



ADDITIONAL INSURED

'The most litigated insurance concept'

A lot of things can go wrong when a client agrees to add a counter-party to a contract as an additional insured. Here's what your clients can do to reduce the risk of a nasty coverage dispute

BY GREG MECKBACH, *Associate Editor*

If your clients sign agreements that require one party to add the other as an additional insured, there is a risk that the actual insurance placed will not be suitable, insurance lawyers warn.

Clauses requiring one party to add another party as an additional insured can appear in contracts for maintenance provision, equipment installation, commercial leases, and construction, said insurance defence lawyer Gemma Healy-Murphy of law firm Rogers Partners LLP in Toronto.

"It could be one of the most litigated insurance concepts in Canada," said Harmon Hayden, owner of B.C.-based Harmon Hayden Law. This is partly because the insurance placed does not always provide the coverage that one party or the other needs, he added.

"The most difficult broker task is placing coverage for an already-signed contract that has language the broker knows an insurer may not be prepared to cover, or cover in the way required," said Marcus Snowden, principal of Snowden Law Professional Corporation. "This is why getting the broker involved before signing is preferable."

Commercial lines brokers should also be sure to ask questions if they are uncertain about terminology that some contract lawyers use in agreements, or wording that may be specific to a given industry (e.g., leasing, construction, property maintenance, etc.), Snowden recommended. He added that commercial brokers often have access to legal counsel who can provide the required

input to ensure the clause in question is properly understood. "Again, this is done before rather than after signing the agreement."

What can go wrong? The insurance placed may not match the contractual documents or their contractual intent, said Hayden. For example, some contracts requiring one party to add the other as an insured have specified policy limits, said Healy-Murphy.

"It may say, 'You are required to take out a policy for the additional insured, with policy limits of \$5 million,'" she said. "And maybe it turns out that the policy was put in place for \$2 million."

As Hayden observes, "sometimes the parties themselves may not have enough sophistication to understand what it

really means to add another party as an additional insured and the scope of coverage that provides.”

In general, what can parties to a contract do to reduce the risk of a dispute if one of those parties must place insurance for the other? “Coverage placement is never guaranteed, particularly in hardening markets like the one developing now – so even the best commercial brokers will sometimes have difficulty placing a given risk,” Snowden said.

Snowden represented Economical Mutual Insurance Company in a coverage dispute with renewable energy firm Sky Solar (Canada) Ltd., which was named as an additional insured on a policy written by Economical for contractor Marnoch Electrical Services Inc. Marnoch installed equipment for two of Sky Solar’s Ontario renewable energy projects, one in Brampton and one in Bolton. Fires occurred at two of those projects after those projects were transferred to Firelight Solar Limited Partnership.

Sky Solar had to compensate Firelight Solar Limited Partnership to the tune of nearly \$600,000.

Economical denied Sky Solar’s liability claim and a coverage dispute ensued. Economical won and Sky Solar appealed. In *Sky Clean Energy Ltd. (Sky Solar (Canada) Ltd.) v. Economical Mutual Insurance Company*, released in September, the Court of Appeal for Ontario ruled in favour of Economical, dismissing Sky Solar’s appeal.

The coverage dispute was over what it means when an additional insured is covered for something “arising out of operations” of the client who buys the policy.

Marnoch had an endorsement on its Economical policy covering Sky Solar as an additional insured. That endorsement covered Sky Solar “with respect to liability arising out of the operations” of Marnoch. The fires at the solar power sites were blamed on transformers that were supplied – but not manufactured – by Marnoch. Those transformers were selected by Sky Solar, not by Marnoch.

Ontario Superior Court Justice Peter Cavanagh concluded there was not enough “proximity” between Sky Solar’s decision to use the transformer it selected and Marnoch’s actions to order and install those transformers to determine that Sky Solar’s liability to Firelight arose out of Marnoch’s “operations.”

In the end, Hayden observed, the court decided that the damages arose out of Sky Solar’s own independent alleged negligence. So that meant that Sky Solar’s alleged negligence was outside the scope of coverage provided by the additional insured endorsement on Marnoch’s policy.

Sometimes when one party is required to add another party to its policy, it does not actually comply with its part of the bargain. “You want to get that insurance as soon as possible,” says Healy-Murphy. “Often times, that step might not be taken. Only later on, when there is a problem, do you find out the coverage was not put in place and that you were not added as an additional insured.” cu

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