



## Do I Have Additional Insured Coverage or Not?

### The “Arising Out Of” vs. “Caused By” Conundrum

by James Pinderski, Esq. and Michael DiSantis, Esq., Tressler LLP

Additional insured issues are generally familiar to insurance professionals. Every day, underwriters receive requests for endorsements to name persons or companies as additional insureds (consistent with the promises their named insureds make in commercial contracts). Claims handlers thereafter receive demands from those persons or companies seeking such coverage. While certainly a common event, the significance of taking on an additional insured risk cannot be overstated.

Language is critical when examining the nature and impact of limitations in two of the most commonly used additional insured endorsements: (1) “arising out of” endorsements, which limit coverage to the additional insured’s liability “arising out” of the named insured’s work or operations, and (2) “caused by” endorsements, which limit coverage to damage “caused by” (or “caused, in whole or in part by”) the named insured’s acts or omissions.

To the casual observer, one might think “arising out of” and “caused by”

endorsements would provide the same measure of additional insured coverage. As a general rule, however, the “arising out of” endorsement provides broad coverage for liability that would not have occurred “but for” the named insured’s operations, and the “caused by” endorsement provides narrower coverage for damage proximately caused by the named insured’s negligence. Judicial interpretations of these endorsements vary state to state and consideration of state law will inform underwriters and adjusters as to the scope of their obligations.

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## About This Newsletter

*Policy Wording Matters* is written for underwriters, program managers, claims and legal professionals, and policy drafters. It discusses coverage issues and solutions cutting across many lines of business.

## Additional Insured Endorsements

Insureds often attempt to transfer the risk of accidental bodily injury and property damage through “additional insured” provisions in commercial contracts (i.e., requirements that one entity add another as an additional insured on its insurance policies). These provisions are especially common in construction contracts in which subcontractors are typically required to name other companies, such as the general contractor and developer, as additional insureds on their policies.

These contractual provisions, without more, have no effect. Only the insurance policy controls whether a person or entity is an additional insured and what the scope of such coverage will be. Very often, the additional insured will not have seen the insurance policy until after a claim is made against it (if at all). Nevertheless, the additional insured will generally still demand full protection as though it were the named insured.

Commonly used additional insured endorsements include a specific limitation requiring a relationship between the named insured’s work and the additional insured’s liability. The precise relationship required will depend on the language used by the endorsement and governing state law interpreting that language. In particular, such endorsements limit additional insured coverage to damages “arising out of” the named insured’s work (“arising out of” endorsements) or damages “caused by” or “caused, in whole or in part, by” the named insured’s acts or omissions (“caused by” endorsements).

A typical “arising out of” endorsement provides the following relevant language:

The Who Is An Insured provision of the Policy is amended to include as an insured any person or organization (called “additional insured”) to whom you are obligated by valid written contract to provide such coverage, but only with respect to liability for “bodily injury” or “property damage” arising solely out of “your work” on behalf of said additional insured for which coverage is provided by this policy.

A typical “caused by” endorsement provides the following relevant language:

The Who Is An Insured provision of the Policy is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury” or “property damage” caused, in whole or in part, by “your work” at the location designated and described in the schedule of this endorsement performed for that additional insured.

In *Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, 2010 WL 4909600 (E.D. Pa. Nov. 30, 2010), a Pennsylvania federal court discussed the drafting history that gave rise to these endorsements. As *Dale* explained, insurers used standard “arising out of” endorsement forms for many years. While courts reached varying conclusions as to the scope of “arising out of” endorsements, they generally construed coverage very broadly. This grew frustrating to insurers who found themselves providing substantial coverage to additional insureds when their name insureds were not at fault for the underlying injury.

Many insurers preferred to provide narrower coverage, limiting the additional insured’s coverage to damage directly caused by the named insured’s work. In response, insurers started using “caused by” endorsement forms in 2004. The court in *Dale* cited commentators who concluded:<sup>1</sup>

The 2004 revisions are a belated acknowledgement [sic] that the “arising out of” language simply did not accomplish the scope of coverage intended by the industry. Many courts interpreted “arising out of” to be a simple causation test and, therefore, afforded direct primary coverage to the additional insured. The ISO hopes that, by substituting “caused by” for “arising out of,” a narrower coverage interpretation will be afforded. Moreover, the revised language specifies that coverage is afforded the additional insured for liability arising out of the named insured’s “acts or omissions,” not simply the named insured’s operations. Arguably, the absence of fault on behalf of the named insured results in a finding of no coverage for the additional insured.

