

Are You Covered? An Introduction to Liability Insurance

BY DAVID B. APPLEFELD

The size, cost, and complexity of many of today's construction projects has significantly increased the risks involved for contractors and builders. Before commencing a project, a builder should be proactive in developing a strategy for identifying, allocating and insuring those potential risks. This article will focus on a type of insurance known as Commercial or Comprehensive General Liability Insurance Coverage ("CGL"). CGL insurance is liability insurance that provides insurance coverage to protect against claims asserted by a third party.

Virtually all businesses maintain CGL insurance. CGL coverage is also required in all major forms of construction contracts, including the AIA form contract documents. Often, a construction contract will require the contractor to purchase CGL coverage and to add the owner as an additional insured. The standard CGL insurance policy provides several different forms of coverage. These include:

1. Bodily Injury and Property Damage Coverage, which provides coverage for claims arising from an accidental "occurrence" of "bodily injury" or "property damage" to a third party, which is not otherwise excluded;
2. Personal Injury and Advertising Injury Coverage, which covers specific third party claims which may cause economic injury without bodily injury or property damage such as false arrest and imprisonment and defamation;
3. Medical Payments Coverage, which provides limited to no-fault coverage for medical costs incurred by a third person injured on the insured's property;
4. Completed Operations Coverage, which covers third party claims for bodily injury or property damage caused by defects in completed work; and
5. Contractual Liability Coverage, which provides coverage for the assumption of another party's legal liability, in situations where the contract contains a hold harmless or indemnification provision.

An insurance company which writes a CGL insurance policy undertakes two obligations to the insured in exchange for the payment of a premium. The first obligation is the duty to indemnify. The second obligation is the duty to defend. The duty to indemnify requires the insurer to pay on behalf of the insured any monetary amount that the insured is legally obligated to pay as a

result of a covered claim. The duty to defend, on the other hand, requires the insurer to pay on behalf of the insured the costs, fees and expenses incurred in defending a third party claim. Because these costs may include attorney's fees, expert witness fees, investigation costs and court costs, some courts have referred to the CGL insurance policy as "litigation insurance." Under a CGL insurance policy, the insurance company has the obligation to defend any claim that is either actually covered or potentially covered under the policy.

CGL coverage is typically triggered in a construction claim when there is a loss involving either bodily injury and/or property damage that is caused by an "occurrence." The term "occurrence" is defined in the insurance policy. It is important to understand that claims which result from an "occurrence" are covered under the CGL policy; while claims which do not result from an "occurrence" are not covered. The term "occurrence" includes accidents, happenings or events which result in bodily injury or property damage that are neither expected nor intended from the standpoint of the insured. The term "accident" includes negligent acts that cause damage which is unforeseen or unexpected by the insured. Thus, claims which result from unexpected events or accidents are covered by the CGL policy. On the other hand, claims made against a contractor which result from the contractor's own breach of its contractual obligations are typically not covered. Such claims are not considered to be caused by an accident and, in the event of a breach, the insured contractor should expect that third parties will be damaged.

Finding an "occurrence" and "property damage" or "bodily injury" does not automatically mean that the CGL insurance policy will be triggered and that the insurer will be obligated to provide coverage and a defense. CGL policies contain many exclusions and understanding these exclusions is critical. Two of the more common exclusions typically encountered in the context of a claims asserted against home builders are the work product exclusion and the professional services exclusion.

The work product exclusion excludes coverage for the cost of replacing or repairing an insured contractor's own work due to the contractor's faulty workmanship. This exclusion is in place because the goal of the CGL insurance policy is to protect the insured contractor from claims of bodily injury or property damage asserted by third parties, not to insure against economic loss

sustained by the contractor as a result of having to repair or replace its own defective work or products. Work product exclusions come in many different forms. Analyzing the language used in the particular insurance policy at issue is critical in determining whether the exclusion applies. It is also important to analyze who is making the claim and which participant in the construction project the claim is being asserted against. The applicability of the work product exclusions will differ depending upon the project participant who is seeking to invoke the insurance coverage. For example, the work product of a general contractor is the entire project, e.g. the entire house. On the other hand, the work product of a subcontractor is only that aspect of the project supplied or built by that subcontractor.

The professional services exclusion excludes coverage for losses arising from design-related and other professional services. In the case of the design professional, this exclusion is intended to recognize that design professionals should be carrying professional liability errors and omissions insurance. In the case of a contractor's CGL policy, the professional services exclusion is premised on the fact that contractors are not traditionally designers and the CGL insurer does not want to insure this type of risk. Thus, contractors who perform design-build services or who engineer their own projects should consider purchasing contractor's design liability coverage through a separate insurance policy endorsement. The failure to do so may result in a gap in insurance coverage in the event a claim is asserted that results from a design error.

A non-covered or insufficiently covered occurrence causing loss of life, property or economic damage can be devastating to both the person or entity that suffered the loss as well as to the responsible party. If you have questions about your company's insurance coverage you should discuss these issues with your insurance professional or your attorney. ■

Mr. Applefeld is a member of the law firm of Adelberg, Rudow, Dorf & Hendler, LLC whose practice concentrates in the areas of construction law and insurance coverage law. If you have questions about the topic of this article or any other legal matters, Mr. Applefeld can be reached at (410) 539-5195 or dapplefeld@adelbergprudow.com.