**COVERAGE TIP – THERE IS SOME NON-OWNED AUTO COVERAGE UNDER THE CGL**

You have a client who has just been named in a suit as being responsible for the operation of an automobile by someone she hired to transport her property from point A to point B. This is an accident where the driver of the transporting “auto” is at fault and several people were killed. While she is an insured under the independent contractor’s BAP, the limits are likely insufficient. Unfortunately, she did not purchase or you did not sell her specific non-owned automobile coverage under a Business Auto Policy or as an endorsement to the CGL Policy. Where might you find insurance protection for this suit?

We have been taught that the CGL Policy has an exclusion that pertains to automobiles. But, let’s peruse this exclusion again.

This insurance does not apply to:

**g. Aircraft, Auto Or Watercraft**

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading”.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage” involved the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

1. A watercraft while ashore on premises you own or rent;
2. A watercraft you do not own that is:
   a. Less than 26 feet long; and
   b. Not being used to carry persons or property for a charge;
3. Parking an “auto” on, or on the ways next to, premises you own or rent, provided the “auto” is not owned by or rented or loaned to you or the insured;
4. Liability assumed under any “insured contract” for the ownership, maintenance or use of aircraft or watercraft; or
5. “Bodily injury” or “property damage” arising out of:
   a. The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of “mobile equipment” if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
   b. The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of “mobile equipment”.

COPYRIGHT INSURANCE SERVICES OFFICE
The exclusion is very specific as to which automobiles are excluded. The exclusion says it applies to...any “auto”... owned or operated by or rented or loaned to any insured. So if the automobile is owned by, operated by, rented to or loaned to any insured, there is no coverage under the Policy for any other insured in spite of the Condition - Separation of Insureds.

Under the CGL Policy, one could be a named insured and qualify as an insured. One could be an automatic insured. Or, finally, one could be an additional insured. But if the automobile in question is not one of the specific types of automobiles excluded, then coverage applies under the CGL Policy.

The terms owned, rented, loaned are fairly self-explanatory. But what does the phrase “operated by” mean. The Policy does not define this phrase. So, where do we go for an explanation? I looked at my dictionary and found the word operate means “to cause to function”. I take this to mean that I must be driving the auto. This is reinforced when I look at Black’s Law Dictionary and find that its definition most closely associated with what I am looking for is “operating a motor vehicle under the influence” or “operating a motor vehicle while intoxicated”. Both of these phrases direct me to “DRIVING UNDER THE INFLUENCE”.

As mentioned above, you have to be concerned with whether or not the automobile in question is owned or operated by or rented or loaned to any insured. Is the person or entity hired by your client an insured under the CGL Policy. For example, if the person your client hired to transport the property from point A to point B is an employee, then no coverage exists as employees are insureds (at least most of the time) under the CGL Policy. If the person or entity that your client hired is an additional insured, then no coverage exists either. But, if the person or entity is an independent contractor that has not been named as an additional insured under your client’s CGL Policy, there is coverage for the vicarious liability allegations against your client for the operation of the automobile by the independent contractor.

This is reinforced by the CGL Policy Condition – Other Insurance.

<table>
<thead>
<tr>
<th>1. Other Insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td>If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:</td>
</tr>
<tr>
<td><strong>a. Primary Insurance</strong></td>
</tr>
<tr>
<td>This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.</td>
</tr>
<tr>
<td><strong>b. Excess Insurance</strong></td>
</tr>
<tr>
<td>(1) This insurance is excess over:</td>
</tr>
<tr>
<td><strong>(a)</strong> Any of the other insurance, whether primary, excess, contingent or on any other basis:</td>
</tr>
<tr>
<td>(i) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for “your work”;</td>
</tr>
<tr>
<td>(ii) That is Fire insurance for premises rented to you or temporarily occupied by</td>
</tr>
</tbody>
</table>
you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for “property damage” to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, “autos” or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations or products and completed operations for which you have been added as an additional insured by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any “suit” if any other insurer has a duty to defend the insured against that “suit”. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also.

Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer’s share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

COPYRIGHT INSURANCE SERVICES OFFICE

Please direct your attention to Paragraph b.(1)(a)(iv). It indicates that any coverage provided for “autos” not subject to the exclusion is excess insurance over other available insurance. This means the independent contractor’s BAP provides the primary coverage for your client. But, if those limits are insufficient, the CGL will respond.

Please remember to report the claim to the CGL insurer in accordance with Policy conditions.