

# To Be or Not to Be An Additional Insured or Certificate Holder

Henry E. Seaton, Esq.

Seaton & Husk, L.P.

2240 Gallows Road, Vienna, VA 22182

*www.transportationlaw.net*

703-573-0700

# Caveat

- An insurance policy is a written bilateral contract between an insurer and the policyholder (the “named insured”).
- Shippers and brokers seek “Certificate Holder” and “Additional Insured” status for two reasons.
  - To obtain assurance of a carrier’s ability to meet its legal obligations; and
  - To receive notice of cancellation; and
  - As a risk transfer device, to obtain the benefits of the carrier’s coverage for the negligent acts or omissions of others.
- Generally speaking, a shipper or broker should make no “assumption” about the coverage afforded to them based upon a “Certificate of Insurance” or evidence of “Additional Insured” status alone without further verification.

# Definitions

# Certificate of Insurance

- Issued by broker or agent on an “Acord Certificate”
- Evidence only that a policy was issued to the named insured at the effective date of the certificate.
- Does not identify exclusions or restrictions in the policy or warrant coverage.
- Agent agrees to endeavor to notify certificate holder of cancellations.
- Gives certificate holder no enforceable rights.
- Is some evidence of certificate holder’s “due diligence”.
- Certificate of Insurance is not a contract and does not convey any access to coverage to the certificate holder.

# Additional Insured Status

- AI Status is often required by entities when the named insured has agreed to indemnify that party in a contract.
- Naming the indemnitee as an additional insured reinforces the risk transfer by providing the additional insured with direct rights against the named insured's policy.
- Additional insured is given rights under the insured policy by the additional insured endorsement.
- Extends some protection to the additional insured under the terms and conditions of the named insured's policy.
- Additional Insured is provided with Notice of Cancellation by the underwriter (obvious benefit).

- Additional insured coverage is often tied to “liability arising out of the operations performed by or on behalf of the named insured”. (under current ISO language is “caused in whole or in part” - broad)
- Unless affirmative endorsement is issued broadening coverage of the policy, the additional insured stands in the shoes of the policyholder with respect to coverage afforded, accepting all limitations, exclusions and provisions of the underlying policy AND the endorsement.
- Additional insured must share one policy limit with policyholder.
- A major coverage issue is whether additional insured is merely seeking indemnification for policyholder’s obligations to it or whether additional insured is seeking general liability coverage for its own negligent actions.
- The scope of coverage afforded can only be determined by examining the policy and the specific endorsement!
- In some policies, additional insured status will void the insurance.

1. “Named Insured” bought and paid for the policy.
2. “Automatic Insureds” are those persons falling within the definition of an insured in the policy, e.g., employees of a corporation, Named Insured.
3. “Additional Insureds” entities added to the definition of an insured by a special endorsement defining extent of coverage.
4. “Additional Named Insured” is ambiguous and DANGEROUS:
  1. Another “Named Insured” co-equal coverage with Named Insured, usually only given to affiliates or owners of the Named Insured and never to outsiders.
  2. An “Additional Insured”

# Automatic Insured

- Employees of insured corporation in scope of employment.
- Coverage duties owed to third parties (shippers or brokers) under the policy without either a formal certificate of insurance or additional insured status.
- Subparagraph e. of ISO Truck Insurance Forms makes shippers and brokers automatic insured parties in BI and PD policies.

## Sec II.A.1.e.- provides:

1. “Who are “Insureds”?... e. Anyone liable for the conduct of an “insured” described [in the policy] but only to the extent of that liability.” (vicarious liability for the named insured’s acts)
- This makes “Additional Insured” status not a major benefit coverage issue for the negligent acts (crashes) of the motor carrier.

# Additional Named Insured

- Two interpretations:
  - Additional “Named Insured” or “Additional Insured.”
- A “Named Insured” Extends coverage of the policy to all operations of the named insured without nexus to work performed for it by policyholder.
- Not relevant where parties are unaffiliated.

- Loss Payee Status – For a lessor or provider of the equipment to the Named Insured who insures the equipment for first party property damage without regard to fault; usually never on a liability policy.
- Motor Truck Cargo “Liability” Policy - policies sold to motor carriers affording specified coverage for loss, damage or delay to the property of others while in their care, custody and control in transit. This coverage is otherwise excluded from other forms of liability insurance. (Not to be confused with first party goods in transit insurance used in sales transactions, e.g. C.I.F. contracts under the UCC Sales §2-320 or § 2-321. which insurance specifically describes the goods insured.)
- Worker’s Compensation Insurance – coverage mandated by state law requiring employers to provide financial surety that employees’ claims for injury on the job will be paid pursuant to schedule of benefits provided by statute.

