

# Broker's Notes

## The Additional Insured Problem

**March 2006**

We receive constant requests to add; Named Insureds; Joint Insureds, Additional Insureds; Loss Payees; Parties of Interest; etc. etc. to our policies, and we routinely refuse.

We are well aware that the vast majority of insurance companies in Canada seem to be more than willing to add virtually any name and title to their policies by endorsement without ever considering exactly what they are providing to. (Many of the “names” aren’t even legal entities.) Recent decisions by the Supreme Court of Canada “against” insurance companies have highlighted the error and risks of this negligent practice, but it is likely that most Insurers will ignore these decisions until they are hit personally.

For example; we have all received multiple demands from “Leasing Companies” to be added to our policies as “Loss Payees”. What is a “Loss Payee” in the insurance contract ? What are its rights and obligations under the policy ? Can you even find a definition of, or a reference to, a Loss Payee in a standard commercial insurance contract ?

### Property

There are **two (2)** issues here: **Property Covered** and **Policy Rights**.

**Property Covered:** Is the additional party’s property covered by the policy ? Our policy covers all property OWNED by; LEASED to; or BORROWED by; the Insured (in excess of 30 consecutive days) and USED by the Insured in the business.

The Insured’s insurable interest in “leased property” is acknowledged and the property is covered in the policy subject to the same terms, conditions, exclusions or warranties as the Insured’s own property.

We have no problem with providing coverage to this property at the Insured’s option and we have no problem with confirming the coverage to the lessor, in the form of a certificate of insurance. As a licensed broker/agent, there is no reason why you could not confirm coverage either.

**Policyholder Rights:** Along with the actual “property loss coverage”, provided by the policy, the Insurance Acts and the policy documents also provide related coverages and numerous policy-owner’s rights to the Insured.

For example: Business Interruption losses due to damage to the insured property; Extra Expense coverage to replace the items or rent alternatives, consequential loss, contingent loss, etc.

And: subrogation rights; salvage rights, presentation of claims right, signing of proof of loss rights, notifications, interpretation of ambiguities, estoppel, equity contract rights, utmost good faith, duty of professional E&O, consumer protection from the Superintendent of Insurance and the Insurance Guarantee Fund, etc.

Do all these rights apply to a "LOSS PAYEE" too ? In the absence of even a definition of the term, one would have to assume so.

What about warranties and representations ? The Supreme Court of Canada just ruled that even the ones in the Statutory Conditions only applied to the INSURED and not to a Mortgagee, "named" in the policy.

In the absence of clear policy wordings we are not prepared to inadvertently extend all of these rights to third parties, regardless of what contracts the Insure signs.

### **Liability**

Again there are **two (2)** key issues: **Direct** liability and **Vicarious** liability.

The CGL wording is VERY broad in scope. It covers ALL liability resulting from the "business of the Insured". Business is not limited. Any denial of coverage would require that the Insurer prove that there was a "material" misrepresentation. (Even that, might not apply beyond the Insured.)

**Additional Insured:** is clearly defined in the CGL policy and the protection provided is specifically limited to vicarious liability "...resulting from the operations of the Named Insured". It is perfectly reasonable to assume the defense and re-imburement of this exposure for the "related party".

**Named, Joint, or "and", Insured:** In the absence of any further reference in the policy wording, we can only assume that any insurer adding these "entities" is in fact extending FULL POLICYHOLDER'S RIGHTS to these third parties including "...all of their business". Any denial of coverage would require the Insurer to prove "material (and virtually intentional) misrepresentation". This would be extremely difficult, given that the Insurer specifically added the entity as a "named" or "joint" insured. If it was not the Insurer's intent to expand the scope of coverage, then why did they add the additional name ?

We do not wish to extend our policy beyond the realm of vicarious liability and therefore we do not add "Landlords", "Land Owners", "Related Companies owned by the same shareholder(s)" etc. to our policies. Coverage as an "ADDITIONAL INSURED" is the extent to which we wish to provide coverage.

**Summary:** We appreciate that in most cases you are dealing with clerks in the leasing companies' offices that do not know what they are asking for and frankly they do not care. They do not understand the insurance contract and it is completely beyond our mandate to even try to explain it to them. We also appreciate that in the face of continued apathy on the part of most insurers to address these problems, you are "caught in the middle".

In response, we have “modified” our policy wordings for 2006 to accommodate the “demands” of lessors without unduly prejudicing our policy terms:

**i.) Named Insured:**

We will only name ONE insured on our policies. This is the LEGAL ENTITY (individual or corporate) that operates the golf course. This NAMED INSURED is the only one with full policyholder rights.

In the odd situation where the Named Insured is in fact a “joint venture” without actual legal status, we will name all of the operating companies, but the policy will be subject to a **Trustee Agreement** whereby the FIRST NAMED INSURED is the sole “AGENT” for all the entities and is authorized to act on their behalf.

**ii.) Mortgagee:**

We will name Mortgagees on the policy as per the IBC - Canadian Bankers Association agreement. Mortgagees’ rights and conditions are subject to the terms of the IBC Standard Mortgage Clause.

**iii.) Loss Payees:**

In order to meet the ever growing demand to cover “leased equipment” we have added a **Blanket Loss Payee** clause to our policy. Loss Payees are specifically defined and subject to a Trustee Agreement.

**COVERAGE IS AUTOMATIC** to **ALL Loss Payees** with whom the Insured has a contractual obligation to provide insurance on non-owned equipment. We do not need to specifically endorse any particular Loss Payee on to the policy to provide coverage and we will not do so just to satisfy a lessor who does not understand the insurance contract.

“Leased Equipment” is defined as leased for over 30 consecutive days. Property rented for a period of less than 30 days is NOT LEASED and is covered separately under our “Legal Liability” extension.

**iv.) Additional Insureds:**

Our policy follows the IBC standard list of Additional Insureds (shareholders, employees, etc.) and also includes a **Blanket Additional Insured** clause which adds any legal entity (government, corporate or individual) with whom the Insured has a contractual obligation to include.

**LOSS PAYEES** as defined are automatically included as **ADDITIONAL INSUREDS**.

We do not need to specifically name any individual Additional Insured.