Your Coverage Advisor

Insurance Coverage Newsletter
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Understanding How "Known Loss" or "Loss in Progress" Principles May Limit Available Insurance Coverage

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An issue often facing policyholders, especially those with claims triggering multiple policy periods, is whether the law of the applicable jurisdiction recognizes a "known loss" or "loss in progress" doctrine that limits the number of policies that may respond to a claim, or whether their policies contain provisions that accomplish the same effect. This determination can have a significant impact on the amount of insurance coverage available to a policyholder.

The basic premise of the "known loss" doctrine as articulated in some jurisdictions is that insurance coverage is only permitted for fortuitous events and that insurance may not be obtained or enforced for a loss that the insured either knows of, planned, intended or is aware is substantially certain to occur. "Hence, '[t]he concept of insurance is that . . . the carrier insures against a risk, not a certainty.'" *Owens-Corning Fiberglas v. Am. Centennial Ins. Co.*, 74 Ohio Misc.2d 183, 192-93 (Lucas Cty. 1995)(citing to *Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27, 29 (1st Cir. 1981)). The "loss in progress" doctrine is very similar. "Generally, that doctrine embodies 'the principle

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that losses which exist at the time of the insuring agreement, or which are so probable or imminent that there is insufficient "risk" being transferred between the insured and the insurer, are not proper subjects of insurance.'" *Am. & Foreign Ins. Co. v. Sequatchie Concrete Servs.*, 441 F.3d 341, 344 (6th Cir. 2006) (applying Tennessee law), quoting 7 Couch on Insurance § 102.8; *see also Inland Waters Pollution Control, Inc. v. Nat'l Union Fire Ins. Co.*, 997 F.2d 172, 178 (6th Cir. 1993) (applying Michigan law). Not all jurisdictions, however, recognize the "known loss" or "loss in progress" doctrines. *See, e.g., Burlington Ins. Co. v. PMI Am., Inc.*, 862 F.Supp.2d 719 (S.D. Ohio 2012) (applying Ohio law).

Even in those jurisdictions that do not specifically recognize the "known loss" or "loss in progress" doctrine, policyholders' insurance policies may contain different variations of contractual "known loss" or "loss in progress" provisions of which policyholders should be aware. For example, a policy may contain the following language:

> **b.** This insurance applies to "bodily injury" and "property damage" only if:
>
> * * *
>
> **(3)** Prior to the policy period, no insured ... knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If [the insured] ... knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

Cases applying policy language identical or substantially similar to this provision generally have done so to preclude coverage under policies issued after first knowledge of the loss, thereby limiting coverage to the policy in effect when the policyholder first knew of the loss. *See, e.g., Transportation Ins. Co. v. Selective Way Ins. Co.*, No. 1:11-CV-01383-RWS, 2012 WL 5605002 (N.D. Ga. Nov. 14, 2012) (holding that the second insurer did not owe any contribution to the first insurer which paid the loss because the insured knew of the trespass claim and the property damage before the second insurer's policy period commenced); *Travelers Cas. & Sur. Co. v. Dormitory N.Y.*, 732 F.Supp.2d 347, 361 (S.D.N.Y. 2010) (holding that the second policy did not provide coverage because remediation and repair of the damage occurred before the start date of the policy and "[t]o the extent that the Flooring Failure continued or worsened…, [the first insurer which paid the loss] may not recover for that damage because 'any continuation, change or resumption of such … "property damage"' [wa]s not covered" under the second policy).

