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Are Two Policies Always Better Than One?

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ARE TWO POLICIES ALWAYS BETTER THAN ONE?

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Occasionally contractors perform professional tasks potentially implicating two types of coverage, commercial general liability ("CGL") and professional liability policies. However the policies are very different. Professional liability policies ae typically claims made policies, with lower limits than CGL policies and claims expenses included in and thus reducing the available policy limits. On the other hand professional liability policies may provide greater coverage since they cover more than "property damage" and do not contain certain business risk exclusions. For example, professional liability policies cover economic losses such as cost overruns and loss of revenue from the failure to complete a project on time, whereas a CGL policy may not. Whether both the CGL and professional liability policies are in play will, of course, depend on the facts of the case.

Threshold Question: What Work Did The Insured Perform?

The line between a professional liability and a commercial liability claim can often be blurred. Whether one or both policies apply will depend on the work the insured agreed to perform. For example, if the insured's work includes architecture and design, surveying, or civil, structural or mechanical engineering then the insured's professional liability policy may be triggered if a claim arises out of that work. In addition, construction management services may also be professional services. On the other hand, a CGL policy is intended to address liability for damage arising out of the work to build the construction project. Moreover CGL policies often contain professional liability and/or construction management exclusions. *See, e.g., Carpenter, Weir & Myers v. St. Paul Fire and Marine*, 1998 WL 976309 at *13 (D. Kan. 1998) (Commercial general liability (CGL) coverage and professional liability coverage 'serve significantly different functions within the insurance industry.' CGL offers comprehensive coverage to the insured and may even cover the provision of services in general. A professional liability policy is designed to insure members of a particular professional group from the practice of liability arising out of a special risk inherent in the practice of the profession.).

For example, in *In re Reinforced Earth, Co.*, 925 F.Supp. 913 (D. P.R. 1996), the issue of which policy covered the loss was in play. In *Reinforced Earth*, after a period of heavy rainfall, the homeowners contracted with Reinforced Earth Company ("RECO") to construct and install an earth retention wall ("REW") in order to retain loose earth. The REW ultimately collapsed, causing the earth that the REW was supposed to retain to subside, fall, and or settle. The homeowners filed suit against RECO, alleging that the REW was defective, inadequately designed and/or installed, and not fit for its intended use, and that RECO was negligent in (i) "failing to ascertain that the soil testing reports were inadequate and that the construction of the REW was not in accordance with engineering standards"; (ii) "failing to analyze earth and soil conditions and side slope earth retention criteria"; and (iii) "failing to warn plaintiffs of the 'dangers to be encountered.'" RECO tendered the suit to both its CGL and professional liability

[1] The views expressed in this paper are those of the author are not of the firm or any of the clients it represents.

insurers. Transportation, the CGL insurer, moved for summary judgment that it owed no coverage, relying principally upon its policy's completed operations and professional services exclusions. The court granted Transportation's motion, ruling that "to the extent that plaintiffs challenge the design, manufacture or installation of the REW, along with any express or implied warranties pertaining to that wall, or claim that RECO improperly designed, supervised, or inspected the wall, said insurance claims against [the insurer] are unequivocally barred by the insurance policy." *Id.* at 918.

The Role of Other Insurance Clauses

"Other insurance" clauses are applicable if there is concurrent coverage, *i.e.*, or where two or more insurance policies insure the same policyholder against the same risk. *Federal Ins. Co. v. Empire Mut. Ins. Co.*, 181 A.2d. 568, 569 (N.Y. App. Div. 1992); *DiCola v. American Steamship Owners Mut. Protection & Indem. Ass'n* 59 F.3d 327 (2nd Cir. 1995); *Keenan Hopkins Schmidt and Stowell Contractors, Inc. v. Continental Cas. Co.*, 653 F. Supp. 2d 1255, 1263-67 (finding "other insurance" clause applies when the other insurer(s) insure the same risk for the benefit of the same entity); *S.C. Ins. Co. v. Fid. & Guar Ins. Underwriting, Inc*. 327 S.C. 207, 489 S.E. 2d 200 (1997) (in order for other insurance clauses to apply, the policies must cover the same risk and same interest for the benefit of the same insured over the same period of time.); *Progressive Michigan Ins. Co. v. American Community Mut. Ins. Co.*, 2003 W.L. 21398326 (Ct. App. Mich. 2003) (holding that since a policy exclusion applied, the other insurance clause was inapplicable).

