

# DEFENSE ASSOCIATION OF NEW YORK CONTINUING LEGAL EDUCATION SEMINAR

Insurance for the Insurance Defense  
Lawyer

April 18, 2018

Speakers:

- Jennifer Ehman, Esq., *Hurwitz & Fine, P.C.*
- Julian D. Ehrlich, Esq., *Aon Risk Services Northeast (DANY Past President)*
- Darrell John, Esq., *Conway, Farrell, Curtin & Kelly, P.C.*

Moderator:

- Rona L. Platt, Esq., *Enstar (US), Inc.*

# Insurance for the Insurance Defense Attorney

- Part I – What does *Burlington v. New York City Transit Authority* mean to you?
- Part II – Indemnification Obligations, Additional Insured Status, and Horizontal Exhaustion
- Part III – Practical Tips for the Defense Practitioner

# Part I

- What does *Burlington v. New York City Transit Authority* mean to you?
  - Presented by Julian Ehrlich, Esq.

# *Burlington v. NYCTA*

Construct, terms & AI forms

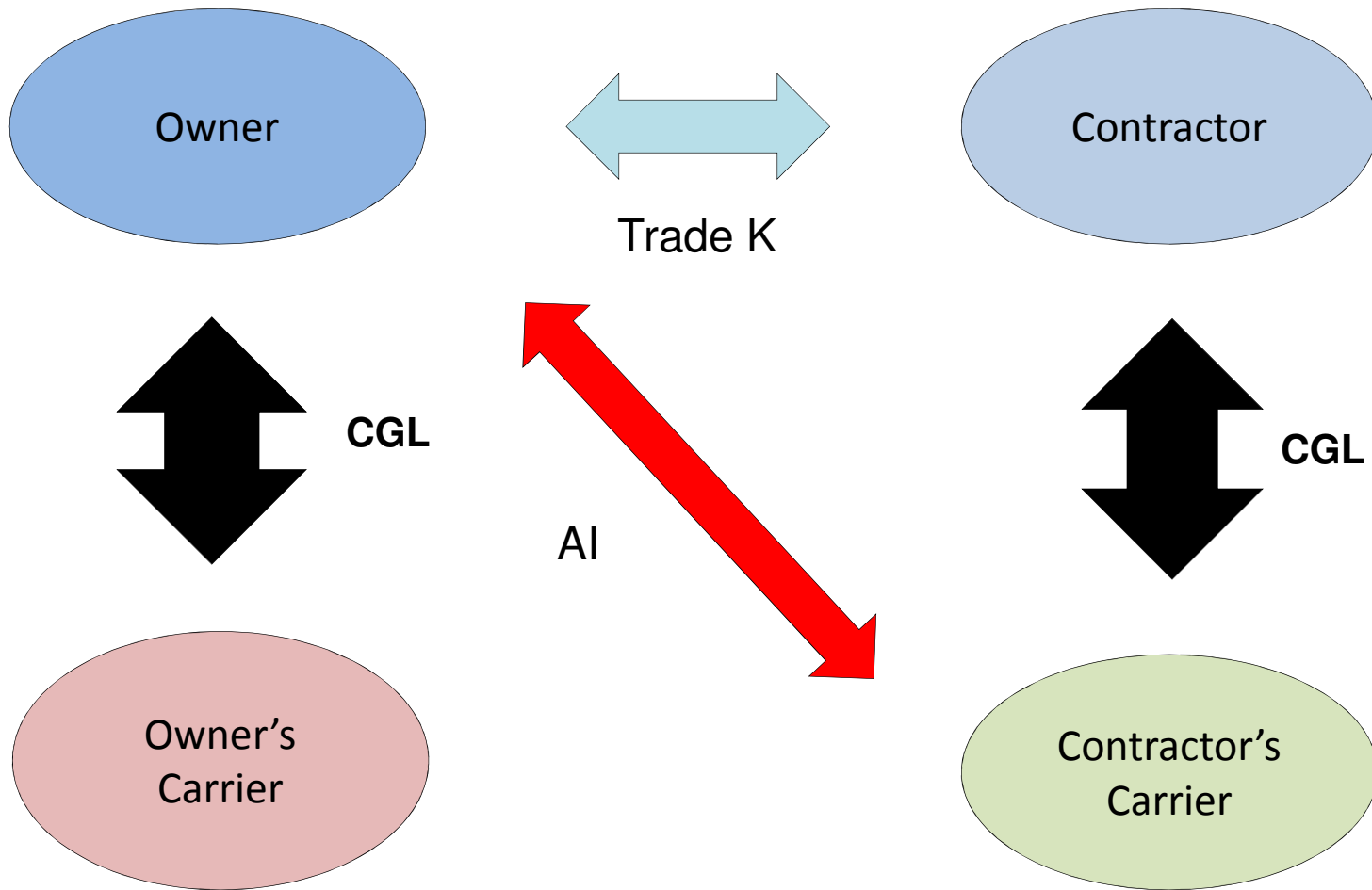
Ct of App. holding

Impact

- What it is
- What should it be



# Basic Construct



# Definitions

Named Insured

Additional Insured

Putative additional insured

Additional Named Insured

# ISO 20 10 11 85

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – (FORM B)**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

### **SCHEDULE**

**Name of Person or Organization:**

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) 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 work" for that insured by or for you.

# ISO 20 33 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**A. Section II – Who Is An Insured** is amended to include as an additional 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 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.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.



# ISO 20 38 04 13

ISO | Commercial General Liability Forms | 04/01/13

COMMERCIAL GENERAL LIABILITY  
CG 20 38 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## **ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT**

This endorsement modifies insurance provided under the following:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II - Who Is An Insured is amended to include as an additional insured:

1. 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; and
2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

- a. Your acts or omissions; or
- b. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured described above:

- a. Only applies to the extent permitted by law; and
- b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for the person or organization described in Paragraph 1. above are completed.



