ADDITIONAL INSURED ISSUES

Additional Insured Obstacles Fall: Coverage Is Not "Premature"

Julian Ehrlich | October 9, 2025



Given how often owners, contractors, their insurers, and courts interpret Insurance Services Office, Inc. (ISO), additional insured (AI) endorsements—and how long these endorsements have been the industry standard—one might expect that all the coverage wrinkles would have been ironed out. However, AI determinations are too often anything but smooth for owners, developers, and contractors relying on this coverage. Instead, AI status and coverage are characterized by frequent, costly, and often unnecessary disputes evidenced by a growing body of case law.

In the last 10 years, courts have rejected many objections by insurers attempting to avoid AI obligations to parties seeking coverage, known as putative additional insureds, who are typically owners and general contractors. Recently, two high court decisions continue the trend toward finding that coverage applies.

This series first briefly traces the evolution of ISO AI wording generating controversy. It reviews how various past attempts by insurers to restrict coverage have failed and then examines recent decisions that reject insurers' latest arguments.

This article discusses how recent authority rejects the argument that AI coverage is premature until a jury verdict is rendered in the underlying tort claim. The second related article, "Additional Insured Obstacles Fall: Is Coverage

Restricted?," reviews the split in authority on whether AI coverage is limited to vicarious liability and how a newer stronger line of decisions finds no such restriction.

Additional Insured Wording Changes

Typically, owners and general contractors require AI coverage from contractors who then buy policies with endorsements to meet those contractual insurance procurement obligations.

A review of the subtle evolution to AI endorsements is helpful to lay a foundation, because every word and comma has been parsed. Before 2004, the ISO additional insured endorsements Additional Insured—Owners Lessees or Contractors (Form B) (20 10 11 85) and Additional Insured—Owners Lessees or Contractors—Scheduled Person or Organization (20 10 10 01) contained a broad "arising out of" the named insured's work or operations trigger providing in pertinent part respectively as follows.

> WHO IS AN INSURED is amended to include as an insured the person shown in the schedule but only with respect liability arising out of '*your work*' (emphasis added) for that insured.…
>
> WHO IS AN INSURED is amended to include the person shown in the schedule but only with respect to liability arising out of *your operations*…. [Emphasis added.]

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the more stringent "caused, in whole or in part by your work" stating in pertinent part as follows:

> **Who is An Insured** is amended to include as an additional insured the persons shown in the Schedule, but only with respect to liability for bodily injury and property damage *caused, in whole or in part,by* "*your work*" (emphasis added)….

In 2013, ISO changed the trigger to "your acts or omissions" wording from the earlier variations of "your work" and "your operations" when it issued its Additional Insured—Owners Lessees or Contractors—Scheduled Person or Organization (20 10 04 13) endorsement that states in pertinent part as follows.

> **Who is An Insured** is amended to include as an additional insured the persons shown in the Schedule but only with respect to liability for bodily injury and property damage caused, in whole or in part,by *your acts or omissions* …. [Emphasis added.]

ISO continues to use the "caused by, in whole or in part, by your acts or omissions" trigger wording in its later 12 19 AI endorsement.

While much of the focus on these changes has been on the implications of the difference between "arising out of your operations" and "caused by acts or omissions," note that ISO has also mixed and matched the phrases "your work," "your operations," and "your acts or omissions" in with "in whole or in part." Arguably, the parenthetical phrase "in whole or in part" is at the heart of the more recent misunderstandings.

Additional Insured Coverage Interpretations

After the 2004 introduction of the 07 04 edition AI endorsements, insurers and policyholders interpretations of "caused, in whole or in part, by your" work, operations, or acts or omissions varied widely resulting in disparate case law until 2017 when New York's high court clarified the meaning of ISO policy language in *Burlington Ins. Co. v. NYC Transit Auth.,* 29 N.Y.3d 313, 79 N.E.3d 477 (2017).

At the time of this writing, *Burlington* has been cited over a thousand times in cases and commentary across the nation, reflecting both that this case is widely recognized as authoritative and that some open questions do remain.

In summary, *Burlington* clarified the following coverage issues.

- Under the ISO wording, there is no cover where the putative AI is solely negligent.

