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Technical Advisory

TA 257

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Subject: The CGL Professional Liability “Exclusion”

Background: As every gardener knows, pulling what appears to be a small weed often reveals an unexpected tangle of roots running in all directions. Insurance agents frequently encounter the same problem as they try to determine the various risk exposures when working on a new account.

With the help of a good coverage checklist, a perceptive agent can untangle and explain the diverse exposures, and make sound recommendations for coverage.

Main Points: One of the most challenging tasks is to determine when a commercial insured has a “professional exposure.” While some are obvious, such as doctors, lawyers, accountants, insurance agents, etc., others are not, and it is very important for an agent to fully understand the nature of the professional exposure.

Frequently, the issue arises as to coverage in the CGL for the professional exposure, or if the CGL has an exclusion for the professional exposure.

Reprinted below is an excellent article on this subject, written by Dave Sanborn, CPCU – one of the most prominent and respected insurance instructors in the country. The article is one of the hundreds that are included in the “Virtual University” of the IIABA – the Independent Insurance Agents & Brokers of America. The Virtual University has become a very valuable resource for independent agents – check it out at www.independentagent.com/VU.

By the way, we are delighted that Dave will be back in Louisiana in November, presenting one of his most popular seminars, “Contractor’s Account Handling.” See the entire 2006 IIABL education schedule, now available at our web site (www.iiabl.com).

Necessary Action: Circulate this Technical Advisory to all appropriate Commercial Lines staff.

The CGL Professional Liability “Exclusion”

By Dave Sanborn, CPCU
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Unlike the simple ISO HO policy, the ISO CGL policy has no specific professional liability exclusion. As a result, sometimes it can be difficult to determine whether a claim is an "occurrence" and covered by the CGL or an "act, error or omission" and not covered. In this article, we'll



explore this issue and include a dynamite download from an attorney who has examined the legal precedents.

Editor's Note: In addition to Dave's article below, we're also providing a free download that looks at the legal precedents involving "professional services" under the CGL. The article is by Thomas M. Bower, J.D. a partner in the New York City office of Shaub, Ahmuty, Citrin & Spratt, LLP.

[What Constitutes "Professional Services"?](#)

by Thomas M. Bower, J.D.

To visit Tom's personal web site and view this article online, [click here](#).

Years ago (I hate to admit how many) I wrote a series of articles on the confusion of "workmanship exclusions" in both property and liability coverage forms. This was/is an area that is terribly confused and the articles got a lot of attention. I still remember when I took my first insurance class at my first insurance job out of college when the instructor said "workmanship type losses were uninsurable." Well, that is nonsense! What exactly is E&O insurance except coverage for screwing up? Workmanship is insurable. This is an area that still needs constant attention as people get it wrong all of the time.

Well, it is now 2002 and I continue to be perplexed constantly about an area that may be related and is just as misunderstood. There is a real need to clear up what professional liability exclusions on the [CGL](#) are really excluding and, just as importantly, to have a better handle on when they should be used in the first place.

Background — If you want to earn \$10 quickly, place this bet with some of your colleagues at your next convention or meeting: "Does a [CGL](#) policy cover professional liability"? 80% will say "of course not." **They are wrong.** The basic axiom of liability is that "everything is covered unless it is excluded." You always read a [CGL](#) like an all-risk property policy...everything is covered unless it is excluded. There is no professional exclusion on a [CGL](#) policy and never has been; therefore, the [CGL](#) does cover professional liability!

BUT...Think of Professional Liability in 2 major areas:

- **Malpractice** — the touching of the body (there is an old Groucho Marx joke here but I will not use it). and/or
- **Errors & Omissions** — the mistake loss; the "how did we screw that up?" type loss.

However, before you even look at exclusions, you must meet the requirements of the Insuring Agreement. A [CGL](#) policy only pays for "bi/pd" type losses that must be caused by an "occurrence" and, of course, it has exclusions for things like "your work," "your product," product/work recall, and "impaired property." A [CGL](#) policy is a "snap, crackle, pop" policy...it is a "physical happening" policy.

So, with or without a professional exclusion, the [CGL](#) does not cover the classic E&O type loss because of the Insuring Agreement, not the exclusions. If an accountant drops an adding machine on a client's toe the [CGL](#) will cover that but it will not give the accountant coverage if s/he drops a zero on a tax return. That is the world of E&O.

A good way to "see this" is to take a look at Section II—Who Is An Insured. If you insure a corporation, Directors and Officers are insureds under the [CGL](#) and always have been. If the [CGL](#) policy does not exclude Professional Liability, why is it necessary, therefore, to write Directors &

Officers E&O coverage? Because, the [CGL](#) at its very best only covers bi/pd losses (which the E&O will exclude anyhow). So, write [CGL](#) for bi/pd and E&O for mistake liability.

So, **AXIOM #1**, the most important (and I think most confused), is: ***A Professional Exclusion Endorsement is not needed to exclude E&O type losses...they are "excluded" by the Insuring Agreement.***

While it is true that a non-endorsed [CGL](#) does cover bi/pd professional losses, that is only true if there are no professional exclusion endorsements attached and there are many that can be attached.

