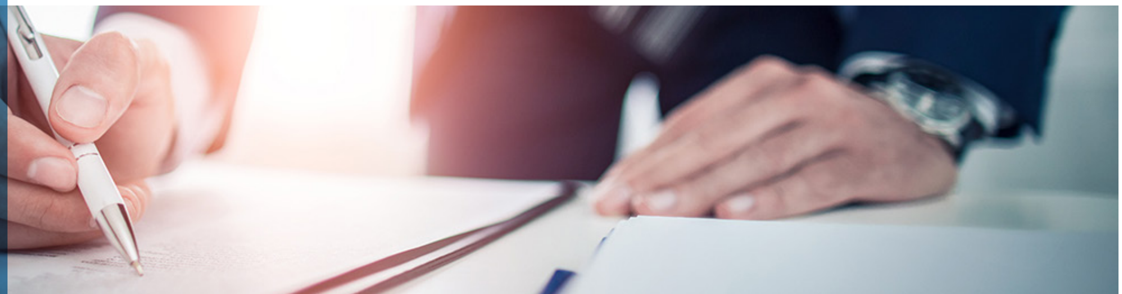

IDENTIFYING ANTI-STACKING PROVISIONS IN POLICY LANGUAGE

Anti-stacking, non-pyramiding, and tie-in provisions (“anti-stacking provisions”) are designed to ensure that an insurance company will not apply multiple sets of limits to a single loss event. Similar provisions can be designed to apply to deductibles. These provisions may be designed for application to intra-policy and inter-policy loss events. However, not every policy contains anti-stacking provisions. Policy stacking provisions are contractual provisions. State law and public policy will dictate if these contractual provisions are enforceable. When a state does not govern stacking or policy language is not clearly expressed, a court may permit stacking if stacking is not in violation of public policy. This is referred to as judicial stacking.

This article will discuss what anti-stacking provisions are, how to identify them in a policy, and what they mean to policyholders.

INTRA-POLICY ANTI-STACKING PROVISIONS

When a loss occurs, insurance policies are analyzed to determine what coverage exists and in what amount. In many cases, multiple coverage provisions will apply to a single loss, which may also result in multiple deductibles. In a perfect world, policyholders would be permitted to stack limits from all the applicable coverage in the policy and only pay one deductible for the entire loss – and in some situations, that is exactly what happens. Intra-policy anti-stacking provisions can occur in any policy. For purposes of this article, we will explore how these provisions apply in a property insurance policy.

Coverage

Insurance companies prefer to place a maximum limit of insurance within the policy to pay for the impact of catastrophic events such as flood, earthquake and named storms. The policy language, application, and impact of these provisions will differ with each insurance policy.

Example 1 – Lexington Insurance Company

Lexington utilizes anti-stacking provisions when it offers named storm coverage. The following is an excerpt from a property policy issued with Lexington. This named storm provision was found in the language regarding the named storm sub-limit:

> *“… per occurrence for the peril of Named Storm (a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone, Tropical Storm or Tropical Depression), regardless of the number of Coverages, Locations or Perils involved (including but not limited to, all Flood, (however caused) wind, wind gusts, storm surges, tornados, cyclones, hail or rain)….”*

The language states that all coverage associated with named storm – including, for example, coverage for debris removal, valuable papers, time element, looting, and sprinkler system discharge – will be included within the named storm sub-limit on the policy and will not be stacked.

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CONTACT

To learn more about how AmWINS can help you place coverage for your clients, reach out to your local AmWINS broker.

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Views expressed here do not constitute legal advice. The information contained herein is for general guidance of matter only and not for the purpose of providing legal advice. Discussion of insurance policy language is descriptive only. Every policy has different policy language. Coverage afforded under any insurance policy issued is subject to individual policy terms and conditions. Please refer to your policy for the actual language.

Courtesy of AmWINS Group, Inc.

