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# **DEFENSE AND INDEMNITY OF ADDITIONAL INSUREDS**

by  
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DEFENSE AND INDEMNITY OF ADDITIONAL INSURED

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## **I. INTRODUCTION.**

Some of the most frequently debated issues in construction defect actions are the obligations of an insurer to a developer or others named as “additional insureds” under liability policies issued to subcontractors. Some insurers claim that their obligations to the additional insureds are less than those owed to the named insured subcontractor. Conversely, additional insureds contend that they are entitled to the same, and sometimes better, coverage than the named insureds.

These differing positions raise numerous questions. What is the scope of the additional insurers' obligation to defend and indemnify the additional insureds? Are the insurers' obligations altered by the presence of other insurance with concurrent duties? What are the additional insurers' obligations when handling claims for coverage by additional insureds? Are the additional insureds entitled to independent counsel? Under what circumstances is the additional insurer entitled to reimbursement of defense costs?

The simple answer in California is that an insured, is an insured, is an insured, and that all insureds must be treated equally and fairly. Indeed, every California Supreme Court and Court of Appeal decision adjudicating the rights and obligations as between additional insureds and their insurers has confirmed that additional insureds are not regarded under the law as lesser insureds. California courts also hold that the longstanding principles regarding the insurer's duties to defend and indemnify and the insurer's duty of good faith and fair dealing apply equally to the additional insureds.

Other Western and South Western states have yet to address some of these issues. While many attorneys are attempting to import California law on these and other insurance issues, it remains to be seen what success they may have.

## **II. ADDITIONAL INSURED STATUS.**

Real estate developers, general contractors, governmental entities, and lenders generally require contractors and subcontractors to be covered by comprehensive or commercial general liability ("CGL") insurance policies. The contract between these parties also will usually require that the contractors and subcontractors obtain an additional endorsement naming them as insureds on their CGL policies. In years past, such endorsements routinely provided both ongoing operations and completed operations coverage to the additional insureds for liability arising out of the work of the named insured. More recently, many insurers have been reluctant to issue completed operations coverage for fear of having to provide, or even contribute, to the defense and indemnity of their additional insureds.

The term "additional insured" is actually a misnomer. An additional insured is in reality an "insured." Either through a “blanket” endorsement or a specific additional insured endorsement, an additional insured generally is provided coverage under the pertinent policy by being added as an "insured." Thus, the additional insured is, in most cases, an insured, like any other "insured"

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under the terms of the policy. A CGL policy may provide coverage to numerous specifically identified or generally categorized entities as insureds. This broad universe of insureds also includes the "named insured" which is generally the entity procuring the insurance. An insurer's well-recognized duties to defend and indemnify apply to all insureds. As will be discussed below, additional insured endorsements providing completed operations coverage to the additional insured (e.g., a 20 10 11 85 endorsement) may limit the insurer's duty to indemnify, but not the duty to defend.

However, other additional insured endorsements are now in use. Many of these endorsements do not provide completed operations coverage to the additional insured (e.g., 20 09 03 97 endorsement, 20 10 03 97 endorsement and 20 33 10 01 endorsement). These endorsements do not limit the duty to defend so much as they attempt to preclude coverage, and ergo a defense, for completed operations claims and suits.

One common misconception under any of these endorsements is that the additional insured does not pay for coverage provided by the additional insurer. Payments made to the contractor and subcontractor pursuant to the contract between the parties generally include amounts sufficient to cover the premium charged by the additional insurer to the named insured for all coverage applicable to the job. The premium for naming any additional insureds usually materializes as part of the premium charged initially to the named insured. Other times it may manifest as a small additional premium charged for the issuance of the additional insured endorsement, or it may be charged through a hybrid method. (See, e.g., *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.* (1986) 180 Cal.App.3d 639, 646.) Most times any additional premium is insubstantial because the insurer has already taken into consideration the contractual liability coverage pursuant to the named insured's obligation to indemnify the additional insured. (Malecki on Insurance (Feb. 1999) Vol. 8, No. 4, 4.)

In sum, except as expressly limited, the additional insured has the rights of an insured under the terms of the policy. The coverage has been paid for and must be provided. Claims that additional insureds are not entitled to the same rights as other insureds are without basis under either the terms of the policy or common law.

### **A. CG 20 09 Additional Insured Endorsement – Owners, Lessees, or Contractors (Form A).**

The pre-1993 CG 20 09 Additional Insured Endorsement ("20 09 endorsement") includes the person or organization named in the endorsement (or policy declarations), but only with respect to liability arising out of (1) "your work" performed for the additional insured at the location designated in the endorsement, or (2) acts or omissions of the additional insured(s) in connection with their general supervision of "your work" at the designated location.

The scope of coverage provided for the additional insured is comparable to that provided for the named insured of the ISO owners and contractors protective (OCP) liability coverage form.

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The endorsement and the OCP coverage form are alternative ways for a contractor to provide limited insurance for a property owner during the course of the contractor's work.

The endorsement contains exclusions of:

1. Bodily injury or property damage for which the additional insured is liable solely by contract. There is no coverage for liability assumed under "insured contracts."
2. Bodily injury or property damage occurring after all work on the project is completed or that portion of the work out of which the injury or damage arises has been put to its intended use. The endorsement, like the OCP coverage form, does not provide completed operations liability coverage.
3. Property damage to: property owned or used by, or in the care, custody, or control of the additional insured; or "your work" for the additional insured.

The pre-1993 version of the 20 09 endorsement referred to the term "your work," which is also used in a completed operations context. This created some ambiguity whether this endorsement's coverage is limited to damage occurring during ongoing operations. Consequently, this endorsement was revised in 1993 to replace the term "your work" with the phrase your ongoing operations. Subsequent revisions have maintained these coverages. Because of the rather limited scope of the revised 20 09 endorsements, some contractors prefer to have the subcontractor indemnify and hold them harmless for all liability arising out of the project and back the hold harmless agreement with contractual liability insurance. Alternatively, developers used to, and many still do, insist upon being named as an additional insured pursuant to a 20 10 11 85 additional insured endorsement. Although such endorsements now are much harder to come by, many developers have not yet changed their documents to reflect this market reality.

### **B. CG 20 10 Additional Insured – Owners, Lessees, or Contractors (Form B).**

The 1985 ISO CG 20 10 Additional Insured ("20 10 endorsement") includes as an insured any person or organization shown in the endorsement (or policy declarations), but only with respect to liability arising out of "your work" for the additional insured. The 20 10 endorsement states:

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.

