimes v. New York Tel. Co., 46 N.Y.2d 132, 412 N.Y.S.2d 863, 385 N.E.2d 601 (1978) (under New York Labor Law Sec. 240, breach of duty concerning scaffolding, ladders and other height-related devices imposes absolute liability on building owner, even where owner does not direct, control or supervise work through which plaintiff receives injury). Owners generally wish to free themselves from the costs of insuring against risks associated with construction controlled by other parties on the premises.
9. See Gonzales v. Armac Indus. Ltd., 81 N.Y.2d 1, 595 N.Y.S.2d 360, 611 N.E.2d 261 (1993) (although exclusive remedy of injured employee against employer for work-related injuries is workers' compensation benefits, New York law incorporates equitable exception allowing non-employer defendant to begin third-party action against plaintiff's employer for employer's share of liability). In 1996, New York modified its Workers Compensation Law to prohibit third-party actions against plaintiffs' employers, except in cases involving grave injury or death. The law is not retroactive. See Morales v. Gross, 230 A.D.2d 7, 657 N.Y.S.2d 711 (2d Dep't 1997) (new law does not apply retroactively to litigation pending at time of enactment). See generally Gary Spencer, Workers' Comp Bill Applies Prospectively, N.Y. L. J., Sept. 19, 1996 at 1, col. 1 (discussing Gleason v. Holman Contract Warehousing Inc., 636 N.Y.S.2d 505, 507 (3d Dep't 1996) (new law applies only to accidents after effective date of Sept. 10, 1996); David Siegel, A Flood of 1996 Procedure Bills: The Workers' Compensation (Dole/Dow) Bill, N.Y. L. J., Oct. 7, 1996 at 1, col 6 (discussing definition of "grave injury" and retroactivity issue).
10. The third-party action may be subject to restriction based on the exclusivity of the Workers Compensation scheme, though there are generally exceptions permitted. For instance, in New York such claims are viable where they involve a "grave injury" as defined by statute, because they seek only contractual indemnification, or, because the action was filed prior to changes in the law circumscribing contribution actions against employers of injured persons. See Mas v. Two Bridges Assoc., 75 N.Y.2d 680, 689, 555 N.Y.S.2d 669, 674, 554 N.E.2d 1257, 1261-1262 (1990) (discussing differences between contribution, in which liability is apportioned, and indemnification, in which entire loss is shifted).
11. See Turner, supra note 3, § 40.01, at 392 (discussing in detail a number of the following advantages of AIEs). With respect to construction subcontractors, merely because an API obligates a sub to provide an AIE for the benefit of another party, that does not mean that its primary coverage may not still be subject to coinsurance from other policies providing coverage on a primary basis, whether through the additional insured's own coverage or AIEs on the policies of other subs. Of course, the greater number of primary policies implicated, the less exposure to excess coverage.
12. Consolidated Edison Co. of New York v. Aetna Cas. Co., 601 F. Supp. 1024 (E.D.N.Y. 1995); Vons Cos., Inc. v. United States Fire Ins. Co., 78 Cal. App. 4th (Cal. App. 2000); ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES Vol. 2 § 1131 (4th Ed. 2001).
13. While Turner, supra note 3, § 40.01, at 392 identifies avoidance of these exclusions as a benefit of AIEs, they generally relate to property damage, rather than personal injury.
14. See, e.g., Long Island Lighting Co. v. Am. Employers Ins. Co., 131 A.D.2d 733, 517 N.Y.S.2d 44 (2d Dep't 1987) (where utility was additional insured under another entity's policy, even if indemnification clause was unenforceable as matter of public policy or by reason of statute, insurance obtained thereby was enforceable right, and utility could recover for its own negligence). In the companion cases, Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co. v. Ginsburg Dev. Corp., 89 N.Y.2d 786, 658 N.Y.S.2d 903, 680 N.E.2d 1200 (1997), the New York Court of Appeals underscored the importance of having unambiguous APIs and AIEs, holding that indemnification agreements which pur-

port to indemnify the promisee against any and all liability, including liability for the negligence of the promisee (typically the owner or GC) are unenforceable under GOL Section 5-322.1. cf. Dutton v. Charles Pankow Builders, Ltd., 296 A.D.2d 321, 745 N.Y.S.2d 520 (1st Dep't 2002) (enforcing indemnity provision with a savings clause limiting scope of indemnity "to the fullest extent permitted by law," but only for that portion of the loss not attributable to the indemnitee's active negligence). See generally Kenneth R. Maguire, Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., et al. — Where Do We Go from Here?, Defense Association of New York, Presentation June 25, 1997. Construction contracts often have some kind of indemnification and/or hold harmless clause(s). Because, under Itri, their enforceability can now be challenged until the indemnitor conclusively proves it is not partly negligent, careful construction participants will not wish to await such a determination. Prudent indemnitees will insist on securing their rights to defense, through additional insured status, under carefully drafted APIs and AIEs.

15. The relationship between AIEs and subrogation rights has been explored in a number of articles addressing New York's public policy limitation on an insurer's subrogation rights. See, e.g., Kelly & Finocchio, Pitfalls of "Kinney" and the Antisubrogation Doctrine, N.Y. L.J., May 22, 1996, at 1, col. 1. For a particularly insightful analysis of antisubrogation and preindemnification issues, see Lustig & Brown, Preindemnification Out, but Anti-Subrogation Rule In, INS. COVERAGE REP., Vol. 4, No. 11 (Nov. 1993). Under New York antisubrogation rules, if one carrier insures two parties for one claim arising from the same risk, that carrier cannot have one of its insureds sue another to subrogate losses. In McCurran v. DiCano, 216 A.D.2d 538, 628 N.Y.S.2d 773 (2d Dep't 1995), for example, although the third-party plaintiff owner and third-party defendant employer were both additional named insureds on the same multi-peril GL policy, the third-party action did not violate New York's antisubrogation rule. Because the GL policy excluded coverage for bodily injury to the employees of the insureds, the third party defendant was not insured for this particular liability under the multi-peril GL policy. Accord Zahno v. Urquart, 214 A.D.2d 326, 625 N.Y.S.2d 11 (4th Dep't 1995) (same outcome involving named insureds on CGL policy); State v. Schenectady Hardware & Elec. Co., 223 A.D.2d 783, 636 N.Y.S.2d 861 (3d Dep't 1996) (same outcome involving different OCP and CGL policies). See also Levinson v. 595 South Broadway, 216 A.D.2d 367, 628 N.Y.S.2d 365 (2d Dep't 1995) (third-party action violated anti-subrogation rule because general liability insurance policy insured both third party plaintiff owner promisee and third party defendant promisor employer for same risk). If the sub's policy provides additional insured coverage to the GC, GC cannot maintain a third party action to impose liability against the sub. See North Star Reins. Corp. v. Continental Ins., 82 N.Y.2d 28, 604 N.Y.S.2d 510, 624 N.E.2d 647 (1993). Anti-subrogation applies only to the extent of the common coverage, meaning that it will not prohibit claims for contribution or indemnification seeking amounts in excess of the limits of the available additional insured coverage. Curran v. City of New York, 234 A.D.2d 254, 651 N.Y.S.2d 54 (2d Dep't 1996) cf. Elrac v. Ward, 96 N.Y.2d 58, 748 N.E.2d 1, 724 N.Y.S.2d 692 (2001) (applying partial antisubrogation bar to claims by a self-insured). Nor will antisubrogation bar claims by the additional insured (or its own CGL carrier) seeking recovery of any coinsurance payments made through its own coverage. See Dillon v. Parade Mgmt. Corp., 268 A.D.2d 554, 702 N.Y.S.2d 368 (2d Dep't 2000). Although anti-subrogation rules generally eliminate liability pass-through, non-identical coverages on both sides of third-party action and co-insurance situations are exceptions. See also Pitruzzello v. Gelco Builders, Inc., 304 A.D.2d 302, 757 N.Y.S.2d 280, 281-282 (1st Dep't 2003) (where plaintiff sued Metro-North Commuter Railroad Company and Metropolitan Transportation Authority (MN/MTA), Gelco Builders ("Gelco," the GC), and LS Transit System, Inc. ("LS Transit," the CM) for injuries arising from construction work at a railroad station and MN/MTA was an additional insured on an LS Transit policy which provided that MN/MTA was an additional insured "but only with respect to liability arising out of [LS Transit's] ongoing operations performed for [MN/MTA]" and LS's work was ongoing at the station at the time of the accident, IAS court erred in finding that issues of fact precluded the MN/MTA's summary judgment motion based on the anti-subrogation rule — in light of plaintiff's claims against Gelco and Gelco's claims for contribution and indemnity against LS Transit for negligence in overseeing the work, any liability imposed on MN/MTA would fall within the ambit of the insurance provided for MN/MTA and the anti-subrogation rule would be implicated with respect to both the duty to defend and duty to indemnify).
16. See Ostrager & Newman, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 7.04, at 270 (Prentice Hall, 8th ed. 1995).
17. The nominal cost has been repeatedly cited by commentators and courts examining interpretive issues raised by AIEs and litigation in attempting to determine the scope of such clauses. See, e.g.,

