

TENDERING CLAIMS UNDER YOUR CGL INSURANCE POLICY

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Please note that this article is only intended to provide some general educational information regarding the structure and application of comprehensive general liability insurance policies. Decisions as to when you can tender your claims and whether or not you should do so is a decision you should make only after consulting relevant professionals in each field and only after reviewing the current laws, and facts and circumstances of each case. In addition, it may be advisable to consult with your attorney and insurance specialist while making such determinations.

I. LIABILITY POLICIES IN GENERAL

A. *History of Commercial Liability Policies*

General liability policies typically include all types of insurance except those which are employment liability (i.e. worker's compensation) or automobile liability insurance. Typically, insurance which covers your commercial activities is called a "Comprehensive General Liability" (or "CGL") policy. CGL policies were introduced in the 1940's to the business community as a way of providing a combination of available types of coverage using standardized language.

CGL policies combine five separate hazards which were previously only available as individual policies. These are hazards relating to (1) premises and operations; (2) elevators; (3) owner's and contractor's protective; (4) completed operations; and (5) products liability.

The declarations page of your various policies will indicate which types of policies your package includes.

B. *Policy Periods And Their Effect On Coverage*

In California, policy periods are typically one-year, although three-year policies are not unheard of. The policy period must be clearly stated in your declarations page. Another area where the policy period is described can be found under the title "Policy Periods; Territory." This typically describes when and what must happen before coverage is triggered.

Note that most policies issued these days indicate that the bodily injury or property damage must "occur" during the policy period (see the discussion on "occurrence" below). Some earlier policies indicated that the "accident" must occur during the policy period.

This is distinguished from a “claims made” policy which requires that the claim must be made (and in some cases, reported) during the policy period.

C. Policy Amounts

Like the policy period, this is another of the essential terms of an insurance contract. Your amount of insurance is described in your policy as “Limit of Liability.” The “limit of liability” means that your insurer “underwrites” the risk of insuring you up to and including the amount stated and you bear the risk of any amount in excess of the limit (with the exception that your insurer may be required to indemnify you for any amounts in excess the policy limits where it breached its duty to settle the case when it had an opportunity to do so within policy limits; see the discussion, below, regarding bad faith claims against an insurer).

A liability policy can have several “limits” of liability, depending on the type of loss or claim. For instance, for bodily injury claims, there may be a “per person” and “per accident” limit (similar to what is found in many automobile policies). You will also typically find an “aggregate” limit which attempts to limit the insurer’s total liability for all damages, regardless of the number of occurrences (and regardless of whether they are related or unrelated) during the policy period.

D. Exclusions

In this age of increasing claims related to, among other things, water intrusion and mold damages, “exclusions” in a CGL policy are more prominent than ever before.

Some provisions restricting your rights under the policy will appear in the declarations page or the coverage section. However, there will also be other restrictions in the “exclusions” section of the policy. Exclusions are provisions of the insurance policy which state that certain causes of loss or certain consequences are not covered. For instance, “intentional injury” (somebody is injured by an event that was done intentionally, such as an assault), is typically excluded from coverage.

One important exclusion is the so-called *Montrose* exclusion. The *Montrose* exclusion is covered in Section II of this article because of its close relationship to the definition of “occurrence.”

E. Endorsements - Broad Form Coverage

Endorsements add coverage of various types to the contract. One form of an endorsement that is common to contractors’ CGL policies is the “broad form property damage” (“BFPD”) endorsement.

There are two forms of BFPD coverage. One excludes, and the other includes, completed operations coverage. However, the general intent of the BFPD endorsement

(which was primarily designed to “benefit” building contractors) is, as the name implies, broaden the coverage for property damage by removing the old “care, custody and control” and “work performance” exclusions.

II. WHAT IS AN “OCCURRENCE?”

As discussed above, the standard CGL policy uses the phrase “occurrence” instead of the previously-used phrase “caused by an accident” when determining if a particular event is covered under the policy.

A. *The General Definition of Occurrence*

In the standard CGL policy, an “occurrence” includes the possibility that the cause of bodily injury or property damage may exist or continue for a period of time. “Occurrence” is typically defined as an accident including injurious exposure to conditions which results, during the policy period, in bodily injury or property damage neither expected nor intended by the insured. The key difference with the definition of “occurrence” from the previously-used term “caused by an accident” is “suddenness.” “Occurrence” is designed to include in coverage those damages which occur over a long period of time.

