Insurance Newsletter
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General Liability Changes

Over the past few decades coverage provided in commercial property and liability policies has followed an interesting arc. In the years following WWII policies were limited to specific defined coverages. You bought a fire insurance policy (not "all risk"). You bought an owners liability policy (not "comprehensive general liability"). If something other than a fire or slip and fall led to a claim, you were out of luck unless you bought specific additional coverages for them.

In the 1970's and 80's insurance companies competed for business by offering "multi-peril" policies. Property coverages, general liability, crime, inland marine and other coverages were all bundled into one policy, and coverage grants were gradually broadened. For a couple of decades commercial insurance coverages really were quite broad. Property policies were "all risk", with just certain limited exceptions. General liability policies really were "comprehensive". For general liability policies in particular, the 1985 edition of standard policy forms probably marked the last time they would ever be as broad in scope; ever since then, each succeeding revision of standard policy forms has mostly reduced coverage, often in significant ways.

It's happening again. The Insurance Services Office (ISO), the organization that writes standard policy forms used in whole or part by the majority of all insurance companies, is filing a revision to a standard GL endorsement that has thus far flown somewhat under the radar, but will likely be appearing with more frequency in the future. Called the "Limitation of Coverage to Designated Premises or Project" Endorsement, it takes away a whole lot of liability insurance coverage that an unsuspecting insurance buyer might think they have.

Most folks who buy general liability insurance likely think that their policy will cover them for claims that might arise out of the normal operations of their business. In the past that might have been a reasonable assumption, but not so much anymore. There has been an ongoing war between insurance companies trying to write policies that cover risks they know, understand and can properly price for, and creative plaintiff's attorneys trying to find coverage in policies that underwriters never contemplated. The lawyers are winning, and underwriters respond by continually narrowing the scope of the coverage they offer.

This particular CGL endorsement was always intended to apply to claims arising out of the ownership, maintenance, or use of specifically described insured premises, "and all operations necessary or incidental thereto." This language has been understood by insurance adjusters to include any off-premises exposures that were legitimately connected to the business conducted on the premises. Courts have been persuaded to interpret "necessary or incidental" in ways never intended or foreseen by underwriters. The result is the new revision of this endorsement, which is a significant narrowing of coverage. When this new version of the endorsement is attached to a liability policy claims will only be covered if they specifically occur at the designated premises or project, or (new wording) in connection with specific described operations. Anything else happening anywhere else…no coverage.

This endorsement (the prior version, that is) is fairly common with real estate or site specific risks (retail operations, condominiums and apartments, etc.), and may often be seen on non-profits. While unwelcome, the prior version did allow for some coverage for offsite exposures. With this revision, that's gone. Buyers should beware of this endorsement going forward. If your underwriter offers it, reject it. If you have no choice, try to write the description of premises or operations a broadly as possible. And we will of course also keep our eyes out for you.

Regulators and Insurance Play Catchup

Change is a fact of life these days. Change in science, technology, and society is not only ongoing and continuous, the pace of change seems to increase each year. Regulators struggle to keep up with developments; insurance companies struggle to rapidly adapt insurance policy forms, or develop new policies, to cover newly arising risks. Here are just some examples of current and developing issues:

1. Uber and Lyft: regulations and insurance policies that are designed for cabs and livery companies don't work for these new transportation options. An individual who wants to make few bucks driving for Uber usually wouldn't buy a commercial auto policy, and of course their personal auto policy excludes commercial use of the vehicle (and probably has woefully inadequate limits). Regulatory response and insurance solutions are coming into focus, driven in large part by the fact that people like these services.
2. Autonomous vehicles: There is a lot of research going into self-driving vehicles. When one crashes, who's liable? The driver (who wasn't driving)? The owner? The manufacturer? The software developer? Lots of questions here, and few answers at present as law and insurance try to figure out these issues.
3. Drones: All current liability policies exclude aircraft claims. Question: Are drones aircraft? That term is not defined in current policies. If a drone falls on someone's head, is any resulting claim covered? How are they regulated (the FAA has been slow to respond here)? How about breach of privacy issues?
4. Airbnb, HomeAway, VRBO: Vacation rental and accommodation websites are proliferating, and a lot of homeowners with a spare bedroom are using them for a little side income (or more). Same situation as with Uber; standard homeowners policies don't cover commercial activities.
5. Lemonade: Google it. Homeowners insurance as a commodity, available with an app on your smartphone. Loads of issues here that regulators are slow to address.