- Pomerantz, Recognizing the Unique Status of Additional Named Insureds, 53 Fordham L. Rev. 117, 131 (1984), text at note 76 and extended list of authorities in note 12; But see Liberty Mut. Ins. Co. v. Statewide Ins. Co., 352 F.3d 1098 (7th Cir. 2003) (considering cost of additional insured endorsement (thirty-five dollars) as factor in rejection of argument that coverage was illusory). The nominal cost of additional insured coverage remains a crucial factor in understanding why additional insured carriers have been reluctant to extend their exposure, notwithstanding ambiguous language contained in the standard language in which these insuring relations are frequently articulated.
18. See Donald S. Malecki & Jack P. Gibson, THE ADDITIONAL INSURED BOOK 6, 221-32 (2d ed. 1994).
  19. Id. at 62; Turner, supra note 3, at 393; Kane, supra note 5, at 17. See Hartford Acc. & Indem. Co. v. Firemen's Ins. Co. of Newark, 146 A.D.2d 855, 536 N.Y.S.2d 260 (3d Dep't 1989) (discussing dilution of policy limits). The named insured may suffer even further dilution in cases where the policy limit attributable to the additional insured coverage is not contractually tied to the named insured's underlying primary policy limit. This occurs, for example, in cases where the additional insured is automatically deemed covered on the named insured's excess or umbrella policy, resulting in additional insured coverage above the underlying primary policy's stated contractual limits.
  20. Kane, supra note 5, at 17.
  21. Id., citing Turner, supra note 3, § 40.01 at 33. While some large companies or those with substantial retained limits may actively involve themselves in the conduct of litigation, in most cases, the carrier, rather than the additional insured, controls litigation defense. The typical policy language reserves to the carrier the right to control the defense, also obligating the insured's cooperation with those efforts. Loss of litigation "control" may not, therefore, be so substantial a detriment as it might appear, at least in many cases. With respect to "other insurance" disputes, "other insurance" clauses coordinate coverage where a number of policies are insuring the same risk. Litigation concerning the interplay of "other insurance" provisions, and thus the priority of contribution, is common. See Ostrager & Newman, supra note 16, §11.01 et. seq. at 493.
  22. Kane, supra note 5, at 17. See generally Beck, Ethical Issues in Joint Representation under Subcontract Requirements for Defense and Additional Insured Status, 15 Constr. Lawyer 25, 26 (Jan. 1995) (identifying and discussing conflicts). An insurer's decision to utilize in-house counsel will not relieve a potential co-insurer from the obligation to share in defense costs. See Travelers Ins. Co. v. Commissioners of the State Ins. Fund, 227 A.D.2d 208, 642 N.Y.S.2d 867 (1st Dep't 1996).
  23. See Nelson, supra note 3, at 29; Kane, supra note 5, at 18; Turner, supra note 3, at 403 (as a result of ethical conflicts, separate counsel is always required for additional insured); Hamilton, supra note 4, at 388; Beck, supra note 22, at 25. See also Dayton Beach Park No. 1 Corp. v. Nat'l Union Fire Ins. Co., 175 A.D.2d 854- 856, 573 N.Y.S.2d 700, 700-01 (2d Dep't 1991) (concluding that language "liability arising out of operations performed for the additional insured by the named insured" was so broad that it could not be limited to mere vicarious liability) (emphasis added).
  24. See infra Part II. See, e.g., Royal Ins. Co. v. 342 Madison Ave. Assocs., 208 A.D.2d 389, 617 N.Y.S.2d 297 (1st Dep't 1994) (carrier proffered narrow construction of endorsement clause but court refused to interpret the clause narrowly against the insured party); Travelers Indem. Co. v. LLJV Dev. Corp., 227 A.D.2d 151, 157-159, 643 N.Y.S.2d 520, 525 (1st Dep't 1996) (broadly construing AIE drafted by the promisor-general contractor's insurance carrier, Continental, and rejecting Continental's "tortured" interpretation of its AIE to provide coverage to promisee construction manager for settlement of claim arising from "operations performed for such insured by or on behalf of the named insured."). The broad construction of AIE's employed by courts nationwide has led ISO to propose policy form revisions which will clarify that coverage for an additional insured's "sole negligence" will not be within the scope of coverage. See Meg Fletcher, ISO Seeking to Narrow CGL Cover for Additional Insureds; Construction Companies Call Amendments Too Restrictive, BUSINESS INSURANCE, Vol. 38, No. 3 (January 19, 2004). The new ISO form, use of which will be optional, may be available as early as June 1, 2004.
  25. See supra note 17 authorities and citations therein. Frequently (and unfortunately), the ultimate economic effects of this apparent "cost efficiency" may become clear only after litigation is commenced. See also Beck, supra note 22, at 25 (subcontractor's exposure may be increased through

