

COMMERCIAL GENERAL LIABILITY POLICIES

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Common format of CGL policies

1. Declarations identifies insured, risks to be covered, policy limits; should also have a listing of the forms and endorsements that form part of the policy
2. Insuring Agreement - describes coverage provided by insurer
3. Conditions - insured's and insurer's rights and responsibilities under the contract/policy -- examples
 - (i) Notice of Loss
 - (ii) Insured's duty to cooperate.
 - (iii) Insurer's duty to respond
4. Exclusions modifies policy's insuring agreement to eliminate uninsurable risks or other coverage not contemplated under the terms of the insurance policy
5. Endorsements should be listed on the declaration page; endorsements can add, clarify or exclude policy coverage

Construction of Insurance Policies

1. Policies are construed liberally in favor of the insured and strictly against the insurer.
2. If the relevant policy language is susceptible to more than one reasonable interpretation; one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous.
3. Ambiguities are construed against the insurer and in favor of coverage.
4. The lack of a definition for an operative term in an insurance policy does not, by itself, create an ambiguity.
5. Although a policy provision may be complex and requires analysis to interpret it, that does not make the provision ambiguous.

Commercial General Liability Policy

In general, a commercial general liability policy does not cover repair or replacement costs, but does cover consequential damages.

The Insuring Clause typically provides coverage for the “sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ caused by an “occurrence” within the “coverage territory” during the policy period.

Insuring Agreement (*Sample form*)

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "**property damage**" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "**occurrence**" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" **occurs during the policy period**; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the

policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.
- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1 of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:
 - (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
 - (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
 - (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

Property damage clause

"Property damage" means: *(sample definition)*

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

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.

Occurrence clause

(Sample definition)

"**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions

In an occurrence policy, coverage is provided if the act giving rise to the claim occurs during the policy period, regardless of when the claim is made or reported.

Defective construction can be an 'occurrence' under Florida law.

If the damage was expected or intended, there may be no occurrence under the definition of the policy term.

Consider whether there are multiple occurrences.

Triggers of Coverage

The four principal theories that various courts have used to determine when coverage is triggered include (1) exposure; (2) manifestation; (3) continuous trigger; and (4) injury-in-fact.

- (1) Exposure theory - property damage occurs upon installation of the defective product.
- (2) Manifestation theory - property damage occurs at the time damage manifests itself.
- (3) Continuous trigger theory - defines property damage as occurring continuously from [the] time of installation until the time of discovery.
- (4) Injury-in-fact or damage-in-fact theory - when the property damage underlying the claim actually occurs.

View That Injury-In-Fact Trigger Applies

Axis Surplus Ins. Co. v. Contravest Constr. Co., 921 F.Supp.2d 1338, 1346 (M.D.Fla.2012); *Trizec Properties, Inc. v. Biltmore Construction Co.*, 767 F.2d 810 (11th Cir. 1985)

View That Manifestation Trigger Applies

Amerisure Mut. Ins. Co. v. Albanese Popkin The Oaks Development, 2010 WL 4942972 (S.D. Fla. 2010) ; *Assur. Co. of Am. v. Lucas Waterproofing Co., Inc.*, 581 F.Supp.2d 1201, 1206 (S.D.Fla.2008).

Products -Completed Operations coverage – This provides a combination of two types of coverage.

- The **completed operations hazard coverage part** covers claims occurring after construction operations are completed.
- The **products hazard coverage** covers claims caused by products after the physical possession of the products has been released to others.”

Duties in event of a loss

- (i) Insured should give notice to insurer
- (ii) Insured should cooperate.
- (iii) Insurer should respond under *F.S. 627.426(2)*, this includes
 - providing written notice of reservation of rights to insured by registered or certified mail (or by hand delivery) within 30 days after liability insurer knew or should have known of the coverage defense
 - providing written notice to insured by certified or registered mail of refusal to defend insured; or obtains a nonwaiver agreement from the insured after full disclosure of specific facts and policy provisions, and the duties, obligations and liabilities of the insurer during and following the pendency of the litigation; or retains independent counsel which is mutually agreeable to the parties, with reasonable fees agreed upon by the parties or set by the court

Florida courts distinguish between a lack of or failure of coverage because coverage does not exist and a specific exclusion to what otherwise is within the insuring clause. *F.S. 627.426(2)*

Duty to Defend

An insurer's duty to defend is distinct from and broader than its duty to indemnify. The duty to defend is determined solely by the allegations in the complaint, which must set forth facts that bring the case within the coverage of the policy. Any doubt about the duty to defend must be resolved in favor of the insured.

