



## UNDERSTANDING POLICY IS KEY TO MAXIMIZING COVERAGE

When loss occurs, promptly put your insurer on notice

By **ASHLEY ROSE ADAMS**

Risk managers, in-house counsel, outside corporate or litigation counsel all have at least one thing in common when it comes to insurance – each should have knowledge of certain critical aspects of the typical commercial general liability insurance policy (CGL). A fundamental understanding of the basic principles of a CGL policy can help maximize coverage after a loss. Many times it is appropriate to rely on non-legal insurance professionals; however, some are too quick to conclude an insurer has no responsibility to defend suits filed against your company.

Though these professionals have tremendous expertise, in many insurance coverage disputes a conclusion is not so clear cut. Understanding your CGL policy can help your company take full advantage of your insurance coverage and minimize loss.

### Litigation Insurance

A CGL policy is “litigation insurance.” It will pay for the defense, as well as any settlement or judgment, for all covered claims. Plainly stated, every claim or suit that alleges “bodily injury” or “property damage” caused by you, has the potential of being covered by a CGL policy. Even some intentional acts resulting in economic loss may be covered under a CGL policy (e.g., wrongful detention, trespass, eviction under CGL Personal/Advertising Injury coverage).

The typical CGL policy is an “occurrence” policy issued for a single annual period. Coverage for any particular yearly

policy is triggered by bodily injury or property damage that happens during that policy period. The first step after an allegation against your company has arisen is to look to your insurer for potential defense of the claim or suit.

### Duty To Defend

An insurer has two distinct obligations to the insured — the duty to defend and the duty to indemnify. The duty to defend will be triggered if there is any possibility that the allegations in the complaint could lead to a judgment that would be covered under the policy. The insurer must defend the entire suit, even if the suit includes both covered and uncovered claims.

Insurers, however, may agree to defend under a reservation of rights — a disclaimer indicating the insurer’s basis for asserting that it will not pay indemnity for any judgment or settlement that is not covered by the policy terms.

If one or more of the claims may be excluded from coverage and the insurer defends without reserving its right not to pay indemnity for the excluded claim then the insurer has waived its ability to raise any policy defenses or exclusions as to the uncovered claim. For example, a complaint may have two counts, one covered by the policy, and one not covered. The insurer is obligated to defend the entire case, but if the insurer reserves its rights properly, it will not be required to pay for a judgment solely based upon the count that is not cov-

ered.

An insurer’s failure to defend a potentially covered allegation may subject the insurer to liability for otherwise non-covered indemnity.

Moreover, the insurer may be liable for the attorney’s fees incurred in the coverage action by the policyholder seeking coverage, in addition to the attorney’s fees incurred in defense of the covered claim.

The amount a CGL policy typically pays, as indemnity, for a judgment or settlement on a covered claim is restricted to an amount specified in the “limits of liability” section of the policy. However, the duty to pay defense fees is usually unlimited so long as the limit has not yet been paid out towards settlement or judgment. For example, a policyholder has a \$1,000,000 indemnity limit, defense of the claim costs \$1,500,000, and the ultimate judgment is \$1,500,000. The insurer will spend a total of \$2,500,000: \$1,500,000 towards defense costs and \$1,000,000 towards the judgment, provided defense costs are paid prior



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to judgment. The remaining \$500,000 will be paid by the policyholder unless it purchased an umbrella or excess policy.

The duty to defend is broader than the duty to indemnify. The insurer is obligated under the duty to defend to pay defense costs for claims that may or may not be covered, while an insurer is only obligated to indemnify if the claims are covered under the policy. The duty to indemnify is triggered after a judgment or settlement has been reached in the underlying case.

## Prompt Notice

When a loss occurs that may potentially be covered under your CGL policy, putting your insurer on notice promptly is vital. Typically, CGL policies require notice "as soon as practicable," which in many instances simply means within a reasonable period of time under the circumstances. Claims can be dismissed if notice is not timely; the standard for notice varies by state.

Some states require the insurer to prove it suffered prejudice from the untimely notice before a claim will be dismissed. Other states may disallow coverage simply because notice was not timely even without prejudice. Prompt notice of the potential loss is always the best course of action regardless of what rule applies.

## Retain Old Policies

Simply because an "occurrence" policy period has ended does not mean that you should throw the policy away. A loss that "occurred" during a prior policy year will provide coverage regardless of when the suit is brought.

A common example of this is a delayed loss scenario, where an event takes place in one year and is not discovered until several years later. Another potential situation is a loss that takes place over several years, triggering multiple policy periods. Some or all of the triggered policies may cover the loss.

## Insurance Archaeology

A delayed loss scenario can create additional problems in obtaining coverage if the policies have been lost or destroyed. Most states do not require insurance companies to retain copies of policies. Having a Certificate of Insurance does not guarantee coverage. Without the policy or at least a declarations page it may be difficult to ascertain whether or not coverage actually exists.

However, knowing basic information such as the policy period, number, limits and deductibles may aid in reconstructing the policy and also may allow for the introduction of secondary evidence to prove the terms of the lost policy. This information may be obtained from a certificate of insurance, receipts, invoices or similar information. Most CGL policies are based on forms created by the Insurance Services Office (ISO), an insurer trade organization that drafts standardized policies. Also, typically, the standard insuring agreement and exclusions issued by any insurance company are uniform for all policyholders for any particular year. Information regarding a company's policy can be matched with the applicable standard policy issued by a particular insurer or ISO form to prove coverage and applicable exclusions. Retaining and archiving old policies can facilitate speedier resolution, maximize recovery and avoid additional litigation expense associated with insurance archaeology.

## Additional Insured Coverage

Many contracts require one party to provide CGL coverage for another party, thus making them an "additional insured" under the policy. For instance, a subcontractor is typically required to protect the general contractor from any liability arising from the subcontractors work by naming the general contractor as an additional insured on the subcontractor's CGL policy. Com-

mercial tenants are almost uniformly obligated under a lease to add the landlord as an additional insured under its CGL policy. Additional insured's have all the same obligations to give notice that an insured has under a policy.

Therefore, obtaining and archiving the policy at the time of the lease or subcontract will prevent major difficulties when a suit is brought later for which you should be covered as an additional insured. If it is difficult or burdensome to retain the full policy because of the large number of the contracts and leases on which you are required to be an additional insured, at the very least a copy of a certificate of insurance, the policies' declaration page, and the relevant additional insured endorsement(s) should be secured.

## Mergers And Acquisitions

If your company merges or acquires another business, preventative measures should be taken in addition to assessing current liabilities. Insurance policies are issued to one entity and may not cover the merged or newly acquired entity if liability should arise. It is critical that insurance policies purchased by the predecessor are assigned to the merged or surviving entity.

Additionally, the closing of the merger or acquisition may be the last possibility to obtain copies of the policies from the predecessor company. Extending your mergers and acquisitions due diligence will ensure a seamless transition of coverage and prevent the surviving entity from liability exposure created prior to the acquisition or merger.

## Conclusion

Knowing where your policy is and when it may potentially cover a claim is vital and can preserve crucial resources. Be aggressive in pursuing coverage – you paid the premium and the rewards of maximizing coverage can be considerable. ■