Additional Insured and Insured Contract Liability Insurance Coverage for General Contractors

by David M. McLain and Alex M. Nelson

General contractors often obtain liability insurance coverage under the policies of their subcontractors through either additional insured endorsements or by way of insured contracts. Recent Colorado legislation impacts the ability of general contractors to obtain these policy benefits.

Developers, general contractors (GCs), and other construction professionals frequently rely on their commercial general liability (CGL) insurance policies to help resolve construction defect or other claims that arise during or after completion of a construction project. Historically, those entities and their attorneys have looked to their own CGL policies to fund defense of claims and indemnity. Additionally, however, the CGL policies purchased by the project subcontractors often provide developers and GCs with defense and indemnity as additional insureds (AIs) under the policies. This article explores AI CGL coverage in the context of construction claims, including the benefits and shortcomings from the perspective of a developer or GC.

Consideration of AI coverage is timely in Colorado. State Senate Bill (S.B.) 07-087, recently passed by the legislature and signed into law by Governor Bill Ritter, places new, explicit limitations on the extent to which GCs can contract for AI coverage.[1] This legislation is part of larger anti-indemnity legislation that will have sweeping effects on risk transfer in Colorado construction matters.

Obtaining Coverage

For an additional (often nominal) fee, a subcontractor can name a GC or developer as an AI under its CGL policy. This commonly is required by construction subcontracts, which often specify policy limits, effective dates, or other important terms of the AI coverage. Some policies contain a "blanket" AI endorsement, which provides AI coverage for any person or entity to whom the primary named insured is contractually bound to provide such coverage. Otherwise, an endorsement is added to the policy that specifically names those persons, entities, or projects that qualify for AI coverage under the policy.

The subcontractor obtains a certificate of insurance from its carrier or agent that demonstrates that the GC or developer has been named as an AI under the policy. The certificate of insurance does not in itself confer any rights under the policy; it merely is an informational document that is subject to the terms of the policy itself, including any AI endorsements that may or may not exist.[2] However, if an insurance certificate indicates that a person or entity is an AI under the policy when no corresponding policy endorsement actually exists, and the intended endorsee reasonably relies on the erroneous certificate, equitable estoppel can apply to afford AI coverage.[3]

The primary and excess CGL policies of many GCs contain provisions requiring them to obtain certain AI coverage from their subcontractors. If the proper AI coverage is not provided by the subcontractors, the GC's deductible or self-insured retention (SIR) on its own CGL policy can rise, its policy limits may be reduced, and coverage under its primary and excess policies may be taken away entirely.[4] This underscores the importance of a thorough insurance compliance program for a GC.[5]

Typically, only the construction subcontractors on a project provide AI coverage for the GC and developer. The professional liability insurers of design professionals, such as architects and engineers, generally do not provide AI coverage, because any such coverage would obviate the distinction between CGL coverage (intended to cover risks such as property damage), and professional liability insurance (intended to cover risks such as professional negligence).

Benefits of AI Coverage

The primary benefits sought by any insured under a CGL policy, including an AI, are: (1) payment of defense fees and costs (including attorney fees) in a potentially covered matter by the insurance carrier; and (2) for the carrier to indemnify the insured from and against any liabilities incurred, including judgments or settle-

Article Editor:

James W. Bain of Benjamin, Bain & Howard, L.L.C., Greenwood Village—(303) 290-6600, jamesbain@bbhlegal.com

About the Authors:

David M. McLain is a partner at Higgins, Hopkins, McLain & Roswell, LLC. Alex M. Nelson is an associate at that firm. Their practice focuses on representation of general contractors and developers in construction matters, including defense of complex construction defect claims—(303) 987-9870, mclain@hhmrlaw.com, nelson@hhmrlaw.com. The authors thank Clayton Sharkey of IMA of Colorado for his invaluable contributions to this article.

Construction Law articles are sponsored by the CBA Construction Law Section.

ments. In Colorado, the duty to defend is broader than duty to indemnify[6]—that is, carriers often fund insureds' defenses even when it eventually may be determined that the carrier has no duty under the policy to indemnify by means of satisfying a judgment or settlement.