This endorsement resembles Form A (CG 20 09) in that both cover the additional insured for liability arising out of the named insured's work for the additional insured. The 20 10 endorsement differs from the 20 09 endorsement in that the 20 10 endorsement does not limit

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coverage to liability arising out of the additional insured's general supervision of the named insured's work.

Also, until the 1993 change to the 20 10 endorsement, this endorsement had provided protection during the period after operations had been completed. However, according to ISO, the intent of the 20 10 endorsement was to limit the additional insured's coverage to only while operations are in progress; but the endorsement was not clear on this point because it referred to the term "your work" which, according to ISO, does not make a distinction between ongoing and completed operations. Therefore, the 1993 revision of the 20 10 endorsement replaced the term "your work" with the phrase "your ongoing operations performed for that insured." The revised 20 10 endorsement also has dropped the words "by or for you." Thus, the 1993 20 10 endorsement reads:

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 ongoing operations performed for that insured.

Subsequent revisions have maintained the "ongoing operations" language.

Deletion of the words "by or for you" following the word "insured" in the endorsement should not be viewed as a limitation, however, because this endorsement is designed for use whenever the CGL policy provides contractual liability coverage; reference to the phrase "arising out of" has been construed as encompassing the independent fault of the additional insured; and when the revised endorsement was introduced, ISO did not mention that any limitation was to apply to the endorsement other than the change dealing with ongoing operations. (See *Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65 Cal.App.4th 21, 31.)

**C. Farmers Insurance Exchange Manuscript ET-108 Endorsement.**

The Farmers Insurance Exchange ET-108 Endorsement provides:

ADDITIONAL INSURED ENDORSEMENT

It is agreed that:

The person or organization to whom the attached Certificate is issued is an additional insured. This applies only with respect to liability arising out of the acts or omissions of the named insured. It applies only to the coverages indicated on the Certificate.

\* \* \*

The intent of this endorsement is to provide the coverage as stated above and in the Certificate.

(UMF No. 5.)

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Farmers and other insurers issuing similar “manuscript” endorsements claim that the language in the additional insured endorsement limits its defense obligation by making it contingent upon a finding of liability on the part of its named insured. Therefore, these insurers argue that they should have no obligation to pay for defense costs or, alternatively, should be entitled to be reimbursed for defense costs paid, if the additional insured is not held vicariously liable for the acts of the named insured. Relying upon the California Supreme Court holding in *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, the Court in *Maryland Casualty Co. v. Nationwide Insurance Co.*, *supra*, 65 Cal.App.4th at pp. 30-31, rejected a similar argument that the language in the additional endorsement “expressly or implicitly” limited the defense obligation and concluded that “any limitations on a promised defense duty must be conspicuous, plain and clear.”

### **III. THE DUTY TO DEFEND THE ADDITIONAL INSUREDS.**

Conflicts generally first arise between the insurer and its additional insureds regarding the duty to defend. Because an understanding of the duty to defend the additional insured is vital to appropriate claims handling, coming to terms with these defense issues at the outset of a case helps to establish a positive insurer-additional insured relationship for the duration of the action. Further, properly dealing with these issues and working together will ultimately promote a quicker and more cost efficient resolution of the action.

#### **A. The General Rules Regarding the Duty to Defend.**

The general rules regarding an insurer's duty to defend its insureds under California law are well-settled. California law requires an insurer to immediately defend its insureds if the allegations in the underlying complaint potentially fall within the scope of coverage provided by the terms and definitions of a policy or, if the policy is lost, by some other proof of the substance of the policy provisions. (*Dart Industries, Inc. v. Commercial Union Co.* (2002) 28 Cal.4th 1059; *Gray v. Zurich Ins. Co.*, *supra*, 65 Cal.2d 263.)<sup>1</sup> A duty to defend may exist in an action even where coverage is questionable and ultimately there may not be an actual duty to indemnify. (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.)<sup>2</sup> A duty to defend exists until the insurer can conclusively establish that “. . . the third party complaint *can by no conceivable theory raise a single issue which could bring it within the policy coverage.*” (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 [emphasis in original].)<sup>3</sup>

Likewise, California courts have consistently held that the duty to defend requires the insurer to provide its insureds with a complete defense of entire actions. The California Supreme Court held in *Gray v. Zurich Insurance Co.*, *supra*, 65 Cal.2d at 275, that an insurer's duty to defend arises if just a single claim in an action potentially falls within the coverage of the policy. It is immaterial whether all of the other claims are uncovered. (*Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 564.)<sup>4</sup> These principles were subsequently affirmed by the Supreme Court in *Montrose Chemical Corp. v. Superior Court*, *supra*, 6 Cal.4th 287.

Any question regarding the scope of the duty to defend was laid to rest by the California Supreme Court's decision in *Buss v. Superior Court* (1997) 16 Cal.4th 35. The Court held that if

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the insurer had a duty to defend any claim made in an action, the only meaningful way to satisfy the duty is to defend immediately and completely by providing a defense for all claims, even those not potentially covered. (*Id.* at p. 49.) The Supreme Court held that the scope and application of the defense obligation is prophylactic and governed by California law. (*Id.* at p. 61.) As a result, an insurer's defense duty is not controlled by the terms of the insurance policy. (*Id.* at pp. 48-49.)

*Buss* was followed by the Supreme Court's ruling in *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, where the Court affirmed and expanded its decision in *Buss*. The *Aerojet* decision confirmed that in a case triggering a defense under multiple insurance policies issued by different insurers, each insurer owed a separate and independent duty to defend its insured for the pertinent actions in their entirety, even though certain claims could not possibly be covered. (*Id.* at p. 70.) Further, the Court, citing *County of San Bernardino v. Pacific Indemnity Co.* (1997) 56 Cal.App.4th 666, held that when an insurer has a duty to defend, the insureds are not required to contribute to the defense. (*Aerojet, supra*, 17 Cal.4th at p. 72.)<sup>5</sup>

### **B. The Duty to Defend and the Additional Insured.**

Any doubt regarding the additional insurer's obligation to fully defend its additional insureds was eliminated by the Courts of Appeal in *Maryland Casualty Co. v. Nationwide Insurance Co.* (1998) 65 Cal.App.4th 21, *Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, and most recently in *Presley Homes, Inc. v. American States Ins. Co.* (2001) 90 Cal.App.4th 571, review den.

