CRC Group
Wholesale & Specialty

Special Report

Avoiding the Two Hit Combo from Action-Over Claims

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Avoiding the Two Hit Combo from Action-Over Claims

Action-over claims can result in significant and unexpected liability for business owners, and these claims may not be covered by all commercial general liability (CGL) policies. For insurance professionals and their insureds, not only can an uncovered loss damage relationships, but it also can lead to litigation. Action-over claims often originate from events of significant physical harm, where the plaintiff seeks to recover additional damages from the deepest pockets, even if that includes recovery from the employer through circuitous means. The concern is even greater in certain regions of the country where the risk may be concentrated or the courts may be particularly plaintiff friendly.

The liability issue in action-over claims arises from indemnification agreements, which are common in business contracts in construction and many other industries. Employers know that workers compensation law generally limits an employee's ability to recover expenses from his or her employer up to the statutory workers comp benefits. These laws, however, generally do not bar a worker from suing a third party. If the worker's employer agreed to indemnify that third party through a business contract, however, liability can end up reverting to the employer – not the third party.

This boomerang effect of third-party action-over claims is worrisome for employers because insurers may exclude coverage for such claims in CGL policies. To further complicate matters, those exclusions may not use the term "action over" but may instead use misleading or generic language such as "injuries to subcontract workers." It is possible under these circumstances for businesses to face both workers comp and commercial liability claims from the same underlying injury – and have no coverage for the CGL portion. Insurance professionals need to understand this complex scenario and how the insurance markets are reacting to it, to make sure that their insureds have protection.

Anatomy of an Action-Over Claim

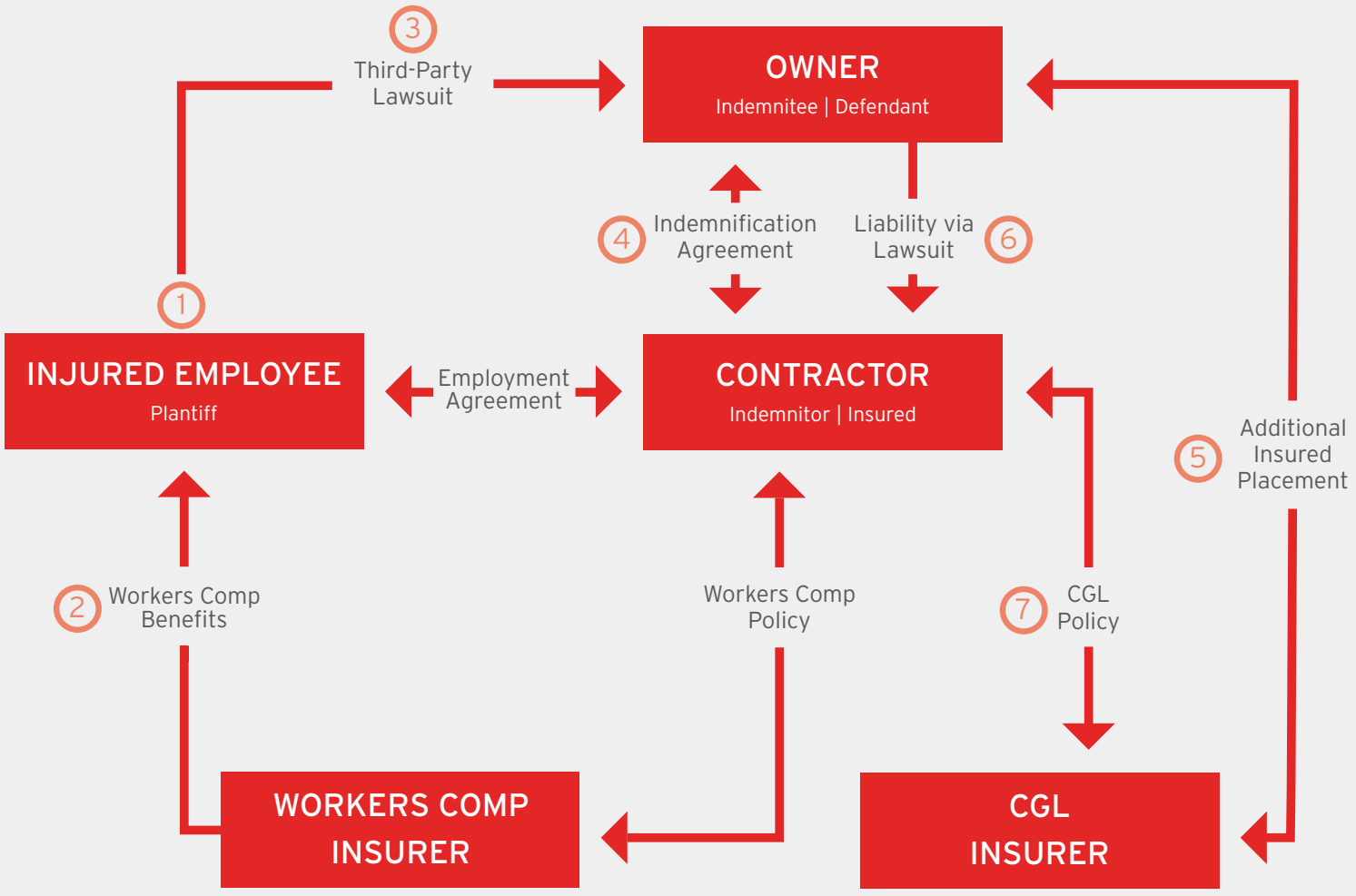
Businesses in many types of industries use subcontractors to perform work on their premises. The construction and oil and gas industries are two examples where subcontractor agreements are customary. Any business that agrees to indemnify another business as a subcontractor, however, may be exposed to action-over liability claims.