To trigger a carrier's duty to defend an AI, the AI must put the carrier on notice of a claim or potential claim. A preliminary determination made by the carrier is whether the insured's notice was timely. To decline a tender of defense based on untimely notice, a carrier must determine that the insured delayed unreasonably in providing its notice.[7] If an insured has unreasonably delayed notice to an insurer, the insurer may deny policy benefits only if it can prove by a preponderance of the evidence that it was prejudiced by the delay.[8]

A carrier owes to an AI the same duties it owes to its primary insured in evaluating a tender of defense.[9] An insurer that seeks to avoid its duty to defend bears a heavy burden.[10] In determining if a duty to defend exists, an insurer must look to the allegations in the complaint to ascertain whether allegations of a covered liability have been made.[11] If the allegations even potentially or arguably come within the policy coverage, or any doubt exists whether a theory of recovery that triggers coverage has been stated, the insurer must accept the defense of the claim.[12] If a duty to defend arises, an insurer must defend against all claims alleged in the lawsuit, even if some of those claims would not be covered if alleged individually.[13]

The appropriate approach for an insurer who asserts no duty to defend exists is either: (1) to provide a defense to the insured under a reservation of its rights to seek reimbursement; or (2) to seek a declaratory judgment to confirm its coverage position.[14] Carriers use declaratory relief actions to obtain a judicial determination of whether a duty to defend exists to avoid paying defense costs and needing to seek reimbursement later.[15]

An insurer can waive coverage defenses that are not timely asserted by reservation of rights.[16] Often, careless claim adjusters lump together their coverage determinations for the primary named insured and for the AI, and issue just one declination letter or one reservation of rights letter. However, any reservation of rights against an AI must be directed to the AI, not just to the primary named insured.[17] Failure of a carrier to state its coverage position to an AI within ninety days of the date of tender is presumptively bad faith in Colorado.[18]

A carrier has a duty to defend its AI even when it also is defending the named insured.[19] In an instance where both a primary named insured and an AI are provided defenses, conflicts of interest in the dispute often require appointment of separate defense counsel.[20] Practically speaking, appointment of separate defense counsel also will require appointment of separate claim adjusters within the insurance company, because regular reporting on case status and strategy is required by all carriers.

AI Coverages and Common Exclusions

AI status typically is conferred by an AI endorsement attached to the primary named insured's policy. The two most common forms of endorsement are drafted and regularly revised by the Insurance Services Office, Inc. (ISO) and adopted for use by the carriers. These forms are are "CG 20 09"[21] and "CG 20 10."[22] The ISO intends that CG 20 09 be used when the primary named insured has no contractual obligation to name an AI, and that CG 20 10 be used when a contractual obligation does exist. Therefore, CG 20 10 is the more typical form, as gratuitous purchase of AI coverage by a subcontractor for its GC rarely occurs. Many CGL and umbrella policies include provisions that automatically grant AI benefits to any person or entity to which the primary named insured is contractually obligated to provide AI coverage.[23] Under such policies, further endorsement to the policy to provide the AI status is unnecessary.

When AI coverage is conferred through use of form CG 20 09 or CG 20 10, much of the language in the body of the insurance policy applies equally to the AI as to the primary named insured, because the endorsement has the effect of amending the definition of the "insured" in the policy to include the AI, as well as the named insured. However, endorsements CG 20 09 and CG 20 10 may contain additional coverage exclusions and grants that modify the AI's coverage, in some respects significantly.

Most CGL policies are "occurrence policies," which confer coverage for personal injury or property damage that occurs during the policy period, regardless of when the claim is presented to the insured or carrier.[24] This contrasts with "claims made" policies, which cover claims made during the policy period regardless of when the alleged damages occurred. A typical insuring agreement in a CGL policy states that the insurer will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage," if such injury or damage is caused by an "occurrence" that takes place during the policy period.[25]

Property Damage

In the majority of construction-related lawsuits (defect claims in particular), allegations of property damage—rather than bodily injury—trigger coverage. "Property damage" is defined in CGL policies as "physical injury to tangible property, including all resulting loss of use of that property."[26] As a general rule, property damage does not include economic harm.[27] Most policies exclude coverage of property damage to the insured's own work or product. Therefore, if a construction defect exists in a contractor's work, some sort of resultant property damage must flow from performance of that bad work for coverage to exist. This is true except if the defective work was performed by a subcontractor on the insured's behalf.[28] This is an example of where a GC AI may have much broader coverage under a CGL policy than the named insured subcontractor, because the GC almost certainly performed most or all of its work through subcontractors.

