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Risk Management

Courts still interpreting the Business Auto Policy

Thirty years after its introduction, the BAP continues to spawn debate

By Donald S. Malecki, CPCU

Recent litigation focuses on additional insured coverage, the Employee as Insured endorsement, and a weak link in the CGL.

The Business Auto Policy, as producers know it today, was introduced by the Insurance Services Office 31 years ago. It, of course, has undergone some revisions but the mechanics of utilizing symbols and the structure of this policy have remained relatively unchanged.

But despite the fact that this policy has been in existence for more than three decades, it still can generate some arguments that only the courts can seem to resolve. These problems are not anything that producers cause but, instead, are created by buyers and sellers.

A trilogy of problems

A couple of the issues that appear to persist with regard to the Business Auto Policy have to do with additional insured coverage, and the employee as insured endorsement. A third issue is auto-related but deals with the Commercial General Liability policy as it pertains to the auto exclusion and where coverage is still possible, at least for the time being.

One of the significant developments that does not really change anything but still is important is the Designated Insured Endorsement CA 20 48. This endorsement was introduced by ISO in 1993 to appease those who not only want to be additional insureds on the commercial auto policies of others, but also want a security blanket of proof; that is, something more than simply confirmation by an insurance certificate.

Referring to the Who is an Insured provision of the Business Auto Policy, the persons or organizations desiring proof of additional insured status is under 1.c. Within this category are those who do not operate the covered autos of the named insured but, instead, could be held liable for the conduct of an otherwise eligible and covered insured who is using such autos.

This endorsement reaffirms the extent to which a person or organization is automatically considered to be an additional insured under the Business Auto Policy. It does this by stating that the person or organization indicated in the endorsement "is an insured for liability coverage, but only to the extent that person or organization qualifies as an insured under the Who is an Insured provision contained in Section II of the Coverage Form."

Strictly from an insurance standpoint, all a person or organization receives, if it otherwise qualifies as an additional insured under this policy, is coverage for its vicarious liability. What this means, in a nutshell, is coverage for liability imputed to it because of the acts or omissions of a qualified insured. As explained below, however, there has to be a principal-agent relationship at the time of the accident, if coverage is to apply.

There are two things that readers need to keep in mind about this endorsement and the additional insured category:

First, if a person or organization desires protection against its vicarious liability under commercial auto coverage, specify that in a written contract. If this intent is not clear, some insurers will contest that status, since it can be costly to an insurer that is having to provide defense.

Second, additional insured status is automatic, at least under the standard ISO policy, but coverage is not. The reason, as noted above, is that there must be a principal-agent relationship. In other words, there also must be some employment or contractual relationship showing that the principal is exercising the kind of control that would create the relationship that gives rise to vicarious liability.

The key, therefore, is control. Generally, independent contractors are not considered to be agents, because, as independents, they are not commonly controlled. To the extent they can be under the direction and control of another, it may then be possible to establish the principal-agent relationship. But it is not easy to show this principal-agent relationship in order to obtain the coverage offered by the Business Auto Policy.

Another reason why this additional insured status should be prescribed by contract is that not all insurers use the ISO Business Auto Policy but, instead, rely on their own independently filed forms that can differ from the standard approach. If a policy that requires that the additional insured coverage be prescribed by contract and the contract is silent, no coverage may need to be provided.

A case in point is *Bituminous Casualty Corporation v. McCarthy Buildings Companies, Inc., No. 04-08-00152-CV, Tex. 4th Dist. Ct. App. 2009.* A general contractor [GC] contracted with a subcontractor [SC] requiring the latter to procure a commercial general liability policy and a commercial auto policy but only requiring additional insured coverage on the CGL policy.

After an employee of the SC was killed by his employer's truck, his estate filed suit against the GC who, in turn, looked to the SC's insurance company for defense and indemnity. The SC's insurer refused to defend the GC because it claimed that the GC was not named as an additional insured on the SC's commercial auto insurance.

Unfortunately for the GC, under the language of the policy issued by the SC's insurer, the GC qualified as an additional insured only if it were "an organization for whom the insured had agreed by written contract to designate as an additional insured."

So here is a bit of advice. If a person or organization desires additional insured status under a commercial auto policy of another, that intent should be prescribed in a written contract. Whether an endorsement is issued really does not matter. In fact, for some strange reason, some underwriters will not issue an endorsement, even like the one offered by ISO! Showing intent is the key to avoiding arguments.

