The New ISO Commercial General Liability Policy: A Summary of December 2004 Policy Changes

October 2004

Coming this December 1, to an insurance company near you, is a brand spanking new, cutting edge, state-of-the-art, fully loaded Insurance Services Office, Inc. (ISO), commercial general liability (CGL) policy. Well, that might be a little bit of an exaggeration. What is true is that ISO has filed in all jurisdictions (except Puerto Rico) a new edition of the CGL policy, to be effective December 1, 2004. While most of the revisions are relatively minor in nature, there are a couple of changes worth noting and one revision that does change coverage significantly for "mobile equipment."

by Craig F. Stanovich
Austin & Stanovich Risk Managers, LLC

This article reviews the changes introduced in the December 2004 edition (as compared to the current October 2001 edition) of the ISO CGL policy. In addition, ISO has introduced two completely new policy forms—the electronic data liability coverage form and the product withdrawal coverage form. Let's start with the changes to "mobile equipment."

"Mobile Equipment" versus "Auto"

With some exceptions, the CGL policy is written to provide liability coverage arising out of "mobile equipment." Similarly, the CGL, again with some exceptions, is written to exclude liability arising out of an "auto." Understanding the CGL definitions of "auto" and "mobile equipment," which have changed very little since the mid-1980s, is the key to grasping how coverage applies. Further, the ISO business auto coverage form definitions of "auto" and "mobile equipment" are verbatim the definitions found in the CGL. That is, until now.

Compulsory Auto Insurance Coverage

Insurers have had to pay compulsory type auto coverage, such as personal injury protection (no-fault), underinsured or underinsured motorist claims under the CGL policy for certain types of mobile equipment. Apparently, some types or uses of mobile equipment have been found to trigger a state's compulsory auto insurance statute or regulation.

Resulting Changes

The payment of claims noted above under the CGL policy has prompted ISO to conclude that compulsory auto insurance coverage is more appropriately provided under a commercial auto policy. To effect this change and resolve the issue, ISO has included several revisions in the December 2004 edition of the CGL policy. Those revisions are:

1. Revise the definition of "auto" and "mobile equipment" under the CGL policy.
2. Revise exclusion g., the Aircraft, Auto and Watercraft Exclusion.
3. Remove entirely Section II item 3, Who Is an Insured.

Revised Definitions

Auto. The definition of "auto" now has two parts. First, as before, an auto is a land motor vehicle (which includes a trailer or semitrailer) designed for travel on public roads. Machinery or equipment attached is considered part of the auto.

Second (and this is the new part), any other land vehicle that falls within either a state's compulsory insurance law, financial responsibility law, or motor vehicle insurance law is considered an auto. The law of state in which the vehicle is principally garaged (or the state in which the vehicle is licensed) is to be used to determine if a compulsory law, financial responsibility law, or motor vehicle law applies to that vehicle.

Mobile Equipment. Consistent with the above, a paragraph has been added at the end of the definition of "mobile equipment" to expressly state that *if* a vehicle falls within a compulsory or financial responsibility law or a motor vehicle insurance law, it is not considered to be mobile equipment, even if the vehicle otherwise fits the multi-part definition. Such a land vehicle is now considered to be an auto.

Exclusion g. Aircraft, Auto or Watercraft—October 2001 Edition

While this exclusion does eliminate most coverage for liability arising out of the operation, maintenance, use, loading, or unloading of autos (including eliminating coverage for negligent maintenance, use or entrustment to others of autos), the October 2001 edition of the CGL does grant two auto exceptions (and thus provides coverage) for:

1. Liability arising out of *parking* an auto on premises owned or rented by the named insured (including while parking on ways next to the premises) as long as the auto is not owned, rented, or loaned to the insured.
2. Liability arising out of the *operation* of equipment attached to certain specifically described self-propelled autos (see "mobile equipment" definition items f.(1) and f.(2)), such as truck mounted cherry pickers used to raise or lower workers.

