ISO's designated insured endorsement intended to alleviate confusion over vicarious liability coverage

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It has been decades now that both personal and commercial auto policies (and most aircraft policies for that matter) have included as insureds, persons or organizations who are deemed to be legally responsible for the use of a vehicle by a permissive user. However, this coverage is not understood by some people. Included within this category are persons or organizations who qualify as such insureds under these policies, as well as some claims people employed by insurance companies.

It is uncertain whether the persons or organizations that qualify as insureds have a general distrust for insurance and insurance companies or simply do not understand how a vehicle liability policy could also protect them. In fact, there have been so many requests over the years for a specific endorsement confirming this insured status that the Insurance Services Office introduced a special endorsement for those who request one.

The endorsement in question is titled "Designated Insured Endorsement," and reads as follows:

Each person or organization indicated above is an "insured" for Liability Coverage, but only to the extent that person or organization qualifies as an "insured" under the Who Is Insured provision contained in Section II of the Coverage Form.

The fact that this endorsement is issued does not change anything. It merely confirms the protection that already exists for persons or organizations under the policy for their vicarious liability (i.e., liability imputed to them because of the fault of a permissive user.) However, this endorsement may also help some claims people who do not seem to understand the Who Is Insured provision of vehicle policies.

It is difficult to pinpoint what class of people or businesses are affected more than others by this part of the Who Is Insured provision of vehicle liability policies. Generally, anyone who hires or employs the services of another wherein a motor vehicle is used can qualify as an insured if the vehicle, of course, otherwise qualifies for coverage under the policy.

A recent case involving a general contractor who sought protection as a vicarious insured under a subcontractor's commercial auto policy is *Canal Insurance Co. v. T.L. James & Company, Inc., et al, 911 F Supp. 225 (S.D. Miss. 1995).* The subcontractor in this case was hired to haul sand and gravel for a construction project.

After work on the project had been completed, the owner of a convenience store located in the vicinity of the project complained that the trucks that hauled sand and gravel had cut across its parking lot causing damage for which compensation was sought. The general contractor notified the subcontractor who did the hauling and demanded that its insurer provide protection.

The subcontractor's insurer declined the general contractor's request for protection. Unable to resolve the situation, the convenience store owner filed suit against both contractors alleging that the subcontractor's trucks, working under the direction and control of the general contractor, had cut through the parking lot causing damage. Later, the plaintiff amended its complaint and also alleged that the trucks owned by the general contractor also contributed to the damage.

The subcontractor's insurer maintained that the general contractor was not an insured under its automobile policy. However, the court saw otherwise. In coming to the conclusion that the general contractor was an insured under the subcontractor's policy, the court first looked to the insuring agreement, which references the word "insured," and then to the Persons Insured provision.

The court noted that the term "insured" not only included the subcontractor, as named insured, but also "any person or organization but only with respect to his or its liability because of acts or omissions of an insured . . ." Because the convenience store owner alleged that the general contractor was vicariously liable for the subcontractor's act, or, to use the language of the policy, that it was liable "because of acts or omissions of the insured," the general contractor was plainly included as insured under the policy in question.

However, there was an additional wrinkle to this particular case because the insurer also maintained that even if the general contractor were to be an insured under its policy, coverage would be precluded in light of a so-called "truckman's endorsement."

This endorsement reads:

In consideration of the premium charged for the policy to which this endorsement is attached, it is understood and agreed that no coverage is extended to any person, firm, or organization using the described motor vehicle pursuant to any lease, contract of hire, bailment, rental agreement or similar contract or agreement, either written or oral, expressed or implied, the terms and provisions of the Insuring Agreement III of Section A, entitled "Persons Insured" notwithstanding . . .

In light of the above provision, the question was whether the general contractor was "using the described motor vehicle pursuant to any lease, contract of hire . . . or any similar contract or agreement." The insurer asserted that the general contractor had leased the subcontractor's trucks, and coupled that assertion with the interpretation of the endorsement which, it said, equates the term "used" with "directed and/or controlled."

The primary thrust of the insurer was two-fold: If its named insured were in fact subject to the general contractor's direction and control such that the general contractor could be held vicariously liable, then the general contractor was necessarily "using" the trucks. On the other hand, if the general contractor did not direct and control the subcontractor's trucks, then it could not be held liable. Either way, it was not covered from the insurer's perspective. It is like saying, "Heads I win; tails you lose."

The court explained that the insurer's premise was that there was a "lease or contract of hire" for the trucks. Thus, unless there was a lease or contract of hire, the insurer could not correctly invoke the exclusion. The trier of fact dispensed with this question by holding that the general contractor did not lease the subcontractor's trucks, nor did the general contractor contract to hire the subcontractor's drivers. Instead, the general contractor simply subcontracted with the hauler, which provided its own drivers to do its own work in the performance of the subcontract and which operated its own trucks with its own employees.

According to the court, the truckman's endorsement was not intended to apply to situations when the named insured is using its own trucks in the furtherance of its business, providing its own drivers and materials. The insurer therefore had the obligation to defend the general contractor.

Whether it was a smart idea for the insurer to argue against coverage under the truckman's endorsement because the term "use" can have a broad connotation is open to question. Seasoned insurance people are likely to say that it is not worth the time and expense to fight this point because the meaning of "use" is ambiguous. Maybe the stakes in this case were simply too high for the insurer to ignore the argument over the truckman's endorsement.

In any event, it may be wise for producers to request that the new designated insured endorsement be issued automatically on all commercial auto policies issued in order to forestall any attempt by a claims person of an insurer who feels that the policy does not protect anyone other than permissive users. The endorsement not only may serve as a learning tool for some claims people, but also may alleviate some of the senseless and costly arguments that arise over this Who Is Insured provision.

What perhaps fuels the decision of the insurer not to want to provide insured status to a person or organization who may be vicariously liable is that such insured obtains primary coverage under the named insured's policy. In other words, there is no opportunity for the insurer to argue that the coverage ought to be split between two policies.

However, a lot of people do not understand how this coverage works. At a parent-teacher meeting recently, some parents were appalled to learn that the educational institution would be an insured under their personal auto policy if the auto were to be used by the parent on behalf of the institution. They quickly learned that to have to share their limits with others could present some problems.

Fortunately, this problem was resolved when the educational institution agreed to add the parents as additional insureds under its auto and general liability policies on an excess basis. It should be mentioned that this was only possible with the good work of the independent insurance agent and his convincing the insurer to approve such a gesture.