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# The Upshot of ISO's Fault-Based Additional Insured Endorsement

**By Lisa C. Wood and Gregory Dennison**

It has been 10 years since the Insurance Services Offices, Inc. ("ISO") issued the fault-based version of its CG 20 10 additional insured endorsement. The 2004 endorsement, Form CG 20 10 07 04, replaced the widely litigated phrase "arising out of" with a more restrictive requirement that the additional insured's liability be "caused, in whole or in part, by" the "acts or omissions" of the named insured. ISO touted the 2004 revisions as the industry's solution to the overly broad judicial interpretations of "arising out of" that have afforded coverage for the additional insured's sole negligence and other unintended transfers of risk. Nevertheless, ISO's effort to achieve a narrower interpretation has been met with inconsistent and sometimes perplexing results. Some courts have interpreted the endorsement as requiring negligence while others have limited the coverage grant more strictly to vicarious liability.

Many courts have wrestled with the requisite degree of fault or how to interpret the duty to defend in the typical scenario where the named insured employed the claimant and is immune from direct allegations of fault. To further complicate matters, a new shift to a "no-fault" interpretation of the endorsement has recently gained traction in New York. With many issues still unresolved and litigation over the endorsement on the rise, ISO's fault-based additional insured endorsement seems to be proving no less troublesome than its predecessor.

## The 2004 Revisions

Prior to 2004, ISO's CG 20 10 endorsement forms provided coverage to the additional insured for liability "arising out of" the named insured's "operations" or "your work" performed for the additional insured. The courts consistently construed the "arising out of" condition broadly, requiring only a nominal or "but for" connection between the named insured's work and the additional insured's

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In the typical construction setting where the claimant is employed by the named insured or the named insured's subcontractor and asserts tort claims against the general contractor (the "subcontractor paradigm"), the broad "arising out of" interpretation means that the general contractor need only establish the employment relationship to trigger additional insured coverage on an "arising out of" basis. The general contractor can also establish additional insured coverage for its liability stemming from the negligence of other contractors or trades if the injured claimant happens to be the named insured's employee or an employee of the named insured's subcontractor. In other words, the subcontractor paradigm essentially gives rise to strict coverage liability for the named insured.

ISO became frustrated with the emphasis in the "arising out of" jurisprudence on the nature of the named insured's relationship and concomitant failure to consider to the named insured's fault. In an effort to narrow the scope of coverage, ISO introduced the 2004 version of the CG 20 10 endorsement which provides:

> Section II- Who Is An Insured is amended to include as additional insured the person(s) or organizations(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> In the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

ISO explained in the memorandum filed with the 2004 endorsement that it was adding specific language to ensure that the additional insured was only being afforded coverage for its "vicarious or contributory negligence." ISO expected that the "caused, in whole or in part," wording would prevent coverage for the additional insured's sole negligence and better reflect the intent of the CG 20 10 endorsement.

### Interpretations of the Degree of Fault

While ISO may have envisioned a clear negligence standard for implicating additional insured coverage under the 2004 endorsement, its interpretation by the courts has largely proven to be the judicial equivalent of herding cats, with inconsistent and often confusing outcomes.

Several courts have given effect to ISO's intended application of the 2004 endorsement, interpreting the "caused, in whole or in part, by" the "acts or omissions" language as requiring the named insured's negligence or fault. *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp.2d 712 (S.D. Texas 2010), aff'd in part and rev'd in part, 664 F.3d 589 (5th Cir. 2011); *American Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 2006 WL 1441854 (S.D.Tex., May 23, 2006); *Terhune Homes, Inc. v. Nationwide Mut. Ins. Co.*, 20 F. Supp.3d 1074 (W.D.Wash. 2014).

There is at least general consensus that the 2004 revisions signify a closer causal relationship to the named insured's conduct than "but for" causation applied to the "arising out of" trigger. *Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, 2010 WL 4909600 (E.D.Pa. 2010), held that the named insured's acts or omissions must proximately cause the injury or damage to trigger the endorsement, a view that has been followed in its district. *See Selective Ins. Co. of South Carolina v. Lower Providence Township*, 2013 WL 3213348 (E.D.Pa. June 26, 2013), and elsewhere: *First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc.*, 2014 WL 5519831 (D.Conn. Oct. 31, 2014); *WBI Energy Transmission, Inc. v. Colony Ins. Co.*, 2014 WL 4851900 (D.Mont. Sept. 29,

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2014) ("caused, in whole or in part, by" means that "acts or omissions of additional insured can be a concurrent or contributing cause of injury or damage, but a direct causal link to named insured must be made."). Other courts have indicated that the endorsement's condition can be met with something less than proximate causation. *Central Park Studios, Inc. v. Slosberg*, 36 Misc.3d 1227(A)(N.Y. Sup. Ct., 2012) ("because of acts or omissions" did not require liability to have "direct causal relationship," but required a "stronger link" than "arising out of" standard urged by the additional insured).

