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PROFESSIONAL INSURANCE WHOLESALERS ASSOCIATION OF NEW YORK STATE, INC.

HOT HINTS FROM THE HOTLINE
A SUMMARY OF SOME RECENT ARTICLES AND CASES OF INTEREST TO WHOLESALE BROKERS

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THE "ADDITIONAL INSURED" ENDORSEMENT MAY PROVIDE BROADER COVERAGE THAN THE INSURER INTENDED

Not too far back, in the course of our discussion about Certificates of Insurance and the ACORD 855 Addendum, we touched on the nature of the coverage provided to the Additional Insured (AI) under an Additional Insured endorsement to a CGL policy. As it was most commonly understood, the owner and/or the general contractor who was an AI, was covered under the policy issued to the named insured (usually a subcontractor) for the named insured's "acts or omissions." In other words, if the owner or general contractor was sued as a result of the negligence of the subcontractor, the subcontractor's policy afforded indemnity and defense costs coverage to the AI-owner and/or general contractor.

Although the AI endorsement gave rise to reams of litigation construing issues such as which policy was primary – the subcontractor's or the owner's – and which policy was excess, there appeared to be general agreement that there had to be some negligence on the part of the named insured-subcontractor in order to trigger the AI coverage. In some recent decisions, however, the courts have broadened the reach of the AI endorsement so that there does not have to be a *negligent* act or omission by the named insured in order for coverage to attach.

In a case decided in August, 2015, Burlington Insurance Company issued a CGL policy to Breaking Solutions, a company engaged in the excavation of subway road beds for the New York City Transit Authority (NYCTA). NYCTA was named as an AI as was the City of New York (which actually owned the road beds and leased them to the Transit Authority). An accident occurred during the excavation operations when a machine being operated by Breaking Solutions came into contact with an electrified buried cable causing injury to an employee of the NYCTA. Both Breaking Solutions and the City of New York were sued and the City tendered its defense to Burlington. The insurer accepted the tender subject to a reservation of its right to withdraw in the event in turned out that the loss was not caused in whole or in part by Breaking Solutions, "acts or omissions."

In the course of discovery in the personal injury action, it emerged that the accident happened because the Transit Authority failed to identify and mark the location of the cable and neglected to turn off power to the cable. Burlington then took the position that it did not owe coverage to the Transit Authority because the incident did not arise as a result of any "act or omission" on the part of its insured, Breaking Solutions. Citing to several recent decisions, the court held that as long as the incident arose from an "act" of the named insured – in this case, the operation of the excavating machine – it didn't matter if the "act" was a negligent act, as long the injury took place during the named insured's ongoing operations for the additional insured.

We don't believe the drafters of the AI endorsement envisioned that coverage would be provided for an additional insured merely because an injury arose from the named insured's ongoing operations on behalf of the additional insured without regard to the named insured's negligence, but that appears to be the case. Perhaps the admitted market will amend the AI endorsement in time to come so that it will provide coverage for the additional insured "with respect to

bodily injury caused in whole or in part by the named insured's *negligent* acts or omissions…". It is more likely that surplus lines insurers will respond to these decisions more quickly and you may want to look for changes in the AI endorsement from non-admitted insurers in the months ahead.

A CLAIM FOR LOSS OF STOCK OPTIONS OR STOCK APPRECIATION RIGHTS IS NOT COVERED UNDER AN EPLI POLICY

While many if not most of you have Employment Practices Liability Policies (EPLI) covering the operations of your businesses, the probability is that if you tendered a claim to the EPLI carrier it had to do with a charge of discrimination and/or harassment of one kind or another.

In a bit of a convoluted case, one of the founders and the chief medical officer (Knuppel) of a small provider of medical services for women, Women's Integrated Network (WIN) alleged that over the course of 10 years he, at first, did not receive a salary and then he was paid well below market value for his services. Instead, he claimed, he was granted options to purchase 26,000 shares of WIN stock, but before he could exercise his options, his employment was terminated. Knuppel brought an action to enforce his options and WIN tendered the defense of the action to its EPLI insurer, U.S.Specialty Insurance Co. When the carrier declined the tender, WIN brought a declaratory judgment action against it. While this action was pending, Knuppel and WIN settled the stock option action, but WIN continued with the DJ action to recover the amount of the settlement and its defense costs. U.S. Specialty moved to dismiss the DJ action on the grounds that the settlement and defense costs were not covered losses under the policy and the motion to dismiss was granted.

