



# Insurance Matters!

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A Newsletter of the **Insurance and Surety Committee**  
of the Real Property Probate and Trust Law Section of The Florida Bar



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## The Claims-Made CGL Policy

By: Craig F. Stanovich, Austin & Stanovich Risk Managers, LLC, Holden, MA

Virtually all contracts or agreements that obligate others to purchase insurance require a general liability policy to be "occurrence-based." In other words, "claims-made" general liability policies are not allowed. If you show up with a claims-made general liability policy, you risk being shunned. Furthermore, it seems claims-made general liability insurance is similar to religion and politics—not to be discussed in polite company. So why does the claims-made commercial general liability (CGL) policy have such a poor reputation?

The difference between an occurrence and claims-made liability policy<sup>1</sup> is all about timing—that is, the coverage "trigger." The question is not only *what* event must take place to obligate the CGL policy to respond but also *when* that event must take place.

### The Occurrence CGL Trigger

The "occurrence" CGL is triggered when the *bodily injury or property damage* is deemed to have occurred. Despite its "occurrence" title, when the occurrence happens has no bearing on the coverage trigger.<sup>2</sup> Instead, the event that must occur and that obligates the CGL insurer to respond is bodily injury or property damage—not the occurrence.



See Claims-Made CGL Policy, continued on Page 2

## Update on the Status of Flood Insurance Legislation

By: Louis E. "Trey" Goldman, Legislative Counsel | Florida Realtors®, Tallahassee, FL

### Highlights of H.R. 3370, the Homeowner Flood Insurance Affordability Act

- Caps annual flood insurance rate increases at 18% for most properties built after 1975. Refunds will be provided to policyholders who purchased a pre-FIRM home and flood insurance policy after July 6, 2012, the effective date of Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12).
- Grandfathering is reinstated. All post-FIRM properties built to code at the time of construction will have protection from rate spikes due to new mapping.
- Grandfathering now stays with the property, not the policy. The sale of a property will no longer trigger a rate increase.
- Residential policyholders will incur a \$50 surcharge, annually. For businesses and second homes, the surcharge is \$250.
- FEMA will strive to reach a goal where most residential policy holders have a premium that is no greater than 1% of the value of coverage (i.e. \$2,000 for a \$200,000 policy).
- This Act returns the "substantial improvement" threshold (i.e. renovations and remodeling) to 50% of a structure's fair market value level. Under BW-12, premium increases were triggered when the renovation investment met 30% of a home's value.
- Establishes a Flood Insurance Advocate within FEMA to, among other things, answer current and prospective policyholder questions about the mapping process and flood insurance rates.
- The Act allows for payments to be made in monthly installments, and policyholders will be reimbursed by FEMA for successful map appeals.



See Flood Insurance Legislation, continued on Page 3

## Claims-Made CGL Policy, continued from page 1

The obligation of the CGL insurer(s) to respond to bodily injury or property damage *occurring during its policy period(s)* remains, even if a claim or lawsuit seeking damages resulting from that bodily injury or property damage is filed months or even years after the "occurrence" CGL policy has ended.

### The Claims-Made CGL Trigger

The "claims-made" CGL is triggered when a *claim* for bodily injury or property damage is *made* against an insured. While the *claim* is the event that triggers a claims-made CGL policy, the timing of the bodily injury or property damage is still very important<sup>3</sup>—but it is *not* the trigger.

Unlike an "occurrence-based" CGL policy, if the first claim is made or lawsuit filed against an insured months or years after an *unendorsed* "claims-made" CGL policy has ended, such a claim will *generally*<sup>4</sup> not be covered, even if the bodily injury or property damage was deemed to have taken place during the terminated CGL policy period. This is the very essence of a claims-made CGL policy—the claim must be made against an insured during the policy period to trigger coverage.

### Retroactive Date

One of the most important characteristics of a claims-made CGL policy is the retroactive date. The CGL declarations usually lists a specific date (month, day, and year) that will be labeled as the retroactive date.

The function of the retroactive date is to *eliminate* all coverage under a claims-made CGL policy for any bodily injury or property damage that occurred *before* the retroactive date. The major reason for the CGL retroactive date is to prevent the purchase of retroactive insurance.

