Gen Re Research

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CASUALTY MATTERS®

From Cyber to Construction to Cars—Developments Affecting Your Business

by Matt Burns, Jill Tumney and Mindy Pollack, Gen Re, Stamford

As we look at the topics in this *Casualty Matters*, a theme emerges. Many of the developments are part of trends creating new challenges and opportunities for the insurance industry.

Cyber coverage, gig economy, farms abutting neighborhoods, ridesharing/homesharing...these are all social, demographic and economic trends that are reshaping how we live and do business today. Some of the other topics, most notably Liquor Liability, are more mature in underwriting terms but present new growth areas for carriers. Even dog bites and construction defects still provide a new twist now and again, as we discuss here.

In this edition several Gen Re underwriting and claim professionals provide perspectives on an issue, to link the new form or ruling to what insurers are doing today. Several of their insights reinforce the interconnections across insurance products. A ruling on CGL coverage creates ripples for Cyber products; a new Personal Auto endorsement warrants Personal Umbrella attention.

The discussion on Cyber coverage may look familiar to you because we sent GL and CU clients a preview in April. After the federal appellate court found CGL coverage for defending a cyber lawsuit, several companies asked about the implications for their GL, CU and/or Cyber products. Rather than wait until our May publication date, we shared out our early draft via Gen Re ENews to clients. There is more information here, so we urge you to take a look.

As we distribute this research publication, we realize it's time for us to collect Gen Re and law firm contributions for our June *Policy Wording Matters* newsletter. Our lead article will delve into the topic of Additional Insured endorsements. As always, we hope you find content of interest to you in our publications.

Contents

Are You Covering Cyber Liability?

Recent Decision Finds CGL Coverage—Implications for Commercial *and* Cyber Insurers

Is there coverage for a data breach under traditional insurance policies? For insurers that have not adopted Bureau or proprietary exclusions, a recent answer from an appellate court may not be welcome. The case sends another message to insurers: Small to mid-size risks, not just the "Targets of the world," can also be victims of breaches and class action lawsuits.

The U.S. appellate court held that a CGL insurer had a duty to defend its insured against privacy lawsuits following a data breach. In an area with little law guiding insurers, this decision is significant and may influence other courts facing similar coverage disputes.

The breach occurred when an employee of a healthcare firm posted patient medical records online and failed to secure the server, exposing the information to public view for more than four months. There were no indications that the personal information was actually seen by other parties. Two patients filed a class-action complaint, which led to this Virginia coverage action.

The core question was whether the access to private information on the Internet constituted a "publication" and otherwise satisfied the definition of Personal Injury in the policies. The language, which was not ISO, covered:

- "electronic publication of material that…gives unreasonable publicity to a person's private life"
- "electronic publication of material that…discloses information about a person's private life"

The appellate court applied Virginia law to find that the lawsuit arguably alleged a "publication" under the policies to trigger a duty to defend. The court, affirming more detailed reasoning from the lower court, said that the records could have been viewed by anyone with an Internet connection, and that created a potential for unreasonable publicity. It did not matter whether or not the records were actually viewed by a third party, at least for coverage purposes. Providing Internet access is still considered

a publication that could bring unreasonable publicity to the private lives of the patients. *Travelers Indemnity v. Portal Healthcare Solutions*, 2016 U.S. App. LEXIS 6554 (unpublished) affirming decision at 2014 U.S.D. LEXIS 110987 (published).

Gen Re Note: For CGL/BOP, CU and Farm carriers that adopted the ISO, AAIS, MSO or other data breach exclusions, the outcome may not cause much concern. Those exclusions, which were filed by ISO in 2013, appear to take out coverage for any type of loss arising from the "access to or disclosure of" personal or confidential information. This privacy claim appears to fit within the exclusion.

In contrast, when the data breach is caused by a hacker stealing personal information, the reasoning may be entirely different. A New York court did not find a "publication" in the Sony gaming hacker case, because *the insured* did not publish or release any personal information. Not all data breaches produce the same coverage result unless, of course, the policy contains a data breach exclusion.

The healthcare solutions firm in this case is not the size of a Target or Home Depot, but it was still sued. There were no cyber criminals or hacktivists; the breach was the result of employee negligence, as it often is. We are reminded that any size or type of risk can make a mistake and end up in court.

ISO, AAIS and MSO Exclusions Available

We have discussed these Bureau "data breach" exclusions in several editions of Gen Re *Policy Wording Matters,* beginning December 2013. If you would like to see these research publications, just contact your Gen Re representative.