- “risk-shifting provisions that (1) require subcontractor to defend and indemnify general contractor for claims arising from subcontractor’s work, and (2) require that subcontractor add general contractor as additional insured to subcontractor’s CGL policy,” noting that such provisions may increase sub’s exposure beyond “reasonable limits” but that few subcontractors have bargaining power to “delete or modify.”). *Id.* at 29 n.4.
26. See, e.g., *750 Lexington Ave. Assocs. v. Mario & DiBono Corp.*, N.Y. L. J., May 4, 1995, at 28, col. 2 (where promisor fulfilled its obligation under API to furnish insurance, but carrier disclaimed coverage for promisee as additional insured, promisee’s only remedy was to sue promisor’s carrier for coverage and declaration of rights); *Murphy v. University Club*, 200 A.D.2d 532, 607 N.Y.S.2d 13 (1st Dep’t 1995) (same). See generally *Kelly & Finocchio*, *supra* note 15.
  27. See generally *Beck*, *supra* note 22. See also *Kane*, *supra* note 5, at 18 (specific endorsement must be reviewed to determine specific elements necessary for coverage). The extent of the coverage is generally derived from the language of the policy itself, and absent an express incorporation of the contract language into the policy, the terms of the contract will not influence the scope of coverage. See e.g., *United States Fid. & Gty. v. CNA Ins. Cos.*, 208 A.D.2d 1163, 618 N.Y.S.2d 465 (3d Dep’t 1994); *Travelers Indemn. Co. v. American and Foreign Ins. Co.*, 286 A.D.2d 626, 730 N.Y.S.2d 231 (1st Dep’t 2001).
  28. See Richard H. Glucksman and Glenn T. Barger, *Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation*, 21-WTR Construction Law. 30, 33 (2001) (“The certificate of insurance is a form that is completed by an insurance broker of the named insured at the request of the named insured. The form is used to confirm that the subcontractor has insurance and the types and amounts of coverage. The terms of the insurance contract prevail over the language of the certificate of insurance because the certificate serves merely as evidence of the insurance and is not a part of the insurance contract.”); *New York City Transit Authority v. Firemen’s Fund Ins. Co.*, 251 A.D.2d 166, 673 N.Y.S.2d 906 (1st Dep’t 1998) (plaintiff’s summary judgment motion properly denied; issues of fact existed as to whether policy covered construction project where accident occurred and, if not, whether plaintiff relied on the certificate indicating policy did cover such project and, if so, whether reliance was reasonable given certificate provision saying it was issued “for information only” and “does not confer any rights upon the certificate holder,” noting absence of “affirmative assurance” of coverage by respondent, other than the certificate itself).
  29. In any event, the additional insured typically has no direct dealings with the named insured’s carrier. The additional insured is generally not a party to negotiations between the named insured and its insurance carrier with respect to the insurance contract or the endorsement issued by that insurer creating the additional insured relationship. The additional insured frequently has no opportunity to protect its own rights through direct dealing with the insurer. As such, the additional insured can only express its intent through the requirements it imposes on the named insured.
  30. “Primary” insurance “is coverage that attaches immediately upon the happening of an occurrence that is covered under the terms of the policy.” *Ostrager & Newman*, *supra* note 16, § 6.03[a], at 216; *Reliance Nat. Ins. Co. v. Royal Indem. Co.*, 2001 WL 984737, at \*18 (S.D.N.Y. 2001).
  31. “Excess” or “secondary” insurance “is coverage that attaches only after a predetermined amount of primary coverage has been exhausted.” *Id.* at 217 (citation omitted).
  32. A “coinsurance clause . . . divides the risk between the insurer and the insured, and limits the insurer’s risk to such proportion of the loss as the sum insured bears to the value of the whole property covered [and] is generally held to be reasonable and valid.” 6 JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 3866, at 319 (Vernon Law Book). Couch defines “coinsurance” as “a relative division of the risk between the insurer and the insured, dependent upon the relative amount of the policy and the actual value of the property insured thereby.” 16 Couch, *supra* note 1, § 62:124, at 598. “The effect of a coinsurance clause is to reduce the liability of an insurer in terms of the percentage of coverage which the clause requires the insured to maintain.” *Id.* § 62.125, at 598.
  33. *Glucksman and Barger*, *supra* note 28 at 35, n.54 (2001) (quoting *Maryland Cas. v. Nationwide Mut. Ins. Co.*, 81 Cal.App.4th 1082, 1087 (2000). Excess policies are triggered only when the underlying insurance is exhausted by the payment of settlements or judgments. See *Commissioners of State Ins. Fund v. Aetna*

- Cas. & Sur. Co., 283 A.D.2d 335, 728 N.Y.S.2d 6 (1st Dep't 2001); St. Paul Fire and Marine Ins. Co. v. Protection Mut. Ins. Co., 607 F. Supp. 388 (S.D.N.Y. 1985). Other courts have reached similar results. See, e.g., United States Fire Ins. Co. v. CNA, 300 A.D.2d 1054, 752 N.Y.S.2d 765 (4th Dep't 2002) (question whether policies were co-excess to each other resolved by considering purpose of the policies as evidenced by (1) their stated coverage, (2) the premium paid for each policy and (3) the wording of each policy with respect to excess insurance coverage, holding defendant's policy had to be exhausted before a claim could be made against the policy issued by plaintiff where (1) plaintiff's policy was an umbrella policy and defendants' policy afforded primary coverage, (2) plaintiff's policy was for a premium substantially less than the premium for defendants' policy, and (3) plaintiff's policy expressly negated contribution with other insurers, whereas defendants' policy did not).
34. Jefferson Ins. Co. v. Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221 (1998); Graphic Arts Mut. Ins. Co. v. Bakers Mut. Ins. Co. of N.Y., 45 N.Y.2d 551, 410 N.Y.S.2d 571, 382 N.E.2d 1347 (1978).
35. Lumbermens Mut. Cas. Co. v. Allstate Ins. Co., 51 N.Y.2d 651, 435 N.Y.S.2d 953 (1980). A true excess or umbrella policy requires that a primary policy be in place as a condition of coverage. The purpose of excess or umbrella policies is to protect the insured from a potential catastrophic loss. See Richmond, Issues and Problems in "Other Insurance," Multiple Insurance and Self Insurance, 22 Pepperdine L. Rev. 1373 (1995). Excess policies provide coverage over and above all primary coverage, including primary policies containing excess "other insurance" clauses. An excess "other insurance" clause, in a primary policy, however, does not transform a primary policy into an excess policy *vis-à-vis* a second insurance policy providing true, excess coverage. *Id.* See also 15 Couch on Ins. (3rd Ed.), § 220:41 ("the umbrella policy would only provide coverage after the primary policies were exhausted").
36. The true excess or umbrella policy also provides for unscheduled, but underlying insurance to be exhausted as well before the umbrella policy is triggered. See generally North River Ins. Co. v. American Home Assur. Co., 210 Cal. App. 3d 108, 257 Cal.Rptr. 129 (Cal. App. 1989); WALL, LITIGATION AND PREVENTION OF INSURANCE BAD FAITH (2nd Ed.), § 6.3; 1 WINDT, INSURANCE CLAIMS AND DISPUTES, § 7.2 ("an umbrella or excess policy should be held to be excess over what was, in fact, a primary policy even when the applicable 'other insurance' clause in the primary policy states that it is excess"). An "other insurance" dispute "cannot arise between primary insurers and true excess insurers." 15 Couch on Insurance at § 218:5 (3rd Ed.). Many cases recognize that a true excess or umbrella policy trumps a primary policy with an excess "other insurance" clause. See, e.g., Travelers Cas. & Sur. Co. v. American Equity Ins. Co., 93 Cal. App. 4th 1142, 1150, 113 Cal.Rptr.2d 613, 618 (Cal. App. 2001) ("other insurance" clauses became relevant only where several insurers insure the same risk at the same level of coverage"); New Hampshire Ins. Co. v. Hanover Ins. Co., 296 Ill.App.3d 701, 705, 696 N.E.2d 22, 25, 231 Ill.Dec. 293, 296 (Ill. App. 1998) ("it is well known that an umbrella policy is different from a primary policy containing an excess insurance clause in that an umbrella policy provides a special and unique coverage . . . , only pay[s] above the primary policies [and] generally allows for lower premiums than those of primary policies"); Bosco v. Bauermeister, 456 Mich. 279, 293, 571 N.W.2d 509, 515 (Mich. 1997) ("examining the policy types within the insurance industry and the premiums charges for such policies is helpful in determining the contractual intent of the insurance policies;" distinguishing "true excess" policy from "coincidental" excess policy); CNA Ins. Co. v. Selective Ins. Co., 354 N.J.Super. 369, 380, 807 A.2d 247, 253 (N.J. App. 2002) (excess "other insurance" clause is intended to operate only "where another primary policy covers the risk"); Safeco Ins. Co. of Ill. v. Automobile Club Ins. Co., 108 Wash.App. 468, 479, 31 P.3d 52, 57 (Wash. App. 2001) ("we adopt the majority view that we cannot interpret the competing clauses of these policies in a vacuum, but must instead consider them in light of the total insuring intent of all the parties. On that basis, we consider the nature and purpose of primary and excess insurer policies"); Executive Risk Specialty Ins. Co. v. Lexington Ins. Co., 106 F. Supp. 2d 181 (D. Mass 2000) ("the generally accepted rule is that primary insurance should be exhausted before excess insurance must pay").
37. See Nelson, *supra* note 3, at 67: "The carrier that issued the 'additional insured' endorsement . . . generally will attempt to involve any other insurance that is available, including the additional insured's own general liability insurer . . . the general carrier, as well as the additional insured, probably will feel that its liability should be excess to that of the carrier that issued the 'additional insured' endorsement. Absent a manuscript policy taking into account these 'additional insurance' provisions . . . , the policies' 'other insurance' clause will control the apportionment between those policies."