For example, consider a landlord who chooses not to purchase any general liability insurance. But the landlord learns today that a patron was seriously injured on his premises last week due to an inadvertently created but unknown, previously existing dangerous condition. Because of the substantial probability of potential liability to the patron for damages, the landlord might now seek a claims-made CGL policy. Although the bodily injury has already occurred, a claims-made policy *without a retroactive date* may afford the landlord coverage for the injured patron<sup>5</sup> as it is likely a claim will not be made against the landlord for a few weeks, which the landlord hopes will be after his purchase of the claims-made CGL policy.

However, if the claims-made CGL policy sought by the landlord is written with a retroactive date that is same date as the policy inception date, the landlord will have no coverage for the claim brought by the patron as the bodily injury occurred *prior* to the retroactive date.

### Retroactive Date—Misconceptions

Unlike most professional liability or management liability policies, the retroactive date on a standard claims-made CGL policy does NOT apply to "prior acts." Rather, the retroactive date applies ONLY to bodily injury or property damage deemed to have occurred *before* the retroactive date. Stated differently, the *date* a construction project was completed or the *date* a product was made is not pertinent to applying a claims-made CGL policy's retroactive date.

Using the previous example of the landlord, if a claims-made CGL policy was purchased by the landlord *after* the unknown dangerous condition was inadvertently created but *prior* to the patron's actual bodily injury, the claims-made policy would still apply. To repeat—the retroactive date on the claims-made CGL applies not to the prior act (the act that created the dangerous condition) but only to the bodily injury or property damage resulting from the act (the date the patron was injured on the dangerous condition).

The misconception that a claims-made CGL policy's retroactive date applies to "prior acts" contributes at least in part to the dim view that many take of a claims-made CGL policy. This lack of understanding may result in a failure to consider the claims-made CGL as a potentially *superior* alternative to many "occurrence-based" CGL policies that contain so many onerous exclusions that the coverage provided borders on illusory.

### Role of "Occurrence" in a Claims-Made CGL

In order for Coverage A in the CGL policy to be triggered, bodily injury or property damage must be caused by an "occurrence." This requirement is the same for both a claims-made and an occurrence CGL policy. Additionally, an each occurrence limit applies to Coverage A for either policy.

### The Tale of Two Tails

If a claims-made CGL policy is canceled (or not renewed), or the insurer moves forward or advances the retroactive date, or the insurer renews or replaces a claims-made CGL with an "occurrence" CGL policy, a gap in coverage will result. The protection against this gap for most insureds is an extended reporting period, sometimes referred to as a

See Claims-Made CGL Policy, continued on Page 4

<http://www.rpptl.org>

## Flood Insurance Legislation, continued from page 1

### Highlights of HB 542, by Senator Jeff Brandes (R - St. Petersburg)

- Effort to establish a regulatory framework that encourages insurers to write primary flood risk in Florida, and provide policyholders with a viable alternative to the National Flood Insurance Program (NFIP).
- Applies to personal lines residential coverage. Does not apply to second homes or commercial properties.
- Defines “flood” and allows authorized insurers to sell four different types of flood insurance products:
  1. Standard coverage, which is the equivalent of a standard flood insurance policy under the NFIP. The policy must provide the same as coverage as a policy provided by the NFIP regarding the definition of flood, coverage, deductibles, and loss adjustment.
  2. Preferred coverage, which includes the same coverage as standard flood insurance and also must cover flood losses caused by water intrusion from outside the structure that are not otherwise covered under the definition of flood in the bill.
  3. Customized coverage, which is coverage that is broader than standard flood coverage.
  4. Supplemental coverage, which supplements an NFIP flood policy or a standard or preferred policy from a private market insurer. Supplemental coverage may provide coverage for jewelry, art, deductibles, and additional living expenses. It does not include excess flood coverage over other flood policies.
- For rating flexibility, the bill allows flood rates filed before October 1, 2019, to be established through a rate filing with the Office of Insurance Regulation (OIR) that is not required to be reviewed by the OIR before implementation of the rate (“file and use” review) or shortly after implementation of the rate (“use and file” review). Specifically, the flood rate is exempt from the “file and use” and “use and file” requirements of s. 627.062(2)(a), F.S., and the OIR’s authority to require the insurer to provide information necessary to evaluate the company and the reasonableness of the rate.
- Allows surplus lines agents to export a contract or endorsement to an eligible surplus lines insurer without making a diligent effort to seek such coverage from three or more authorized insurers.
- Prohibits Florida Hurricane Catastrophe (CAT) Fund – a state-created reinsurer for insurers – from providing reimbursement for flood losses.
- Allows Florida’s Insurance Commissioner to provide any Federally required certifications.
- Bill is effective upon becoming law. **IM**