No court has clearly articulated a level of causation greater than that required by "arising out of" and less than proximately caused by negligence, but a few have wrestled with whether a non-negligent act or omission could trigger the endorsement. *See, e.g., Eric Ins. Exch. v. BNSF Railway Co.*, 2014 WL 5798344 (Ill. App. 1 Dist., Nov. 6, 2014)("Even if injury can be caused by an act or omission without that act or omission being 'negligent' … "); *Strauss Painting, Inc. v. Mt. Hawley Ins. Co.*, 105 A.D.3d 512 (1st Dep't 2013) (concluding that "in the unlikely event that some non-negligent act by the [named insured] caused the accident … ").

Still other courts have held that the 2004 endorsement provides insurance to the additional insured only for its vicarious liability for the named insured's acts or omissions. *See Schafer v. Paragano Custom Building, Inc.*, 2010 WL 624108 (N.J. App. Div., Feb. 24, 2010); *Gilbane Bldg. Co.*, *supra*; and *Huber Engineered Woods, LLC v. Canal Ins. Co.*, 700 S.E.2d 220, 221 (N.C. 2010). This interpretation is narrower than ISO intended, and becomes problematic in the subcontractor paradigm where the general contractor's potential liability is generally not solely vicarious. The vicarious liability-only approach has been expressly rejected by the majority of courts that have considered such a construction. *See, e.g., Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 831 F. Supp.2d 367 (D. Maine 2011); *MacArthur v. O'Connor Corp.*, 635 F. Supp.2d 112 (D.R.I. 2009); *Thunder Basin Coal Company, LLC v. Zurich American Ins. Co.*, 943 F. Supp.2d 1010 (E.D. Mo. 2013); and *Shawmut Woodworking*, *supra*, 2014 WL 5519831 (D. Conn. Oct. 31, 2014).

Finally, as discussed below, the courts in New York have apparently now rejected any construction imparting a tighter degree of causation, concluding that the "caused, in whole or in part, by ... acts or omissions" language is not materially different from "arising out of." *National Union Fire Ins. Co. of Pittsburgh, P.A. v. Greenwich Ins. Co.*, 103 A.D.3d 473 (1st Dep't 2013).

## The Duty to Defend And the Subcontractor Paradigm

While determining the insurer's duty to defend under the 2004 endorsement does not appear to have proven particularly problematic in other circumstances, the subcontractor paradigm is particularly troublesome because there are often few — if any — claims against the named insured in light of the worker's compensation bar. As such, courts have struggled to find principled ways to analyze whether the additional insured's alleged liability satisfies the "caused by" the named insured's "acts or omissions" language.

Many jurisdictions purport to adhere to the "eight-corners" analysis and will not look outside the pleading and the policy to determine a duty to defend, but few rigidly apply this approach when confronted with the subcontractor paradigm under the 2004 endorsement. *Gilbane*, *supra*, however, is at least one notable exception. The injured subcontractor employee's complaint contained no allegations against the named insured employer, and the Fifth Circuit found no duty to defend under Texas law as a result. In doing so, the Circuit Court refused to consider allegations of wet and slippery conditions from which the trial court inferred a basis that satisfied the endorsement, and emphasized the Texas Supreme Court's refusal to recognize any exceptions to Texas' very strict eight-corners analysis.

Other jurisdictions confronting the subcontractor paradigm have attempted to avoid *Gilbane's* harsh result by employing a hodge-podge of muddled reasoning. For example, in *Ramara, Inc. v. Westfield Ins. Co.*, 298 F.R.D. 219 (E.D.Pa. 2014), the court purported to apply an eight-corners test but found coverage despite the absence of allegations against the named insured because the plaintiff fortuitously alleged negligence on the part of the defendants and their "agents." This allegation made it "possible" for the court to "infer" that the jury could conclude the named insured was at fault. *Greenwich Ins. Co. v. BBU Services, Inc.,* 2014 WL 7344060 (W.D.Pa. Dec. 23, 2014), refused to apply an eight-corners analysis where the outcome would frustrate the additional insured's expectation of coverage for the injuries suffered by the subcontractor's employees.