Some cases involve a single additional insured being named as such on both primary and excess policies. See, e.g., AIU Ins. Co. v. Valley Forge Ins. Co., 303 A.D.2d 325, 325-26, 758 N.Y.S.2d 16, 17-18 (1st Dep't 2003)(insurer not required to contribute to settlement where it did not participate in settlement of the underlying personal injury action and insured was entitled to full indemnification and a complete pass-through of liability, in the absence of any showing of any direct negligence on insured's part, where insured was an additional named insured on primary and excess policies maintained by the actively negligent party and the insured's liability was purely statutory).

38. Turner, supra note 3, at 401, citing cases.
39. 198 A.D.2d 134, 604 N.Y.S.2d 55 (1st Dep't 1993).
40. 236 A.D.2d 385, 653 N.Y.S.2d 367 (2d Dep't 1997).
41. 33 Mass.App.Ct. 446, 601 N.E.2d 473, 475 (Mass.App. 1992).
42. See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hartford Ins. Co., 248 A.D.2d 78, 677 N.Y.S.2d 105 (1st Dep't 1998)(where subcontractor's general liability insurer sued for a declaration that general contractor's CGL insurer was responsible for one-half the cost of the defense and settlement of suit against the general contractor, Court held that where two or more insurers bind themselves to the same risk and one pays the whole loss, the paying insurer has a right of action against his coinsurers for a ratable portion of the amount paid — on the facts, the First Department held the insurers were co-insurers of the same interest and risk and that an indemnification clause could not override the fact that both policies provided for primary coverage and had matching "other insurance" clauses), aff'd, 93 N.Y.2d 983, 695 N.Y.S.2d 740 (1999).
43. See Investors Ins. Co. v. Hartford Fire Ins. Co., 233 A.D.2d 197, 650 N.Y.S.2d 527 (1st Dep't 1996) (summary judgment affirmed where "matching clauses" which are "standard in the industry" manifest an intent for the application of contribution by equal shares); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund, 222 A.D.2d 369, 636 N.Y.S.2d 31 (1st Dep't 1995)(where subcontractor's CGL insurer sought a declaration that that subcontractor's employer's liability insurer was a co-insurer responsible for half of amounts the CGL insurer paid for defense and settlement of a mutually insured loss in a third party action, appellate court held they were coinsurers and each had an obligation to pay one-half the reasonable amounts incurred to settle and defend the action).
44. See generally Zurich-American Ins. Co. v. Atlantic Mut. Ins. Co., 139 A.D.2d 379, 531 N.Y.S.2d 911 (1st Dep't 1988), aff'd, 74 N.Y.2d 621, 541 N.Y.S.2d 970 (1989).
45. See Hartford Fire Ins. Co. v. LaBrutto, 275 A.D.2d 525, 711 N.Y.S.2d 639 (3rd Dep't 2000)(where subcontractor's policy included an AIE which "'include[s] as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under \* \* \* [a] written contract . . . [and] that [a]ny coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured \* \* \* unless a contract specifically requires that the insurance be primary or you request that it apply on a primary basis," and parties did not address whether the subcontractor requested that the additional insured coverage apply on a primary basis and no clause specified coverage was to be on an primary basis, coverage was excess).
46. See Jefferson Ins. Co. of N.Y. v. Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221 (1998).
47. See Federal Ins. Co. v. Atlantic Nat. Ins. Co., 25 N.Y.2d 71, 75-76, 302 N.Y.S.2d 769, 771, 250 N.E.2d 193, 194-195 (1969) (where automobile liability insurers sought to determine coverage, and one covered a rented automobile involved in an accident and the other the driver, and the policy of the former provided insurance to "be excess insurance over any other valid and collectible insurance and the other policy specified that all coverage it extended would be "excess" where another policy encompassed a loss it insured, since both policies would be "excess," if the court literally applied policy language, the language in each policy describing the nature of coverage "cancelled" each other out — both coverages had to be treated as primary and both insurers were obligated to share in the cost of the settlement and expenses); Tops Market Inc. v. Maryland Cas., 267 A.D.2d 999, 700 N.Y.S.2d 325 (4th Dep't 1999)(where two policies provide coverage for the same interest and against

the same risk, concurrent coverage exists and insurers will be held to be coinsurers who must contribute a ratable portion of the amount paid, holding insurers, both of which had "other insurance" clauses in their policies, were primary insurers which had to pay equally).