# Best Practices:

What evidence of insurance is typically required?

- Under traditional principles of federal transportation law:
  - Shippers and brokers are customers of carriers, carriers are vendors.
  - Federal statutes and requirements that carriers be “fit, willing and able” affording shippers and brokers all of the financial assurance and liability insurance required.

# Auto Liability/Vicarious Liability

- Motor carriers required to have a minimum of \$750,000 per occurrence in BI/PD insurance. 49 C.F.R. 379.
- Insurer is required to post broad endorsement/filing to pay all judgments for which carrier is legally liable without exclusion, guaranteeing that \$750,000 per occurrence minimum would be paid. MCS-90/BMC-91.
- Shipper and broker traditionally had no liability for accidents as supply chain / shippers and they could rely upon BMC-91X in carrier selection

# Cargo Liability

- All carriers were legally liable for claims under Carmack Amendment (“full actual value”)
- Regulated carriers were required to file Form BMC-32
  - Cargo insurer liable for full legal liability subject to \$5000 per loss and \$10,000 aggregate.
  - FMCSA website afforded proof of insurance with no coverage loophole, at least for first \$5,000 of coverage.

# CGL and WC coverage

- As customers, neither shippers nor brokers had potential liability for worker's compensation claims, so proof of same was not typically required.
- General liability insurance was not deemed required because Auto Liability (BI and PD) and cargo insurance covered virtually all of the potential risks associated with transportation.

## ***NOTE:***

- Some Exclusions from general liability include:
  - All liability arising out of use of a motor vehicle
  - Liability due to an employee's injury (worker's comp)
  - Liability for damage to cargo
- Some Exclusions from BI and PD include:
  - Damage to cargo and injury to employee of insured

# Post-Deregulation

- Written bilateral? contracts began trumping general principles of federal transportation law.
- Transportation departments of major shippers eliminated and contracting for transportation turned over to procurement department.
- Shippers began dictating contract terms, treating brokers and carriers as garden variety “service providers”.
- The result: Shipper imposed contractual indemnity and additional insurance requirements.
- Because of cargo insurance problems, shippers began offsetting cargo claims against freight charges.
- Cargo claims/Offset/Indemnity
  - “The Spiral of Death” for small carriers with poor insurance.

# Post Deregulation Standard Practices

- Standard evidence of broker due diligence, if there is any standard, appears to be as follows:
  - A Certificate of Insurance should be obtained on the sample Acord form showing the broker as the certificate holder with the following limits:
    - General Liability - \$1,000,000 per occurrence
    - Auto Liability - \$1,000,000 CSL per occurrence
    - Cargo Liability Broad Form, Not Specified Peril - \$100,000 per occurrence
    - Worker's Compensation – as required by state law

# What is Wrong with the Certificate of Insurance?

- It may be the best the shipper or broker can get in the transactional market, but do not sleep at night relying on it.
- It is not a contract of insurance.
- It does not impose any legal obligation on the agent to actually notify you of any changes.
- It does not disclose policy terms and conditions which can be troubling
  - General Liability policies because they exclude worker's comp, cargo and liability arising out of use of commercial motor vehicle, seldom present real issues.

# Auto Liability

- MSC-90/BMC-91X filing shown on Certificate is best evidence of Auto Liability.
- Why? Because:
  - Verifiable on website of FMCSA
  - The filing with FMCSA can only be canceled on 30 days notice; insurance policy can be cancelled in about 10 days for non-pay.
  - The filing requires full legal liability coverage.
- Certificate may have value in disclosing umbrella or additional Excess Auto Liability limit
  - But if you require in excess of the statutory minimums, SIRs and scheduled vehicle issues may vitiate the coverage you think you are obtaining either as a certificate holder or as an additional named insured.

So what do you get if you insist upon additional insured or additional named insured status?

- On BI and PD of the GL and AL policy:
  - You do not get much not already covered under the Automatic Insured provisions.
  - Some extra duty on the insured not to settle around the broker for less than the full claim or the fully policy limits?
  - Notice of Cancellation!

# Cargo Liability Policies, Value of Additional Insured Status

- Many say it is a conflict in terms.
- Cargo policies are limited to cargo in the possession of an insured which belongs to another so is arguably of no use to shipper.
- If broker gets benefits of policy, it is still subject to the exclusions, so is it of any value?
- Area of great misunderstanding.

- Even underwriters will issue additional insured endorsements modifying policies and naming shippers as an additional insured. Is it bad faith or a mistake they can use against the shipper when denying a claim?
- Loss payee status is proper status for shipper or broker
  - Requires insurer to pay claimant, not indemnify its insured trucker only after the trucker has paid the claim as some cargo “indemnity” policies permit (as opposed to “liability” cargo policies).

