

## **CGL Insurance 2007 Edition—A Summary of Changes**

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Picture this: you are at a gathering or other social event. Suddenly, and without warning, you find that you are cornered by a stranger who intends to regale you with every detail of their vacation (or other equally tedious topics, such their dubious business success stories or their financial triumphs in the stock market). What to do?

When you get a word in edgewise, ask the stranger what else is new. If you are lucky, the person may ask you the same question. This gives you the opening you need. Say "plenty," and launch into an explanation of each and every change included in the December 2007 edition the Insurance Services Office, Inc. (ISO), commercial general liability (CGL) policy (and to be doubly effective, don't leave out endorsement changes).

The result will likely be that you have extricated yourself from the conversation as you babble on in what may be perceived to be speaking in tongues. But extreme caution is highly advised—not only have your revealed yourself to be an insurance nerd, this approach should never, ever be used on spouses, in-laws, or family members. So be judicious, as you will have incredible power when you know the 2007 changes.

### **ISO December 2007 Edition of the Commercial General Liability Form Changes**

It is not fair to dismiss the 2007 changes as much ado about nothing, but there may be a temptation to do so. While many of the changes are editorial only, such as renumbering paragraphs for the sake of consistency throughout the CGL form, there are a few substantive changes that are important, particularly endorsement changes.

#### ***Supplementary Payments Section***

Paid in addition to the limits, Supplementary Payments have included for years "all costs taxed against the insured in a 'suit.'" ISO has tightened up this wording by qualifying which costs are included here. The costs now must be *court* costs

taxed against the insured. Further, a paragraph has been *added* to the "court costs taxed against the insured" to expressly state that court costs taxed against the insured do not include attorneys' fees or expenses taxed against an insured.

## **Background**

Most U.S. tort litigation follows the "American System," which generally means that if a plaintiff wins his or her case (and the insurer for the defendant pays damages to the plaintiff), the plaintiff pays for its own attorney's fees and other attorney's expenses (such as legal research, expert witnesses, etc.) out of the award of judgment or settlement amount paid by the defendant's insurer.

This approach is not universal, however. For example, certain federal laws that form the basis for a jury award of compensatory damages also award the successful plaintiff its attorney's fees and attorney's costs.

## **Resulting Changes**

The intent of this change to the CGL form is to make clear that the costs taxed against the insured must be costs imposed by the courts, and that the Supplementary Payments section does not pay the plaintiff's attorney fees and costs—such costs (if they are awarded separately) would be paid in the form of damages to the successful plaintiff, and thus such costs are paid within the policy limit.

## ***Violation of Communication Laws***

What was previously a mandatory endorsement (CG 00 67) to the CGL form is now incorporated into the form as exclusion q. under Coverage A—Bodily Injury or Property Damage and as exclusion p. under Coverage B—Personal and Advertising Injury.

## **Resulting Changes**

This exclusion eliminates claims (whether the claim is made under Coverage A or Coverage B) for violation of "do not call" and similar laws, such as the Telephone Consumer Protection Act (TCPA) or the CAN-SPAM Act of 2003, that prohibit sending, transmitting, communicating, or distributing material or information. For example, an insured continues to send "blast" advertising faxes to numerous prospects even after the prospects have demanded the insured stop sending the faxes. Any allegations of damages against the insured sending

the "blast" faxes, such as allegations of interference with business relations or invasion of privacy, are unequivocally eliminated from coverage by this exclusion.

## **CGL Endorsement Changes**

As mentioned above, there were several CGL endorsement changes as well. These are described below.

### ***Employment-Related Practices Exclusion (CG 21 47) Endorsement***

A couple of cases where courts found coverage despite this exclusion have prompted ISO to expand the breadth of the exclusion. In short, the exclusion has been specifically amended to apply to employment-related practices that involve malicious prosecution claims as well as claims made after employment.

In *Peterborough Oil Co., Inc. v. Great Am. Ins.*, 397 F. Supp. 2d 230 (D. Mass. 2005), an employee of Peterborough was terminated, ostensibly for stealing the employer's funds. A review of the store's security tapes by the terminated employee showed another Peterborough employee failing to pay for multiple lottery tickets scratched by the employee. Although Peterborough was provided the security tapes, they nonetheless pursued a criminal complaint against the terminated employee. At the criminal trial, the security tape was played for the jury and the terminated employee was found not guilty of the criminal charges lodged by Peterborough.

Shortly thereafter, the terminated employee brought a civil complaint against his former employer, alleging Peterborough's actions in pursuing the criminal complaint amounted to malicious prosecution and infliction of emotional distress. At the civil trial, the employee prevailed.