Given the significance of "known loss" and "loss in progress" principles, policyholders would be well-advised to evaluate at the outset whether the applicable jurisdiction's law recognizes a "known loss" or "loss in progress" doctrine and whether their insurance policies contain similar contractual provisions. By doing so, they can accurately evaluate the amount of available coverage for a claim. ■

Reducing Your Risk in the Construction Industry: The Benefits of Being Listed as an Additional Insured

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In the construction industry, general contractors are often faced with making risk management decisions designed to effectively shift the dangers of liability that may ensue during the course of a project. The desired outcome behind this risk shifting scheme is to divert property damage and bodily injury claims to the entities responsible for actually performing the work- after all who wants to be on the hook for someone else's mistakes? A general contractor may solve this dilemma and deflect the risk of liability to others by requesting to be listed as an additional insured on their subcontractor's insurance policies. In essence, this provides the general contractor with an extra layer of protection, with coverage under its own policies and coverage under policies issued to its subcontractors. Additional insured coverage seems straightforward, but issues can, and do, frequently arise, often relating to whether a higher-tier contractor has properly been added as an additional insured, and the scope of the additional insured coverage.

Have You Properly Obtained Additional Insured Status?

General contractors should be aware that it is important to properly confirm their status as an additional insured to ensure liability protection. Oftentimes, companies wrongfully believe that this status can be conferred with a Certificate of Insurance or by requiring that the company be named as an additional insured in the construction contract documents. However, obtaining the benefits of an additional insured, is generally only achieved in one of two ways. First, the named insured (subcontractor)

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can specifically identify a higher-tier contractor as an additional insured on a policy endorsement issued by the subcontractor's insurance carrier. Alternatively, a subcontractor can obtain a blanket additional insured endorsement, which states that any party for whom the subcontractor is contractually obligated to obtain such coverage will be considered an additional insured. Either option is acceptable and will result in protection for the higher-tier contractor.

But how should that higher-tier contractor ensure that it has been provided additional insured coverage? Frequently, it demands, and receives, a Certificate of Insurance which ostensibly advises it that it has been named (either specifically, or in a blanket endorsement) as an additional insured. Importantly, however, a Certificate of Insurance does not create any obligation on the part of the insurer and, in fact, it usually says as much. Certificates of Insurance are issued by brokers, not insurers, at a point in time and may, or may not, accurately reflect the policy's coverage. Therefore, sophisticated contractors frequently request not only a Certificate of Insurance, but also a copy of the policy, or at least the declaration page and the endorsement that names it as an additional insured. This information should be requested at the beginning of a project and before any milestone payments have been made.

The Benefits of Being Named as an Additional Insured

Once a general contractor has properly been listed as an additional insured, they will reap several benefits from this extra layer of protection. As an additional insured, the contractor gains rights to make claims on the named insured's policy. In addition, this status can provide extra liability protection to the general contractor in the event of property damage and bodily injury during the course of a project. Additional insured status can oftentimes help to curb increases in insurance premiums since being named on another entity's insurance policy will decrease the likelihood that your own insurance will be used to cover claims. Furthermore, having additional insured status can also enable the additional insured to participate in the legal defense provided by the named insured's carrier.

Limitations on the Coverage of Additional Insureds

It should be noted that the scope of coverage for an additional insured is often subject to statutory and contractual limitations. In some jurisdictions, statutes have been enacted to prohibit or limit insurance coverage for an additional insured's negligent actions during the scope of a project. It should also be kept in mind that insurance carriers may restrict the coverage afforded to an additional insured within the language of CGL policies itself, for example by limiting coverage only to injury that would be indemnifiable under relevant state law. Moreover, additional insured status can be conferred for injury occurring during the work, after the work, or both. There are various forms that can be utilized by the named insured and insurer, and it is critically important that an additional insured review the policy language to make sure that it conforms to the construction contract and its expectations.

When attempting to reduce risk in the construction industry, it is important to consult with an attorney to ensure that you have properly obtained the additional insured status and to fully understand the scope and limitations on this type of coverage. ■

Insurance Coverage for "Pollution" Claims: Are you Properly Insured?

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A large number of commercial policyholders are significantly underinsured for environmental and pollution risks and, in many cases, policyholders purchase no insurance that would protect against these risks. There are a number of factors that contribute to these companies being underinsured or uninsured. Policyholders often are unaware of what pollution-related risks might be relevant to their business or believe that those risks are fully covered by general liability insurance policies. Additionally, policyholders do not understand or appreciate the insurance options available to them in today's market.