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Example 2 – Zurich EDGE

A similarly applied provision exists in the Zurich EDGE policy. It applies the following language for certain described causes of loss, including the perils of earth movement, flood and named storm.

> *"If coverage is afforded under any Special Coverage or Described Cause of Loss, the applicable Limit of Liability for that Special Coverage of Described Cause of Loss is the most the Company will pay for all the loss or damage described therein even if coverage would otherwise be available under any other part of this Policy."*

In the Zurich policy, the above wording is modified within the definitions of flood, earth movement and named storm to provide limited exception for ensuing perils (e.g. fire, explosion, theft) that will not be aggregated in the limit.

Unlike inter-policy stacking provisions, intra-policy stacking provisions are not readily identifiable. In the above policy examples, one provision was found in the sub-limits and one provision was found in the limits section within the policy form itself.

Judicial Examples

In 2017, the Supreme Court of New Jersey ruled on Oxford Realty Group Cedar v. Travelers Excess & Surplus Lines Co. In this case, the plaintiff Oxford Realty (the insured) sustained severe damage during Superstorm Sandy. The insured claimed $207,961 of debris removal cost in addition to the $1,000,000 in flood damage. Travelers paid the $1,000,000 and refused to pay additional amounts for debris removal because Travelers intended for the $1,000,000 limit for flood to be the maximum limit for all loss and damage caused by flood. The court found the Travelers policy very difficult to read and understand. Based on policy wording, the insured believed the sub-limit of $500,000 for debris removal was in addition to the flood limit of $1,000,000. The flood endorsement placed a hard cap on the amount recoverable for flood damage. The provision stated:

> *"The most [Travelers] will pay for the total of all loss or damage caused by Flood… is the single highest Annual Aggregate Limit of Insurance specified for Flood in the Supplemental Coverage Declarations. This limit is part of, and does not increase, the limits of insurance that apply under this policy."*

The court ruled in favor of Travelers.

Similarly, in 2001, the Eighth Circuit ruled on Altru Health Systems v. American Protection Insurance Company. In 1997, the Red River in Grand Forks, N.D. crested 26 feet above flood stage. Altru Health Systems, a hospital, was ordered to evacuate. The flood damaged the hospital's parking lot and forced the hospital to close for three weeks. The hospital made a claim for more than $5,000,000 for the damage to the parking lot, civil authority business interruption, and extra expense. American Protection Insurance Company paid $1,500,000 (the flood limit) and stated that the loss filed under Civil Authority was included within the flood limit and was not in addition to it. The pertinent part of the wording is as follows:

> *"…all claims for loss, damage or expense arising out of any one Flood occurrence shall be adjusted as one claim."*

The court agreed with the insurer and capped the hospital's recovery at the flood limit of $1,500,000.

While property insurers may not agree to unstack limits of insurance for certain catastrophic perils, they may be willing to carve out from the limit loss that ensues or arises from the original peril and is not otherwise excluded. For example, an earthquake may result in sprinkler leakage, looting, fire or explosion. An insurer may be willing to agree that these ensuing perils are not part of the earthquake limit. Ideally, brokers should advise clients to avoid itemizing perils and instead include an exception for all covered causes of loss.

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Deductibles

Unlike coverage anti-stacking provisions, anti-stacking provisions for deductibles can benefit insureds. Each insurance company is different in their application of deductibles, and in most cases, deductible wording can be negotiated.

Consider a fire loss: a deductible will apply to the physical damage caused by the fire. A separate deductible may also apply to the time element loss. When an insurance policy has numerous deductibles listed, multiple deductibles may be stacked in a single loss.

When possible, an insurance policy should be structured so that only one deductible applies in an occurrence, regardless of the number of locations, perils, and coverages affected by the loss.