The Endorsements — With a [CGL](#) policy, exclusion endorsements start with a "21" or a "22." There is only one "21" that is a professional exclusion: [CG 21 16](#). With this endorsement the underwriter specifies what is being excluded. Will an endorsement like this be on a hospital's [CGL](#)? You BET! That is OK because the Professional/Malpractice Policy written for the hospital will pick up what the endorsement is excluding and the two will blend which is what is needed and what we want.

When I started in this business (I hate to admit it but I am using this phrase more and more all of the time!), professional exclusions on [CGL](#) policies were used most often for things like hospitals and physicians which is FINE! In other words they were used when there was a major bi/pd professional exposure that the [CGL](#) should not cover and the Professional policy should/did.

But, something started to change. Professional exclusion endorsements started to show up for all kinds of risks and seemed to be put on the policy because of the fear of E&O type losses. This is what I call underwriting by computer or by classification number. "When in doubt throw it on" when what should happen is "when in doubt leave it out."

Most professional exclusion endorsements start with a "22." Many 22's are not professional but many are (have you really read your [CG 22 48](#)?). 22's are only to be used with certain risks under certain circumstances. Herein lies the problem. Many of these endorsements are added just too freely. The biggest reason seems to be that carriers/underwriters think that, without these exclusions, the [CGL](#) picks up (or might pick up) E&O type losses.

AXIOM #1 again (just to make sure you don't forget): ***The [CGL](#) does not need to be endorsed to exclude E&O type losses!!!*** The Insuring Agreement takes care of this problem as we have previously discussed. If a [CGL](#) covered E&O type losses why have companies been buying Directors & Officers policies all of these years?

AXIOM #2 — ***These endorsements exclude bi/pd losses.*** If the underwriter is afraid that the court might say that the [CGL](#) covers "E&O" type losses, these endorsements will not save the carrier anyway as they do not mention E&O. They exclude, AND THIS IS THE REAL PROBLEM/CONFUSION, bi/pd losses. That is what they all say.

So, if the [CGL](#) is excluding bi/pd professional losses that exposure better be covered somewhere else. Is it?

- Malpractice? YES...the 2 key policies "fit."
- Most E&O policies? Probably not, as they exclude bi/pd.
- Some E&O policies? Perhaps, but how far and for what?

The industry is slowly addressing some of these changes but there is a real need to speed the process up. A classic example is construction....

When I started in this business (dang, there it is again), construction was design—bid—build. Now it is often bid—design—build. Often, the same company does the design/A&E work and also acts as the General Contractor. For years we always used (and still do) the [CG 22 43](#). This endorsement is “ok” for a pure A&E firm, as their A&E policy will “pick up” the items excluded (A&E is one of the few E&O policies that covers bi/pd as well as E&O).

But does an A&E form cover everything? NO! It covers items within the definition of a “wrongful act” which usually pulls it down to “professional services the named insured is legally qualified to perform.” So, it is covering design situations. What if the loss is just “methods and means of construction” in the Named Insured’s role as General Contractor? How far does this exclusion go? If you read it literally it goes a long way and definitely could go beyond what the agent or the insured expects.

Key Items on this endorsement:

- It excludes “any” professional services done by you (the Named Insured) or anyone working for the NI.
- Professional Services are defined in a very broad way. In fact they are really not defined at all. Whenever I see the word “include,” I read it as “but not limited to.” This definition could include many things that any contractor does as part of his/her work not just a design/build contractor.
- The biggest problem: It says what professional services “include,” but it does not say what they do not include and therefore would not be excluded by this endorsement!

AND, remember, this endorsement is not excluding E&O losses (the Insuring Agreement does that)...it is excluding bi/pd losses! So, if your insured’s work kills 10 people and it “could” fall within the broad parameters of this exclusion, there is no coverage. Think what many carriers could do with the exclusion if there was a \$10 million dollar multiple bi loss!??

Well doesn’t the A&E policy cover everything excluded? I doubt it. While it is true that an A&E E&O policy is one of the few that does cover bi/pd losses as well as E&O “type” losses, the coverage must fall within the definition of “professional services.” It does not cover any and all liabilities. No E&O policy covers everything. The definition includes the phrase “legally qualified to perform” which everyone generally agrees includes services for which there is a license...the pure professional exposure as a licensed professional, not necessarily acts of a contractor. You can see the battle between the two carriers.

The good news—many people besides me have been questioning this problem for a long time. Slowly, changes have started to be made. In 1996, ISO introduced two new endorsements in this specific area: [CG 22 79](#) and [CG 22 80](#) (since updated). Let’s give credit where credit is due, some good changes here! The [CG 22 79](#) only applies as an exclusion if the NI provides professional services to someone else. The [CG 22 80](#) has made a great contribution. It is the same as the [CG 22 43](#) except that it adds a paragraph #3. Paragraph #3 says what Professional Services DO NOT INCLUDE and hence would NOT be excluded by this endorsement. You will note that “methods and means” of construction are now not included within the exclusion. This is a MAJOR improvement.