Consider the following example of how an action-over claim works: A maintenance company (the Employer) that contracts to provide its services to a property owner (the Owner) signs an indemnification agreement that requires the Employer to indemnify the Owner for claims against the Owner related to the Employer's work at the premises. One of the maintenance company's employees falls off a ladder at the property owner's premises while changing a lightbulb and incurs a serious head injury. The injured worker files a workers comp claim and, due to the nature of the injury, pursues third-party litigation against the property owner for several million dollars. Due to the indemnification agreement, the Owner requires the Employer to indemnify it for costs associated with the injured employee's lawsuit, which is known as an action-over claim.

Similarly, a construction subcontractor may agree to indemnify the general contractor. Commonly, the general contractor may insist on such indemnification as a condition of its contract for any litigation arising from the project. An injury to one of the subcontractor's employees, even if it's the fault of the general contractor, may result in liability for the subcontractor, depending on applicable state law.

The subcontractor may reasonably expect that it could submit such a claim to its CGL insurer, especially if the claim is for a debilitating injury. However, if the CGL insurer has excluded coverage for this type of claim, the subcontractor could face financial ruin or sue its insurance agent to recover these damages.

THE ROADMAP OF ACTION OVER CLAIMS



Difficult Venues

Most of the states in the U.S. permit construction contracts to include indemnity provisions. The scope of these provisions vary significantly, however, as restrictions may exist for private contracts, and broad form or intermediate form indemnity terms apply. Also many states have laws in place regarding Additional Insured endorsements and the extent to which a subcontractor's insurer is permitted to indemnify the contractor. As a result, state laws must be taken into consideration in order to understand the protections available and to draft policy language that provides these protections.

In addition, various jurisdictions around the nation are known as particularly friendly to plaintiffs. Strict labor laws typically influence the amount of litigation as well as the size of jury awards and settlements.

NEW YORK

New York historically has been one of the nation's most difficult venues for employers, particularly for businesses in the construction industry.

Loss drivers in New York, from a construction injury claims perspective, include frequency and severity of accidents as well as the state's plaintiff-friendly legal climate. The U.S. Occupational Safety and Health Administration (OSHA) since 2015 has required employers to report not only workplace fatalities but also serious work-related injuries, defined as those involving amputation, inpatient hospitalization, or the loss of an eye.

Three sections of New York's Labor Law -- 200, 240 and 241 – are special concerns for employers in construction:

- **Section 200.** This part of the labor law reinforces the common-law duty on employers to protect the health and safety of employees and those who are lawfully present on worksites. Notably, courts have expanded the scope of Section 200 to apply broadly to employers, not just those involved in construction.
- **Section 240.** Known as the "ladder law" or "scaffold law," this section protects workers from gravity-related injuries, i.e. falling from a height or being struck by a falling object. Section 240 also bars consideration of the worker's comparative fault and imposes strict liability on construction site owners and general contractors. In combination, those provisions of Section 240 alone make New York more plaintiff-friendly than other jurisdictions.
- **Section 241.** The labor law section imposes on construction site owners and contractors a duty to maintain a safe worksite that cannot be delegated. Under Section 241, a plaintiff need not establish that the site owner or contractor was negligent; rather, the plaintiff must show that the site owner or contractor violated industrial code and that such a violation caused the injury.[1]