- The putative AI can still insure away up to 99 percent of its negligence where the named insured was the proximate cause of the loss. [1]
- Proximate cause may be evidenced by the named insured's negligence but also its "actionable deeds" such as violations of Occupational Safety and Health and Administration (OSHA), building and industrial codes, and regulations. [2]
- Foreseeability, including prior notice of the dangerous condition or method of work to the named insured, can be decisive in establishing proximate cause. [3]
- AI coverage may not be reduced by the named insured or putative AI's percentage of negligence. [4]
- AI coverage is not restricted to the vicarious liability of the putative AI.

Accordingly, *Burlington* added some certainty regarding AI coverage and forced insurers looking to resist AI coverage to modify their positions. Nonetheless, some insurers continue to baselessly thwart AI coverage to parties relying on coverage.

"AI Coverage Is Premature"

One of the most common positions insurers take is that AI coverage is premature pending a jury determination that the named insured caused the loss and was negligent. Further, their argument continues, causation is always the exclusive province of a jury and not properly decided by a court in summary motions. As a result, when insurers take this position often the putative additional insured must wait for years for in limbo.

However, this wait-and-see position is typically unfounded as a matter of fact and now a new high court decision finds that position to be baseless as a matter of law as well.

As a matter of fact, the causal nexus between loss and the named insured, often the claimant's employer, is often readily knowable from the initial investigation. Frequently, the accident details are recorded in incident reports, workers compensation forms, and OSHA, department of buildings (DOB), industrial code violations or other reports. Moreover, liability theories follow a well-worn path of claims alleging failures to provide injured workers with proper instruction, tools, and equipment and a safe place to work. Furthermore, typically injured workers plead a history of prior complaints to foremen about the risks giving rise to the injury as well.

Thus, usually insurers know or should know AI coverage is proper early in the life of a claim.

Such was the case in *Liberty Ins. Corp. v. Hudson Excess Ins. Co.,* 147 F.4th 249 (2d Cir. 2025), in a coverage declaratory judgment (DJ) action, decided August 13, 2025. In *Liberty*, the Second Circuit Court of Appeals rejected the argument by Hudson, the employer's insurer, that AI coverage for the general contractor and owner was premature pending a causation determination in the underlying personal injury suit. The court found that the facts, including that the named insured employer instructed the injured worker to use an employer-built scaffold that collapsed, established that AI coverage was proper as a matter of law under ISO AI endorsement wording.

Similarly, the court in the DJ held that an order from the pending related state court claim finding that issues of fact remained outstanding on causation was not a reason to delay a causation determination in the coverage case. That court stated as follows.

> *Burlington* did not hold that a court in an underlying personal injury action must first determine a defendant's liability before a court in a separate declaratory judgment (DJ) action can determine whether a named insured proximately cause the injuries at issue for purposes of declaring a duty of indemnity.

This raises the question of whether there can be inconsistent findings on causation in the DJ action and the court deciding the underlying tort claim. Indeed, the court in *Liberty* considered whether the DJ was a "race to *res judicata*." Thus, defendants who are parties to a DJ and related tort case will have to be mindful of *res judicata* implications in each proceeding.

Nonetheless, *Liberty* provides important guidance that should correct the course of insurers who delay providing AI coverage under the pretext of waiting for a jury verdict in the underlying tort case.

The second part of this discussion examines where courts have split on the nature of AI coverage, with particular

attention to the stronger line of cases finding unrestricted AI coverage. See "Additional Insured Obstacles Fall: Is Coverage Restricted?"

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Footnotes

[1] See Julian D. Ehrlich "Readjusting Risk Transfer," NYLJ (June 12, 2017).

[2] See Julian D. Ehrlich "Reaction and Overreaction to *Burlington v. NYC Tr. Auth.*" NYLJ (Feb. 28, 2018).

[3] See Julian D. Ehrlich, "'Caused in Whole or in Part:' Foreseeable Additional Insured Issues," NYLJ (Feb. 14, 2020).

[4] See Cesar A. Pereira and Julian D. Ehrlich "Additional Insured Coverage: Asked, Answered and Unanswered," NYLJ (Jan. 23, 2019).

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