# Underlying Tort Claim

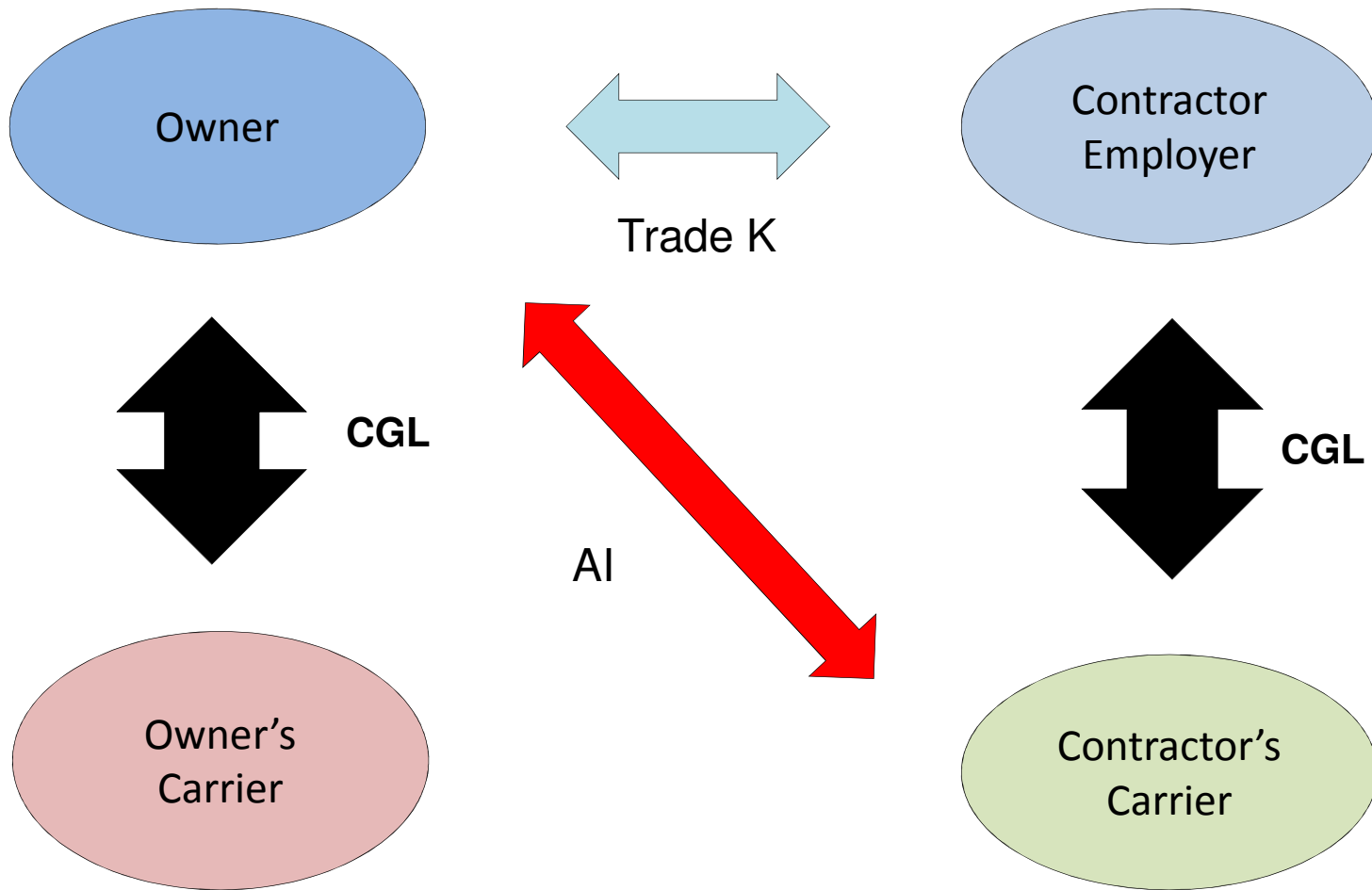
*Thomas P. Kenny v. City of New York and  
Breaking Solutions, Inc.; City of New York v.  
**New York City Transit Authority**  
and MTA*

