CGL—Covered Locations

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Everyone has heard this one: the three most important considerations in real estate are location, location, location. While some have observed that whoever lives by this mantra can't count, it seems to me they have missed the point. Location is all important—in real estate. Does location hold the same importance in today's CGL policy? Let's take a look.

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In the days of yesteryear, before fax machines, e-mail, and cell phones, there once was a general liability policy known by it's acronym of OL&T. For those who remember carbon paper (how many youngsters using e-mail realize that "cc" stands for carbon copy?), you may also remember that the initials stood for owners, landlords, and tenants. You guessed it—a general liability policy intended for use by owners of property, including those who are landlords and those who are tenants. So why the history lesson?

In the OL&T policy, location was of critical importance. Liability coverage only applied if bodily injury or property damage arose out of the "the ownership, maintenance or use of the *insured premises* and all operations necessary or incidental thereto." To have the honor of being an "insured premises," the location had to be designated on the declarations for coverage to apply. Put another way, coverage did not apply to locations not listed. In the OL&T policy, location was indeed all important. And it seems a few in our business somehow have not forgotten the restrictiveness of the OL&T when they interpret today's CGL policy.

Commercial General Liability Policy

There is no location restriction written into today's CGL, without endorsements added. Of course, an insurance company can amend the CGL to add the Limitation to Designated Premises Endorsement, which requires the bodily injury, property damage, or personal and advertising injury to "arise out of the ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises." This is just about the same location restriction as the OL&T.

CGL Declarations Page

It is worth noting that the CGL Declarations Page (CG DS 01 10 01) does contain a section to list "All Premises You Own, Rent or Occupy." This list should accurately reflect premises a named insured owns, rents, or occupies. But if the location schedule is wrong, does this negate coverage for claims that may arise from the missing location?

Representations Condition

The commercial general liability Conditions section does contain a short, seemingly innocuous clause entitled "Representations." The essence of this condition is that the named insureds understand that the Declarations Page is based on representations made to the insurer and that the insurance company has relied on these representations, which the named insureds agree are complete and accurate when they accept the policy.

Does this mean that not listing a location or locations will automatically result in no coverage for injury or damage that arises out of the undisclosed location? Not necessarily.

Misrepresentations

For an insurance company to be able to deny coverage because of a misrepresentation, the misrepresentation has to be a fact that is material. Although it varies by jurisdiction (state statutes may apply), material usually means the insurance company would have acted differently if the fact was known. Materiality is usually measured by how much, if any, the fact would have influenced the insurance company. For example, if the fact was known previously, might the insurance company have declined to provide coverage or might the insurance company have provided coverage, but with more restrictive policy terms or greater premiums?

Of course, what the insurance company *says* they would have done is not the sole factor—in most cases, the insurance company would have to demonstrate that their underwriting action would be applied to similar accounts (and not just to the policyholder whose loss they don't want to pay). Underwriting guides or rating plans are often used to illustrate standard underwriting policies. By contrast, if the policyholder said the building was black, but it was really grey, it is unlikely any court would find this to be a material fact.

Location as a Material Fact

Could an insurance company justifiably consider failure to provide a complete and accurate list of locations to be a misrepresentation of a material fact? It is certainly possible—provided the insurance company can demonstrate it would have acted differently had it known.

For example, assume a business is looking to purchase CGL coverage from a certain insurer, but knows the insurer will not write locations in a specific state because it is an oft-mentioned "judicial hellhole." To obtain the coverage, the business decides to omit from the application the locations in that state. This type of misrepresentation is probably fraud: an intent to deceive calculated to induce the insurance company to provide coverage that the insurance company would not otherwise provide. Courts would likely consider such a misrepresentation legitimate grounds to void the CGL policy, relieving the insurer of any obligation to pay claims.

However, careless or even innocent mistakes in providing information to the insurance company when applying for coverage may have the same effect. Some courts might find the policyholder has engaged in material misrepresentation, using the same or similar measures of materiality.