The next two hurdles are for the person or organization to be sued alleging liability against it, and to prove that there was a principal-agent relationship at the time of the accident.

Employees as Insureds coverage

The Business Auto Policy covers employees while using a covered auto owned, hired, or borrowed by the named insured, but it will not cover employees while using their personal autos for business. What is required to obtain this coverage, often looked upon as an employee benefit, is a generous employer and an endorsement.

The standard ISO endorsement used for this purpose is titled Employees as Insureds Endorsement CA 99 33. It, however, is not always readily available. Underwriters usually want some assurances that the employees are maintaining modest limits, higher than the limits required by financial responsibility laws, even though this endorsement applies as excess to the employees' personal auto limits.

Employers probably feel the same way as underwriters do. To permit employees to operate their autos on company business with low limits could activate the employer's policy a lot sooner and have an impact on future pricing. Some companies are known to have written documents suggesting the minimum limits to be maintained.

When this kind of endorsement is issued, it modifies the Who is an Insured provision to include as an insured any employee of the named insured while such employee is using his own automobile in the named insured's business or personal affairs. This is highly recommended.

The hurdle here is that insurers generally will look very closely at whether the personal auto was, in fact, being used in the named insured's business or personal affairs a the time of the accident. One such case where this occurred is in *O'Shea v. Welch, et al., 101 Fed. Appx. 800 (U.S. Ct. App. 10th Cir. 2004).*

At the time of an accident, a store manager was driving from his store to his district office to deliver baseball tickets which had been obtained from a vendor to be distributed to other store managers. En route, the store manager made "a spur of the moment" decision to turn into a service station for repair work when he struck another motorist. Both the store manager and his employer were sued.

The district court stated that "no reasonable jury" could conclude that the store manager was

acting within the scope of his employment and, therefore, held that his employer was not vicariously liable for its employee's negligence. On appeal, the crux of this case was the meaning of "in your business," as those words appear in the endorsement. The answer, consistent with decisions in other states, was determined to mean "scope of employment." Unfortunately, the court did not resolve the issue but merely remanded the proceedings to the district court to be resolved.

In the case of *Lincoln General Insurance Company v. Gateway Security Services, Inc., et al., No. 1:06-CV-01143 (U.S. Dist. Ct. E.D. CA 2008)*, an insurer balked at providing coverage under the Employees as Insureds endorsement. At the time of an accident, the president of a closely-held corporation was commuting to work in her personal auto. In light of this, the insurer sought a declaration that it had no duty to indemnify the corporation or its president.

The court ruled that coverage did not apply. In doing so, it stated that an insured cannot reasonably expect coverage for personal commuting under a business auto policy where an individual has not read the policy, was unaware of the endorsement language at issue, and never discussed, requested or contemplated auto insurance for commuting in a personal auto.

Interestingly, the court also offered some insurance advice. It stated that had the company president desired coverage under the Business Auto Policy while using her personal auto, the Individual Named Insured endorsement was available for that purpose. The court explained that this endorsement is used to cover private passenger autos under a commercial policy where the owner needs non-business use coverage and is a sole proprietor or owner of a closely held corporation.

Under this endorsement, CA 99 17, the court added, the owner would be able to obtain the equivalent of personal auto coverage under a commercial auto policy.

Weak link in the CGL policy

There may come a time soon when the CGL policy will need to be amended regarding the exclusion dealing with any auto owned or operated by or rented or loaned to any insured. The problem for insurers is that a temporary employee is not considered to be an insured. So if a temporary employee operates an auto for the entity that employed him or her, both the entity and temporary employee could have coverage under the CGL policy, excess of any applicable auto liability coverage.

A case in point is *Nick's Brick Oven Pizza, Inc. v. Excelsior Insurance Company, et al., No. 2008-03856 (Sup. Ct. N.Y. App. Div. 2009).* Both the pizza business and the person delivering pizzas were sued following an accident that injured another motorist. Claim was denied because of (1) the auto exclusion in the CGL policy and (2) the driver, as an employee, was an insured.

The pizza company, however, maintained that the delivery person was a temporary employee because he was hired to meet seasonal or short-term workload conditions during the busy summer months prior to his return to college. Since the delivery person was not an insured, coverage applied.

Ever since its introduction to the CGL policy, the definition of "temporary employee" has been a problem for insurers. It, therefore, should not be a surprise if a change were to be made with the definition of "temporary employee" and this CGL exclusion.

The author

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