The scope of coverage under each endorsement will vary based not only on the language used, but the sometimes unpredictable (state-specific) interpretation of that language. For instance, while some courts have interpreted “arising out of” broadly to encompass all damage “relating to” the insured’s work, other courts have held it limits coverage to the additional insured’s “vicarious liability” for the named insured’s conduct. Similarly, while some courts have interpreted “caused by” endorsements to require proximate causation between the named insured’s acts and the plaintiff’s injury, other courts have imposed a less stringent standard of causation.

## “Arising Out Of” Endorsements—1985, 1993, 1997 and 2001 ISO

Courts generally take one of two approaches in interpreting the scope of coverage provided by this language. Under the first approach, this endorsement provides coverage where there is *any* causal relationship between the named insured’s



work, acts and/or omissions and the additional insured's liability. Under the second approach, this endorsement limits the coverage to the additional insured's vicarious liability for the named insured's conduct.

The former approach is the majority rule. *Federal Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 184 P.3d 990 (Nev. 2008) ("the majority of jurisdictions resolving disputes over whether coverage extends to the additional insured's own negligent acts have interpreted additional insured endorsements in favor of coverage, regardless of fault, provided that the injury or loss is connected to the named insured's operations performed for the additional insured").<sup>2</sup>

*State Auto. Mut. Ins. Co. v. Kingsport Development, LLC*, 846 N.E.2d 974 (Ill. App. 2006) is an example of the majority rule. In *Kingsport*, an employee of the named insured subcontractor, Anderson, sued the general contractor, Kingsport, for liability arising out of a workplace injury. The plaintiff alleged he was injured while working on the site for Anderson when a scaffold constructed by Kingsport collapsed. The court held Anderson's insurer owed a duty to defend Kingsport under an endorsement covering liability arising out of Anderson's work. The court explained:

[T]he phrase "arising out of" has been held to mean "originating from," "having its origin in," "growing out of," and "flowing from," the phrase "arising out of" is both broad and vague, and must be liberally construed in favor of the insured; accordingly "but for" causation, not necessarily proximate causation, satisfies this language.

Even though the complaint alleged that Kingsport was liable as a result of its own independent negligent acts, not Anderson's negligence, the court held there was a duty to defend. The court reasoned that because the plaintiff was employed by and working for Anderson when he was injured, he would not have been injured "but for" Anderson's work.

## ISO's Additional Insured Endorsements

Snapshot of How CG 20 10, Additional Insured—Owners, Lessees or Contractors Has Evolved

### 1985

- > Applies to liability **arising out of "your work"** for the additional insured...

### 1993/1997

- > Applies to liability **arising out of your ongoing operations** for the additional insured.

### 2001

- > Applies to liability **arising out of your ongoing operations** for the additional insured.
- > Excludes completed operations.

### 2004

- > Applies to liability **caused in whole or in part by the acts or omissions of you or others on your behalf** in the performance of your **ongoing operations** for the additional insured at the **designated locations**.
- > Excludes completed operations.

### 2013

- > Applies to liability **caused in whole or in part by the acts or omissions of you or others on your behalf** in the performance of your **ongoing operations** for the additional insured at the **designated locations**.
- > Excludes completed operations.
- > Applies only to the extent permitted by law.
- > Limits coverage to that required by any contract with the additional insured.

Concerns or questions about the right AI form for your risks? We may be able to help. Just contact your Gen Re representative for assistance. ■

Ohio courts have taken a different approach, holding that an "arising out of" endorsement limits coverage to the additional insured's vicarious liability for the named insured's conduct. See, for example, *City of Cleveland v. Vandra Bros. Constr., Inc.*,

948 N.E.3d 298 (Ohio Ct. App. 2011). In *Vandra Bros.*, the plaintiff sued the City of Cleveland and a contractor for injuries sustained in a car accident occurring after his car hit a pothole. The plaintiff alleged the city negligently allowed the pothole to exist and the contractor failed to warn motorists. The court held there was no coverage for the city under the contractor's policy because the city was sued for its own independent negligence, not for its vicarious liability for the contractor's failure to warn. Under the Ohio rule, the "arising out of" endorsement provides a strong limitation of coverage and will not cover allegations that an additional insured was negligent even if there is also the allegation that the named insured's work caused the accident at issue.