Where two policies cover different risks, however, their "other insurance" clauses do not apply. In *Federal Insurance Co. v. Firemen's Insurance Co.*, 2011 WL 2710458 (D. Md. July 11, 2011), the court recognized that there is a conflict as to whether "other insurance" clauses need to be compared when the policies containing them cover different risks. The Court held that the different policies had to cover the same risk in order to apply the policies' "other insurance" clauses. *See also, Polsky v. National Union Fire Ins. Co.*, Case No. 12-21275 (S.D. Fla. 2013) ("National Union contends that its "Other Insurance" clause, which provides that coverage "shall be excess of any other policy pursuant to which any other insurer has a duty to defend a Claim for which this policy may be obligated to pay Loss," renders it an excess insurance carrier to PIIC. However, because National Union and PIIC did not cover the same loss, i.e. National Union does not cover losses arising out of professional negligence whereas PIIC policy covers such losses, it is not an excess carrier to PIIC".)

Thus where both professional liability and CGL policies are implicated by a loss, other insurance clauses should not come into play. Rather, both the professional and CGL insurers are primary and should have a duty to defend and indemnify their mutual insured subject to the terms and conditions of their respective policies.

Let the Battle Begin

One would think that having coverage under two policies is better than one. That may not be the case, as the court in *Marwell Constr., Inc. v. Underwriters at Lloyd's, London*, 465 P.2d 298 (Alaska 1970) observed:

> On facts, strikingly simple, neither complex nor conflicting, we have again the problem of an Insurer who has written the policy and taken the Assured's premium urging him to go elsewhere, tentatively if not finally, because another insurer is, or ought to, or may be, liable for the whole, half, or part a loaf. In the process the moving Insurer generally garbs itself in the appealing robes of some assured so that, casting itself in a strange role, it asserts what it so often denied that the policy should be liberally construed and, by a bare toe hold manages to make itself enough of a party to force a construction of another contract made by another insurer with another assured and which, under no circumstance, was made for its benefit.
>
> So it is here. Coming as it does the accident and the assureds seem all but forgotten as the two Insurers match clause against clause, coverage against exclusion, claim against denial, in this battle between fortuitous adversaries.

These remarks reflect the potentially harsh reality facing insureds when they are insured under two policies. Might the defense and settlement of the claim or suit on behalf of the insured be "all but forgotten" when insurers quarrel over which policy should pay—and in what order? Put another way, having insurance in more than one place can indeed be problematic for insureds.

First, is who will defend the insured and controls the defense. In a perfect world the professional liability and CGL insurer would agree to defend the case with the same counsel. The obvious advantage for the insurers is sharing in the cost of the defense – a defense which is often costly. Plus, with one firm defending the insured, it will preserve the policy limit of the professional liability policy if claims expenses are within limits.

However, in most cases this does not happen since the two insurers have divergent interests and different panel counsel firms. The professional liability insurer will defend the case by arguing the design was not the legal cause of the damages. In contrast, the CGL carrier will focus on the construction methods and means and argue that defective construction was not the legal cause of the alleged damages. Although the law requiring independent counsel and who controls the defense may differ from state to state, this divergence of issues over whether the cause of the loss is predicated upon the insured's professional or construction activities should not create a conflict since both the professional liability and CGL carriers, as well as the counsel they retain, have a common interest to defeat the claim and whether one or two lawyers are retained by the insurers, that lawyer(s) should and typically do follow their ethical obligations.

