Other Insurance and the CGL Policy

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We usually make sure our client has purchased its own CGL policy—a policy on which it is a named insured. We are sometimes a bit surprised to find our client *also* has coverage on *someone else's insurance*. Or that some unrelated person or organization may be covered on our client's CGL policy.

On the surface, this does not appear to create a problem. After all, isn't it better to have coverage in two places rather than just one? Before answering, consider *Marwell Constr., Inc. v. Underwriters at Lloyd's, London*, 465 P.2d 298 (Alaska 1970), where the Alaska Supreme Court quoted the Fifth Circuit Court of Appeals:

> …we have again the *problem* of an Insurer who has written the policy and taken the Assured's premium urging him to go elsewhere, tentatively, if not finally, because another insurer is, or ought to be, or may be, liable for the whole, half, or part of a loaf. In the process the moving insurer … asserts, what it so often denied that the policy should be liberally construed and … manages to make itself enough of a party to force a construction of another contract made by another insurer with another assured and which, under no circumstances, was made for its benefit.
>
> So it is here. Coming as it does *the accident and the assureds all seem but forgotten* as the two insurers match clause against clause, coverage against exclusion, claim against denial, in this battle between fortuitous adversaries. [Emphasis added.]

These remarks reflect the potentially harsh reality facing insureds when they find themselves insureds on two policies. Might the claim and these insureds be "all but forgotten" when insurers quarrel over which policy should pay—and in what order?

Put another way, having insurance in more than one place can indeed be problematic for insureds.

It should now be apparent that a basic understanding of the "other insurance" clause of the commercial general liability policy is needed.

What Is "Other Insurance?"

Located toward the end of the Insurance Services Office, Inc. (ISO) CGL policy, the "other insurance" clause is found in Section IV—Commercial General Liability Conditions—Item 4, with the appropriate heading, "Other Insurance."

Valid and Collectible Insurance

To be considered "other insurance" for the purposes of this policy condition, the other insurance must be both valid and collectible. First, and at the risk of stating the obvious, other insurance must usually be *insurance*. For instance, is self-insurance considered insurance and thus other insurance?

Let's say a general contractor has elected a $1 million self-insured retention on its CGL policy. If a $500,000 suit is brought against the general contractor, does the general contractor's CGL policy qualify as other insurance from the standpoint of the subcontractor's insurer who has listed the general contractor on the subcontractor's CGL as an additional insured? Possibly not:

> Self-insurance … does not fall within this definition [insurance] and therefore, is not "other collectible insurance." *State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co.*, 406 So. 2d 1184 (Fla. Dist. Ct. App. 1981)

In the above example, the general contractor's CGL is not insurance or at least not "collectible insurance." However, other states may view this situation differently, depending on the situation.

Second, "valid" insurance normally means the insurance policy is legal, i.e., enforceable. If the other insurance is subject to rescission because of a misstatement or misrepresentation made by the policyholder, it will generally not be considered valid.[1]

Similarly, if an insured does not comply with policy conditions, the policy may not be valid, such as a failure to timely notify the insurer of an accident.[2]

Third, "collectible" usually requires the insurer be solvent.[3] Put another way, if the insurer becomes insolvent, the policy is likely not considered collectible. Along the same lines, if the aggregate limit or limits of a policy are exhausted and the insurer has no further obligation to any insured, the policy may be "valid," but it is not "collectible."

Insurance Is Available

The other insurance must also be available to the insured. For example, the court in *Federal Ins. Co. v. Empire Mut. Ins. Co.*, 181 A.2d. 568, 569 (N.Y. App. Div. 1992) observed:

> Other insurance and concurrent coverage exists where there are two or more insurance policies covering the *same interest* and against the *same risk*. [Emphasis added.]

Stated differently, being "available" to an insured requires both (or all) policies include the same person or organization as an *insured*. However, as simple as this seems, confusion is too often widespread as to what constitutes "available to the insured." Consider this illustration:

> A landlord enters a real estate lease with a commercial tenant. In the lease, the tenant must purchase CGL coverage, but there is NO requirement that the tenant list the landlord as an additional insured. Despite the absence of an additional insured requirement, the tenant agrees to "hold harmless and indemnify" the landlord under certain circumstances.

The CGL policy of the tenant should not be considered other insurance from the viewpoint of the landlord.

That the tenant's insurer may potentially pay the *tenant's obligation* to indemnify the landlord (the landlord is a non-insured indemnitee) resulting from the landlord's tort liability to third parties is not the equivalent of the landlord having the status as an insured on the tenant's CGL policy.

Coverage A or B

The other insurance clause applies not only to bodily injury or property damage as included with Coverage A, it also applies to personal and advertising injury as included with Coverage B of the CGL.