## Launch of New Optional Appellate Arbitration Rules by AAA and ICDR

By: Giselle Leonardo, Esq., Arbitrator and Civil Engineer. Giselle Leonardo P.A., Ft. Lauderdale, FL



On November 1, 2013, the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR) made effective the new optional procedures for appeal for parties involved in arbitrations which provide for a streamlined, high level review of arbitral awards.<sup>1</sup> Generally, courts have been reluctant to set aside arbitration awards. Historically, the trend has been that arbitration awards have only been set aside by courts when very narrowly defined statutory grounds have been met. The new appellate rules allow for an appeal within the arbitral process and comport with the goal of an “expedited, cost-effective and just appellate arbitral process.”<sup>2</sup> This appellate arbitral process allows for a standard of review that is broader than currently contemplated by federal and state statutes for vacature. The move by the institution apparently was in response to users concerns regarding the importance of the ability to appeal in large complex cases.

Key points of the new Optional Appellate Arbitration Rules (“Appellate Rules”) include:

- 1 – The Appellate Rules may be provided for by the parties, independent of, and whether or not the underlying award was conducted under the rules of the AAA or ICDR.<sup>3</sup>
- 2 – The rules may only be used when there is an agreement of the parties, either by contract or by stipulation.<sup>4</sup>
- 3 – The bases for appeal of the underlying award include “an error of law that is material and prejudicial” and “determinations of fact that are clearly erroneous.”<sup>5</sup>
- 4 – Determination of the appeal will generally be determined by the submission of written documents with no oral argument, unless directed by the appeal tribunal.<sup>6</sup>
- 5 – The anticipated time for completion of the process under the new Appellate Rules is about three months which gives both sides time to submit appellate briefs.<sup>7</sup>

*“The new appellate rules ... allows for a standard of review that is broader than currently contemplated by federal and state statutes for vacature.”*

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## Claims-Made CGL Policy, continued from page 2

"tail." An extended reporting period lengthens the CGL policy to include coverage for certain claims made against an insured *after* the CGL policy has ended.

### Basic Extended Reporting Period

In a standard Insurance Services Office, Inc. (ISO), claims-made CGL policy, if any of the above actions are taken, the basic extended reporting period (BERP) protects the insured *automatically* without additional charge.

The BERP may apply in one of two ways. First, if an incident (referenced in the policy as an "occurrence") is reported to the insurer not later than 60 days after the end of the policy *and* that incident involves bodily injury or property damage, the BERP is extended 5 years from the end of the policy.

The result is that the BERP changes the policy so that a claim made against an insured *resulting* from the reported incident *and* made within 5 years after the end of the CGL policy is considered a claim made *during the policy period*.

Second, the BERP will also respond to a claim made against an insured for an incident NOT previously reported to the insurer. However, coverage under the BERP applies for such an unreported incident *only if* the claim is made no more than 60 days after the end of the policy.

**BERP—other limitations.** The BERP does not apply to any claims if subsequent insurance (for example, another claims-made CGL policy) would apply to the claim. Further, if the BERP does apply, it will not serve to increase the limits or reinstate any aggregate limits of the claims-made CGL policy under which it is activated. Finally, the BERP applies only if the bodily injury or property damage that gives rise to the claim occurs after the policy retroactive date and *before the end of the policy period*.

What is obvious is that the BERP provides very limited coverage, particularly for unknown incidents that result in claims against an insured more than 60 days after the policy ends. In most instances, the BERP still leaves the policyholder with a substantial gap in its liability coverage.

### Supplemental Extended Reporting Period

Also provided within a standard ISO claims-made CGL policy is the optional supplemental extended reporting period (SERP). The SERP is available to the insured under the same circumstances as the BERP (policy cancellation or non-renewal, the insurer advances the retroactive date, or the insurer replaces the claims-made CGL with an "occurrence" policy). There are, however, several substantial differences.

**SERP—premium charge.** The SERP must be elected by the insured and requires payment of additional premium. While the premium is set by the insurer, the standard ISO claims-made CGL policy caps the additional premium at 200 percent of the annual premium of the claims-made policy under which this option is being chosen. Further, the insured has a limited amount of time to decide to purchase the SERP; the election must be made in writing by the policyholder within 60 days after the end of policy.

