

Managing Construction Risk Through Commercial General Liability Insurance

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Commercial general liability (CGL) insurance is often used to manage risk on a construction project. However, CGL policies can contain gaps in coverage or exclusions that may leave a contractor or subcontractor without the anticipated protection. This Practice Note addresses common business risk exclusions in CGL policies and provides guidance on how all project participants can ensure they are properly covered.

Claims for personal injury and property damage commonly occur on construction projects. Unfortunately, project participants (owners, contractors, and subcontractors) often fail to adequately address insurance coverage issues during the contract drafting process and only learn that they are not protected when a claim materializes.

Whether the owner or a third party makes the claim, the injured party will often look to the prime or general contractor (contractor) and its insurance coverage. Therefore, contractors must both:

- Ensure that their own insurance policies are in place and afford appropriate coverage for all risks.
- Confirm that the policies of their subcontractors and lower-tier subcontractors do the same.

From the owner's perspective, it is critical to obtain appropriate coverage because if there is a loss, an owner wants to eliminate any concern over whether the culpable contractor has sufficient assets to pay the claim.

This Practice Note:

- Provides an overview of the basic concepts of coverage under a commercial general liability (CGL) insurance policy.
- Explains the common business risk exclusions in a CGL policy applicable to construction projects.
- Identifies insurance pitfalls that often leave owners and contractors without the coverage they expected when a claim is filed.

Overview of CGL Coverage

There are many important components to insurance coverage on a construction project. Because no two projects and scopes of work are identical, collaboration among the insured's risk manager, insurance broker, and counsel is necessary to adequately assess and hedge against potential risks. For example, a subcontractor performing excavation and site preparation work in an environmentally sensitive area may need to procure contractor's pollution liability insurance, which ordinarily is not part of the typical insurance coverage specified in subcontractor agreements, such as workers' compensation, general liability, auto liability, and excess liability. Careful drafting of the insurance requirements in the subcontract is essential as the first step of protection to ensure alignment with the insured's scope of work.

While the interpretation of certain CGL provisions varies from state to state, most CGL policies follow one of the standard formats issued by the Insurance Services Office, Inc. (ISO), which contain many of the same basic options.

In the construction industry, most CGL policies provide coverage on an occurrence basis rather than a claims-made basis (see [Practice Note, Commercial General Liability Insurance Policies: Property Damage and Bodily Injury Coverage \(Coverage A\): Trigger of Insurance Company's Coverage Obligations](#)). This means that the occurrence (as defined in the policy)

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giving rise to the claimed loss or damage must have happened during the policy period.

A CGL policy essentially provides coverage to the insured (contractor or subcontractor) for those sums the insured becomes legally obligated to pay as damages for:

- **Bodily injury or property damage.** Property damage is generally defined as physical injury to tangible property or loss of use of tangible property that is not physically injured.
- **Caused by an occurrence.** Most policies define an occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” While not defined in the policy itself, an accident is generally considered to be something that is not intended, expected, or anticipated. Therefore, coverage under a CGL policy is thought of in terms of negligence, as opposed to an intentional act.
- **In the coverage territory.** This pertains to where the occurrence giving rise to the damage happened. For example, if the policy insures a specific construction project, damages occurring off-site might not be covered.
- **During the policy period.** This means that the occurrence giving rise to the personal injury or property damage must happen during the policy period, even if the claim or lawsuit is filed after the expiration of the policy period.

Each of the foregoing requirements for coverage under a CGL policy has generated its own body of case law in many jurisdictions. Counsel for all project participants should familiarize themselves with the application of that case law in the jurisdiction where the policy is written.

For a further discussion of these terms in CGL policies, see [Practice Note, Commercial General Liability Insurance Policies: Property Damage and Bodily Injury Coverage \(Coverage A\): Key Policy Terms](#).

Common “Business Risk” Exclusions

While there are many exclusions that can limit coverage under a CGL policy, there are a few key “business risk” exclusions related to construction work of which an owner, contractor, and subcontractor should be aware. These exclusions are primarily predicated on the fact that a CGL policy is designed to provide the insured with coverage against third-party claims for injury or damage as opposed to

covering the insured for its own losses due to the need to repair or replace its own work. Parties and their counsel should carefully review all policy exclusions and consult with an insurance professional to understand their application and determine whether any exceptions to these exclusions are available through endorsements to the policy.

