

Who Is An Insured?

A Seminar Presented for

EVANSTON INSURANCE CO.

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Terminology

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Section II Who Is An Insured

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TERMINOLOGY

General Definitions

The introductory paragraphs of a CGL policy define the two basic types of those who may qualify for insurance protection:

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II Who Is An Insured.

Specific Definitions

CGL policies specifically define certain individuals who may or may not qualify as insureds:

"Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

"Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

"Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

"Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

"Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

Other Definitions

For purposes of distinguishing between different types of insureds, some insurance commentators have developed useful definitions, as described in the book entitled, "The Additional Insured Book," by Donald S. Malecki, et al., Fourth Ed. (IRMI 2000):

Named insureds are those individuals or entities to whom the policy is issued. Named insureds typically have more rights and responsibilities than additional insureds and are subject to more exclusions.

Automatic Insureds are individuals or entities who are automatically provided with insured status in the policy by virtue of being members of a group with close ties to the named insured, such as the named insured's directors, officers, and employees.

Additional Insureds are individuals or entities who require insured status in conjunction with a business relationship. Additional insured status is usually provided either by endorsement or, as previously mentioned, by way of a policy provision that is triggered by a requirement for additional insured status in the underlying contractual agreement.

SECTION II WHO IS AN INSURED

Sole Proprietorships

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

Partnerships

1. If you are designated in the Declarations as:
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

Corporations

1. If you are designated in the Declarations as:
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

Employees and Voluntary Workers

2. Each of the following is also an insured:
 - a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
 - (1) "Bodily injury" or "personal and advertising injury":
 - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business.

Real Estate Managers

2. Each of the following is also an insured:
 - b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

Unscheduled Joint Ventures

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

ANALYTICAL CHECKLIST

Initial Questions

Analyzing whether a tendering party has been sued in an insured capacity is among the most difficult coverage issues. Often, no firm conclusions can be reached at the time of tender. States vary somewhat in their approach to insured-qualification issues. The following checklist is intended to describe an initial approach to analyzing the problem. Evaluating this initial set of questions is useful in identifying potential issues as to whether the tendering party may or may not qualify as an insured.

- What is the specific legal name of each tendering party?
- What type of legal entity is the tendering party, i.e., sole proprietorship, corporation, partnership, joint venture?
- Is that tendering party identified in the policy's declarations?
- If not, is the tendering party identified in any policy endorsements?
- If so, does the endorsement identify the tendering party as a named insured, additional insured, or insured?
- If not identified in the declarations or endorsements, is the tendering party actually or potentially related to the named insured?
- If so, what is the nature of the relationship?
- Within which part of Section II Who Is An Insured does the tendering party most closely fit, and what is the key qualifying language?
- What was the actual or alleged liability-producing conduct committed by the tendering party?
- In view of the pertinent provisions of Section II, was the actual or alleged liability-producing conduct potentially committed within the scope of the key qualifying language?

Additional Questions

The questions outlined above will likely lead to either a conclusion or at least assist in focusing the analysis to the specific issue. However, fully evaluating the issue may require legal analysis. The following are few suggested questions to ask a manager, defense counsel, or coverage counsel in evaluating these issues:

- What is the relevant substantive law (e.g., partnership law, corporate law, agency/principal, respondeat superior) that applies in determining whether the tendering party was sued in an insured capacity?
- Did the tendering party's liability-producing conduct benefit or harm the named insured?
- Did the tendering party's liability-producing conduct create a potential liability on the part of the named insured?
- Is the dispute limited to an internal dispute among those running the named insured's business or is there a potential liability to a third party?
- Is there any practical reason to defend and/or indemnify the tendering party even if he or she may not qualify as an insured?

HYPOTHETICAL NO. 1(a)

John Burns and his wife, Alma, are sued for construction defects. They tender to their insurer under a policy issued to named insured, John Burns d/b/a Burns Construction. Alma is not employed. In the declarations, the box for “Individuals” is checked off, showing the form of the business.



Does Alma qualify as an insured?

HYPOTHETICAL NO. 1(b)

The next year, John Burns incorporates his business, and a new policy is issued to John Burns Construction, Inc. John is the corporation’s director, officer, and sole shareholder. Alma is not employed. But she is named in a lawsuit for construction defects along with John and the corporation.

Does Alma qualify as an insured?

HYPOTHETICAL NO. 2

An off-duty cook at a ski resort went skiing at the resort using a free pass given to employees. The cook collided with a ski resort patron. The injured patron sued both the resort and cook. The resort's insurer defended the resort, but not the cook. The patron obtained a judgment against the cook.

The patron sued the insurer as a third-party creditor. The insurer's policy to the resort stated that insureds included "any employee ... of the name[d] insured while acting within the scope of his duties as such"

Does the cook qualify as an insured?



HYPOTHETICAL NO. 3

Milazo formed a partnership with butchers to operate a meat market. The partnership leased a storefront from a property company, in which Milazo was also an owner. Milazo and others in the property company conspired to take over the meat market by not renewing the partnership's lease. The butchers sued Milazo for usurping a partnership opportunity.