Some Practical Considerations for Defense

If only it was that easy. In large exposure cases, defense counsel may need to be careful in several respects. First, defense should consider the insured's available insurance. For example, if the available CGL coverage is $25 million and the available professional liability coverage is $5 million, and the potential damages are $15 million, shaping the defense strategy to minimize the potential professional liability exposure may be appropriate. Second, if defense expenses are within the policy limit of the professional liability policy, then defense counsel may have an

obligation to try and settle the claim, in whole or in part, before the limit of the professional liability policy is significantly eroded. Third, defense counsel should consider if either the CGL or professional liability policy has a large deductible or SIR, which also might affect strategy.

This example also poses interesting issues for insurers' counsel. Counsel for either (or both) the CGL or professional liability carrier may consider asking for an itemized verdict or intervening to ask for an itemized verdict. In certain circumstances this may be required, although not preferable since a lawyer for the insurer will not be present to advocate for the insurer's position (e.g. that the loss was caused by professional as opposed construction methods and means) during the trial, unless the court allows the intervenor to participate in the trial.

At the very least some jurisdictions may require the insurer to ask for an itemized verdict. For example in *Duke v. Hoch,* 468 F.2d 973 (5th Cir. 1973), the court held that were there is a conflict of interest between the insured and insurer based upon whether certain damages are covered, the insurer must request an itemized verdict. The *Duke* court held that the failure to request an itemized verdict shifts the burden of proof to the insurer to prove that an unallocated jury verdict is not covered. ("Once Home established that part of the liability represented by the judgment was for noncovered acts, the burden became Duke's to prove the precise portion of the unallocated verdict representative of acts for which Home is responsible.") *Id.* at 977.

Who has the burden of proof can be case dispositive. If the insurer cannot meet this burden, then the entire judgment may be covered.

> However, insureds may be relieved of this "impossible burden of proof" where "the insurer failed to fully advise its insureds of the divergence of interest between it and them with respect to the [use of an allocated] verdict." *Duke*, 468 F.2d at 979–80. The insurer plainly has an interest in using a general verdict form when an action involves elements of both covered and non-covered damages. *Id.* at 979. To the insured, the inevitable consequence of a general verdict is a "catastrophic total loss of coverage." *Id.* But "the insurance company loses no benefit to which it is validly entitled from having the jury earmark the losses." *Id* . Accordingly, the insurance company is "required to make known to the insured the availability of a special verdict and the divergence of interest" between the insurer and insured "springing from whether damages [a]re or [a]re not allocated." *Id.*

Arnett v. Mid-Continent Cas. Co., 2010 WL 2821981, at *6 (M.D. Fla. 2010).

In the absence of an itemized award, there will be a general verdict that does not apportion damages between those caused by the insured's professional as opposed to construction activities. Although in a different context, that is what happened in *Arnett* since the carrier did not ask for an itemized verdict resulting in post-judgment coverage litigation to apportion the damage award.

The policyholder's coverage counsel also plays an important role in helping to settle the claim. Determining the cause(s) of the loss and then making demands upon the carriers is a key role. For example, if the dewatering design is deficient in one area of a project and the failure to

properly install the dewatering system in another area of the project caused the project to flood and resulted in property damage and construction delays, convincing one or both insurers to settle may require the hiring of a forensic engineer to apportion the loss. The need for a forensic engineer may equally apply to the carrier's coverage counsel. Without this evidence in hand, the insured may have difficulty convincing either (or both) the CGL and professional liability carrier to pay as the insurers may argue that the primary cause of the loss was not covered by their respective policy.

The root cause analysis will also have to focus on the type of damage since certain damages may be covered by one policy and not the other. Although the law varies from jurisdiction to jurisdiction what constitutes "property damage," whether business risk exclusions apply, and what constitutes professional services may all become relevant. *See Reinforced Earth*, 925 F. Supp. at 918.

Finally, coverage counsel for the policyholder and insurer(s) may be able to work together to resolve these issues in order to obtain an early resolution or to convince a recalcitrant insurer that it has coverage and an obligation to defend and potentially indemnify their mutual insured.