

Miscellaneous Healthcare Spotlight

The Devil in Additional Insured

by Evan Smith



The Additional Insured grant is frequently applied to professional liability and general liability policies, including miscellaneous medical professional liability policies. Extending coverage to Additional Insureds should always be done with care and with eyes wide open to the good, the bad and the downright dangerous aspects of these arrangements.

Start at the very beginning

Before we get into the ins and outs of the Additional Insured provision, a quick primer: Page one, Item one of the Declarations Page of most policies identify the Named Insured. This is the party purchasing the insurance for all insureds under the policy. The Named Insured shoulders certain obligations under the policy, such as paying the premium and deductibles, receiving notices, requesting cancellations, and wields other decision-making powers.

Additional Named Insureds may include people like physicians who are primary owners of the Named Insured entity; subsidiaries; and perhaps joint ventures in which the Named Insured owns 50 percent or more of voting stock. Non-owner physicians or other specified independent contractors covered by a miscellaneous medical professional liability policy would typically be scheduled separately as a covered Insured, with coverage granted expressly for when these professionals are performing professional services on behalf of the Named Insured. This distinction, “when performing professional services on behalf of the Named Insured,” is important in corraling exposure. Without it, the Named Insured could wind up picking up liability for all of a physician’s professional activities, regardless of whom they are performing the services for (e.g., when a doctor is moonlighting, doing procedures at a different facility, or a locum tenens, filling in for physicians at other institutions when sick or on vacation).

The Additional Insured difference

The Additional Insured is none of the above: It is not an Insured as defined under the policy, but an outside third party who has requested and been granted coverage under the Named Insured’s policy. These third parties generally fall into one of the following categories:

- A third party to whom the Named Insured is providing services. For example, a hospital may request Additional Insured status on the policy of the staffing agency that is providing services on the hospital’s premises.
- The owner of a premises in which the Named Insured is conducting its business. If the building owner is named in a claim arising out of the insured’s business operations, it will want to be indemnified or held harmless for something it did not cause (unless of course the claim arises out of the construction or design of the physical location). Examples of this could include injuries caused by an elevator, stairwell, burst pipe, sidewalk or parking facilities that are not under the Named Insured’s control or not its responsibility

under the lease agreement.

- A third party with an ownership or financial interest in the Named Insured. This might be a lender, mortgagee, or private equity fund.

How it happens

The granting of Additional Insured status on a miscellaneous medical professional liability policy can happen in one of two ways.

A Blanket Additional Insured endorsement can be added to confer Additional Insured status on all those to whom the Named Insured contractually owes Additional Insured status or indemnification. This is an administrative plus for everyone, eliminating the need to tack on policy endorsements to capture new Additional Insureds with every new contact. From an underwriter's perspective it only makes sense from an exposure point of view (for both the Named Insured and the insurer) when there are a limited number of Additional Insureds and the Named Insured is assuming a significant portion of the risk with a higher retention/deductible. This blanket approach is more frequently granted for general liability... things get a little trickier on the professional liability (medical malpractice and E&O) side, as we'll see shortly.

Scheduled Additional Insured endorsements grant coverage for these third parties in a more limited way, adding them party by party. This allows for a more measured approach to underwriting Additional Insureds but it can be cumbersome and time consuming for Named Insureds, brokers and underwriters, particularly when there are large volumes or specialized requirements as discussed further below.

All-important contract wording

Decisions on how and when Additional Insured status is granted should be closely tied to the provisions of the Named Insured's contracts for services. Entities that are rigorous in protecting their interests through contract reviews and sound contracting practices are more likely to receive grants of Blanket Additional Insured status and/or to have Additional Insureds scheduled onto their policies. Those that don't have sound contracting practices – for instance they may have sales departments handling contracts without review by General Counsel, Risk Managers, or the like – are less likely to receive these grants (sales folks are motivated by closing deals, not managing risks).

Numerous potential pitfalls

So what is the harm in granting Additional Insured status? By adding an Additional Insured, the Named Insured essentially opens its policy limits to a third party, giving this party rights (legal defense and loss indemnification) under the policy, without requiring them to assume any of the obligations or duties of the policy. The obligations and duties remain with the Named Insured.