First, an occurrence contemplates both an “accident” as well as “continuous or repeated exposure to substantially the same harmful conditions.” Provided the bodily injury or property damage was not *intended* by the insured, and bodily injury or property damage results, it will likely be considered an “occurrence.” But an “occurrence” is broader than an unintentional act—it includes the possibility that the cause of bodily injury or property damage may exist or continue for a period of time.

An example of an “occurrence” that causes damage over time is a municipal swimming pool that springs a small leak, gradually causing structural property damage to the adjacent buildings. Even though damage to the buildings took place over a period of months, this event would likely be considered “an occurrence.” The property damage to the buildings was caused by a continuous exposure to substantially the same harmful conditions: the slowly leaking water.

B. *Note That “Occurrence” Is Not The “Trigger”*

Another important observation about “occurrence” is that the *bodily injury or property damage* must occur *during the policy period* to trigger the CGL coverage. A common misperception is that the “occurrence,” or the cause of the bodily injury or property damage, is the CGL “trigger.” In short, if bodily injury or property damage takes place during the policy period, coverage is triggered on the “occurrence” CGL policy, regardless of when the occurrence took place.

C. *So When Does The Bodily Injury Or Property Damage “Occur?”*

For most CGL claims, the injury or damage takes place almost simultaneously with or immediately after the occurrence. For example, a mason drops a brick on a parked car, causing property damage to its windshield. The occurrence (dropping of the

brick) causes property damage (the smashing of the windshield). Most people would consider this a simple accident. There is little question as to when the property damage actually happened.

But what if the bodily injury or property damage does not happen quickly? What if it is the type of injury or damage that happens gradually, deteriorating or progressing over time?

Thus, the question arose as to whether a CGL policy is triggered when progressive injury or damage continues into the policy period even after the injury or damage has manifested itself and is discovered? Or, conversely, does coverage cease for all subsequent CGL policies once the policyholder learns of the continuing injury or damage?

The case of *Montrose Chemical of California v Admiral Insurance Company*, decided by the California Supreme Court in 1995, examined these questions. In the *Montrose* case, the Court concluded that where bodily injuries or property damage are continuous or progressively deteriorating throughout successive policy periods, then such damages or claims are covered by all policies in effect during those periods. In other words, some insurers were finding themselves liable, as a result of the *Montrose* decision, to cover damages which may have originated before the policy period covered by that insurer.

D. The “Montrose Exclusion” and Subsequent Amendments To Standard CGL Policies

The *Montrose* decision was based on standard language ambiguities in insurance policies. As a result, insurers have created what is commonly known as a *Montrose* exclusion, which negates the effects of the *Montrose* decision (note, however, that only policies written after the *Montrose* decision would likely have this exclusion).

Not surprisingly, Admiral Insurance Company was one of the first to create the “*Montrose* Exclusion” following the Supreme Court Decision. Most other companies issuing CGL policies quickly followed suit. It is pretty much a given that any CGL policy issued after 1995 contains a *Montrose* exclusion.

In short, a *Montrose exclusion* is intended to preclude coverage for damage that first occurred before policy inception and, in effect, overrides the California Supreme Court’s decision in the *Montrose* case.

However, in 1998, insurance companies added some new wording which qualified the CGL coverage “trigger.” Specifically, this new language requires that not only must bodily injury or property damage be caused by an occurrence and take place during the policy period, certain insureds must not know, *prior to the policy period*, the injury or damage has occurred or is occurring. Such knowledge will eliminate all coverage under the CGL for injury or damage that continues into or resumes during the policy period. With this “known injury or damage” wording, coverage ceases for all subsequent CGL policies once certain insureds learn of any continuing injury or damage.

This restriction or qualification of the CGL coverage trigger applies only if the continuing injury or damage is known by certain insureds. The “certain” insureds are those included in “Who Is An Insured—Section II, paragraph 1” of the standard form, and include:

- Named insured individuals (sole proprietors) and their spouses with respect to conduct of the business
- Partners of a named insured partnership or members of a named insured joint venture and their respective spouses with respect to conduct of the business
- Members and managers of a named insured limited liability company
- Executive officers, directors, and stockholders
- Trustees of a named insured trust

In addition, any employee who is authorized by the named insured to give or receive notice of a claim or occurrence is listed as one of the insureds whose knowledge will nullify coverage. Such a person or persons could range from a corporate risk manager to an administrative assistant so long as the employee is authorized to “give or receive” notice of a claim or occurrence. Note that this restriction does not apply to any employee, only employees authorized to give or receive notice of a claim or occurrence.