If Gen Re policy wording specialists can help you evaluate or draft exclusions, for current Bureau editions or older forms, please let us know.

Underwriter View—Implications (and Surprises) for Commercial and Cyber Specialty Insurers

by Matt Burns and Wendy Woolf, Gen Re

Matt Burns

Commercial Umbrella Underwriter

In our conversations with BOP/CGL, CU and Farm insurers across the country, we find that a number of carriers have not adopted the latest data breach exclusions available from the Bureaus. In most cases, the carrier is still using older ISO, AAIS or manuscript editions. More often than not, it's about systems and costs, and we certainly understand that.

This breach case demonstrates that there are other costs to consider when making form decisions—such as the cost to defend and perhaps indemnify for liability after a data breach. If a business mistakenly releases personal information of customers, whether via the Internet or by sending a simple email with a wrong attachment, its BOP or GL policy (or the umbrella from dropdown) may be the first place to find coverage.

The law is still evolving, but this case helps explain why the Bureaus affirmed that data breach exposures belong in specialized cyber covers rather than general commercial policies. Filing the exclusions as mandatory Bureau endorsements just emphasizes the point.

"A number of Cyber products are expressly written to apply in excess of other available insurance and that raises coverage questions under the Cyber and GL/BOP/CU policies."

Wendy Woolf

Cyber Underwriter

The lack of a data breach exclusion could have implications for an insurer's Cyber program as well. Increasingly, carriers provide cyber coverage as endorsements to their BOP/CPP and CGL policies. Where this is the case, there may be the expectation, on the carrier's part, that the privacy lawsuit is covered by the Cyber endorsement and the Cyber reinsurer.

Carriers, learning that their BOP/CPP/GL/Farm policy covers the privacy lawsuit because there is no exclusion, might be surprised. Still, they may think that the loss falls under the more specialized Cyber product. Then comes the next surprise.

A number of Cyber products are expressly written to apply ***in excess of other available insurance*** and that raises coverage questions under the Cyber and GL/BOP/CU policies. (For the record, our Cyber product does not.) This limitation is often found in the Conditions section of the Cyber endorsement or policy. If this type of Other Insurance condition is present, the BOP/CPP/CGL policy would be the first to defend and pay until the limits are exhausted before the Cyber endorsement pays a dime. As a result, the loss goes to the reinsurance program (or insurer's net retention) on the BOP/CPP/CGL/Farm policies, and not to the Cyber reinsurer. This outcome may or may not be fine with the insurer.

Our point is that commercial *and* Cyber forms should be carefully studied for how they will interact in the event of a Cyber lawsuit.

Update: We recently noticed a Cyber policy that appears to ***exclude*** all claims that are covered by other insurance. If any CGL, Property, Fidelity or Crime policy applies to the loss, there could be no Cyber coverage. Some courts do not enforce this type of exclusion. Cyber policies will no doubt be examined by many courts in coming years. ■

Employers Liability Exclusions—Pennsylvania and New York—Different Coverage Results

We recently observed an increase in the number of coverage suits involving questions of employment status and how the "Employers Liability Exclusion" (EL) in commercial policies applies. The facts range from traditional contracting scenarios to "gig economy" workers, and from leased employees to additional insureds. Examples include:

- The Additional Insured (building owner) was not considered an employer for EL purposes when a worker for the insured tenant (restaurant) was injured on the premises. (Pennsylvania)
- When several Named Insureds (NI) were listed, the EL exclusion applying to the employee of NI could refer to any of the NIs or just the NI employing the worker, rendering the exclusion ambiguous. (New York)
- A subcontractor's employee fell within the broad EL exclusion encompassing any person "hired by, loaned to, leased to...the insured, whether or not paid by the insured". (New York)

A series of articles published by IRMI, "Misapplication of the Employers Liability Exclusion in CGL Policies" provides an excellent review of the topic. For more, go to: www.irmi.com.

Pollution Exclusions—Illinois—Farms and Permitted Activity

In an earlier Gen Re *Insurance Issues* publication, we reported an Illinois appellate decision where the court refused to apply an absolute pollution exclusion to industrial emissions that were within the scope of a government permit. Now another Illinois court from a different district has ruled the same way on a nuisance suit against a livestock facility. The court also held that the exclusion was ambiguous when considered in the context of legal emissions under regulatory permits. *Country Mutual Ins. v. Bible Pork*, 2015 Ill. App. LEXIS 870.

