

WHO ARE YOU?

William J. Mitchell Ahmuty, Demers & McManus

No, this is not a tribute to Pete Townshend or Roger Daltrey, but for folks involved with general liabilities policies, maybe just as exciting. This is a reflection on the term “you” as defined and used in the standard general liability policy form. Despite the benefit of being defined by the insurance contract, courts vary on their interpretation of the term “you,” and often in a manner inconsistent with its definition. Sometimes the definition is observed; other times it is ignored.

THE POLICY DEFINITION OF “YOU”

The ISO general liability coverage form separates additional insureds from named insureds by defining and limiting the term “you” and “your” in the policy to mean the *named* insured, while anyone else qualifying as an insured, such as an additional insured, is simply *an insured*. The policy also describes “we” to mean the insurer issuing that

policy, but there is only one of those (unlike multiple potential “insureds”), so the interpretation of “we” is straightforward.

Of course, many will argue that there need not be judicial interpretation of a defined policy term. An important concept running in the background of all this is that any ambiguity in an insurance policy is construed against the drafter, under the doctrine of *contra proferentem*. The insurer is deemed the drafter of its insurance policy, so any genuine question of interpretation is decided against the insurer-drafter. Therefore, if we stopped here, it could be safe to assume that “you” means the named insured, but not an additional insured.

As an initial thought, additional insureds on a general liability policy typically receive the same coverage — and are subject to the same duties — as the named insured, absent a stated distinction in the policy. An additional insured could also

have less, or even greater coverage than the named insured, based on the interpretation of “you.” One would think that in the event of a question on policy interpretation, the courts would apply the language of the insurance contract in favor of the insureds, but this is not always the case.

In many states, the courts hold that “you” includes additional insureds. As one court put it, “neither the capitalization pattern nor the usage distinction between the terms ‘Named Insured’ and ‘Additional Insured’ can suffice to create legal ambiguity.” The reasons for this view include: the definition of “you” does not put additional insureds on notice that they are excluded from the policy provisions, the policy does not state that additional insureds are different from named insureds, or the definition is not intended to change the nature of the coverage, nor to change the meaning of the policy declarations. But this view ignores the

definition and focuses more on what the policy intends to say, but does not, versus what it actually does say.

Perhaps part of the blame lies with the policy format. “You” is defined separately from other definitions, and unlike other defined terms, “you” does not appear in bold-face or in quotation marks when it appears in the policy. It does not stand out, and can often go unnoticed.

“YOU” IN THE OTHER INSURANCE CLAUSE

One of the more commonly observed appearances of “you” is in the “other insurance” provision of the recent policy forms. There, the policy states that it is excess over “any other primary insurance available to you...for which you have been added as an additional insured by the attachment of an endorsement.” The application intended by ISO is that this policy, while primary for the named insured if it is the only coverage, becomes excess coverage where the named insured has been added as an additional insured on another primary policy.

Thus, in practice, where a general contractor has been included as an additional insured on a subcontractor’s policy, the general contractor’s policy is rendered excess over the subcontractor’s policy, even where the two policies may have identical “other insurance” clauses. This is because the general contractor is an additional insured on another policy (that of the subcontractor) but the subcontractor is not added as an additional insured to the general contractor’s policy. Granted, in this hypothetical the interpretation of this clause would be substantially similar even if the reference to “you” were replaced with “any insured.” But the clause doesn’t say “any insured,” and so in context this clause draws attention to the word “you” — the insured on the policy — as opposed to the non-insured subcontractor. As one court wrote in the context of “other insurance” clauses: “Inescapably, the key to interpreting and applying these provisions is the definition of ‘you.’”

“YOU” MUST GIVE PROMPT NOTICE OF ANY CLAIMS

There are instances, however, where “you” is not synonymous with “any insured,” and thus could quite reasonably be given its plain meaning. For example, in the Conditions section of the policy, the insured is advised that “you must see to it that we are notified as soon as practicable of an occurrence or offense which may result in a claim.”

