

# SECOND OPINION

SMALL DOSES OF HEALTHCARE INSIGHT



## Inherent Dangers of Adding Third Parties as "Additional Insureds"

Consider this common scenario: a healthcare organization engages a third party provider for services performed on its behalf. This might include the hiring of staffing agencies to provide skilled nurses in a hospital setting. Invariably the contract for services requires the Named Insured (your client) to add the healthcare organization or intermediate staffing agency as an additional insured **on both** their professional liability and general liability policies. Your client contacts you, as their insurance broker, and requests coverage for this third party. No problem, right? WRONG. While it is prevalent to add additional insured coverage on general liability policies, one should proceed with extreme caution when adding additional insureds on professional liability policies.

### Why Should I Be Concerned About This?

Professional liability policies are designed to protect against specific risks – the risk of loss caused by the negligent performance of professional services by insureds. Professional liability policies do not make payments to the insured; rather, the policy pays on behalf of the insured in the event that your client is negligent in rendering professional services causing damages or injury. The policy is not designed to stand behind all contractual obligations.

The old adage that 'less is more' is certainly true when considering frequently requested "enhancements" to additional insured coverage. Requests to your client to have additional insured status provided on a "primary and non-contributory" basis essentially make them responsible for insuring the whole claim with no contribution from the additional insured's policy. "Waiver of subrogation" provisions require your client and their insurance carrier to agree not to pursue recovery of any policy proceeds from the additional insured or its insurer.

By adding additional insured coverage, your client is essentially opening up their policy limits to third parties – giving these third parties rights (defense and loss indemnification) under their policy without requiring the additional insured to assume any of the obligations and duties of the policy. What's more, conflicts of interest may arise between your client and additional insured. There could be a real possibility that future claims may not be covered as the policy limits have been exhausted. Further, it is your client's loss history that will be impacted, not the additional insured.

### Additional Consequences to Amending the Policy

- **Impact on Other "Additional Insureds."** Another potential conflict could arise if your client also has other contracts requiring Additional Insureds to be named. Are those parties aware that there are other Additional Insureds now sharing that limit? If a claim should occur, it could very well erode protection they believe they have for the services they have contracted.
- **Insured vs Insured Exclusion Language.** Professional Liability policies include exclusionary language preventing all insureds (named and additional) from being able to file a claim against each other.
- **Who's Covered?** Often the request is for Blanket Additional Insured language. It is very important to understand who those Additional Insureds are and what the specific contracts require. Are they providing the same services? Are there other types of exposures involved that the Insured is unaware of? Too often, your client might not even know the names, qualifications or vetting of the people being hired by the third party to work in their facilities.
- **Nowhere to Hide.** There is often a belief that if only the Additional Insured is named in a suit, that the client's policy would not be triggered. However, a good attorney will be able to follow the trail of services being offered – particularly in a medical setting – that would lead to the contract with your client.

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- **Administrative Burdens.** Often, additional insureds request to be notified by the insurer upon the policy cancellation. This request is an administrative burden for both your client and its insurer.

### So What Should You Do?

First and foremost, pay attention to the details – details of the request, details of the professional liability policy, and details of the specific contract language. Understand the potential case scenarios triggered by adding additional insureds. Second, ask lots of questions to determine the why behind the request to add additional insured coverage:

- What services is the third party providing and to whom?
- Most Professional Liability policies define Professional Services as "services performed by an Insured" specific to the nature of the operation. Does the Additional Insured meet that definition? Does your client understand the risks and consequences? As the Insurance Broker you need to educate your client of the potential conflicts that could arise, including erosion of limits, impact on loss history, loss of control, etc.

Policy language is written to protect the best interest of the Insured.

### Understanding Is Key

Understanding the many risks associated with requesting additional insured coverage on professional liability policies will ensure your client is fully informed and protected in the future. Education is the key to protecting you, your client and the Insurer. In order for your client (the Named Insured) to get the full protection of their professional liability policy, it is essential that you understand the third party contract language, the why behind your client's request and the significance of adding additional insured coverage on their professional liability policies. It also gives you the opportunity to add value to the relationship as your client's insurance advisor – protecting their interests while also protecting against potential future E&O claims.

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#### **QUESTIONS?**

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