*Nor-Son, Inc. v. Western National Mut. Ins. Co.*, 2012 WL 1658938 (Minn.App. May 14, 2012), found that the insurer had a duty to defend the additional insured based in part on the additional insured's third-party complaint, and rejected the argument that the additional insured could not use "its own opportunistic claim of fault" to establish coverage. *Compare, Erie Ins. Exch.*, *supra* (rejecting finding of additional insured coverage based on third-party pleadings). *National Union Fire Ins. Co. of Pittsburgh, PA v. NGM Ins. Co.*, 2011 WL 6415484 (D.N.H. Dec. 21, 2011), considered both the third-party pleadings against the named insured and "the circumstances of the accident, beyond the claims in the complaint," and inferred that the named insured could have caused the accident because its employees were operating the subject machinery.

*Pro Con*, *supra*, illustrates how the intended causation requirement of the endorsement does not translate into an effective distinction when the duty to defend is applied. In *Pro Con*, the additional insured

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was solely responsible for installing the tarps that caused the claimant to slip and fall. Nevertheless, the court found the injury arose out of the named insured's operations, which gave rise to "the potential that facts might be developed at trial that would result in the fact finder determining that [plaintiff's] bodily injuries were caused, at least in part by, the acts or omissions of" the named insured or its agents. Similarly, other courts have held that the claimant's work on behalf of the named insured alone is sufficient to satisfy the grant of additional insurance given the potential for contributory negligence on the part of the plaintiff. *See, e.g., Hobbs v. Shingobee Builders, Inc*., 2013 WL 5951707 (Mich.App. Nov. 7, 2013).

The myriad duty to defend decisions illustrate the fundamental problem courts have encountered in attempting to apply the "caused by" analysis in a meaningful way. Granting additional insured coverage based on hypothesized inferences a jury could draw, or the plaintiff's presence at a job site or potential contributory negligence, or the named insured's performance of operations for the additional insured, seems no different than the types of factors upon which courts found coverage under the "arising out of" language of the prior endorsements.

### New York's 'No-Fault' Interpretation

While other jurisdictions have struggled with varying degrees of fault and the duty to defend implications of a fault-based trigger, the New York courts have recently shifted to an interpretation of the 2004 endorsement that ignores the fault requirement altogether. This "no-fault" interpretation was adopted without explanation by the First Department in 2013 in *National Union*, *supra*, and has now simply been accepted and followed in a number of recent decisions.

National Union's interpretation of the "caused, in whole or in part, by" the "acts or omissions" of the named insured language stems from the First Department's prior consideration of a subcontractor's additional insured endorsement that covered liability "caused by" the named insured's "ongoing operations" for the additional insured in *W&W Glass Sys., Inc. v Admiral Ins. Co.*, 91 A.D.3d 530 (1st Dep't 2012). W&W Glass concluded that "caused by" the named insured's operations did not "materially differ" from the general "arising out of" phrase and did not require a negligence trigger. The court specifically rejected the argument that "caused by" was narrower in any respect than 'arising out of."

The Southern District of New York was quick to criticize *W&W Glass*, and refused to follow it in *National Union Fire Ins. Co. of Pittsburgh, PA v. XL Ins. Am., Inc.*, 2013 WL 1944468 (S.D.N.Y. May 07, 2013). *XL Ins.* looked at the drafting history of the 2004 endorsement and concluded that the "arising out of" analysis was inapposite because the "caused by" condition was intended to require stronger causative meaning. *XL Ins.* faulted *W&W Glass* for failing to "carefully parse the contractual language at issue," and for placing undue interpretive emphasis on the broadness of the insurer's duty to defend.