Priority of Coverage

The first portion of the other insurance clause addresses when the CGL policy is primary coverage. If a person or organization has the status of insured, this CGL policy is primary, unless Item b. applies. It is worth noting that "primary" is the "default" position in the CGL priority of coverage—coverage to *all insureds* (including additional insureds added to this policy) is "primary" unless the other insurance falls within Item b. Excess Insurance.

The insurer's obligation to the insured is not affected unless the other insurance is also primary—if more than one policy is primary, then all primary policies will share the claim. Exactly how the primary policies will share is specifically addressed below in Method of Sharing.

Excess Insurance—Part One

The CGL policy is excess over certain other types of insurance, regardless of the wording of the other insurance clauses of those policies, whether such policies are purported to be primary, excess, contingent, or on any other basis.

In this section of the CGL policy, the insurer lists four situations in which the CGL insurer intends to apply as *excess coverage only*. While not all inclusive, here are some examples of these situations.

- **Builder's Risk.** If the insured is also an insured on a first-party policy, such as a fire and extended coverage policy, a builders risk policy, an installation floater, or coverage that is similar to the policies previously listed, and the coverage *is intended to insure "your work,"* the CGL is *excess* of such a first-party policy. Of course, the distinguishing factor here is that the first-party policies, such as a builders risk policy, insure "your work." Conversely, if the first-party policies do not insure "your work," this section does not apply.
- **Fire Insurance.** A tenant, while renting a premises it does not own, may agree in a lease to be responsible for any damage to the landlord's building, regardless of fault or cause. In such cases, the tenant usually purchases fire or other first-party property insurance in its own name to protect its interest in the building. If a fire occurs, the tenant's CGL policy (which may provide some coverage under the "Damage to Premises Rented to You" exception) expressly states *it will apply as excess* of the first-party property policy purchased by the tenant for any damage to the landlord's building.
- **Legal Liability.** An organization regularly rents conference rooms at various hotels. As part of its property insurance program, the organization purchases the Legal Liability Coverage Form (CP 0040) to pay for its potential legal liability for property damage to the conference rooms. A presenter from the organization forgets to shut off a projector, which overheats and causes the sprinklers in the conference room to discharge. The CGL policy clearly states it will apply as excess over any payments made under the Legal Liability Coverage Form for the water damage to the conference room.
- **Aircraft, Autos, or Watercraft.** A new restaurant offers valet parking. Not only has the restaurant purchased a CGL policy, it also has purchased a business auto policy including coverage for nonowned autos. While sending a text message on his cell phone, the attendant, while parking a patron's auto, knocks down a passerby, causing bodily injury. The injured passerby sues the restaurant. The claim is tendered to both the restaurant's CGL and business auto insurers. While the CGL does provide coverage to the restaurant for the bodily injury that took place while the attendant was parking the patron's auto, the CGL will apply only as excess of the Business Auto policy of the restaurant.

Excess Insurance—Part Two

Disputes over the priority of coverage often arise when a policyholder has purchased its own policy and has also intentionally obtained coverage as an additional insured on the CGL policy of an unrelated person or organization, such as a tenant or subcontractor.

It is generally understood that the intent of this arrangement is that policyholder's own CGL policy, that is the CGL on which the policyholder is listed as a named insured, is to apply as excess and not share its limits with the CGL policy on which it is *an additional insured*.

Today's ISO CGL (December 2007 edition) "other insurance" wording generally (with some notable exceptions) complies with this intent. For example, if a general contractor and a subcontractor both have an ISO CGL policy (December 2007 edition) with the current other insurance wording, and the general contractor is also listed as an additional insured *by endorsement* on the CGL of the subcontractor, the policies will pay as explained below.

To the extent the general contractor is covered as an additional insured on the CGL policy of the subcontractor, the CGL policy of the subcontractor will apply on a primary basis to protect the additional insured general contractor. Recall that the CGL "default" as respects the order of coverage is for an insured (including an additional insured) to apply as primary coverage (see Priority of Coverage above). Thus, the insurer for the subcontractor will defend and pay on behalf of the additional insured general contractor. Further, the general contractor's CGL policy is excess based on its "other insurance" wording:

> This insurance is excess over:
> Any other primary insurance available to you covering you for damages … for which you have been added as an additional insured by attachment of an endorsement.

Attention should be directed to a few important issues.

To repeat, the above example presupposes that the general contractor and the subcontractor both have the same ISO other insurance wording. Several insurers, both national and regional, have developed their own proprietary additional insured endorsement forms, which include very significant differences in the wording of the other insurance clause.

For instance, if in our example the subcontractor's CGL policy stated that coverage available to any additional insured applies only as excess to any insurance purchased by the additional insured, the priority of coverage is lost, and thus the intent is thwarted. In other words, the priority of coverage cannot be determined unless the other insurance clauses of both policies are closely examined.