The attorneys representing WIN in the DJ action did not file an immediate appeal. WIN retained new attorneys to appeal the dismissal of the DJ action but the court ruled that the appeal was untimely. WIN then sued its original attorneys

for malpractice. That action was also dismissed on motion, the court holding that since the EPLI policy stated that "Loss" does not include "payments for stock option or stock appreciation rights," WIN was not entitled to recover the amount of the settlement paid to Knuppel or its defense costs in the Knuppel action. Thus, WIN suffered no damage from the fact that the appeal of the dismissal of the DJ action was untimely. In other words, "no harm, no foul" and although the original attorneys might have messed up with respect to taking a timely appeal, since there was no coverage under the EPLI policy, it didn't make a difference.

The take-away here is somewhat arcane but you should be aware that your EPLI policy does not provide coverage for claims for loss of stock options or stock appreciation rights.

BETWEEN A ROCK AND A HARD PLACE

I recently attended the Defense Research Institute Professional Liability Seminar and saw some interesting presentations relative to brokers and agents. Of significant interest was a talk on brokers being put between a rock and a hard place – a situation not uncommon among wholesale brokers in particular – when the insurer denies coverage and the retail broker who is a major customer calls upon you "to get the coverage issue resolved" because the insured is the retailer's largest client. This is especially so when the retailer expressly or impliedly indicates that he/she will hold you responsible if it turns out that there is no coverage and the insured is already pointing fingers. Is it time for you to notify your own E&O carrier and risk an increase in premium on renewal or should you hold off and hope that the situation gets resolved? Of course, by delaying notification to the E&O carrier you run the risk of your own coverage being impaired because of late notice.

The first order of business is to gather the facts and examine your own file to determine if a mistake was made in your shop with respect to the application for

coverage or the transmittal of the policy and all endorsements. You must also determine the extent of the claim. Does it involve a claim for hundreds of thousands of dollars involving a huge construction project or a slip and fall where the claim is for soft tissue injuries? Given the circumstances of the claim and the "politics" of your relationship with the insurer, you may want to reach out to the claims adjuster to determine if he/she made a mistake in evaluating the facts of the claim or in construing the applicable policy language. This may resolve the situation without anyone's "nose getting out of joint."

Of course, if your file discloses a discrepancy in the way your office handled the placement or if the insured demands that you provide the coverage that the insurer will not, it is time to notify the E&O carrier. This will usually be followed by the E&O insurer assigning an attorney, pre-suit, to review your file and handle all further negotiations among the insured, the carrier, the retail broker and you.

Some things that you should NOT do when such a situation arises is become the insured's advocate vis-à-vis the insurer, especially if the insured or its attorney is making bad faith claims against the insurer. Or, even if you determine that the insurer's position is well taken, don't take on the carrier's cause to the extent of alienating your retail broker-customer. By keeping a low profile in the dispute between the insured and the carrier you *might* be able to avoid being brought into any litigation that may arise from the denial of coverage. When in doubt, give us a shout, and call the HOTLINE.

YOU GO TO MY HEAD
OR WHAT TO DO WHEN YOUR RETAILER
IS SEEKING COVERAGE FOR UAVS (DRONES)

As reported in several recent news articles, the use of commercial and recreational Unmanned Aerial Vehicles ("UAV") has increased substantially over the past several years. Another presentation at the DRI Professional Liability Seminar

dealt with coverage issues that may arise from the use of these new "toys." First, it must be recognized that the FAA has regulatory authority over the use of drones, both commercial and recreational, and can impose fines for unauthorized drone use. The FAA currently allows the recreational use of UAVs but they must weigh less than 55 pounds and cannot fly higher than 400 feet above the ground or interfere with manned airplane traffic. Commercially, UAVs are used by design and engineering companies, surveying companies, law enforcement agencies and many utilities to inspect facilities for preventive maintenance. However, commercial users must first obtain a Certificate of Waiver or Authorization from the FAA and must comply with FAA regulations regarding air worthiness and limitations on altitude and geographical areas.

