New 'Expected or Intended Injury' Language in Some CGL, Umbrella Policies

Exclusion Could Be E&O Trap for Unwary Brokers, Agents

By Michael A. Rossi
Troop Meisinger Steuber & Pasich LLP
Los Angeles

How would you feel if you had made a commercial-general-liability or umbrella placement for a client that excluded coverage for negligence? How about a policy that excludes coverage for an insured employer whose employee or agent intentionally or expectedly causes injury?

You may be putting yourself in that situation without even knowing it. A new form of "expected or intended injury" exclusion that is dramatically different from traditional forms of the exclusion has quietly slipped into the insurance market within the last couple of years.

It is only a matter of time before litigation over the meaning of the new exclusion mushrooms if insurers rely on it to deny coverage for claims that insureds surely would expect to be covered under their CGL and umbrella policies. The exclusion also could expose brokers and agents to errors-&-omissions claims for failing to disclose the new language to their clients.

For decades, liability policies have contained some type of exclusion intended to bar coverage for injury intentionally caused by the insured. Such language typically is found in a self-contained exclusion usually labeled "intentional acts," "expected or intended injury" or something similar. The language in such self-contained exclusions typically reads as follows:

"This policy does not apply to bodily injury or property damage intentionally caused by the insured."

Similar exclusionary language sometimes is contained in the definition of "occurrence" -- rather than in a self-contained exclusion -- where "occurrence" is defined in part as something that "results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

New Form Rears Its Head

However, at least one insurer is currently issuing liability policies (primary CGL as well as umbrella) with a new form of "expected or intended injury" exclusion that appears to be an attempt to circumvent the favorable law that has developed interpreting the traditional types of "expected or intended" exclusions. This new form of exclusion reads as follows:

Expected Or Intended Injury

This insurance does not apply to **bodily injury** or **property damage** which results from an act that:

* is intended by the insured;
* or can be expected from the standpoint of a reasonable person

to cause **bodily injury** or **property damage,** even if the injury or damage is of a different degree or type than actually intended or expected.

This exclusion does not apply to **bodily injury** resulting from the use of reasonable force to protect persons or property.

This language is problematic because it potentially could bar the application of favorable insurance law to certain insurance-coverage disputes. For several decades, courts throughout the United States have narrowly interpreted traditional forms of "expected or intended" exclusions, thereby barring application of the exclusions under a wide variety of circumstances.

For example, courts have allowed coverage for an employer who is held liable for the intentionally injurious acts of its employee or agent, whether the liability is vicarious liability based on theories of *respondeat superior* or is direct liability based on theories of negligent supervision.

In addition, when the insured's own conduct, rather than the conduct of an employee or agent, caused the injury suffered by the claimant, courts have held that an objective "reasonable person" standard does not apply to determining whether the insured "expected or intended" the injury at issue.

Subjective Intent

Rather, many state supreme courts and intermediate appellate courts have held that the subjective intention and/or expectation of the insured must be examined in order to determine whether the "expected or intended" exclusion applies. In other words, it must have been within the subjective intention of the insured to cause, or expect to cause, injury or damage.

However, an insured with a policy containing this new "expected or intended injury" exclusion might not be able to avail itself of the favorable insurance law that has developed throughout the United States with respect to such exclusions.

First, the exclusion appears not to require that the injury at issue must be expected or intended **by the insured.** Rather, the exclusion implies that it would apply to any injury that could have been expected by a "reasonable person."

This could bar coverage for any insured whose employee or agent intentionally or expectedly causes the injury or damage sustained by the claimant. If that interpretation were upheld by a court, the results could be devastating for any policyholder who faces liability exposure because employees and/or agents are running operations.

Second, the new exclusion's objective "reasonable person" standard could prove to be very problematic even when it was the insured's acts that caused injury to the claimant. A component of negligence liability is that the damage caused by the purportedly negligent person must have been reasonably foreseeable. How difficult would it be for an insured held liable for negligence to prove an entitlement to coverage with an exclusion for damage that could have been expected by a reasonable person? The task might prove daunting, if not impossible.

Finally, the new exclusion does not require that the specific degree or type of injury or damage be "expected or intended," but states that the exclusion applies "even if the injury or damage is of a different degree or type than actually intended or expected." That, too, is a reduction in coverage provided by standard-form "expected or intended" exclusions as interpreted by some courts.

Why Didn't Agent Tell Me?

If one of my clients ever came to me with a liability policy containing this new form of "expected or intended injury" exclusion, I would explain the problem and ask the client whether his or her broker or agent ever discussed this new exclusion and the potentially dramatic impact it could have on the coverage afforded by standard-form liability policies. I would also ask whether the insured obtained a substantial premium reduction because of the new exclusion.

I think you know what my client would be thinking if the answer to either question was no. "Why didn't my broker tell me about this?" The result, if a claim were fried, likely would be an

E&O claim against the broker or agent who placed the coverage.

In sum, save yourself from a potentially costly and embarrassing situation. Look for this new "expected or intended injury" exclusion in all liability policies you have placed and will place in the future.

If you find it in a policy you will be placing, you should discuss this issue with your client and make sure the client understands he or she is buying a liability policy that provides less coverage than many others in the market that contain a traditional "expected or intended" exclusion.

If the client decides to buy the policy after you explain the issue, you might want to record in writing that the conversation took place in order to protect yourself from liability if the exclusion ever serves as the basis for a declination of coverage on a particular claim.

If you find this new exclusion in a policy you have already placed, that creates a different problem. Options include deleting the exclusion and replacing it with a back-dated endorsement that has a traditional "expected or intended" exclusion (or one that is otherwise acceptable). If that option is not available, perhaps the policy can be canceled and a different policy with a traditional "expected or intended" injury exclusion put in place.

Of course, the coverage could always be kept in place without change, and the insured could wait to see if any claims are denied under the exclusion that the insured surely would expect to be covered. A coverage lawsuit and perhaps also an E&O suit against the broker or agent probably could result.

Perhaps there is no one best way to address this particular problem. In any event, the broker or agent might want to discuss the issue with the client in order to determine how, if at all, to deal with the issue.

In the final analysis, this new "expected or intended" injury exclusion is one case in which a heads-up approach in the placement or renewal of insurance can save a lot of headaches later.

Michael A. Rossi is a lawyer with the Los Angeles firm of Troop Meisinger Steuber & Pasich LLP. Rossi works with independent agents and brokers to provide legal advice exclusively to policyholders from all over the United States with respect to insurance-program reviews and audits, initial placements and renewals of particular policies, and coverage disputes.