48. See State Farm Fire & Cas. Co. v. Li Mauro, 65 N.Y.2d 369, 492 N.Y.S.2d 534, 482 N.E.2d 13 (1985) (pro rata contribution will "distort" intention of parties).
49. 99 N.Y.2d 391, 756 N.Y.S.2d 822, 786 N.E.2d 391 (N.Y. 2003).
50. Blanket additional insured endorsements may be issued to create additional insured status for all entities for which the named insured must name additional insureds. See, e.g., Rosato v. Karl Koch Erecting Co., Inc., 865 F. Supp. 104 (S.D.N.Y. 1996). Unless the endorsement specifically requires that the contract or agreement be in writing, an oral contract, if proven, will suffice. See Powerhouse Sheet Metal Co., Inc. v. Hanover Ins. Co., 288 A.D.2d 164, 733 N.Y.S.2d 72 (1st Dep't 2001) (where employee of sub-subcontractor Powerhouse Sheet Metal Company ("Powerhouse") sued subcontractor ARA Plumbing and Heating ("ARA") which employed Powerhouse and ARA filed a third party action against Powerhouse, and the defense was that Powerhouse and ARA had not executed any written agreement prior to work commencing, trial court properly refused to grant summary judgment holding that oral if not written contract was required if duty to defend or indemnify was to be found, noting failure of contract to define the terms "executed," "contract," "agreement," and "insured contract" policy language did not establish, as a matter of law, that a contract to indemnify is not covered unless in writing).
51. Pecker Iron Works of N.Y., Inc. v. Travelers Ins. Co., 290 A.D.2d 426, 736 N.Y.S.2d 103 (2nd Dep't 2002).
52. 99 N.Y.2d 391, 756 N.Y.S.2d 822, 786 N.E.2d 863 (N.Y. 2003).
53. 99 N.Y.2d at 393, 756 N.Y.S.2d at 823, 786 N.E.2d at 864.
54. 297 A.D.2d 544, 747 N.Y.S.2d 213 (1st Dep't 2002).
55. 297 A.D.2d at 547, 747 N.Y.S.2d at 216.
56. 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221 (1998).
57. In Jefferson Ins. Co. v. Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221 (1998), a pedestrian sued the owner of a leased vehicle (A-Drive), which was insured by Reliance (on a primary basis), Jefferson Insurance Co. (on an excess policy), and Travelers (another primary policy issued to the lessee Continental Copy with additional insured coverage for the owner A-Drive). The Court of Appeals observed that where two or more policies conflict, e.g., as would two policies that purported to be excess over each other, the insurers would be required to contribute in the proportion that their policies bore to the limit of coverage at that level. However, it continued, a policy that explicitly provides that it is to be excess over other excess coverage could be specifically enforced. Although the Travelers' policy contained an "other insurance" provision which made its coverage excess for nonowned vehicles, it did not bar primary coverage of A-Drive or make coverage excess to that provided by Jefferson or Reliance. Specifically, it reasoned, because there was no limitation as to the type of coverage in the Travelers' endorsement making A-Drive an additional insured and because the Travelers policy was designed to provide Continental Copy with primary insurance, after finding A-Drive was an additional insured under the Travelers policy, "it would naturally follow that coverage of A-Drive was also primary." 92 N.Y.2d at 372, 681 N.Y.S.2d at 213, 703 N.E.2d at 1226. In contrast, the Jefferson policy specifically described its coverage as excess insurance and defined its losses as those in excess of all other insurance that could cover the risk. It found that the Travelers primary auto policy (with an excess clause) was intended to provide primary insurance for the additional insured, and Jefferson, "who contracted for excess coverage, is 'last on the risk.'" Id. The Court of Appeals applied "a functional analysis" to determine whether the excess policy was above the primary policy with an excess clause.
58. In Washington v. New York City Indus. Dev., 215 A.D.2d 297, 627 N.Y.S.2d 343 (1st Dep't 1995), the promisee additional insured's other insurance carrier prevailed in convincing the court that because the API designated the promisor's policy as primary and the actual liability policy was a primary

liability policy, there was no coinsurance with the additional insureds' other insurance policy. Litigation, however, was foreseeable despite the fact that the API and the AIE both provided that coverage was primary. The problem was that neither specified that any other coverage under applicable policies would be excess to the primary coverage they created.

59. See, e.g., McGill v. Polytechnic Univ., 235 A.D.2d 400, 651 N.Y.S.2d 992 (2d Dep't 1997) (where appellant breached contract to purchase primary liability insurance for additional insureds, summary judgment was proper). See generally Keelan v. Sivan, 234 A.D.2d 516, 651 N.Y.S.2d 178 (2d Dep't 1996) (where promisor failed to purchase contractually required insurance coverage for promisee, summary judgment should have been entered, and promisor was liable for all resultant damages).
60. 203 A.D.2d 83, 610 N.Y.S.2d 219 (1st Dep't 1994).
61. See Kane, *supra* note 5, at 18: "Although, generally, certificates of insurance indicating the promisee's status as additional insured are sent to confirm the new status, it is the additional insured endorsement which confers the coverage rights and obligations even though the promisee often does not receive a copy of the endorsement or the policy," citing Malecki & Gibson, *supra* note 18, at 81-91, and Turner, *supra* note 3, § 40.01, at 392. See also Hamilton, *supra* note 4, at 384: "Common problems with certificates of insurance include the possibility that certificates issued by agents contain errors describing coverage afforded by policies and the possibility that the certificates fail to reveal special limitations applicable to the coverages afforded."
62. Hamilton, *supra* note 4, at 384: ("Communication breakdowns between named insureds, additional insureds, agents and insurers can result in a failure to comply with the insurance requirements in the contract between the indemnitor and indemnitee."). See generally Moleon v. Kreisler Borg Florman General Const. Co., Inc., 304 A.D.2d 337, 758 N.Y.S.2d 621, 623-324 (1st Dep't 2003)(where party not named in AIE as an additional insured attempted to rely on insurance certificate which contained a disclaimer which stated: "this certificate is issued as a matter of information only and confers no rights upon the certificate holder [and that] this certificate does not amend, extend or alter the coverage afforded by the policies," the certificate was insufficient to establish the party was an additional insured where the policy itself made "no provision for coverage (see Glynn v. United House of Prayer for All People, 292 A.D.2d 319, 322, 741 N.Y.S.2d 499; American Motorist Ins. Co. v. Superior Acoustics Inc., 277 A.D.2d 97, 716 N.Y.S.2d 389; see also Taylor v. Kinsella, 742 F.2d 709 [applying New York law].").
63. See Penske Truck Leasing Co. v. Home Ins. Co., 251 A.D.2d 478, 480, 674 N.Y.S.2d 400, 401 (2d Dep't 1998)(reversing trial court which denied summary judgment where certificate contained disclaimer stating it was "issued as a matter of information only and confer[ed] no rights upon the certificate holder" and did "not amend, extend or alter the coverage," holding that certificate, in itself, does not establish certificate holder is covered, that a certificate is not conclusive proof of contract or itself a contract to insure and that the doctrine of estoppel may not be invoked to create coverage where none exists under the policy).
64. See, e.g., Kennelty v. Darlind Constr. Inc., 260 A.D.2d 443, 668 N.Y.S.2d 584 (2nd Dep't 1999); New York City Transit Auth. v. Fireman's Fund Ins. Co., 251 A.D.2d 166, 673 N.Y.S.2d 906 (1st Dep't 1998).
65. See Lenox Realty, Inc. v. Excelsior Ins. Co., 255 A.D.2d 644, 679 N.Y.S.2d 749 (3rd Dep't 1998)(where property owner and manager sued insurer seeking declaration that they were entitled to defense and indemnification arising from personal injury action).
66. See Niagara Mohawk Power Corp. v. Skibeck Pipeline Co., Inc., 270 A.D.2d 867, 705 N.Y.S.2d 459 (4th Dep't 2000)(where agent of insurer issued a certificate designating party an additional insured but, just before the subject accident, issued another certificate which did not include an additional insured designation, trial court properly found party was an additional insured because record evidence indicated neither party intended that the designation "additional insured" be deleted and the deletion was attributable to a clerical error).
67. See Mic Property and Cas. Ins. Corp. v. Custom Craftsman of Brooklyn, Inc., 269 A.D.2d 179, 703 N.Y.S.2d 179 (1st Dep't 2000)(where a party contending that it is entitled to additional insured status

