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Additional Insureds

By Donald R. McMinn and John M. McNulty

As part of business agreements between companies, one company often will require that it be added to another's liability insurance policies as an additional insured. Given the frequency of these requests for additional-insured coverage, the insurance industry developed endorsements that extend additional-insured coverage to any entity for which a named policyholder has contractually obligated itself to procure coverage. These endorsements typically modify the "Who Is An Insured" provision. Many insurers use language in a "blanket" additional insured endorsement found in Commercial General Liability ("CGL") coverage forms:

> WHO IS AN INSURED is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured.
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> ISO Form 20 33 10 01 (2000)

Not surprisingly, there can be disputes over the coverage these endorsements offer, particularly as a result of endorsement language referring to the underlying "contract or agreement." Inter-company indemnification agreements in underlying contracts often require not only the insured's indemnification of the would-be additional insured, but also that the indemnifying company secure CGL coverage, sometimes written as coverage that is "not less than" a certain amount. Whether the "not less than" language adds the indemnified company to policies in excess of the minimum required coverage is a question that has divided courts (although there appear to be few reported cases on the issue). *Compare, e.g., Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039, 1045 (5th Cir. 1991) (applying Texas law) (additional insured not covered under $1 million excess policy where underlying contract required "not less than" $100,000 per incident or $300,000 aggregate) with *Valentine v. Aetna Ins. Co.*, 564 F.2d 292, 296 (9th Cir. 1977) (applying California law) (underlying contract's requirement of "not less than" $300,000 of insurance "only sets a floor, not a ceiling, for coverage") and *Lake Cable Partners v. Interstate Power Co.*, 563 N.W.2d 81, 87 (Minn. 1997) (contract requiring indemnitor to carry "not less than $250,000/$500,000" of liability coverage did not cap indemnitee's additional insured coverage at those amounts).

Norfolk Southern

A recent decision in the U.S. District Court for the Southern District of West Virginia confirms that the language of an underlying commercial contract can be critical to determining the scope of additional insured coverage. *See Norfolk Southern Railway Corporation v. National Union Fire Insurance Company of Pittsburgh, PA*, No. 2:12-cv-05183, 2014 WL 773517 --- F. Supp.2d --- (S.D. W. Va., Feb. 26, 2014). Addressing an issue of first impression under West Virginia law, the District Court ruled that an excess insurer incepting at $2 million could not avoid coverage by relying on the underlying contractual requirement that the insured secure "not less than" $2 million for its contracting partner.

The *Norfolk Southern* case stemmed from a 2009 train derailment in Mingo County, WV. A Norfolk Southern Railway Company ("Norfolk Southern") train derailed during coal-loading operations while at a facility leased and operated by Cobra Natural Resources, LLC ("Cobra"). Pursuant to the lease agreement between the companies, Cobra agreed both to indemnify Norfolk Southern fully for particular losses and to add Norfolk Southern as an insured and provide coverage in an amount

Donald R. McMinn, a member of this newsletter's Board of Editors, is a partner and **John M. McNulty** is an associate at Hollingsworth LLP in Washington, DC.

"not less than $2,000,000 for each occurrence (or such greater amount over time so as to be commercially reasonable)" for liabilities "arising out of" Cobra's "work" or property "owned or used" by Cobra.

Following the derailment, Norfolk Southern sought coverage as an additional insured on an excess policy issued by Westchester Fire Insurance Company ("Westchester") incepting at $2 million. The Westchester policy stated that it covered the named insured and it subsidiaries (including Cobra), as well as "any person, organization, trustee or estate that has obligated [Cobra] by written contract to provide the insurance that is afforded by this policy." *Id*. at *3. Westchester argued that Cobra's contractual obligation to provide Norfolk Southern with coverage of "not less than $2,000,000" meant that Norfolk Southern was never intended to be added to Westchester's policy, but only to the underlying $2 million primary policy of another carrier. According to Westchester, Norfolk Southern did not "obligate [Cobra] by written contract to provide" coverage under the Westchester policy because primary insurance fully satisfied the lease's additional-insurance requirement of "not less than" $2 million in insurance coverage.

Westchester cited Fifth Circuit cases, including *Musgrove v. Southland Corporation*, 898 F.2d 1041 (5th Cir. 1990) (applying Louisiana law). In *Musgrove*, the named insured obtained a primary policy with a limit of $1 million and an excess policy incepting above that amount. The definition of "insured" in the excess policy included any organization "obligated by virtue of a written contract to provide insurance such as is afforded by this policy." Citgo, an additional insured, sued for coverage under the excess policy based on an underlying contract in which the named insured agreed to provide Citgo "not less than" $1 million of insurance coverage. The Fifth Circuit rejected Citgo's claim, finding that the named insured made a "voluntary" decision to purchase coverage above $1 million and therefore was not obligated to obtain excess coverage for Citgo.

The Ruling

In finding Norfolk Southern an additional insured on the Westchester policy, the *Norfolk Southern* court rejected Musgrove's "faulty reasoning" that the term "not less than" provides a cap on an indemnitor's additional insurance obligation. Instead, the court found that Cobra's contractual requirement to obtain "not less than $2,000,000" of insurance for Norfolk Southern was a minimum requirement and not a restriction on the amount of insurance to which Norfolk Southern was entitled. The court held, "Cobra could, and did, obtain insurance in excess of $2 million consistent with the terms of the 2008 Lease Agreement." The holding was congruent with Cobra's uncapped indemnification obligation under the 2008 Lease, which gave Cobra every incentive to provide Norfolk Southern insurance limits similar to its own to protect itself.

The court buttressed its conclusion by noting that the 2008 Lease itself expressly contemplated limits above $2 million with the parenthetical "not less than $2,000,000 (or such greater amount over time as to be commercially reasonable)." This parenthetical distinguished the facts from another case cited by *Westchester, USX Corporation v. International Insurance Company*, Civ. No. 94–5534, 1996 WL 131030, at *1 (E.D. Pa. Mar. 21, 1996), where the underlying contract expressly limited coverage to "up to one million dollars."

Norfolk Southern's claim for coverage was further bolstered by a certificate of insurance listing it as an additional insured on the Westchester policy. Although the *Norfolk Southern* court did not need to address the certificate of insurance to find coverage, in some states (including West Virginia) a certificate indicating that the certificate holder is an additional insured will estop the insurer from contesting the existence of coverage. *See, e.g., Marlin v. Wetzel Cnty. Bd. of Educ.*, 569 S.E.2d 462, 472-73 (W. Va. 2002). Such alternative means to support claims for insurance (or the lack of insurance) offer opportunities to minimize the risks presented by ambiguous underlying "written contracts" requiring additional insurance coverage.

Conclusion

The *Norfolk Southern* case confirms the relevance of underlying contracts in determining the scope of additional insurance and counsels parties to the underlying transactions to be clear as to their intent. However, the meaning of "no less than" in underlying contracts remains unsettled across many jurisdictions, and insurers and policyholders alike should remember that the scope of additional insurance coverage may depend on more than the terms in the underlying contract.

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