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How Do You Get There From Here? Navigating the Caps in GL Coverage for Cyber Exposures

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Insurance professionals are constantly challenged to stay “ahead of the curve” when evaluating their clients’ insurance needs and the key distinctions between the many coverage options available. The ultimate goal, of course, is to properly match client exposures with the most appropriate available coverage, thereby leaving no unexpected gaps.

When it comes to cyber-related risk exposures and the standard GL form, which claims will actually be covered continues to be unclear. Nowadays, even a relatively small business is likely to have a web site. Because often the main purpose of a web site is advertising, the business owner seeks to keep clients coming back to the site and staying longer on the site when they do. Thus, many of those sites are content-rich and highly dynamic. Evaluating whether corresponding exposures are covered by the existing insurance program is an important but sometimes difficult and time-consuming task. This article will examine potential gaps in coverage for a business with a web site that relies solely upon its GL policy for coverage.

Does the site host a chat forum or bulletin board? It is not uncommon for a business web site to provide a chat forum so that customers and other business partners can utilize the site to discuss industry-related news. The ISO GL form provides coverage for certain claims for “personal and advertising injury” but then excludes claims arising out of “an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.” While most of the content posted on such sites is noncontroversial, occasionally objectionable content is posted and the site owner gets sued. For instance, if a third party believes that statements posted on the site relating to them, their business or their products are false or disparaging, they may file a suit for defamation. Generally, Section 230 of the Communications Decency Act (47 U.S.C. §230) provides a defense to such suits, although the ultimate outcome will depend on the specific circumstances. Furthermore, even if there is a good defense, the site owner may be forced to hire its own attorney and put forth that defense at its own expense, if there is no insurance covering this exposure.

Does the site provide entertainment or industry news, or any content other than pure, traditional advertising of the site owner’s services or products? Sometimes a business web site will have a fun or entertaining section. For example, restaurants and banks often have those

sections on their web sites, many of them targeted to children. Would an intellectual property claim arising out of that part of the web site be covered by the standard GL? The ISO GL covers “personal and advertising injury” including “infringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’” It excludes claims “arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights” except “infringement, in your advertisement, of copyright, trade dress or slogan.” Thus, copyright, trade dress and infringement of slogan claims are covered to the extent they arise out of the insured’s “advertisement.” The form defines “advertisement” and states, “regarding web-sites, only that part of a web-site that is about your goods, products or services for the purpose of attracting customers or supporters is considered an advertisement.” Thus, unless content is “about” the site owner’s goods, products or services, it is not covered as “advertisement” even though it may well serve to make the site more user-friendly and thus more valuable from a marketing perspective.

What about other claims arising out of content on the site? The GL policy covers bodily injury and property damage arising out of an “occurrence” but would it cover a bodily injury claim caused by directions or advice or other content published on the insured’s web site? What about a restaurant that is promoting its new

“healthy eating” menu and publishes recipes and exercise instructions on its web site? If someone gets ill because the recipe has a mistake in it or gets injured because the exercise instructions are incorrect or too strenuous, will the GL policy cover that claim? It does not seem to fall within the scope of the “personal and advertising injury” coverage, but is it covered under Coverage A of the form, as part of the “products-completed operations hazard” coverage? It may depend on whether such content is considered part of “your work” or “your product.”

What sort of user information is gathered via the site, and how is that information stored and protected? If the site owner gathers information about Internet users but is less than clear in disclosing its information-gathering practices to users, the site owner may be subject to a lawsuit from users who object to having information about their browsing habits collected and used. Additionally, businesses whose web sites have sections targeted to children are subject to strict rules governing information collection practices on such sites, (e.g., The Children’s Online Privacy Protection Act, 15 USC §6502).

Furthermore, if information about child Internet users is gathered, the release of such information, even if accidental, could spawn messy litigation against the business web site owner, particularly if a third party obtains the information and uses it to send inappropriate communications to the children. Would the GL policy cover these claims? The ISO GL covers “oral or written publication, in any manner, of material that violates a person’s right of privacy.” Thus, to the extent such claims arise out of oral or written publication of information and fall into the category of “invasion of privacy,” they should be covered. If a claim falls outside of these parameters, it may not be covered.

As most know, GL policies exclude coverage for personal and advertising injury claims arising out of acts “committed by an insured whose business is...advertising, broadcasting, publishing or telecasting.” The ISO form attempts to clarify the intent of this exclusion somewhat by noting that for purposes of the exclusion, “the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.” Unfortunately, this language does not shed much light on how to determine in what circumstances an entity **will** be deemed to be in the business of advertising or publishing. There have been a few court decisions analyzing this issue, but the question of whether a particular insured will be deemed to be in the business of publishing or advertising based on their Internet presence will depend on the specifics of a given situation. This is another issue to be aware of when evaluating web site exposures and insurance coverage.

Some larger or more sophisticated clients might maintain an errors and omissions policy in addition to their GL policy, which typically covers negligence in performing services and which may pick up some of the Internet-related exposures. However, many E&O policies are schedule-driven; the policy will only cover certain claims that arise out of specific services scheduled in the policy form. If the web site offers services not scheduled, in all likelihood they would not be covered. Furthermore, many E&O policies do not include coverage for advertising or other content disseminated by the insured.

Given all of these uncertainties, what is the best approach for producers and their clients?

First and foremost is to recognize that these potential gaps exist and to be prepared to deal with them through identification and disclosure to your client. There are specific policies designed to cover Internet exposures, but realistically many may be too expensive for the smaller business owner and may actually compel a purchase of more coverage than the client really needs. Some GL carriers may be willing to extend coverage for at least some of the potential gaps for an additional premium via endorsements to the policy. Additionally, it is often possible to purchase broader GL coverage that deviates somewhat from ISO form language.

In conclusion, the best way to deal with these increasingly complex coverage issues is to:

- Identify potential gaps in your client’s insurance portfolio (a coverage checklist works great);
- Discuss potential gaps with your client so they can make an informed and considered decision on whether to retain the risk associated with these possible exposures or explore additional coverage alternatives;
- Document that these issues have been fully addressed with your client.

Of course, the likelihood that business owners with a web site will ever get sued for any of these types of claims is relatively small. Many may indeed be willing to take the risk of not having coverage for all of their web site-related exposures and may instead elect to self-insure. By helping your clients identify the possible gaps and the various coverage options available, you will have given them the framework they need to make an informed decision on this complex issue.

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