Some of the more common business risk exclusions include:

- **“Your work” exclusion.** This exclusion precludes coverage for damages to the insured contractor’s own work and materials. Essentially, coverage is not available to repair or replace the contractor’s own faulty or defective workmanship. In 1986, the language of this exclusion was clarified to confirm that it did not exclude losses arising from work performed by a party retained by the insured contractor to perform a portion of the work, such as a subcontractor, even though the subcontractor performed its work on the insured’s behalf.
- **Owned property exclusion.** Coverage is not provided for damage to property that is owned or leased by the insured. This can have implications for a developer who, either directly or through an affiliated entity, acts as its own contractor in performing construction on property it owns.
- **Contractual liability exclusion.** This endorsement essentially excludes coverage for losses the insured must pay by reason of the assumption of liability in a contract or any claims sounding in breach of contract. This excludes claims predicated on a contractual warranty that obligates an insured to repair or replace its own defective work. However, exceptions to this exclusion allow coverage for losses:
 - the insured would incur in the absence of a contract, such as common law tort liability; or
 - where the insured assumes the tort liability of another, such as an indemnity obligation in a contract, but only if the injury or damage occurred after the contract was signed.

For a discussion of indemnification obligations, see [Practice Note, Indemnification Provisions in Construction Contracts: Drafting Strategies](#). Even where state anti-indemnity statutes limit the ability of one party (the indemnitor) to indemnify another (indemnitee) based on whether the indemnitee was culpable, even in part, many statutes expressly do not disturb any separate insurance obligation (see [Construction Anti-Indemnity Statutes: State Comparison Chart](#)).

- **Residential exclusion.** These endorsements vary, but typically exclude coverage for the construction of condominiums. Policies for condominium construction projects are more frequently being written with this exclusion, which may completely void coverage. The problem is exacerbated by the risk that a multifamily project, such as a rental apartment building, is converted to a condominium post-construction, but before the expiration of any statute of limitations applicable to claims associated with latent construction defects (see [Products and Completed Operations](#)).

Owners, contractors, and subcontractors constructing any type of multifamily residential project must take precautions to ensure that their policies, as well as those purchased by others for their protection, do not include this type of residential exclusion.

For a further discussion of common exclusions in CGL policies, see [Practice Note, Commercial General Liability Insurance \(Coverage A\): Key Policy Exclusions](#).

Critical Policy Provisions and Endorsements

There are certain insurance provisions and features that contractors should insist on in their own policies and in those procured by subcontractors performing work on their behalf. Subcontractors who contract-out work to sub-subcontractors should similarly require that all lower-tier subcontractors procure policies with these same features. Most standard CGL policy forms do not automatically include these critical provisions and endorsements must be specifically requested to obtain the proper coverage.

Additional Insured Status

Essentially all contracts require the contractor or subcontractor to obtain CGL coverage for their work. The contract should also require the contractor or subcontractor to name as additional insureds on those policies each of the following, to the extent involved in the project:

- The owner, often a single or special purpose entity (SPE).
- Any separate developer, often an owner-affiliated entity.
- The landlord on a tenant improvement project.
- All construction lenders.

- Any owner's representative.
- Any construction manager.
- All higher-tier contractors.

These project participants must be accurately named in the actual policy or an endorsement because an additional insured may make a direct and immediate claim for defense and indemnity under that particular insurance policy if there is any occurrence that results in bodily injury or property damage covered by the policy. All intended additional insureds should be named specifically, even though many policies include language insuring a party with whom the insured has a contract as additional insureds. Relying on that language alone, however, could leave others outside of the direct contract relationship omitted from additional insured status.

Inclusion in a certificate of insurance (COI) alone does not equal coverage by the policy (see [Obtain Proper Proof of Coverage](#) and [Practice Note, Additional Insureds: Basic Issues: Certificates of Insurance](#)). Coverage should be independently verified through review of the policy terms and any additional insured endorsements.