How Is “Known” Determined? The CGL attempts to clarify this question by stating that bodily injury or property damage is deemed to be “known” when a listed insured:

1. Reports all or part of bodily injury or property damage under a previous policy, either the current insurer’s policy or another insurer’s policy; or
2. Receives a demand or claim for damages due to bodily injury or property damage; or
3. Becomes aware by any other means that bodily injury or property damage has occurred or begun to occur.

Provided the listed insureds *do not know* of the continuing or progressive injury or damage, all of the CGL policies in effect during such injury or damage will be triggered—presuming a “continuous trigger” theory is applied in the court with jurisdiction over the coverage dispute.

E. Single Vs. Multiple “Occurrences” In the Montrose Exclusion Era

In 2002, a California Appellate court decided an important issue involving the Montrose exclusion in most, if not all, CGL policies issued after 1995.

In the case entitled *First Financial Insurance Co. v. Reeves*, the evidence showed that First Financial issued successive CGL policies, each of which contained a *Montrose* exclusion (i.e., all damage that first occurred before policy inception was not covered). The insured, a waterproofing subcontractor, completed its work on the townhome project in question prior to the inception of its policy period with First Financial.

The insured was sued in a construction defect action. Damages in the suit alleged water intrusion to four separate areas which had been waterproofed by the insured. The

Court was required to determine whether the occurrence of water damage to the four separate areas constituted a “single occurrence” or multiple occurrences. Essentially, the Court knew that water damage to the garage was the first to occur and this was prior to First Financial’s policy periods. However, damage to the other areas occurred during First Financial’s policy periods.

However, First Financial argued that there was a “single occurrence” (and further argued that the single occurrence first took place before its policy period and, therefore, its *Montrose* exclusion would apply) and the occurrence of water damage to the other three areas constituted a single occurrence because water damage is generally continuous or progressively deteriorating in nature. The insured argued that the water damage to each of the four areas was a separate occurrence because the cause of water damage to each area was potentially different.

Obviously, this was a crucial determination. If the Court accepted First Financial’s arguments, then the insured would have no coverage under the First Financial CGL policies. If the insured’s argument was successful, then the *Montrose* exclusion in the policy would operate to bar coverage only for damage to the subterranean garage.

The Appellate Court ultimately determined that if multiple occurrences of damage are alleged, each separate occurrence of damage must be in process on the inception date before the *Montrose* exclusion will apply to preclude coverage. In this case, the evidence showed that at least one of the causes of damage may have occurred after the inception of the First Financial policies and, therefore, the *Montrose* exclusion in the policy would not apply to bar all coverage.

We’ve now covered the history, development and structure of CGL policies, what sorts of claims are covered, what factors the insurance companies will use to determine coverage based on “occurrence” and the definition of “occurrence.” We now turn to post-claim considerations and effective tendering of your claim to your insurer.

III. TENDERING THE CLAIM

You’ve been put on notice of a construction-related bodily injury or property damage. Let’s say you’re a general contractor and the owner is demanding to initiate the *Calderon* process or you’ve been sued. Or you’re a subcontractor on a project having been put on notice by the general contractor of a pending or existing (or even, previously-resolved) claim made by the owner of the property.

The first step is, of course, putting your insurance carrier on notice of the claim. However, there are some important considerations to keep in mind and be prepared for before doing so.

A. *Pre-Tender Considerations*

Gather up all your insurance policy information. You may find it handy to keep an “Insurance History” chart or spreadsheet (I typically prepare one for my clients who have been sued in construction defect actions in an excel spreadsheet). It is useful if the columns in each spreadsheet are set out in the following order and filled out as completely as possible: Policy Period, Policy Number, Insurer (name, address and telephone numbers), policy type (primary or excess), policy limits, aggregate amount remaining, and coverage (e.g. whether coverage has been accepted or denied). This should be kept in a folder with all your insurance policies and the spreadsheet updated as necessary.

