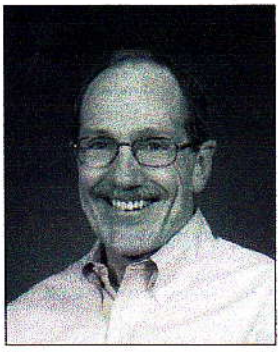
The General Aggregate Limit and Long Tail Claims — A Historical Perspective on Claims for Increased Limits

by Tommy R. Michaels, CPCU, AIC



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Asbestos, environmental, sexual abuse and other claims that date back to, and originate from, the 1940s continue to be a drag on insurance company earnings. Most of these claims are on policies issued before 1985, when the general aggregate limit was added to the policy. To fully understand the evolution of aggregate limits and the reasons why a general aggregate limit was not used until 1985, it is necessary to go back to the early part of the last century.

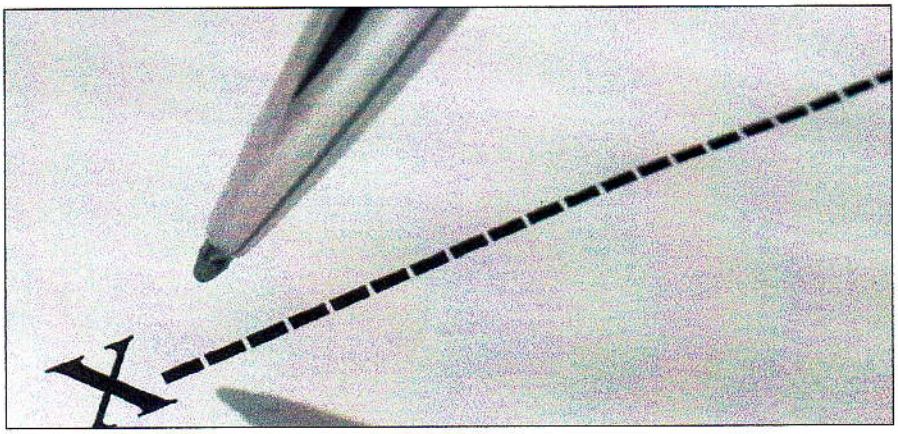
At that time, liability insurance was sold for specific hazards such as public liability, manufacturing liability, team liability and various types of contingent liability, to name a few. Having separate policies for each hazard was based on the belief that "the cost of the hazards of the new types of insurance should not be averaged in the premiums of all policyholders, because not all of the policyholders would have such hazards." (Sawyer, p. 13)

Each policy, therefore, had its own premium-rating basis. This might be area, payroll, sales, receipts or another basis. "Because each separate cover was regarded as a separate policy or contract, not only different rating bases were adopted but separate rules governing the writing of each cover were formulated." (Sawyer, p. 15)

As companies expanded operations throughout the nation and hazards increased, a need was recognized for a policy combining several coverages. In 1939, the National Bureau of Casualty and Surety Underwriters and The Mutual Casualty Insurance Rating Bureau began developing a comprehensive liability insurance program. In 1941, when the comprehensive general liability (CGL) insurance policy first became available nationwide, a new approach to the writing of liability insurance began.

Rather than needing a separate policy for each hazard to which an organization could be potentially exposed, an insured could obtain the CGL policy, which would insure all hazards not specifically excluded. This would mean that as new hazards arose, an exclusion would have to be added or an appropriate premium charge made.

There were many challenges and obstacles in implementing the new policy, with the different manual rules and rating bases serving as two of the biggest challenges. To meet the challenge of complying with the various manual-rating rules for the different types of coverage combined in the comprehensive liability form, there were separate aggregate limits — not a general aggregate limit on the policy.



Though the declarations page in the early versions of the CGL form had only one bodily injury aggregate limit, and that applied to products and completed operations, the declarations page had four separate property damage aggregate limits. These separate aggregate limits corresponded to the separate covers that were combined into the CGL policy:

- Premises.
- Operations.
- Protective.
- Products-Completed Operations.
- Contractual.

The limits of liability section of the form described the circumstances under which each aggregate would apply. The four separate property damage aggregate limits remained on the declarations page of the policy until the 1966 revision, but the description of circumstances for the different aggregates continued to be in the form with little change. This was finally overcome in 1985, when the general aggregate came into existence.