produced only a certificate of insurance referencng an expired policy, motion under CPLR § 3211 would be considered a summary judgment motion and dismissal was proper).

68. See Dryden Cent. School Dist. v. Dryden Aquatic Racing Team, 195 A.D.2d 790, 600 N.Y.S.2d 388 (3rd Dep't 1993)(trial court properly granted plaintiff's summary judgment motion seeking declaration that party was entitled to defense and indemnification where claim was made against policy one day before issuance of a certificate which named party an additional insured and neither the certificate nor policy could be read to limit coverage to claims made after date of the certificate — certificate did not alter effective dates and policy period specified in both the policy and certificate and did not give rise to an ambiguity in the certificate, based on issuance date).
69. 198 A.D.2d 105, 603 N.Y.S.2d 830 (1st Dep't 1993).
70. 181 A.D.2d 500, 580 N.Y.S.2d 356 (1st Dep't 1992).
71. 225 A.D.2d 443, 639 N.Y.S.2d 355 (1st Dep't 1996).
72. See, e.g., Bucon Inc. v. Pennsylvania Mfg. Ass'n Ins. Co., 151 A.D.2d 207, 547 N.Y.S.2d 925 (3d Dep't 1989) (in declaratory judgment action, where insurer failed to deliver policy that did not name plaintiff as additional insured, insured was entitled to rely on certificate naming him additional insured, and insurer precluded from challenging "additional insured" status on estoppel principles).
73. 227 A.D.2d 151, 643 N.Y.S.2d 520 (1st Dep't 1996).
74. 227 A.D.2d at 158, 643 N.Y.S.2d at 526 (emphasis added).
75. Use of the word "by" would limit coverage in the same way that use of the term "for" limits coverage in the standard AIE forms A and Form B, promulgated by the Insurance Service Organization, discussed below.
76. See, e.g., Aetna Cas. & Sur. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 228 A.D.2d 385, 645 N.Y.S.2d 5 (1st Dep't 1996) (declaratory judgment action holding accident arose from operations "by or on behalf of" named insured subcontractor where named insured's hoist was provided by named insured to subcontractors for use on job and subcontractor's employee was killed while using hoist; irrelevant that named insured was not using hoist at time); County of Orange v. Hartford Acc. & Indem. Corp., 226 A.D.2d 578, 579, 641 N.Y.S.2d 118, 119 (2d Dep't 1996) (in declaratory action, insurer had to defend county as additional insured under AIE providing coverage for "[w]ork operations performed by you or on your behalf" (emphasis added) where injury occurred during resurfacing road project being performed for county and injured person was employee of named insured contractor); New York Univ. v. Royal Ins. Co., 200 A.D.2d 527, 528-29, 607 N.Y.S.2d 12, 13 (1st Dep't 1994) (plaintiff additional insured held covered in declaratory judgment action where injured party was employed by named insureds and accident occurred during course of and within the scope of injured person's employment under AIE providing coverage "with respect to operations by or on behalf of the named insureds." (emphasis added)).
77. Simon, Coverage for the Additional Insured, N.Y. L.J., Jan. 8, 1996 at 1, col. 1.
78. Id. at 4, col. 4.
79. 573 N.Y.S.2d 700 (2d Dep't 1991).
80. Simon, supra note 77, at 4, col. 6.
81. Turner, supra note 3, at 395 and 1995 Supp. § 40.02A, at 176 ("As the phrase arise out of is both broad and vague, it must be liberally construed in favor of the insured."). Factual issues regarding whether liability "arises out of" a party's activities frequently results in denial of summary judgment. See, e.g., Ceron v. Rector, Church Wardens & Vestry Members of Trinity Church, 224 A.D.2d 475, 638 N.Y.S.2d 476 (2d Dep't 1996) (question of fact precluded summary judgment as against some, but not all, defendants). See generally Hendrick, supra note 4 at 612-613 ("[W]here the insurance is unqualified by limitations and exclusions, the majority rule favors liberal interpretation of additional insured endorsement language, such as coverage for liability which "arises out of" the

named insured's performance, in favor of coverage, even where the additional insured's negligence caused or contributed to the injury giving rise to the plaintiff's claim against the additional insured. However, if the additional insured endorsement is explicit in not extending coverage to an additional insurer where the claims arise out of the additional insured's sole negligence, courts are likely to enforce such restrictions.").