Vicarious Liability From the Named Insured

Many carriers attempt to limit AI coverage to vicarious liability imposed on an AI for the acts or omissions of its subcontractor named insured, as opposed to liability the AI may incur because of its own acts or omissions. For example, the current version of form CG 20 10 limits AI coverage to:

> "bodily injury," "property damage," or "personal and advertising injury" caused in whole or in party, by: (1) [the primary named insured's] acts or omissions; or (2) the acts or omission of those acting on [behalf of the primary named insured.][29]

Another form, CG 7482, states:

> This insurance does not apply to any . . . "property damage" resulting from any act or omission by or willful misconduct of the additional insured shown in the Schedule, whether the sole or a contributing loss. The coverage afforded to the additional insured is limited solely to the additional insured's "vicarious lia-

bility" that is a specific and direct result of [the named insured's] conduct. . . .
"Vicarious liability" as used in this endorsement means liability that is imposed on the additional insured solely by virtue of its relationship with you, and not due to any act or omission of the additional insured.

Coverage for General Supervision of Named Insured

Even if a CGL carrier attempts to limit AI coverage under its policy to vicarious liability only, absent an explicit statement like that found in CG 7482 or CG 20 10, many courts hold that AI coverage extends to the acts or omissions of the AI itself, including its general supervision of the primary named insured. The Tenth Circuit Court of Appeals has ruled several times that standard AI endorsement language provides the AI coverage for matters caused by both the named insured's negligence and the AI's negligence.[30] The court explained that this majority rule is based largely on the premise that any exclusionary clause of an insurance contract must be construed in favor of the insured.[31]

Ongoing Operations Requirement and Work Completed Exclusion

In recent years, insurance carriers have attempted to limit their coverage for AIs to allegations of property damage that occurs during the ongoing operations of the primary named insured or the AI, so as to avoid liability for property damage caused by construction defects that manifest long after completion of the construction project. The 1993 and 1997 editions of form CG 20 10 provided AI coverage "only with respect to liability arising out of [the primary named insured's] ongoing operations for [the AI]."[32] Fortunately for GCs and much to the CGL carriers' chagrin, that wording has been held by courts in many states not to have achieved the desired coverage limitations.[33]

For example, in *St. Paul Fire & Marine Ins. Co. v. Amer. Dynasty Surplus Lines Ins. Co.*,[34] the court determined that the ISO form's language was ambiguous because it could attempt to limit coverage either: (1) to any property damage arising while the primary named insured is on the GC/AI's project performing work; or (2) to liability arising, in a "but for" sense, from the named insured's performance of its work. Because any insurance policy ambiguity is resolved in favor of the insured in Colorado, courts in this state likely will adopt the latter interpretation of the AI endorsement language.

In fact, the Tenth Circuit made a similar ruling in *Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.*[35] The court, applying Wyoming law, held that for something to "arise out of . . . ongoing operations," it must only be a "natural consequence" of the operations. However, Colorado courts have not followed suit. The Colorado Court of Appeals recently ruled in *Weitz Company, LLC v. Mid-Century Ins. Co.*[36] that the plain and ordinary meaning of the ongoing operations limitation found in CG 20 10 (1993 edition) is not ambiguous, and that the endorsement does not provide coverage for an AI's completed operations.

The current ISO form CG 20 10 AI endorsement covers the primary named insured's acts or omissions (or the acts or omissions of those acting on its behalf), "in performance of [its] ongoing operations for the additional insured."[37] The endorsement continues, and makes the following additional exclusions:

This insurance does not apply to "bodily injury" or "property damage" occurring after:
(1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance, or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
(2) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.[38]

The efficacy of these most recent attempts by the ISO and CGL carriers to limit liability for completed operations has yet to be significantly tested in the courts. It should be noted, though, that ongoing operations of a GC can include supervision of subcontractors.[39] Also, ongoing operations are not limited to an insured's work in its most frequent or core trade or business.[40] Coverage for only ongoing operations requires a demonstration that the work performed was not yet completed or put to its intended purpose.[41] A question that remains for interpretation by the courts is whether "operations" means the entire project, or whether it means each discrete subpart of a contractor's work on the project, such as individual buildings in a multi-family complex. Because the word is ambiguous and generally undefined in policies, the interpretation that most favors the insured likely will be adopted.[42] Nonetheless, completed work exclusions on AI coverage generally are enforced by courts when clearly worded and when the facts warrant.

Insured Contract Indemnity Agreements

If no AI coverage is obtained by a GC, or if the coverage is determined not to be triggered by the particular facts of a claim, the GC still may obtain the benefits of defense and indemnity from subcontractors' policies. If the subcontract qualifies as an "insured contract," a defined term in the CGL policy, the GC can trigger the carrier's duty to defend or indemnify.