Absent the additional insured coverage, the owner or a contractor against whom a claim is asserted resulting from another's negligence or defective work must first obtain a judgment against the culpable subcontractor or sub-subcontractor before being able to make a claim to the culpable party's insurance carrier. In the meantime, the owner or vicariously culpable contractor (or its insurance carriers) is forced to fund the cost of the defense, including attorney's fees, along with incurring the associated remedial costs before being able to recover against the responsible party's insurance carrier.

A contractor should resist requests to add the owner to its policy as an additional named insured. Most insurance companies do not want to include the owner as an additional named insured because it will expand coverage under the policy to the owner's activities in addition those of the contractor.

For a further discussion of additional insureds, see [Practice Note, Additional Insureds: Basic Issues](#).

Products and Completed Operations

Insureds may not be aware that their CGL coverage is only for the period when they are constructing the project. Once construction is complete, CGL coverage

under the policy stops unless the policy language covers or the insured obtains an endorsement for completed operations. Once the project is completed and turned over to the owner for its intended use, completed operations coverage extends to future covered losses arising from the insured's defective work, subject to similar CGL restrictions, such as the "your work" exclusion. Completed operations coverage must not be allowed to lapse due to nonrenewal. In most instances, it cannot be reinstated.

Damage to covered property resulting from the performance of defective work may not manifest itself until years after project completion. Parties should familiarize themselves with their jurisdiction's statute of repose, which allows claims for latent defects to be brought several years after a project's certificate of occupancy (C of O) has been issued, sometimes as much as ten years or more. This property damage will only be covered if the CGL and excess liability policies include language or an endorsement for completed operations coverage.

For information on a particular state's statute of repose, see *Construction Laws and Customs: State Q&A Tool: Question 23*.

The bigger problem faced by owners and contractors is ensuring that completed operations coverage is maintained by every party that performed work on the project for the duration of time claims may still be made. It is also critical to ensure that the completed operations coverage is continued for all additional insureds during the same statutory period because the coverage for additional insureds is not automatic (see *Obtain Proper Proof of Coverage*).

Primary and Non-Contributory Coverage

It is not unusual for policies procured by multiple project participants to be implicated by a single occurrence and to be called on to cover the same resulting property damage. This usually occurs when a subcontractor's performance results in physical injury to other tangible property, such as the owner's furniture or expensive fixtures like millwork, and a claim is asserted against the contractor. While the contractor's status as an additional insured on that particular subcontractor's policy may enable it to seek defense and indemnity under the subcontractor's policy, the contractor may also have coverage under its own policy (see *Common*

"Business Risk" Exclusions). Rather than defending and paying the claim, the contractor and its carrier would likely prefer that the subcontractor and its carrier provide a defense and pay the claim.

This issue may be exacerbated if a catastrophic failure of major building components results in damages that exceed the limits of primary coverage and implicate the excess insurance policies of culpable subcontractors and lower-tier subcontractors. Even if the subcontractors' or lower-tier subcontractors' primary carriers agree to indemnify the contractor, their excess carriers may argue that the contractor's own primary coverage must first be exhausted before the excess carrier will agree to contribute to pay the loss.

All subcontracts and sub-subcontracts must therefore mandate that the policies procured and maintained include a provision confirming that they are primary and non-contributory with other potentially implicated policies, such as the contractor's or subcontractor's primary policy. Absent this language, the contractor or subcontractor for whom work is being performed may not receive the protection it thought it obtained when contracting with its subcontractor or lower-tier subcontractor.

Enforcement and Confirmation

Contractors and subcontractors must ensure that they are protected not only by their own CGL policy coverage but by all parties performing work on their behalf. Even where a sophisticated contractor or subcontractor uses form contracts that were properly vetted by counsel well-versed in coverage issues, these forms must be continually updated to address:

- State court holdings that may impact the interpretation of standard policy provisions.
- Changes in state statutes governing the scope and validity of indemnification and insurance provisions in construction contracts.

There are several steps a contractor can take to avoid an insurance carrier disclaiming coverage when a claim is made or a lawsuit filed.