INTER-POLICY ANTI-STACKING PROVISIONS

Inter-policy anti-stacking provisions are usually easier to identify, but not in all cases. When a single loss event touches more than one policy, the amount of recovery may be restricted to a capped limit, even though multiple policies exist to pay the claim. It is important that any inter-policy anti-stacking provision clarifies that the provision will not apply to insurance designed as excess insurance.

Inter-policy anti-stacking provisions are found primarily on casualty, financial, and foreign package policy placements. In casualty placements, the provision might be referred to as “anti-stacking” or “non-pyramiding.” In professional policies like directors & officers (D&O), the provision might be referred to as “tie-in.”

Casualty Lines

Anti-stacking provisions are found in all types of casualty policies, including general liability, professional liability, and automobile. The following example details an Arizona case involving multiple automobile policies issued between a family of insurers.

In 2018, the Court of Appeals in Arizona ruled on Hanfelder v. GEICO Indemnity Company. Hanfelder, the insured, was injured in car accident in 2013. Hanfelder had two automobile insurance policies with GEICO: one was issued by GEICO Casualty Company and one was issued by GEICO Indemnity Company. GEICO Casualty is a wholly owned subsidiary of GEICO Indemnity. Hanfelder filed an underinsured motorist (“UIM”) claim under both policies because the at-fault driver was underinsured. GEICO Casualty tendered their UIM limit, but GEICO Indemnity denied the claim. GEICO Indemnity included the following provision in their policy:

> *“If separate policies or coverages with us are in effect for you or any person in your household, they may not be combined to increase the limit of our liability for a loss; however, you have the right to select which policy or coverage is to be applicable for the loss.”*
>
> *“If multiple policies or coverages purchased by one insured on different vehicles apply to an accident or claim, the insurer may limit the coverage so that only one policy or coverage, selected by the insured, shall be applicable to any one accident... For the purposes of this subsection, ‘insurer’ includes every insurer within a group of insurers under a common management.”*

The parties agreed that the GEICO companies are under common management, but the parties disagreed on the terms “us” and “we” in the policy. Hanfelder argued that “us” and “we” referred to GEICO Indemnity only and not GEICO Casualty (a non-party). The court consulted the Arizona UIM statute A.R.S. § 20-259.01(H) and agreed with the policyholder. Despite GEICO’s attempt to keep the policies from stacking their limits, the court overturned the trial court, which had ruled in favor of GEICO.

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Professional Lines

Anti-stacking provisions are generally referred to as "tie-in" provisions in the professional lines sector of the insurance industry. The example below concerns a tie-in provision in an excess D&O policy.

In 2011, the Supreme Court of New York, Appellate Division, ruled on a case that involved a plaintiff who purchased $20 million in excess D&O insurance for their companies. In 2001, a suit was filed against the plaintiff and the board of directors for a portfolio company of the plaintiff.

The portfolio company had D&O limits of $15 million. Both sets of D&O limits ($35 million total) included an AIG company as an issuing insurer. The plaintiff's AIG policy included a tie-in (or non-stacking) provision. It read as follows:

> *"In the event other insurance is provided to...a Portfolio Entity... and such other insurance is provided by the Insurer (AISLIC) or any other member company of American International Group (AIG)... then the Insurer's (AISLIC'S) maximum aggregate Limit of Liability for all Losses combined in connection with a Claim covered, in part or in whole, by this policy and such other insurance policy issued by AIG shall not exceed the greater of the Limit of Liability of this policy or the limit of liability of such other AIG insurance policy."*

As a result, instead of $35 million of limits, only $20 million would be available. The full $15 million of the portfolio company's D&O insurance was paid, but only $5 million of the plaintiff's $20 million in limits was paid by AIG because of the tie-in provision.

CONCLUSION

Anti-stacking provisions can have a significant impact on claims, and policyholders should always thoroughly read their policies. It is important for policyholders to ask questions about how their limits of insurance apply so they can make informed decisions concerning the limit of insurance to purchase. If possible, it is also important to negotiate deductibles in order to ensure that only one deductible applies in an occurrence.