When the First Department decided *National Union* in the latter part of 2013, it simply followed the *W&W Glass* interpretation without acknowledging that the endorsement before it required the liability to be caused by the named insured's "acts or omissions" and not more generally by its "ongoing operations." *National Union* also failed to reconcile its adoption of the *W&W Glass* interpretation with the negligence construction previously adopted by many New York courts. *See, e.g., Crespo v. City of New York*, 303 A.D.2d 166 (1st Dep't 2003) (construing similar endorsement insuring liability "to the extent" caused by named insured's "acts or omissions"); *Am. Guar. & Liab. Ins. Co. v. CNA Reins. Co.*, 16 A.D.3d 154 (1st Dep't 2005) (security company's operations at site without specific allegations of negligence were insufficient to trigger coverage for landlord's liability for tenant shooting); *see also CNY Builders, LLC v. Fireman's Fund Ins. Co.*, 2012 WL 6090103 (N.Y. Sup. Ct., Nov. 26, 2012); *Burlington Ins. Co. v. NYC Tr. Auth.*, 38 Misc.3d 1205 (N.Y. Sup. Ct. 2012); *Chunn v. New York City Hous. Auth.*, 2011 WL 5825889 (N.Y. Sup. Ct., Nov. 3, 2011). *National Union* did not mention this prior body of law.

It is difficult to discern whether *National Union* can be attributed merely to undisciplined analysis or is truly reflective of the First Department's reasoned determination. The facts that gave rise to the additional insured's alleged liability were not discussed. The trial court record leaves little question that the named insured's negligence contributed to the accident. Thus, the analytical difference between "caused by" and "arising out of" was not integral to reaching the proper outcome. The court's real focus in *National Union* was whether the additional insured had in place the requisite contract to trigger application of the endorsement.

Two months after *National Union*, the First Department concluded in *Strauss* that the endorsement did not necessarily require negligence, but the court did not adopt the "arising out of" interpretation or even mention *National Union*. *Strauss* acknowledged that it was drawing a very fine distinction between "caused by an act or omission" and actual negligence because it was seemingly unlikely that any such "act or omission" could be "non-negligent." Nevertheless, *Strauss* conceded that it was still required to consider whether there was a qualifying act or omission that could be attributed to the named insured and whether the act or omission was causally related to the injury. As a practical matter, *Strauss* did not reach any final conclusions as to whether the endorsement could be implicated by non-negligent conduct under the circumstances presented to it.

Like *National Union*, the facts of the underlying accident in *Strauss*

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are not discussed in the appellate decision. The trial court record reveals that the claimant was employed by the named insured's subcontractor and was injured while performing operations for the additional insured. 2011 WL 5117697 (N.Y. Sup. Ct. Oct. 31, 2011). These facts are significant because the First Department remanded for further findings of fact regarding causation to determine coverage. This suggests that the employment relationship or the named insured's presence at the site alone was insufficient to implicate the endorsement as a matter of law.

The decisions that have followed *National Union* and *Strauss* have not afforded any clarity to the analysis, opting simply to follow the "arising out of" interpretation. *See Liberty Mut. Fire Ins. Co. v., Chartis Specialty Ins. Co.*, No. 12 CIV. 9226 (AKH)(S.D.N.Y. Sept. 18, 2013); *Petrillo Stone Corp. v. QBE Ins. Corp.*, 42 Misc.3d 1207(A) (Sup.Ct. Jan. 3, 2014) (endorsement applied to injuries sustained by named insured's employee who tripped on equipment left by another subcontractor because claim arose from named insured's contract for services with additional insured); *Liberty Mut. Ins. Co. v. Zurich American Ins. Co.*, 2014 WL 1303595 (S.D.N.Y. March 28, 2014) ("courts in the First Department have repeatedly concluded, albeit in the absence of significant legal analysis, that the phrase "caused by" does not materially differ from the phrase "arising out of"); *Hotels AB, LLC v. Permasteelisa, CS, Zurich Ins. Ireland Ltd.*, 2013 WL 5293494 (N.Y.Sup. Sept. 11, 2013); *Astoria Energy II LLC v. Navigators Ins. Co.*, 2014 WL 5781417 (N.Y.Sup. Nov. 6, 2014). Indeed, several of these decisions cite to *Strauss* in support of the "arising out of" interpretation, entirely missing the subtle distinction drawn with respect to "caused by." *See, e.g., Zurich, supra*. It remains to be seen whether the New York Court of Appeals will ultimately address this issue.

### Conclusion

Ultimately, the theoretical and linguistic differences between the 2004 Endorsement and its predecessors appear to have largely failed to achieve ISO's objectives in practice, and the industry has been left with a large measure of uncertainty and increased litigation.

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