Gen Re Note: If an insured's activity complies with permits issued by regulatory authorities, no matter how "environmental" the event may seem, Illinois courts are not likely to apply the pollution exclusion. Illinois has also been limiting the application of pollution exclusions to "traditional environmental pollution," and farm odors just do not fit within their view of traditional pollution. For contrast, across the state border Iowa courts do apply the pollution exclusion to nuisance suits against neighboring swine and poultry farms. *Grinnell Mutual Re v. Rambo*, 2015 U.S. App. LEXIS 22751.

Pollution and Plumbing Contractor—Arizona—Not Traditional Pollution

For another state with a "traditional environmental pollution" view for pollution exclusions, we look at an Arizona case. As yet, there is no state supreme court ruling on this coverage issue. The claim involved noxious fumes from hydrogen sulfide released into several stores in a mall, which was apparently the result of negligent plumbing work. While the federal court found the fumes to qualify as a pollutant, it would not apply the exclusion to everyday plumbing work. To apply the exclusion here would "seemingly eviscerate coverage." *National Fire Ins.of Ga. v. James River Ins.*, 2016 U.S.D. LEXIS 19076.

Construction Defects—New Mexico—Your Work Exclusion

New Mexico has no high court decision on Construction Defect (CD) coverage but now we have intermediate court guidance. The claim tested coverage for the window installer across two policy periods and how the "your work" exclusion applied. In the first policy period, water intrusion had damaged the windows themselves ("your work") but nothing more. In the second policy period, water had eventually damaged stucco walls. The appellate court found no coverage (applied the exclusion) in the first policy because "mere water leakage" had not caused damage beyond the windows themselves. However, the court found coverage in the second policy period where the defective work resulted in damage to other parts of the building (stucco walls). *Pulte Homes of New Mexico v. Indiana Lumbermens Insurance,* 2015 N.M. App. LEXIS 134.

No Negligence Action Against Taverns—Florida and Ohio—Dram Shop Exclusive Remedy

If the facts of a case do not trigger the dram shop statute, the plaintiffs may still seek to recover under common law negligence. That happened in the

following two claims. The scenarios were different but the outcome was the same: The dram shop statute created an exclusive remedy and a negligence cause of action was not recognized. Without any basis for the suit, there was no liability at all.

Florida: The intoxicated driver was an adult patron and the bar had stopped serving her before she left and caused a serious crash. The Florida dram shop statute only allows an action for serving a minor or habitual drunk—and she was neither. The plaintiff argued that the bar undertook a voluntary duty to prevent the patron from driving away drunk, and then failed to do so. The court rejected the negligence argument. Stopping service and providing only water did not amount to undertaking a duty or increase the risk of harm. *De La Torre v. Flanigan's Enterprises*, 2016 Fla. App. LEXIS 3606.

Ohio: What if a bar employee is the intoxicated person? This employee had consumed several drinks during working hours before causing a serious accident on her way home. The Ohio statute creates liability when the tavern "knowingly" serves a "visibly intoxicated" person or a minor, but neither provision applied. There are limited circumstances where employers can be responsible for employee drinking, but the court did not find any duty here. As a result, a $2.8 million plaintiff verdict was thrown out. *Johnson v. Montgomery*, 2016 Ohio. App. LEXIS 1365.

Sample Assault & Battery Exclusion—Illinois—All Liquor Liability

You might be interested to see the comprehensive Assault & Battery (A&B) exclusion used in the GL and LL policy issued to a tavern in Illinois. It listed all the types of intentional and negligent conduct, and even intoxication in connection with A&B. The wording gave no opening for coverage. The trial court judge observed "that the company is trying to...get itself clean out of the realm of bar fights in any way, shape, or form." They succeeded. *Green Dolphin, Inc. v. Capital Specialty Ins.*, 2016 Ill. App. Unpub. LEXIS 452.

VERDICTS AND SETTLEMENTS—LIQUOR LIABILITY

- **$760,000**—Intoxicated bar patron fell upon exiting the bar, resulting in a traumatic brain injury. (Texas settlement)
- **$3.85 million**—Bar served intoxicated patron after state-mandated closing time before fatal accident. (South Carolina verdict)
- **$7 million**—Victim beaten to death by three drunk assailants well outside the defendant bars. (Pennsylvania settlement)

Gen Re Note: Of the 12 dram shop verdicts and settlements we found online, two involved assault and battery—and they were both high verdicts from a jury.

