The 2013 Edition of the CGL Policy

March 2013

Wait! What? Didn't they just change this thing? It was December 2007? No way!

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

Way! And once again, we must confront the terrifying prospect of change. Well, terrifying may be a bit of a hyperbole—most people are not traumatized when changes are announced in an insurance policy. Perhaps "important" is a better description of the changes. But for whom are these changes important?

While arguably important to everyone, the changes will have the greatest impact on establishments selling liquor as well as those that allow you to "bring your own" (BYO) liquor. Also, any person or organization that is an additional insured (or those who need to include others as an additional insured) will be affected, particularly contractors and the construction industry.

ISO April 2013 Edition of the CGL Form—Major Changes

In June 2012, Insurance Services Office, Inc. (ISO), announced changes to its commercial general liability (CGL) policy to be effective in most states on April 1, 2013. Many of the changes are editorial and are not anticipated to have any impact on the coverage provided. The following are some on which to focus.

The Liquor Exclusion—Selling Liquor

The scope of the CGL policy's standard liquor exclusion has been recently tested. In *Penn-America Ins. Co. v. Peccadillos*, 27 A.3d 259 (Pa. Super. Ct. 2011), the insured allegedly continued to serve patrons who were visibly intoxicated. Apparently, at one point, the intoxicated patrons were involved in a "physical altercation" with another patron, at which point the insured required the persons to leave. The two intoxicated patrons drove away in their auto, colliding with another auto, resulting in the death of the other driver and serious injuries to the other passengers.

In tendering the claim to its CGL insurer, the insured argued that the claim fell outside the CGL liquor exclusion because the allegations included negligence for ejecting the patrons rather than summoning the police when the insured knew the patrons would drive. The court ruled that the insurer's duty to defend was triggered.

In *McGuire v. Curry*, 766 N.W.2d 501 (S.D. 2009), an employer provided an underage employee with unsupervised and unrestricted access to its alcohol storage facility. After the employee's shift ended, he was involved in an auto accident, injuring a passenger on a motorcycle. The employee admitted to drinking on the job before the accident. The plaintiff's allegations against the employer included allegations of negligent hiring and negligent supervision of the employee; the court found that the employer had a duty to supervise the underage employee.

Finally, in *Essex Ins. Co. v. Café Dupont LLC*, 674 F. Supp. 2d 166 (D.D.C. 2009), allegations were lodged against a nightclub (whose liquor coverage had been canceled) for failing to prevent a patron from becoming intoxicated and for failing to detain the patron or arranging alternative transportation.

Expanding CGL Liquor Exclusion

The liquor exclusion has been amended in the April 2013 CGL policy and will apply even if the allegations are negligence in supervising, hiring, employment, training, or monitoring of others, or failing to provide transportation for anyone who may be under the influence. In other words, crafting allegations such as negligence in supervision or negligence in failing to provide transportation will not have the effect of bypassing what would otherwise be eliminated from coverage by the CGL liquor exclusion.

The Liquor Exclusion—BYO

At least one court, *Simmons v. Homatas*, 236 Ill. 2d 459 (2010), has found that an establishment that allows patrons to bring their own can be liable for alcohol-related injuries. Liability was imposed on a BYO

club for negligent conduct *independent* of the alcohol the patrons brought with them and subsequently consumed on the premises. Specifically, the court found that liability may be imposed for "giving substantial assistance or encouragement to another's tortious conduct."

Here, the club was alleged to have ejected the intoxicated patron and to have affirmatively assisted him in driving a motor vehicle—the valet brought the intoxicated patron's car up to the front door and directed him into the vehicle.

CGL Liquor Exclusion—April 2013—Providing BYO Coverage

The April 2013 CGL policy's liquor exclusion has been amended to expressly state that permitting alcohol to be brought on the premises for consumption on the premises is *not* considered to be in the business of selling, serving, or furnishing alcoholic beverages, *even if a fee is charged (such as a "corking fee") or a license is required for BYO*.

Thus, the CGL policy now expressly provides coverage (subject to all other policy terms and conditions) for liability arising out of BYO. *CAUTION: The insurer may remove the BYO coverage by attachment of a liquor exclusion endorsement*. See below.

