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THE INSURANCE NEWSLETTER

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2013 Insurance Policy Form Revisions

There is an insurance industry organization called the Insurance Services Office (ISO) that, among other things, writes the standard insurance policy forms used by the large majority of all insurance companies. Chances are good that if you look at some of the more common property and liability policies you buy such as general liability, business auto and such, the policy forms and most of the endorsements attached to them are on, or based on, ISO standard forms.

This bit of insurance trivia is important to you because ISO has made it a practice over the years to revise and alter these standard forms periodically, usually about every three years or so. Plaintiff's attorneys are ever creative in seeking to establish new theories and precedents for liability, politicians constantly pass new laws (though they seldom seem to ever repeal any), and evolution in new products, technology and society all combine to create new risks and exposures for businesses. Insurance policy forms have to change and evolve over time to keep up with evolving events and exposures. That means that the policy you bought five years ago is different than the one you have now, and different from the one you bought five, ten or fifteen years before that. Most significant for this discussion, the policy you have now will be changing in 2013.

The changes to the General Liability policy and its many standard endorsements will be of interest to almost all commercial insurance buyers. Many of the changes are editorial in nature; there are a couple of other changes that will affect only businesses dealing with liquor. There are, however, significant changes in standard general liability additional insured endorsements that will affect almost everyone; in fact twenty-four of the thirty one standard ISO additional insured endorsements are amended in the 2013 filing.

We have written about these endorsements, and problems with them, in past issues. Additional insured ("AI") status is perhaps the most common risk transfer method used across all industries, likely effects almost everyone reading this, and is often required between entities who do not share a direct contractual relationship. Additional insured endorsements as currently written pose some problems; most current standard blanket AI endorsements require a direct contractual relationship between the parties providing and receiving AI status, which often doesn't exist. By way of example in a construction setting project owners (the so-called "upstream" party) will always require AI status from all contractors on their job, but customarily do not contract directly with subcontractors or sub-subcontractors (the "downstream" parties). The owner's expectation is that the subcontractor's AI endorsement will cover their upstream interests, but in current AI endorsement forms, absent a direct contractual relationship between parties coverage can be problematic.

ISO fixes this with the 2013 edition by introducing a brand new AI endorsement. *The Additional Insured - Owners, Lessees or Contractors - Automatic Status for Other Parties When Required in Written Construction Agreement* allows additional insured status to be extended to an upper tier party as required by a contract, but who may not be a direct party to the contract. For instance, a contract between the general contractor and a lower-tier subcontractor may require the sub to extend additional insured coverage to the property owner (who is not a direct party to the contract between the

GC and the sub). This new endorsement would allow the extension of additional insured status to the owner without the need for a specific listing.

This is generally a positive change, and will make administration of certificates of insurance easier for most organizations. The key, of course, will be to make sure that affected policies have the new 2013 AI endorsement. An additional premium applies to this endorsement and will most likely vary with each insurance company.

Along with this useful change, however, all AI endorsements are also changing in other ways. In the 2013 revisions there are three significant changes:

- There is new wording specifying that the coverage afforded the additional insured will not be broader than the contract or agreement requires.
- There is a limitation on the amount of coverage afforded to the additional insured party. The endorsements now state that the coverage limit extended to the additional insured is the lesser of: 1) the amount required by the contract; or 2) policy limits.
- And new endorsement language now states that the coverage afforded to the additional insured only applies to the extent permitted by law in the subject jurisdiction.

These changes create some challenges. Express reference to numerous external factors or documents to determine the scope or limits of coverage available to the additional insured brings with it obvious inherent difficulties. Disputes over the application of a statute or the meaning of contract wording can be anticipated, all of which operate to reduce the certainty of coverage available to the additional insured. Indemnification provisions and additional insured requirements in contracts and leases are often drafted by attorneys with minimal knowledge or understanding of what coverage is actually available in insurance policies. There has also been a trend in many states to enact anti-indemnification laws that specifically restrict the breadth of allowable additional insured coverage.

Staying on the subject of contractual insurance requirements, the *Primary and Noncontributory - Other Insurance Condition* endorsement is another new optional endorsement introduced in response to contractual wording often found in contracts and leases requiring coverage extended to the additional insured be provided on a "primary and noncontributory" basis. This creates potential problems with the "other insurance" provision in policies. This new endorsement applies when:

- The additional insured is a named insured on another policy; AND
- A written contract or agreement requires the named insured's policy to be primary and to not seek contribution from other insurance available to the additional insured.

The endorsement, like the others mentioned, applies to the CGL only, not any umbrella that may be attached. Whether and how much of an additional premium applies is subject to the insurance carrier. Put all these changes together, and the landscape has shifted for any commercial liability insurance buyer who is party to any lease, contract or other agreement that limits or transfers risk to or from other parties with contractual insurance requirements.

ISO says they have filed in most jurisdictions for these new forms to be effective as of April 1, 2013, so chances are good they will have already begun affecting you by the time you are reading this. If you think you need more information or a better understanding of the way these changes will affect you give us a call.

WC Return to Work Programs

Employers have long understood that the key to controlling WC costs is to control claims. A valuable tool for that purpose has always been an effective return to work (RTW) program. The goal of an RTW program is simple: keep an injured employee in the work force with modified duties that reflect temporary physical limitations due to their injury. Sitting around at home on a couch isn't good for anyone; most people do better if they have a routine and destination to go to each day. If an employee can come back to work in some limited capacity it benefits both employer and employee.