Having separate aggregate limits gave policyholders and their attorneys opportunities to make several different arguments to increase the limits of coverage and ultimate payout beyond what drafters intended. Listed below are three of the more common arguments and the basis of each argument:

- *The Products-Completed Operations Aggregate for Bodily Injury does not apply to workers exposed to asbestos during installation of asbestos-containing products even if the triggered policy incepts after the installation is completed.*
  From the early 1980s until the mid-1990s, most insurers made payments for asbestos claims as Products-Completed Operations, therefore subject to an aggregate. As limits became exhausted, policyholder

attorneys sought other ways to access insurance coverage. Policyholders oftentimes did not have umbrella or excess coverage, especially during the 1940s and 1950s, or the umbrella or excess insurer in place at the time may have subsequently become insolvent. In those instances, policyholder attorneys began making the argument that the policies were not exhausted because these were operations claims and there was no aggregate for bodily injury. Additionally, plaintiff attorneys began suing peripheral defendants that were considered second- or third-tier defendants. The attorneys for the plaintiffs and policyholders have been fairly successful in advancing this argument, and asbestos litigation has continued beyond the mid-1990s when it was believed to be going away.

- *A Property Damage Aggregate limit does not apply to environmental contamination caused by operations of a policyholder if the premium rating basis was not remuneration.*
  This argument is likely to be advanced for a policyholder whose policy was composite-rated for ease of premium calculation. The composite-rate may certainly include remuneration rating for manufacturer and contractor exposures, but oftentimes the rating sheets for a policy issued more than 20 years ago are not available.
- *There is a separate aggregate limit for each site where the policyholder is liable for environmental contamination.*
  This argument is premised on the policy language that describes the circumstances for the Premises Operations Aggregate and Protective or Independent Contractor Aggregate, which states, "These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured" or uses similar language. Separate aggregate limits for each project reflect the manual rules in effect in 1941. The manual called for "Property damage liability for a contractor requires a limit upon the aggregate losses which result from each separate project." (Sawyer, pp. 15–16) Even though there is no definition in the coverage form for "project," there is a statement that the aggregate for Protective or Independent Contractors is for operations performed for the named insured by independent contractors and general supervision thereof by the named insured.

The CGL form promulgated in late 1940 was a beginning, and all understood it would continue to change. The first revision to this form was in 1943, with other revisions taking place in 1947, 1955, 1966 and 1973, before the massive landmark revisions in 1985. Though E. W. Sawyer, a person instrumental in the development of the CGL policy, acknowledged that the CGL policy would continue to change and be modified, I do not believe he ever

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anticipated the long tail type of claims that insurance companies are being confronted with today.

An exclusion dealing with pollution exposure was finally added to the CGL policy in 1970. This exclusion was only a qualified exclusion and allowed the policy to still provide coverage for "sudden and accidental" pollution events. In 1985, the absolute pollution exclusion was adopted and incorporated into the CGL policy. Exclusions dealing with asbestos were added in the late 1970s and early 1980s. Since the courts consider sexual abuse to be an intentional act, the "expected or intended" injury exclusion would apply to those types of claims. Even though these exclusions were developed to restrict the scope of coverage to that anticipated by the premium, policyholder attorneys developed creative methods to expand coverage beyond that which was originally contemplated when the policy had been issued. This was done primarily through interpretation of the four or five different aggregates on the CGL policy.

This ability to increase the limits of coverage and ultimate payout continued until the General Aggregate limit came into existence along with massive changes made to the CGL policy in 1985. This was also the edition that changed the name of the form from Comprehensive General Liability to Commercial General Liability. The current CGL policy form has a General Aggregate limit and a Product-Completed Operations Aggregate limit. These limits apply to all bodily injury and property damage under Coverage A, damages under Coverage B and medical expenses under Coverage C.

The use of a General Aggregate limit resolved these issues because there was an aggregate limit that applied to bodily injury other than Products and Completed Operations. The General Aggregate limit is not dependent on a rating base or for separate projects, although there are endorsements available currently that allow a policyholder to have separate General Aggregate limits for each designated project.

As new hazards develop, new legal theories emerge and courts interpret the policy in ways not anticipated by the drafters at the time it was issued, the CGL policy form will continue to change and evolve. As always in handling claims, it is important to read the policy. ■

Reference

Sawyer, E. W. *Comprehensive Liability Insurance.* New York: The Underwriter Printer and Publishing Co., 1943.