In *Maryland Casualty*, the subcontractors were required to name the general contractor as an additional insured on their liability policy. (*Maryland Casualty, supra*, 65 Cal.App.4th at p. 25.) The endorsement issued by the insurer [Nationwide] provided the general contractor with coverage "as an insured" but "only to the extent that [the contractor] is held liable for [their subcontractor's] acts or omissions." (*Id.* at p. 28.) Since the additional insured was defined as an "insured" within the meaning of the insuring clause, the Court of Appeal looked to the policy – not just the additional insured endorsement – to determine the general contractor's rights relative to the subcontractor's insurer. (*Id.* at pp. 31-32.) The Court determined that a duty to defend presumptively existed and rejected Nationwide's argument that its form "4190" endorsement only contained an obligation to indemnify the additional insured. (*Ibid.*)<sup>6</sup> In holding that Nationwide had a duty to defend its additional insured, the Court determined that the principles of *Gray v. Zurich Insurance Co., supra*, 65 Cal.2d 263 apply equally to additional insureds. (*Id.* at p. 32.)

Also, the *Maryland Casualty* Court specifically found that the limiting language in the additional insured endorsement did not eliminate the insurer's defense duty, but instead simply defined the scope of the insurer's indemnity obligation. (*Id.* at p. 30.) The *Maryland Casualty* Court stated that the insurer's attempt to limit the scope of its defense duty violates two fundamental tenets of insurance law: "(1) [a] liability policy is presumed to include a defense duty unless said duty is excluded by unambiguous language; and (2) a defense duty is presumed to be broader than the duty to indemnify." (*Ibid.*; see also *St. Paul Fire & Marine Ins. Co. v. Sears, Roebuck & Co.* (9th Cir. 1979) 603 F.2d 780.)<sup>7</sup>

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The Court's finding in *Maryland Casualty* should come as no surprise. Indeed, additional insured endorsements usually do not contain any language mentioning -- much less limiting -- the duty to defend. Therefore, the argument that the defense of additional insureds should be limited is contrary to California law, which clearly requires that policy provisions that limit coverage must be "conspicuous, plain and clear" in order to be enforceable. (*De May v. Interinsurance Exchange of Auto Club of So. California* (1995) 32 Cal.App.4th 1133, 1137.) Moreover, even if the insurance policy or additional insured endorsement specifically limits the insurer's duty to indemnify specific claims, the Supreme Court has made clear that the insurer still has a broader obligation to defend the entire action, subject to a reimbursement right at the conclusion of the action. (*Buss v. Superior Court, supra*, 16 Cal.4th at p. 50.)<sup>8</sup>

In *Pardee, supra*, 77 Cal.App.4th 1340, the Court of Appeal held that an additional insured endorsement, combined with completed operations coverage in the subcontractor's policy, extends coverage to a general contractor even where the policies and endorsements are issued years after the project was completed. (*Id.* at pp. 1360-1361.) In reaching this holding, the Fourth District Court of Appeal again looked at the underlying policy, not just the additional insured endorsement, and applied the law applicable to the defense of named insureds to determine the extent of the additional insured general contractor's rights to a defense. (*Id.* at p. 1351.)<sup>9</sup>

Similarly, in *Century Indemnity Co. v. Hearrean* (2002) 98 Cal.App.4th 734, the Court of Appeal held that the duty to defend and indemnify extends to losses not discovered until after the expiration of the policy if the property damage occurs when the policy is in effect. In *Hearrean*, the insured purchased a hotel in 1988 and constructed improvements from 1989 to 1990. (*Id.* at p. 736.) The improvements caused property damage during the period from 1989 to 1993 while the insured was the owner. (*Id.* at p. 738.) During this period, the insured carried liability insurance. (*Ibid.*) The insured later lost the hotel in a foreclosure sale, and the property was then acquired by a third party. (*Id.* at p. 737.) In 1996, the third party sued the insured for damage as a result of the insured's negligent and defective construction of improvements. (*Id.* at p. 736.) The insurer filed an action for declaratory relief contending that since the third party did not acquire the hotel until after the expiration of all of the insurer's policies, the third party's claim did not constitute a claim for damages occurring during the policy period. (*Ibid.*) The court held that the trigger of coverage, the continuous and progressive injury to the property caused by defective design and construction, occurred during the policy period, and activated the insurer's defense and indemnity obligations. (*Id.* at p. 743.) The court reasoning, that to require the claim of the third party to arise during the policy period would transform an occurrence-based CGL policy into a claims-made policy. (*Ibid.*)

Finally, in *Presley, supra*, 90 Cal.App.4th 571, the issue before the Court was whether an insurer had a duty to provide an additional insured developer with an immediate, full and complete (100%) defense of all claims, covered and non-covered, arising out of a construction defect action. (*Id.* at p. 573.) The Court held that as a matter of California public policy, the additional insured is entitled to the same immediate and complete defense owed to the named insured, i.e., "[t]o defend meaningfully, the insurer must defend immediately... [t]o defend

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immediately, it must defend entirely.” (*Buss v. Superior Court, supra*, 16 Cal.4th 35, at pp. 48-49.) Also, relying upon *Maryland Casualty, supra*, 65 Cal.App.4th 21, the *Presley* Court concluded that “[w]hile the endorsements limited the coverage for plaintiff to ‘liability’ arising from [the subcontractor’s] work, nothing in either the policies or the endorsements limited defendant’s obligation to provide plaintiff with a defense.” (*Presley, supra*, 90 Cal.App.4th at p. 575.)

The insurer in *Presley* tacitly admitted that it owed the developer a defense at least as to some claims, but dickered as to the scope of that defense. (*Id.* at p. 576.) In rendering its decision, the Court was mindful of the typical defense delays faced by additional insureds when an insurer tries to limit its defense obligation to the portion of the fault attributable to their named insured. (*Id.* at pp. 576-577.) The Court stated that, “the delay in providing a defense while the parties attempted to reach a mutually acceptable percentage, highlights the very reason the Supreme Court requires an insurer to provide a complete defense even where the underlying lawsuit includes both covered and uncovered claims.” (*Ibid.*)

Some have explained the *Presley* decision as simply extending the *Buss* rule -- requiring insurers to provide a complete defense against a mixed action -- to additional insureds. However, when viewed in conjunction with the earlier *Maryland Casualty* and *Pardee* cases involving additional insured general contractors, another rule clearly emerges: that an additional insured’s rights are no less than those of the named insured.

