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Technical Advisory

TA 239 **Date: August 4, 2004**

SUBJECT: Garage Exclusion for "Work You Performed"

BACKGROUND: A frequent source of confusion under the Garage Policy is the exclusion for "work you performed." One of the most common scenarios is when a quick-lube shop fails to properly reinstall and tighten the oil drain plug in a car they have done an oil change for. A few miles later, the engine freezes up after all the oil leaks out.

Another common situation is when a tire store fails to tighten lug nuts, and a wheel later comes loose while the customer is driving the car, causing an auto accident.

In these and similar cases, does the "work you performed" exclusion preclude coverage for any of the subsequent damage?

MAIN POINTS: The exclusion only applies to part of each loss. Note that the exclusion (reproduced below) applies TO "work you performed." Thus, the loss of the oil and the expense to replace it are excluded, but not the subsequent damage to the engine. Also, the damaged wheel is excluded, but NOT the subsequent damage to the car following the wreck.

Highly respected sources such as IRMI and FC&S both contain these and similar loss examples, with the conclusion that the exclusion only applies to the work performed, not subsequent damage.

Reproduced below is an excellent article from the "Virtual University," which is a terrific education resource of the Independent Insurance Agents & Brokers of America (IIABA). The Virtual University has several hundred technical articles such as the one below. In addition, there are over 25,000 subscribers to the free bi-weekly VU newsletter. Check out the VU at www.iiaba.net/vu.

NECESSARY ACTION: Circulate this Technical Advisory to all Commercial Auto staff.

The "Work You Performed" Exclusion

Abstract
Needless to say, when a garage does repair work on an auto, it's possible that negligent or defective work could result in subsequent damage. At issue is what part of that damage is covered or excluded by the garage policy? The answer depends on what "work you performed." You might be surprised at how some insurers interpret this provision....

The ISO garage policy contains the following exclusion:

13. Work You Performed

"Property damage" to "work you performed" if the "property damage" results from any part of the work itself or from the parts, materials or equipment used in connection with the work.

"Work you performed" is defined as:

S. "Work you performed" includes:

a. Work that someone performed on your behalf; and

b. The providing of or failure to provide warnings or instructions.

[Note: The ISO CGL policy has a similar exclusion (l. Damage To Your Work), the principal difference being that the CGL makes an exception for work performed on the insured's behalf by a subcontractor.]

As you can see, the "definition" above really doesn't define anything. It just says that "work you performed" INCLUDES....what constitutes "work" is not defined in the policy.

This exclusion is generally considered to be a workmanship exclusion. The garage policy is not a warranty or a guarantee of the quality or fitness of the work performed by an insured. For example, you go to a quick lube service for an oil change. The filter is improperly installed and, shortly thereafter, it blows off, resulting in a loss of the filter, oil, etc. The resulting "damage" (i.e., reservicing cost) is NOT covered due to this exclusion.

However, if other damage was to arise out of this (e.g., engine damage due to increased friction or heat), the exclusion does not apply to that damage. The reason is because of the word "to" in the exclusion. The exclusion applies to damage **TO** "work you performed." The quick lube shop didn't work on the engine, just on the oil filter and related system parts.

Similarly, let's say you get a new set of tires and the lugs on one of the tires are not properly fastened. While driving down the highway, the tire comes off, resulting in a bent wheel and damage when you sideswipe a guard rail before coming to a stop. The damage to the wheel assembly is arguably not covered by the tire store's garage policy due to the exclusion; however, there is no question that the damage when you hit the guard rail is covered since the tire shop wasn't working on anything except the tires and wheels.

There are situations, though, where coverage may not be so obvious. For example, below is a recent "Ask an Expert" question we received.

Q. "My client is a 'quick lube' service whose receipts come largely from oil changes. However, they also have other services such as air filter replacement, transmission service, a/c recharging, belt replacement, tire rotation, windshield repair, and others.

"Their primary oil change service also includes a '10-point check' where they 'inspect' brake, transmission, differential, power steering, windshield washer, and battery fluids. They also check the air filter, wiper blades, lights, belts, and tire pressure, and will clean the windows and vacuum the interior. For the most part, this is more of a marketing feature than any real servicing. It mainly involves eyeballing or touching various parts of the vehicle and little 'work' is actually done for most customers.

"One of their customers has now filed a claim on the basis that he got home and, three weeks later, the transmission went out. He wants my insured to replace transmission. The insurer has denied the claim and says, if he sues, they have no duty to defend because of the "work you performed" in the garage policy.

"The company says the insured should have caught the problem during their 10-point check. I say that, at this point, we don't even know what caused the transmission to go out and, until we do, the insurer has a duty to defend. They say they don't have to defend something that isn't covered. I say that all the insured did was check the transmission fluid and that that 'work' couldn't have caused a transmission to fail.

