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PROTECTING YOUR INSURANCE PROTECTION E-UPDATE

DEALING WITH A CARRIER'S DENIAL OF COVERAGE

By Henry L. Goldberg, Esq. & W. Richard Kroeger, Esq.

JANUARY 2012

Carriers appear to be denying coverage under commercial general liability (CGL) and other insurance policies with increasing frequency. Perhaps because the investment portfolios of carriers have been weakened in the current economic downdraft or perhaps because they simply believe it "worth the effort," insurance companies are often failing to step up and provide the coverage their insureds purchased, often after receiving premiums from these same insureds for years. In the high risk construction industry, no contractor can or should accept this. While it is, of course, necessary to consult with insurance coverage counsel before planning your response to your carrier, here are a few "first aid" items to keep in mind.

YOUR INSURER HAS A DUTY TO TIMELY DISCLAIM COVERAGE

Most insureds are unaware that if an insurance company intends to disclaim coverage or deny liability for a claim or suit such as a construction accident case, it is required by law to give written notice of this disclaimer "as soon as is reasonably possible." Most court decisions in New York interpreting this phrase require that such notice be given to the insured, and the injured party, within thirty to forty-five days.

If an insurance company fails to disclaim coverage within this relatively strict time period, it waives its right to do so later based upon any policy condition or exclusion which it knew or should have known was available to it. In such case, it will be obligated to defend and indemnify its insured as set forth in the policy it issued.

THE DUTY TO DEFEND IS CRITICAL

CGL or liability coverage is often referred to as "litigation insurance," and for good reason. The cost of defending a complex construction accident case is formidable, often reaching into the hundreds of thousands of dollars. A major benefit of CGL insurance, therefore, is the first of the two basic duties of your carrier under your policy: the duty to defend you (i.e., a certain and significant cost) and the duty to indemnify or reimburse you if, and only if, you are found responsible for the accident in whole or in part and for the resulting injuries to the construction worker.

Therefore, your first priority would be to assure that your carrier immediately provides you with legal representation. If your insurer has disclaimed coverage, and you need to immediately defend against a suit yourself, you would be faced with the upfront burden of having to engage counsel to represent and defend your company in the underlying accident case. However, by aggressively pushing back against the carrier's disclaimer, it may be possible to convince your insurer to at least defend you under a reservation of rights ("ROR") which will enable it, as it steps up to defend you, to reserve all rights to later disclaim coverage as the case is

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settled or otherwise resolved and the carrier is first called upon to actually indemnify you for any losses by paying on your behalf your allocated portion of any damages that might be assessed against you.

Let's assume, after the initial denial of coverage, that you submit additional information about the incident to your insurer, yet it still refuses to defend and indemnify you in the underlying accident case. At that point, you must seek insurance coverage counsel to commence a declaratory judgment action against your insurance company.

By your commencing a declaratory judgment ("DJ") action to establish your rights under your insurance policy, your insurer will recognize that you are serious in your belief that you are entitled to coverage in the underlying accident case. After thoroughly examining the issues raised in your DJ action, as well as your policy, your insurer may offer to at least defend you in the underlying accident case as it proceeds, while reserving, as indicated, its right to later dispute whether it is also required to indemnify you for any damages for which you may be have been found liable.

This would be an important partial victory for two reasons: 1) once your insurer agrees to defend you in the underlying law suit, you are relieved of the significant and immediate burden of paying for the legal fees and costs associated with the defense of such a law suit; and 2) it brings the insurer "to the table" for possible settlement discussions of the underlying law suit, making it more likely that the insurer may contribute something toward the settlement if it will completely resolve the underlying suit with the injured party and the DJ law suit commenced against it by you.

RECOVERY OF ATTORNEY FEES

If your insurer wrongfully refuses to defend and indemnify you in the underlying accident case and you are forced to file a DJ action against it, it is important to keep in mind that when you win such case you will be able to recover all attorney's fees and out of pocket expenses that you have expended to date in defending the underlying accident case.

The fees and costs which can be recovered are those which were reasonably and necessarily incurred in the defense of the underlying law suit. These are the fees which the insurer promised to pay on your behalf in the policy of insurance which you purchased, and then wrongfully refused to provide at its own cost.

You may find that your insurer attempts to settle this part of your claim by offering to reimburse you for attorney fees at the hourly rate that it ordinarily pays to its high-volume, insurance defense-type attorneys that it normally hires. Those rates are often significantly lower than the rates of other attorneys, because of the repetitive nature of that type of practice. Remember, the insurer already had the chance to hire an attorney at those lower rates, but denied coverage

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instead. It had its chance. You, therefore, are entitled to recover the full amount that you actually paid for your own defense.

IN A BATTLE BETWEEN A CONSTRUCTION CONTRACT'S INSURANCE SPECIFICATIONS AND YOUR INSURANCE POLICY, THE POLICY WINS

Keep in mind that one of the most common conflicts between a construction contract and an insurance policy is the issue of "priority" of coverage. As a general rule, a policy will supersede the requirements of the insurance specifications in a prime or subcontract. This is because an insurer is not a party to your construction contract and is not bound by its insurance specifications. Thus, regardless of what your construction contract requires concerning the priority of coverage (e.g., between primary and additional insureds), where there is a difference between the insurance coverage required by your construction contract and the insurance coverage actually provided (or not provided) in your policy, the terms of the policy will prevail.

Again, the best course of action would be to meticulously compare, pre-bid, your construction contract's insurance requirements with what your CGL policy actually provides. The differences can be shocking. In a similar vein, general constructors should not rely on ACORD-type Certificates of Insurance, but should carefully review the actual policies of their subcontractors to make certain that the required insurance was actually acquired. Unpleasant surprises in this regard can be very costly and are wholly preventable.

G&C COMMENTARY

Keep the foregoing in mind when dealing with your insurance carrier. Be prepared to deal with the unfortunate situation where your insurer denies you coverage for a claim for any number of reasons.

Careful analysis by insurance coverage counsel will help you handicap whether you could or should proceed with a DJ action against your carrier seeking to vindicate your rights under your insurance policy. Many times this can be resolved or compromised by the carrier agreeing to at least defend you under an ROR arrangement. The cost of defending construction accident cases, which invariably involve numerous parties, carriers, medical and engineering experts, as well as complex safety and construction issues, is considerable. Unfortunately, you may have to be prepared to fight for your rights to be properly defended and indemnified under your policy.