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THE CURRENT SPIKE IN CGL INSURANCE PRICING - HOW TO MITIGATE THE COSTS

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Contractors and subcontractors throughout the region are witnessing a rapid spiking of insurance costs. We can cite many causes of this trend: excessive payouts resulting from Labor Law 240 and 241 claims; 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 because of these issues.

Perhaps the single biggest reason for these cost increases, however, are recent court decisions enforcing the "horizontal exhaustion" of coverage contained in 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 "vertical exhaustion" structure was also the concept underlying the indemnity clauses 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 such contracts' terms. Accordingly, the courts ruled that the insurance policies' terms control in any coverage dispute. 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 ("horizontal exhaustion").

This has led many CMs and owners to raise the minimum required limits of insurance coverage that their subcontractors must provide from $1million/$2million to $2million/$4million CGL coverage. Doing so provides CMs and owners with a larger "cushion" of insurance coverage from the subcontractor's primary (CGL) policy before the CM's and owner's own CGL (primary) policy is triggered. This increase in primary coverage limits, however, has resulted in a significant increase in the cost of the CGL coverage that the subcontractor must provide.

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If you are experiencing this situation, there is a possible solution that you can discuss with your insurance broker and, perhaps, with your carrier's concurrence, you might be able to offer to your CM and owner as a less expensive way to provide the "horizontal exhaustion" contemplated by the subcontract's insurance provisions. 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 more commonly found annexed to a CGL policy. 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 the subcontractor's excess or umbrella policy.

We are aware of two insurers who are currently willing to add this endorsement to a subcontractor's excess or umbrella

liability policy. The language of their endorsements differs slightly, but both provide the desired effect, establishing the "primary" nature of the subcontractor's excess and umbrella policies relative to the CGL policies of the upstream parties.

Whatever endorsement language is used, just remember that the key elements are a promise by the insurer that it will not seek contribution from any other insurance available to that party; or from any primary or excess insurance for which the party is a named or additional insured.