- **NYCTA** is upstream (lessee) & employer

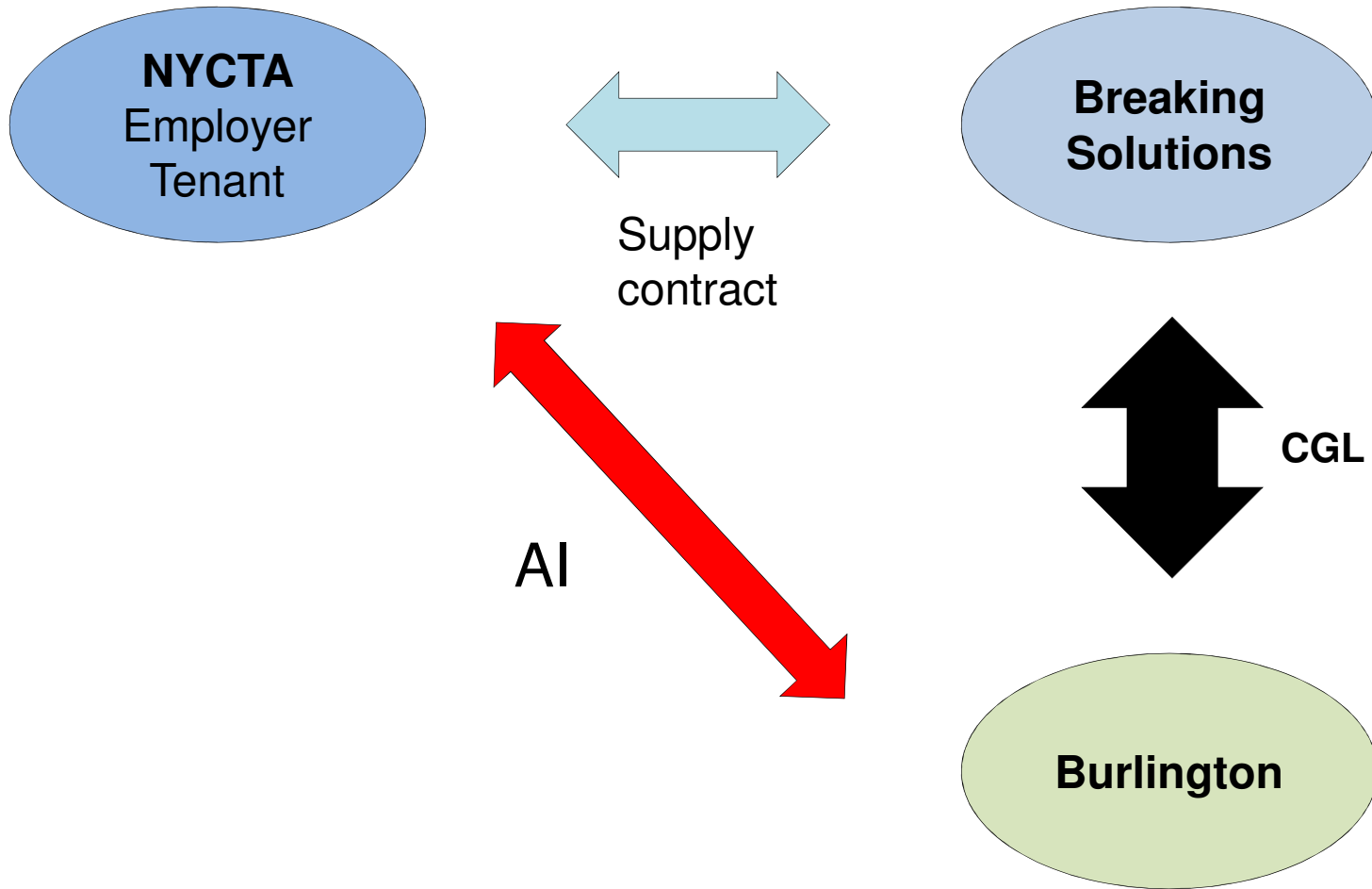
# A Closer Look at the Underlying Suit

- NYCTA – upstream - conceded sole negligence and sole proximate cause for the loss!
- Undisputed the machine provider was not negligent and did not cause the loss
- NYCTA sought AI status from *Burlington*, GL insurer of machine provider

# Basic Construct



# *Burlington*



## *Burlington v. NYCTA*

- Where putative AI is solely negligent, no AI triggered under the 07 04
- 07 04 “caused by acts or omissions” is more restrictive than “arising out of”
- \* Employer status of the named insured alone is not enough to trigger AI cover

# *Burlington* Changes Precedent

- New restriction of AI coverage
- New introduction of negligence into 07 04 AI endorsement trigger wording
- 07 04 = middle ground
  - More than “arising out of”
  - Less than negligence

# Causation v. Negligence

“... we agree with the dissent that interpreting the phrases differently does not compel the conclusion that the endorsement incorporates a negligence requirement ...”

*Burlington v. NYCTA*, 19 N.Y.3d 313 at 324 (2017).



## *Burlington* Does Not Change ...

- Coverage for putative AI up to 99% negligent
- Rule that allegations in pleadings trigger AI defense obligation
- Rule that evidence extrinsic to pleadings also triggers AI defense obligation

## *Burlington* Does Not Change ...

AI cover when any pleading alleges the NAMED INSURED (employer) was the ...

“proximate cause based on the (named) insured’s negligence **OR OTHER ACTIONABLE DEED, ACTIONABLE ACT OR OMISSION**”

# *Burlington* & Causation

- Proximate cause v. “but for” cause
- Causation is source of confusion
- Causation is typically a question of fact

*Burlington* Does Not Change ...

**MOST CASES**

# Impact of *Burlington*

- Legal world
- Insurance industry
- Insureds
- Defense counsel



# World after *Burlington*

- More full & partial denials of AI tenders
- More DJ actions
- Frustrated policyholders

# Perfect World after *Burlington*

- A more limited impact?
- Missing the “big picture” including
  - Pleadings
  - “other actionable deeds”
  - contractual indemnity

# Insureds Predicament

Change insurance procurement agreement?

