



Current Articles 2006 – April

The Revised CGL and Some Concerns

Over the past several weeks, I have traveled around the province (including Dryden, Ont. at -31 degrees C) delivering the new seminar entitled “The Revised Commercial General Liability Policy”. Feedback, comments and inquiries have some interesting responses and concerns.

The lack of consistency in adopting the new wording, the IBC Form 2100 dated March 2005, among insurers can create an Error or Omission for a broker. Many insurers are not using the new wording at all and are continuing with either the previous IBC CGL or their own CGL wording. Other insurers are using parts of the new wording only. And still others are adopting the new wording either in its entirety or with minor modifications. When a broker renews or replaces a Commercial General Liability and the replacement wording is more restrictive than either the previous wording or **more restrictive than other insurers’ wordings that the broker can effect from his office**, a denial of coverage from such a restriction can attract an E & O claim. At a court hearing how could you defend the situation if the claimant’s attorney acquires knowledge that you could have placed the coverage with an alternate insurer who may have covered the occurrence?

The new wording includes Advertising Injury Liability as part of the Insuring Agreement B along with Personal Injury. In other words the new CGL “builds in” Advertising Liability. Previously, Advertising Liability had to be added by endorsement. Some insurers are not including the Advertising Liability within their wording, but are continuing to add the previous Advertising Liability endorsement if acceptable to the underwriters. However this can create a problem as the previous Advertising Liability endorsement is not as broad or inclusive as the “built in” new wording. Review my article of October, 2003 titled “Trade Dress – What is it? Trade dress is an American term and that is being introduced in Canadian courts as an advertising liability offense. The new CGL covers “trade dress” but the previous endorsement makes no mention of trade dress by name.

The new IBC wording has introduced an automobile exclusion that excludes coverage when the automobile is used for loading and unloading. This may be applicable to building supply dealers, landscape and gardening centres, etc. all of which have a large truck with a crane mounted on the truck to unload their products away from their premises. Now, if the automobile policy that insures this truck includes an OPCF 30 endorsement – “Removing Coverage for Attached Machinery” then neither the auto policy or the CGL will cover loss or damage caused by unloading the truck. It is absolutely imperative that if a vehicle has any attached machinery used for loading or unloading that the auto policy DOES NOT INCLUDE an OPCF 30. An error could occur when the broker only effects the auto policy or the CGL and may not be aware of how the corresponding policy is written.

The last concern is with regard to the Aggregate Limits. Although the previous IBC CGL included a general aggregate, not many insurers applied the general aggregate and relied on a products and completed operations aggregate only. The new wording has two aggregates – one applying to products and completed operations and the other as a general aggregate applicable to BI and PD, Personal and Advertising Injury and Medical Payments. Aggregates are sold as multiples of the occurrence limit and the higher – the better. This is the question that I have been asked many times. As an example, and if our aggregate products and completed operation limit is \$1,000,000 and there is a serious product failure causing extensive injury, will the insurer disclose to the insured their bodily injury reserves? Not likely. It may take years to settle. Now as a further example, there is a second serious product claim in the same policy term. Later the first claim is settled for \$700,000. and subsequently the second claim settled for **\$500,000**. These two claims together have exceeded the annual aggregate by \$200,000 for the policy in place when the loss occurred. Will the insurer expect a repayment by the insured for the \$200,000 when the claims are settled many years later? Or has an estoppel been created. If the insured has an umbrella (which includes “drop down” coverage) but the insured or broker does not report the claim to the umbrella carrier believing that the primary policy is adequate, will the umbrella carrier deny coverage for late reporting?

Interesting observations and concerns that you may want to address with your own insuring companies.

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