Remember once again (I know I am repeating this but...), with or without any of these endorsements the [CGL](#) does not cover E&O type losses as the policy only covers, at its best, bi/pd/occurrence losses—SNAP, CRACKLE, POPS.

So, by the use of these endorsements, you are getting closer to what we want/need...getting the [CGL](#) and the E&O policy to “fit.”

If you insure a pure design firm you can accept the [CG 22 43](#), as their A&E form will pick up what is being excluded. If, however, you insure a design/build firm, don't accept the [CG 22 43](#) on the [CGL](#) as there is a "fit" problem. Get the underwriter to add the [CG 22 79](#) (usually) or, in some cases, the [CG 22 80](#). Now you have a better fit with the E&O.

While this may be a problem for things like Design/Build Contractors, at least their E&O covers some bi/pd. Remember, most E&O policies do not cover bi/pd (I bet yours does not). Most E&O policies flatly exclude all bi/pd as they are designed to just cover "mistake type" losses and the [CGL](#) is for bi/pd/occurrence type losses. So, if you think this is just a problem for Design/Build Contractors, think again.

If you happen to have the "22" exclusion endorsements themselves, start to leaf through them and just look at the titles (they are probably between your John Grisham and Stephen King novels). Many, not all, seem to say "E&O" in the title. But that is not what they are excluding. They are excluding bi/pd losses. If the endorsement has been added to remove E&O losses, it is not necessary to begin with. These endorsements are added incorrectly all of the time and they should be removed. If the E&O policy (if there is one) is also excluding bi/pd losses, where are these losses covered? Good question!

Let's just look at one in detail---[CG 22 75](#).

I am writing this article on Word 2001 for MAC (yes, I use a MAC at least most of the time). This is a new copy of Word 2001, as I had to return the original one. The original one kept "quitting" and interesting flashes kept going across the screen. Something was just wrong with that piece of software. They exchanged it quickly and happily. No major problem, but let's just say that I had purchased software that was used to run my complicated manufacturing equipment. Microsoft employees came to my plant and designed specific software for my needs and guaranteed to me its functionality. Because it was not designed properly, my machinery just did not work and I suffered a large loss of income.

I sue Microsoft. Should that type of a loss be covered under their [CGL](#)? NO! Is it covered by their [CGL](#)? NO! Is the [CG 22 75](#) needed to exclude this type of loss? NO! The Insuring Agreement excludes the loss and yet 95% of the time, the reason given for attaching this endorsement is the type of loss just described. This endorsement is not needed for this type of loss and that is ok because their E&O policy will pick up this kind of a loss.

BUT...let's say that, for some strange reason, the software had caused an electrical short in my computer (or the manufacturing equipment) that caused my computer to blow up in my face. I now sue Microsoft. Is that loss now covered by Microsoft's [CGL](#)? YES! Is it covered with the [CG 22 75](#) attached? **I say no!** Notice that the exclusion even excludes bi/pd losses arising out of manuals for goodness sake. Is this type of loss covered under Microsoft's E&O policy? Microsoft's policy, perhaps, but for most E&O designers, no as their E&O policy totally excludes all bi/pd. There is just something fundamentally wrong here.

An underwriter might say (but I bet they did not initially) that the type of catastrophic loss I described with the manufacturing equipment is exactly what they wanted to exclude with the [CGL](#). Well, then it better be covered somewhere else and it generally is not.

This is just one example. In some cases, perhaps the exclusions are warranted, but in most they are not. They are just not understood by the agent, underwriter or client. There is a real hole here that needs to be closed. I have had at least five calls in the last three years where a bi/pd loss was being

denied by both the [CGL](#) carrier and the E&O carrier and, in two of those cases, both the [CGL](#) and the E&O were with the same carrier. Try explaining that to an insured.

What to do...

- Try to get the exclusion removed from the [CGL](#) and remind the underwriter that the E&O policy will cover the “mistake” loss. Send them a copy of that policy if necessary but underline its bi/pd exclusion. BEST ACTION.
- If they flatly will not remove the exclusion see if it can be amended to get away from words like “any and all.” Narrow the exclusion down. SECOND BEST.
- See if the E&O underwriter will give you some bi/pd/occurrence coverage for the professional services covered under the E&O. THIRD BEST.

I apologize but I have to say this one last time....

With or without any of these endorsements the [CGL](#) does not cover E&O type losses as the policy only covers, at its best, bi/pd/occurrence losses — SNAP, CRACKLE, POPS.

Summary — Who is to blame for all of this? No one! It is important to remember that insurance (especially liability) is a “work in progress” and always will be. Don’t make the presumption that we know what we are doing all of the time because we do not. (Think about the way we rate a [CGL](#) policy. Does that really make sense to you?)

We are getting better at all of this but it is amazing how far something can go when its basic premise is just misunderstood. This area is also more complicated because most E&O forms are not ISO forms. They are not standardized. There is a need for more standardization in this area as E&O is not exotic anymore as it once was. We need to take more steps to get the [CGL](#) and the D&O policy to “fit.”



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