### **C. Attempts By Insurers to Force Their Additional Insureds to Accept a Lesser Defense Are Unacceptable.**

Additional insurers sometimes suggest that their obligation to defend additional insureds is limited to claims relating to the work performed by the named insured. This position, however, is contrary to California law. No California case has even suggested that the additional insurer is exempt from the broad obligation to defend its additional insured. Indeed, offering less than a full defense is considered the equivalent of a defense denial. (*Presley Homes, Inc. v. American States Ins. Co., supra*, 90 Cal.App.4th 571.) The existence of other potentially responsible insurers is also no excuse for failing to provide a defense and/or indemnity. (See *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 976, fn. 9.)

Additional insurers that attempt to avoid their legal obligation to provide a complete defense for their additional insureds generally do so by either offering to appoint counsel to represent the additional insured solely with respect to claims relating to the work of the named insured subcontractor, or by offering to pay a percentage of the defense which they assert is commensurate with the presumed liability of the subcontractor. If unilaterally imposed by the insurer on the insured, both of these scenarios are practically, legally and ethically unworkable.

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**1. Agreements To Associate Counsel For An Issue Defense.**

If insurers were allowed to associate counsel on discrete issues, additional insureds could have dozens of law firms separately representing discrete issues. Thus, the additional insureds would have numerous attorneys, each with their own agenda, pointing the finger at each other. For instance, the attorney representing a developer solely on the roofing issues might blame the framing and sheet metal subcontractors, among others, for the roof leaks. In this way, the attorney would be blaming the developer itself, since it is responsible for each of the other subcontractor's work. Since the insurer responsible for coverage of the roofing issues would take the position that it is not responsible for framing and sheet metal issues, there would be every incentive to blame these trades. In this context, who would make the opening statement at time of trial? Would the roofing attorney cross-complain against the roofer for indemnity? Beyond it being contrary to California law, this scenario could never benefit the insured developer. Although a particular insurer may reduce its own liability by this method, the developers' overall liability would most likely increase. The logical result of such an arrangement is chaos.

This type of defense also flies in the face of the concept of zealous advocacy. An attorney is required to diligently represent his/her client and provide such representation free of potential conflicts. (See California Rules of Prof. Conduct, rule 3-110; *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358; *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114.) How can an attorney possibly fulfill these fiduciary obligations when the representation does not take into account the entire action? Depending upon the additional insured's coverage situation, it could potentially be completely without a defense on certain claims in the case and receive multiple defenses to other claims. Certainly, these gaps in the defense might expose the additional insured to increased liability or a default judgment. Critically, the insurers' attempt to associate counsel to defend a particular issue was one of the tactics rejected by the Court of Appeal in *Presley, supra*, 90 Cal.App.4th at pp. 574, 576-577.

**2. Agreements To Pay A Percentage Of The Defense.**

This second scenario is no better. An insurer's unilateral agreement to pay only a particular percentage of the defense requires that the insured assume the time-consuming and substantial financial burden to apportion "responsibility" to the respective subcontractors for alleged damage before the additional insurer funds any portion of the defense. This arrangement defeats the purpose of the insurance contract and the additional insured's reasonable expectations under the contract. The objectively reasonable additional insured expects to receive an "immediate" and "complete" defense against any action where even one claim potentially falls within the coverage of the policy. Further, this arrangement presumes that the additional insured could very rapidly obtain funding of 100% of its defense. This is rarely the case. In such a circumstance the insured is again left with either a substandard defense or without any defense at all. This again amounts to a defense denial. (See *Presley Homes, Inc. v. American States Ins. Co., supra*, 90 Cal.App.4th 571; *Haskel, Inc. v. Superior Court, supra*, 33 Cal.App.4th 963.)

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**3. Insurers, Not Insureds, Are Obligated To Secure Contribution From Other Potentially Responsible Insurers.**

Insurers often attempt to avoid their obligations to defend and indemnify by pointing to other insurers which also may have such duties. While these other insurers may in fact have obligations to the insured, it is not the insured's responsibility to secure their participation.

When more than one insurer owes a coverage obligation, the insured is entitled to select a policy to protect it without regard to the obligations of other insurers. (*Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 49-55.) This right makes it clear that obligations existing between insurers are not the responsibility of the insureds. Indeed, the rights or subrogation of contribution exists only between insurers. (*Aerojet-General Corp. v. Transport Indemnity Co., supra*, 17 Cal.4th at p. 72.)

Further, well established law recognizes that an insured's desire to rely upon its insurer's superior resources for the defense of a third party claim is usually a significant motive for obtaining insurance. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at pp. 295-296; see also *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319 [an insurer obtains insurance to provide protection, security and peace of mind from knowing that its insurer will provide a defense against a claim for potentially covered damages].) Refusing to defend or indemnify based upon the presence of other obligated insurers once again defeats these expectations.

If an insurer has a duty to defend or indemnify, it must agree to perform these duties without regard to how another similarly situated insurer may respond. If other insurers also have these duties, the insureds may, but are not obligated to, obtain their participation. Since full participation by all implicated insurers is often to the benefit of the insureds, insurers recognizing their legal obligations should offer to fully perform and concurrently ask for their insured's assistance in obtaining participation of other insurers. Indeed, when the additional insureds and their insurers can work together in the defense of the plaintiffs' claims, a united strategy can be maintained that will reduce defense costs, expedite resolution of the construction defect case, and avoid coverage and bad faith litigation.

**IV. THE DUTY TO INDEMNIFY THE ADDITIONAL INSURED.**

Insurers have a duty to indemnify their insureds based upon the particular language of their policies. California courts have taken a broad view of the duty to indemnify. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 825-826 [insuring provision broad enough to cover all types of claims obligating the insured to pay covered damages]; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra*, 45 Cal.App.4th at pp. 49-55 [each insurer on the risk required to indemnify for "all sums" up to its policy limits].) These same general principles apply to the additional insureds.

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In *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, the Court addressed the scope of the insurer's duty to indemnify its additional insured with respect to the language contained in an additional insured endorsement, stating that the additional insured's liability is covered for damages "arising out of" the named insured's work. As noted above, this language is contained in the 20 10 endorsement as well as many other commonly used additional insured endorsements.

