The effectiveness of contractual risk transfer is more strained than ever. Insurance carriers are implementing restrictive additional insured endorsements, and some states, such as California and Texas, have passed legislation restricting the ability of upstream parties to transfer contributory negligence.

As a result, upstream parties (owners and general contractors) have toughened the insurance requirement language in their construction contracts. To avoid getting caught in the costly whirlwind of insurance lawsuits, it is important that contractors and project owners pay careful attention to the insurance requirement wording in each contract they enter. As you will see, it is important that the insurance terms addressed in the construction contract are completely clear and ones with which you may comply.

There is a wide array of words and phrases that trip people up when looking at the insurance requirements in construction contracts, but here are five maddening examples encountered on a regular basis.
WHAT YOU MAY FIND MADDENING

There is only a one-word difference between these two phrases. But that one word represents a significant variance in coverage. In the vast majority of situations, an insured would not want to name an upstream party as an additional named insured. Prior to adding any named insured to your policy, it should be analyzed to be assured you are not assuming insurance coverage for liabilities and/or exposures outside of your control.

Additional insured generally refers to those covered by the policy for claims that arise due to the actions or omissions of the primary insured who holds the insurance policy. Any claims against an additional insured that are not caused by the primary holder, or one of its subsidiaries, will not be covered.

Additional named insureds have the same rights as the primary insurance holder listed on the policy. Additional named insureds could have coverage even if the named insured is not involved in the claim.

WHAT YOU NEED TO KNOW

An additional named insured would have the same coverage as the policyholder without having to pay any premium. Complying with this term in a contract means that you could wind up providing coverage for liabilities and/or exposures beyond your control. By using just “additional insured,” liability is limited to incidents related to your work.

WHAT I’VE SEEN

Additional Named Insured in Action! A construction company agreed contractually to name the city government as an additional named insured in a construction contract. And, unfortunately, a certificate of insurance was issued evidencing this. A vehicle accident occurred in the city due to faulty stoplights in a different area from where the construction was taking place. The individuals involved in the accident sued the city. Upon discovering the certificate of insurance and because the City was listed as an additional named insured on the certificate, lawyers for the injured parties made a claim under the construction company’s policy. This claim was made despite the fact that the occurrence that led to the injury was completely unrelated to the construction company’s scope of work. Regardless of whether or not the insurance company ended up having to pay under their policy, the contractor that signed the contract was in breach of contract, and the agent that issued the certificate could be facing a potential E&O or fraud claim if they evidenced on the certificate something that was not supported by the policy.

If the city had been an additional insured, coverage would only have been triggered if the accident was caused, in whole or in part, by acts or omissions of the construction company.
Maintain vs. Provide

WHAT YOU MAY FIND MADDENING

An increasing number of contracts will state the Commercial General Liability (CGL) policy must “provide” completed operations coverage for a specified number of years. The typical occurrence-based CGL policy is written on an annual basis. The policy coverage renews every year should the insured decide to continue coverage. A common question involving occurrence-based policies is “what policy will respond if a loss happens?” The answer is the policy period in which the occurrence occurred not necessarily when the loss occurred. Some losses occur over time or are not discovered until several years after the project is completed. There are several different trigger theories the courts use to help determine the date of an occurrence. These include Exposure Theory, Manifestation Theory, Injury-in-Fact Theory, or Continuous Trigger Theory.

For purposes of this discussion, the relevance of these theories is that it is quite possible for a project to be completed in one year, a claim be presented four years later, and the court to find the occurrence took place at the time the claim was presented. The policy in effect four years after the project completion is the policy that will respond to the claim, not the policy that was in effect when the construction project was completed. In short, there is a need for upstream parties to want lower-stream parties to have insurance in place in the future should the above example take place.

Since it is probable a future insurance policy will be the one responding to claims for projects being completed today, a contractor could not agree to “provide” coverage. However, they are in a position to agree to “maintain” coverage. This would be accomplished simply by renewing the CGL coverage without any form of exclusion for prior jobs. (EIFS exclusion, condo conversion exclusion, prior jobs exclusion, state exclusion, residential exclusion, etc).

WHAT YOU NEED TO KNOW

By using the word “maintain” in a contract, you are agreeing to provide insurance that will cover the time frame agreed upon in the contract. In a majority of cases, this is the word you will want to use. Should you agree to “provide” coverage for the future liability of your work, you may be forced to implement a Controlled Insurance Program (CIP) or purchase Project-Specific Insurance. While this is not the typical insurance delivery mechanism for a majority of contractors and/or subcontractors, these do provide extended completed operations for the project insured.
WHAT YOU MAY FIND MADDENING

Increasingly, contracts require notice of cancellation, expiration (nonrenewal), and/or material change (modification) to the owner of the construction project. It may also require that the notices be sent by certified mail.