Claim View—Contractors, Defects and Coverage

by Paul Kelejian, Claims Executive

I can now add New Mexico to the growing list of states taking this coverage position—that a standard CGL policy covers defective construction that causes damage to other work. The jurisdictions rejecting all CD coverage are declining, though a few large states are in that group. However, even in many of those jurisdictions, many court watchers believe case law is getting ready to change and find coverage for CD under the basic insuring agreement.

This is definitely the prevailing trend across the country. The battleground is now moving to other exclusions added to policies to tailor underwriting intent. Examples include exclusions for continuing loss, known loss, residential work, condominium work, mold and others.

Additional Insured exposures have also become significant issues for carriers writing general contractors and subcontractors. Further, a five-year loss run will fall short of the 10-plus years required for CD exposures to develop, leaving many underwriters with half a view (or less) of the insured's experience. CD litigation is not going away, and neither is the need for underwriting diligence. Gen Re underwriters can assist in developing a strategy to reduce CD exposures in your book. Just let us know how we can help. ■

For more, see my related articles on genre.com—search "Kelejian"

Social Host—Oregon—Defining Social Host Liability

Two recent rulings from the Oregon Supreme Court clarify the scope of adult social host liability under statute and common law. One suit involved drinking and driving; the other involved gunplay at the party. The bottom line is this: For a viable action, the host must have observed or been capable of observing a visibly intoxicated guest, and been aware that his/her intoxicated state could lead to harm or injury. The Court applied an objective standard. Did the host exit the room while guests were drinking heavily? Was the host aware that an inebriated guest would be driving home? The good news is that negligence alone is not enough; the plaintiff must prove knowledge of drinking while visibly intoxicated and that harm could follow. *Deckard v. Bunch*, 2016 Ore. LEXIS 170 and *Baker v. Croslin*, 2016 Ore. LEXIS 147.

Gen Re Note: We spoke with attorneys in Oregon who handle dram shop cases, and suggest you visit their website soon for a discussion of recent decisions and their implications, at: http://smithfreed.com/knowledge-center.

Dog Bites—Idaho, Tennessee and Wisconsin—Revisions to Laws

We saw a flurry of activity on the topic of dog bite laws, and they go in different directions.

- **Idaho:** A new Dangerous and At-Risk Dogs Act, HB 525, creates civil liability when a dog attacks a person who did not trespass or provoke the animal. The plaintiff need not show that the dog was previously found to be dangerous or at risk. The law took effect on March 30, 2016.
- **Tennessee:** In contrast to Idaho, the Tennessee law eases the liability provisions for owners of the property where a dog is kept. Under HB 2170, effective July 1, 2016, land ownership by itself does not make the property owner the "harborer" of a dog for civil liability purposes.
- **Wisconsin:** Finally, new Wisconsin SB 286, effective November 2015, limits the dog bite claims that can qualify for double damages. The bite must cause permanent disfigurement or scarring, and the owner must have known of similarly serious and unprovoked bites in the past.

Gen Re Note: After several years of expanding animal injury laws, we sense a slow retreat in some states. The intent seems to attach liability to the owner, who can best control the animal.

Rental Property—Vermont—Failure to Contain Animals

This loss involves the escape of a horse from rented premises and the resulting auto accident on a nearby road. The lessee had constructed a fence on the property, but it was sagging and a gate was down. Does the property owner owe a duty to inspect rented property for the safety of the public? The Vermont Supreme Court held that the owner does not have such a duty in the absence of having any involvement in the ownership, management or control of the animal. Vermont is an agricultural state and allowing a tenant to pasture a horse does not create liability for permitting an "unreasonable risk." Requiring a landowner to

VERDICTS AND SETTLEMENTS—AROUND THE HOUSE

- **$175,000**—Teen discharged airsoft gun while playing in home, hitting friend in eye. (California)
- **$450,000**—Woman fell from recently renovated deck stairs due to lack of handrails. (New York)
- **$525,000**—Football, thrown in home, hit glass case and caused severe laceration to guest. (New Jersey)
- **$600,000**—Boy hit by stick thrown by teen, causing blindness in one eye—multiple defendants, including family of teen and owners of neighboring property where pile of sticks were left behind. (New Jersey)
- **$1 million**—Combustible materials thrown into open fire pit caused explosion, injuring guest at barbecue. (Massachusetts)

Underwriter View—Ridesharing and Umbrella

by Jill Tumney, Personal Umbrella Underwriter

The share economy raises many questions for personal umbrella coverage. Because of severity, auto exposures tend to get the most attention in our area. When carriers address ridesharing in the primary policy, they also need to take action on the PU as well. If they do not, they create a potential dropdown exposure that has not been underwritten or priced. The risk of misalignment is greatest when writing over another carrier's policy, as the PU might not be aware of the underlying endorsements.