Does Your CGL Policy Provide Coverage?

Historically, commercial policyholders relied on their Commercial General Liability (CGL) policies to cover all risks, including pollution. This is not the case anymore. While CGL policies still have broad and general coverage, over the last several decades, insurance companies have narrowed or effectively eliminated coverage for pollution claims. In fact, virtually all new CGL policies issued today include some form of an "absolute" or "total" pollution exclusion.

While the terms "absolute" or "total" pollution exclusion are misleading, as there are instances when coverage is available for certain pollution events, insurers continue to take the position that these exclusions preclude coverage for claims arising out of a pollution event. When analyzing whether a particular exclusion will bar coverage for a specific pollution-related injury, a policyholder or its counsel should carefully review the specific language of the policy to determine how it applies under the circumstances. The policyholder should also be mindful that, in Ohio and most jurisdictions, exclusions will be construed narrowly, and ambiguities will be resolved in favor of the policyholder. Moreover, in some jurisdictions, courts will go further and resolve ambiguities in the policy to conform with the reasonable expectations of the policyholder, which can be an important distinction when the "pollution" at issue is not a traditional pollution event or condition.

Courts have been faced with pollution-related injury claims involving non-traditional pollutants such as carbon monoxide, bodily fluids, airborne dust, bacteria, and even odors in which insurers have sought to apply the total or absolute pollution exclusions. Yet, as noted, such exclusions are not definitive and the courts have examined both the policy and the relevant jurisdiction's case law to determine whether there is coverage for the non-traditional pollution claim, notwithstanding an insurer's assertion that the exclusion in its policy is "absolute" or "total." For these non-traditional pollution claims, it is important to be aware of how the various courts handled these claims in order to evaluate if a company's risks are covered, and what jurisdictions are most favorable and likely to provide coverage.

Additional Coverage Options

With the risk that a CGL policy may not provide coverage for certain pollution-related claims, an alternative risk management strategy has developed in today's market for many policyholders. Environmental insurance is relatively accessible coverage that essentially gives back the coverage that is sought to be excluded by the total or absolute pollution exclusions. The various environmental insurance options available provide companies with additional tools for forming their risk management strategy. There are many

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coverage options available to assist a company in filling this type of coverage gap, including:

- Pollution Legal Liability Insurance
- Cost Cap Insurance
- Contractor's Pollution Liability Insurance
- Errors and Omissions Insurance

A Pollution Legal Liability policy offers coverage for the environmental risks associated with owning, developing, or operating a specific facility or site. A Contractors Pollution Liability policy provides coverage for pollution-related bodily injury, property damage, or cleanup costs that arise from contracting operations performed by the named insured. Cost Cap Insurance can ameliorate the risk of costs associated with a known environmental remediation issue. Finally, Errors & Omissions coverage can protect against pollution conditions arising from faulty workmanship, design, or the use of defective materials or products.

Environmental insurance is traditionally associated with companies that utilize or generate hazardous substances, such as manufacturers and those in the oil and gas industry, that could pollute soil or water resources. However, many other types of companies have operations, services, or products that could result in pollution-related claims, and can benefit from some form of environmental insurance coverage, particularly in those situations that are outside the traditional scope of pollution or may be excluded from coverage under a CGL policy.

As the pollution exclusion has expanded in scope, there is a growing need for specific and comprehensive insurance coverage for pollution incidents. Many businesses are not adequately protected. It is important to accurately assess the risks and engage competent brokers and attorneys regarding the different insurance policies available. ■

Using Indemnity Provisions to Reduce Risk in Construction Projects

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A general contractor is building a house and decides to use a subcontractor for the roof. The subcontractor, however, negligently installs the roof, resulting in water intrusion damages to the home. The homeowner sues the general contractor for negligence. This article will analyze two things: (1) How the general contractor could utilize an indemnity provision to protect itself from financial exposure in situations where it hires a subcontractor and (2) How the general contractor can utilize the indemnity provision and a subcontractor's Commercial General Liability Policy to cover defense and indemnity costs.