Flow Down of Insurance Requirements

Contractors and subcontractors must ensure that each of their agreements contains a flow down of all insurance requirements in their own contracts to all

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subcontractors and lower-tier subcontractors. These insurance requirements should specify:

- The same types and limits of coverage.
- That the policies name as additional insureds the owner, its lenders and affiliated entities, the landlord, as applicable, the contractor, and those subcontractors on whose behalf work is being performed (see Additional Insured Status).
- That all coverage be primary and non-contributory (see Primary and Non-Contributory Coverage).
- That the carrier will provide ample notice (usually 30 days) of an intention to cancel the policy for nonpayment or other reasons.
- A flow down of insurance requirements not only for CGL coverage, but worker's compensation, automobile, and any other coverage the particular project or risk requires.

Adequate insurance protection is required even where a subcontractor or lower-tier subcontractor is also obligated to indemnify other project participants for damages and losses arising from or related to their work. Given the proliferation of anti-indemnity statutes in most jurisdictions, an owner or contractor cannot rely on indemnification alone. However, many anti-indemnity statutes expressly do not apply to or limit coverage under insurance contracts:

- That may provide coverage where the subcontractor or lower-tier subcontractor is contractually obligated to indemnify another for negligence (see Critical Policy Provisions and Endorsements).
- Where indemnified parties are also named as additional insureds (see Additional Insured Status).

For a discussion of indemnification drafting strategies and anti-indemnity statutes, see [Practice Note, Indemnification Provisions in Construction Contracts: Drafting Strategies](#) and [Construction Anti-Indemnity Statutes: State Comparison Chart](#).

Obtain Proof of Coverage

Contractually mandating the proper insurance is only the first step. An owner, contractor, or subcontractor must also enforce those requirements and confirm that the required coverage was actually secured. Without confirmation, gaps and mistakes in coverage can occur.

Confirming that all project participants have procured the required coverage can be extremely challenging,

however, especially on larger projects. Many contractors and subcontractors do not obtain evidence of coverage from all entities furnishing labor, services, and materials to a project. More often the evidence obtained is either insufficient or does not accurately describe the coverage actually placed.

Identify All Project Participants

Subcontracts frequently require the lower-tier subcontractor to either self-perform the scope of work or identify all entities discharging their contractual duties. These lists are usually prepared at the start of the project, however, and may prove to be inaccurate or incomplete as assigned work changes during the project. To obtain an accurate list of all those performing work, contractors should start by monitoring the service of notices (often in connection with mechanic's lien or construction lien laws) where required by state statutes and require in its subcontracts that all lists must be updated with regularity equal to the timing for payment application submissions. Also, review the entities identified in supporting documentation included with payment applications for consistency with the submitted lists.

An additional step at the project level is also recommended. Contractors should require their job site supervisors to log all individuals and entities working on the project daily and use that list to routinely confirm that they have procured the required insurance coverage.

Another possible way to address this concern is for all contractors and subcontractors to contractually condition payment to subcontractors and lower-tier subcontractors on meeting their administrative responsibilities to:

- Submit appropriate proof that all required insurance coverage was procured at the start of the project, including proof of payment of all premiums.
- Provide evidence that coverage is maintained during the life of the project, including confirmation of renewal of policies.

Counsel must first confirm that these contractual requirements do not violate the applicable state's prompt payment laws (see [Prompt Payment Acts \(Private Projects\): State Comparison Chart](#) and [Prompt Payment Acts \(Public Projects\): State Comparison Chart](#)).

Obtain Proper Proof of Coverage

Owners or contractors often find it difficult to obtain reliable evidence of required coverage. Many construction professionals rely on COIs to confirm that the coverage has been procured and are surprised when a carrier disclaims coverage based on the actual provisions of the policy. COIs have, however, been held to be evidence only of the carrier's intent to provide coverage, not that coverage actually exists (see *Landsman Dev. Corp. v. RLI Ins. Co.*, 53 N.Y.S. 3d 428, 430 (4th Dep't 2017)). For additional information on COIs, see [Practice Note, Additional Insureds: Basic Issues: Certificates of Insurance](#).