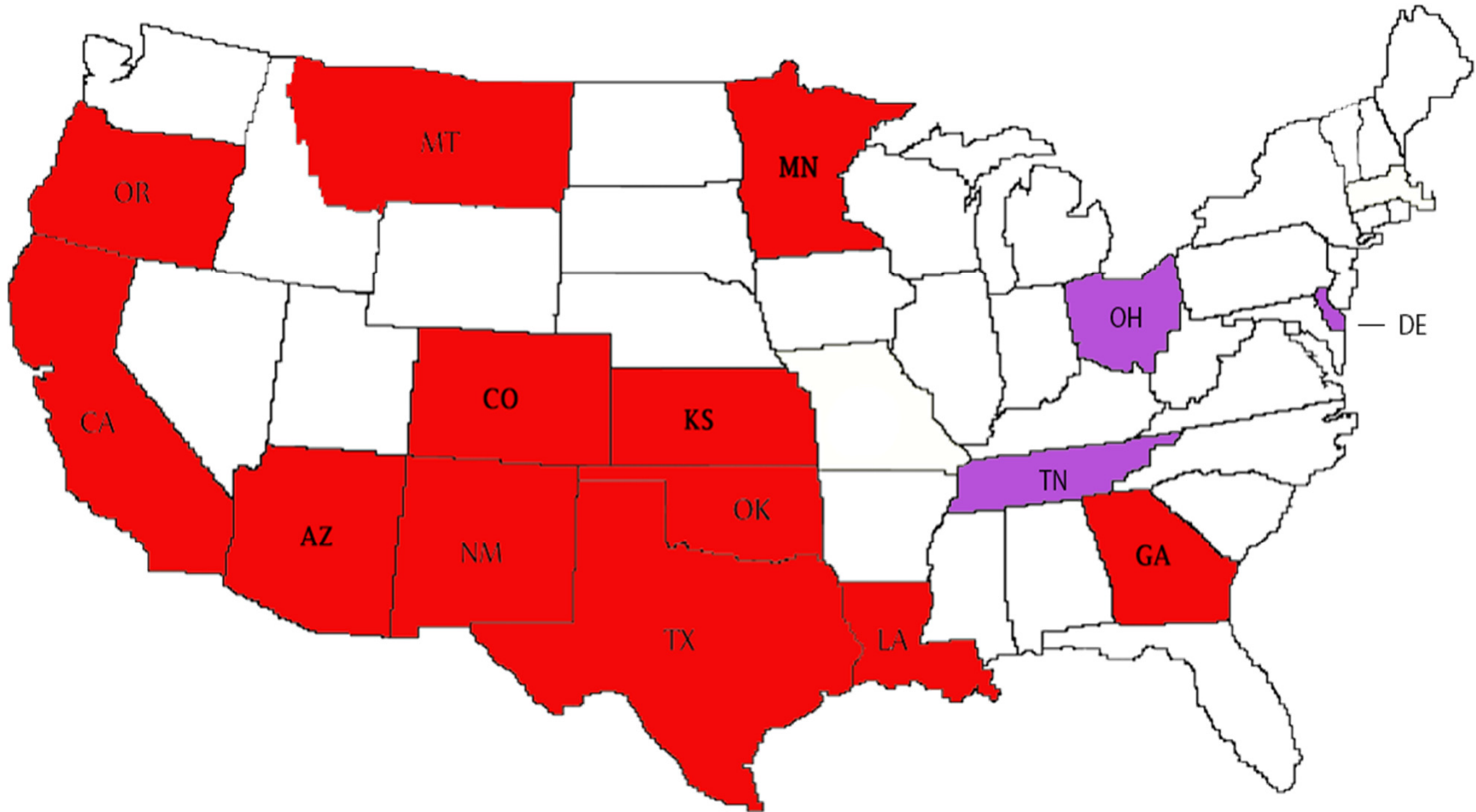
- Request old 10 01 “arising out of work” endorsements?

OR

- Request newer 07 04 & 04 13 “caused by acts or omissions” endorsements?



# Anti-Indemnity Statutes Applying to AI Procurement



# The Future

- More confusion
- More coverage litigation
- A new ISO form



# Part II

- Indemnification Obligations, Additional Insured Status, and Horizontal Exhaustion  
– Presented by Jennifer Ehman, Esq.

# Other Insurance and Other Insurers

```
graph TD; A[Identify all applicable policies] --> B[Sort by "tier"]; B --> C[Compare "other insurance" clauses];
```

Identify all applicable policies

Sort by "tier"

Compare "other insurance" clauses

# CG 00 01 12 07 -- Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A or B of this Coverage Part**, our obligations are limited as follows:

**a. Primary Insurance**

This insurance is primary except when Paragraph **b. below applies**. **If this insurance is primary**, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c. below**.

**b. Excess Insurance**

**(1) This insurance is excess over ...:**

**(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.**

# CONTRACTUAL INDEMNIFICATION



# **Indemnity Agreements May Be Independently Enforceable; Carrier's Obligations May Differ From Insureds**

- Remember, indemnity agreements and insurance policies live in different worlds;
- Even without coverage, indemnity agreements may be enforceable;
- If no coverage, the question then becomes whether you have an obligation to indemnify the insured for the contractual liability claim;
- That often turns on whether the agreement is an “Insured Contract.”



# Contractual Indemnitee

- It has no direct relationship with the insurer.
- It must prove that the named insured has made an enforceable promise in a contract or agreement and that the named insured owes it a duty.
- Since the promise is the named insured's and not the insurer's, defense/indemnity paid to (or on behalf of) a contractual indemnitee are considered damages under the policy.

*Don't confuse an indemnity provision in a contract with a promise to provide AI coverage!*

Contractual Indemnitees are in **privity with the *named insured*** and **not the insurer.**

# Compare with Additional Insured

- Stands in the same shoes as the Named Insured so entitled to all the same rights:
  - Right to immediate defense
  - Right to be indemnified, often even for their own negligence
  - Right to be treated in good faith
- Also have the same duties:
  - Notice of accident, claim and suit
  - Cooperation

**Additional Insureds are in  
privity with the *carrier***

# Practical Considerations: Why Do We Care?

- ❖ Who has right to select defense counsel?
- ❖ Is there a duty to report to the carrier?
- ❖ Who has right to control settlement?
- ❖ Is there an extra-contractual exposure?

# Classic Indemnity Agreement

## Indemnification

To the fullest extent of the law, you agree to hold the Owner and General Contractor harmless from any claim for death, injury, property damage or other loss which may **result from your performance of operations under this contract**. In the event that such a claim is made against the General Contractor, you will defend the General Contractor, and you will pay any amount (indemnify) for which the General Contractor may be held liable in a legal action for such claims.

# Breadth of the Provision

- Does the loss arise from the conduct described in the indemnity agreement?
- Is there a negligence trigger?
- Is there an obligation to pay defense costs?
- Was the entity seeking to enforce the agreement negligent?

# Protecting Your Client

- Remember, indemnity agreements and insurance policies live in different worlds;
- Even without coverage, indemnity agreements may be enforceable

But, is this claim typically covered by insurance?