The SERP is usually purchased because the protection afforded by the BERP still leaves the policyholder with a gap in coverage. For example, any incident in which bodily injury or property damage occurs during the claims-made policy periods but that is unknown to the policyholder during those policy periods (and 60 days thereafter) and that results in a claim more than 60 days after the policy has ended will not be a covered claim under the BERP.

Thus, the SERP extends the policy for an "unlimited duration," meaning that coverage is provided for any claim that is made against an insured, provided the claim results from bodily injury or property damage that occurred after the retroactive date and before the end of the policy period. The SERP begins only after the BERP ends.

In addition, unlike the BERP, the SERP *does* reinstate the aggregate limits. Referred to as supplemental aggregate limits, the aggregate limits of the claims-made policy under which the SERP is elected are "reset" for any claims that are covered by the SERP.

**SERP—other insurance.** Also unlike the BERP, the SERP still applies even if other insurance applies to the same claim. However, the SERP will apply only as excess over that other insurance.

**SERP—misconceptions.** Demands for a "tail" are far too common in the context of liability insurance for persons or organizations that are selling or ceasing operations. Not only is a "tail" not available for purchase on an "occurrence-based" CGL policy; a "tail" or extended reporting period on a claims-made CGL policy does not provide any coverage for discontinued products or completed operations.

As noted above and emphasized here, the BERP and SERP both require that the bodily injury or property damage occurs not only after the retroactive date *but also prior to the end of the policy*. Bodily injury or property damage that

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## Appellate Arbitration Rules, continued from page 3

6 – The Arbitrators comprising the Appellate Panel consist of former federal and state judges and neutrals with strong appellate backgrounds.<sup>8</sup>

The Appellate Rules set forth procedures including: Applicability of the Appellate Rules, the Effect of Appeal on the Underlying Award, Filing Requirements including Cross-Appeals, Qualifications of the Appeal Tribunal and Appointment of the Appeal Tribunal, Preliminary Procedures and Parties' Participation, Jurisdiction, Bases for Appeal, Assessment of Costs and Fees, Conduct of Hearing (including Venue, Oral Argument, Record on Appeal, Appellate Briefs and Cross Appeal Briefs, Service of Documents), Decision of Appeal Tribunal, Finality of Appeal, Confidentiality and Applications to Court, among others. The Appellate rules do not apply to consumer type disputes with standardized agreements.<sup>9</sup>

By filing the Notice of Appeal, the parties agree that the underlying award shall not be considered final for purposes of any court actions to "modify, enforce, correct, or vacate the underlying award" and is not intended to replace the modification of award remedies available under the AAA's Commercial Arbitration Rules.<sup>10</sup>

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occurs *during* the extended reporting period (and thus after the end of the CGL policy) is not covered by the claims-made CGL policy "tail," even if the claim against an insured is actually made during the extended reporting period. This fundamental principle regarding the function of a claims-made extended reporting period or "tail" is too often misunderstood.

### Conclusion

There is nothing inherently evil or defective about a claims-made CGL policy. There may be situations in which a claims-made CGL policy would provide essentially the same coverage as an "occurrence" CGL policy.

For example, a new operation that obtains a claims-made CGL policy with a retroactive date that is the same as the inception date of the policy would not have any liability coverage disadvantage compared to an occurrence CGL policy. As operations have not yet begun, bodily injury or property damage taking place before the retroactive date and the inception date of the CGL policy are not only unlikely; even if they did take place, the occurrence policy would not apply either—the bodily injury or property damage did not occur during the policy period (occurrence CGL).

One advantage of the claims-made CGL policy may be the premium—the first year of a claims-made policy is typically a fraction (38 to 60 percent) of the occurrence CGL premium. Of course, the premium increases each year the claims-made policy matures until, after 5 years, the premium of the claims-made CGL policy is 100 percent of the occurrence CGL policy.

The downside, of course, is the need to purchase the SERP at up to 200 percent of the annual premium in the event the retroactive date is pushed forward or the only replacement or renewal option is an "occurrence" CGL. But, a continuous claims-made CGL policy, which maintains the original retroactive date, provides the same coverage *while it is in effect* as does an occurrence CGL policy. While there certainly are no guarantees that an insurer, or any insurer, will offer such continuous coverage, there are no corresponding guarantees that an insurer will continue the same terms and conditions for an occurrence CGL policy either.

