Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
Http://www.sabozahn.com

Sabo & Zahn
Attorneys at Law

Litigation Update – Additional Insured Provision in Insurance Policy

Many construction contracts require that a party be named as an additional insured on another party's insurance policy. When an accident then occurs, the party may have a choice of two or more insurance carriers to provide a defense in the event of a lawsuit. A recent case decided by the Illinois Supreme Court illustrates some of the issues involved.

In *John Burns Construction Co. v. Indiana Insurance Company*,[1] Burns entered into a subcontract with Sal Barba Asphalt Paving for Barba to pave a parking lot at a commuter railroad station in Harvard, Illinois. The agreement required Barba to maintain liability insurance for Burns. Pursuant to the agreement, Barba arranged for Burns to be added to Barba's policy with Indiana Insurance Company by way of an endorsement naming Burns as an additional insured. Following completion of the project, a person using the railroad station slipped and fell in the parking lot that Barba had paved. Burns and several other defendants were sued by that person, alleging that the lot had been improperly paved. Barba was not named a defendant in the case.

Burns then informed Barba of the lawsuit and asked that Barba's insurance carrier defend and indemnify Burns in the action. Burns also stated that it had notified its own carrier, Royal, of the action, but that Burns wanted Indiana to provide the sole defense and not Royal. Indiana initially refused to defend the action, maintaining that there was no duty to defend because the injuries were not sustained during the period of the contract for the paving work. Burns then sought defense from Royal in the lawsuit. Burns and Royal later filed this action against Indiana, seeking a declaration that Indiana alone had the duty to defend and indemnify Burns in the initial lawsuit.

In its answer, Indiana admitted that it had a duty to defend Burns, but maintained that Royal was required to share the defense and

This article is not legal advice. Consult with an attorney familiar with the law in your area.

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
Http://www.sabozahn.com

indemnity duties. Indiana therefore asked the court to require that Royal contribute equally to Burns' defense and indemnification in the first lawsuit. Both the trial and appellate courts held that the insurance costs must be shared by the two carriers. The question for the Illinois Supreme Court was whether an insurer to whom litigation is tendered and whose policy contains an "other insurance" clause may seek contribution from another insurer whose policy is in existence but whose coverage the insured has refused to invoke.

This is an important question for contractors, architects and engineers. For instance, many architects carry a $1 million liability policy. Such a policy will typically have the insurance stated as an aggregate amount, so that, for instance, if there are three losses of $400,000 each in a single year, there is not enough coverage. On the other hand, if one of the losses can be transferred to a contractor's policy through an "additional insured" provision, the architect will have enough coverage.

First, the court held that an insured has a right to elect which insurer would be required to defend and indemnify it under these circumstances, and that nothing in Indiana's policy limited Burns' right to select which insurer would be required to do this. The court cited a recent case[2] for the proposition that an insured may knowingly forgo the insurer's assistance by instructing the insurer not to involve itself in the litigation. The insurer would then be relieved of its obligation to the insured with regard to that claim. Further, that insurer would not be liable to the other insurance carrier for contribution. An "other insurance" provision in an insurance policy does not in itself overcome the right of an insured to tender defense of an action to one insurer alone.

Indiana also suggested that Royal had a duty to defend because Burns notified Royal of the first lawsuit. The court here pointed out that Burns made clear that it did not want Royal to become involved in the matter and that the defense was being tendered solely to Indiana. Therefore, Indiana could not seek equitable contribution from Royal, particularly after Indiana had initially refused to defend Burns.

Be aware that the 1997 version of AIA Document A201, General Conditions of the Contract for Construction, contains a provision at ¶ 11.3.3 that states as follows: "The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as addition insureds on the Contractor's Liability Insurance coverage under Paragraph 11.1." Although it can be argued that

This article is not legal advice. Consult with an attorney familiar with the law in your area.

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
Http://www.sabozahn.com

this provision applies only in the event of an active "Project Management Protective Liability" insurance policy in force on the project, the language does not state that. If ¶ 11.3.3 is not deleted, an insurance carrier such as the one in the Burns case may argue that it has no duty to defend the owner or architect, even if the specifications require them to be named as additional insureds and even if a certificate of insurance naming these parties as additional insureds is obtained.

Insurance is an area where knowledgeable help is invaluable for the owner and A/E. You should consult with an insurance adviser about your own liability and how you can structure the Contract Documents to minimize that liability. Traditionally, being named as an additional insured on the contractor's policy is such a way. This case illustrates some of the things that should be considered. If there is a lawsuit brought by an injured party, you may find it extremely useful to have several choices of insurance carriers to choose from in defending you. This choice may include your own insurance carrier, the general contractor's, as well as the carriers for the major subcontractors. Naturally, you will want to consider the quality of each carrier, the amount of coverage, how many defendants are covered by that same policy, and who the law firm will be that will actually do the work. Finally, you should consider how many other known claims you have that apply to that policy year and how those claims might affect your own liability exposure under your insurance policy.

Werner Sabo, FAIA, CSI
James K. Zahn, FAIA, CSI

1. 727 N.E.2d 211 (April 3, 2000).
2. *Cincinnati Cos. V. West American Insurance Co.*, 183 Ill.2d 317, 701 N.E.2d 499 (1998).

This article is not legal advice. Consult with an attorney familiar with the law in your area.