Investigate and determine on your own when the claims were first asserted and by whom. Also determine if the injury is ongoing or has been repaired and corrected. Third, interview your personnel and employees to determine if and when they had prior knowledge of this claim or the damage from which the claim arises.

B. The Initial Tender of Defense

The policy and the law requires that, for the insurer’s duty to defend you to trigger, the insurer must be put “on notice” of the claim. Typically, standard notice language provides that notice be given to “the company or any of its authorized agents.

The standard notice language in a policy also requires that notice of an occurrence be given “as soon as practicable” and that, in the event of a claim or lawsuit, you **immediately** forward “every demand, notice, summons or other process” received by you.

Standard notice language in a CGL policy requires the following information: (1) your identity; (2) information relating to the time, place and circumstances of the occurrence; and (3) the names, addresses of the insured and of available witnesses. While you may not have information relating to other parties, you should certainly provide your insurer with the names of any of your personnel or employees who have knowledge of this particular work.

For the most part, this article discussed CGL policies based on “occurrence.” However, in a “claims-made” policy, which is one where coverage is triggered when the claim is made (which is opposed to an “occurrence” policy whereby coverage is determined depending on when the occurrence giving rise to the damage first took place). Thus, in a claims-made policy, notice must be given during the policy period.

This tender of defense should, of course, be in writing. This is not to say that you cannot or should not give your insurance company verbal notice while you are awaiting additional information to complete a detailed “tender letter.”

IV. YOUR INSURER’S DUTY TO DEFEND

A. *Basic Obligations*

Standard language in a CGL policy states that the insurer will pay “all sums which the insured becomes ‘legally obligated’ to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence.”

By its wording, this clause means that the insurer is only obligated to pay based on your legal liability to a third party. For obligations you voluntarily assume, the insured may not be required to defend and indemnify you.

B. *Bad Faith Claims Against Your Insurer*

Your insurer has two key important duties. First, they have a duty to defend you (on a proper claim) and the insurer has a duty to settle the case where feasible.

The duty to defend will arise from the language of the policy and the facts and allegations contained in the specific claim. Even if the claim against you is groundless, false or fraudulent, the insurer is still required to provide a defense. Note, however, that once your insurer provides a defense, it also has the right to control that defense (including the right to settle the claim if it is within policy limits), provided there is no conflict of interest. This includes selecting counsel of its’ choosing to handle your case.

An insurer will breach the duty to settle when it had an opportunity to settle a claim within policy limits, failed to do so and the case ultimately went to trial and ended up in a verdict against the insured **in excess** of the policy limits. The theory is that the insurer put the insured at a risk of personal exposure above and beyond its insurance policy limits when the insurer could have avoided that result by settling the case.

V. POST TENDER CONSIDERATIONS

Once you tender the defense to your insurance company, you are now allowing them to investigate, retain an attorney on your behalf and control the litigation on your behalf. Furthermore, you will be required to participate in the lawsuit and (most policies contain a “cooperation” clause requiring you, as the insured, to cooperate and assist with your defense).

Remember also, that most insurance policies do not require your consent to settle the claim so long as it is within policy limits. In fact, as discussed above, an insurer can face a bad faith lawsuit from its insured if it had the opportunity to settle the claim within policy limits but failed to do so.

Does this mean that you have absolutely no say in the litigation? No. In my experience, most insurance companies will heed the concerns of their insureds. For instance, I represented one client on a number of cases. The client had a situation where it was concerned about several claims exhausting certain policy periods and it was concerned about the amounts the insurance companies had been and were paying to settle these claims. More specifically, the client was concerned that the carriers were aware there were many claims out there and were simply trying to “exhaust” the limits of the policy as soon as possible so that it could deny coverage on other claims (which, at a minimum, would end up saving the insurance company quite a bit in legal defense and related costs).

Therefore, the client made it clear to these insurance companies, that it would take an active hand at the mediations and settlement talks to ensure that its needs were being met and the concern about the policy.

Insurance companies are always concerned about bad faith claims (see, above). Therefore, when you combine any or all of these factors, you do have a right to oversee and actively assist in the management of the claims against you.

If you have any questions or comments regarding this article, please do not hesitate to contact Nick Campbell at Green & Campbell, LLP.

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