

Workshop W1

Wednesday, November 4, 9:00 a.m.–noon

FILLING THE HOLES IN CONTRACTORS' LIABILITY COVERAGES

Presented by



Karen A. Reutter
Senior Vice President
Aon

This fast-moving session will pinpoint common problems that can result in gaps in contractors' liability coverages, including general liability, umbrella liability, contractors professional liability, and contractors pollution liability. Often, there are relatively easy "fixes" that can close holes in the basic policy form and avoid unexpected gaps in coverage. Find out how to maximize the value of your liability insurance program (or your client's) and protect the company balance sheet from a potentially devastating uninsured loss by closing these common holes in a contractor's liability program. Even where gaps can't be closed, contractors who know they exist can make informed decisions about alternative methods of managing these risks.



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Karen A. Reutter
Senior Vice President
Aon

Ms. Reutter is copresenting Workshop W1, "Filling the Holes in Contractors' Liability Coverages," on Wednesday morning. She has over 20 years of experience in the construction risk management and insurance fields. She began her career at IRMI in Dallas, prior to joining St. Paul Construction in St. Paul, Minnesota, in the early 1990s. While at St. Paul Companies, she served in several roles including national director of casualty underwriting, senior officer of construction risk management services, as well as senior officer of strategy and planning for the corporation. Ms. Reutter subsequently joined Zurich Construction in its home office of Minneapolis, Minnesota, as a national director of project risk underwriting. During the past several years, Ms. Reutter has worked on the brokerage side of the business, in national roles, including production, product development, and management. She was with the Willis national team for Construction prior to joining Aon's construction team in a national role in 2008. Ms. Reutter is a frequent speaker and writer on topics related to the construction risk management field. She holds B.B.A. and M.B.A. degrees from the University of North Texas and has her CPCU and ARM designations.

Notes

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Coverage Gaps: Commercial General and Excess Liability Policies

Presented by:
Karen A. Reutter
Senior Vice President
Aon
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Discussion Overview

- What drives coverage changes
- Industry numbers: Hard vs. Soft market
- Potential gaps in coverage and suggested solutions
- Conclusion

What Prompts Coverage Changes?

- Coverage changes can be broadening or restricting
- Hard vs. Soft market
- Attempts to delineate coverage by defined insurance products
- Court interpretations

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Broadening vs. Restricting Coverage

- Insurer-driven changes
 - Via endorsement or via management
 - Examples
 - Notable restrictions
 - Less notable restrictions
- Broker/Buyer-driven changes
 - Manuscript endorsements

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Disciplined Underwriting

Construction Risks

- Number of carriers: recent past versus today
- Lessons learned from prior years
- Ability to manage data
- Scrutiny of financial sector
- Disciplined underwriting: pricing versus terms/conditions

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GL Coverage Considerations:

Business Risk Doctrine

- The application of the Business Risk Doctrine is used to deny liability coverage based upon a premise that defective work is not considered an “occurrence” under the CGL policy
- The Business Risk Doctrine is based upon jurisdiction state law. In most of these cases, the court has opined that property damage caused by faulty workmanship was not an occurrence under the CGL policy, but most early cases left open that coverage would be provided if the faulty work causes damage to another (i.e., resulting damage)
- Some major carriers are now taking a negative stance on business risk

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GL Coverage Considerations:

Subcontractor Exception—Damage to Your Work

- Major inroad to the “Business Risk Doctrine”
- Subcontractor is broadly interpreted to include many entities
- Key to completed operations coverage
- Source of classic judicial statements of coverage for defective work

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GL Coverage Considerations:

Sample Endorsement Language

Business Risk Doctrine

- Definition of “Occurrence”
 - The following is added to the definition of “occurrence” in Section V Definitions, but only for the purpose of determining whether property damage to Your work caused by the work of one of Your subcontractors is caused by an “occurrence” as defined under the Policy:
 - Defects in “Your Work,” neither expected nor intended by any “insured” performed on Your behalf by any subcontractor, shall also be deemed an “occurrence.”

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GL Coverage Considerations:

Sample Endorsement Language

Business Risk Doctrine

- Another example of amending “occurrence”
 - “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, including but not limited to property damage caused by your negligent actions or performance of your work done by or for you.