General Contractors Can Use Indemnity Provisions to Transfer Risk

At the beginning of a construction project, a general contractor (as well as other parties involved in the construction project) can effectively plan how certain risks will be allocated among the participants in the projects. Doing so allows each party to manage and plan for risk and, additionally, potentially shift the risk to the party that is most able to control that particular risk. One of the most popular ways of doing this is through indemnification provisions.

Generally speaking, indemnity provisions provide that one party (the indemnitor) will protect another party (the indemnitee) from losses arising from the events that are specified in the indemnity provisions (the indemnified risk). This article will assume that the general contractor is the indemnitee (the party being indemnified) and the subcontractor is the indemnitor (the party providing indemnity protection).

An indemnity provision typically provides that the subcontractor will indemnify, defend, and hold harmless the general contractor for certain claims, liabilities, and losses. A tension, however, exists for general contractors when they are drafting such indemnity provisions. On one hand, the general contractor could seek a broad indemnity provision to maximize the types of situations in which the subcontractor would be obligated to provide indemnity. On the other hand, however, several states have imposed limits on indemnification provisions—namely that an indemnity provision cannot protect a party from liability caused by its own negligence. Indeed, Section 2305.31 of the Ohio Revised Code prohibits indemnity provisions that indemnify a party against claims caused by its own actions. Accordingly, general contractors should draft the indemnity provision carefully so that it comports with applicable state law and, in Ohio, excludes indemnity for claims arising from its own negligence.

Insuring the Indemnity Risk

Indemnity provisions can also provide the general contractor another avenue to recoup its defense costs and any judgment in favor of or settlement with the claimant—the subcontractor's insurance company. This is because, under many commercial general liability forms, the subcontractor-policyholder has insured its indemnity risk.

Generally, commercial general liability policies exclude liability the insured assumed through contract. However, policies generally provide an exception for "insured contracts." A typical definition of "insured contract" is:

> That part of any other contract or agreement pertaining to your business… under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

See, ISO Form CG 00 01 12 07, Section V(9)(f). In many cases, the indemnity provision found within a construction contract satisfies this definition. Where it does, the subcontractor-policyholder is entitled to coverage for the indemnity obligation that it owes to the general contractor. This coverage can be incredibly valuable where the general contractor has inadvertently not been named as an additional insured on the subcontractor's policy. (See *Reducing Your Risk in the Construction Industry: The Benefits of Being Listed as an Additional Insured,* page 3.)

The general contractor's defense costs may also be covered by the subcontractor's policy so long as the indemnity agreement requires the subcontractor to assume the general contractor's defense. These defense costs, however, are usually subject to the policy's limit of liability unless they satisfy the conditions of the supplementary payments provision. Defense costs may be paid by the insurer in addition to the policy limits where both the general contractor and subcontractor may be defended by the same counsel in the suit. See ISO Form CG 00 01 12 07, Supplementary Payments Coverage at Clause 2.

Conclusion

Construction sites present the inherent risk of accidents or injuries. General contractors, however, can mitigate these risks by implementing a carefully drafted indemnity provision and, additionally, requiring its subcontractors to obtain the proper insurance. ■

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Attorney Highlights

Christopher T. Teodosio joined the Community Legal Aid Board.

P. Wesley Lambert wrote an article for the February issue of the Cleveland Metropolitan Bar Journal titled "Maximizing Insurance Coverage for Cybercrime Losses."

Amanda M. Leffler and **Caroline L. Marks** attended the Trial & Insurance Practice Section 26th Annual Insurance Coverage Litigation Midyear Conference hosted from February 22-24, 2018.

Alexandra V. Dattilo and **Kerri L. Keller** attended the Annual Insurance Coverage Litigation Committee CLE Seminar hosted from February 28 – March 3, 2018.

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