82. In Tishman Const. Corp. of New York v. Amer. Mfrs. Mut. Ins. Co., 303 A.D.2d 323, 323-24, 757 N.Y.S.2d 535, 536-537 (1st Dep't 2003), for example, construction manager (Tishman) contracted with defendant subcontractor (Newport) to perform painting work. Newport was contractually obligated to procure primary commercial liability insurance coverage for Tishman and the property owner. Newport obtained a policy from American Manufacturers Mutual Insurance Company (AMMI) which included an AIE providing coverage to any entity that Newport was contractually required to insure for liability "arising out of" Newport's "work" for that additional insured. A Newport employee, O'Keefe, sued for personal injuries, which occurred while he was painting. AMMI argued it was not be required to provide coverage under the endorsement because O'Keefe, at the time of the accident, was not doing Newport's work but rather was acting as Tishman's special employee, acting under Tishman's exclusive control and supervision, performing work in tandem with a Tishman employee, pursuant to a dangerous method of work devised by Tishman that was the subject of an unsigned change order that was not part of the Newport's painting contract. New York's Appellate Division, First Department, rejected the argument, observing that it had consistently held that any negligence by the additional insured in causing an accident underlying the claim would not be material to the application of the AIE. There was no dispute that (1) Newport was the painting contractor, (2) Newport was O'Keefe's general employer, and (3) O'Keefe was injured while performing painting work. Because his activity "related to" the work Newport performed under the contract, the accident was within the endorsement. Thus, it held that AMMI was properly required to reimburse Tishman and the property owner for all their defense costs in O'Keefe's personal injury action and AMMI was properly required to indemnify Tishman and the property owner for the settlement in O'Keefe's action, to the extent of policy limits, subject to a determination as to the reasonableness of claimed defense costs. In Brooklyn Union Gas Co. v. Interboro Asphalt Surface Co., Inc., 303 A.D.2d 532, 534-35, 757 N.Y.S.2d 72, 75 (2d Dep't 2003), one defendant negligently paved over a certain shut-off valve and another failed to inspect the valve. After an explosion and ensuing litigation, the action was settled. The settling party was held entitled to summary judgment on breach of contract claim and declaratory relief where, even though opposing party had failed to name other party an additional insured, as contract required. The contract contained a broad indemnification against any and all loss, damage and liability, costs and expenses, and from and against any and all claims, caused by or to have arisen from (or claimed to have been caused by or to have arisen from or in connection with certain work). The policy also contained a contractual liability endorsement which provided that opposing party would pay all sums which moving party assumed by reason of liability pursuant to written contracts entered into by it, including the subject contract.
83. 212 A.D.2d 980, 643 N.Y.S.2d 802 (4th Dep't 1996).
84. 226 A.D.2d 179, 640 N.Y.S.2d 533 (1st Dep't 1996).
85. 89 N.Y.2d 990, 679 N.Y.S.2d 390, 679 N.E.2d 629 (1997).
86. 89 N.Y.2d at 991, 679 N.Y.S.2d 391, 679 N.E.2d at 630.
87. 280 A.D.2d 576, 720 N.Y.S.2d 797 (2nd Dep't 2001).
88. 275 A.D.2d 603, 713 N.Y.S.2d 161 (1st Dep't 2000).
89. 236 A.D.2d 211, 652 N.Y.S.2d 742 (1st Dep't 1998).
90. 274 A.D.2d at 203, 713 N.Y.S.2d at 162. See also DeJesus v. Tyree Organization, 304 A.D.2d 360, 759 N.Y.S.2d 449 (1st Dep't April 8, 2003) (where lease required lessee to indemnify owner for specified liabilities unless such resulted from the owner's sole negligence, and to obtain liability insurance listing the owner as an additional insured, the lease did not require the lessee to obtain insurance covering losses caused solely by the owner's negligence, so the insurer defending the lessee was not seeking to recover against the owner for a claim arising from the risk for which the lessee agreed to obtain insurance).

91. 168 A.D.2d 321, 562 N.Y.S.2d 655 (1st Dep't 1990).
92. 176 A.D.2d 1156, 575 N.Y.S.2d 598 (3d Dep't 1991).
93. 176 A.D.2d at 1156-57, 575 N.Y.S.2d at 600.
94. 162 A.D.2d 130, 131-32, 556 N.Y.S.2d 76, 77-78 (1st Dep't 1990) (construing same endorsement, insurer only obligated to defend and indemnify if accident occurs within that part of the premises leased to insured).
95. 235 A.D.2d 363, 653 N.Y.S.2d 16 (1st Dep't 1997).
96. 234 A.D.2d 337, 651 N.Y.S.2d 866 (2d Dep't 1996).
97. Courts have frequently disagreed about whether clauses using this language are ambiguous. See, e.g., Royal Ins. Co. of America v. 342 Madison Ave. Assoc., 208 A.D.2d 389, 617 N.Y.S.2d 297 (1st Dep't 1994) (trial court erred in concluding that endorsement covering defendant for any liability "arising out of the ownership, maintenance or use of the premises" was ambiguous).
98. Turner, supra note 3 at 395 ("[B]ut for causation, not proximate causation, is all that is required for the coverage of the additional insured," citing cases). See generally Glucksman and Barger, supra note 28 at 31 ("most decisions now broadly construe the phrase to require that the incident be causally connected with the named insured's work. In other words, 'arising out of' is satisfied by 'but for' causation.").
99. Glucksman and Barger, supra note 28 at 31 (quoting Colony Ins. Co. v. Pinewoods Enters. Inc., 29 F. Supp.2d 1079, 1083 (E.D.MO.1998)).
100. Lim v. Atlas-Gem Erectors Co., 225 A.D.2d 304, 638 N.Y.S.2d 946 (1st Dep't 1996) (citing Consolidated Edison Co. of N.Y., Inc. v. Hartford Ins. Co., 203 A.D.2d 83, 610 N.Y.S.2d 219 (1st Dep't 1994)).
101. See, e.g., Con. Edison Co. of N.Y., Inc. v. U.S. Fidelity and Guar. Co., 266 A.D.2d 209, 697, N.Y.S.2d 670 (1st Dep't 1999).
102. See Tishman Constr. Corp. v. CNA Ins. Co., 236 A.D.2d 211, 652 N.Y.S.2d 742 (1st Dep't 1997); Charter Oak Fire Ins. Co. v. Trustees of Columbia Univ., 198 A.D.2d 134, 604 N.Y.S.2d 55 (1st Dep't 1993).
103. See Maxwell v. Toy-R-Us NY, 269 A.D.2d 503, 504, 702 N.Y.S.2d 651, 652-653 (2nd Dep't 2000) (in an action arising out of a personal injury action brought by an employee of a subcontractor against a general contractor and property owner, where Royal Insurance had issued a policy to Island Acoustics, a subcontractor of James A. Smith Contracting ("Smith") which was engaged in renovations of a Toys "R" US store ("Toys"), and the Royal policy contained an AIE providing that "any coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured unless a contract specifically requires that this insurance be primary," Hanover Insurance was a coinsurer of damages arising out of the accident under a blanket AIE covering liability "arising out of" contractors work; therefore, the trial court's denial of coverage was improper because accident arose out of the course of contractor's work); Tishman Interiors Corp. of N.Y. v. Fireman's Fund Ins. Co., 236 A.D.2d 385, 653 N.Y.S.2d 367 (2nd Dep't 1997).
104. 282 A.D.2d 266, 267, 723 N.Y.S.2d 177, 178 (1st Dep't 2001).
105. 282 A.D.2d at 267, 723 N.Y.S.2d at 179.
106. 288 A.D.2d 13, 732 N.Y.S.2d 161 (1st Dep't 2001).
107. 288 A.D.2d at 14, 732 N.Y.S.2d at 162.
108. See Glucksman and Barger, supra note 28 at 30 (manuscript endorsements generally reduce the scope of the additional insured coverage below that of either of the ISO form endorsements).