It is important to note that insurance companies usually will not agree to provide a notice of expiration (nonrenewal), a notice of material change, or a notice by certified mail. The certificate shows an expiration date for each coverage, which should be sufficient for notice of expiration and an assumption of nonrenewal. As for notice of material change or modification, this is an undefined term and could be construed to mean anything, including reduction of policy aggregates by payment or reserve on a claim or just deletion of an automobile, if it is the vehicle that is later involved in an accident.

There are times when exceptions may be made, for example, with governmental bodies like the Corps of Engineers. But these are rare and only available when there is a regulation, statute, or covenant in place requiring this notice. In any event, the insurance company will always reserve their right to cancel in 10 days for nonpayment.

WHAT YOU NEED TO KNOW

Insurance companies will rarely agree to provide more than notice of cancellation. A solution to this issue is for the Contractor (not the insurance carrier) to agree to provide notice of cancellation, change, modification, or nonrenewal if it wants to assume this responsibility.

WHAT YOU MAY FIND MADDENING

The standard CGL policy does provide contractual liability coverage as defined by the policy, but many policyholders and contract drafters often believe this covers any and all claims arising from the indemnity clause of the contract. However, many forget to take into consideration that coverage is “subject to policy terms, conditions, and exclusions.” Just because a contract requires indemnification for “any and all” claims, it may not necessarily be covered under the insurance policy. Coverage may not be as broad as the indemnities assumed.

Examples of claims that would not be provided coverage under the standard CGL are patent infringement, intentional acts, breach of warranty, breach of contract, professional, and pollution. This list should not be considered all-encompassing as every CGL policy will have its own terms, conditions, and exclusions.

WHAT YOU NEED TO KNOW

It is important not only to pay attention to the coverage listed, but also to thoroughly review and understand the extent of coverages being called out in the contract. Read all the policy terms, conditions, and exclusions. Coverage may not be as broad as you, or the contract drafter, might anticipate.
WHAT YOU MAY FIND MADDENING

The standard Commercial General Liability (CGL) policy contains two Aggregates, the General Aggregate and the Products/Completed Operations Aggregate. The General Aggregate applies to premises and ongoing operations occurrences. It is common to encounter contracts that will require CGL coverage with only a per-occurrence limit shown. This could lead to the false impression that coverage is unlimited under the policy, which it is not. It is limited by the policy aggregates, both of which must be stated.

In connection with that, contracts quite often will require the Aggregate be on a Per-Project basis, without specifying WHICH aggregate. It is industry norm that only the General Aggregate may be on a Per-Project basis, and the Insurance Services Office (ISO) publishes an endorsement to do this. The only way to obtain the Products/Completed Operations Aggregate on a Per-Project basis is typically through implementation of a Project-Specific policy or a Controlled Insurance Program. Both options could add considerable cost to a project or to the contractor’s overhead if it is not identified prior to contract finalization, and it is truly the upstream party’s intent to have a per-project completed operations Aggregate Limit.

WHAT YOU NEED TO KNOW

An aggregate limit is the maximum dollar amount the insurer will pay to settle all claims arising from incidents that occur during the policy period. The General Aggregate is the maximum for occurrences other than Products/Completed Operations-type occurrences. Products/Completed Operations claims are those losses that occur after you have sold your product or completed your project, not while you are building it.

WHAT I’VE SEEN

A contractor signed a construction contract with an owner that required a per-project completed operations aggregate to be provided through the statute of repose (see previous discussion on word “provide”). The general contractor signed the contract agreeing to this under the assumption the owner would accept coverage utilizing the general contractor’s continued renewals of their CGL policy. Unfortunately, three months into the project when the owner requested a copy of the Controlled Insurance Program (CIP) policy, the general contractor found out the owner had actually wanted the project insured under a wrap-up. It is tempting to assume you know what the other party is requiring and not address it with the upstream party, but that could be a costly mistake, turning a profitable construction project into an unprofitable one!

These Maddening Five Phrases represent only a small number of the many issues that may present themselves when reviewing a construction contract. When insurance requirements are unclear in a contract, do not make assumptions. Always understand clearly what you are agreeing to, and whether it is even commercially available. Every word and punctuation mark in a contract counts, so read everything literally and pay attention to words and terms that are often overlooked. The best way to ensure you are properly covered and ready to sign the contract is by verifying the insurance requirements with an insurance broker or legal counsel with an in-depth knowledge of the intricacies of construction and insurance before moving forward.
Our Mission
To be the worldwide value and service leader in insurance brokerage, employee benefits, and risk management

Our Goal
To be the best place to do business and to work