In almost all CGL policies, a coverage exclusion for contractual liability of the primary named insured is written into the policy. This is because CGL insurance is intended to cover unforeseen liabilities and not the normal business risks assumed in contracts. However, the CGL exclusion does not apply to contractual liability undertaken in an insured contract. Typical policies provide as follows:

This insurance does not apply to . . . "[b]odily injury" or "property damage" for which the insured is obligated to pay damage 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. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damage because of "bodily injury" or "property damage", provided:
(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternate dispute resolution proceeding in which damages to which this insurance applies are alleged.[43]

Thus, indemnity is available to a third party that enters into an insured contract with the primary named insured. A defense under the policy also is available to that third party under the insured contract if its terms provide for a shifting of attorney fees and litigation costs.[44] Additionally, the property damage alleged must have occurred after the parties entered into the insured contract.

An "insured contract" is defined in most policies to include, among other things:

> [t]hat part of [any] contract or agreement . . . 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.[45]

Thus, an insured contract essentially is an indemnity or hold harmless agreement that transfers risk between the parties.[46] An agreement to provide insurance is not itself an indemnity agreement, because it does not require either party to directly assume tort liability, nor is it an insured contract.[47] Similarly, a performance bond also is not an insured contract.[48]

Arguably, the "other insurance" clause in an indemnitor's policy does not apply to any carrier's insured contract defense of an indemnitee, because the indemnitee is not technically an insured under the indemnitor's policy. Any defense or indemnity provided to an indemnitee based on the insured contract policy provisions are simply third-party benefits under the policy.

Where no contractual transfer of tort liability occurs—for example, where an indemnitor agrees only to indemnify for its sole negligence and therefore cannot obtain insured contract benefits under the policy—an indemnitee still can obtain a defense under the indemnitor's policy if it was named as an AI. This is because the two types of coverage operate independently of one another and are triggered in different ways.[49]

Recent Colorado Legislation and Potential Implications

S.B. 07-087 adds a new subsection (6) to CRS § 13-21-111.5, Colorado's pro-rata liability statute, effectively barring the transfer of tort liability among construction professionals.[50] The new statute applies to all "construction contracts," a term defined to include, among other things, construction project subcontracts between GCs and subcontractors that are entered into on or after July 1, 2007.

In relevant part, the new subsection provides that "it is the intent of the General Assembly that the duty of a business to be responsible for its own negligence be nondelegable."[51] The statute specifies that:

> any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury

to person or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.[52]

The legislation does, however, permit indemnification in construction contracts for amounts equivalent to "that represented by the degree or percentage of negligence or fault attributable to the indemnitor or the indemnitor's agents, representatives, subcontractors, or suppliers."[53] It also imposes new limits on the extent to which a contracting party may require AI coverage. A GC now may require its subcontractors to name it as an AI "only to the extent that such additional insured coverage provides coverage to the [GC] for liability due to the acts or omissions of the [subcontractor]."[54]

As the language of the statute makes clear, tort liability cannot be transferred between construction professionals in contracts entered into after July 1, 2007. Because such tort liability transfer generally is a prerequisite to a GC's receipt of insured contract coverage under CGL policies of its subcontractors, it appears at first blush that the insured contract concept quickly is reaching the end of its useful life in Colorado. However, case law in other states has reached the opposite conclusion, and held that contractual liability insurance coverage actually may serve to circumvent anti-indemnity statutes.

For example, in *McAbee Constr. Co. v. Georgia Kraft Co.*,[55] the Georgia Court of Appeals held that, although Georgia's anti-indemnity statute prohibited certain risk transfer clauses in construction contracts, the contract at issue expressly transferred risk to the indemnitor's insurer, and not to the indemnitor itself. The insurance provisions of the contract, when read in conjunction with the indemnity provisions, confirmed the parties' intent to transfer risk to the indemnitor's insurer rather than the indemnitor. Because there is no public policy objection to transferring risk to insurers in Georgia, the insured contract exceptions to the contractual liability exclusions in the subcontractor's CGL policy provided benefits for the GC litigant in that case. If Colorado courts follow the lead of states like Georgia in this regard, insured contract coverage for GCs still may be effective despite the new amendments to CRS § 13-21-111.5.

