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THERE'S A BETTER WAY.

CLIENT ADVISORY

ALL DECKED OUT – DISCONTINUED OPERATIONS COVERAGE

Brian B. Benefit is very skilled at carpentry – especially in the construction of residential decks. Doing business as BBB Builders, Brian is a sole proprietor (with no employees) who has been constructing decks for over 10 years. His insurance agent, Acme Agency of America, has recommended, and Brian has purchased, an ISO Commercial General Liability insurance policy. In fact, Brian has purchased his liability coverage from the same insurer, Intrepid International Insurance, since starting his business in 1997, paying about $5,000 each year in annual liability insurance premium.

Retirement

Brian has been very successful financially and has decided to retire on August 1, 2008 – no more deck building! Accordingly, Brian asked his insurance agent, Acme Agency, to terminate his policy effective August 1, 2008. Acme complied with Brian's request and the CGL policy with Intrepid International was terminated on August 1, 2008.

A Bad Day

In early 2007, Brian was hired to construct a deck for a homeowner, William Warner, whose deck was built in May of 2007. When Mr. Warner walked out onto his second story deck on the morning of September 13, 2008, the deck collapsed, causing Mr. Warner to fall and suffer serious injuries. The building inspector investigated the collapse and found that BBB Builders had made a mistake – they had failed to properly fasten the deck to the home. On October 1, 2008, William Warner sued Brian B. Benefit for the damages arising out of his injuries, alleging that Brian was negligent in failing to properly fasten the deck to the house.

An Unwelcome Surprise

Shortly after sending the suit papers to his insurer, Brian B. Benefit received a letter from Intrepid International – with the shocking assertion that there was no coverage for the William Warner lawsuit. The letter was concise – the CGL policy was not triggered as the bodily injury did not occur during the policy period.

Brian was stunned – he had paid over $50,000 in insurance premiums over a period of ten years to Intrepid. But when he needed them most, they weren't there. Intrepid Insurance had to be mistaken. Brian and his attorney came up with a couple of different reasons why coverage should be provided for the William Warner suit.

First, they found that BBB Builders had purchased an ISO "occurrence" Commercial General Liability policy every year since 1997. And wasn't the "occurrence" Brian's failure to properly fasten the deck to the house in May 2007? If so, the policy was in force when he built the deck, so coverage should apply, right?

Second, all of the policies provided coverage for the "products-completed operations" hazard. Isn't this claim what the policy was intended to cover – injuries or damage that took place after the work was completed?

Plain Meaning

Unfortunately for Brian and BBB Builders, a closer look at the CGL policy wording does not support their reasoning. The CGL policy did require an "occurrence," but the policy was actually not triggered by an "occurrence." Instead, the CGL insuring agreement states:

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> (2) The "bodily injury" or "property damage" occurs during the policy period;

In other words, the bodily injury has to occur during the policy period for coverage to apply. Even though the work on the deck was done during the policy period, the bodily injury that resulted from the work did NOT take place during the policy period. Was Intrepid correct? If they are, what is the use of "products-completed operations" coverage?

Painful Truth

Intrepid is correct –the bodily injury to William Warner did not occur during the policy period. Therefore, BBB Builder's CGL insuring agreement did not apply. It matters not when the deck was constructed – what matters is when the injury to Mr. Warner took place – which was September 13, 2008, unmistakably after BBB Builder's CGL was terminated on August 1, 2008.

So what good is "products-completed operations" coverage? The answer is maddeningly simple – it is no good if the policy is not in effect when the injury or damage occurs.

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Proposed Solutions

Brian's attorney is adamant Brian should have purchased a "tail" to have coverage for the Warner claim. After a little research, Brian finds that a "tail" generally refers to an Extended Reporting Period, which is available only on a "claims-made" CGL policy – a "tail" could not have been obtained on the Intrepid CGL policy.

And even if Brian had a "claims-made" CGL policy, purchase of the "tail" or Extended Reporting Period (ERP) would still not have worked. An ERP for a claims-made CGL does NOT provide coverage for injuries or damage that took place after the policy expired and during the "tail" period – the CGL ERP provides coverage only if the injury or damage took place before the policy was terminated and then only if the claim for that injury or damage was made during the ERP.

Discontinued Operations Coverage

BBB Builders should have continued to purchase CGL coverage for several years after Brian retired – if an ISO CGL policy had been in effect on September 13, 2008, coverage would have been afforded for the Warner claim under the "products-completed operations" hazard.

Generally known as a "discontinued operations" or "discontinued completed operations" policy, such coverage is usually a CGL policy with one unique aspect – the premium is calculated differently. In the case of BBB Builder's, an insurer who undertakes to provide "discontinued operations" coverage is now giving coverage only for work that was done before Brian retired. There is no longer any exposure for premises or operations claims – only for completed work. And the completed work exposure diminishes over time as no new work is being done – the coverage applies only to work done in the past.

Consequently, it can be argued the annual premium for BBB Builder's discontinued operations policy should actually be the same or less than the $5,000 per year Brian was paying with Intrepid International. The practical problem is that many insurers refuse to provide coverage for discontinued operations – their underwriting guidelines contain a prohibition for discontinued operations coverage.

This is curious indeed, as the same insurer who would gladly offer BBB Builder's a CGL policy for continuing operations (if Brian remained in business), would refuse to offer discontinued operations coverage (if Brian retired), citing the fact that they did not want to pick up all of the work Brian had done over the past ten years. Yet, the same insurer would pick up all of Brian's past work – whether or not the ISO CGL was a continuing operations or discontinued operations CGL policy.

The solution available to Brian is discontinued operations coverage from a non-admitted or surplus lines insurer. Should Brian choose not to purchase the discontinued operations policy, he will face a significant uninsured exposure to risk.

Conclusion

Since the mid-1980s, the "trigger" of an ISO "occurrence" CGL policy has been abundantly clear – the CGL is triggered only when the bodily injury or property damage occurs during the policy period. This rather straightforward coverage issue is widely misunderstood both in and out of the risk and insurance industry. It is all too common for builders to assume the CGL policy in effect when the structure is erected will protect the organization from injury or damage that occurs months or years after the CGL policy has expired. Discontinued operations coverage is the answer to closing this serious gap in a policyholder's insurance program.

About the Author

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 risk management, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com