Is the Personal Umbrella underwriter comfortable with how the underlying auto policy addresses ridesharing? Does the auto policy contain the latest ISO revisions (or equivalent) to the livery exclusion?

The new ISO wording reinforces the livery exclusion by adding language tailored to the practicalities of the rideshare business. It confirms that when the rideshare app is on, the driver is working—and personal auto coverage is off. ISO PP 23 40 is the version for personal auto, and ISO DL 99 12 is available for personal umbrella.

A handful of carriers are taking a different approach by expressly underwriting the rideshare exposure for Personal Auto customers. Either way, the goal is the same: aligning rates and forms with underwriting intent. ■

regularly walk a tenant's land to check conditions would "distort the contractual relations between landlord and tenant beyond reasonable bounds." *Deveneau v. Wielt*, 2016 Vt. LEXIS 28.

Gen Re Note: Based on our last Personal Umbrella loss study, we can say that rental properties generate a significant number of claims (though still nowhere near that of Auto). Most losses involve injuries to the *renters* rather than third parties. We discussed some common underwriting guidelines for assessing the risk of such properties in our November 2013 *Casualty Matters*.

Auto UIM—Oregon and Maryland—Stacking Over Liability Insurance Recovery

In 2015 Oregon enacted SB 411 to expand recovery and change the way UIM applies. Instead of offsetting UIM by the amount of any liability insurance payment from the at-fault driver, the new Oregon law makes UIM coverage additive and no longer subject to offset. UIM essentially "stacks" on top of the liability insurance recovery. Earlier this year Maryland considered HB 667/SB 533 to do the same thing as Oregon's SB 411. Fortunately that proposal *did not pass.* The insurance trade associations have this issue on their radar, and so do we.

Gen Re Note: This is one of the issues we track in our UM/UIM Law Survey shared with our Auto and Umbrella clients. If you would like to know more about it, please contact your Gen Re representative.

Share Economy—Cars and Homes—Lawsuit Over Hidden Camera

We started this *Casualty Matters* with privacy issues under commercial policies and now we close it with a personal lines privacy claim. Although the litigation also involves Airbnb, we have seen claims like this in other rental scenarios. The homeowners had installed a hidden camera that appeared to be operating while the renters were in the home. Upon discovery of the camera, the couple left and later sued Airbnb for negligence, and the *owners* for wiretapping, privacy intrusion, and infliction of emotional distress. Will there be liability and/or coverage? ■

MORE GEN RE RESEARCH

Also From Gen Re Research

Here are some recent Gen Re Research publications and blog posts. You can search on genre.com for these titles:

- Commercial Umbrella Lesson From Losses – Segmentation Insights (May article by Matt Burns and Liz Kramer)
- Is This Auto Claim Covered? – The Ridesharing Challenge (April article by David Hurt)
- School Liability – Student Athlete Concussions (April article by Charlie Kingdollar and Jeffrey Weisel)
- Apartment and Condo Pools: Staying Afloat With Commercial Umbrella Insurance (March blog by Maria Slowinski)
- Predictive Analytics in Workers' Comp (March article by Bill Lentz, Gary Tamburri, Lori Walters, with Stan Smith of MillimanMAX)
- 2015 EEOC Statistics and EPLI: Why Are Retaliation Claims Increasing? (March blog by Bill Baumann)
- E-Cigarettes–How Safe Is the Safer Alternative? (February blog by Charlie Kingdollar)
- The Innovative and Entrepreneurial Underbelly in Workers' Comp (February article by Adrienne Breslin, Lackawanna Insurance Group)
- Medical Marijuana and Workers' Compensation—The Impact of Potential Federal Reclassification (February article by Bill Lentz)
- Uninsured and Underinsured Motorist Liability Survey (updated monthly; Auto clients receive quarterly updates via ENews emails)

COMING SOON FROM GEN RE RESEARCH

- **Policy Wording Matters**—Discussion of Additional Insured endorsements, AAIS, BOP and Personal Auto filings, Designated Premises endorsements, and more.
- **Liquor Liability**—A review of the laws, liability and insurance issues facing carriers that write commercial liquor liability, with a focus on the Mid-Atlantic area.
- **Agriculture Risks**—For a look at GMO food risks, watch for our blog in June.

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