The overall point is this—the poor reputation of the claims-made CGL policy tends to be exaggerated and is often based on misinformation, such as charges that the retroactive date excludes "prior acts." A thorough understanding of the workings of a claims-made CGL policy should be undertaken *before* following conventional wisdom and categorically dismissing this option entirely.


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<sup>1</sup> Reference in this article is solely to Coverage A – Bodily Injury and Property Damage. The claims-made CGL policy also changes Coverage B, but such changes are not addressed here.

<sup>2</sup> See also "Is the Occurrence the Bodily Injury or Property Damage?"

<sup>3</sup> See retroactive date and extended reporting period explanation below.

<sup>4</sup> In certain circumstances, the unendorsed CGL policy's basic extended reporting period may apply for as long as 5 years from the termination of the claims-made policy, as explained later in this article.

<sup>5</sup> Some states' laws may consider the patron's bodily injury a known loss or loss in progress and prohibit coverage as a matter of law, despite the terms of the claims-made CGL policy. 

"A thorough understanding of the workings of a claims-made CGL policy should be undertaken before following conventional wisdom and categorically dismissing this option entirely."

## Appellate Arbitration Rules, continued from page 5

<sup>1</sup> American Arbitration Association, Released November 1, 2013. Online at [www.adr.org](http://www.adr.org).

<sup>2</sup> American Arbitration Association.

<sup>3</sup> <http://go.adr.org/AppellateRules> Rule A-1.

<sup>4</sup> *Id.* at Rule A-1.

<sup>5</sup> *Id.* at Rule A-10.

<sup>6</sup> *Id.* at Rule A-15.

<sup>7</sup> *Id.* at Introduction.

<sup>8</sup> American Arbitration Association.

<sup>9</sup> *Id.* at Rule A-1.

<sup>10</sup> *Id.* at Rule A-2.



## Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management.

## Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

Co-Chair - Wm. Cary Wright ([cwright@cfjblaw.com](mailto:cwright@cfjblaw.com))

Co-Chair - Frederick R. ("Fred") Dudley ([dudley@mylicenselaw.com](mailto:dudley@mylicenselaw.com))

Vice-Chair and CLE - Michael G. Meyer ([mgmeyer83@gmail.com](mailto:mgmeyer83@gmail.com))

Secretary & Newsletter - Scott P. Pence ([spence@cfjblaw.com](mailto:spence@cfjblaw.com))

Legislative Subcommittee—Sanjay Kurian ([skurian@becker-poliakoff.com](mailto:skurian@becker-poliakoff.com))

Website - Timothy P. Lewis ([tlewis@milbermakris.com](mailto:tlewis@milbermakris.com))

Legislative Liaison - Louis E. "Trey" Goldman ([treyg@floridarealtors.org](mailto:treyg@floridarealtors.org))

## Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

Get answers to these, and many other questions, by attending our **FREE** monthly CLE programs.

When: Noon - 1:00 P.M. ET on the third Monday of every month, excluding government holidays.

Where: Via Teleconference

How: Dial-in number: **888-376-5050**

Participate Code: **8425484201#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-60 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

## Schedule of Upcoming RPPTL Section Meetings

July 31-August 3, 2014  
Executive Council Meeting  
& Legislative Update  
The Breakers  
Palm Beach, Florida

September 18-22, 2014  
Executive Council Meeting  
(Out of State Meeting)  
Sofitel Chicago Water Tower  
Chicago, Illinois

November 13-16, 2014  
Executive Council Meeting  
Waldorf Astoria Naples  
Naples, Florida

## UPCOMING CLE:

A special RPPTL Section-wide CLE presentation by **Bruce Partington** on behalf of the Insurance and Surety Committee.

***Practical Advice for Clients on Development and Construction Insurance Issues and Claims***

**Date: TBD**

Check the RPPTL Section's web page for more details about this and other CLE programs.

## Did you know?

You can access previous issues of *Insurance Matters!*, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at <http://www.rpptl.org>.

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of *Insurance Matters!*, please contact Scott Pence at [spence@cfjblaw.com](mailto:spence@cfjblaw.com).

<http://www.rpptl.org>