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Legacy Provisions in CGL Policies: Gone but Not Forgotten

I. Legacy Provisions

A. Defined

Underwriters seek to ensure that insurance policies say what they mean and mean what they say. When a court interprets policy language consistently with the underwriters' intent, insurance works from an actuarial perspective. But when a court interprets a policy in a manner not intended by the underwriters, insurers often respond by changing policy language to more closely track the underwriters' intent.

Certain provisions in standard CGL forms have been changed by underwriters, but often courts treat the new policy language as if it had not been changed. For example, prior to 1986, the insuring agreement language in the standard commercial general liability form provided that an insurer must pay "all sums" the insured becomes legally obligated to pay as damages was changed to "those sums." This change was to address the coverage available to an insured in a continuous loss situation by limiting that coverage to damage that actually occurred during the policy period. Although this change was designed to limit coverage to damages that occurred during the policy period, many states maintain the effect of the "all sums" language.

Similarly, in 1986, language extending an insurer's duty to defend claims that are "groundless, false, or fraudulent" was deleted from standard policy forms. Nevertheless, many courts still read that language into the insuring agreement. In a jurisdiction where the insured may consider extrinsic evidence in making its coverage determination, whether a claim is "groundless, false or fraudulent" could affect the coverage determination. The question remains, however, whether a court in those jurisdictions would be willing to limit the defense obligation.

A claims professional must understand the law regarding "legacy provision" in order to properly determine coverage, because the policy language means what it previously said.

II. All Sums vs. Those Sums

A. Policy Language

Prior to 1986, the CG 00 01 policy form provided that "We will pay *all* sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'" caused by an "occurrence." In that policy form, "occurrence" is defined as an accident that results in bodily injury or property damage during the policy period. Given the "occurrence" definition, a reasonable reading of the insuring agreement would be to limit coverage to bodily injury or property damage during the policy period. Many courts, however, determined that the "all sums" language meant that if any bodily injury or property damage occurred during the policy period, then all such bodily injury or property damage would be coverage by the policy, even if such bodily injury or property damage commenced before the policy period or continued after the policy period. Because of such holdings, in 1986, the policy language was changed to provide that the insurer would pay "those sums" that the insured became legally obligation to pay for bodily injury or property damage occurring during the policy period.

B. Trigger

Whether the language in the insuring agreement will affect coverage for injuries or damages that span multiple policy periods may turn on the trigger theory applied in the relevant jurisdiction. If the jurisdiction employs a manifestation trigger, only that policy on the risk when the bodily injury or property damage was first discovered or was first discoverable will respond to the claim. Under this trigger theory, those policies on the risk before and after the period in which the injury was discovered have no coverage obligation.

Under the injury-in-fact theory, all policies are triggered if they are in effect during the time the injury or damage is shown to actually have taken place, even if the injury or damage continues over multiple policy periods. Under the continuous injury trigger, any policy in effect when the claimant is exposed to something that causes injury or damage, while the actual injury or damage occurs, or while the injury or damage is manifested provides coverage.

One reading of the change from "all sums" to "those sums" is that coverage should be limited only to that injury or damage that actually occurred during the policy period.

C. Allocation Methods

1. All Sums Approach

Keene Corporation v. Insurance Company of North America, 667 F.2d 1034 (D.C. Cir. 1981), articulates the "all sums" allocation method. That case involved claims

for injury suffered due to asbestos exposure. The exposure for such injury spanned several policy periods. The *Keene* court determined that each insurer on the risk during that period could be liable for the full amount of the plaintiff's claims. Under the *Keene* decision, the insured could pick any policy to respond to the entire claim. The insurer's policy that was picked, however, could pursue other carriers who were on the risk for equitable relief.

2. Pro Rata

Insurance Company of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), set forth the pro rata allocation theory. Under this theory, each insurer is liable for its time on the risk, rather than the entire period during which the damage occurred. A potential question using this theory is whether the insured will bear any risk for any uninsured periods.

3. Certain Courts Maintain "All Sums" Approach

Certain states have been deemed to be "all sums" states, possibly because the courts in those states have yet to address the "those sums" language in the insuring agreement. In *State of California v. Continental Insurance Company*, 55 Cal.4th 186 (2012), the California Supreme Court adopted the "all sums with stacking" approach, meaning that all policies on the risk could be responsible for all the liability in a continuous loss situation. That language in that case related to "all sums." How California courts would address that situation if the policy language provided for "those sums" remains an open issue. *See also Plastics Engineering Co. v. Liberty Mutual Ins. Co.*, 315 Wis. 556 (2009).

