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The Ins and Outs of the CGL Policy

If you think of insurance coverage as a puzzle, with the individual pieces of the puzzle representing the various forms of insurance, that when put together, complete the picture, the Commercial General Liability (CGL) policy is an important piece of the puzzle. In fact, as the author of this article points out, the CGL policy is the most common liability policy purchased in Canada. However, it's important to understand that although the CGL policy is an important piece of the puzzle, it is not the only piece, and often an insured will require an errors and omissions policy or other specialized coverage to complement the coverage provided by the CGL policy. The following article provides some insight into the nature of the coverage provided by the CGL policy as well as some of the coverage issues that may arise in the context of this type of policy.

It is one of the most popular liability insurance policies sold in Canada, and at the same time one of the least understood. CGL insurance is sold to business enterprises across a broad spectrum of industries. Stripped down to its essentials, the CGL policy is intended to defend and indemnify a business facing claims by a third party alleging property damage or bodily injury resulting from an "occurrence," i.e., an accident or mishap, including negligence by the insured. Additional standard coverages include "Personal Injury and Advertising Injury" and "Tenants' Legal Liability."

Illustrations of the types of claims that may trigger coverage under the CGL policy range from run-of-the-mill "slip-and-fall" claims originating at the insured's premises, to multimillion-dollar product liability class actions and complex construction lawsuits.

It is important to note that there is no uniform CGL policy in force across Canada. While the Insurance Bureau of Canada (IBC) did publish a new advisory wording in 2005, many carriers still use the old 1987 IBC wording or some variation of this form. In any case, while there are some significant differences among the wordings on the Canadian market, most of the essential terms and conditions are similar, if not identical.

Generally speaking, in order to trigger coverage under the property damage/bodily injury insuring agreement (far and away the one most often at play), the following elements must be present:

- "property damage" (i.e., physical injury to tangible property, including loss of use of tangible property) or "bodily injury"
- occurring during the policy period
- caused by an "occurrence" (includes the insured's negligence)
- which takes place in the "coverage territory"
- for which the insured is legally obliged to pay compensatory damages

When determining whether a claim is covered under the CGL policy, it is important to first ensure that these various elements are all present and accounted for. Too often in coverage

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disputes does discussion turn immediately to whether or not one or another of the exclusions applies, without first asking if the relevant insuring agreement has been triggered.

As with any other policy wording, and perhaps more so in the case of the CGL policy, numerous wording changes have been introduced over the years in order to clarify the underwriting intention — often in response to entirely unexpected, adverse court decisions. This is perhaps most evident in the exclusions applicable to property damage claims, where insurers have sought to ensure that they do not pick up liability for uninsurable "business risk." This is the risk that the insured's product or work has to be replaced or redone. This type of risk is not within the scope of CGL coverage. It is only if the defective product or work causes damage to other property that the CGL policy is meant to respond.

Putting this principle into practice has proven more difficult than was originally anticipated, however. There are now no less than six exclusions seeking to eliminate coverage for "business risk," including the following:

- contractual liability
- "Broad Form Property Damage" (excludes damage to ongoing work and to property owned, rented or occupied by the insured)
- insured's own product
- insured's own work
- "Impaired Property" (i.e., property incorporating the insured's defective product or work)
- "Sistership" (excludes coverage for the costs of product recalls)

Coverage litigation over the so-called "business risk" exclusions under the CGL policy has spawned a substantial body of case law and numerous wording changes over the years. Because the CGL policy covers a broad spectrum of businesses and the claims scenarios are constantly changing, it is perhaps not surprising that this area has been fertile ground for coverage disputes.

In some cases, the insured's expectations as to what the policy actually covers are the source of the problem. First and foremost, the CGL is not a performance bond. This type of protection is typically far more expensive than a CGL policy and provides the company issuing the bond with a recourse against the insured in the event of its default on its contractual obligations. No such recourse exists under a CGL policy (as the insurer cannot subrogate against its own insured). In consequence, the insured should not expect that its CGL insurer would be paying to redo its own faulty workmanship or replace its own defective product. This is the insured's obligation. It should only look to its CGL carrier if its work or product causes damage to other property belonging to third parties.

It should also be recalled that the CGL policy is not intended to provide coverage for claims arising from rendering or failing to render professional services. Errors and omissions policies issued to professionals are intended to respond to this type of claim. The 2005 IBC advisory wording now standardizes what has become an increasingly common feature of CGL policies by adding a "Professional Services" exclusion. It also incorporates a number of exclusions that have become more and more common on the market as CGL insurers seek to avoid exposure to claims citing abuse, mould contamination, war/terrorism, etc.

It should also be noted that there is no coverage under the CGL policy for what have been dubbed as “pure economic loss” claims. The policy does cover claims for loss of use of tangible property. There are, however, other economic losses not related to loss of use of tangible property that are often claimed. For example, a party may claim the cost of investigating a loss, legal and accounting costs, or other financial losses not related to the loss of use of tangible property. These do not constitute property damage claims under the CGL policy and accordingly should not trigger coverage.

It is not uncommon for there to be successive CGL insurance policies triggered by the same claim. These policies are generally issued on an “occurrence basis,” i.e., the policy is triggered by the occurrence of the bodily injury or property damage. If the bodily injury or property damage occurs over a number of policy periods, different policies and possibly different insurers will be called upon to respond. The issue of which policies are triggered and in what respective percentages has also generated a great deal of case law, particularly in the United States. Canadian courts, at least in the context of property damage claims, tend to apply a combination of what are known as the “Injury in Fact” and “Continuous or Triple Trigger” theories. According to the first theory, one should apply the policy in effect when the property damage in fact occurred. If, however, the evidentiary record is insufficient to determine with certainty when the injury in fact occurred, all of the policies in force between the initial exposure to the cause of the injury and the manifestation of the loss are triggered.

It should be noted that the 2005 IBC advisory wording seeks to change this result. The new wording would require that the insurer on risk at the time that the injury or damage first occurred also cover any continuation or resurgence of the injury or damage at a later date. In consideration of this increased exposure, the wording also excludes any liability for injury or damage known to the insured at the time of policy inception.

Sometimes, there are two or more policies that apply to the same loss occurring within one policy period, for example where the property owner, which already has CGL coverage, is added as an additional insured to its contractor’s policy. In these instances, it is necessary to examine the coverage grant, e.g., the Additional Insured Endorsement, and the exclusions to determine whether there truly is concurrent coverage. If there is, the policies’ respective “Other Insurance” clauses must be reviewed to determine if there is any stated indication as to which policy is primary and which is excess. In the event that the wordings do not permit resolution of the issue through the ordinary principles of interpretation and construction, generally both insurers are put to contribution.

These are just some of the issues that should be considered when procuring CGL coverage or responding to a claim that may trigger coverage. Despite the fact that the evolution of the policy has left us with a number of unwieldy policy provisions and exclusions whose meanings can prove elusive even to the specialists in the area, the fact remains that the CGL policy is often the only protection the insured may have (not to mention the only asset the claimant may have) in an increasingly litigious world.

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Although this article highlights some of the key issues in relation to CGL policies, it is not intended to be a comprehensive analysis of this type of coverage. As noted, the coverage can vary from policy to policy and, therefore, the policy wording should be reviewed carefully to ensure that it meets the requirements of the particular insured.

It is also worth noting that a CGL policy is an "occurrence" based policy which means that the occurrence or event that is the subject of the loss must have occurred during the policy period. That is significantly different than errors and omissions policies which require that the claim not only be made against the insured, but also reported to the insurer during the policy period, even though the wrongful act may have occurred before the inception date of the policy.

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