Syufy was the owner of a theater who entered into an agreement with a contractor to provide lighting and temperature controls at the theater. (*Id.* at p. 324.) An employee of the contractor was subsequently injured while attempting to access the roof of the owner's theater. (*Ibid.*) The injury was caused solely by Syufy's negligent failure to maintain his property since the contractor did not perform any work on the "roof hatch" at issue. (*Ibid.*)

The contractor's insurer issued an additional insured endorsement to Syufy which provided that Syufy was insured under the policy, "but only with respect to liability arising out of 'your work' for that insured by or for you." (*Ibid.*) The policy specified that "you" and "your" refer to the named insured contractor. (*Ibid.*)

The *Syufy* Court remarked that California courts have consistently interpreted the phrases "arising out of" or "arising from" in a broad fashion. (*Id.* at p. 328.) The Court found that the language "arising out of" "broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." (*Ibid.*) The *Syufy* Court, stating:

Under this common sense approach, Weber's injury clearly "arose out of" the work he was performing on the roof of Syufy's building. The relationship between the defective hatch and the job was more than incidental, in that Weber could not have done the job without passing through the hatch. The fact that the defect was attributable to Syufy's negligence is irrelevant, since the policy language does not purport to allocate coverage according to fault.

(*Id.* at pp. 328-329.)

Similarly, in *Fireman's Fund Ins. Companies v. Atlantic Richfield Co.* (2001) 94 Cal.App.4th 842, the heart of the controversy was whether an insurer had to indemnify an additional insured if personal injuries suffered by a named insured's employee were caused solely by the additional insured's negligence. In accordance with *Syufy*, the *Fireman's Fund* court held that even a minimal causal connection will trigger a duty to indemnify the additional insured. (*Id.* at pp. 849-850.)

In *Vitton Construction Co. v. Pacific Insurance Co.* (2003) 110 Cal.App.4th 762, the court was asked to determine whether negligence of the named insured was a prerequisite for coverage of an additional insured. In *Vitton*, a roofing subcontractor ("named insured") cut holes in the roof of a warehouse for installation of skylights and HVAC equipment that was going to be completed

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by others. The named insured completed its work and left the jobsite. Thereafter, a worker fell through one of the openings while working on the roof. The issue before the court was whether such injury “arose out of” the named insured’s work thus affording coverage to the general contractor that was named as an additional insured under the named insured’s policy. The court held that there was a sufficient minimum connection “between the named insured’s work and the situation giving rise to liability to trigger coverage” for the additional insured. (*Id.* at p. 767.) Following *Syufy*, the court stated that, “the fact that an accident is not attributable to the named insured’s negligence is *irrelevant* when the additional insured endorsement does not purport to allocate or restrict coverage according to fault.” (*Id.*)

Thus, the *Syufy*, *Fireman’s Fund* and *Vitton* decisions hold that additional insureds are covered without regard to whether the injury was exclusively caused by either the named insured or the additional insureds and specifically rejected the argument that additional insureds are only covered for vicarious liability emanating from the direct acts of the named insured.

In contrast, there must be at least some slight connection between the subcontractor’s “ongoing operations” and the injury. In *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, based upon stipulated facts, the court found that the subcontractor’s mere presence at the jobsite while performing the subcontracted work was not a sufficient nexus to trigger coverage. Sasco, the subcontractor, was performing electrical work at the project in accordance with its subcontract with the general contractor. However, while performing this work, one of Sasco’s employees was injured when a pipe connected to a fuel tank exploded while being pressure-tested by the general contractor. The parties agreed that Sasco’s work did not in any way involve the testing or installation of the pipe. As a result, the court determined that the injury resulted entirely from the conduct of the general contractor and “were unrelated to the work called for in the subcontract” agreement. (*Id.* at p. 1041.) As a result, the court found there was no coverage under the endorsement that provided coverage, only for liability arising out of Sasco’s ongoing operations. (*Id.* at p. 1043.)

Also, the Court of Appeal in *National Union Fire Ins. Co. of Pittsburgh, PA v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709 made findings regarding the duty to indemnify pursuant to Nationwide’s “4190” additional insured endorsement that was at issue in *Maryland Casualty, supra*, 65 Cal.App.4th 21. Recall that in *Maryland Casualty*, the Court held that the 4190 endorsement provided a duty to defend the additional insured because any limiting language applied only to the duty to indemnify. (See *id.* at p. 30.) In *National Union*, the Court noted, and it was apparently conceded, that the indemnity language limited coverage to the vicarious liability of the additional insured. (*National Union, supra*, 69 Cal.App.4th at p. 721.) The *National Union* Court then distinguished *Syufy* as involving broader language which did not make coverage dependent upon the derivative liability of the additional insured. (*Ibid.*)

In practice, the *National Union* and *St. Paul v. American Dynasty* decisions should have extremely limited application. The *National Union* holding applies only to the relatively uncommon 4190 endorsement and the *St. Paul* holding was based upon stipulated facts where the

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parties agreed that there was no connection between the work being done by the subcontractor and the injury that occurred. On the other hand, the *Syufy*, *Vitton*, and *Fireman's Fund* rulings have widespread implications regarding indemnity and defense for additional insureds. These cases recognize that only the slightest causal connection is required between the named insured's work and the circumstances creating liability. Therefore, the additional insurer has a broad duty to indemnify its additional insureds. Not only does the additional insurer have a duty to indemnify the additional insureds for their vicarious liability and strict liability related to the work of the named insured subcontractors, but it also has the duty to indemnify the additional insureds for any negligent supervision of the subcontractors. Again, this is the proper result because, as the *Syufy* Court noted, the insurer could have utilized "clearly limited" language and chose not to do so. (*Syufy*, *supra*, 69 Cal.App.4th at p. 330; see also *Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52 [where National Union not only provided 100% of its additional insured's defense, it also paid all settlement amounts necessary to satisfy the \$1,000,000 SIR under the additional insured's own policy so as to trigger and share the settlement costs with that policy].)

### V. BAD FAITH AND THE ADDITIONAL INSURER.

California law implies a covenant of good faith and fair dealing in every insurance contract. When an insurer fails to act in good faith and thereby injures its insured, the insurer may be liable for consequential and punitive damages pursuant to its breach of the implied covenant of good faith and fair dealing. If an insured brings an action to obtain policy benefits unreasonably withheld by the insurer, the insurer may also be liable for attorney fees incurred by the insured to obtain these policy benefits in the coverage action. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813.)

