Understanding Your Insurance Coverage

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Insurance contracts can be complicated and lengthy documents you place in your filing cabinet after speaking with your insurance agent and receiving a copy of your annual commercial general liability ("CGL") policy. However, it is important to understand what you've purchased. It's easy to tell your insurance agent every year that your business needs to renew its CGL coverage. However, the desire for cheap premiums may leave you paying for your own attorneys and subsequent damages in the unfortunate circumstance if you are sued. After reading this article, you should have a general understanding of insurance coverage, and, importantly, additional insured endorsements.

Insurance Basics

Interpretation

Insurance contracts are complex documents - where there are ambiguities, they are interpreted in favor of the insured and against the insurer. However, when the policy language is clear and unambiguous, the policy will be interpreted and enforced as written. The goal of the courts is to carry out the desired intent of the contracting parties, the insured and the insurer.

Claims-Made v. Occurrence-Based Policies

Under a claims-made policy, as the insured you are covered against any claims made against you during the dates the policy is in effect. Once that policy expires ("lapses"), the insured is no longer covered under that policy. Under claims-made policies, it is important to continue your coverage to ensure coverage for any claims that may arise in the future.

Under an occurrence-based policy, the insured is covered for acts of negligence that occurred during the time the policy was in effect. Carriers tend to maintain more expensive premiums for occurrence-based policies because they forever cover any incidents that occur while that policy was in effect. That is, it does not matter when the suit is brought, so long as the alleged negligence that is the basis for the suit occurred while the insurance policy was in place.

Types of Property Damage

In order to trigger coverage under either a claims-made or occurrence-based policy, there must be property damage or bodily injury caused by an occurrence. By definition, property damage includes three types of losses: physical injury to tangible property, loss of use of injured tangible property, and loss of use of uninjured tangible property.

- **Physical Injury to Tangible Property**
  This is the most common type of property damage. Some examples are as follows: you are erecting a new building when debris falls from the project and breaks the window of a neighboring building. Or you are spray painting a building on a windy day and the spray paint blows into a nearby parking lot damaging parked vehicles.

- **Loss of Use of Injured Tangible Property**
  Property damage includes the loss of use of property that has been physically injured. An example of loss of use of injured tangible property is where a builder is contracted to renovate an apartment that the landlord has leased the apartment to a tenant, and the tenant is scheduled to move in October 1. During construction, the builder accidentally causes a fire while drilling into the wall causing severe damage to the property. The repairs take several months, and the tenant does not move in until February 1. The apartment complex files suit against the contractor for both the cost to repair the damage as well as the lost rental income it would have received had the renovation gone to plan. In this case, there was loss of use due to physical injury to tangible property.

- **Loss of Use of Uninjured Tangible Property**
  Property damage also includes the loss of use of property that has not been physically injured. For example, a contractor is in the process of constructing a building when a wall collapses. The local authorities rope off the area surrounding the construction site, including an adjoining business. While the neighboring business was not physically harmed, it was closed for a duration and lost business sales. When the business owner sues the contractor for lost income, the contractor should have coverage under its CGL policy for property damage it caused.

Duty to Defend and Indemnify

A CGL policy affords the insured two separate coverages: one, to defend the

insured; and two, to indemnify the insured should damages be awarded to the plaintiff ("claimant"). The duty to defend arises "if the allegations of a third party against the policyholder even arguably come within the policy coverage. *Polkow v Citizens Ins Co,* 438 Mich 174, 178 (1991). This is true even where the claim may be groundless or frivolous. If there is any doubt as to whether the complaint alleges a liability covered under the policy, the doubt must be resolved in the insured's favor.

As for the duty to indemnify, should your insurance carrier decide to settle the matter prior to trial, your carrier will pay those damages. However, should your carrier not settle the matter, and the matter proceed through trial, there are circumstances wherein your carrier may not have a duty to indemnify the insured. For example, a court may find the contractor owes no damages to Plaintiff. On the other hand, a judgment may be for damages not covered by your insurance policy. For example, most insurance policies contain an intentional act

exclusion. In a construction accident matter, where it is alleged that the contractor negligently dropped a piece of glass that fell and hit a bystander, the insurer is not obligated to pay the judgment should it be determined the individual worker intentionally threw the piece of glass at the plaintiff.

Additional Insured Endorsements

- ***Different Indemnification Clauses***
  Perhaps one of the most important endorsements in an insurance policy, especially in the construction context, is the additional insured endorsement ("AIE"). The construction industry relies heavily on additional insured language as contracts almost always require the downstream contractor to indemnify those upstream of it, i.e., subcontractors as part of their contract with contractors typically must add the contractor and owner as additional insureds. The additional insured language, however, varies; some provisions only indemnify the upstream party from the downstream contractor's negligent acts while other endorsements will indemnify upstream parties from their own negligence.

  It should be noted, though, that the broader the indemnification language, the more likely it is that a court will not uphold it. However, additional insured language indemnifying the upstream party for losses caused, in whole or part, by the upstream party should withstand a legal challenge. As will indemnification language that indemnifies the upstream party for losses "except for loss caused by the sole negligence" of the upstream party, i.e., owner or contractor negligence.

- ***Recent Additional Insured Form and Issues***
  The most recent Insurance Services Office ("ISO") AIE has modified its application. The ISO serves insurers and other participants in the property/casualty marketplace with insurance lines services such as standardized text for insurance forms. Along with many other insurance forms, the ISO provides standardized text for the AIE.

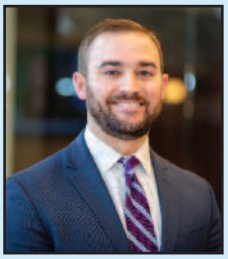
  There are many different AIE forms available, and the upstream parties should be cognizant of what AIE is being used. Depending on the language of the AIE form, the subcontractor, contractor, or owner may need to litigate its additional insured status. For example, one AIE form will only provide additional insured status "when you and such other person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." This language creates a potential exposure and coverage issue when a subcontractor and a contract have additional insured language for the contractor and owner, but there is no contract between the subcontractor and the construction manager or owner. In these situations, you must carefully look at your contract and AIE in order to determine what is necessary to ensure coverage.

Conclusion

It is important to review your CGL policy with your insurance agent, and it is equally important to understand the additional insured language in the contract documents and a CGL policy in order to avoid gaps in coverage that can be very costly should your business face a lawsuit. If your business has any issues in this regard, the attorneys at Plunkett Cooney have the expertise to help guide your business.

About the Authors:

David R. Stechow focuses his practice in various areas of complex litigation, including construction law, product liability and fire and property damage litigation. Stechow has appeared before numerous state and federal trial courts and has successfully litigated both jury trials and arbitrations. He has defended builders, contractors, management companies, manufacturers and suppliers. Many of these cases include property destruction or serious injury or death.



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