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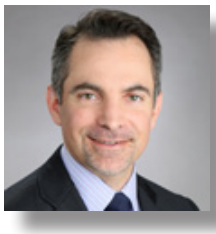

Don't Get Trapped in the Coverage Gap: Additional Insured Under Commercial General Liability Policies--Recent Developments

by Jordan N. Uditsky

As the former owner of a contracting business I am all too familiar with the need to be named as an "additional insured" on a subcontractor's certificate of insurance. Most business owners and risk managers though don't fully understand the nuances of this often overlooked but vitally important part of their overall insurance coverage. For those that fail to read the fine print a trap may be looming and, as evidenced by a recent District Court case in the Northern District of Illinois, falling in could cost your company hundreds of thousands of dollars.

It is standard procedure in most service agreements that the service provider (the "Provider") name the recipient of those services (the "Recipient") as an "additional insured" on the Provider's commercial general liability insurance ("CGL") policy and evidence the same in a certificate of insurance issued by the Provider's insurance carrier. The Recipient traditionally relies on this certificate as evidence of insurance in the event that damage to person or property is caused by the Provider, its employees or agents during the performance of the Provider's duties under the agreement. The Recipient further expects that the Provider's insurance will be primary in the event of an incident causing such damage. A recent case decided in the U.S. District Court for the Northern District of Illinois, however, exposed a coverage gap in which an additional insured might not be covered by the Provider's CGL policy for damages incurred by the Provider's employees.

The Provider in the case, Independent Building Maintenance Company ("IBM"), was engaged by Archer Daniels Midland Company ("ADM") to perform window cleaning services. The service contract included a provision requiring IBM to obtain insurance and indemnify ADM for liability arising from the work IBM performed. A policy with The Burlington Insurance Company (the "Insurance Company") was accordingly endorsed to name ADM as an additional insured. Subsequently, an IBM employee was cleaning windows when his ladder slipped causing him to injure his knee. The employee filed suit against ADM asserting negligence and premises liability. ADM tendered the defense of the suit to the Insurance Company, which ultimately disclaimed any duty to provide a defense. ADM settled the suit for $150,000 and alleged that it spent almost $200,000 in attorney's fees over the course of the suit. The Insurance Company claimed it had no duty to defend ADM in the suit because (1) the policy's cross liability exclusion barred coverage for bodily injury to an "employee of any insured" and (2) the employer's liability exclusion barred coverage for bodily injury to an"employee of the insured".

The court addressed the employer's liability exclusion first, which is a typical provision in a CGL policy that

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bars coverage for personal injury claims by employees of the insured as such claims would normally be covered by an employer's workers compensation insurance. The policy also included a severability clause that ADM relied on to argue that it was entitled to separate coverage under the policy so that a claim of injury by IBM's employee against ADM would actually be covered. In general, severability clauses are intended to treat each entity covered under the policy as if each were insured separately. The court agreed with ADM, citing an Illinois Supreme Court case that considered the interplay of a severability clause and an employee exclusionary clause barring coverage for bodily injury to employees of "the insured". The court noted, however, that drafting a broader exclusion might be effective in barring coverage for employee's suits against non-employer-insureds despite the existence of a severability clause.

Though the language of the employer's liability exclusion was not sufficient for the Insurance Company to bar coverage to ADM, the court found the opposite with the cross liability exclusion which barred coverage for bodily injury to an "employee of any insured". ADM attempted to rely on the same severability argument but the court disagreed, pointing in particular to the language "any insured". The court found that the distinction between the terms "the insured" and "any insured" in an exclusion is crucial in determining the significance of a severability clause, and even more so where the terms were used in different exclusion provisions of the same policy.

In summary, the court relied on the plain language to conclude that the employer's liability exclusion did not bar coverage for ADM because the injured employee was not actually ADM's employee (i.e., not an employee of "the insured" under the plain language of the exclusion), but did bar coverage for ADM under the cross liability exclusion because, being named as an additional insured on the original endorsement, ADM became "any insured" under the terms of the exclusion. In practice, business owners and risk managers should be wary to avoid the trap ADM fell into by doing some simple planning. First and foremost, realize that a certificate of insurance is merely evidence that coverage exists and is current but is subject to the exclusions in the original policy. Where possible obtain a waiver of the cross liability exclusion in the certificate of insurance, and be sure your counsel negotiates strong contractual indemnity provisions in the underlying agreement and that the Provider has the balance sheet strength to honor them.

Any comments and questions of the author can be directed to:

Jordan N. Uditsky
312.899.1685
juditsky@gouldratner.com

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