



## PROTECTING YOUR INSURANCE PROTECTION E-UPDATE

### THE EMPTY POLICY - COVERAGE IS A ZERO SUM GAME Know What You Actually Purchased

By Henry L. Goldberg, Esq.

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“Let the buyer (Contractors and Subcontractors) beware!”

Those were the words utilized by the judge in a recent New York court decision by an owner against an insurance carrier. Enforcement of several exclusions in the CGL policy at issue in that case essentially rendered the policy worthless.

A subcontractor was contractually required to purchase general liability coverage and name the general contractor and owner as additional insureds, the usual situation on most construction projects. The subcontractor purchased such insurance which named the general contractor and owner as additional insureds. However, the policy contained three exclusions: (1) an employee exclusion; (2) an exclusion for roofing work; and (3) an exclusion for any liabilities assumed under contract or agreement. When a worker employed by the subcontractor was injured on the project, the owner sought indemnification from the subcontractor's insurance carrier. The coverage was denied under the three exclusions mentioned above. The owner subsequently tried to enforce the indemnification and insurance provisions of its contract (with the general contractor, in turn, making the same type of claims against the subcontractor).

Although sympathetic to the plight of all the parties, the court recognized that the policy obtained by the subcontractor was “worthless.” It held that there was no public policy mandate prohibiting or limiting exclusions inserted into a CGL policy

that render the coverage meaningless, nor did the Insurance Law or Insurance Department regulations provide protection for insureds as to the minimum requirements for construction site insurance policies.

As such, the court held that the owner and general contractor had a duty to do a “due diligence” review of the policy presented by the subcontractor. Had they read the policy when it was first presented, they may have observed the exclusions and rejected the policy as not in compliance with the contractual requirements. Having failed to do so, they were left exposed and bound by the worthless coverage provided by its subcontractor. (Note that while this lawsuit involved claims by the owner and general contractor, its holding would be the same for any subcontractor that seeks to be covered by a lower-tier subcontractor's policy.) The insurance coverage was meant to flow down to the contractually responsible party. Here, the exclusions disemboweled the policy preventing this from occurring.]

#### G&C COMMENTARY

We've said it before, READ YOUR POLICY! Whether it's a policy presented to you by a subcontractor that is contractually obligated to provide general commercial liability coverage and name an upstream general contractor or owner (or both) as an additional insured, or ones own policy, or the policy of a lower-tier subcontractor be sure to read all scope of coverage



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declarations, definitions, exclusions and endorsements, to determine that your coverage is not limited in such a way as to make it worthless to you. The subcontractor in this case, unfortunately, was “ripped-off.” It paid the premium and received nothing in return.

Furthermore, if you are contractually obligated to provide insurance coverage and fail to do so, you may very well be held to be the “insurer” of the parties to whom you are obligated to provide coverage. Few contractors or subcontractors are in the financial position to assume such potential liabilities. Unlike an insurance company, no reserve has been set aside for such eventualities and the exposure can be tremendous. As with all important purchases, know precisely what you are buying.

As this case also evidences, it is entirely “legal” for an insurance policy to include exclusions that virtually swallow the entire policy, rendering coverage worthless. There is nothing a court of law can do to protect you in such circumstances. Is the insurance company’s behavior in such a situation a disgrace? Yes. Unlawful? No.

Coverage disputes can be contentious and we strive to bring recalcitrant carriers into the fold. But when the policy has loopholes as wide as the Grand Canyon, the “policy” is really an illusion and you have been duped, plain and simple. This all seems quite obvious, but it is truly amazing how rarely these simple and important precautions are taken.

Coverage after all is a “zero sum game.” Whether you are an owner, subcontractor or general contractor, you should get what you pay for and receive the protection you need. Coverage declarations + endorsements minus exclusions = actual coverage. The competency and professionalism of your insurance broker is critical. This is not rocket science, but the lure of an inexpensive premium can be tempting. Contractors and subcontractors will never understand exactly what you bought without understanding both size of the equation, the pluses and the minuses. “Cheap” premiums can certainly end up not being no bargain at all.