Like the duties to defend and indemnify, the duty of good faith and fair dealing applies equally to additional insureds. In *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319, the Court held that an insurer breaches the implied covenant of good faith and fair dealing if it unreasonably fails to defend its additional insureds. In *Campbell*, a general contractor was an additional insured on a subcontractor's CGL policy. (*Id.* at p. 1311.) The additional insured endorsement provided coverage to the general contractor for liability arising out of the work of the subcontractor. (*Id.* at p. 1312.) The insurer provided a defense to its named insured subcontractor. (*Ibid.*) However, the insurer failed to provide a defense to its additional insured general contractor. (*Ibid.*) The Court ultimately held that such conduct constitutes a prima facie case of bad faith against the additional insurer. (*Id.* at pp. 1321-1322.) Likewise, in *Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, PA.* (1996) 44 Cal.App.4th 1633, the Court held that the additional insurer's duty of good faith and fair dealing in paying policy benefits applies equally to its additional insured.

Given the state of the law in California, it is apparent that insurers must give equal care to the handling of claims of additional insureds as to their named insureds. This means that all internal claims handling guidelines apply equally. This rule also applies to compliance with the Unfair Claims Practices Act contained in the California Insurance Code and promulgated further in

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the Code of Regulations. The failure of an insurer to treat additional insureds in conformity with its internal guidelines and established California law will certainly be admissible evidence in any subsequent bad faith case. Further, if multiple insureds are involved in the same litigation, separate adjusters and "Chinese walls" may be required to handle the claims. Such division of claims handling is required to prevent one person from having any measure of control over the defense of insureds with conflicting interests.

This "Chinese wall" can take the form of the insurer assigning separate adjusters in different offices or locations. While this arrangement provides the appearance of preventing the flow of information internally, it may not be enough. Consider that the law of agency requires a duty of absolute loyalty of the adjuster to its employer, the insurer. (See Restatement Second of Agency, § 387 (1958).) Therefore, it is better practice for the insurer to retain an independent adjuster to adjust the additional insured claims because the independent adjuster's obligation is measured by the contract between the adjuster and the insurer – not the employee-employer relationship.

### **VI. AN ADDITIONAL INSURER'S AGREEMENT TO DEFEND UNDER A RESERVATION OF RIGHTS MAY TRIGGER THE REQUIREMENTS OF CIVIL CODE § 2860.**

*California Civil Code Section 2860* requires an insurer to appoint independent counsel to represent its insured when a conflict of interest arises between the insurer and insured. This statute codifies a portion of *San Diego Federal Credit Union v. Cumis Insurance Society, Inc.*, *supra*, 162 Cal.App.3d 358, 375. The independent counsel requirement of Civil Code Section 2860 is generally triggered when an insurer issues a reservation of its rights to disclaim coverage, and at the same time, appoints defense counsel to represent the insured in a situation where the outcome of the case may be "steered" toward covered or uncovered damages by the insurer-appointed counsel. (*James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093.)

Some of the circumstances that may create a conflict of interest requiring the insurer to provide independent counsel include: (1) where the insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by the insurer's retained counsel (Civ. Code, § 2860, subd. (b); *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1394-1395); (2) where the insurer insures both the plaintiff and the defendant (*O'Morrow v. Borad* (1946) 27 Cal.2d 794, 799); (3) where the insurer has filed suit against the insured, whether or not the suit related to the lawsuit the insurer is obligated to defend (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050); (4) where the insurer pursues settlement in excess of policy limits without the insured's informed consent and leaves the insured exposed to claims by third parties. (*Golden Eagle Ins. Co. v. Foremost Ins. Co.*, *supra*, 20 Cal.App.4th at p. 1396); and (5) any other situation where an attorney who represents the interests of both the insurer and the insured finds that his or her representation of the one is rendered less effective by reason of his or her representation of the other. (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713; *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, *supra*, 20 Cal.App.4th at p. 1396.)

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Typically, additional insurers agreeing to defend additional insureds in construction defect cases do so pursuant to reservation of rights letters asserting various coverage defenses. As a general practice, these insurers will seek to reserve a right of reimbursement, to limit indemnity payments to the work of the named insured or to damages not expected or intended and, in a broad catch-all manner, reserve all other rights that it may have under the terms of the policy. In this situation, a *Cumis* requirement is almost always triggered if the additional insurer requires the additional insureds to use the insurer's panel counsel.

Moreover, it is contrary to public policy for an insurer to control both sides of litigation. While some insurers will argue that no conflict necessarily arises because the insurers seek only to direct the respective defenses of the subcontractor and the additional insureds, the issues of negligence and contributory negligence cannot be separated. These issues require the presentation of evidence by means of the same witnesses, and although the insurers propose to retain different counsel for each policyholder, through their respective attorneys, the insurer would have access to all information in regard to the entire case.

Because the insurers have undertaken to pay any judgment rendered in favor of either the cross-complainant additional insureds or the cross-defendant subcontractors; they have a pecuniary interest in effecting a balance between the litigants and conducting the litigation so that neither party recovers against the other. California courts recognize the rule "that in litigation involving only private parties and rights, payment of all counsel fees by one party to the litigation may give that party such control over both the preparation and argument of the cause, as to make the suit collusive." (*O'Morrow v. Borad*, *supra*, 27 Cal.2d at p. 799; *City & County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 694.) These decisions are in accordance with the well-established fundamental principle that one may not be both the plaintiff and the defendant in an action. (*Stevens v. Superior Court* (1909) 155 Cal. 148, 150; & *Byrne v. Byrne* (1892) 94 Cal. 576, 579.) Certainly a full and fair judicial examination of the merits of a case cannot be had when one insurer controls defense counsel for both sides.

Insurers sometimes cite to *Blanchard v. State Farm Fire & Casualty Co.* (1991) 2 Cal.App.4th 345, as authority for the proposition that independent counsel is not required in construction litigation. Besides being poorly reasoned, *Blanchard* is inapplicable to most factual situations that arise in the context of the defense of additional insureds in construction defect actions.<sup>10</sup> In *Blanchard* the insured failed to identify any specific conflict. (*Id.* at p. 350.) Accordingly, the Court had no choice but to find in favor of the insurer. (*Ibid.*) If, however, coverage questions depend upon an insured's own conduct, independent counsel is required. (*Foremost Ins. Co. v. Wilkes* (1988) 206 Cal.App.3d 251, 261.)