Exclusion g. Aircraft, Auto or Watercraft—Revised

A third exception to exclusion g. has been added to the December 2004 CGL to provide liability coverage for the *operation* of equipment attached to land vehicles that fall under statutory financial responsibility or motor vehicle insurance laws and are thus now "autos." Similar to 2. above, the CGL does intend to provide coverage for liability arising out of the *operation* of equipment attached to such autos; the new "auto" and "mobile equipment" definitions are intended to eliminate *only* coverage for over-the-road exposures.

This exception, however, only applies to land vehicles that would otherwise fit the definition of "mobile equipment," but now fall outside of the definition *solely* due to compulsory financial responsibility or motor vehicle insurance laws that apply to that vehicle. For example, a building materials dealer regularly uses her tractor and semitrailer to transport and deliver lumber to customers. While using a crane that is attached to the semitrailer to deliver a load, a passerby is injured when some of the lumber slides off the crane. Even though this is liability arising out of the operation of equipment (the crane) attached to the auto, this vehicle does not fall under this exception as it does not fit the definition of "mobile equipment." The semitrailer is an auto because it is maintained primarily for the transport of cargo on public roads, not because it falls within the state's financial responsibility or compulsory motor vehicle insurance laws.

Revisions to Who Is Insured

Consistent with the elimination from the new CGL of liability coverage for any land vehicles that falls within a state's financial responsibility law, compulsory insurance law or motor vehicle insurance law, item 3. Section II, Who Is Insured, has been eliminated in its entirety. As coverage is not intended to apply to mobile equipment registered under a motor vehicle registration law and operated along a public highway, providing coverage to an insured operating such a land vehicle is also eliminated.

Commercial Auto Revisions—"Bridge" Endorsement CA 00 51 12 04

ISO has filed a "bridge" endorsement to be used with commercial auto forms to mirror the CGL changes. The bridge endorsement, entitled "Changes in Coverage Forms—Mobile Equipment Subject to Motor Vehicle Insurance Laws" (CA 00 51 12 04), contains revisions explained below.

To dovetail with the amendment to CGL Exclusion g. Aircraft, Auto and Watercraft, the commercial auto Operations Exclusion under the Section II Liability is changed to eliminate coverage for the *operation* of equipment attached to a land vehicle that would otherwise be "mobile equipment," but is considered an "auto" solely due to the application of financial responsibility laws, compulsory insurance laws or motor vehicle insurance laws.

The commercial auto definitions of "auto" and "mobile equipment" have been amended to match exactly the new definitions in the December 2004 CGL policy.

Revised Pollution Exclusion

As has been the case with the pollution exclusion since the July 1998 edition of the CGL policy, the CGL continues to narrow the scope of the pollution exclusion by the addition or broadening of exceptions to the exclusion. Litigation over the interpretation and construction of the so-called absolute pollution exclusion continues; keeping abreast of changes to this hotly contested portion of the CGL policy is essential to continue to properly handle the risk and fairly settle claims.

The December 2004 CGL has expanded the building heating equipment exception to now include equipment used to cool or dehumidify the building as well as equipment used to heat water for the building's occupants (and their guests') personal use. This change is in recognition of the fact that this type of equipment presents a pollution exposure that is very similar to building heating equipment.

This exception is limited in that it continues to grant coverage only for bodily injury sustained within a building caused by smoke, fumes, vapor, or soot that is produced or originates from the described building equipment.

Revised War Exclusion

This revision now incorporates the current mandatory war endorsement exclusion (CG 00 62) into the December 2004 edition of the CGL policy in both Coverage A—Bodily Injury and Property Damage and Coverage B—Personal and Advertising Injury. The previous exclusion (prior to the mandatory war exclusion endorsement) excluded only war assumed in an "insured contract."

The war exclusion being incorporated into the December 2004 edition of the CGL excludes any liability arising out of war. "War" is broadly defined and includes undeclared war, civil war, warlike action by a military force, insurrection, rebellion, revolution, usurped power, or action taken by government authority in hindering or defending against any of these.