Amendment of Liquor Liability Exclusion Endorsement—Excluding BYO Coverage

Filed along with the April 2013 edition of the CGL policy are two amended liquor exclusions: CG 21 50 04 13, "Amendment of Liquor Liability Exclusion," and CG 21 51 04 13, "Amendment of Liquor Liability Exclusion for Scheduled Premises or Activities."

While these amended liquor exclusions were originally developed to address liquor sold or served by not-for-profit organizations (to read more on the background of these endorsements, see "Raising the Bar—The Liquor Liability Exclusion in the CGL"), the amended liquor exclusion has become commonplace—it is routinely attached to CGL policies for most types of businesses or organizations without regard to their status as not-for-profit entities.

The April 2013 edition of the CG 21 50 and CG 21 51[1] expand the liquor exclusion to specifically apply to an insured that permits any person to bring alcoholic beverages onto the named insured's premises for consumption on the premises—*thus excluding BYO*.

Therefore, while the *unendorsed* April 2013 CGL allows coverage within the liquor exclusion for BYO (again, subject to all other policy terms and conditions), this coverage is *removed entirely* by the amended liquor exclusions, leaving no coverage within the CGL for BYO. In these instances, separate liquor liability insurance is necessary in order to obtain coverage for liability arising out of BYO.

CGL Endorsements—Major Changes

As previously stated, those who seek status as an additional insured on the CGL policy of another or those who are required to add others as an additional insured to their own CGL policy should be aware of several changes.

CG 20 01 Primary and Noncontributory—Other Insurance Condition

Described as an optional endorsement, ISO has introduced as an addition to the other insurance condition of the CGL policy coverage for an additional insured on a "primary and noncontributory" basis. The crux is that the CGL insurer will provide *primary* coverage to an additional insured, and the CGL insurer will not seek *contribution* from other insurance available to the additional insured (provided the additional insured is a *named insured* on the other insurance). Further, this endorsement is activated *only if* the named insured has agreed to these terms in a written contract or agreement.

As with the current CGL (ISO 2007 edition), the other insurance condition would result in the same order of coverage as "primary and noncontributory" (if both CGL policies included the ISO other insurance condition). ISO maintains that this endorsement has no impact on coverage. (To read more on the CGL other insurance clause and order of coverage, see the article "Primary and Noncontributory.")

The practical effect of using this endorsement is to allow "primary and noncontributory" to be shown on a certificate of insurance, a frequent demand of an additional insured. Because, absent this new endorsement, the ISO CGL does not use the phrase "primary and noncontributory," representing this condition on the certificate of insurance is problematic if not prohibited.

Additional Insureds—Generally

The April 2013 ISO additional insured endorsements will include three major changes. Coverage will be provided to the additional insured:

1. only to the extent permitted by law;

2. not broader than the coverage required by contract or agreement;

3. for no more than the limit required by the contract or agreement or the policy limit, whichever is *less*.

To the Extent Permitted by Law

There has been a trend, most recently in Texas and California, to enact construction-related anti-indemnification laws that also specifically restrict the breadth of additional insured coverage. Further, as many states' construction-related anti-indemnification statutes are either silent or less than clear as to whether the restrictions apply to contractual indemnification as well as insurance (i.e., additional insured coverage), ISO has added this restriction to additional insured endorsements.

The intent is to make clear that, despite the actual wording included in the additional insured coverage, if coverage is beyond what the law allows, coverage will not apply beyond what is consistent with the law. For example, while most of the ISO additional insured endorsements provide coverage to the additional insured for negligence shared with the named insured, some anti-indemnity statutes prohibit providing the indemnitee indemnity for any of its own negligence. Should such a statute be found to apply to the additional insured, the "to the extent permitted by law" restriction would reduce coverage to the additional insured to its vicarious liability for the negligence of the named insured.

This contractual indemnification/anti-indemnity issue is further exacerbated by a frequent failure to understand the difference between an additional insured and a non-insured indemnitee. Conflating the two will undoubtedly result in some unintended consequences.

Coverage Not Broader Than Contract or Agreement

Similar to the above, despite the actual wording provided by the additional insured endorsement, coverage provided to an additional insured will be no broader than required in the underlying contract or agreement. Clearly, this is to avoid giving an additional insured *broader* coverage than requested. For example, the underlying contract may require the additional insured be covered only for its liability arising out of the negligence of the named insured—a narrow scope of coverage. Despite actual wording to the contrary in the additional insured endorsement, in this example, the additional insured would not be covered for anything but the liability imposed on it solely because of the negligence of the named insured.