Like anything else, an RTW program needs management attention and must be run effectively to make it worthwhile. Here are a few common pitfalls to avoid.

Failure to distinguish between "light duty", "transitional work" and "reasonable accommodation." The definition of these terms is complicated and confusing. "Light duty" is a term commonly used, but in fact the better term is "modified duty", since work must be modified to fit the injured employee's physical limitations while they recover. Occupational RTW assignments are best described as transitional tasks. Limited in duration, such tasks help the injured worker return to full productivity by being progressively adjusted in line with medically documented changes in the employee's ability. This is not "reasonable accommodation" under the ADAAA, these are specific time limited jobs designed to aid an employee recovering from an injury.

Failing to set up transitional assignments for fear the employee may get hurt again. Both employer and employee fear of re-injury can hamper RTW efforts. It's a real risk, but an even greater risk is having the employee stay at home and develop a "disability attitude" that extends their absence and drives up costs. The right timeline and transitional process for an employee to return to work is best done on a case-by-case basis. Guided by the goal of safely returning the employee to their pre-injury job, employers who work and stay in touch with the employee, the treating physician, and supervisor are most successful.

Failing to set goals and time limits. A modified work assignment made as part of an RTW program is a transitional work assignment. The intent is to keep an injured employee gainfully employed within their physical limitations while they proceed through the recovery progress toward a full return to normal duty. That means there is a time limit and an end point. It's not uncommon for employees to get comfortable with their modified duty assignment, but if recovery is not progressing, or full recovery leaves the employee with an impairment that precludes them from resuming their job, the RTW program is no longer appropriate and other management strategies must be considered.

RTW programs do impose an additional management burden on the employer to make modified work available and to monitor the injured employee's progress, but the payoff in quicker recovery and lower claim cost is indisputable and makes the additional management work well worth the effort.

Increased Cost of Construction

The aftermath of hurricane Sandy is shedding some light on an often overlooked coverage that could be critical to any property insurance policyholder with a major property claim.

Building codes in many states have been and are being changed and strengthened in response to events such as hurricanes, floods, tornadoes, earthquakes, wildfires and such. Engineers have examined the damage caused by these various events and concluded that strengthening and enforcing stricter requirements in building construction can reduce or minimize damage from these natural catastrophes.

Florida began tightening it's building codes after Hurricane Andrew in 1992, up to then the worst storm in recorded history. Much damage was noted from roofs blowing off and windows blowing in; new building codes mandated strengthening the way that roofs are secured to structures, and required stronger storm proof windows or storm shutters be installed. California has a well documented history of requiring greater earthquake resistance in structures. Nationally, building codes are requiring that buildings damaged or destroyed by flood be rebuilt with floor levels lifted out of the flood danger elevation. Similar examples exist across the country.

Property insurance policies these days are most commonly written on a replacement cost valuation basis. Replacement cost is defined as the cost to replace damaged property with "like kind or quality", without deduction for depreciation. It's a good deal; the policyholder can essentially replace an older, perhaps somewhat worn out structure with a brand new one... new for old.

But while replacement cost coverage will pay to replace what was there, won't pay to upgrade what was there, and that's what tougher building codes are requiring. Take a simple example, again from Sandy. Homes damaged by that storm must be replaced, but new codes are being enforced mandating construction above flood elevation. Cost to elevate a flood exposed home on pilings can run an additional $30,000 to $70,000, depending on the size of the home and how high it must be raised. Those numbers are in addition to the replacement cost of the structure. Now imagine this scenario in the case of a larger commercial building; the problem is even greater. And there are many other building code or zoning changes that could mandate expensive upgrades to electrical systems, plumbing, ingress or egress and other building features and components.

The standard property policy will afford some coverage for these increased costs, but the form is sublimited to only $10,000 in coverage. For anyone requiring higher limits there is a specific policy endorsement that addresses this need, the *Ordnance or Law Coverage form*. There are three separate additional coverages included in this form:

- Coverage A is Coverage for Loss to the Undamaged Portion of the Building. Here's how it works: your building catches fire and suffers damage equal to 50% of its value. Building officials say you can't just rebuild the damaged half, you must demolish the remaining undamaged part of the structure and rebuild the whole thing. The undamaged part did not burn; it must be demolished due to building codes. This coverage will pay you for that.
- Coverage B is Demolition Cost Coverage. Debris removal cost to cart away the debris from the fire is covered as part of your building limit, but the often expensive cost to demolish the rest of the building is not...unless you have this endorsement.
- Coverage C is Increased Cost of Construction. Building codes say that you have to elevate the floor level, put on a roof that complies with current codes, and upgrade the electrical system. These upgrades will add significantly to the cost of reconstruction. This coverage will pay you for that.

Coverage A does not add to your limit of liability, its included within it. Coverage B and C may have a specific limit of insurance, or may be included in the building limit. You need to give some thought to limits, and be sure you have enough.

Building laws have been changing fairly consistently over the past decade or so, and increased attention to the possible effects of possible climate change and the recent history of unusual and severe weather events will likely continue to motivate more changes in the future. The fact that you might be insuring a relatively newer building does not insulate you from the possible need for these coverages; almost every commercial property insurance buyer should consider them. Give us a call and we'll be happy to review these further with you.

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