The standard CGL policy excludes liability arising out of the insured's "ownership, maintenance or use" of an auto, aircraft or watercraft. The FAA has construed a UAV to be an aircraft so that the exclusion would apply. Similarly, most Architects and Engineers E&O policies also exclude coverage for use of an aircraft. Thus, you can expect to see more retail brokers who deal with design professionals, utilities or maintenance of way contractors seeking to place coverage on their clients' drones in the surplus lines market. Some E&S companies have already promulgated endorsements to cover the operation of a UAV but they have substantial deductibles and tight limits of liability. These endorsements provide coverage not only for bodily injury and property damage, but also for trespass and breach of privacy, which may be incidental to the use of a UAV. The only endorsement displayed at the seminar was intended for a design professional's E&O policy and we did not see either a stand-alone policy or an endorsement covering the recreational use of drones, although they may already be out there.

If you see an application for UAV coverage come across your desk, you should inquire as to whether the drone operator has FAA approval and that the

UAV will be used for the purposes set forth in the application to the FAA before submitting same to the insurer. Once a policy or endorsement has been issued, care should taken to make sure that the retail broker understands that the limit of the UAV endorsement or policy may be less than the limit of the CGL policy and may have a higher deductible than the policy to which it is attached.

The Seminar was very informative and I will comment on other topics covered there in future issues of HOT TIPS FROM THE HOTLINE.

GIFT GIVING AT CHRISTMAS AND THE REST OF THE YEAR

A recent inquiry to the HOTLINE from a PIWA Member raised the issue of what restrictions, if any, are imposed on a wholesale broker wishing to give gifts to a retail broker. New York Insurance Law Section 2324 prohibits a licensed broker or agent from sharing commissions with an *insured* or giving an *insured* any special favor or advantage or any valuable consideration or merchandise exceeding $25.00 in value. There is no restriction on sharing a commission with another *licensed broker* (if otherwise, there would be no wholesale brokerage industry) or giving a *licensed broker* a gift in any amount. If you are both a licensed excess and surplus lines broker and a licensed retail broker you should be aware of Regulation 194 (11NYCRR, Part 30) called "Producer Compensation Transparency." In general, it requires a producer to disclose to an *insured* any compensation he/she may receive from an *insurer* that may be dependent upon the profitability of the account or the volume of business the producer gives to the *insurer* (i.e. contingency compensation). The rule doesn't prohibit such compensation, it merely requires that it be disclosed to the insured. The rule does not apply to a producer who has no direct contact with an insured, such as a wholesale broker or a managing general agent. However, historically, the Department (formerly, of Insurance, now, of Financial Services) does not look kindly on excessive gift giving, in whatever form it takes. Finally, it should be

borne in mind that any gift or compensation given to the retail broker above the normal commission structure, must be disclosed to the insured.

ET CETERA

In our HOT TIPS dealing with Risk Retention Groups, we referred to a federal appeals court decision in which a New York claimant who recovered a judgment against her chiropractor for malpractice was not able to collect the judgment from the chiropractor's insurer because it was a risk retention group not chartered in New York and, therefore, not subject to the provisions of NY Insurance Law Sec. 3420 which permits a direct action against an insurer if a judgment against its insured remains unsatisfied for a period of 30 days. In a decision handed down on November 12, 2015, a federal district court in New York reiterated the rule and held that an injured laborer was not entitled to pursue collection of his unsatisfied judgment against the defendant's insurer, National Contractors Insurance Company, because it was a risk retention group organized under the laws of Montana. As noted in the earlier article, a broker placing coverage with a risk retention group must exercise "due care" – making sure that the filings are up to date and checking the financial condition of the carrier.

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