Limit Required by Contract or Agreement

This addresses the amount of coverage available to the additional insured. To avoid a windfall—limits available to the additional insured that exceed the limits required—the limit for the additional insured is now the lesser of the actual limit or the limit required in the underlying contract or agreement.

Implications

Of course, express reference to numerous extrinsic matters or extrinsic documents to determine the scope or limits of coverage available to the additional insured brings with it some inherent difficulties. Disputes over the application of a statute or the meaning of contract wording should be anticipated, reducing the certainty of coverage.

Further, it is fair to observe that underlying contracts or agreements tend not to be models of clarity as respects the extent of additional insured coverage required. Requirements for "named insured," "additional

named insured," or "coinsured" are all too common; many agreements simply require a party to the contract to be an "additional insured" or simply "an insured." What, then, is the breadth of coverage agreed upon?

An additional insured may be all but abandoned as ultimately the application of the statute or the meaning of contract wording (and thus scope of coverage) has to be resolved by litigation, delaying payment of damages and possibly defense of the additional insured. In fact, disputes over the meaning of agreements or contracts may be the most troublesome result of the current changes. Witness a recent case (February 13, 2013) decided at the appellate division (first department) of the New York court system. An insurer denied coverage, contending in part that the putative additional insured was covered only for the supply of its materials, even though the agreement clearly stated "… materials and/or services performed." The court found coverage for the additional insured, but the finding was months, if not years, after the claim was tendered by the additional insured.

Additional Insured—Owners, Lessees or Contractors—Automatic Status for Other Parties When Required in Written Construction Agreement (CG 20 38 04 13)

This newly introduced endorsement broadens, in certain circumstances, the person or organization that will automatically be granted the status of an additional insured.

Construction projects typically require a "downstream" party to include as an additional insured an "upstream" party, even though the downstream party (for example, a subcontractor) has no contract with the upstream party (for example, the project owner). The subcontractor typically has a direct contract only with the general contractor—and it is in that general contractor/subcontractor agreement that the subcontractor agrees to include the project owner as an additional insured.

The ISO "Additional Insured—Owners, Lessees or Contractors—Automatic Status for Other Parties When Required in Written Construction Agreement with You" endorsement (CG 20 33) has been found in some instances to include as additional insured *only those parties* with which the downstream party *entered a direct contract or agreement*.[2] (To read more on the limitations of blanket or automatic additional insured endorsements, see "Additional Insured—Automatic or Wet Blanket?")

The purpose of this new endorsement is to include not only those persons or organizations the downstream party has directly contracted with as an additional insured but also any other person or organization the downstream party is required to add as an additional insured by the terms of any direct agreement with an upstream party. Thus, if a subcontractor is required in the general contractor/subcontractor agreement to add the project owner as an additional insured, CG 20 38 would include the project owner even though the subcontractor has no *direct* contractual relationship with the project owner.

A word of caution is still warranted: even with this new endorsement, the named insured must be performing operations for the additional insured. For example, if the subcontractor is required to add the lender as an additional insured, the CG 20 38 would likely not be adequate as the subcontractor is performing operations for the owner and general contractor but not performing operations for the lender.

Conclusion

The only major change to the unendorsed April 2013 edition CGL is the liquor exclusion. However, attaching the "Amendment of Liquor Liability Exclusion" endorsements (CG 21 50 and CG 21 51) will remove entirely any coverage for BYO—separate liquor liability coverage will be needed for a BYO establishment for liquor-related claims.

The changes and the potential implication of the changes in the additional insured endorsements should be thoroughly understood, including the availability of the new CG 20 01 "Primary and Noncontributory" endorsement and the new CG 20 38 "Additional Insured—Owners, Lessees or Contractors—Automatic Status for Other Parties When Required in Written Construction Agreement."

---

[1]The exception allowed in the CG 21 51 *may* include BYO, but only if the insurer designates in the schedule the description of premises for which BYO is allowed. Often, CG 21 51 provides no exception in the schedule.

[2]*Westfield Ins. Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730 (Ill. App. Ct. 1st Dist. 2011).

Craig F. Stanovich, CPCU, CIC, CRM, AU 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

http://www.irmi.com/expert/articles/2013/stanovich03-cgl-general-liability-insurance.aspx