



ENCON Group Inc.
500-1400 Blair Place
Ottawa, Ontario K1J 9B8
Telephone 613-786-2000
Facsimile 613-786-2001
Toll Free 800-267-6684
www.encon.ca

Professional Liability and Commercial General Liability: Are There Reasons to Place These Coverages With the Same Insurer?

Insurance brokers and their clients may question whether or not there is any benefit to placing the professional's Errors and Omissions (E&O) insurance and Commercial General Liability (CGL) insurance with the same insurer. This article outlines several factors that may be worth considering when making this important decision.

The question as to which of the two policies should respond when a liability claim is reported is one that is steeped in uncertainty. Will it be one, the other, or perhaps both? The answer to this question depends, among other things, upon: a) the nature of the loss or damage; and b) how the allegations giving rise to the claim are "framed" by the plaintiff's counsel.

Nature of the Loss or Damage

The scope of coverage provided by any insurance policy is essentially determined by the Insuring Agreements and the Exclusions.

An occurrence-form CGL policy provides coverage for claims resulting from "occurrences" during the policy period due to bodily injury, property damage, personal injury, and possibly advertising injury, as they are defined in the policy. A CGL policy is not intended to insure a claim for pure financial loss that does not result from one or more of these forms of injury or damage. CGL policies almost without exception exclude coverage for claims arising from the rendering or failure to render "professional services." CGL policy wordings vary, as does the definition of professional services, and accordingly, the scope of the exclusion.

A claims-made E&O policy insures claims first reported during the policy period, for liability arising from errors, omissions or negligent acts in the rendering or the failure to render defined professional services, including those that result in financial loss. Some E&O policies exclude claims resulting from bodily injury and property damage, while others do not.

Variation in Professional Services Exposures

The E&O exposures of some professionals relate primarily to bodily injury. Examples include the medical malpractice exposures of medical professionals and clinics, first responders and ambulance services. The same may be said for certain engineers who design structures, equipment or products that have the potential to cause bodily injury if they fail. Professionals who provide services that are closely tied to the transportation, health care and recreation industries also fall into this category.

Other professions present exposures that may give rise to liability for property damage. This would include professionals who are responsible for the design of industrial structures and equipment. In today's über-connected and wired world, professionals who provide technology services may also be at risk of liability exposures for property damages.

On the other hand, the E&O exposures of some professionals have the potential to cause losses that are almost exclusively of a financial nature. This would include professionals who provide strictly financial services, such as accountants, insurance brokers, claim adjusters, lawyers and mortgage brokers.

Professions that experience exposure to bodily injury and property damage claims will find considerably greater rationale for placing their E&O and CGL coverage with the same insurer than those professionals who have exposures to claims that are almost solely related to pure financial loss. This is because allegations regarding bodily injury and property damage may be “framed” so as to trigger either policy, or in the case of mixed allegations, both policies.

Examples of Claims That May Involve Both Professional Liability and Commercial General Liability Policies

In each case below, try to decide whether the insured’s E&O and CGL coverage should be with the same or different insurers. Keep in mind that if the policies are with different insurers, the policyholder will likely have to:

- report the claim to two insurers
- deal with two adjusters
- participate in the investigations of the claim circumstances by both insurers
- wait for determination of whether either or both of the insurers will defend the claim
- potentially deal with two sets of counsel that have varied approaches to defending the claim
- await the outcome of both parties agreeing to a settlement

Example 1 – Medical

During an eye examination, an insured ophthalmologist administered eye drops that dilated a patient’s pupils and resulted in blurred vision. When leaving the premises, the patient slipped and fell down the office stairs and incurred a broken arm and dislocated shoulder. The patient initiated legal action claiming for damages resulting from her injury. The patient’s counsel alleged that the ophthalmologist and his staff failed to sufficiently warn the patient of the need to delay departure until her vision impairment subsided or to arrange for someone to accompany her prior to leaving. There was a further allegation that damaged edging on one of the top stairs of the ophthalmologist’s office was a factor in the fall. The CGL policy contained a “professional services” exclusion.

Example 2 – Technology

An insured technology consulting firm provided hardware and software solutions to a health care institution. A major storm caused a power surge that resulted in interruption to the client’s power supply, damage to its hardware, corruption of files and incurring costs to recover data. In its claim, the client’s counsel alleged: a) that the consultant committed an error or omission in its failure to ensure that an appropriate safety system was in place to prevent damage from the power surge; and b) that the consultant improperly installed the surge protection system that was in place at the time of the loss. The scope of coverage afforded by each policy would be dependent on its wording. It is very likely that the CGL policy excluded damage to “data,” while the E&O policy may or may not have contained an exclusion for bodily injury and property damage.

Example 3 – Construction

An insured mechanical contractor undertook a project for which he was to design, fabricate, deliver and install a new cooling tower for an industrial application. The contractor engaged a professional engineering firm to design the tower structure and the related electrical and mechanical systems. An engineer employed by the firm provided field services to oversee the fabrication of the tower and the installation by subcontractors. Three years after the work was completed, the tower experienced settlement problems and other issues that affected its performance. The client initiated legal action to recover for damage to the tower and resultant business interruption to manufacturing operations. The client's counsel alleged that the damage to the tower was caused by a) an improper design of the foundations and tower structure by the subcontracted structural engineer; b) faulty materials and workmanship in construction of the foundation by the subcontractor; and c) an error or omission by the staff engineer while providing field services for erection of the tower. The CGL policy contained a "professional services" exclusion.

So, Which Policy Will Cover the Claim?

The answer is: *there is often not one clear answer*. The examples above present situations where the answer will very likely only be determined after considering the relevant facts and circumstances of each case and examining how the plaintiffs' counsel framed the allegations of liability that resulted in the claim. Questions about which policy will respond to mixed allegations also give rise to questions regarding which limits and deductibles apply, as well as how liability may be apportioned if both policies cover the claim. The point here is that answers can often only be found after thorough investigation by the insurers. Resolution is often more easily achieved if the same insurer underwrote both policies.

Other Benefits to Having One Insurer

Aside from the matter of avoiding potential disputes with and between different insurers implicated in a claim, there are other reasons to consider placing both coverages with the same insurer. These may include:

- Policy wordings that are more "in sync" in terms of definitions, terms and conditions
- Concurrency of entities named, policy period, territory and other coverage elements that warrant attention
- Potential discounts from purchasing multiple insurance products from the same insurer

Brokers and their professional clients will often benefit from placing E&O and CGL with the same insurer. It is certainly worth further consideration for those professions that are exposed to bodily injury and property damage claims, but having one insurer for both coverages can provide benefits to other professions as well.

This document is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the program described. Please remember only the insurance policy can give actual terms, coverage amounts, conditions and exclusions. Program availability and coverage are subject to individual underwriting criteria.