

Finding Liability Coverage for Damaged Data

Picture this: Your firm has been selected to design or build a new high-rise assisted-living facility next door to a big hospital. Something goes wrong, and you cause a fire that does serious damage to the hospital's administrative offices. The damage to the building is only about \$1 million, but the fire also destroys \$500,000 of data. Are you covered? If you have a standard commercial general liability (CGL) policy—and if the fire was not caused by an excluded professional service—the answer is “yes” for the building, but a resounding “NO” for the data.

In this article we discuss this potential gap in CGL coverage and how to plug it. Whether your firm is the architect or engineer designing the project or the contractor building it, you need to be aware of the gap and to take the appropriate steps to fix it.

Destroying the Data Next Door

Most CGL policies either use the forms published by Insurance Services Office (ISO) or are based on those forms. The ISO CGL form includes coverage for property damage, defined as physical injury to tangible property and the resulting loss of use. It also provides coverage for loss of use of tangible property not physically injured.

The form did not originally address electronic data. But in 2001, ISO added a clarification, which reads as follows:

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

In 2004, ISO further clarified the intent by adding a new exclusion, which reads as follows:

This insurance does not apply to...

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

Thus, any firm that buys a CGL policy and thinks that the policy will cover not only the building and contents, but also the electronic data in the building next door, is sorely mistaken. Given the reliance by so many businesses on their data to operate, this gap could prove to be very costly.

Of course, many firms back up their data offsite; so in some cases, there may be little or no data lost. But there may be firms that do not have offsite backup. Even those that do may have substantial amounts of data vulnerable to loss just prior to the next scheduled backup. Further, even if the data are backed up offsite, it will still cost time and money to restore them to the onsite computers.

Plugging the CGL Coverage Gap

In 2002, ISO introduced an endorsement that can plug this hole in CGL coverage. The endorsement, titled “Electronic Data Liability,” adds coverage back into the form for situations where damage to data is part of the loss when there is also damage to tangible property.

The term “property damage” is redefined to include:

Loss of, loss of use of, damage to, corruption of, inability to access, or inability to properly manipulate "electronic data", resulting from physical injury to tangible property. All such loss of "electronic data" shall be deemed to occur at the time of the "occurrence" that caused it.

The endorsement contains a schedule for the insurer to complete with the applicable limit for loss of electronic data. With this modification to coverage, if your firm causes \$1 million of damage to the building and \$500,000 of damage to data, all as a result of the same event, the CGL policy will cover all the damage—provided, of course, that your limits are sufficient.

Not every insurer may be willing to add this endorsement, and both the pricing and the maximum limit available will vary from one insurer to the next. But if your firm could conceivably cause damage not just to buildings and tangible contents, but also to data, you need this coverage enhancement. Otherwise, the cost to restore the lost data comes out of your own pocket.

An architect or engineer should advise the owner of a project to include this as a requirement in the insurance provisions of the Contract Documents.

Plugging the Professional Liability Gap

For architects, engineers, and contractors, there is an additional gap created by the professional services exclusion added to the basic CGL policy. The ISO version excludes coverage for bodily injury,

property damage, personal injury, and advertising injury arising out of:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
2. Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

It is important to note that the CGL will cover nonprofessional acts and services, but not those deemed professional. For example, consider the following scenarios:

- ▲ If a design firm leaves a space heater plugged in and it causes a fire, that act is not a professional service and would be covered under the CGL; but if the same firm designs a heating system that causes a fire, that would be excluded.
- ▲ If a contractor constructs a building strictly according to the architect’s and engineer’s plans and causes a fire while welding support beams, that act would be covered under the CGL; but if the same firm also designs the building and something inherent in the design causes a fire, that act would be excluded.

This gap cannot be plugged on a CGL. The only way to secure coverage is to purchase a professional liability policy, a coverage most design firms and many contractors have purchased.

Finding Help to Plug Your Gaps

For help in plugging your coverage gaps, please contact Gregg Bundschuh, J.D., at (770) 552-4225 or Gregg.Bundschuh@greyling.com.