Furthermore, reservations of rights asserted by insurers against additional insureds developers in construction defect cases generally involve not only the type of damages, as was the case in *Blanchard*, but also *the causation of the damages* which is clearly subject to manipulation through control of the defense. For example, the roofer's insurer will disclaim coverage for damages caused by the sheet metal subcontractor. If the roofer's insurer appoints defense counsel

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to represent the developer, said counsel will have the ability to shift the focus of liability from the roofer to the sheet metal subcontractor, i.e., from a covered to a non-covered cause. This is apparent through defense counsel's ability to select experts, settle claims, determine witnesses, establish the order of proof at trial, focus cross-examination etc, all of which demonstrates how the outcome of coverage, causation and timing of damages may be controlled by counsel.

In a multi-party construction defect case where the insurer issues a typical reservation of rights letter, it is difficult to imagine that a conflict would not arise for insurer-appointed defense counsel. This is particularly true where the insurer fails to identify the scope of its reservation by including some sort of broad catch-all language. Obviously, this type of sweeping reservation puts the insureds in the position of being defended by the insurer's appointed defense counsel without any sort of firm understanding of what ultimately will or will not be covered. Defense counsel, however, will enter the case with an understanding of the insurer's expectations. In such a situation, all doubt regarding the application of Civil Code Section 2860 must be resolved in favor of the insured.

In light of the foregoing, insureds should evaluate claims independently with an eye to the facts and contentions of the particular case and the respective interests of the insurer and insured. (*Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007-1008; *State Farm Fire & Casualty Co. v. Superior Court* (1989) 216 Cal.App.3d 1222; *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, supra*, (2000) 79 Cal.App.4th 114; *James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093.) Accordingly, the additional insurer must carefully review an insured's request for independent counsel and, if possible, attempt to come to an agreeable resolution with its insured.

**VII. THE ADDITIONAL INSURER'S RIGHT OF REIMBURSEMENT.**

An insurer possesses two primary rights to seek a recoupment of defense costs spent defending an additional insured. First, an insurer may file an action for equitable contribution against the other carriers that provided coverage to the additional insured, but failed to recognize their defense obligations. (See *Maryland Casualty Co. v. National American Ins. Co.* (1996) 48 Cal.App.4th 1822, 1828-1829 [insurer that faithfully discharges defense obligation entitled to equitable contribution from insurer that breaches defense obligation].) Second, an insurer who provided a lawful defense to its additional insured may seek reimbursement of defense costs that are solely allocable to claims that were never potentially covered. (See *Buss v. Superior Court, supra*, 16 Cal.4th at pp. 49-53.)

The insurer's right to contribution, however, may be affected by any indemnity language contained in the subcontract agreement between the contractor and subcontractor. In *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622 the Supreme Court held that an indemnity provision in the contract between the general contractor and subcontractor precluded the subcontractor's insurer from obtaining contribution from the general contractor's insurer. The Court reasoned that if it allowed contribution it would negate the indemnity provisions of the subcontracts. (See also, *Hartford Casualty Ins. v. Mt. Hawley Ins. Co.* (2004) 123 Cal.App.4<sup>th</sup>

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278.) In contrast, in *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4<sup>th</sup> 1234, the court found that the endorsements naming a crane lessor as an additional insured under the lessee's policy were ambiguous because they provided coverage for work performed for the lessor when none was contemplated by the lease agreement. To determine the reasonable expectation of the lessor, the court looked to the language of indemnity provision of the lease agreement. As a result, the matter was remanded to the trial court for determination of fault between the lessor and lessee so that the court could then determine the equitable apportionment among the insurers.

An insurer's ability to obtain reimbursement of defense costs from its insured is predicated upon the insurer having provided a complete defense to the entire underlying action. (*Buss v. Superior Court, supra*, 16 Cal.4th at pp. 49-53.) The California Supreme Court in *Buss* determined that CGL policy language only requires an insurer to defend those claims for which there is a potential for coverage. (*Id.* at p. 49.) The Supreme Court determined that the right of reimbursement was not an express right since the insurance policy does not make any such provision. (*Id.* at p. 51.) In applying the principles of restitution, the Supreme Court held that an insured would be unjustly enriched by receiving a defense of claims for which there was no potential for coverage. (*Ibid.*) Thus, the Supreme Court held that an insurer could reserve its right for reimbursement, but only for those costs incurred in providing a defense for claims for which there was no potential for coverage. (*Id.* at pp. 52-53.)

After recognizing the existence of a right to reimbursement, the Supreme Court next determined what costs would be subject to reimbursement. The answer: only those costs allocable *solely* to claims that were not even potentially covered. (*Buss, supra*, 16 Cal.4th at p. 52.) Any argument that the calculation of the amount subject to reimbursement is in any way a factor of the ultimate liability imposed upon the insured, must be rejected. The Supreme Court went on to hold that the insurer had a heavy burden of proof in terms of any claim for reimbursement. (*Id.* at pp. 57-58.) A preponderance of the evidence was determined to be that burden of proof. (*Ibid.*) Practically, *Buss* sets up a system that makes it extremely difficult to obtain reimbursement.

The difficulty in making such an allocation has long been recognized by courts that have struggled with this issue. (*Crist v. Insurance Co. of North America* (D.Utah 1982) 529 F.Supp. 601, 604-605.) The insurer must prove that the defense costs in question are solely allocable to claims for which there is not even a potential for coverage. In *State of California v. Pacific Indemnity Co.* (1998) 63 Cal.App.4th 1535, 1549, the Court confirmed that *Buss* was premised on a "defend now seek reimbursement later" theory. In *Pacific Indemnity*, the Court explicitly conditioned an insurer's ability to seek reimbursement of defense costs that were expended for claims which were not potentially covered upon the carrier having provided a lawful defense to its insured. (*Id.* at p. 1550.)

In most cases this will not be an easy task. As a general matter, most work performed in defense of an action cannot be solely allocated to one claim or another, much less to claims for which there is not even a potential for coverage. While in some cases such allocation may not be

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impossible, it is nonetheless a daunting task for an insurer attempting to make such an allocation. Additionally, the nature of the additional insurer's claim may make it more difficult to obtain reimbursement. It is evident that segregating bills based upon types of damage or causation will not be an easy task. It is likely that even under the most favorable circumstances, the ability to obtain reimbursement will be limited at best.