*Worth Constr. Co., Inc. v. Admiral Constr. Co.*, 888 N.E.2d 1043 (N.Y. 2008) provides an example of a middle ground between the two rules. In *Worth*, the plaintiff alleged that he slipped on the stairs built by the named insured, Pacific, as a result of the fireproofing later placed on the stairs by another subcontractor. The injury occurred after Pacific's work was complete. The general contractor (Worth) was sued by the plaintiff and sought coverage under Pacific's insurance policy.

Pacific's policy provided additional insured coverage to Worth, "but only with respect to liability arising out of [Pacific's] operations." The court found that under New York law, the phrase "arising out of" means "originating from, incident to, or having connection with" and requires "only that there be some causal relationship between the injury and the risk for which coverage is provided."

The court did not use the phrase "but for," but instead found the key issue "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." Applying this conclusion, the court held Worth was not covered under Pacific's policy because another subcontractor was responsible for the application of the fireproofing upon which the plaintiff was injured.

The fact that the plaintiff's injury occurred where Pacific completed its work was not sufficient to compel the conclusion that his injury "arose out of" Pacific's operations. A stronger relationship between the named insured's work and the plaintiff's injury was required. Compare *Worth* with *Regal Constr. Corp. v. Nat'l Union Fire Ins. Co. of Pennsylvania*, 930 N.E.2d 259 (N.Y. 2010) (holding an injury to the named insured's employee sustained in the course of its operations arose out of the named insured's work even if the injury may have been caused by the additional insured's actions).

### "Caused by" Endorsements— 2004 and 2013 ISO

Most courts have held that "caused by" endorsements cover damage proximately caused by the named insured's negligence. For instance, in *Dale*, the court recognized that, like Illinois courts, "Pennsylvania courts have uniformly held phrases like 'arising out of' to require only a showing of 'but for' causation." Then, the court assessed the scope of coverage provided by a "caused by" endorsement by evaluating the drafting history of additional insured endorsements.

The court noted that the Insurance Services Office created the "caused by" endorsement and hoped that "by substituting 'caused by' for 'arising out of,' a narrower coverage interpretation will be afforded." The court cited two Texas cases holding the "caused by" endorsement limited coverage to those circumstances in which the named insured's work proximately caused the accident.<sup>3</sup> The court concluded, "[t]he case law and the drafter's history supports my conclusion that the additional insured provision requires a showing that [the named insured's] acts or omissions were a proximate cause of [the plaintiff's] injuries in order to trigger the policy coverage."

In *James G. Davis Constr. Corp. v. Erie Ins. Exch.*, 126 A.3d 753 (Md. Ct. App. 2015), the court reached the same conclusion, rejecting an even narrower interpretation of the "caused by" endorsement. The insurer argued that a "caused by" endorsement limited coverage to those circumstances in which the additional insured was vicariously liable for the named insured's acts or omissions. The court disagreed, finding the "caused by" endorsement required proximate causation between the named insured's work and the injury. The court held that an insurer owed a duty to defend so long as the complaint raised the possibility that the named insured's acts or omissions caused the plaintiff's injuries.

Not all courts have found "caused by" endorsements to provide narrower coverage than "arising out of" endorsements. In New York, "arising out of" and "caused by" endorsements have been interpreted to provide identical coverage. *Pettillos Stone Corp. v. QBE Ins. Corp.*, 984 N.Y.S.2d 634 (N.Y. App. Div. 2014) ("[t]he phrase 'caused by' does not materially differ from the phrase 'arising out of,' used in other additional insured endorsements, which focuses not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained"). Nevertheless, as a general rule, the "arising out of" endorsement provides far broader coverage than the "caused by" additional insured endorsement.

