

Contractual liability

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Regardless of what an insurance company adjuster or claims counsel may assert as respects the claim at hand and/or potential coverage, it is always advisable to review and assess the situation independently, and never relinquish your position or acquiesce to the decisions made at the company claims department or legal level until all avenues to confirm coverage have been exhausted.

Consider the workers compensation loss of John Doe, who was injured while working for a construction company in Texas. Mr. Doe's injuries were at the time life-threatening, and as a result, it is reasonable to assume that this is a lifetime medical and benefits case.

Although the workers compensation carrier has assumed the loss for benefits and medical bills, ultimately Mr. Doe hired his own counsel and sued the project owner, citing negligence and gross negligence, stating that the defendants failed to perform their work in a "safe and competent" manner.

The project owner's legal counsel tendered the lawsuit to the contractor on an action-over, citing the indemnity provision in the contract whereby the contractor agreed to indemnify and hold harmless the owner of the project, regardless of fault. It was also stated within the contract language that as respects the insurance coverage and limits required herein, the contractor was to have named the owner as an additional insured with a waiver of subrogation in favor of the owner.

Following the accident, the contractor, who had already turned in the claim to its general liability and umbrella carriers, subsequently alerted each carrier when tendered the notice to accept liability as provided for within the contract.

The insurance company for the contractor's general liability coverage initially denied coverage, stating that there was a section in the general liability policy that asserted no coverage for the "additional insured for bodily injury arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured."

The carrier's point was that a) we do not deny that the owner was listed as an additional insured; but b) since only the owner was sued and not the contractor, this constituted sole negligence, and bodily injury resulting from the sole negligence of the additional insured preclud-

ed that the contractor's negligence contributed to the accident.

It was also pointed out to all respective parties that the intent of the coverage is to provide defense and indemnification for and on behalf of the insured (and those legitimately added as additional insured) for causes of action resulting in bodily injury and/or property damage caused by the negligence of the insured, including the additional insured.

Further, it should not have been the intent for the carrier to deny coverage based on the sole negligence argument, with the general liability carrier knowing that the contractor would not be added to the lawsuit due to the exclusive remedy provision of the workers compensation act of Texas. The bottom line is that the general liability carrier agreed to provide coverage and defense as allowed for within the policy provisions.

ISO had introduced an amendment to the Insured Contract definition to that part of any other contract or agreement pertaining to the named insured's business from which the named insured assumes the liability of another (e.g. additional insured) provided that the bodily injury (or property damage) was caused by the named insured. If coverage for sole negligence of an additional insured is being denied, this would also have affected contractual liability coverage for that particular portion of an indemnity agreement.

Once a carrier establishes a position of denial in terms of coverage, if it appears that the denial could possibly be overridden - if there is an opportunity to represent your client by both reviewing the coverage and establishing a basis for acceptance by the insurance company, the gray area that seems to permeate the interpretation of policy language may indeed be turned in favor of the contractor client.

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The carrier's point was that a) we do not deny that the owner was listed as an additional insured; but b) since only the owner was sued and not the contractor, this constituted sole negligence, and bodily injury resulting from the sole negligence of the additional insured precluded coverage.

It should be noted that the contractor was not named in the lawsuit, since the sole and exclusive remedy for the employee was through the workers compensation system, and thus the only reason that the owner alone was originally named in the lawsuit. (Because of the general liability carrier's determination to deny coverage, the umbrella carrier was prepared to follow suit).

However, following several meetings with the general liability carrier and its counsel, it was ultimately determined

injury (or property damage) was caused by the named insured. If coverage for sole negligence of an additional insured is being denied, this would also have affected contractual liability coverage for that particular portion of an indemnity agreement.

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It should be understood that even though the carrier hires counsel to interpret the coverage and although the initial decision may be one of denying coverage, this should be construed as an opportunity and challenge for the client and its broker to delve into the coverage language, determine intent, and continue to search for whatever consideration may be there for the benefit of the client contractor.

Robert M. Overbey Jr. is the owner and president of BondPro Inc., an insurance firm specializing in contract bonds and related insurance products for construction contractors, energy companies and related industries.

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