With respect to AI coverage for GCs, the statute clearly limits only the type of coverage for which AIs can contract. There is no corresponding limit on the AI coverage that actually can be provided by a carrier. How carriers' AI endorsements will change in Colorado, if at all, remains to be seen. It is not clear whether AI endorsements will be redrafted to mirror the limits on the parties' ability to contract (which occurred in New Mexico in 2004 after similar legislation was enacted[56]), or whether the same ISO form AI endorsements used nationwide will continue in use in Colorado. If the latter scenario plays out, AI coverage for GCs may not, as a practical matter, be impaired by the new statute in any way. After all, AI coverage provided by a carrier without any contractual obligation of its primary named insured is valid and enforceable coverage.[57]

Even if AI endorsements were revised in Colorado, the carriers' duties to indemnify likely would be affected more than their defense duties. Practically speaking, even if CGL policy language provided only a duty to defend a GC AI to the extent of the primary named insured's negligence (the contractual limit imposed by S.B. 07-087), when looking at a complaint at the start of a lawsuit and construing the allegations in favor of coverage,[58] a version of the facts almost always can be created that implicates the subcontractor and alleges negligence against it, thereby triggering the carrier's duty to defend the GC. Therefore, carriers' duties to defend their AIs will continue into the future, along with the attendant coverage disputes.

Conclusion

In light of the recent legislation that directly and indirectly affects AI and insured contract coverage for GCs in Colorado, the future state of such coverages is somewhat uncertain. However, GCs will continue to require their subcontractors to name them as AIs under the subcontractors' CGL policies and will continue to enter into indemnity agreements with subcontractors to the maximum extent permissible by the law. This type of risk transfer has been a fundamental element of the economic viability and stability of the construction industry for many years. Therefore, AI and insured contract coverage and the related coverage disputes will persist in Colorado into the foreseeable future as the case law in this area continues to evolve.

Notes

1. CRS § 13-21-111.5(6)(d).

2. *See Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.*, 794 P.2d 264 (Colo.App. 1990).

3. *See, e.g., Strain Poultry Farms, Inc. v. Am. Southern Ins. Co.*, 197 S.E.2d 498 (Ga.App. 1973); *Blackburn, Nickels & Smith, Inc. v. Nat'l Farm-*

ers Union Prop. and Cas. Co., 482 N.W.2d 600 (N.D. 1992); *Riske v. Nat'l Cas. Co.*, 67 N.W.2d 385 (Wis. 1954). *But see Broderick Inv. Co., supra* note 2 (refusing to apply promissory estoppel, holding no duty of insurance carrier to inform additional insured of subsequent decreases in the coverage stated on insurance certificate).

4. *See, e.g.*, nonstandard forms M-5085 (8/2002), ICB-7006 07 05, and NPC-706 05 06.

5. Many reputable insurance brokers regularly perform this service for their clients, whereby they review certificates of insurance submitted by a GC's subcontractors to ensure conformity with the subcontract terms and the GC's own CGL policy requirements.

6. *See City of Englewood v. Commercial Union Assur. Cos.*, 940 P.2d 948, 953 (Colo.App. 1996).

7. *See Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223 (Colo. 2001).

8. *See id.*

9. *See Sears, Roebuck and Co. v. Reliance Ins. Co.*, 654 F.2d 494 (7th Cir. 1981); *Presley Homes, Inc. v. Am. States Ins. Co.*, 108 Cal.Rptr.2d 686 (Cal.App. 2001).

10. *See City of Englewood, supra* note 6 at 953.

11. *See Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).

12. *See id.*; *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 827 (Colo. 2004).

13. *See City of Englewood, supra* note 6 at 954.

14. *See Hecla Mining Co., supra* note 11 at 1089.

15. *See, e.g., Constitution Assocs. v. New Hampshire Ins. Co.*, 930 P.2d 556 (Colo. 1996).

16. *See Fed. Life Ins. Co. v. Wells*, 56 P.2d 936, 938 (Colo. 1936); *U.S. Fidelity & Guar. Co. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 210 n.3 (Colo. 1993).

17. *See Knox-Tenn Rental Co. v. Home Ins. Co.*, 2 F.3d 678 (6th Cir. 1993) (applying Tennessee law).

18. *See* CRS § 10-1-131; 3 C.C.R. Div. of Ins. § 5-1-15.

19. *See Priester v. Vigilant Ins. Co.*, 268 F.Supp. 156 (S.D.Iowa 1967).

20. *See St. Paul School Dist. No. 625 v. Columbia Transit Corp.*, 321 N.W.2d 41, 47 (Minn. 1982).

21. Form CG 20 09 was known as "Form A" before 1997.

22. Form CG 20 10 was known as "Form B" before 1997.

23. *See, e.g.*, ISO form CG 20 33 07 04.