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GL Coverage Considerations:

Excess of Wrap-Ups

- Intent of endorsement
- Relevance in today’s market
- Sample language

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GL Coverage Considerations:

Sample Endorsement Language:

DIC/DIL of Wrap-ups

EXCESS PROVISION – CONSOLIDATED (WRAP-UP) INSURANCE PROVISION

This endorsement modifies insurance provided under the following:

Paragraph 4.b.2 of the Other Insurance Condition – (Section IV – Commercial General Liability Conditions) is replaced by the following:

b. Excess Insurance

This insurance is excess over:

.... (2) Any primary or excess insurance available to you through a Consolidated (Wrap-Up) Insurance Program.

... When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any “suit” if any other insurer has a duty to defend the insured against that “suit”. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.

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GL Coverage Considerations:

Premises “Gap” Coverage for Wrap-Ups

- Intent of endorsement
- Historical perspective
- Sample language

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GL Coverage Considerations:

Sample Endorsement Language

Premises “gap” coverage

Separate Endorsement: Limited Coverage Repair Work

This insurance is extended for an additional period of time with respect to liability for “bodily injury” or “property damage” arising out of “repair work”. This extension shall commence as of the date that “your work” is deemed to be completed and shall end as of the expiration of any express warranty for “your work”, or the statutory time period for such “repair work”, or 10 years from the date of completion of “your work”, whichever comes first.

- Notes: attached to CIP, definitions of “Policy Period”, “Repair Work”, and “Enrolled” are modified.

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GL Coverage Considerations:

Professional Liability Exclusions

- General liability coverage
 - CG 22 79 vs. CG 22 80, professional services exclusion
 - Intent of endorsement
 - Recent underwriting history
 - Which endorsement should apply
 - Sample endorsement language

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Sample Endorsement Language:
CG 22 43

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Sample Endorsement Language:
CG 22 79

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Sample Endorsement Language:
CG 22 80

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GL Coverage Considerations:
Additional Insured Endorsements

- Standard ISO endorsements vs. Manuscript endorsements
- Completed operations vs. Ongoing operations
- Sole negligence issues
- Blanket/Automatic vs. scheduled additional insureds
- Written contract or agreement vs. broader to include verbal; prior to loss

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GL Coverage Considerations:

Joint Ventures

- CGL policy includes a provision that removes all coverage with respect to liability arising out of participation in a partnership, JV, or limited liability company
 - Ongoing operations
 - Completed operations
- Unless the JV is scheduled in the declarations page
- Relatively easy to do this and carry over year after year if you do very few JVs; potential gaps if you're involved with several or in some cases hundreds during the years

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GL Coverage Considerations:

Joint Ventures

CG 0001 12 07

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GL Coverage Considerations:

Joint Ventures

- In some cases, the JV will purchase its own primary and excess liability coverage; completed operations period can be a problem and potential gap (e.g., 3 years)
- In order for a contractor to be protected for exposures arising from JVs participated in
 - Attach an endorsement to its own CGL policy to extend completed operations coverage to past JVs
 - Scheduled or “blanket” (would provide coverage for scheduled JVs or not)
 - Purchase a “discontinued operations” policy through the surplus lines markets

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GL Coverage Considerations:

Joint Ventures

- Add blanket JV coverage endorsement to provide coverage for all current and past JVs
 - Coverage is excess over any other coverage available under a policy purchased specifically for the JV, including completed operations coverage extension (“the tail”)
 - In this way, contractors benefit from the coverage purchased specifically for the JV exposures plus have protection under their own policy after the JV’s coverage expires or is exhausted by claims
 - Coverage only benefits the contractor (named insured); does not benefit the JV or any participants in the JV

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GL Coverage Considerations:

Joint Ventures

Blanket Coverage—Current and Past Joint Ventures

Delete the last paragraph of Section II, part 4 (“Who is An Insured”). This text is reproduced below for identification purposes:

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

Add the following paragraph to Section II (“Who is An Insured”)

5. With respect to “your work,” you are an insured for your liability arising out of the conduct of any partnership or joint venture of which you are or were a partner or member, even though such partnership or joint venture is not shown as a Named Insured in the Declarations. This coverage is excess over any available liability insurance purchased specifically to insure the partnership or joint venture.

This coverage will not inure to the benefit of any party except you.

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Excess Liability Coverage Considerations:

- Is it true excess, follow-form or not?
- Should not be taken for granted in today’s market
- Potential gaps to watch for include:
 - Excess of wrap-up coverage
 - Residential exclusions
 - Completed operations period (related to a GL project policy)

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