Also important is to recognize that the additional insured has to be added by endorsement for this excess clause to be triggered. This wording does not affect coverage for those persons or organizations that are *automatically insureds on the CGL*. For example, a real estate manager is automatically an insured under the CGL policy of the real estate owner for which they are providing services. It is likely the real estate manager also has his or her own CGL policy on which it is a named insured. As the real estate manager is not an additional insured added by endorsement to the CGL of the real estate owner, the other insurance clauses would likely result in both CGL policies applying as primary—and thus the sharing of limits, which might not have been the intent of the parties.

Finally, it is too often assumed that the any "excess" or "umbrella" policy will apply with the same priority of coverage that is found in the example of the general contractor and subcontractor. Unfortunately, that assumption is very often mistaken. Several states have made it clear that all primary policies must be exhausted before any excess or umbrella policies will be triggered. Even a cursory reading of the other insurance clause of an excess or umbrella policy should quickly reveal the difference in wording compared to a CGL policy.

How the CGL Applies as Excess Insurance

Once it is established the CGL is to apply as excess, a few additional conditions need to be considered and understood.

Defense

The insurer will not defend any insured if the CGL is found to apply as excess. However, even if the CGL is to apply as excess, *if no other insurer defends* an insured, the excess CGL insurer does agree to step up and undertake defense of its insured, even if another insurer actually has the defense obligation. The offset to defending an insured as an excess insurer is the condition that the insurer will take any of the insured's rights to recover from all those other insurers. In sum, an insured will not be denied a defense by its CGL insurer solely because the CGL insurer is found to apply as excess, but the excess insurer does intend to seek contribution from all other insurers who should have provided a defense to the insured.

Payments

Even when the CGL insurer is excess, it promises to pay excess of the other insurance, but only if the loss exceeds the total of the limit of insurance and any deductible or self-insured retention amounts. In other words, if the CGL that is found to be primary has a limit of $1 million and self-insured retention of $250,000, the CGL insurer that applies as excess will not pay any part of a loss until it exceeds, in this example, the limit of $1 million plus the self-insured retention of $250,000, or a total of $1,250,000.

Other Excess

The CGL insurer, even as excess, will pay its share of a loss with other excess insurers, provided the insurance is not specifically written as excess of the CGL policy and is not the type of insurance describe in the excess insuring provision (builders risk, installation floater, etc.).

Method of Sharing

Recall the example of the real estate manager that was automatically an insured on the CGL of the real estate owner for which it provided

services *and* was also a named insured on its own policy. As the real estate manager was insured on two policies, each insurer would consider the other insurer's policy to be "valid and collectible insurance available to the insured." Further, the coverage provided to the real estate manager was primary on both policies. Here is where the sharing of the loss is outlined in the policy.

Equal Shares

Let's say the CGL for the real estate owner is written by XYX Mutual with a limit of $1 million each occurrence; the CGL for the real estate manager is written by ABC Indemnity with a limit of $500,000 each occurrence. The damages awarded against the real estate manager are $300,000. How much will each insurer pay? In contribution by equal shares, each insurer would pay 50 percent of the loss or $150,000 each.

Let's change the example a little. What if damages awarded against the real estate manager were $1.2 million? Equal shares would require ABC to pay $500,000, its policy limit, while XYZ would pay $700,000 (still less than its policy limit of $1 million).

While the CGL does mandate the equal shares method of contribution, this method applies only if all insurers permit contribution by equal shares.

By Limits

If all policies do not permit contribution by equal shares, then the contribution is by limits—that is, proportional. Assume for a moment the same example with the real estate manager, but instead assume the XYZ policy does *not* permit contribution by equal shares. The CGL would then require contribution by limits.

Here's how the damages would be shared when contribution by limits applies.

- XYZ—$1 million each occurrence limit
- ABC—$500,000 each occurrence limit
- Total Limits: $1.5 million

XYZ's share of the loss would be $1 million as a percentage of $1.5 million or 67 percent; ABC's share of the loss would be $500,000 as a percentage of $1.5 million or 33 percent.

Loss of $300,000—XYZ would pay 67 percent or $200,000; ABC would pay 33 percent or $100,000.

Loss of $1.2 million—XYX would pay 67 percent or $804,000; ABC would pay 33 percent or $396,000.

Conclusion

It is commonplace for insureds to be insured not only on their own CGL policy, but also on the policy of another. It is equally likely that a person or organization is relying on the same insured's CGL policy for protection in addition or in lieu of their own policy. While negotiating through the implications of "other insurance" can be very complex, it is crucial to at least understand the basics of the CGL other insurance

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[1] *Couch on Insurance* 3d, §219:9, page 219-16, 17 © 2005 Thomson/West
[2] Ibid.
[3] Ibid.

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