24. 8 Grund and Miller, *Colorado Personal Injury Practice—Torts and Insurance* § 46.6 (2000). *See also Browder v. U.S. Fidelity & Guar. Co.*, 893 P.2d 132 (Colo. 1995); *Leprino v. Nationwide Prop. & Cas. Ins. Co.*, 89 P.3d 487 (Colo.App. 2003); *Globe Indem. Co. v. Travelers Indem. Co. of Illinois*, 98 P.3d 971, 974 (Colo.App. 2004).

25. *See generally* ISO form CG 00 01.

26. *Id.*

27. *See Hommel v. George*, 802 P.2d 1156 (Colo.App. 1990). *But see Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294 (Colo. 2003) (holding that the particular policy language at issue did not clearly exclude economic damages, and all ambiguities were construed against the insurer).

28. *See* ISO form CG 00 01 at § I(2)(l).

29. ISO form CG 20 10 07 04.

30. *Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001) (applying Wyoming law); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993) (applying Kansas law).

31. *Id. See also Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11 (Colo.App. 1985).

32. ISO form CG 20 10 03 97.

33. *See Valley Ins. Co. v. Wellington Cheswick, LLC*, 2006 WL 3030282, *4-5 (W.D.Wash. 2006). Numerous construction defects including resultant property damage were alleged. The AI endorsement at issue resembled that contained in the 1993 and 1997 CG 20 10, and limited coverage to liability arising out of the ongoing operations of the subcontractor. The court held that although the property damage may not have arisen out of the ongoing operations (it arose later), the liability did, triggering the duty to defend the AI. *See also* Malecki *et al.*, *The Additional Insured Book* 183, Ex. 9.3 (5th ed. 2004) for a complete discussion of the history and evolution of CGL carriers' attempts at "ongoing operations" limitations.

34. *St. Paul Fire & Marine Ins. Co. v. Amer. Dynasty Surplus Lines Ins. Co.*, 124 Cal.Rptr.2d 818, 831 (Cal.App. 2002).

35. *Marathon Ashland Pipe Line LLC, supra* note 30.

36. *Weitz Co., LLC v. Mid-Century Ins. Co.*, No. 06CA0163, 2007 WL 2264634 (Colo.App. Aug. 9, 2007) (not selected for publication).

37. ISO form CG 20 10 07 04.

38. *Id.*

39. *See Marathon Ashland Pipe Line LLC, supra* note 30.

40. *See id.*

41. *See Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882 (10th Cir. 1991) (applying Wyoming law).

42. *See Colard, supra* note 31; *St. Paul Fire & Marine Ins. Co., supra* note 34 at 831 (holding an AI endorsement covering liability arising out of named insured's ongoing operations performed for the AI was ambiguous).

43. ISO form CG 00 01 10 01.

44. *See, e.g., Kiewit Eastern Co., Inc. v. L & R Constr. Co., Inc.*, 44 F.3d 1194 (3rd Cir. 1995).

45. ISO form CG 00 01 10 01.

46. *See VBF, Inc. v. Chubb Group of Ins. Cos.*, 263 F.3d 1226 (10th Cir. 2001) (applying Oklahoma law).

47. *See Lehman v. IBP, Inc.*, 639 N.E.2d 152 (Ill.App.Ct. 1994).

48. *See Sanders v. Ashland Oil, Inc.*, 656 So.2d 643, 649-50 (La.Ct.App. 1995); *Bernstein v. Consol. Am. Ins. Co.*, 43 Cal.Rptr.2d 817 (Cal.App. 1995).

49. *See Scottsdale Ins. Co. v. Glick*, 397 S.E.2d 105 (Va. 1990).

50. For a complete discussion of the legislation, *see* Eberle, "S.B. 07-087 and the Enforceability of Indemnification Provisions in Colorado Construction Contracts," 36 *The Colorado Lawyer* 59 (Sept. 2007).

51. CRS § 13-21-111.5(6)(a)(IV).

52. CRS § 13-21-111.5(6)(b).

53. CRS § 13-21-111.5(6)(c).

54. CRS § 13-21-111.5(6)(d)(I).

55. *McAbee Constr. Co. v. Georgia Kraft Co.*, 343 S.E.2d 513 (Ga.App. 1986).

56. *See* N.M. Stat. § 56-7-1 (2003); ISO forms CG 32 04 12 04, 32 05 12 04, and 32 12 12 04.

57. *See Long Island Lighting Co. v. Am. Employers Ins. Co.*, 131 A.D.2d 733, 734 (N.Y.A.D. 1987).

58. *See Hecla Mining Co., supra* note 11. ■