We could cite other examples, but you get the picture. Changes in risk and new laws, precedents and insurance policies used to evolve at a much slower pace, but the rate of change these days is considerably faster. Don't for a moment assume that old forms of insurance automatically adapt to new scenarios like those described above, or others. Call us if you have questions.

Duty to Defend

Standard liability policies make two specific promises to policyholders. The first is the obvious one most people understand right away, the promise to pay, specifically to pay sums the insured is legally obligated to pay as damages arising from a covered claim. That's the biggie, of course, and what most people think of if they think at all about these policies.

There's another promise, often overlooked but equally and perhaps even more important; that's the insurance company's promise and duty to defend the insured against suits and claims alleging damage and liability. In fact, the duty to defend is actually broader than the duty to pay damages. If you've ever read a lawsuit you know they typically contain numerous claims and allegations; attorneys like to throw as much as they can against the wall in the hope that something sticks. While many allegations in a suit may not be covered by the policy, the general rule in most jurisdictions is that if even one complaint in a lawsuit has the potential for being covered, the insurer must defend against all allegations. Also, in general, where there is any ambiguity whether a complaint might be covered or not, courts are usually generous toward policyholders in finding an initial duty to defend.

This is an important and valuable aspect to liability insurance coverage, and it's a pretty good deal for the policyholder. Finding a good lawyer experienced in claims litigation may be a challenge for starters, and good lawyers don't come cheap. Insurance companies have a stable of experienced litigators at their disposal, and pick up the tab, at least initially. Another key, and valuable, point: in standard liability policies the costs for defense are outside policy limits. Put simply, if you have a policy with limits of a million dollars and it costs you half that in legal fees and defense costs just to fight a claim, you still have full policy limits available to pay a settlement if you lose; dollars spent to defend a claim don't erode limits. And since the duty of an insurance company to defend their policyholder is actually broader that the duty to pay a claim, it's not uncommon to find insurers defending cases where they actually end up paying no damages.

Like we said, a good deal for policyholders…but not with all policies. Standard, occurrence based liability policies are almost always duty to defend policies as described above. Claims made management and professional liability type policies, like D&O, EPL (employment practices liability), and such, are different and may not include a responsibility for the insurance company to defend; that responsibility is specifically assigned to the policyholder. For these specialized types of policies this may not automatically be a bad thing; you might prefer to hire your own attorneys, who know already the intricacies of your business and industry, to defend these types of claims. Unfortunately, such policies will also typically specify that defense costs are within limits, so money spent on defense erodes the limits available to pay any settlement. That's something to keep in mind when deciding what limit of liability to buy for these policies.

As a general rule, though, if any liability policy you consider is an occurrence policy, the insurance company will probably have the duty to defend. For claims made policies, all bets are off; you need to read the form to find out who defends. Fortunately, you won't have to look far; in any policy responsibility for defense will usually be right there on the front page of the coverage form; it's that important a consideration.

Keep in mind, too, that the duty to defend isn't an open ended or endless responsibility. If the part of a claim giving rise to the duty to defend is dismissed for any reason, then the insurer's duty to defend ceases instantly. This puts a policyholder in the middle of ongoing litigation in the difficult situation of having to finance and potentially find new counsel in the middle of a lawsuit. It can also create a complicated situation where the interests of the insurance company and the insured are not fully in line. This might happen when a claim includes both covered and uncovered allegations. The insurance company would prefer to prevail on the covered allegations, thus freeing itself from defense obligations; the policyholder would prefer to prevail on the uncovered allegations, so that insurance would cover any settlements. In this the insured defendant's interests align with the plaintiff, since the plaintiff usually prefers to have insurance policy limits available to pay any settlements.

Other key points to remember about insurance policy duty to defend:

- Where the insurance company has a duty to defend, they also have the right to select defense counsel, while defense counsel has an ethical obligation to serve the interests of the insured as well as the insurer.