# Contractual Liability Exclusion and *Insured Contract Exception*

## b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an **“insured contract”**, provided the “bodily injury” or “property damage” occurs **subsequent to the execution of the contract or agreement...**



# *Insured Contract (defined)*

9. “Insured contract” means:
  - a. A contract for a lease of premises...

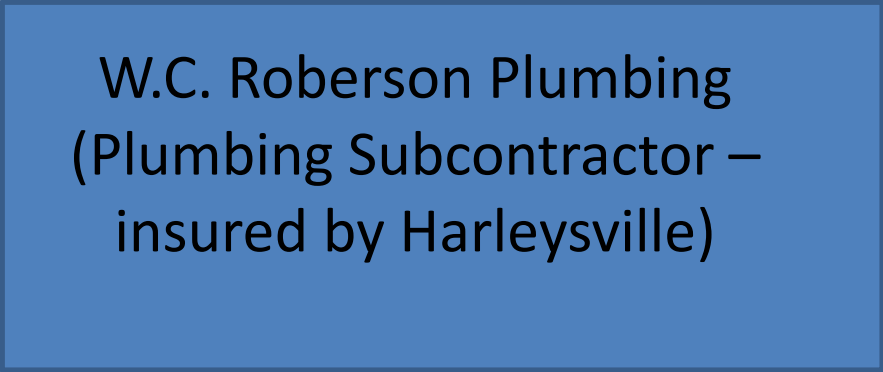
\* \* \*
  - f. That part of any other contract or agreement **pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.** Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

# *Harleysville Ins. Co. v. Travelers Ins. Co.*

Savarino Construction Services  
(General Contractor – insured  
by Travelers)



W.C. Roberson Plumbing  
(Plumbing Subcontractor –  
insured by Harleysville)



- Savarino retains Roberson to act as its plumbing subcontractor
- Roberson's employee is injured on the job
- The employee sues Savarino under the Labor Law
- Based on the Savarino/Roberson contract, Roberson must:
  - Include Savarino as an additional insured on Roberson's CGL policy
    - No obligation relative to the excess coverage
  - Hold Savarino harmless
- Settlement reached with employee
- Harleysville pays its entire primary policy limit of \$1,000,000 and a portion of its excess coverage

- Harleysville's argument in the Declaratory Judgment Action:
  - Savarino is an additional insured on its primary policy
  - But, Savarino has its own coverage from Travelers
    - The Travelers Policy also provides primary coverage
  - Upon a comparison of the “other insurance provisions,” Travelers and Harleysville are obligated to share equally in the costs associated with the defense of Savarino and the settlement

## Appellate Court's Ruling:

- Starts by conducting the “other insurance” analysis:
  - Compares the provisions
  - Determines that the provisions are not identical in application
    - Savarino was added to the Harleysville policy as an additional insured by endorsement
    - Provisions do not cancel each other out
    - Instead, Traveler's coverage is excess to Harleysville's coverage
- But, that is not the end...

### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

#### a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

#### b. Excess Insurance

This insurance is excess over:

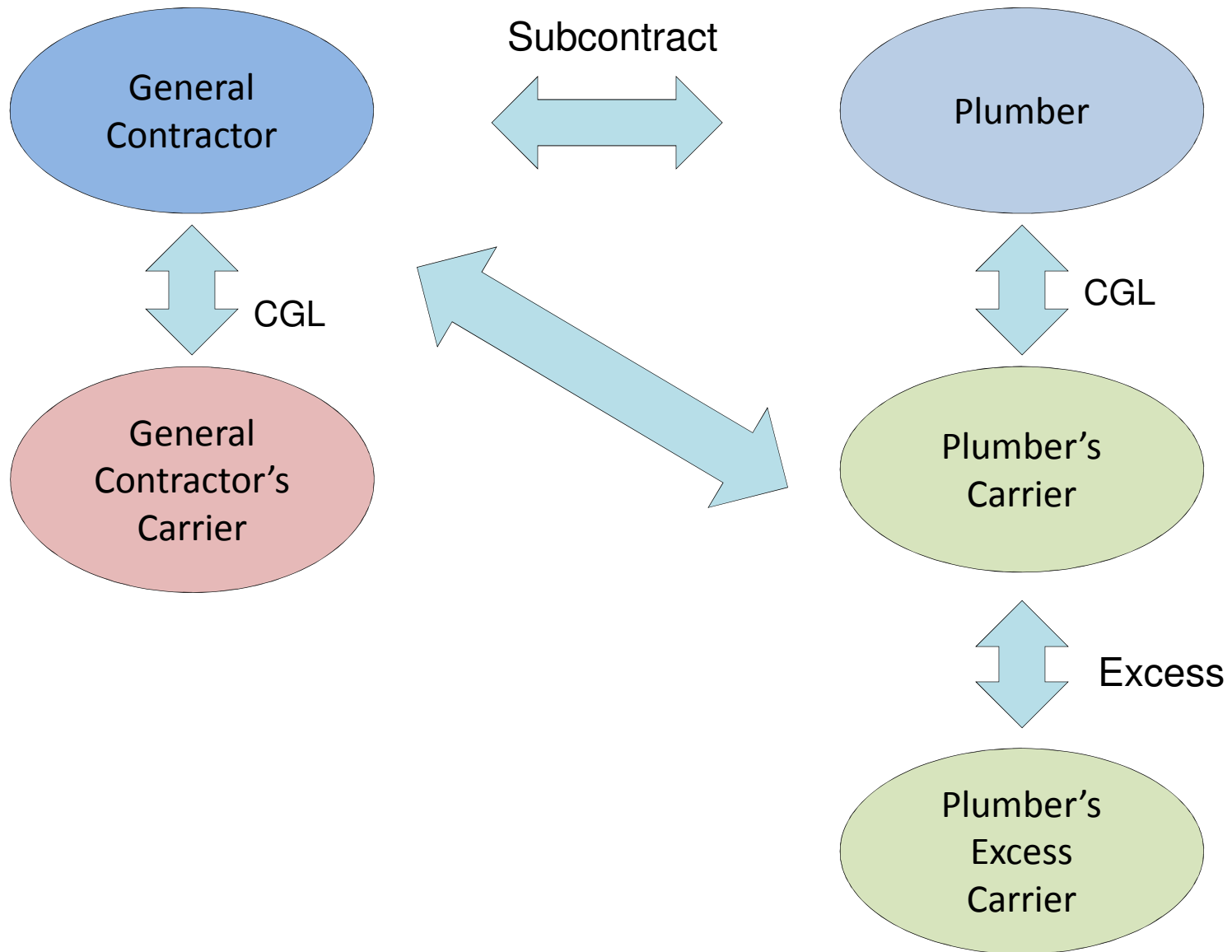
- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
  - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
  - (b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
  - (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
  - (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.
- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

