



## CONSTRUCTION LAW E-UPDATE

### THE CURRENT SPIKE IN CGL INSURANCE PRICING – How To Mitigate The Costs?

By Henry L. Goldberg, Managing Partner, Goldberg & Connolly and STA Legal Counsel

JUNE 2012

Contractors and subcontractors throughout the region are witnessing a rapid spiking of insurance costs. There are many causes of this: excessive payouts resulting from Labor Law 240 and 241; Workers' Compensation "reform"; insurance company portfolio losses; and significant losses in wrap-up and OCIP programs. As has been well publicized, some insurers have already left the New York market as a result.

Perhaps the single biggest reason for these cost increases, however, are recent court decisions imposing the "horizontal exhaustion" of CGL insurance policies. What does this mean and what is its impact?

Prior to these decisions, the insurance industry assumed that the CGL and excess/umbrella insurance policies of a subcontractor would all have to be exhausted before coverage under the upstream parties' CGL policies was triggered. This assumption was also the basic concept underpinning the indemnity principles in most construction contracts.

However, the courts concluded that because the insurance companies themselves were not parties to those construction contracts, they could not be bound by the contract's terms. Accordingly, the insurance policies' terms control in any dispute between the policy and the construction contract. Those policies' standard terms require that all primary CGL policies, including the Construction Manager's ("CMs") and

the owner's, must be exhausted before the subcontractor's excess or umbrella policy is triggered.

This has led many CMs and owners to raise the minimum required limits of their subcontractors from \$1 million/\$2 million CGL coverage to \$2 million/\$4 million CGL coverage in order to provide a larger "cushion" of insurance before their own CGL (primary) policy is triggered. This results in dramatic increases in the cost of the coverage that the subcontractor must provide, as well as the costs of upstream primary coverage.

#### **G&C Commentary**

If you are experiencing this situation, there is a possible solution that you can discuss with your broker and perhaps be able, with your carrier's concurrence, to offer to your CM and owner the protection that they previously thought they had. The solution comes in the form of a "Primary and Non-Contributory" endorsement to your excess and umbrella liability policies.

The "Primary and Non-Contributory" endorsement is frequently found annexed to a CGL policy, and is available from many insurers. However, in order to ensure that the subcontractor's excess or umbrella liability policy is triggered before the CM's and owner's primary CGL policies, such an endorsement must also be attached to your own excess or umbrella policy.



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We are aware of two insurers who are currently willing to add this endorsement to a subcontractor's excess or umbrella liability policy: National Union Fire Insurance Co., and Starr Indemnity & Liability Co.

The language of the National Union and Starr endorsements differs slightly, but both provide the desired effect, establishing the "primary" nature of the excess and umbrella policies of the subcontractors, relative to the CGL policies of the upstream parties.

By way of example, the Starr policy uses the following language:

#### **Other Insurance – Primary and Noncontributory for Additional Insured**

This endorsement modifies insurance provided under the following:

#### **EXCESS LIABILITY POLICY FORM**

A. Sub-paragraph 3. of Item I. Other Insurance under SECTION IV. CONDITIONS is replaced with the following:

3. Insurance held by a person(s) or Organization(s) qualifying as an additional insured in "Underlying Insurance", but only when the written contract or agreement between you and the additional insured:

- a. Requires a specific limit of insurance that is excess of the Underlying Limits of Insurance;
- b. Requires that your insurance be primary and not contribute with that of the additional insured; and
- c. Executed prior to the loss.

In such case as described in sub-paragraph 3. above, we shall not seek contribution from the additional insured's primary or excess insurance for which they are a named insured for amounts payable under this insurance.

If you deal with another insurer who prefers to use different language, just remember that the key element, necessary to extend the desired coverage to an "additional insured," is a promise by the insurer that it will not seek contribution from:

1. Any other insurance available to that party; or
2. Primary or excess insurance for which the party is a named or additional insured.

*Please feel free to contact me with any questions in this regard. I may be reached at (516)764-2800 or [hlgoldberg@goldbergconnolly.com](mailto:hlgoldberg@goldbergconnolly.com).*