

Navigating Commercial Liability Insurance: An Essential Guide for General Counsel

2023 Christian Legal Society National Conference

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I. COMMON LOSS EXPOSURES FOR NONPROFIT ORGANIZATIONS

- a. Bodily injury/property damage to individuals outside the organization
- b. Injuries to employed workers
- c. Injuries to volunteers and bystanders
- d. Auto accidents
- e. Damage to owned buildings and contents
- f. Sexual misconduct claims

II. PRIMARY BENEFITS OF INSURANCE

- a. Risk Transfer – A policyholder limits its financial exposure for specified risks, like those already mentioned, by shifting the risk to an insurance company in exchange for the payment of premium.
 - i. First-party loss (owned/leased real and personal property)
 - ii. Third-party loss (injuries to volunteers and employees or lawsuits against the organization)
 1. Indemnifies the policyholder for claims asserted against it and covers legal fees and costs incurred to defend claims.
- b. Obligations by law or contract
- c. Lawsuits – Duty to Defend and Duty to Indemnify
 - i. “[A]n insurer has a duty to indemnify and defend an insured when the insured’s claimed occurrence falls within the terms of the insurer’s coverage as expressed in the policy. The ‘duty to defend,’ however, is broader than the duty to indemnify. An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.” *Addison Ins. Co. v. Pink Palace, LLC*, 2017 WL 11485525, at *3 (D. Neb. Sept. 25, 2017).

III. HOW TO READ YOUR ORGANIZATION’S INSURANCE POLICY

- a. Declarations page
 - i. This is a snapshot of your coverages and limits. It may be the only place in the policy identifying the named insured.
- b. Insuring agreements (Coverage Grant)
- c. Definitions
- d. Exclusions – What is not covered at all or is covered elsewhere
- e. Conditions
 - i. Selection of counsel/Control of defense

- ii. Notice
- iii. Cooperation
- f. Endorsements

IV. THE WHO, WHAT, WHERE, WHEN, AND WHY OF COMMERCIAL GENERAL LIABILITY COVERAGE

- a. **Who** is covered?
 - i. ISO – Who is an Insured?
 1. The organization
 2. Executive officers and directors
 3. Volunteer workers
 4. Employees
- b. **What** is covered?
 - i. Bodily injury (Coverage A)
 1. “Bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”
 2. What about emotional injury? Not without an accompanying physical injury.
 - a. “‘Bodily injury’ as used in an insurance policy is a narrow and unambiguous term. It includes only actual physical injuries to the human body and the consequences thereof; it ‘does not include humiliation and mental anguish and suffering.’” *Richardson v. Liberty Mut. Fire Ins. Co.*, 716 N.E.2d 117, 121 (1999)
 - ii. Property damage (Coverage A)
 1. “Physical injury to tangible property...loss of use of tangible property that is not physically injured...electronic data is not tangible property.”
 - iii. Personal and advertising injury (Coverage B)
 1. Personal Violations (i.e., false arrest, detention or imprisonment, malicious prosecution, wrongful eviction from or entry into, invasion of privacy)
 2. Defamatory Acts (i.e., slander, libel, defamation)
 3. Infringement Acts (i.e., violations of intellectual property rights)
 - iv. Medical payments (Coverage C)
 1. No fault or goodwill coverage
- c. **Where** does coverage apply?
 - i. “Coverage territory” – Primarily the United States (including its territories and possessions, Puerto Rico, and Canada.
- d. **When** does coverage apply?
 - i. Occurrence-based coverage – The coverage trigger is the date of the act or omission that gives rise to the third-party claim against an insured, regardless of when a claim is made. Coverage applies to injury or loss that occurs during the policy period, regardless of when discovered or a third party makes a claim against the policyholder.

- ii. Claims-made coverage – The event that triggers coverage is the date the insured becomes aware of the third-party claim or potential claim against it, regardless of whether the injury occurred before or during the policy period. Coverage is provided for claims made and reported to the insurer within the policy period.
- e. **Why** did the injury happen?
 - i. Occurrence – What is it and is not?
 1. “An accident, including continuous or repeated exposure to substantially the same general harmful conditions.” ISO Commercial General Liability Coverage Form (CG 00 01).
 2. “[C]ourts have held that a breach of contract claim cannot constitute an ‘occurrence’ under liability policies triggered by an accident or an occurrence.” *Cincinnati Ins. Co. v. Richfield Corp., Inc.*, 395 F. Supp. 3d 894, 907 (E.D. Mich. 2019).
 3. “A claim arising from a breach of contract is not covered under a general liability policy because it is not considered an ‘occurrence.’ This is true regardless of whether or not the breach was intentional.” *Tower Ins. Co. v. Dockside Associates Pier 30 LP*, 834 F. Supp. 2d 257, 263 (E.D. Pa. 2011).
 - ii. Expected or Intended Injury Exclusion (CG 00 01)
 1. “This insurance does not apply to ‘bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured. This exclusion does not apply to ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.”

