

# ProNetwork News

## Risk Management Tools for the Design Professional

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### The Additional Insured Conundrum

A/E Firms Face a New and Potentially Growing Liability Exposure

By Michael G. Welbel

#### The Issue

Recent court decisions and increasingly onerous client demands are creating substantial insurance related difficulties for design firms. This article will focus on the potentially hazardous and surprising consequences of adding clients and others as additional insureds to the A/E's general liability insurance (CGL) policy(s).

A recent Illinois Appellate Court Decision illustrates this threat: Patrick Engineering Inc. (Patrick) v. Old Republic General Insurance Co (Old Republic). The basic facts are:

Patrick was retained by Commonwealth Edison (Com Ed) to provide engineering services in connection with relocation of utility poles. While working on the project, Com Ed smashed through an underground sewer in at least four separate locations. Subsequently, the local municipality, Village of Lombard, sued Com Ed alleging that it acted negligently.

Patrick's contract with Com Ed required that Patrick secure CGL insurance naming Com Ed as an additional insured. Patrick complied, or at least thought it complied. Com Ed sought coverage for the Village's claim under Patrick's insurance policy rather than its own. Com Ed therefore tendered the lawsuit to Patrick on the basis that it was an additional insured on Patrick's CGL policy issued by Old Republic. Old Republic denied coverage to Com Ed citing the professional services exclusion and the fact that Com Ed's liability did not arise out of the negligence or fault of Patrick. Old Republic's refusal to cover Com Ed caused Com Ed to file a breach of contract action against Patrick for its failure to provide the required insurance coverage.



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Patrick found itself in a very unenviable situation. First it needed to defend itself in the breach of contract action due to the coverage position taken by its insurer over which it likely had limited, if any control. It was then forced to sue its own insurer in an effort to establish coverage under its own policy for a problem that it did not cause. At the end of the day, Patrick wins its case against Old Republic. This, however, is a Pyrrhic victory for Patrick. On one hand Patrick is able to satisfy its contractual obligation to its client but on the other hand will carry the burden of the loss under its own coverage for years.

### Arising Out Of

This court followed the decisions of courts in various jurisdictions that have held, “arising out of” creates coverage for additional insureds when only an indirect causal relationship exists between the service provided by the named insured and the liability of the additional insured. Some of these decisions determined that the phrase “arising out of” was either broad enough or sufficiently vague to cover the additional insured’s own negligence. In many cases the mere fact that the named insured was involved in the project was sufficient to trigger coverage for the additional insured. In response, ISO<sup>1</sup> changed the standard additional insured endorsement language in 2004. At that time ISO advised that the additional insured’s sole negligence was never intended to be covered under the standard additional insured endorsement (ISO CG 20 10). The language of this endorsement was substantially changed in an effort to narrow its application consistent with its original intent.

### Additional Insured Endorsement ISO CG 20 10

The ISO CG 20 10 is the most widely used standard endorsement to create additional insured status under the CGL policy. The pre-2004 language is as follows:

*Who is an insured 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 (emphasis added).*

The 2004 version has the following changes:

*Who is an Insured 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”, “property damage” or “personal and advertising injury” CAUSED IN WHOLE OR IN PART”(emphasis added), by:*

- 1. Your acts or omissions; or*
- 2. The acts or omissions of those acting on your behalf*

The operative change was replacing the words “arising out of” with “caused in whole or in part”. The effect of the 2004 revision has been characterized as the elimination of coverage for the additional insured due to its sole negligence.

<sup>1</sup> ISO is the Insurance Services Office which promulgates wordings and standards commonly used by the Insurance Industry.



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It should be noted that once an edition has been changed prior versions are typically no longer available. However, for reasons that might seem obvious, clients of A/E firms want additional insured coverage under the old language. Despite the fact that the 2004 version corrects an error or misunderstanding, insurance specifications written in 2013 oftentimes continue to require the pre 2004 language. It is therefore not unusual to see an insurance requirement that reads something like, "Client shall be named as Additional Insured under CG 20 10 (85) or equivalent". This creates two problems. First, in practice, the pre 2004 endorsement language is very difficult, if not impossible, for many A/E firms to secure. Insurers understandably do not want to pick up the liability of others when the named insured is not at fault. In addition to owners, contractors oftentimes seek additional insured coverage under the A/E's CGL policy. A contractor presents a far greater CGL exposure than an A/E. Consider as well the fact that the insurer typically has no information about the additional insured and is therefore not in a position to evaluate the added exposure. This creates a conundrum: If the A/E is unable to provide the requested coverage, it faces a potential breach of contract action like Patrick. If the A/E is successful in securing the required coverage however, it might pay the price for insuring its client or others for a problem that the A/E did not create. Thus the snare is set when the contract is executed.

Those reviewing insurance requirements might either miss this subtle issue entirely or not understand the significance of the edition date. One must also not assume that the term "equivalent" satisfies the contract obligation if the policy contains the current version of the CG 20 10. Non-compliance might also arise in a more subtle context. One recently reviewed contract provides, "Designer shall add Owner and other such parties as is required under the Contract Documents to be named as additional insureds with respect to liability *arising out of...*" The drafters of this agreement use the "arising out of language" which, as indicated above, is no longer in line with current standard additional insured language. Even though a specific endorsement is not specified, the use of the current wording would likely not satisfy the above contract requirement opening up the possibility of a breach of contract action. The danger of course is amplified when one is faced with an additional insured requirement that includes multiple parties.

### What to Do

When reviewing and executing contracts, one must take care and pay particular attention to the additional insured requirements. If the contract requires pre-2004 wording, the A/E should attempt to have it changed to the current version. The pre-2004 language creates a difficult burden. Like Patrick, the A/E might find itself paying, albeit indirectly, for the damages arising out of the sole negligence of an additional insured. In addition, as stated above, it is very likely that any pre-2004 wording requirement is inconsistent with the current coverage provided to the A/E and it is very unlikely the A/E will be able to secure coverage to meet the requirement.

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