

INITIAL QUESTIONS

Scenario: You are GC, Sub, or Supplier. You have CGL insurance. A construction defect claim is asserted that implicates YOUR WORK.

1. Is there CGL insurance coverage?!?
2. Is there “*property damage*” within the meaning of my CGL policy?
3. What was the “*occurrence*” that triggered CGL policy(ies)?
4. What “*property damage*” is covered vs. not covered (excluded) under the CGL policy(ies)...pre-completion...post-completion?

Answers to these questions will be based on YOUR Jurisdiction!

CGL COVERAGE APPLICABLE TO CONSTRUCTION

Purpose of CGL

1. Duty to defend insured
2. Duty to indemnify insured from 3rd party claims

*duty to defend broader; triggered by allegations in “suit” (defined term in policy)

**insurers typically defend under reservation of rights to deny coverage / duty to indemnify

→ states have statutes re: timing of reservation of rights letters applicable to coverage defenses

CGL COVERAGE APPLICABLE TO CONSTRUCTION

Coverage

- Property damage - triggered by occurrence
- bodily injury/death - triggered by occurrence

**Remember, coverage will be subject to exclusions in the applicable CGL policy(ies)...and, there may be exceptions to certain exclusions

CGL COVERAGE APPLICABLE TO CONSTRUCTION

What is Covered?

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

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:

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

What is an occurrence & property damage?

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

17. "Property damage" means:

- 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.

***Remember the Exclusions...**

INDEMNIFICATION OBLIGATIONS

CGL Policy

▶ Again, CGL policy to **indemnify** insured(s) for covered damages associated with third-party claims (duty to indemnify)

Flowing Down Damage (Flowing Down YOUR Risk)

▶ **Additional Insured Status** - e.g., getting yourself named as insured on another's CGL policy so that you can be defended & indemnified for primary insured's negligence...for pre-completion and post-completion operations

▶ **Contractual Indemnification**- e.g., contractually requiring another / indemnitor to indemnify you / indemnitee for...

- ▶ *Narrow* (indemnitor's sole negligence)
- ▶ *Intermediate* (caused wholly or partially by indemnitor's negligence)
- ▶ *Broad* (for indemnitee's sole negligence)

**Indemnification lang. must comply with statutory requirements

▶ **Primary & noncontributory lang. and insurance endorsement**- deals with priority of coverage - e.g., you want another / indemnitor's liability policy to be primary and noncontributory to insurance coverage provided by add'l insured...scope of this lang. will generally not be broader than requirements of contract

COVERED DAMAGES

Depends on Jurisdiction...

- ▶ **Resulting Damage** - damage to other work caused by defect
- ▶ **“Rip & Tear” Damages** - damage associated with repairing resulting damage (e.g., rip out defective work to repair resulting damage)
- ▶ **Loss of Use Damages** - loss of use of property
 - ▶ *Big-D Const. Corp. v. Take it for Granite Too*, 917 F.Supp.2d 1096 (D.Nev. 2013) - loss of use of front entrance door due to defective exterior stone tile (that had fallen) was covered; damages to be determined at trial
 - ▶ *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684 (7th Cir. 2008) -LDs and owner’s storage fees associated with delay not covered loss of use as they aren’t result of loss of use of tangible property but damages due to delay (economic in nature)
 - ▶ *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Structural Systems Technology, Inc.*, 756 F.Supp. 1232 (E.D.Mo. 1991) -radio tower collapsed and owner sued for lost profits / diminution in value of radio station; court held this is covered damage if determined insurer has duty to indemnify ⁶

COVERED DAMAGES

Depends on Jurisdiction...

- ▶ **Diminution in Value** - diminished value of property
 - ▶ *American Mercury Ins. Group v. Urban*, 2001 WL 1723734 (D.Kan. 2001) - CGL does not cover diminution in value damages to owner's facility
 - ▶ *Pavarini Construction Co (Se) Inc. v. Ace American Ins. Co.*, 2015 WL 9686009 (S.D.Fla. 2015) - CGL policies do not cover damages purely economic in nature; therefore, no coverage to GC for delay costs, lost profits, diminution in value, or other economic losses flowing from injury to property
 - ▶ *Missouri Terazzo Co. v. Iowa Nat. Mut. Ins. Co.*, 740 F.2d 647 (8th Cir. 1984)- diminished value of supermarket building due to damage to terrazzo floor (cracking and discoloration) was covered since it was means to measure damage sustained as the result of property damage