4. At Least One Court Has Held that the "Those Sums" Language Limits Coverage to Damages during the Policy Period

In *Thompson Inc. v. Insurance Company of North America*, 11 N.E.3d 982 (Ct. App. Ind. 2014), the Indiana Court of Appeals determined that pro rata allocation is appropriate where the policy provides that the insurer will pay for "those sums" for which the insured becomes legally obligated to pay for property damage that occurs during the policy period. This holding may be a harbinger for other states that have yet to address the "those sums" language.

D. Claims Handling Considerations

Insurance professionals handling claims involving a continuous loss must be aware of the applicable trigger theory in the jurisdiction in which the claims are pending and how the jurisdiction addresses allocation in those situations under the "all sums" and "those sums" policy language. This could impact an insurer's decision to provide a defense (based on the trigger issue) and allocation of damages with other carriers and possibly the insured.

III. Groundless, False or Fraudulent

The 1973 commercial general liability policy form require the insured to defend suits, even where the claims were "groundless, false or fraudulent." In 1986, and in subsequent forms, "groundless, false or fraudulent" was taken out of the defense requirement. That deletion may impact the scope of coverage to which the insured is entitled, especially in a state where extrinsic evidence may be considered.

A. Four Corners/Eight Corners vs. Extrinsic Evidence

Whether a state limits the insurer to the claims raised against the insured in the complaint or allows the insurer to consider extrinsic evidence in making a coverage determination could be critical in whether the deletion of the "groundless, false or fraudulent" language from the policy form could impact coverage. If the insurer has an obligation to defend any potentially covered claim based on the pleadings, the insurer cannot consider outside evidence that could affect that determination. As a result, a claim that is sufficiently pled to allege facts to potentially bring it within policy coverage would be sufficient to create a defense duty.

In states, such as California, in which the insurer may consider extrinsic evidence, the deletion of the language may affect the insurer's obligations. Notably, however, California has yet to hold that an insurer can deny a claim where the allegations in the complaint raise the potential for coverage, but the extrinsic evidence shows that the claims are "groundless, false or fraudulent." The hypothetical below exemplifies this situation.

B. Hypothetical Involving a Groundless, False and Fraudulent Claim

The following hypothetical will demonstrate how, in a jurisdiction where the insurer may consider extrinsic evidence, that the removal of the requirement that an insurer defend claims that are "groundless, false or fraudulent" could affect the insurer's obligation.

A patron at a dance club renowned for its specialty drinks filed a complaint against the club, alleging that while she was dancing, she slipped and fell, suffering injury to her hip, back and neck. The club tendered its defense to its commercial general liability insurance carrier.

Based on the complaint, the insurance company elected to defend the club pursuant to a full and complete reservation of rights. As part of its investigation, the insurer requested all documents and other materials from the club relating to the alleged accident, and the identification of any persons who may have witnessed the accident. Before the insurance company obtained the information, the insurer-appointed defense attorney took the plaintiff's deposition. During the deposition, the plaintiff testified under oath that while she was dancing on the dance floor, she slipped on some liquid and fell to the floor, suffering injury.

After the plaintiff's deposition, the club sent its materials to the insurer. Among those materials were a police report, showing that the plaintiff had instigated a fight and had been arrested for assault and battery. The club also sent footage from its security cameras, which showed the plaintiff approaching and punching another patron, setting off a brawl involving four other patrons. The footage established that the only time the plaintiff fell to the floor was during the altercation.

The club's insurance policy contains an "assault and battery" exclusion, barring coverage for any bodily injury arising out of an "assault and battery." The insurer confirmed that the security camera was working properly. Based on the security camera footage, the injuries suffered by the plaintiff clearly resulted from an "assault and battery" as defined by the policy. The insurer determined that the plaintiff's claims against the club were "groundless, false and fraudulent," and that the extrinsic evidence showed that the "assault and battery" exclusion should apply.

C. Claims Handling Considerations Re Hypothetical

To properly address the hypothetical, the insurance professional must be aware of whether the insurer may consider extrinsic evidence regarding the plaintiff's claims. If the claim is brought in a four corners or eight corners state, extrinsic evidence does not matter and the analysis ends. The insurer has an obligation to defend the insured.

If, however, the claim arises in a state where the insurer may consider extrinsic evidence, the analysis becomes more complicated. First, the insurer must first evaluate the coverage under the policy. In the hypothetical above, the claim would be excluded by the assault and battery exclusion.

An insurer, however, should be cautioned before denying coverage simply based on the exclusionary language and the extrinsic evidence. Many jurisdictions have not decided how a claim that is "groundless, false or fraudulent" may be addressed where the pleading contains allegations that are undisputedly untrue. Moreover, many courts will likely presume that the insurer should provide a defense in that circumstance. In order to avoid any potential problem that could be caused by a withdrawal from the defense, the insurer may wish to defend the insured and proceed with a declaratory relief action. That way, the insurer can protect its insured's interests while obtaining a judicial declaration that will establish its obligation.