- FMCSA did industry no favors in abolishing the BMC-32 endorsement
- Certificates of Insurance and Additional Insured Certificates alone do not disclose exclusions and loopholes:
  - Specified vehicle limitations
  - Restrictions against theft coverage
  - Wetness, dampness and moisture exclusions
  - Temperature damage/reefer breakdown isn't enough
  - See Protecting Motor Carrier Interests In Contracts for discussion of insurance loopholes.
- The major problem with indemnity, offsets, and cargo claims is caused by defective cargo policies!

# Worker's Compensation

- State law variance in coverage issues
- The problems of double brokerage
- Use of owner-operators/the misclassification issue
- Shippers and brokers are not employees and should not seek Additional Insured or endorsement as Alternate Employer.
- Just warranty that carriers are in compliance.

# The Big Squeeze – Risk Transfer Devices as Liability Runs Upstream and Indemnity Runs Downstream

- As shown herein, Certificates of Insurance:
  - do not provide assurance of actual coverage, particularly with respect to BI and PD over the statutory amounts; or
  - real legal liability coverage for cargo loss or damage.

- Yet, shippers insist on:
  - full indemnity against negligent selection or vicarious liability lawsuits; and
  - full broker responsibility for cargo claims (turning broker into a forwarder and perhaps voiding broker's contingent coverages)
  - indemnification language waiving Carmack
- They protect themselves through contractual indemnity and additional insured requirements, two risk transfer devices which increase the broker's risk exponentially.

- The result is the broker, whose expertise is in arranging transportation and finding licensed, authorized and insured service providers, are now thrown into the liability loop with little practical way to pass the liability downstream to small carriers.

# What is the Broker to Do?

- Don't accept indemnity obligations you cannot pass downstream to the service providers.
- Resist the two-handed pick pocket.
- Remember, indemnity and additional insurance are two risk transfer devices which go hand in hand.
- You must focus on both to preserve your wallet.

# Avoid Overreaching Indemnification Language in Contracts

- What's fair / what's legal?
  - Both parties to a bilateral contract indemnify the other to the extent their negligent acts result in the indemnitee suffering loss, damage or claim (other than cargo).
- What do shippers' procurement departments typically try to obtain?
  - Broadly worded indemnity making the broker or carrier liable for all loss, damage or claim (including cargo, resulting from or occasioned by the services provided turning broker into a forwarder).
  - Shippers follow a "If you don't ask, you don't get strategy" and claim no one ever turns them down.
- What's the difference?
  - The shipper or broker picks up liability for the negligent acts or omissions of third parties such as lumpers.
  - When the shipper is sued they can pay unreasonable amounts to settle claims and then seek indemnity, leaving the indemnitor with no ability to settle and dilution of any applicable coverage the indemnitee otherwise has available.
  - Broker faced with excess limit claims and forced to buy effective reinsurance through contingent auto and contingent cargo policies.

# Effect of Anti-Indemnity Statutes and Additional Insured Requirements

- 33 states now have anti-indemnity statutes precluding shippers and brokers from requiring carriers to indemnify them for their negligence.
- Such statutes may trump abuses of over indemnity language, but
  - After the shipper thinks you're buying him insurance and your insurer disagrees and
  - Some courts may hold that the indemnity is void but the obligation to effectively purchase insurance to cover the shipper's liability is not.
  - Some States Anti-Indemnity Statutes Trump "Buy Me Insurance"  
Some do not.

***ATTENTION Brokers and Carriers: Don't let "Additional Insured" provisions result in an end run around anti-indemnity.***

# Best Practices

- Brokers preserve role as arranger offering indemnity only for your own negligence.
- Provide that you will obtain licensed, authorized and insured carriers.
- Warrant that the statutory minimums will be available as surety for any accident subject to policy terms.
- Consider contingent cargo and contingent liability insurance but be sure you read those policies before you pay your premium.
- Stay out of indemnifying shippers for cargo loss or unilateral shipper offsets; don't become a forwarder.
- Seek professional help before agreeing to broad Additional Insured requirements – the Policy & the Endorsement not the status as an additional insured is key

# Conclusions

- If this webinar hasn't been helpful, don't blame the messenger.
- Additional insured status is the second hand of the two handed pick pocket.
- A prudent broker or carrier would have to read the underlying policy or get the underwriter to opine that coverage is co-extensive with a broad indemnity afforded in order for the indemnitee to feel secure.
- In practice, that only happens with multi-million dollar contracts, not with standard auto liability and particularly cargo coverage.
- Major insurance industry push-back on simple transparency frustrates shippers, brokers and carriers.