# Appellate Court's Ruling Continued...

- Savarino was granted summary judgment against Roberson on its contractual indemnification cause of action

*“Travelers would therefore have a right of subrogation against Roberson in that third-party action..., and, as a practical matter, would be entitled to reimbursement from Roberson for the amount that Travelers is obligated to pay plaintiff as excess coverage for Savarino’s liability to Roberson’s employee.”*

# Horizontal Exhaustion



# Part III

- Practical Tips for the Insurance Defense Practitioner
  - Presented by Darrell John, Esq.

**JOHNNY WORKER**, a pro in construction management, is on the jobsite for the construction of the Floating Soccer Stadium on the Hudson River.

After enjoying a nice lunch, he is instructed by his employer, Fabulous General Contractors LLC (**"FABULOUS"**), to inspect some of the work at the mezzanine level of the structure.

While traversing a dark interior staircase, he trips and falls, sustaining a serious injury to his right elbow.

He feels around (with the other hand) for the object which caused his fall and comes across a piece of steel piping.

He recalls that the week prior, Perfect Piping Inc. (**"PERFECT"**) had been doing some pipe work at that location.





Prior to the accident, the owner of the property, PASSIVE PROPERTY OWNERS LLC (**PASSIVE**), had entered into an agreement with FABULOUS to construct the stadium including the interior staircase and a raceway for pipes within the stairwell.

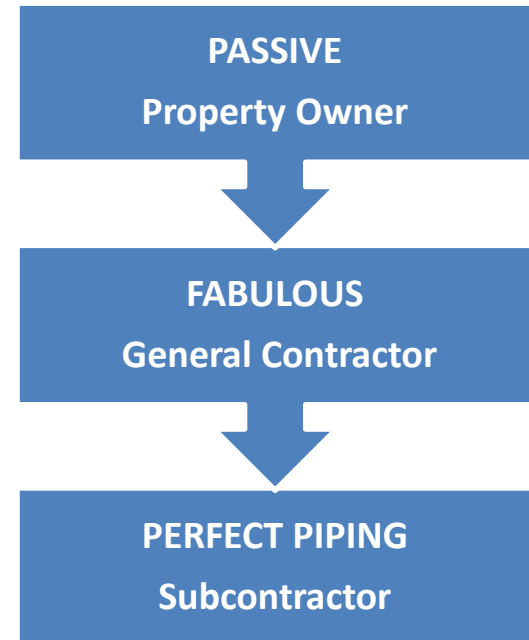
In the agreement, FABULOUS was responsible for providing any necessary temporary lighting. FABULOUS subcontracted the pipe work to PERFECT.

JOHNNY WORKER's elbow just hasn't felt the same since the fall. The accident has ended his illustrious recreational softball career.

JOHNNY WORKER brings a lawsuit against PASSIVE alleging violations of New York Labor Law §§ 240(1), 241(6), 200 and common law negligence. With regard to § 241(6), he alleges that Industrial Code §§ 23-1.7(e) (Tripping and other hazards in passageways) and 23.30 (Illumination sufficient for safe working) were violated. PASSIVE then commences a **Third-Party Action** against FABULOUS for common law and contractual indemnification.

**ABLE ATTORNEY** is retained by FABULOUS's general liability insurer, DELIGHTFUL INSURANCE COMPANY ("**DELIGHTFUL**"), to represent FABULOUS in the Third-Party complaint. FABULOUS provides ABLE with a Certificate of Insurance listing **FABULOUS COMPANIES** as a certificate holder and AGREEABLE INSURANCE CORP. ("**AGREEABLE**") as PERFECT's general liability insurer.

Without waiting for a response, ABLE commences a **Fourth-Party Action** against PERFECT for common law and contractual indemnification.



Agreeable Insurance Corp.  
Hartford, CT

RE:                    Matter:                    Johnny Worker v. Passive Property Owners LLC.  
                          Your Insured:    Perfect Piping  
                          Date of Loss:    05/25/15  
                          Policy No.:        1492-1776-1984

I am reporting this claim to you and expect that AGREEABLE will defend and indemnify my client, FABULOUS COMPANIES. FABULOUS was retained by the property owner, PASSIVE PROPERTY OWNERS LLC., to construct the Floating Soccer Stadium, Hudson River, New York. JOHNNY WORKER, an employee of FABULOUS, sustained injury when he fell due to debris left by your insured, PERFECT PIPING INC. Not so perfect, huh?

He is now making a claim against PASSIVE, claiming violations of New York Labor Law §§ 240(1), 241(6) and 200 plus common law negligence. PASSIVE has since commenced a Third-Party Action against my client even though as it was clearly your insured's fault that he fell. FABULOUS had a contract with PERFECT to perform the piping work and to clean up all debris when finished. I am also quite certain that the contract required PERFECT to indemnify, protect, hold harmless and provide coverage for FABULOUS and PASSIVE. In fact, we even have a Certificate of Insurance with our name on it.