Peterborough's CGL insurer denied coverage for the malicious prosecution claim made against Peterborough by the terminated employee, citing the Employment-Related Practices Exclusion (CG 21 47) endorsement. In the coverage dispute, the federal U.S. District Court found coverage in Peterborough's CGL policy for the terminated employee's claim, noting that the exclusion did not apply as the phrase "malicious prosecution" was not a specifically excluded offense in the employment-related practices exclusion endorsement [malicious prosecution is a *covered offense* under the CGL policy's personal and advertising injury].

In *Owners Ins. Co. v. Clayton*, 614 S.E.2d 611 (S.C. 2005), a motel manager was terminated for alleging stealing from her employer. After termination of employment, two persons called the motel on separate occasions, asking for the motel manager. Both persons were informed that the motel manager had been fired for stealing money. When the terminated employee learned of the statements made about her, she sued her employer, alleging malicious prosecution, slander, and negligence. When the claim by the terminated employee against the employer was presented to the insurer, coverage was denied based on the Employment-Related Practices Exclusion (CG 21 47). The Supreme Court of South Carolina found the employment-related practices exclusion did not apply to the specifics of this situation—while the substance of the defamatory statements were *related* to employment, the *context* of the statement was not employment. The persons to whom the defamatory comments were made were *not* potential employers, but rather an acquaintance and former business associate. Put another way, the defamatory comments were made outside of employment.

### **Resulting Changes**

The December 2007 edition of the Employment-Related Practices Exclusion (CG 21 47 12 07) endorsement has been changed to add to excluded *malicious prosecution* and also to state this exclusion applies even if the injury causing event occurs before, during, or *after employment*.

### ***Limitation of Coverage—Real Estate Operations (CG 22 60) Endorsement***

Currently, the ISO classification for real estate agents (Code 47050) restricts CGL coverage *by endorsement* (CG 22 60) to apply only to those premises the insured uses as an *office* or to locations *listed by the insured* for rental or sale. Any other locations must be classified and rated separately for coverage to apply.

For example, any premises at which the insured acts as their client's property manager to collect tenants' rents will not be covered by the CGL *unless* the policy declarations shows a separate classification (and premium charge) for management of the client's location. If the location managed by the insured is separately classified and rated, endorsement CG 22 60 is removed, eliminating

the restriction of coverage to the insured's office or locations listed by the insured for rental or sale.

### **Resulting Changes**

The December 2007 edition of Limitation of Coverage—Real Estate Operations (CG 22 60 12 07) endorsement has been expanded to include not only coverage for any premises that the real estate agent insured *lists* for rental or sale, but also any premises *shown* by the real estate agent insured for rental or sale, even if the premises is not listed by the insured. This is intended to be an expansion of coverage, recognizing that realtors often show locations that they do not list. Thus, with the use of the revised endorsement, the CGL now provides coverage for locations shown without the need of separate classifications and premium charges.

### ***Lawn Care Services Coverage (CG 22 93) Endorsement***

This endorsement (CG 22 93) is required by ISO classification notes to be added to those operations providing lawn care services (lawn mowing, fertilizing, edging, etc.) and is intended to *restrict* the CGL policy to provide coverage *to incidental* application of over-the-counter pesticides and herbicides. The July 1998 edition of the lawn care services coverage endorsement expressly excluded (under exclusion f.) coverage for an insured who was required to obtain a license or permit to apply herbicides or pesticides.

### **Resulting Changes**

Although the classification description has not changed as respects its scope—incidental application of over-the-counter pesticides or herbicides to lawns under the insured's regular care—the December 2007 edition of the lawn care services coverage endorsement has *eliminated* the exclusion applicable to those insureds that require a permit or license to apply herbicides and pesticides. In other words, if a lawn service company is required to obtain a permit or license to apply pesticides or herbicides to a lawn under their regular care, the revised endorsement broadens coverage and now affords coverage under the CGL for the lawn service company should liability arise out of the application of pesticides or herbicides applied according to the license or permit.

### ***Abuse or Molestation Exclusion—Specified Professional Services (CG 21 97) Endorsement***

For over 20 years, ISO has made available endorsement CG 21 46—Abuse or Molestation Exclusion—which applies to all activities of an insured, provided the alleged abuse or molestation is to a person in the care, custody, or control of any insured. Introduced with the changes in December 2007 is a new optional endorsement that excludes abuse or molestation only for specified professional services described in the endorsement schedule, provided the person alleging the abuse or molestation is in the care, custody, or control of any insured.

#### **Resulting Changes**

This new endorsement is less restrictive than the CG 21 46, as the CG 21 97 applies only to the professional services specifically described in the endorsement and not to all of the insured's operations or activities, as does the CG 21 46. The result is that insurers now have a tool to carve out abuse or molestation coverage only for the professional services described in the endorsement schedule.