Duty to Indemnify

The duty to indemnify is narrower than the duty to defend and is determined by the underlying facts adduced at trial or developed through discovery during the litigation.

Common business risk exclusions

Damage to your work exclusion

(Sample form)

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

This exclusion removes coverage for the repair or replacement of self-performed work where the occurrence took place after project completion. But the exclusion does not apply either to damage to the insured’s subcontractors’ work, nor to damage caused by the work of the insured’s subcontractors (including to the insured’s own work if caused by the subcontractor’s work)

Subcontractor Exception for Completed Operations exclusion *(Sample form)*

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

In 1986, the insurance industry amended the ‘your work’ exclusion to provide that even if the property damage is the builder's own work, the ‘your work’ exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

In *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007) the court found coverage for structural damage to completed homes caused by subcontractor's defective work. The court reasoned that the subcontractor exception to the “your work” exclusion under completed operations coverage allowed for such coverage.

In *Auto-Owners Insurance Company v. Pozzi Window Company*, 984 So.2d 1241 (Fla.2008) insurance coverage was sought under a contractor's standard CGL policy for the costs to repair and replace windows which were defectively installed in a new home by a subcontractor. After moving in, the homeowner discovered that the windows leaked, causing water damage to the surrounding walls, floor and ceiling, as well as to the windows themselves. The contractor's insurer paid the homeowner for damage caused to his personal property by the leaky windows, but refused to pay for the repair or replacement of the windows themselves. In analyzing this issue, Florida’s Supreme Court held that:

If the windows were purchased by the [h]omeowner and were not defective before being installed, coverage would exist for the cost of repair or replacement of the windows because there is physical injury to tangible property (the windows) caused by defective installation by a subcontractor. In that instance, damage to the windows caused by the defective installation is the same as damage to other portions of the home caused by the leaking windows. However, a different result would follow

if the windows were defective prior to being installed and the damage to the completed project was therefore caused by defective windows rather than faulty installation alone.

Pozzi Window, at 1248

Damage to Property Exclusion

(Sample form)

That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations; or (6) That particular part of any property that must be restored, repaired or replaced because your

The damage to property exclusion removes coverage for damage to “that particular part” of real property on which the insured or its subcontractors are performing operations, or “that particular part” of any property that must be repaired or replaced because the insured’s work was performed incorrectly on it.

Impaired Property exclusion

(Sample form)

... any ‘Property Damage’ to ‘Impaired Property’ that has not been physically injured, arising out of (1) a defect, deficiency inadequacy or dangerous condition in Your Product ...; or (2) a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with

The impaired property exclusion is not easily understood. The exclusion removes coverage for “impaired property” or property that has not yet been physically injured. It addresses so-called “passive defects” in buildings or other structures due to the presence of defective work. A passive defect is one that has not yet failed, but presents an increased risk of failure in the future.

Generally, the role of this exclusion is to bar coverage of property damage (usually in the form of ‘loss of use’) to ‘good work’ caused by the insured’s ‘bad work.’ Put another way, the exclusion attempts to address, among other matters, the inclusion of the insured’s work into a larger project.

Contractual Liability Exclusion

(Sample form)

“[P]roperty damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an “insured contract”,

provided the ... “property damage” occurs subsequent to the execution of the contract or agreement.

This exclusion typically applies to liability assumed under a contract or agreement but not to duties assumed by the insured. In general, this exclusion does not apply to the insured’s assumption of another contracting party’s tort liability to third parties, where the agreement qualifies as an “insured contract” and providing that the agreement was executed before the subject property damage occurred.

"Insured contract" means: (*Sample definition*)

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement

Rip and Tear Damages

These are generally damages caused to non-defective work that needs to be accessed to repair defective work. For example, one might have to destroy perfectly fine drywall in order to repair and replace corroded A/C piping.

One view of these types of damages is that CGL policies cover the removal and replacement of non-defective property because such "property damage" was caused by an "occurrence;" the defective workmanship. An opposing view is that the expenses for removing and repairing the non-defective property does not constitute an “occurrence” and contends that the damage is caused by the repair of the defective condition, but not damage actually caused by the defective condition.

Additional insured considerations

1. Is your client an additional insured?
 - (a) What does the contract require?
 - (b) What does the insurance policy state?
 - (i) Applicable endorsements?
2. What coverage do you have as an additional insured?
 - (a) What does the insurance policy states?
3. Example language for ongoing operations.
 - A. *Section II – Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.*
 - B. *With respect to the insurance afforded to these additional insureds, the following exclusion is added:*

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

- (1) *All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or*
- (2) *That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.*

4. Example language for completed operations.

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

Bottom Line: Read the Policy