Because a COI is generally prepared and executed by an insurance broker, a carrier may argue that the broker does not have the authority to change the policy terms in the absence of an executed endorsement issued by the carrier. Therefore, even if a COI identifies additional insureds or states that the CGL policy is primary and non-contributory, the owner or contractor relying on the COI alone may learn that the coverage identified was not actually purchased.

The only true evidence of insurance coverage is what is contained in the issued policy, including all endorsements. Policy premium costs may be redacted as necessary to preserve sensitive pricing information. Claims submitted to carriers in reliance on coverage reflected in COIs are often rejected and the COIs are proven to be wrong or, even worse, fraudulent. The better alternative is for the owner, contractor, or subcontractor to obtain a copy of each complete policy, including all endorsements, even though this can be logistically challenging depending on the number of subcontractors on a particular project.

Some contractors on larger projects only obtain complete documentation from higher-risk trades, such as site preparation, electrical, and plumbing subcontractors, often leaving themselves at risk for work performed by other trades. Other contractors employ specially trained staff that solely focus on gathering policies and analyzing evidence of coverage. These present business risks and considerations that should be carefully weighed and addressed by construction and insurance professionals at the start of a project.

Personnel tasked with gathering and reviewing insurance documentation must be properly trained as many traps exist. For example, some insurance companies recently started using a different

endorsement for additional insured coverage. While the new endorsement confirms an entity's additional insured status, it only does so for ongoing operations and does not provide critical completed operations coverage for the additional insured (see *Critical Policy Provisions and Endorsements*). In these instances, an owner or contractor sued for property damage resulting from a subcontractor's defective work manifested following completion of the subcontractor's work and acceptance of the project would then not be covered under the subcontractor's completed operations insurance.

In this instance, an additional insured identified under CGL policy coverage endorsement must confirm that the policy also contains a second separate endorsement covering it as an additional insured for completed operations coverage. Both endorsements must be executed for those named as additional insureds to have coverage for any potential liability for covered losses due to latent defects arising during the entire period of any statute of repose. This is particularly important since the time for bringing a claim against a subcontractor's performance bond surety may expire, whether by contract or statute, years before the statute of repose allowing for claims for latent defects in that subcontractor's work. This may leave a gap between a contractor's potential liability and its ability to seek recourse from its subcontractor's surety, making insurance coverage an important tool to hedge risk against at least the covered damage resulting from a latent deficiency.

Confirm Continuation of Coverage

Monitoring renewal of completed operations coverage for the period of any statute of repose is especially difficult after project completion. It can become a full-time job to ensure that all subcontractors and, in some instances, sub-subcontractors, continually renew coverage through the statute of repose. This is particularly true given that in tough economic times, many contractors go out of business. Financially frustrated contractors may fail to take necessary steps to ensure the insurance coverage contracted for remains in place following project completion.

Despite the difficulties, continuing to monitor and enforce these contractual insurance requirements after project completion is as important as doing so before the project starts. Whether contractors manage the risk proactively or reactively, it will be costly. However, the overall cost tends to be higher

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when an uninsured or underinsured claim occurs than when the risk is proactively managed and mitigated up front.

Make Safety and Insurance Coverage a Priority

A contractor can hedge risks by letting all subcontractors know, as early as the bid process, that risk management is a priority for the contractor and the project.

It can also use the subcontractor prequalification process and questionnaire forms as proactive tools. A contractor has the opportunity to convey to prospective subcontractors its commitment to safety, risk management, and insurance by asking key questions and requesting specific information:

- In the safety section of the form, contractors can request information related to the subcontractor's:
 - full-time safety personnel;
 - return-to-work programs;

- drug testing policy;
 - safety disciplinary plan;
 - Occupational Safety and Health Administration (OSHA) violations; and
 - claim experience modification factor or rating.
- In the insurance section, the contractor can specify the key endorsements required, such as:
 - additional insured;
 - primary insurance;
 - waiver of subrogation; and
 - notice of cancellation.

This conveys to a prospective subcontractor the general and specific insurance requirements for specialized trades and prepares it to procure compliant coverage should it be awarded the work.

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