

The New Travelers CGL Form CG T1 00 02 19 May Cause Risk Transfer Problems for Upstream Parties

The Travelers Indemnity Company (“Travelers”) recently released a new proprietary commercial general liability (“CGL”) form designated CG T1 00 02 19. The form is largely reflective of current ISO forms but includes one change that can significantly impact risk transfer when used by a trade contractor who has promised additional insured coverage to an upstream party. The change appears in **SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. Other Insurance**. Travelers has added a provision whereby the policy is excess to:

Any of the other insurance, whether primary, excess, contingent or on any other basis, that is available to the insured when the insured is an additional insured, or is any other insured that does not qualify as a named insured, under such other insurance.¹

This language means that the insurance afforded to an additional insured by this policy is excess to the coverage afforded to that additional insured by any other policy on which that party also qualifies as an additional insured. Consider the following example:

AB Exteriors, a window contractor, has promised AI coverage to its GC. A claim arises relating to post-completion water intrusion, leading the owner to bring suit against the GC, AB Exteriors, CD Waterproofing, EF Carpentry and GH Roofing alleging responsibility for defective work and resulting property damage. All the subs have made the same contractual promise to provide AI coverage to the GC. Investigation demonstrates that the majority, if not all, of the responsibility lies with AB Exteriors. AB Exteriors, based on its Travelers policy including the CG T1 00 02 19, refuses defense to the GC, and refuses settlement contribution, arguing that the AI coverage provided by the other subs is primary.

Travelers is neither the first nor the only insurer to deploy such language. But, given Travelers’ strong market position as an insurer of construction subcontractors, we expect Travelers’ inclusion of this language in its new standard form will increase the exposure of upstream parties to this language and its potential consequences.

¹ It is important to distinguish this language from the language found in a typical ISO policy. A current ISO form provides:

This insurance is excess over:

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

This language makes the insurance excess to additional insured coverage available to a **named insured**, meaning that AI coverage goes first for named insureds. This is because of the use of the word “you” instead of “insured”. This does not address the coverage provided to an additional insured (they are an “insured”; not “you”). In effect, Travelers has modified this language, using the term “insured” instead of “you” to make the coverage excess to all other AI insurance for named insureds **and** additional insureds.

The result described above is probably inconsistent with the expectations of the upstream parties with respect to how AI risk transfer to AB Exteriors should work. An upstream party would typically expect that the AI coverage provided by AB Exteriors would be co-primary with the AI coverage provided by the other subcontractors. As such, AB Exteriors' insurer would be in a position to defend and contribute to a settlement based on the extent to which its first named insured caused the additional insured's damages, and would not be able to avoid that obligation based on an excess priority of insurance position. However, there is still a question whether the language in Travelers form violates the insurance requirements of the typical subcontract agreement. The answer depends on the subcontract agreement.

The new Travelers language may not violate a promise that the subcontractor's insurance be primary and non-contributory to the upstream party's insurance. The Travelers language makes the policy excess to other AI policies, but not to the upstream party's own policies. Consider the following language examples:

The coverage afforded to the additional insured must be primary and non-contributory to any other insurance on which the additional insured is a named insured.

The Travelers' language does not violate this requirement because the Travelers policy is only excess to other insurance on which the upstream party is an insured but not a named insured. However, consider the following:

The coverage afforded to the additional insured must be primary and non-contributory to any other insurance available to the additional insured.

Other AI insurance would be "any other insurance available to the additional insured", and, therefore, taking a position that this insurance is excess to that other insurance would be inconsistent with the contract requirement. The first language example is the one more commonly seen in the construction industry. This is due to most insurers' desire to avoid the scenario described with the second language example; where the policy is arguably made primary to other AI insurance. With respect to insurance priority, most policies provide (usually by endorsement) that coverage for an AI will be primary and non-contributory to the AI's "own" insurance where required by contract, but co-primary with any other AI coverage. This is the ISO "default" position, which Travelers has now modified. These are subtle differences. Below we will discuss recommendations for contracts in light of this new language, but whether the Travelers language violates current contracts requires a careful look at the existing contract language.

It is also worth noting that many subcontract insurance requirements include language like the following:

Subcontractor must provide commercial general liability insurance on a current ISO occurrence form.

If the Subcontract agreement requires a current ISO form policy, then there is a basis to push back on the Travelers' language. The language is a restriction over current ISO language and restricts the effectiveness of risk transfer in the real world. Some subcontract agreements add the dreaded phrase "or equivalent" to the above. This author would argue that the Travelers change is significant enough

that it is not “equivalent” to an ISO policy, but that would likely be the subject of a spirited debate about how much has to change before the policy is no longer an “equivalent” form.

The example above, which illustrates how AB Exteriors can leverage the new Travelers language to avoid or reduce the claim resolution payment it would otherwise be expected to make, probably strikes most upstream construction parties as inconsistent with the intent and expectation of the typical construction subcontract. The basic premise is that, having signed the contract and been paid a cost of insurance reflecting standard commercial terms, the downstream party should not be able to then provide insurance that restricts coverage from that standard. In theory, this supports an upstream party refusing to accept this Travelers policy form.

Would the new Travelers language be appropriate for anyone in the construction contract chain? In short, yes. In this author’s opinion, this language would be appropriate for a GC, CM or Design Builder who is not self-performing any of the work. In principle, it is fair and reasonable for a supervising entity who is not performing the work, to require that the insurance of the party actually performing the work that gives rise to the claim be the one that provides primary AI insurance. In effect, this would mean that the AI coverage provided to the owner and any other party upstream of the GC/CM should come first from the subcontractors, and the AI coverage provided to those upstream parties by the GC/CM should be excess (excess to other AI insurers but still primary and non-contributory to the upstream owner, etc.). Practically, the result of the GC/CM being co-primary with other AI coverage is that the GC/CM, who often has better terms and higher limits, pays a disproportionately higher amount of the settlement/defense than its culpability (if any) dictates.

In order to create a solid contractual basis to refuse the new Travelers language, we recommend the following be inserted into the subcontract general liability insurance requirements:

“This insurance may not include terms which make the coverage afforded to an additional insured excess to other insurance on which such insured is also an additional insured.”

There are no published court decisions that we are aware of dealing with the new Travelers form. Whether it gains traction in the insurance market place and spreads to other subcontractor insurers remains to be seen.

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