

ISO GENERAL LIABILITY FORM REVISIONS – EFFECTIVE APRIL 1, 2013

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CAVEATS

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We recommend that clients engage counsel to thoroughly review the Insurance Services Office, Inc. (ISO) changes to both the forms and endorsements to determine how coverage might ultimately be affected.

BACKGROUND

ISO is revising the general liability (GL) occurrence coverage form and various endorsements "to reflect the changing needs of insureds and insurers, to make other various revisions and to introduce new endorsements." ¹

This paper will review changes made to the Commercial General Liability Coverage Form (now known as CG 00 01 04 13). We will address endorsement changes in a separate article; therefore they are not discussed this paper. This paper outlines the possible impact of revised wording, but does not undertake to identify all potential liabilities that may arise. In many respects, the implications of these changes will not be fully known until they have been examined by the courts in the context of real-life claim scenarios. The reader is urged to proceed cautiously, as prior form and endorsement alterations have not always produced the results that even ISO anticipated.

EXCLUSION C: LIQUOR LIABILITY

This exclusion has been expanded. As ISO explained:

"We are revising the Liquor Liability exclusion in various GL coverage forms to address "Bring Your Own" establishments (BYO) as well as certain court decisions with respect to claims of negligence by an insured." ²

¹ COMMERCIAL GENERAL LIABILITY FORMS FILING GL-2012-OFR12 all references to ISO and GL forms in this document are derived from this document. © Insurance Services Office, Inc., 2012.

² © Insurance Services Office, Inc., 2012.

There appear to be two principal motivations for the change to this exclusion: 1) coverage for bring-your-own (BYO) establishments; and 2) court decisions that ISO considered as aberrant. In those cases, despite the presence of the liquor liability exclusion, the GL insured nevertheless sought coverage in response to allegations of negligent hiring, improper supervision of employees, or failure to transport intoxicated patrons.

As to BYO insureds, the base form now provides an exception to the exclusion:

“However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.”³

Regarding the second point above:

“...the provisions of the exclusion will now apply even if the claims against an insured allege negligence in the supervision, hiring, employment, training or monitoring of others, or providing or failing to provide transportation with respect to any person that may be under the influence of alcohol.”

Indeed, the exclusion now reads as follows:

“Liquor Liability

“Bodily injury” or “property damage” for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance, or regulation relating to the sale, gift, distribution, or use of alcoholic beverages.

³ The italicized portion of the quoted section is new. © Insurance Services Office, Inc., 2012

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training, or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the “occurrence” which caused the “bodily injury” or “property damage”, involved that which is described in Paragraph (1), (2) or (3) above.”⁴

In short, the first change to some extent broadens coverage for the BYO insured. The latter change enhances the liquor liability exclusion, and therefore restricts coverage.

EXCLUSION G: AIRCRAFT, AUTO, OR WATERCRAFT

A minor alteration has been made to this exclusion. In the exception to the exclusion, ISO previously carved out:

“(5) “Bodily injury” or “property damage” arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of “mobile equipment” if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged ...”

As evidenced by the strike out above, ISO has removed the clause “in the state” to accommodate territories where the GL form might apply which are not states, such as: Washington, D.C.; Puerto Rico; Guam; and the US Virgin Islands. The same change appears in the last paragraph of Definition 12: Mobile Equipment.

EXCLUSION P: ELECTRONIC DATA

The ISO GL excluded damages arising out of the loss of use of electronic data since its last revision. Since then, ISO has received inquiries about whether the provision also excluded

⁴ The italicized portion of the quoted section is new. © Insurance Services Office, Inc., 2012

bodily injury arising out of the loss of use or inability to access data. The amendment adds a sentence which clarifies that the exclusion does not apply to bodily injury:

“However, this exclusion does not apply to liability for damages because of
“bodily injury.”

Arguably, the existing exclusion would not have barred coverage for bodily injury, since in other sections of the prior form, the verbiage distinguished between injury and damage. Given the prevalence of computer-driven devices in modern society, dependencies have grown up around their use. ISO has stated that its intention with this change is to confirm that there should be coverage if the loss of use of data or the inability to access it leads to bodily injury.⁵

EXCLUSION Q: RECORDING AND DISTRIBUTION OF MATERIAL OR INFORMATION IN VIOLATION OF LAW

Formerly entitled “Distribution of Material in Violation of Statutes,” this exclusion has been modified and expanded. The introduction remains the same:

“Bodily injury” or “property damage” arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

Item (3) is new and expands the reach of the exclusion to encompass the Fair Credit Reporting Act:

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

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Finally, item (4) has been modified to specifically recite federal, state and local laws and regulations:

(4) Any federal, state, or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating, or distribution of material or information.⁶

Note additionally that item (4) broadens the purview of the exclusion by listing “addresses” in addition to “prohibits or limits.” Further, while the prior version of the exclusion applied to “the sending, transmitting, communicating or distribution” of material or information, the new version is enlarged to include the printing, dissemination, disposal, collecting, or recording, of material or information.

Note that the revised exclusion also appears in the personal and advertising Injury section of the policy.

In sum, this is now a far broader exclusion. Markets that adopt this form may be signaling their intent to encourage the purchase of cyber and/or media policies to accommodate such risks.

COVERAGE B: PERSONAL AND ADVERTISING INJURY LIABILITY – EXCLUSIONS B AND C

These two exclusions have been modified to make clear that publication includes electronic or cyber publication. The change — the addition of the clause “in any manner” after the words “oral or written publication” — aligns the exclusions with definition of personal and advertising injury offense.

CONDITIONS: OTHER INSURANCE – EXCESS INSURANCE

Section 4.b. (1) (b) of the prior iteration of the form read as follows:

Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.⁷

⁶ © Insurance Services Office, Inc., 2012

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The underlined portion above has been stricken by ISO. By implication, the new ISO GL form is excess to other available primary insurance that covers liability arising out of premises, operations, or products and completed operations where the named insured has been added as an additional insured, irrespective of whether that status was conferred by an endorsement. The change was made by ISO in response to the fact that certain carriers offer additional insured status within their forms, rather than via endorsement.

CONCLUSION

The changes to the form include clarifications, certain expansions, and enhanced exclusions. As such, they may affect insureds differently, according to their applicability to an insured's specific risk profile. Policyholders are advised to review the new form⁸ carefully, and to seek guidance on any questions from coverage counsel.

⁸ Once again, this paper does not address changes made by ISO to endorsements. It only discusses modifications to the form itself.



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