## Conclusion

Additional insured questions are very often the most complex and hotly contested questions that are presented by large commercial claims. While the “caused by” endorsement has been utilized by insurers for more than a decade, both “arising out of” and “caused by” additional insured endorsements remain in the marketplace (as well as many other variations of such endorsements). Knowing how the language of such endorsements will be construed should assist underwriters in managing such risks and be instructive to claims personnel in deciding how to respond to such claims. ■

### About the Authors and Law Firm

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**Tressler LLP**: Headquartered in Chicago, with six offices located in four states, Tressler LLP is a national law firm comprised primarily of attorneys who devote their practices to the representation of the insurance industry in coverage analysis and resolution, litigation, underwriting consultation, product development, claims management and reinsurance. For additional information about the firm, visit [www.tresslerllp.com](http://www.tresslerllp.com).

### Endnotes

- 1 Philip L. Bruner & Patrick J. O'Connor, Jr., Braner and O'Connor on Construction Law §11:167 (2010).
- 2 *Citing Merchants Ins. Co. of New Hampshire, Inc. v. USF & G*, 143 F.3d 5, 9–10 (1st Cir.1998); see Douglas R. Richmond, The Additional Problems of Additional Insureds, 33 Tort & Ins. L.J. 945, 958 (1998).
- 3 *Am. Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 2006 WL 1441854 (S.D. Tex. May 23, 2006); *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, 2010 WL 707378 (S.D. Tex. Feb.23, 2010).

## BIG NEWS



### CGL and Cyber Policies—Where Is Coverage?

Now that a federal court of appeals has found Cyber defense coverage in a CGL policy, insurers are focusing on their General Liability and Cyber forms. The *Travelers v. Portal Healthcare Solutions* ruling is not the first court to find CGL coverage for a breach lawsuit, but it is generating more attention than others have received. *Travelers v. Portal Healthcare Solutions*, No. 14-1944 (4<sup>th</sup> Cir. April 11, 2016, unpub.), lower court decision at 2014 U.S. Dist. LEXIS 110987.

The court determined that making personal data accessible on the Internet can amount to a “publication” for Personal Injury—whether or not any third party actually views that data. The policy language was not ISO, but we do not think the variations were central to the decision. The policy preceded the appearance of ISO and other Bureau “data breach” exclusions.

The decision has implications for commercial and specialty products and insurers, namely:

- > **“Data Breach” Exclusion:** Without an exclusion, there is a higher likelihood of finding Cyber coverage in GL/BOP/CU policies.
- > **Cyber Policies:** If there is coverage in the GL/BOP/ CU policy, questions about “other insurance” provisions in the Cyber policy arise. See **Case in Point** in this publication.

We will be sharing more research on the CGL and Cyber coverage and issues in the coming months. If you would like to discuss your forms, please contact your Gen Re account executive. We are happy to provide policy language and coverage insights.

For more published Gen Re research on this topic, see our *Casualty Matters* (May 2016) and E-News email, “Cyber Lawsuit Finds Coverage in CGL Policy” (April 2016). ■



## Meet Christine Unger

### New Member of Gen Re's Policy Wording Team

*Interview by Mindy Pollack, Gen Re, Stamford*



Christine Unger joined Gen Re's Policy Wording Unit this past summer. She works closely with Lucille Hyland in drafting and reviewing policies and endorsements for our clients. We thought you might like to know more about the experience and expertise she brings to Gen Re and our clients.

**Q** Tell us about your background before joining Gen Re.

**A** I came to policy wording through legal and claims work, which definitely contributes to my policy drafting skills. After law school, I took my first insurance job at a primary insurance claims department, where I specialized in professional liability and specialty lines—MPL, D&O, EPLI, E&O. I also handled specialty claims for a Third Party Administrator (TPA) that was just establishing a professional liability unit. As its client base grew, so did the lines I supported, and eventually I also took on management responsibilities.

**Q** Did you get involved in policy drafting in connection with your claims work?

**A** I actually did a lot of form drafting and analysis in both positions, particularly with regard to endorsements. Most insurers have a base form they do not wish to refile, so my focus tended to be manuscript endorsements. However, I did contribute to broader changes in programs and forms. If a claim or series of claims raised a significant issue affecting the insurer's broader book, I would suggest a revision and work with the insurer on the drafting.