Some of the rights granted to Additional Insureds may conflict with the Named Insured's interests. For example, the Additional Insured could assume control of the claims against them falling under the Named Insured's policy. They may want their own counsel and have their own desired defense strategy to protect their own interests, contrary to the Named Insured's interests. This is particularly true in the professional liability realm, where who is actually at fault in a claim can be murky and can put Named Insureds and Additional Insureds at odds with one another. For instance, when a patient sues over a post-operative infection, who is to blame? Is it the staffing agency's nurse who dropped the scalpel on the floor, the hospital that did

not clean the floor properly, or the doctor who should have known not to use the contaminated scalpel handed over by the nurse? The staffing agency's policy should not respond to other parties' independent acts of negligence. Maintaining separate policies (e.g., not granting Additional Insured status) ensures that the insurer (and the Named Insured) has an unfettered ability to defend the Named Insured in a claim.

There are some situations where an Additional Insured extension is just not practical and cannot be effective. For instance, granting Additional Insured status to a third party, such as a client or customer on an E&O (financial injury) policy, could cause the Additional Insured to lose coverage altogether by triggering the Insured versus Insured exclusion in a claim brought by an Additional Insured against the Named Insured. So the Additional Insured is actually thwarting the very coverage under the policy for which it seeks coverage: the E&O policy is there for the client to bring claims against the Named Insured. Alternatively, a would-be Additional Insured may have wholly unrealistic expectations of the insurance cover provided under the Named Insured's policy, and need to be told – for example – that sexual abuse coverage on an occurrence basis is not provided under this (or in all probability, any) policy.

Certain “bells and whistles” frequently requested in Additional Insured wordings can have potentially adverse impacts, too, amplifying the impact of losses on the Named Insured and its loss history. For example:

- Additional Insured status provided on a “primary and non-contributory” basis generally makes the Named Insured responsible for insuring the whole claim, with no contribution from the Additional Insured's policy, and clarifying the Named Insured's policy will act as the primary policy;
- When an Additional Insured requests a “waiver of subrogation,” they are asking the Named Insured, and perhaps its insurer, not to just grant Additional Insured status, but to forego any chance to pursue recovery of any policy proceeds from the Additional Insured's insurer or from the Additional Insured itself; or
- The third party may request that the carrier be required to provide notice of policy cancellation to them as an Additional Insured. This can be challenging as the insurer needs to know exactly where and how to contact the third party – and the insurer must actively assume this extra obligation under the policy.

Making it work

Contracted relations between the Named Insured and their Additional Insured are more complicated than they appear. Basic contractual language can have long lasting claim repercussions and subtle changes in language can materially shift claim responsibilities. Insureds, brokers, and insurance carriers need to take a fresh look at existing contract and insurance language to make sure they are fair and are what the parties intended.

When it comes to Additional Insureds, there are many issues to consider. We want to partner with our Insureds to get what is right and fair to them. Well-informed decisions come only after rigorous review of multiple factors – from specific contract provisions, to particular Additional Insured wordings. Indeed, when it comes to granting Additional Insured status, the devil is in the details.

At Beazley, we work in partnership with our policyholders, the Named Insureds, to help all parties make informed decisions about third parties, Additional Insureds, and manage the risks associated with these coverage extensions. We review contracts and contracting practices. We provide guidance to help our Named Insureds protect their interests and their policy assets, and add endorsements as they make sense for our Named Insureds. Shouldn't this obligation remain with the Named Insured, as the insurer has no contractual privity with the third party?

Hierarchy of "insured" by capacity

Named insured	<ul style="list-style-type: none">• First party, main party insured – entity or person buying the insurance
Additional named insured	<ul style="list-style-type: none">• Specified subsidiaries or persons who are first party insureds
Insured	<ul style="list-style-type: none">• Employees• Board members• Volunteers• Students• Blanket independent contractors
Additional insured	<ul style="list-style-type: none">• Third parties• Clients• Landlords• Lenders

To learn more about Beazley's solutions for Miscellaneous Healthcare Professional Liability Risks, contact Evan Smith at evan.smith@beazley.com

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