Medical Payments—Athletic Activities

The October 2001 edition of the CGL Coverage C—Medical Payment coverage currently excludes expenses for bodily injury to a person injured in athletics. The term "athletics" was not defined in the form and has been very narrowly interpreted, resulting in payment of medical expenses to persons who were involved in activities that posed a risk of injury far greater than insurers believed was ever contemplated in this "payment without regard to fault" coverage.

To remedy this issue, Exclusion e. of Coverage C—Medical Payments, has been rewritten to clearly eliminate payment of expenses for bodily injury while the person is practicing, instructing, or participating in any physical exercise or games, sports, or athletic contests. For example, persons injured while engaged in activities (including providing instruction) such as aerobics, dancing, kick boxing, yoga, weight training, etc., will likely no longer have the benefit of this coverage.

Revised Policy Condition—Other Insurance

The current other insurance condition of the October 2001 edition of the CGL policy states that the CGL is primary, but is excess for specific situations or arrangements. One of the situations in which the CGL is excess is when the *named insured* is added by endorsement as an additional insured to another person or organization's CGL policy to protect the named insured's liability arising out of premises and operations exposure.

In the above situation, the named insured's CGL is excess of (and does not contribute with) the CGL on which the named insured has been added as additional insured. However, the excess provision applies only to the extent the named insured has coverage as an additional insured for premises and operations exposure. If the named insured also is an additional insured for products and completed operations (which is typically by a separate additional insured endorsement), the excess provision of the named insured's policy does not expressly apply. The result is that the named insured's CGL would likely share in the loss, based on the CGL policy's described method of sharing.

To fix this apparent oversight, ISO has amended the other insurance clause in the December 2004 edition of the CGL to apply as excess if the named insured is added by endorsement to another person or organization's CGL policy as an additional insured for not only premises and operations but also products and completed operations exposures. This would generally make the CGL policy on which the named insured has been added as an additional insured "primary and noncontributory," a common demand of the risk management community (or at least a demand from risk managers with superior bargaining power).

Other Forms Introduced

As mentioned at the beginning of this article, in addition to the above CGL changes, ISO has also introduced two completely new coverage forms. These are discussed below.

Electronic Data Liability Coverage Form

A separate claims-made form (CG 00 65 12 04) provides coverage for liability resulting in loss of electronic data that is caused by an "electronic data incident." An "electronic data incident" is an accident, negligent act, error, or omission which results in loss of electronic data.

Coverage provided by this new separate form is broader than the CGL electronic data liability endorsement (CG 04 37) as the electronic data liability coverage form does not require that the loss of electronic data result from physical injury to tangible property (as is required by the endorsement). This new form is not designed for policyholders who are providing computer products or services, as losses arising out of such activities are expressly excluded. Additional important exclusions include damage to the insured's own electronic data, liability assumed by contract, failure to perform a contract, infringement of intellectual property rights, and unauthorized use of electronic data.

Product Withdrawal Expense Coverage Form

Also introduced is a separate coverage form (CG 00 66) that provides broader coverage than the currently available limited product withdrawal expense endorsement (CG 04 26 10 01). The new product withdrawal expense coverage form provides:

- Coverage A—Reimbursement for product withdrawal expenses incurred by the insured because of a covered product withdrawal.
- Coverage B—Liability to others for damages an insured is legally obligated to pay because of product withdrawal expenses (including legal fees).

Coverage A and Coverage B are subject to numerous exclusions in addition to limitations contained in the definitions of "product withdrawal" and "product withdrawal expenses."

Summary of December 2004 Changes

By far the greatest impact of the revisions included within the December 2004 edition of the CGL policy form is the change in the definitions of "mobile equipment" and "auto." This change adds potential confusion by attempting to solve an issue that might have been addressed more directly.

Financial Responsibility Laws

Reference to land vehicles subject to "a compulsory or financial responsibility law or other motor vehicle insurance law" presumes that such laws are relatively clear and understandable. In reality, it may be very difficult for a policyholder (or a broker, agent, or adjuster) to accurately determine which types and which uses of land vehicles that were formerly "mobile equipment" fall within the laws that require insurance.