Clearly, this condition requires that the named insured notify the carrier as soon as possible of an accident. But there is no cor-

relative requirement imposed upon additional insureds under a strict reading of the policy. The condition goes on to require that in the event of a claim or suit against any insured, you must immediately notify the carrier. The condition then broadens to “you and any other involved insured” must immediately send the carrier copies of any legal papers, and that no “insured” will make any voluntary payments or assume any obligations without the carrier’s consent.

While jurisdictions will vary as to who may give notice on behalf of whom, an insurer should be hard pressed to claim that “you” means both named insureds and additional insureds within the policy notice condition, because the notice condition itself distinguishes between “you” and “you and any other involved insured.” Yet, many jurisdictions impose the same notice requirements on additional insureds as are imposed upon named insureds.

In contrast, one court recently broke down these notice requirements, finding that even though the additional insured gave no notice at all, it could not have violated the first two conditions that only reference “you.” Nevertheless, the same additional insured *did* violate that part of the notice condition that required “you and any other involved insured” to immediately forward legal papers to the insurer.

“YOU” HAVE CONTRACTUAL INDEMNITY COVERAGE

“You” often goes unnoticed in the contractual indemnity coverage part of the policy. Although the ISO policy excludes contractual liability coverage in the first instance, the exclusion contains an exception for “insured contracts,” thus restoring contractual indemnity coverage. Although the argument is often made that an additional insured benefits from contractual liability coverage, the definition of “insured contract” includes “that part of any other contract or agreement pertaining to your business...under which you assume the tort liability of another party.”

Here, we have to follow the bouncing ball for a moment. Because the contractual indemnity exclusion allows an exception for insured contracts, and insured contracts are defined as only those pertaining to “your” business, only the named insured should have the benefit of the “insured contract” exception to the contractual indemnity exclusion. An additional insured, strictly speaking, should not be entitled to contractual liability coverage.

For the claims analyst, a potential pitfall awaits (or windfall, depending on your point of view). An additional insured may

be clearly entitled to an acceptance of its tender, but absent a proper disclaimer to the additional insured, contractual indemnity coverage would also follow. The additional insured only loses contractual indemnity coverage if the insurer properly disclaims on that ground. But in many risk transfer situations, the accepting carrier acknowledges a coverage obligation, and does not issue a disclaimer or reservation based upon contractual indemnity, thus potentially waiving that exclusion for contractual indemnity to the additional insured.

“YOU” MUST PAY THE SELF-INSURED RETENTION

A circumstance that appears relatively predictable is the interpretation of “you” in the context of self-insured retentions. Often, the named insured agrees to be responsible for payment of the retention amount, as seen in the phrases: “you will continue to be responsible for the payment of the Retention Amount,” or “You are responsible for the payment of Allocated Loss Adjustment Expenses.” The word “you” refers to the named insured, which is the same entity that clearly assumed the obligation to pay the retention. In this context, very few courts would hold that “you” includes additional insureds to the point of requiring additional insureds to satisfy or even contribute to the policy’s self-insured retention. A broad application of “you” in these scenarios would certainly be unexpected.

NOW TELL ME, WHO ARE YOU?

In sum, there is inconsistent treatment of “you” in the standard form liability policies, which is surprising given that the term is defined. As it stands now, one side will argue that the policy means what it says and should be read strictly, with any omissions construed against the carrier. The other side will respond that insureds — named or additional — are intended to have the same rights and duties under the policy, which does not clearly state otherwise. If your venue has not dealt with the specific policy language at issue, you can credibly apply either argument to your case.



William J. Mitchell is a member of Ahmuty, Demers & McManus in New York, where he chairs the firm’s Insurance Coverage Group. His practice focuses on insurance coverage litigation, for both policy holders and insurers, and he may be reached at william.mitchell@admlaw.com.