**Q** How does your claims experience contribute to your form work?

**A** I find that claim examiners, underwriters and drafters each bring a different perspective to the table, and all are critical to producing good forms. Claims examiners see how different people can read the same language very differently. They hear the policyholder and coverage counsel arguments as to what the policy says, which is not always what an insurer intends it to say. While I could not always find merit in the policyholder interpretation, there were times when I did. The claims perspective adds how the

policy could work when a certain type of loss happens. The underwriters can then consider if that is the outcome they intend.

**Q** What types of policies have you reviewed and drafted at Gen Re?

**A** My focus is still Casualty business, with a combination of professional and traditional lines. I just finished an analysis of E&O policies and endorsements. My legal and professional lines experience certainly came in handy. I also have been comparing client GL and Umbrella programs to the most current ISO or AAIS editions, and I've been participating in several ISO panel meetings so I could hear what changes are in the pipeline. Some insurers are considering whether to adopt the latest edition, others are more concerned about how their policy stacks up against their competitors'. Both competitor and Bureau forms figure into my work.

**Q** Is there any best practice you have observed in companies with strong wording skills?

**A** I think that direct and frequent communication among underwriters, drafters and claims is key to good policy wording. In my past work, and here at Gen Re, there is ongoing discussion of exposures, coverage and wording across departments. We have different skills and backgrounds, we see different things. Good communication helps insurers identify and stop the issue before it becomes a problem.

**Q** Is that why you got into policy drafting?

**A** I guess I always enjoyed the communication and language aspects of my claims work. I could easily see the connection between clear wording and claims. I like the challenge of finding the right words to accurately convey underwriting intent. In the end, it means better underwriting and claim results. ■

# AAIS Updates—BOP Revisions and New Personal Auto

by Lucille Hyland, Gen Re, Stamford

In our December 2015 issue of *Policy Wording Matters*, we reported on AAIS's new Farm endorsements. AAIS will soon be filing additional Farm endorsements to address drone exposures. Property and liability coverage options will be provided, and P&AI will be specifically addressed. On other noteworthy AAIS news, the Businessowners program has been updated and expanded, and a new Personal Auto program is being introduced.

## Businessowners Revisions

AAIS has expanded eligibility under its Businessowners program to include hotels, motels, bed and breakfasts, and self-service car washes. AAIS has also made several changes to existing program features. Office risks may now be further delineated due to new classes for medical, dental, real estate and insurance agency. The current restaurant class has been divided into fast food, limited cooking and not otherwise classified. Also, maximum allowable square footage and receipts have been increased. In conjunction with these eligibility changes, AAIS filed a number of Businessowners endorsements for use with either the Standard Policy (BP 0100 06 12) or the Special Policy (BP 0200 06 12). The endorsements became effective beginning January 1 of this year and are approved in about 40 jurisdictions. Two endorsements are mandatory:

- > **Policy Amendatory Endorsement BP 0816 01 15**—This Endorsement includes various updates, some of which we have seen on other lines. Among them:
  - Earth movement exclusion applies whether the loss results from manmade or natural causes, and specifically contemplates construction, excavation, hydraulic fracturing and blasting.
  - Water exclusion applies whether the loss results from manmade or natural causes.
  - Specific coverage is possible for trees, shrubs, plants or lawns that are part of vegetated roofs.
  - Debris removal limit has increased, from \$10,000 to \$25,000.
  - Amended liquor liability exclusion excludes negligent transportation, supervision and hiring but allows coverage for BYOB operations.
- > **Exclusion—Data Breach Liability BP 0798 01 15**—This Endorsement adds a data breach exclusion under both



Coverages A and B. BI, PD, P&AI and associated credit monitoring, notification, forensic and legal expenses are excluded. The Endorsement also contains the existing Coverage A exclusion for liability arising out damage to, corruption of, or loss of use of data records. Subscribers may use Endorsement BP 0797 01 15 instead if they wish to apply the data breach exclusion to Coverage B only.