- Should a conflict arise between the insurer and the insureds, most courts have held that the insured has the right to select its own independent counsel.

- Last point, when an insurance company assumes the duty to defend, be prepared to receive what is known as a reservation of rights notice from the insurance company. This is a letter sent to an insured stating that the insurer will provide a defense on behalf of the insured but that the insurance company may also argue (reserves the right) to have the claim determined to be outside the insurance policy and therefore not covered. Its purpose is to prevent the insured or a court from considering the provision of legal defense by the insurance company as an admission of liability or coverage by the insurance company.

New, First in Nation New York Regulation

New York is like approximately twenty-one other states as of this writing that have some version of “ban the box” type laws on the books. The “box” in question is the one found on employment applications that asks if the applicant has ever been convicted of a crime. Different states and jurisdictions structure these laws differently, but the common element is that they prohibit or discourage employers from asking prospective new hires about any criminal history, or doing criminal background checks, at least until the applicant has been otherwise deemed suitable for the position in question and in many cases until after an offer of employment has been made. These laws are well intentioned, seeking to make it easier for convicted criminals to re-enter the workforce and build productive lives, and given the high rates of incarceration here in the U.S. there is a clear social policy justification for them. Nevertheless, in their many iterations across the country they pose significant challenges for employers.

One problem is due to standard wording in many commercial crime and employee dishonesty insurance policies. Standard forms of these policies have provisions excluding coverage for loss caused by an employee who has committed “…theft or any other dishonest act…” learned of by the insured prior to the policy period. The practical effect of this standard policy exclusion was to exclude crime insurance coverage for acts of convicted criminals unless they lied to their employer and concealed their criminal past, another obviously undesirable situation. If the applicant is honest then the employer faces a Catch-22 situation: If the employer complies with applicable “ban the box” laws or regulations and hires the applicant the employer automatically loses any coverage under their crime or employee dishonesty insurance policy for any losses from that employee that might occur in the future. On the other hand, decline to hire the applicant, and it’s an employment practices liability claim waiting to happen.

New York recently enacted a new regulation addressing this issue. Insurance Regulation 209 takes effect on July 1, 2017, and applies to all insurance policies issued, renewed or delivered on or after that date. The aim of the new regulation is to make it easier for employers in New York to comply with the law and hire formerly incarcerated employees, by allowing them to obtain coverage for theft, loss or damage caused by an employee with a criminal history. It does so by prohibiting insurance companies from denying commercial crime insurance coverage to New York businesses knowingly employing convicted criminals. It effectively eliminates the crime policy provision that excludes such coverage, as described above.

Employers, in New York and elsewhere, must already grapple with the challenges and complexities of determining if a prospective employee with a criminal history can be properly and safely employed in a given position. With this new regulation, they gain the assurance that if something goes wrong they will at least have crime insurance coverage to fall back on. Not addressed are any potential liability issues arising from claims by third parties who might suffer injury from such employees. Liability insurance policies should respond to claims like that; they currently have no standard exclusions for claims arising from employed persons with criminal histories, as crime policies do.

Predictable consequences of this new regulation: Insurance companies writing crime and employee dishonesty policies in New York will have to amend their policies to eliminate the exclusion applying to knowingly employed employees with prior criminal offenses. This coverage carveback will likely have practical insurance repercussions in the future. States and jurisdictions pay attention to what other states are doing; one could reasonably predict that this new regulation will soon be copied elsewhere. And as a practical matter, once the availability of this coverage carveback is established, employers anywhere will probably want it, whether they are in a “ban the box” state or not.

As a result, crime insurance applications will probably become more detailed, as underwriters more closely scrutinize the controls and procedures employers have in place to prevent and detect employee dishonesty losses. Crime insurance premiums have historically been relatively low; increases in premiums might be expected. Limits offered might be reduced, and deductibles increased. We are keeping an eye out for all these possible developments.

This new regulation applies only in New York, but it prods insurers to make a needed change in their employee dishonesty policy forms that could ultimately benefit crime insurance policyholders anywhere.