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Risk Management Consultants - Established 1926

Third-Party-Over Action CGL Exclusions

Introduction

The International Risk Management Institute (IRMI) defines **third-party-over action** as:

“A type of action in which an injured employee, after collecting workers’ compensation benefits from the employer, sues a third party for contributing to the employee’s injury. Then, because of some type of contractual relationship between the third party and the employer, the liability is passed back to the employer by prior agreement. Depending on the nature and allegations of the action, coverage may be afforded under the contractual liability section of the employer’s commercial liability policy or the employers’ liability section of the employer’s workers’ compensation policy.”

This discussion will focus on the contractual liability section of the employer’s commercial general liability (CGL) policy.

Most non-admitted insurers now issue third-party-over action exclusions/endorsements as part of their standard CGL policy. This proliferation of exclusions has created problems for insurance agents, policyholders (vendors and contractors typically) and the customers of those policyholders (owners and general contractors) seeking coverage when a claim occurs.

We will examine one such endorsement titled “Action Over Exclusion” and how it removes coverage under a CGL policy. In addition, we will suggest ways to uncover when these types of exclusions are part of a vendor or contractors CGL policy.

How does the “Action Over Exclusion” Work

If we look at a standard ISO CGL policy (ISO CG 00 01 12 07 edition **SECTION I COVERAGES, 2. Exclusion, e. Employer’s Liability**), it excludes:

“Bodily injury” to:

(1) An “employee” of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured’s business; or

(2) The spouse, child, parent, brother or sister of that “employee” as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

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This exclusion does not apply to liability assumed by the insured under an "insured contract."

[Underline added for emphasis]

The key language here is the exception to the exclusion (underlined above), which adds back coverage when liability is assumed in an “insured contract”, which typically occurs in the indemnity/hold harmless section of a contract.

For Example: An Owner of a building hires Light Repair Company to perform maintenance work on the light fixtures in their lobby. The Owner executes a written agreement with Light Repair Company for the work which includes a hold harmless clause in favor of the Owner. Light Repair Company maintains a standard ISO CGL policy with no changes to Exclusion e.

Light Repair Company’s employee falls from their ladder while working on the light fixture and is injured. After collecting workers’ compensation benefits, the injured employee sues the Owner. The Owner then looks to Light Repair Company’s CGL insurer to indemnify based on the exception to Exclusion e. (underlined above) and the hold harmless language in the written agreement with Light Repair Company.

If we apply the “Action Over Exclusion” language to Light Repair Company’s CGL insurance policy; it will read as follows:

*“It is agreed that the following change is made to Coverage A. 2. Exclusions:
Exclusion e. Employer's Liability is deleted in its entirety and replaced with the following:*

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

The exception to the exclusion is removed by the Action Over Exclusion. Now let’s take the same claim scenario outlined above; Light Repair Company’s insurer would deny coverage to both Light Repair Company and to the Owner, since there is no longer any coverage (amended Exclusion e. would apply) for liability assumed under an insured contract for the suit from the injured employee.

This leaves Light Repair Company with the burden of indemnifying the Owner with no insurance coverage to fund that obligation.

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How do you know if a Vendors CGL policy has this type of exclusion?

There is no reference to third-party-over action exclusions/endorsements on an ACORD 25 Certificate of Insurance form. And very few insurance requirements within contracts make any reference to this issue. You will likely only find out that this exclusion exist at the time of a claim, when it is too late.

Several options available to Owners and General Contractors to determine if their vendors or contracts CGL policies contain a third-party-over action exclusion include:

1. Collect and review a copy of the vendor or contractors CGL Policy Schedule of Forms and Endorsements and require them to provide you with copies of any exclusions or endorsements that you are not familiar with or that you want to review more closely.
2. Have the vendor or contractor amend their ACORD 25 Certificate to include the following affirmative statement in the DESCRIPTION OF OPERATIONS section:

There are no third-party-over action exclusions or similar endorsements or limitations as part of the General Liability policy evidenced on this certificate.

3. Have your vendor or contractor obtain a signed letter from their Insurer or Insurance Agent with the above affirmative statement as respects their CGL policy.

Summary

Third-party-over action exclusions equal trouble for insurance agents, policyholders and their customers. By taking a proactive approach to determine which vendors and contractors CGL policies contain such exclusion, Owners and general contractors will have an opportunity prior to a claim, to address the exposure.

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