Optional endorsements address a number of areas. Here, we highlight just a few:

- > **Windstorm and Hail**—Cosmetic damage to roofing material may be excluded (BP 0811 01 15); roofing losses may be settled on an ACV basis (BP 0818 01 15 or BP 0819 01 15); or all windstorm and hail losses may be excluded (BP 0820 01 15).
- > **Pharmacist Professional**—Now both Broad and Limited endorsements are available (BP 0718 01 15 and BP 0821 01 15). The Broad form covers most activities of a current-day pharmacy, other than compounding; the Limited form is confined to the selling/handling of drugs, filling of prescriptions and administering of vaccines.
- > **Other Professional**—Endorsements now distinguish between barbers/hairstylists and full service salons (BP 0721 01 15 and BP 0822 01 15). Optical/hearing aid, veterinarian, printers and funeral directors forms have been updated and refined (BP 0719 01 15, BP 0732 01 15, BP 0733 01 15, BP 0741 01 15).

## New Personal Auto Program

AAIS has announced that it will be filing its first Personal Auto Program this summer. This is good news for AAIS Personal Lines subscribers as they will now have a full array of Personal Lines forms available to them, including Homeowners, Personal Auto and Personal Umbrella. The new AAIS Personal Auto Program will encompass the base countrywide policy form, required state amendatory endorsements, and more than 60 optional endorsements.

Coverage alternatives will be provided in such areas as: audio, video and data equipment; physical damage valuation; alternative ownership arrangements (e.g., lessors, trusts and joint owners); non-owned autos; farm vehicles and recreational type vehicles; vehicle sharing and ridesharing. ■



## The CGL Designated Premises Endorsement— Uncertainty From Different Court Opinions

by Christine Unger, Gen Re, Stamford

ISO's Limitation of Coverage to Designated Premises or Project Endorsement (CG 21 44—Designated Premises Endorsement) states that coverage only applies to “bodily injury,” “property damage,” “personal and advertising injury,” and medical expenses that arise out of “the ownership, maintenance or use of the premises shown on the Schedule and operations necessary and incidental to those premises” or the project shown in the Schedule.

When specific premises are scheduled, the purpose of the endorsement is to limit coverage to those premises; however, some courts have interpreted this endorsement as providing coverage for incidents that occur outside the premises. How far has this legal trend gone?

### Coverage Included for Incidents That Occurred Off Premises

Recently the Hawaiian Supreme Court interpreted an endorsement very similar to ISO's CG 21 44 in *C. Brewer & Co. v. Marine Indemnity, Ins.*<sup>1</sup> In *Brewer* both “property damage” and “bodily injury” resulted when a dam collapsed. The dam was not on the property scheduled in the Designated Premises Endorsement. However, the court found that there was coverage under the policy for the dam collapse.

The court looked at the fact that the endorsement included coverage for “personal injury,” which would likely occur off the premises. The court also looked at the definition of “coverage territory,” which included locations outside the designated premises. The court reasoned that the Designated Premises Endorsement must also apply to off-premises losses,

concluding that there only had to be a causal connection between the injury and the premises in the Schedule. The court found that the causal connection was that the corporate decision regarding the maintenance of the dam was made on the premises listed on the Designated Premises Endorsement.

The *Brewer* court does not stand alone on this reading of the endorsement. In *Western Heritage Insurance Company v. Cyril Hoover dba Okanogan Valley Transportation*, the Washington court relied heavily on the *Brewer* case in determining that the Designated Premises Endorsement is ambiguous and does not only apply to acts that take place on the premises.<sup>2</sup> In both cases the courts were concerned with turning the CGL policy into a premises liability policy if the Designated Premises Endorsement was strictly construed. Both looked to the definition of “personal injury” and “coverage territory” to determine that the Designated Premises Endorsement should have a broad interpretation.

### Coverage Limited to Occurrences on the Premises

Not all courts have expanded the reach of a Designated Premises Endorsement. In *Western World Insurance Company v. Urmila Thakur*, a Connecticut court interpreted an endorsement with identical language to CG 21 44 and determined that there was no coverage for alleged personal and advertising injuries that took place off the premises.<sup>3</sup> The court found that the allegations in the complaint did not arise out of the ownership, maintenance or use of the premises shown in the schedule. The fact that a meeting took place at the location on the Schedule did not persuade the court to find coverage.