### **VIII. CONCLUSION.**

In recent years, insurers have been amending their policies and endorsements in an attempt to preclude whole classes of coverage, such as completed operations coverage, to additional insureds. Where successful, these insurers also will avoid any duty to defend. On the other hand, when a potential for coverage still exists as to an additional insured, the long-standing insurance law principles regarding an insurer's duty to defend and indemnify its insured will also apply to the additional insureds. When a potential for coverage exists in such multi-party cases, the insurers' first priority must be to make sure that their named insureds and any other insureds, including any contractors, governmental entities and lenders, are properly treated through the provision of an immediate, complete and conflict-free defense. The insurer should work with the additional insureds and its other insurers to fund a proper defense and provide appropriate indemnity based upon equitable principles of subrogation and contribution. However, intra-insurer disputes should never prejudice the insureds. An insurer who unreasonably fails to defend or indemnify its additional insureds is liable for breach of the implied covenant of good faith and fair dealing.

In summary, additional insurers and their insureds should work together to a common goal, reducing the plaintiffs' claims and achieving an early resolution of the case. This will result in less coverage litigation and a more cost efficient mechanism for handling construction defect claims.

### Endnotes

<sup>1</sup> *Constitution Associates v. New Hampshire Ins. Co.* (Colo. 1996) 930 P.2d 556 (duty to defend arises where alleged facts potentially fall within scope of coverage); *Gerrity Co., Inc. v. CIGNA Property & Casualty Ins. Co.* (Colo.Ct.App. 1993) 860 P.2d 606 (obligation to defend arises from allegations of complaint); *Nevada VTN v. General Ins. Co. of America* (9th Cir. Nev. 1987) 834 F.2d 770 (under Nevada law, if wrongful death claims against insured corporation were potentially covered by policy, insurer was under duty to defend, given policy provision that insurer had right and duty to defend any suit against insured seeking damages on account of bodily injury or property damage, even if allegations of suit were groundless, false, or fraudulent); Cf. *Northern Ins. Co. of New York v. Morgan* (Ariz.Ct.App. 1995) 918 P.2d 1051 (duty to defend stems from facts, not allegations of complaint); *Granite State Ins. Corp. v. Mountain States Tel. & Tel. Co.* (Ariz.Ct.App. 1977) 573 P.2d 506 (although insurer may refuse to defend when facts appear to exclude coverage, if insurer refuses to defend and awaits determination of its obligation in subsequent proceeding, it acts at its peril, and if it guesses wrong it must bear consequences of its breach of contract).

<sup>2</sup> *Fire Ins. Exchange v. Berray* (Ariz.Ct.App. 1983) 694 P.2d 259 (if insured raises issue of self-defense to alleged intentional assault, insurer owes a duty to defend); *Constitution Associates v. New Hampshire Ins. Co.* (Colo. 1996) 930 P.2d 556 (duty to defend pertains to insurance company's duty to affirmatively defend its insured against pending claims; in contrast, duty to indemnify relates to insurer's duty to satisfy judgment against insured); *Hecla Mining Co. v. New Hampshire Ins. Co.* (Colo. 1991) 811 P.2d 1083 (duty to defend and duty to indemnify are separate and distinct).

<sup>3</sup> *TerraMatrix, Inc. v. U.S. Fire Ins. Co.* (Colo.Ct.App. 1997) 939 P.2d 483 (insurer has duty to defend unless it can show that: (1) allegations in complaint against insured describe only situations which are within policy exclusions; and (2) there is no factual or legal basis on which insurer might be held liable to indemnify insured); *Compass Ins. Co. v. City of Littleton, CO* (Colo. 1999) 984 P.2d 606 (to trigger insurer's duty to defend, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove that it cannot); *Associated Aviation Underwriters, Inc. v. Vegas Jet, L.L.C.* (D.Nev. 2000) 106 F.Supp.2d 1051 (under Nevada law, liability insurer's duty to defend, once triggered, generally continues throughout course of litigation against insured); *Home Savings Assn. v. Aetna Casualty & Surety Co.* (Nev. 1993) 854 P.2d 851 (insurer obligated by contract to defend insured owes insured continuing duty to defend).

<sup>4</sup> *Western Casualty & Surety Co. v. International Spas of Arizona, Inc.* (Ariz.Ct.App. 1981) 634 P.2d 3 (general liability insurer was obligated to defend insured as to all allegations of complaint, including those which were groundless or uncovered as far as insurer was concerned); *Fire Ins. Exchange v. Bentley* (Colo.Ct.App. 1998) 953 P.2d 1297 (if underlying complaint asserts more than one claim, duty to defend against all claims asserted arises if any one of them is arguably a risk covered by policy).

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<sup>5</sup> *TPLC, Inc. v. United National Ins. Co.* (10th Cir. Colo. 1995) 44 F.3d 1484 (duty to defend could not be prorated between insurer and insured as a self-insurer during the period that it was uninsured as to defense costs).

<sup>6</sup> The 4190 endorsement differs from the 20 10 endorsement in that it only provides coverage to the extent that the additional insured is "held liable" for the named insured's acts or omissions.

<sup>7</sup> One court has even noted that the rules regarding an insurer's duty to defend under California law apply to non-insureds when the insurer agrees to provide a voluntary defense. (See *Mosier v. Southern California Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1040.)

<sup>8</sup> It was even determined in an unpublished decision that an insurer has an immediate duty to provide a complete defense to an additional insured under a 20 09 operations additional insured endorsement where there was a mere possibility that covered property damage occurred during operations. (*Urban West Communities v. U.S. Fire* (May 10, 1996, G019729) [nonpub. opn.].)

<sup>9</sup> Compare this decision with the unpublished decision of *Golden Eagle Ins. Co. v. Pardee Construction*, B130619 (Second Dist., Div. 5) issued 21 days before *Pardee Construction Co. v. Insurance Company of the West* came down. Amazingly, at the insistence of Golden Eagle, itself, the Second District found the "your work" exclusion to be ambiguous. Having done so, the Court then looked to the reasonable expectations of the insureds and found that neither the additional insured developer **nor the named insured subcontractor** could expect any coverage for a project under a policy issued years after the project was completed.

<sup>10</sup> Moreover, the failure to appoint "cumis" counsel may necessitate the appointment of a "cumis" adjuster. (See *State Farm Fire & Casualty Co. v. Superior Court* (1989) 216 Cal.App.3d 1222 [holding that the prior appointment of "cumis counsel" may alleviate the need for the appointment of an independent adjuster].)