

# Construction Insurance

2019 Construction Certification Review Course

Christopher Mueller  
Taylor, Day, Grimm & Boyd



TAYLOR DAY

# Typical Types of Insurance

- ▶ Comprehensive general liability
- ▶ Builder's risk coverage
- ▶ Errors and omissions coverage
- ▶ Owner controlled or contractor controlled insurance programs

# CGL Coverage

- ▶ Duty to Defend v. Duty to Indemnify
  - ▶ When does the duty to defend begin? *Altman Contractors, Inc. v. Crum & Forster Spec. Insur. Co.*, No. SC16-1420 (December 14, 2017).
  - ▶ The necessity of timely notice of a claim
- ▶ Occurrence Policies v. Claims Made Policies
  - ▶ Occurrence: Provide coverage for bodily injury and property damage caused during the policy period by an occurrence, even if claim is made against insured after the expiration of the policy
  - ▶ Claims Made: Provide coverage for claims only if they are made against the insured during the policy period
- ▶ Standard for Interpretation
  - ▶ According to their plain meaning
  - ▶ With any ambiguities construed against the insurer and in favor of coverage.

# The CGL Policy

- ▶ Insuring agreement
- ▶ What's an occurrence?
- ▶ Coverage exclusions and limitations
- ▶ Endorsements

# The Insuring Agreement

## 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:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

# What Is An “Occurrence”?

An accident, including continuous or repeated exposure to substantially the same harmful general conditions

*United Fire Insurance Co. v. J.S.U.B., Inc.* 979 So.2d 871  
(Fla. 2007)

# The Trigger: Did “Occurrence” Occur Within “Policy Periods”?

1. Exposure
2. Manifestation
3. Continuous trigger
4. Injury in fact

# Coverage Exclusions and Limitations

“It is the function of exclusions to restrict and shape the coverage otherwise granted by the insuring agreement.”

- *WEEDO V. STONE-E-BRICK, INC.*, 405 A.2D 788 (N.J. 1979)

Exclusions are meant to be read with the insuring agreement independent of every other exclusion



# Rip and Tear Damages

Damage caused by defective work is covered. The work itself is not. What about non-defective damaged due to damage caused by defective work?

*Carithers v. Mid-Continent Casualty Company*, 782 F.3d 1240  
(11<sup>th</sup> Cir. 2015)

The CGL policy covered the cost of uncovering one's non-defective work to repair damage to other property.

# Prominent Exclusions

1. Expected or intended injury
2. Contractual liability
3. Employer's liability
4. Pollution
5. Aircraft, auto or watercraft liability

# Prominent Exclusions

6. Care, custody, or control
7. Damage to product or work itself
8. Failure to perform
9. Recall of products, work or impaired property
10. Voluntary payments

# Limiting Endorsements

1. Contractual liability limitation
2. Products completed operation hazard
3. Damage to work performed by subcontractors on your behalf
4. Exterior insulation and finish systems (EIFS)
5. Engineers, architects or surveyors professional liability
6. Construction management errors & omissions
7. Designated operations covered by a consolidated insurance exclusion program
8. Overspray or spillage

# Additional Insured Coverage

- ▶ One of the most commonly found clauses in a construction contract requires a party to name another as an additional insured
  - ▶ Flow down (owner to contractor to subcontractors)
- ▶ Endorsements
  - ▶ Varied and customized
  - ▶ Broad Form
  - ▶ Completed operations/ongoing operations
  - ▶ Primary and non-contributing

# Additional Insured Coverage

- ▶ **GENERAL CONTRACTORS:** Imperative to draft the additional insured requirements so that the most coverage is afforded to your client
  - ▶ Should be primary and non-contributing to any other insurance afforded to the general contractor
- ▶ **SUBCONTRACTORS:** involve insurance broker to make sure that subcontractor is meeting insurance requirements of subcontract
  - ▶ Failure to comply is likely a material breach of the subcontract
- ▶ **ALL:** Certificates of Insurance do not bind coverage; must confirm endorsements and/or policy language

# Builder's Risk Insurance

- ▶ Indemnifies against damage to buildings while they are under construction
- ▶ Requirement of financing
- ▶ Coverage for fire, wind, theft and vandalism but typically not perils such as earthquake, flood or wind in beach zones
- ▶ Coverage typically runs until work has been completed and property is ready for use or occupancy (earliest of closing, occupancy or policy expiration)

# Builder's Risk Insurance: Coverage Exclusions And Limitations

1. Increase of hazard by insured
2. Loss due to design, specifications, workmanship or materials
3. Loss due to wear and tear, deterioration, and settling foundation
4. Loss due to earth movement
5. Loss caused by surface water or waves
6. Loss caused by theft



# Builder's Risk Insurance: Coverage Exclusions And Limitations

7. Loss occasioned or increased by local ordinance
8. Loss to interior of building caused by rain, snow, sand, or dust
9. Loss concurrently caused by covered and excluded risks

# Professional Liability

- ▶ Covers claims against design professionals for errors and omissions in their design
  - ▶ An integral part of the insurance program for contractors
- ▶ Most are declining balances (“eroding”) policies
- ▶ Duty to defend under the policy
  - ▶ If the complaint alleges a claim covered by the policy’s terms, the insurer must defend the insured
  - ▶ The insurer’s duty to defend is often broader than its duty to pay

# Professional Liability: Duty To Defend

- ▶ Even when only some of the allegations in the complaint are against the insured, the insurer has a duty to defend the entire action
  - ▶ *Am. Hardware mutual insurance Co. v. Miami Leasing & Rentals, Inc.*, 362 so.2d 28 (Fla. 3d DCA 1978)
- ▶ May also include the duty to appeal
- ▶ Defense cost reimbursements

# WRAP, OCIP, And CCIP Insurance

- ▶ Provide coverage for all of the major participants in a large construction project or a series of related projects
  - ▶ What do they provide?
- ▶ The court's interpretation
  - ▶ *Zurich Am. Insurance Co. v. Penn. Mfrs. Assoc. Insurance Co.*, 2003 WL 23095605 (NJ Super., App. Div., May 7, 2003)

# WRAP, OCIP, and CCIP Insurance

- ▶ F.S. §255.0517 (2017)
  - ▶ Governs wrap-up policies on public projects
  - ▶ Numerous conditions must be met
  - ▶ Some projects are exempted from the statute

# Take Aways for the Exam

- ▶ The 4 types of coverage
- ▶ Duties to Defend and Indemnify
- ▶ CGL “Occurrence” and Triggers
- ▶ Additional Insured Coverage
- ▶ Endorsements and Exclusions

Questions?

Chris Mueller

[cjm@taylordaylaw.com](mailto:cjm@taylordaylaw.com)

(904) 356-0700