V. OTHER TYPES OF LIABILITY INSURANCE

- a. Directors and Officers Liability – This insurance provides financial damage protection for directors and officers of an organization, the organization itself, and sometimes employees serving in leadership roles. It is designed to safeguard directors, officers, and other leaders from financial loss in situations where they may be held personally liable for alleged wrongful acts committed while carrying out their official duties.
- b. Employment Practices Liability – This insurance covers claims made by past or present employees or applicants against employers for wrongful employment practices. This can include allegations of discrimination, harassment, wrongful termination, or violation of employment laws.
- c. Employee Benefits Liability – This insurance protects employers, their leaders, and employees from claims arising from errors or omissions in administering employee benefit programs. It covers situations where employees claim they suffered harm or financial loss due to mistakes in managing benefits like health insurance, retirement plans, or disability coverage.
- d. Sexual Misconduct Liability – This insurance provides coverage for claims related to sexual abuse, molestation, or misconduct. It typically includes coverage for non-employment sexual harassment as well.

- e. Professional Liability – This insurance, also known as errors and omissions (E&O) insurance, is intended to cover professionals in case they make mistakes or provide inadequate services, resulting in financial loss for their clients. It is commonly used by professionals such as doctors, lawyers, architects, engineers, and consultants.
- f. Cyber Liability – This insurance offers protection against losses and liabilities resulting from cyberattacks and data breaches. It covers expenses related to incident response, data recovery, legal fees, regulatory fines, and liability claims arising from the theft, loss, or unauthorized disclosure of sensitive customer or corporate information. It also provides assistance in managing the reputational damage caused by a cyber incident.

VI. COMMERCIAL LIABILITY INSURANCE AND CONTRACTS WITH THIRD PARTIES

- a. General counsel is often asked to review contracts with third parties that may require the organization to agree to indemnify the other party. Liability insurance designed to fulfill this obligation is called contractual liability coverage.
 - i. ISO CGL includes contractual liability coverage, but it is limited to the following types of agreements
 1. leased premises (with a fire-legal exception),
 2. a sidetrack agreement (a short-track railroad maintenance obligation),
 3. an easement or license agreement (with some exceptions),
 4. an agreement to indemnify a municipality but not perform actual work for the municipality (usually related to permit issuance), and
 5. an elevator maintenance agreement.
 - ii. Additional contractual liability coverage is available from some carriers but is still often limited to bodily injury and property damage.

VII. WHEN TO NOTIFY THE INSURANCE COMPANY

- a. Commercial liability policies typically require the insured to provide notice to the insurer as soon as practicable, and it is usually in the insured's best interest to proactively contact their insurer if they believe they may face a liability claim.
- b. An insurance company typically cannot deny a claim based on inadequate notice unless it has been prejudiced.
- c. *Harleysville Worcester Ins. Co. v. High Tech Constr., Inc.*, 568 F. Supp. 3d 152, 154 (D.R.I. 2021)
 - i. Insured subcontractor caused damage to property in 2012 and was fired by the contractor. The property owner discovered damage in 2014 and filed suit in 2017. A judge granted a default judgment in 2018, and then the subcontractor notified its insurance company. The court held that the insurer was prejudiced by this "extremely late notice."
- d. *Aseff v. Catlin Specialty Ins. Co.*, 115 F. Supp. 3d 1364, 1370 (S.D. Fla. 2015)
 - i. Notice was provided to the insurer four years after the employee died from an accident on the job and nearly three years after the wrongful death suit was filed. The delay clearly prejudiced the insurer.

- e. *Meridian Mut. Ins. Co. v. Majestic Block & Supply, Inc.*, 1 N.E.3d 173, 180 (Ind. Ct. App. 2013)
 - i. This case involved an environmental claim, and the insured made the insurance company aware of the claim three years after being ordered to take clean-up action. The court ordered that the insurer only be required to provide coverage for clean-up costs beginning only from the time notice was given.