### ***Total Pollution Exclusion (CG 21 98) Endorsement***

The current Total Pollution Exclusion (CG 21 49 09 99) applies only to the commercial general liability Coverage Part. In some instances, insurers only provide the products-completed operations liability Coverage Part using form CG 00 37 (occurrence) or form CG 00 38 (claims made). Currently, neither products-completed operations coverage form includes a pollution exclusion.

#### **Resulting Changes**

ISO has introduced a new optional endorsement, Total Pollution Exclusion (CG 21 98 12 07), for use with the products-completed operations Coverage Part, applicable to either form CG 0037 or form CG 0038.

### ***Snow Plow Operations Coverage (CG 22 92) Endorsement***

The CGL policy does exclude liability arising out of the ownership, maintenance, or use of autos owned or operated by, or rented to or loaned to any insured (with certain exceptions). For those areas of the country that receive snow, it is common for property owners to have the snow cleared from parking lots and

driveways by others—typically contractors that attach snow plows to their trucks (autos).

Provided the truck is a "covered auto," bodily injury or property damage that takes place *during* the process of plowing (such as the ubiquitous damage to lawns or mailboxes), is covered by a commercial automobile coverage form.

However, commercial auto policies typically exclude bodily injury or property damage arising out "completed operations" if the operation that has been finished arises out of the use of a covered auto (again, with certain exceptions).

Some insurers have interpreted the CGL policy to *exclude* coverage for bodily injury or property damage that takes place *after the snow plowing is complete*, despite the coverage provided in the CGL for products and completed operations. Such insurers point to exclusion g.—exclusion of coverage for liability arising out of the use of autos.

### **No Coverage**

As can be seen, an insured that has purchased *both* a business auto and CGL policy may not have *any coverage* for bodily injury or property damage that takes place after the snow plowing operation has been completed. For example, the snow plow operator carelessly clears the snow from a portion of the parking lot that is used by a store's patrons, causing one patron to fall on an unnatural build up of ice that accumulated 3 days after the snow plowing operation was completed.

The patron may make claim for her injuries against not only the store owner but also the snow plowing company. Or the property owner (or their CGL insurer) may pursue a claim against the snow plow contractor. In either case, in this illustration, even if the snow plowing company had purchased both business automobile and CGL coverage (even with the same insurer), *it is possible that neither policy would provide coverage* for the claim made by the injured patron.

### **Resulting Changes**

To clarify that coverage is provided under the CGL, ISO has introduced a new optional endorsement—Snow Plow Operations Coverage (CG 22 92 12 07)—that now expressly states that exclusion g. (the auto exclusion) *does not apply* to any auto used for snow plowing operations for bodily injury or property damage

that falls *within* the products-completed operations hazard. Awareness of the availability and effect of this new endorsement form is critical to policyholders, risk managers, agents, brokers and advisers.

### ***Canoes or Rowboats (CG 24 16) Endorsement***

This optional endorsement has been introduced for use with hotels and motels that are classified *with* or *without* pools or beaches. Currently (as of December 2004), the classification footnotes for hotels and motels without pools or beaches states that liability coverage for owned *rowboats and canoes* is included (at no additional charge) and that the endorsement Boats (CG 24 12 11 85) is to be attached to provide watercraft coverage. However, as the Boats endorsement applies *only* to watercraft described in the endorsement, carrying out the intent expressed in the classification footnotes (automatic liability coverage for canoes and rowboats) requires another step—the insurer must also complete the Boats endorsement by inserting "Canoes and Rowboats" in the description under the Schedule. Failure to complete the Boats endorsement correctly may result in confusion as to coverage provided.

### **Resulting Changes**

By using the new Canoes and Rowboats endorsement (CG 24 16 12 07), the insurer no longer has to insert in the Schedule the description "Canoes and Rowboats" for coverage to apply. Therefore, if an insurer is providing coverage for a hotel or motel (either with or without a pool or beach), the Canoes and Rowboats endorsement (CG 24 16 12 07) may be used to simplify the mechanics of providing liability coverage—reducing the potential for confusion and coverage disputes.

It is important to keep in mind that the Boats (CG 24 12 11 85) endorsement may still be used *in conjunction with* the Canoes and Rowboats endorsement to provide coverage for additional types of watercraft. For example, a hotel may own a 50-foot sailboat that is used for tours of the facility—watercraft liability coverage may be provided using the Boats endorsement by inserting in the Schedule on the Boats endorsement "Sailboats" and listing the additional premium charge. In this illustration, the hotel would have liability coverage for rowboats and canoes via CG 24 16 12 07 and for the sailboat via CG 24 12 11 85.

## Conclusion

While there are not wholesale changes found in the December 2007 edition of the ISO commercial general liability policy, there are some changes that are important. This is particularly true for certain endorsements which apply to only specific classifications, but which may significantly change how the coverage applies.

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