Furthermore, in *Tudor Ins. Co. v. Golovunin*, the District Court for the Eastern District of New York did not extend coverage to an incident that occurred off the scheduled premises.<sup>4</sup> In this case, a counselor for a dance camp was in an auto accident, off the dance camp premises, causing the deaths of the counselor and the other passengers in the car. The insured argued that since the definition of “coverage territory” in the policy included “all parts of the world,” the Designated Premises Endorsement did not apply. The court replied by stating that the definition of “coverage territory” in the policy is the “outer limit” of the coverage area and not the specific territory covered





by this particular insurance policy. The court found that the endorsement was clear in limiting coverage to the camp only and not incidents that occur outside the camp premises.

### Using the Endorsement in Practice

As can be seen by the examples above, courts have different views on how to interpret the Designated Premises Endorsement. While the language attempts to limit exposure to incidents that occur only on the premises, courts have found the endorsement ambiguous and have expanded coverage to incidents that have occurred off premises. These same courts are reluctant to make the CGL Policy a premises liability policy and often rely on the definition of “personal injury” and “coverage territory” as evidence that the endorsement is ambiguous.

When attaching the Designated Premises Endorsement to a policy, underwriters should be aware that their intent to limit exposure to a certain premises may not be seen the same way by the court interpreting the language. ■

### Endnotes

- 1 2015 Haw. LEXIS 62.
- 2 2016 U.S. Dist. LEXIS 42587.
- 3 2014 Conn. Super. LEXIS 688.
- 4 2013 U.S. Dist. LEXIS 140186.

## PRIOR AND PENDING

Our December 2015 *Policy Wording Matters* edition discussed several issues of continuing relevance to insurers, including:



- > The Meaning of “Publication” in the Electronic World—From Data Collection to Data Breaches
- > ISO and AAIS Farmowners Program Changes
- > Defining Pollutants—Will New Indiana Pollution Exclusions Work?
- > The Importance of Reviewing Endorsements With the Entire Policy

If you missed our May *Casualty Matters* research publication, check our website or give us a call. We discussed cyber coverage, construction defects, ridesharing, liquor liability and more. ■

## GOOD READING



A variety of helpful articles appeared in law firm and other blogs over the past six months. We selected a handful that might be of value to you.

- > **How General Is “General Aggregate?”** at [www.carltonfields.com](http://www.carltonfields.com).
- > **Construing Collapse Under a Homeowners Insurance Policy**, by Squire Patton Boggs, available at [www.inredisputes.com](http://www.inredisputes.com).
- > **Is Cannabis Inventory Covered by Commercial Property Insurance?** available at [www.wilsonelser.com](http://www.wilsonelser.com).
- > **Are You a “You?” Don’t Ignore CGL Policies’ Separation of Insureds Clause**, by Pillsbury Winthrop Shaw Pittman, available at [www.lexology.com](http://www.lexology.com). ■

## LEGAL ROUND-UP



### Arizona Requires Producer Information on Dec Page

Under Arizona HB 2342, language must be added to the Dec Page or an endorsement to identify the producer of the business. Also, all references to countersignature requirements are removed. The changes take effect August 6, 2016.

### California Improves Process for Work Comp Form Development and Filing

In a long regulation with many parts, California has reorganized the policy requirements and procedures for insurers writing workers' compensation business in the state. Much of Regulation 2014-00014 is aimed at cleaning up existing rules and eliminating inconsistencies. The rule addresses standard and nonstandard policy and endorsement forms, and limiting and restricting endorsements. A theme running through the regulation is making the process more tech-friendly. The regulation, which was proposed in February 2015, is effective immediately.

### Ohio Tightens Certificate of Insurance Law

Much like dozens of other states, Ohio has enacted legislation to reduce disputes over certificates of insurance. Under HB 259, the certificate cannot alter insurance coverage and in the case of a conflict, the policy controls. The law took effect March 21, 2016.

### Oklahoma Allows Claims Made Policy Annulment

S. 791 carves out an exception to the liability policy law prohibiting annulment of policies after an occurrence causing injury or damage. In the case of claims-made policies, annulment is allowed unless actual notice of a claim made against the insured was reported to the insurer. The legislation takes effect November 1, 2016.

### Auto Exclusion Must Be by Endorsement

This main body of the personal auto policy excluded "bodily injury to you"—with "you" being the named insured. The language was clear, but was it enforceable?

Not according to the Connecticut Supreme Court, because that exclusion was not in an endorsement as the statute requires.