109. See Town of Oyster Bay v. Emp. Ins. of Wausau, 269 A.D.2d 387, 702 N.Y.S.2d 630 (2nd Dep't 2000) (where injured party fell on ice in a parking lot owned by town and sued town for negligence, insurers of town properly refused to defend and indemnify town because injuries in the underlying action did not "arise out of" snow removal work; the injuries occurred prior to snow removal obligations being undertaken by the contractor).
110. See, e.g., Daily News, L.P. v. OCS Sec., Inc., 280 A.D.2d 576, 720 N.Y.S.2d 797 (2nd Dep't 2001) (plaintiff visitor to Daily News plant injured when struck by a descending elevator door operated by an employee on lunch break, holding injury arose out of work for Daily News because work necessarily required employee to use the elevator to perform his job and reach and leave his workplace).
111. 84 A.D.2d 809, 444 N.Y.S.2d 140 (2d Dep't 1981).
112. 225 A.D.2d 304, 638 N.Y.S.2d 946 (1st Dep't 1996).
113. 225 A.D.2d at 305, 638 N.Y.S.2d at 947.
114. Id.
115. 225 A.D.2d at 305-306, 638 N.Y.S.2d at 947.
116. 225 A.D.2d at 306, 638 N.Y.S.2d at 948.
117. See, e.g., Nuzzo v. Griffin Technology Inc., 212 A.D.2d 980, 624 N.Y.S.2d 703 (4th Dep't 1995) (where contract did not require procurement of policy that would cover owner for all contract claims, or for its own negligence, coverage was limited to only contractual terms; had contract more precisely identified whose negligence was being insured, part of litigation might have been avoided).
118. Kane, supra note 5, at 17. ISO form contracts are an "important feature [ ] of the insurance industry," and "most [commercial general liability] insurance written in the United States is written on these forms." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772, 113 S. Ct. 2891 125 L.Ed. 2d 612 (1993).
119. Turner, supra note 3 § 40.01 at 393.
120. Nelson, supra note 3, at 72. Commentator, William Kelly, states he was inspired by Con. Edison v. Hartford, 203 A.D.2d 83, 610 N.Y.S.2d 219 (1st Dep't 1994), to develop the following language to clarify Form B:

This endorsement covers the above name or organization only for vicarious liability arising solely out of the scope of the work as defined in the contract between our named insured and this additional insured and performed by our named insured. This endorsement does not provide coverage for any acts or omissions of this additional insured or this additional insured's employees.

See also Hendrick, supra note 4, at 619 (discussing history of ISO Form changes, as follows:

"An earlier version of the ISO form CG 20 10 (1185), issued in November 1985, referenced coverage for the designated additional "insured" to broadly include "liability arising out of "your work" for that insured by or for you" [emphasis added]. This was subsequently changed by ISO in the 1993 and 1997 revisions of this endorsement, e.g., form CG 20 10 (3/97), which employed a purposefully narrower terminology extending coverage to the designated additional "insured" only for "liability arising out of your [i.e. the named "insured's"] ongoing operations" [emphasis added]. These were modified to clarify and make more explicit the intention that such additional insured coverage was not to include "completed operations" coverage for occurrences arising after completion of the named insured's "work." This purpose may have actually been achieved by this change in terminology, although in matters other than application of "completed operations" coverage most courts and commentators have concluded that usage of the terms "work" versus "ongoing operations" is a distinction without a difference. In furtherance of this intention to narrow the coverage afforded to the designated additional insured so that it does not include coverage in a "completed operations" situation, the most recent revision of this ISO form issued in 2001, CG 20 10 (10-01), additionally

sets forth express “exclusions” which specify that the additional insurance coverage does not apply to injuries occurring after all work on the project has been completed or the work of the named insured party on the project has been put to the intended use. This revision in the 2001 amendment is the most explicit yet in expressly excluding damage or injury occurring after the covered operations have been completed or put to their intended usage. This narrowed coverage under the most recent version of the scheduled additional insured endorsement, CG 20 10, is intended to correspond with an entirely new additional insured ISO endorsement form issued in 2001, CG 20 37 (10-1), which specifically does afford only completed operations coverage to an additional insured to the extent included in the “products-completed operations hazard” coverage extended under the basic CGL policy of the named insured. However, it remains to be seen how this version will fair in the marketplace.”).

121. See, e.g., Dayton Beach Park, 175 A.D.2d 854, 573 N.Y.S.2d 700 (2d Dep’t 1991) (where policy provided for coverage for liability “arising out of operations” but did not limit the scope of coverage to liability under “respondent superior” principles, carrier was required to defend and indemnify). See also Merchants & Business Men’s Mut. Ins. v. Savemart, 213 A.D.2d 607, 624 N.Y.S.2d 623 (2d Dep’t 1995) (other insurance provisions in promisor’s and promisee’s policies created coinsurance, absent API specification of nature of coverage). The same type of problem exists where the drafter fails to unambiguously indicate the type of insurance required to be obtained under an API, creating a factual issue, precluding a decision on motion. See, e.g., Gaston v. Great Neck Union Free Sch. Dist., 204 A.D.2d 683, 612 N.Y.S.2d 439 (2d Dep’t 1994) (summary judgment denied where API was unclear as to whether it required promisor contractor to procure general liability coverage or workers’ compensation coverage for owner promisee).
122. See Nelson, supra note 3, at 72 (noting that where manuscript endorsements and requirements mandate that contract containing API be submitted to additional insured carrier, receipt of contract provides evidence that carrier knew of parties’ intent at time AIE was issued; absent evidence of knowledge and acquiescence by carrier, author concludes it is doubtful that insureds’ intent can be controlling on carrier).
123. See generally 1420 Concourse Corp. v. Cruz, 175 A.D.2d 747, 573 N.Y.S.2d 669 (1st Dep’t 1991) (silence plus acquiescence constitute ratification); Cucchiario v. Cucchiario, 165 Misc.2d 134, 627 N.Y.S.2d 224 (Sup.Ct. Orange Co. 1995) (“In the contractual context . . . ratification is the affirmance of an avoidable agreement by silence or inaction with knowledge of one’s rights,” citing Strauss v. Title Guar. & Trust Co., 284 N.Y. 41, 29 N.E.2d 462 (1940)).
124. The additional insured cannot directly require the additional insured carrier to provide a policy and endorsements because it is not contractually related to the insurer. The additional insured must work through the named insured.
125. Malecki & Gibson, supra note 18, at 156. Commentators Malecki and Gibson identify three reasons why insurers use certificate notifications: (1) they are required to provide evidence of insurance to hundreds or thousands of insureds, constituting an huge administrative burden, (2) standardized certificates can be handled by clerical staff without the expense of having more expensive oversight of the process, and (3) because insurers receive no additional consideration for issuing additional insured coverage, they do not wish to incur added contractual liability or additional administrative expense. Id. at 155. In response to its realization that certain cities, counties and other organizations were requiring as a condition of doing business that insured parties produce certificates of insurance on forms that appeared to alter the terms of the actual policies insuring them, the New York State Insurance Department issued Circular Letter No. 8, June 7, 1995, to all licensed property and casualty insurers, expressly stating: “Insurers are advised that certificates of insurance should be used only to provide evidence of insurance in lieu of an actual copy of the applicable insurance policy. Certificates should not be used to amend, expand, or otherwise alter the terms of the actual policy.”
126. See Malecki & Gibson, supra note 18, at 159-60. While the API is controlling on the sub, it is not controlling on the carrier. Moreover, in cases where an injury takes place before the owner gets to see the policy the owner may have little recourse against the sub. Indeed, even if the owner contractually provides that the subcontract may be cancelled if the sub fails to provide it with the requisite insurance, mid-project economics may make this alternative undesirable. ■