A sampling of severe injuries reported to OSHA from construction industry employers in the Five Boroughs of New York City alone, from Jan. 1, 2015, to this year, include: chemical burns, electrocutions, electric shock, electrical burns, intracranial injuries, leg fractures, major muscle tears and other traumatic injuries requiring hospitalization.[2]

An example of New York's favorable legal climate for plaintiffs is the June 2017 decision by the Supreme Court of New York in *Cano v. Mid-Valley Oil Co. Inc.* In this case, involving a third-party action-over liability claim against the site owner, a subcontracted construction worker injured his dominant hand and wrist after falling from an unsecured ladder in 2005. The court not only adjusted the plaintiff's award for future medical expenses but also increased the plaintiff's award for past pain and suffering, from $100,000 to $1 million, and increased the award for future pain and suffering from $375,000 to $2.5 million.[3]

ILLINOIS

Cook County, Illinois, among other legal venues in the state, has a well-earned reputation as a plaintiff-friendly venue. Verdicts in construction injury lawsuits in Illinois can be quite large.

In 2012, an ironworker who was paralyzed after falling from a steel beam to a concrete floor 15 feet below was awarded $64 million.[4] The injured worker was a subcontractor who obtained workers compensation benefits from his employer and filed a third-party lawsuit against Panduit, which had contracted with the worker's employer, Area Erectors Inc. Although Area Erectors was dismissed from the injured worker's lawsuit against Panduit, it was ordered to contribute to attorneys' fees for the plaintiff's future medical expenses, which amounted to $25 million. On appeal, the Supreme Court of Illinois upheld the trial court's decision to require Area Erectors to pay the attorneys' fees.[5]

OTHER STATES

The Southeastern United States, like other areas where construction industry growth is strong, has seen a tightening of occupational safety and health regulation, which can contribute to increased litigation trends. Alabama, Florida and Georgia, for example, are seeing a combination of construction job growth, new penalties for health and safety violations, and more enforcement by state and federal health and safety regulators.[6]

Language of Exclusions

Exclusions in CGL policy forms are not all uniform, so a close reading of them is critical to determine whether they provide the intended scope of coverage. This is especially true of language that removes coverage for third-party action-over claims. Retail agents and brokers must remain aware that innocuous-sounding clauses in policy language can have major implications for coverage.

Action-over exclusions are generally a challenge only in non-admitted, or excess and surplus lines, policies. For example, some E&S insurers remove coverage via endorsement, and some are beginning to add exclusions for action-over claims in specific states, such as New York. Complicating matters, not all exclusions refer to "action-only claims" explicitly. Often exclusions refer instead to "amendment of employee injury exclusion", "amendment to definition of employee injury", or "carveback to contractual liability." Insurance professionals should read such clauses closely and seek clarification whenever needed.

Action-Over Questions Retailers Should Ask

1. Does the client's CGL policy exclude action-over claims or have wording that effectively bars coverage for them?
2. What options are available to obtain coverage for action-over claims?
3. What is your client's intention for risk transfer and indemnification in its contract?
4. Is the client prepared to front costs for a worker's injury over and above whatever workers comp benefits are available?

Analyzing the coverage issues and obtaining appropriate insurance requires expertise and knowledge of specific markets. Working with an experienced wholesale partner is important to prevent coverage gaps and costly unintended consequences. For more information, please contact your CRC Group representative.

Endnotes

1. "State of New York Construction Law Compendium," US Law Network Inc., 2012, https://www.uslaw.org/files/Compendiums2012/Construction/NewYork_Construction_Compendium_12.pdf

2. Severe Injury Reports, U.S. Department of Labor, Occupational Safety and Health Administration, https://www.osha.gov/severeinjury/index.html

3. Cano v. Mid-Valley Oil Company Inc., Supreme Court of New York, 2nd Appellate Division, 151 A.D.3d 685; June 7, 2017, http://law.justia.com/cases/new-york/appellate-division-second-department/2017/2015-02474.html

4. "Former ironworker gets record $64 million verdict for fall," The Chicago Tribune; Nov. 17, 2012, http://articles.chicagotribune.com/2012-11-17/news/ct-met-injured-worker-awarded-millions-20121117_1_million-verdict-steel-beam-third-generation-ironworker

5. Bayer v. Panduit Corp., Supreme Court of Illinois; 2016 IL 119553, http://illinoiscourts.gov/Opinions/SupremeCourt/2016/119553.pdf

6. "Why the Southeast is a hotspot for workplace safety law," Bloomberg Bureau of National Affairs, Sept. 21, 2017, https://www.bna.com/why-southeast-hotspot-n57982088322/

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