At Time of Loss

Usually the issue of misrepresentation arises when a claim or suit is filed against an insured on the CGL. For instance, an injury occurs at a location the named insured owns that is located in a "judicial hellhole" state, but the location is not listed on the Declarations. The insurance company looks at the Declarations Page, sees the location is not listed, and denies coverage.

The Insurance Company's Remedy

As mentioned earlier, the CGL policy wording does not restrict coverage to a location, despite the Declarations Page list of locations. Therefore, the denial of coverage in the above example cannot be approached by the insurer as if they were citing a policy exclusion. Instead, an allegation by the insurance company of material misrepresentation in a CGL policy as a reason for claim denial is a contention not that the policy does not provide coverage (in this case, it does), rather it is a contention that the policy does not legally exist!

Refusing to pay an otherwise covered CGL claim because of material misrepresentation *is a big deal*. An insurance company that takes this position is (whether it knows it or not) attempting to *void* the CGL policy. The insurer is claiming that, during the formation of the contract, important factual information was falsely represented by the insured and further the insurer would not have agreed had it known the true facts.

Put another way, the insurance company is stating that there was never a "meeting of the minds" and the contract—in this case, the CGL policy—cannot be enforced against the insurer and is a legal "nullity." Some jurisdictions require the insurer to obtain a court ruling to void a policy and further require the insurer to tender the entire annual premium to the insured. Failure to return the premium may be considered a waiver of the insurance company's right (presuming they have such a right) to void the policy.

It is also important to keep in mind that the CGL is valid unless and until the material misrepresentation is properly demonstrated and the policy is voided. For example, the insurer may have to continue to defend the insured against a suit until the policy is found to be void.

Location, Location, Location

How does this relate to coverage on the unendorsed CGL policy for locations not on the Declarations Page? Coverage exists for any location (within the policy territory) of the named insured, whether or not listed on the CGL Declarations, unless the insurance company can demonstrate material misrepresentation and moves to void the policy.

A Somewhat Made-up Story

A national insurer (licensed in all 50 states) is told *during the CGL policy period* that its named insured is going to open a location in another state. The insurer does not like that state and informs the CGL policyholder it has no coverage for claims at the new location. The national insurer's CGL policy contains no endorsement that limits coverage to listed locations.

The policyholder continues on and begins operations at the new location. Should the policyholder pursue CGL coverage with another insurer for that location? If an injury occurs at the new location, can the national insurer move for material misrepresentation and successfully deny coverage under their policy?

The short answer is, "No." The CGL insurer is providing coverage for the new location, whether it admits it or not. First, no misrepresentation was made—the policyholder provided the insurer with accurate factual information: a location in another state. Second, while the situation changed for the insurer, the changes occurred after the policy was provided. Claims of misrepresentation of a material fact are usually made *at the time of policy formation*.

This is reinforced by the Representations Condition of the CGL, which states the insurer has *issued the policy* in reliance on the named insured's representations. As the policy was already issued when the named insured announced the new location, the Representations condition does not apply to locations acquired during the policy period.

Can the national insurer now amend the CGL policy mid-term to exclude the unwanted location from the policy? The answer is usually that it cannot—insurance policies cannot normally be unilaterally changed; policy changes require the consent of both parties.

However, the insurer does, subject to state statute, have a right to cancel the policy with the appropriate advance written notice to the first named insured. When confronted with a notice of cancellation, the policyholder may then agree to a reduction in coverage, such as excluding a location from the policy.

Conclusion

An unendorsed commercial general liability policy is neither location nor state specific; unlike the old OL&T policy, there is no location restriction within the policy wording. Although coverage can be reduced by various endorsements, the CGL is subject to its actual terms and conditions, including the policy territory. Nonetheless, a policyholder should carefully obtain information about their operations, locations, and activities and provide it to their insurer (or the insurer's agent) regularly.

Although denial of an otherwise covered CGL claim based on material misrepresentation is not as easy as citing a policy exclusion, insurers have successfully voided CGL policies.

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