We tender this to you as you are the insurer for PERFECT since you will be ultimately responsible. PASSIVE also did not do anything wrong here. Please take over for them too. Please let PERFECT know that FABULOUS has made these claims.

Best,  
Able Attorney



## Tender Menu

Tender by Whom?

Tender to Whom?

Tender When?

Tender Contents

# Tender by Whom?

## SECTION IV COMMERCIAL GENERAL LIABILITY CONDITIONS

### (2) Duties In The Event Of Occurrence, Offense, Claim or Suit

(a) **YOU** must see to it that we are notified as soon as practicable of an “occurrence” ... which may result in a claim

(b) If a claim is made or “suit” is brought against any insured, **YOU** must ... (2) notify us as soon as practicable.

An Additional Insured has an **implied duty** to provide timely notice of an occurrence or claim.



## Tender When?

For a CGL policy, the **named insured** has an express duty to provide timely notice of an occurrence or claim. The insured must notify the insurer of an occurrence or claim **as soon as practicable**. The issue of timeliness is a jury issue unless there are no mitigating factors. *Deso v. London & Lancashire Indem. Co. of Am.*, 3 N.Y.2d 127, 130, 143 N.E.2d 889, 891 (1957).

The putative additional insured has an **implied duty** to provide the insurer with timely notice that is independent of the named insured's obligation to provide timely notice. *City of New York v. Investors Ins. Co. of Am.*, 89 A.D.3d 489 (1<sup>st</sup> Dept. 2011); *Spoleta Constr. LLC v. Apsen Ins. UK Ltd.*, 119 A.D.3d 1391 (4<sup>th</sup> Dept. 2014).

Generally, the Additional Insured may not rely on the Named Insured's timely notice. *1700 Broadway Co. v. Greater New York Mut. Ins. Co.*, 54 A.D.3d 593 (2008). An exception exists when it can be shown that the Named Insured, being united in interest with the Additional Insured, provided timely notice on behalf of the additional insured. *New York Tel. Co. v. Travelers Cas. & Sur. Co. of Am.*, 280 A.D.2d 268 (1<sup>st</sup> Dept. 2001).

If the insured provides notice of occurrence/claim within two years of the time required under the policy, the insurer bears the burden to show that it has been prejudiced by any delay. On the other hand, if the delay is more than two years, then burden shifts to the insured to establish no prejudice to the insurer from the late notice. Insurance Law § 3420(c)(2)(A).

## **Tender to Whom?**

- To Downstream broker?
- To Downstream contractor?
- To Downstream insurer?

## Tender Contents?

The standard for determining whether an additional insured is entitled to a defense is the same as that which is used to determine if a named insured is entitled to a defense. *Mack-Cali Realty Corp. v. NGM Ins. Co.*, 119 A.D.3d 905 (1<sup>st</sup> Dept. 2014).

- State precisely who you represent and the basis of the tender
- Demand defense and indemnification as Additional Insured on primary non-contributory basis
- Attach any supporting documents (complaint, contract, certificate, etc.)
- Demand contractual indemnity, if applicable?
- Tender on behalf of upstream indemnitees? *Gilbane Bldg. Co./TDX Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 143 A.D.3d 146 (1<sup>st</sup> Dept. 2016)(affirmed March 2018).

# Are Certificates of Insurance worth anything?

- The Acord form states: “for informational purposes only, confers no rights upon the holder.”
- A **certificate of insurance issued by a broker** (as opposed to the insurer’s agent) is only evidence of the insurer’s intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists. *Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198 (2004).
- **The additional insured requirement must be expressly and specifically stated in a contract.** *Christ the King Regional High School v. Zurich Ins. Co.*, 91 A.D.3 806 (2d Dept. 2012), *lv to appeal denied* 19 N.Y.3d 806 (2012).

**BUT**

- Sub’s contract **only required providing a certificate** naming owner & GC as additional insureds -- “**could only be reasonably read**” as requiring trade contractor’s carrier to name owner & GC as additional insureds **on a primary basis.** *QBE Ins. Corp. v. Adjo Constr. Corp.*, 121 A.D.3d 1064 (2d Dept. 2014); *Christ the King Regional High School v. Zurich Ins. Co.*, 91 A.D.3 806 (2d Dept. 2012).
- “A certificate may be sufficient to raise an issue of fact especially where additional factors exist favoring coverage...” *Horn Maintenance Corp. v. Aetna Cas. & Sur. Co.*, 225 A.D.2d 443 (1<sup>st</sup> Dept. 1996).

AGENCY CUSTOMER ID: \_\_\_\_\_

**ACORD**  
**NEW YORK CONSTRUCTION**  
**CERTIFICATE OF LIABILITY INSURANCE ADDENDUM**

DATE (MM/DD/YYYY) \_\_\_\_\_

THIS ADDENDUM SUMMARIZES SOME OF THE POLICY PROVISIONS IN THE REFERENCED INSURANCE POLICIES AND IS ISSUED AS A MATTER OF INFORMATION ONLY. IT CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. ALL TERMS, EXCLUSIONS AND CONDITIONS IN THE ACTUAL POLICY SHOULD BE CONSULTED FOR A MORE DETAILED ANALYSIS OF COVERAGE, AS THIS ADDENDUM DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES.