The Connecticut auto insurance laws state that coverage shall apply to the named insured and relatives in the household "unless any such person is specifically excluded by endorsement." If that exclusion is part of the basic policy, is it valid? The state high court said "No." It went on to say that in the insurance context, an endorsement is a writing "added or attached to a policy" and that was not present here. The fact that the exclusionary language was clear did not affect the court, even though the language clearly applied to the named insured's own injuries and not to third parties. The legislature said "endorsement" and their intent must be honored. *Dairyland Ins. v. Mitchell*, 2016 Conn. LEXIS 6.

**Gen Re Note:** We expected to see discussion around whether policyholders are more apt to notice an exclusion contained in a long policy versus a one-page endorsement, but there was none. In Connecticut it seems you just have to comply with the words of the statute.

### Animal Damage Exclusion Applied to Cat Hoarding

We do not see many coverage cases involving cats (we saw one pollution exclusion decision) but here is one relevant to rental property. The tenant had 95 cats (and two dogs) to be precise. The tenant's cats caused considerable damage to the home, and the owners sought insurance coverage for repairs. The policy excluded damage caused "directly and immediately" by "birds, vermin, rodents, insects or domestic animals." The owners contended that the cats were not "domestic animals" and that the damage was the result of covered vandalism. The court did not buy either argument. First, the damage was the "direct and immediate" result of domestic animals, and the cats—whether "feral or warm and fuzzy"—are still domestic animals. *Bjogan v. State Farm*, 2016 U.S. App. LEXIS 4990.

**Gen Re Note:** What more is there to say? ■

## CASE IN POINT



### “Other Insurance” Wording Cannot Withdraw Defense Coverage

What happens when a primary CGL attempts to eliminate defense coverage when there is other insurance available? It may not be enforceable, at least in California.

The GL policy at issue contained two pertinent provisions. The policy established a duty to defend “provided no other insurance affording a defense against such a suit is available to you.” Later in the policy an “Other Insurance” condition added:

“This insurance is excess over any other insurance... applicable...whether such other insurance is primary, excess, contingent or contributing...”

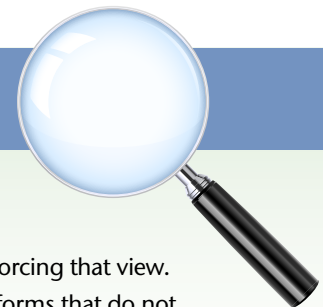
“When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or suit that any other insurer has a duty to defend.”

The dispute involved a construction defect claim where progressive damage triggered three successive GL policies, and the carrier in the last period asserted the excess language to deny a duty to defend.

The California Court of Appeals characterized the language as an “escape clause” rather than a true “other insurance” clause. An “other insurance” clause is designed to prevent multiple recoveries for the same loss, but an “escape clause” operates to withdraw coverage given by the policy due to the presence of other insurance. Escape clauses are disfavored for public policy reasons. It did not matter that the limitations were also placed in the insuring agreements. As a result, the insurer was ordered to contribute to the defense. *Certain Underwriters at Lloyds v. Arch Specialty*, 2016 Cal. App. LEXIS 275.

**Gen Re Note:** We see many variations of “Other Insurance” or “Excess Insurance” clauses, most recently in Cyber policies. This California ruling suggests that the scope and wording of such provisions will be very important to their enforceability. ■

## SECOND GLANCE



### Claims Made, Late Notice and Maryland

The good news is that courts continue to enforce “claims-made and reported” language found in many EPLI, D&O and E&O policies. Courts in Missouri, New Jersey and Pennsylvania rejected attempts to require the insurer show it was prejudiced by late notice, holding that claims-made and reported policies are not subject to such law.

However, Maryland courts still hold that their notice-prejudice statute applies to occurrence *and* “claims-made and reported” policies—and now the Maryland Insurance

Administration (MIA) is reinforcing that view. The MIA has been rejecting forms that do not contain explicit language embedding the prejudice standard. When the policy is revised to add a prejudice requirement for late notice, the claims-made and reported policy is then approved. If you would like a sample filing to review, just let us know.

To our knowledge, Maryland remains the only state with this position. ■

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**All of the contributors to  
Policy Wording Matters  
wish you a wonderful summer!**

*The difference is...the quality of the promise.*



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