Milazo tendered the suit to insurer, who agreed to defend under a reservation of rights. The butchers obtained a money judgment against Milazo. He sought declaratory judgment against the insurer for indemnification. The insurer's policy to the partnership stated that insureds included "any partner ... but only with respect to his liability as such"

Did Milazo qualify as an insured?

HYPOTHETICAL NO. 4

Relations between a minority stockholder and the director of a software company deteriorated. The director sued the stockholder and software company under various legal theories. Insurer defend the named insured software company, as well as the stockholder. The stockholder and software company counterclaimed against the director for defamation. The company's insurer declined to defend the director.



The director had allegedly told the company's creditor that the company was financially unstable, causing the company to lose financing. The director sought declaratory judgment against the insurer for defense, claiming his comments were in the course of the software company's business. The insurer's policy to the software company stated that insureds included "directors ... but only with respect to their duties as ... directors."

Did the director qualify as an insured?

HYPOTHETICAL NO. 5

A medical management company sued two of its former executive officers for defamation. The officers allegedly damaged the company by saying it had created a system that violated California's prohibition against the corporate practice of medicine. The officers tendered the suit to the company's insurer. The insurer declined the defense.



The officers sought declaratory relief arguing the insurer had a duty to defend the suit. The insurer's policy stated that insureds included "executive officers ..., but only with respect to their duties as your officers."

Did the officers qualify as insureds?

HYPOTHETICAL NO. 6

Claimant was injured when his car collided with a runaway horse. The pasture from which the horse had escaped was enclosed by electric fence tape made by the named insured corporation. The driver sued the corporation and its parent corporation, alleging that each bore responsibility under products liability theories.



The corporation's insurer defended and indemnified the corporation, but not the parent corporation. The parent corporation argued that it qualified under the policy's language providing that "your stockholders are also insureds but only with respect to their liability as stockholders." The parent corporation sought declaratory judgment against the insurer.

Did the parent corporation qualify as an insured?

ANSWERS TO HYPOTHETICALS

1(a). Yes.

1(b). No.

2. No. See Miller v. American Home Assurance Company (1996) 47 Cal.App.4th 844. The California Supreme Court has held that an employee is acting within the scope of his employment:

When in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer.

Farmers Ins. Group v. County of Santa Clara, 11 Cal.4th 992, 47 Cal.Rptr.2d 478 (1995).

3. No. See Milazo v. Gulf Insurance Company (1990) 224 Cal.App.3d 1528. The court in Milazo reasoned that under partnership law:

The status of partner, without more, provides only the authority to bind the partnership by acts which are apparently within the usual course of the particular business of the partnership. A partner, without the consent of all of the remaining partners, has no authority to do any act which is destructive of the partnership or, indeed, any act which is not apparently done for the purpose of carrying on the partnership business in the "usual way." Cal. Corp. Code § 15009(2) and (3)(c).

4. No. See Lomes v. Hartford Financial Services (2001) 88 Cal.App.4th 127. The court in Lomes explained its reasoning as follows:

"While a partner may act independently within a partnership's usual course of business, the powers of a director of a corporation are more circumscribed. A corporation does not act through individual directors but, rather, through its board of directors. An individual director has no authority to take action on behalf of the corporation without the consent of the board of directors. A director's unilateral acts are not binding on the corporation unless ratified by the board. As there are no facts ... that he was acting in his capacity as a director, we conclude, as a matter of law, he was sued purely in his individual capacity."

5. Yes. See Barnett v. Fireman's Fund Insurance Company (2001) 90 Cal.App.4th 500. The court in Barnett explained its reasoning as follows:

Because the complaint alleges the officers were seeking to further the corporate interests when they criticized the named insured corporation, it is possible they were engaged with respect to their duties as executive officers when they committed the alleged misconduct and therefore a potential for coverage exists.

6. No. See CertainTeed Corporation and Bay Mills, Ltd. v. Federal Insurance Co., 913 F. Supp. 351 (E.D. Penn. 1995). The Certain Tweed court explained its reasoning as follows:

While the complaint referred to the "ultimate parent," the claims made against the named insured's parent corporation are not as alter ego, or simply as stockholder, but, rather, as an independent actor charged with the same conduct on its own. The policy language reflects coverage for a stockholder when its status as stockholder—not its own conduct—makes it liable for conduct of the named insured.

LAWYER JOKES

Q: Why won't sharks attack lawyers?

A: Professional courtesy.

Q: What's the difference between a good lawyer and a great lawyer?

A: A good lawyer knows the law. A great lawyer knows the judge.

Q: What does a lawyer get when you give him Viagra?

A: Taller.

Q: What is the difference between a lawyer and a trampoline?

A: You take off your shoes before you jump on a trampoline.

Q: What's the difference between a lawyer and a catfish?

A: One is a slimy, bottom dwelling, scum sucker. The other is a fish.

You Know You Need a New Lawyer When:

1. During your initial consultation he tries to sell you Amway.
2. When the prosecutors see who your lawyer is, they high-five each other.
3. He asks a hostile witness to "pull my finger."
4. He begins closing arguments with, "As Ally McBeal once said . . . "
5. Just before he says, "Your Honor," he makes those little quotation marks in the air with his fingers.



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