AGENCY	NAMED INSURED(S)		
POLICY NUMBER	EFFECTIVE DATE	CARRIER	NAIC CODE

ADDENDUM INFORMATION      CERTIFICATE NUMBER: \_\_\_\_\_      REVISION NUMBER: \_\_\_\_\_

**A. Insurer**

Admitted / authorized

Excess line or free trade zone

**B. General Liability (GL) policy form**

ISO / ISO modified

Other

**C. Specific operations excluded or restricted (GL policy)**

Location: \_\_\_\_\_

Type of construction: \_\_\_\_\_

Building height: \_\_\_\_\_

Classifications [see attached declarations / endorsement]

Designated work [see attached endorsement]

**D. Additional insured endorsement (GL policy)**

CG 20 10     CG 20 25     CG 20 32     CG 20 33     CG 20 37     CG 20 38

Other: # \_\_\_\_\_ Title: \_\_\_\_\_

**E. According to the terms of this GL policy, the additional insured has primary and noncontributory coverage**

Yes     No and     no other option is available with this insurer

**F. Additional insured will receive advance notice if insurer cancels (GL policy)**

Yes     No and     no other option is available with this insurer

**G. Blanket contractual liability located in the "insured contract" definition (Section V, Number 5, Item 7. in the ISO CGL policy) is removed or restricted**

Yes and     no other option is available with this insurer     No changes made

**H. "Insured contract" exception to the employers liability exclusion is removed or modified (GL policy)**

Yes and     no other option is available with this insurer     No changes made

**I. GL policy (including endorsement(s)) does not cover the additional insured for claims involving injury to employees of the named insured or subcontractors (not workers' compensation)**

Yes and     no other option is available with this insurer     No changes made

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## Reservation of Rights

In its response letter, AGREEABLE posits that its policy only applies to liability caused by PERFECT's **acts or omissions** at the project, and that its investigation of the claim is still ongoing. AGREEABLE, however, offers a defense for FABULOUS against the Third-Party claim as an additional insured (on a primary basis), but reserves its rights to withdraw the offer after the investigation is completed.

AGREEABLE denies coverage for the contractual claims as premature and asks for a copy of the relevant contract. AGREEABLE also declines to participate in PASSIVE's defense, stating that additional insured status is limited to parties that entered into a written contract with PERFECT.

AGREEABLE asks ABLE to discontinue the Fourth-Party Action and transfer the file to PERFECT's ATTORNEY for continued handling.

**What are AGREEABLE's rights in light of the Reservation of Rights letter?**

## Reservation of Rights: Right to Independent Counsel

When an actual conflict exists between the interest of the insured and the insurer in defending a liability claim, the insured may retain independent counsel. The insurer is obligated to pay such counsel a reasonable fee. *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981).

When an insurer offers its insured a defense but reserves rights with respect to its duty to indemnify, the insured may choose independent counsel. The insurer is obligated to pay such counsel a reasonable fee. *First Jeffersonian Assocs. v. Ins. Co. of N. Am.*, 262 A.D.2d 133, 134 (1<sup>st</sup> Dept. 1999).

Insured has a right to independent counsel when there exists both covered and uncovered claims. The insurer is obligated to pay such counsel a reasonable fee. *Bryan v. State-Wide Ins. Co.*, 144 A.D.2d 325 (2<sup>nd</sup> Dept. 1988).

## Declaratory Judgment Actions

After completing its investigation, AGREEABLE withdrew its participation in the defense of FABULOUS, stating that Johnny Worker's accident was caused by FABULOUS's own negligence. ABLE then commenced a declaratory judgment action against AGREEABLE and PERFECT on behalf of FABULOUS.

PERFECT's attorney then answered the declaratory judgment action on behalf of both AGREEABLE and PERFECT. During the course of discovery, PERFECT tells its attorney that FABULOUS is an important client, and to make sure that FABULOUS gets coverage under the AGREEABLE policy.

**Does ABLE have a potential conflict of interest?**

**Does PERFECT's attorney have a potential conflict of interest?**

## Declaratory Judgment Actions

The insured is the insurance defense attorney's client. The attorney also has contractual duties to the retaining insurer such as reporting facts, evaluating liability, etc. When the interests of the insurer and insured diverge (or likely to diverge), the tripartite relationship between insurer, insured, and attorney creates a conflict of interest for the attorney.

An attorney owes his or her client undivided loyalty and allegiance. "Where an insurer disclaims coverage or reserves the right to do so, it is generally improper for an attorney to represent both the insured and insurer in the same action..." *Booth v. Cont'l Ins. Co.*, 167 Misc. 2d 429, 436, 634 N.Y.S.2d 650, 655 (Sup. Ct. 1995)

## Cooperation of the Insured

After the Floating Soccer Stadium sinks into the Hudson River, FABULOUS is sold to the highest bidder, FREDDY FLIPPER for pennies. Every time ABLE attorney calls for documents and information to defend the company, FREDDY says he is too busy liquidating FABULOUS's assets to worry about a softball pitcher's arm.

FREDDY fails to appear for FABULOUS' deposition. ABLE informs AGREEABLE of the issue. FREDDY then stops taking any phone calls from ABLE and AGREEABLE.

AGREEABLE then sends FREDDY a letter advising that FABULOUS has violated the cooperation portion of its policy and that coverage is being denied. The letter also indicates that ABLE would be making an application to withdraw as counsel in the next few days.

**Does Agreeable have a sufficient basis to deny coverage?**

## Cooperation of the Insured

The burden of proving the insured's lack of cooperation is placed upon the insurer. *Thrasher v. U. S. Liab. Ins. Co.*, 19 N.Y.2d 159 (1967).

In order to successfully disclaim, the insurer must demonstrate:

- 1) that it acted diligently in seeking to bring about the insured's cooperation;
- 2) that the efforts employed by the insurer were reasonably calculated to obtain the insurer's co-operation; and
- 3) that the attitude of the insured after his cooperation was sought was one of 'willful and avowed obstruction.' *Thrasher v. U. S. Liab. Ins. Co.*, 19 N.Y.2d 159 (1967).

The insurer must disclaim for lack of cooperation as soon as is reasonably possible. The question of timeliness is generally a factual question. *Cont'l Cas. Co. v. Stradford*, 11 N.Y.3d 443 (2008)

Any questions?

