CONSTRUCTION LAW ALERT
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By: Craig H. Handler, Esq.

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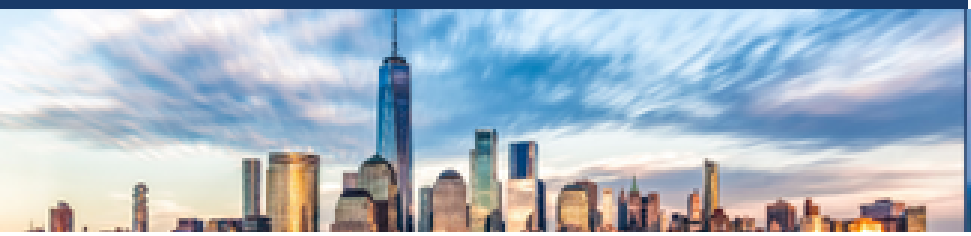

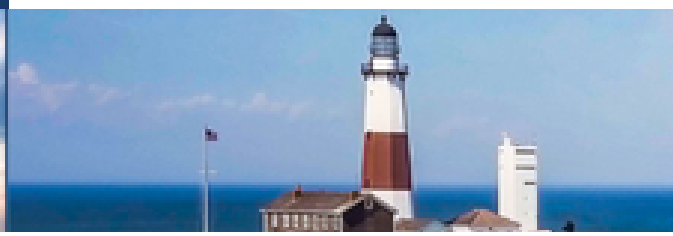

Insurance for Contractors 101 – Beware of the "Cheap" Policy! The Most Affordable Option May Put Your Business at Risk

Responsible construction contractors understand the importance of maintaining a commercial general liability policy of insurance ("CGL"). Having insurance coverage with ample policy limits provides peace of mind that the business is protected against claims involving, among other things, personal injury, illness, death, or property damage suffered by employees or property on a project site. However, many contractors are unaware that their CGL policy may be leaving their businesses, and even their assets, exposed and at risk.

Although it may be counter-intuitive, many CGL policies marketed to construction contractors in New York State actually *exclude* crucial coverage. In fact, often times a contractor's CGL policy will exclude coverage for even the most common risks and hazards associated with every construction job.

While these policies are likely saving you money in the short term through lower premiums, your insurance coverage for certain inherent risks may be nonexistent. So, if you find yourself in the unenviable position of having a claim against you or your company, you may be shocked to discover that you are without coverage and on the hook for your own defense and possibly liable for thousands (or even millions) of dollars, depending upon the severity of the claim.

In order to avoid unwitting disaster, it is critical that you carefully review your policy, know the extent of your coverage and always be on the lookout for a few key endorsements that may serve to exclude coverage for various claims.

WHICH EXCLUSIONS SHOULD I BE LOOKING OUT FOR?

The Labor Law Exclusion – Insurance carriers in New York frequently include endorsements to eliminate coverage arising out of employee injuries. These are commonly known as Labor Law Exclusions, or Employer's Liability Exclusions. Notwithstanding these common endorsements, the vast majority of liability claims actually arise out of claims asserted by employees who are injured while working on the job. The injured worker will typically assert his or her claim against the property owner or general contractor ("GC"). The theory is that the owner and/or GC violated the safety requirements imposed by the New York Labor Law. The GC and owner then look to the employer for coverage by means of an indemnification agreement. If you are unfortunate enough to have a Labor Law Exclusion in your policy, you are out of luck because your insurance company will most probably disclaim coverage to you for the loss.

This result seems unfair to a contractor who expressly procured a CGL policy to protect its business from these very claims. However, the New York State Department of Insurance has approved these exclusions and has found them to be acceptable and not misleading or against public policy.

Therefore, if your CGL policy contains an exclusion for injuries to employees, it is most likely valid. Once again, it is incumbent upon you to know your policy and understand what will constitute a covered loss, and conversely, what will not.

The Contractual Liability Exclusion – Most construction contracts in New York include a provision requiring one party to take on the liability of another. These contractual provisions are typically referred to as "hold harmless" or "indemnity" agreements. The hold harmless or indemnity agreement contractually obligates one party (the indemnitor) to reimburse, and in some cases defend, the other party (the indemnitee) against claims or suits brought against the indemnitee by a third party. The purpose of the hold harmless or indemnity agreement is to transfer the risk of loss from one party (the indemnitee) to another party (the indemnitor).

Ordinarily, if an insured party agrees to indemnify another for bodily injury or property damage, and the agreement to indemnify is part of an "insured contract" as defined by the CGL policy, then in most situations, the contractual liability insurance of the CGL will pay what the insured party must pay because of the indemnity agreement.

However, if the CGL policy contains the infamous Contractual Liability Exclusion, the definition of an “insured contract” in the CGL policy may be altered so that the contract containing the indemnity agreement falls outside the scope of coverage. Put simply, the end result is that the liability you assume by signing a contract containing an indemnity agreement with the general contractor or owner, may not be covered by the insurance policy.

In general, the Contractual Liability Exclusion means that coverage will not apply for hold harmless and indemnity clauses unless liability would otherwise have been imposed by law or unless the hold harmless and indemnity clause found in the contract or agreement still falls within the policy’s definition of “insured contract,” typically through one of several possible exceptions to the exclusion.

If one of your employees, or anyone for that matter, gets hurt on a job site and he or she sues the owner or GC who have an indemnity agreement running in their favor, you are contractually obligated to cover them in the lawsuit. However, if you have the Contractual Liability Exclusion in your policy, the insurance carrier may not indemnify the owner, or GC, and you will most likely end up paying out of pocket.

THE MORAL OF THE STORY

Even though a CGL policy that excludes injuries to employees, or certain insured contracts may be more cost effective in the short term, you do not want to be left without insurance coverage in the event your business becomes the target of an uninsured claim. In today’s litigious society, the majority of personal injury claims arising out of construction work involve claims asserted by an employee. There is a strong likelihood that in the event of an accident, one or both of the above noted exclusions, if they are contained within your CGL policy, will bar coverage leaving you to fend for yourself.

This potentially disastrous outcome can easily be avoided through careful planning with your legal and insurance experts, and by always reviewing and understanding your CGL policy. Remember – as a general rule, prevention is almost always less painful and costly than a cure.

ABOUT THE AUTHOR:

Craig H. Handler is an experienced attorney dedicating much of his practice to working with construction industry professionals and property owners in contract drafting and negotiation and in disputes related to defective construction, delay, scope of work, mechanic's lien foreclosure and defense, OSHA violations, ECB violations, and Labor Law claims. Mr. Handler's prior experience working with the insurance industry has afforded him a broad understanding of the complex insurance coverage and indemnity issues that regularly impact the construction industry. Mr. Handler routinely applies this expertise to his practice in order to help his clients cut costs, limit exposure and avoid the many risks associated with this fast-paced industry.

For more information, please contact:

Craig H. Handler, Esq.
(516) 663-6506
chandler@rmfpc.com