"Subject To"

Once a determination is made as to how a state's financial responsibility or insurance law applies, the meaning of the phrase "subject to" must be also be deciphered to decide if CGL coverage applies. Consider the following illustration and its examples.

A contractor owns a small backhoe for use in his construction business. It is definitively determined that the backhoe falls under the state's compulsory motor vehicle insurance law *only* if the backhoe is operated on public roads.

Example 1. The contractor decides to transport the backhoe to all job sites on a flatbed trailer; the backhoe is not operated on public roads. While at a job site, the backhoe operator negligently backs into and damages a couple of parked cars. The contractor's CGL insurer denies liability coverage for damage to the cars, concluding that the backhoe is an "auto" and thus its use is excluded. The insurer explains that "subject to" means *could or might* fall under the compulsory insurance law—after all, the insurer routinely observes similar types of "mobile equipment" that fall under the compulsory insurance law.

Example 2. After the above accident, the contractor decides to drive the backhoe on a public road to a job site while his trailer is being repaired. The contractor understands that this use does, indeed, trigger the compulsory insurance law. At the advice of his insurance broker, the contractor specifically lists the backhoe on his business auto policy as a covered "auto" for liability coverage (the business auto insurer also uses the "bridge" endorsement).

While driving the backhoe on a public road from a job site to the contractor's yard, the backhoe operator negligently collides with a motor vehicle, injuring the occupants, and causing damage to the vehicle. The contractor's CGL insurer again denies liability coverage, explaining that the backhoe falls under the state's compulsory insurance law and is therefore an "auto" excluded by the contractor's CGL policy. Coverage for the liability resulting from this accident is provided by the contractor's business auto policy.

Example 3. The flatbed trailer is finally repaired and the contractor reverts back to transporting the backhoe to and from the job site using the trailer. The contractor removes the backhoe as a covered "auto" from the business auto policy.

At a new job site, the backhoe negligently runs over and crushes some piping. The CGL insurer again denies liability coverage, explaining that the backhoe *did* fall under the compulsory insurance law, and is thus an "auto" and excluded by the CGL.

A Question of Semantics

The actual words of the policy and their arrangement do matter. A closer look reveals the CGL uses either the phrase "*is* subject to" or "*are* subject to" in the context of "mobile equipment" and "auto." This strongly indicates present tense—the land motor vehicle must fall within the insurance law at the present time. ISO could have chosen the phrasing "*may* be subject to," "*was* subject to," or "*is or was at any time* subject to," but has elected otherwise.

Considering the above, the most compelling interpretation of "subject to" is that land vehicles are considered "autos" only if the vehicle falls under the state's financial responsibility or motor vehicle insurance law *at the time of the occurrence* that results in bodily injury or property damage. Therefore, in the above examples, only Example 2 properly applies the definitions of "mobile equipment" and "auto" included in the December 2004 edition of the CGL. Both Examples 1 and 3 are overly broad in their application of "subject to" as respects the new definitions of "mobile equipment" and "auto," resulting in improper coverage denials.

It is worth noting that ISO has expressly stated that it wants to eliminate compulsory motor vehicle type coverage from the CGL as the commercial auto policy is the appropriate place for such coverage involving over-the-road exposures. This further reinforces the "at the time of occurrence" view as it may be inferred that ISO intends to avoid paying *only* state-imposed compulsory motor vehicle insurance claims or benefits under the CGL.

While it may have been clearer to simply exclude any obligation of any insured under any motor vehicle financial responsibility law, compulsory motor vehicle insurance law or other motor vehicle insurance law (similar to the workers compensation exclusion), that is not what has been filed. Nonetheless, a narrow reading of "is subject to" is warranted when considering the context of the 2004 changes; a land vehicle that otherwise fits the definition of "mobile equipment" should be considered an "auto" only if, at the time of the loss, compulsory motor vehicle insurance laws or motor vehicle financial responsibility laws apply to that vehicle.

Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based "rent-a-risk manager" outsourcing, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com.