"The insurer is broadening the exclusion so that any item within the 10-point service check will not be covered. The claims adjuster said that if the brakes had failed and the car wrecked, there wouldn't be any coverage because our insured checked the brake fluid which is part of the brake 'system' and, thus, part of their work and not covered. He even used the example of changing the oil and leaving the plug out, saying that any resulting engine damage wouldn't be covered either! (I told the adjuster that I was nominating him as 'Idiot of the Year' -- I really did -- which I think has just made him even more determined to deny the claim.)

"My point is, I cannot see where the insurer is willing to pay or defend ANYTHING my client is doing other than resulting damage to other property. Since the 10-point 'inspection' (including vacuuming the car) covers just about the entire vehicle, the adjuster doesn't seem to think that any resulting damage to the car is covered. Apparently, if you just look at something, you're 'working' on it in his eyes.

"What really galls me is that this same company has paid similar claims on a number of occasions over the past few years. When I spoke to the claims supervisor, I was told that they have 'expanded their interpretation of the exclusion recently'. And, in a letter to the insured, the adjuster said, 'In determining coverage, each claim is examined separately and coverage determined based on the facts of the particular claim and policy language. A decision on a prior claim with different facts does not impact our coverage decision. None of the other claims referenced in your letter involved allegations where damage was limited to a transmission caused by work on that transmission.'

"What's really interesting about the position stated in the letter is that it is made after a lengthy listing of court cases that also have different facts and none of them deals with a situation like this. In fact, I don't think the court cases they cite have anything to do with this and some/most don't even involve the same exclusion."

A. Welcome to the hard market! While we might marginally debate the subject claim, the adjuster's other examples of the application of the exclusion defy logic and reason (though you'll be happy to know that, among our faculty, you have garnered several other votes for your "IOTY" award :-).

As you mention, the carrier has paid similar claims in the past. While opinions can change over time, such past actions of the insurer would most likely be admissible in any legal proceedings against it. In the case of *Aetna Casualty & Surety Ins. Co. v. Hass, 422 S.W.2d 316 (Mo. 1968)*, the court found that payment of similar prior claims, upon discovery, bound the insurer to coverage of a later claim of the same type. The exclusion in question has remained largely unchanged since at least 1980, so the insurer could have a hard time justifying their interpretative change of heart.

In addition, a case could be made that the insurer, through it's underwriting process, was fully aware of the nature of the services provided by the insured. If you follow their logic, just about anything the insured does would not be covered because of this one exclusion. It might be hard for a court to

permit them to take such a broad and sweeping interpretation to the point where the policy they purchased does little more than provide some slip and fall coverage.

Our consensus is that, based on how you've described the situation, your insured did not perform any work ON the transmission. The work performed was checking the fluid level, not servicing the transmission. Therefore, even if (and that's a big IF) the damage arose out of negligence in checking the transmission fluid level (which the claimant would have to prove), such damage didn't involve damage TO work performed.

According to Couch, "Under an exclusion from a garage policy for property damage to work performed by, or on behalf of, the named insured arising out of the work, the policyholder is not insured against liability to replace or repair his own defective work, but is covered for the insured's liability for damages to other property resulting from the defective condition of his work, so that the exclusion does not bar coverage for the destruction of the remainder of an engine allegedly caused by the insured garage owner's defective performance of work on the valves." – *Travelers Ins. Co. v. Volentine, 578 S.W.2d 501 (Tex. Civ. App. Texarkana 1979)*

In the case cited above, the insured's work on the valves in an engine resulted in damage to the rest of the engine, but the court found that the exclusion didn't apply. This is a much more extreme situation than the one faced by your insured (and we're not sure we'd agree with the court on this one).

Hopefully, the carrier will change their interpretation again, along with their initial denial. If anything, this claim does demonstrate the value of alternative risk management techniques. It would probably be a good idea if the insured developed some sort of hold harmless clause in their service contract such that it would not be held liable for oversights while conducting it's 10-point service inspection.

In addition, it might be a good idea to exclude this service as an integral part of the basic oil change service and, instead, make it a free option. That way, there would be no remuneration or consideration paid by the customer, thus lessening the chance of a breach of contract claim. Since these are legal issues, the insured might want to consult with a qualified attorney to see if there are other ways to minimize the exposure.

Unfortunately, this exclusion has no "broad form buy-back" endorsement like that commonly available for products, rather than completed operations, claims. IIABA's national and regional technical affairs committees continue to urge ISO to offer such a buy-back or to modify the language (e.g., using the CGL "that particular part" wording) so as to preserve the exclusion of true workmanship claims while clarifying that damage arising out of such work is covered.

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