CHAPTER 1

THE CGL POLICY: INTRODUCTION AND OVERVIEW

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This book was a labor of love prepared by the members of the Insurance Coverage Litigation Committee of the ABA’s Tort Trial & Insurance Practice Section. It was intended as a roadmap to our fellow lawyers who may not have the intimate exposure to the industry often required for the effective provision of insurance coverage advice.

The insurance industry is constantly adapting to new risks. As the industry evolves, so does the law. Four years have passed since this book was first published. The events of the last four years have created new liabilities and are shaping insurance coverage considerations on a wide variety of topics. The changes to insurance coverage law are further impacted by the ever-shifting legal interpretation of common coverage forms by courts across the nation.

As with most fields of law, knowledge of the type of tree is just as important, if not more, as knowing the size, density, and composition of the forest. We offer this book to our colleagues with the intention of providing an overview of the major legal issues that tend to arise in insurance coverage disputes involving commercial general liability policies, as a whole. We genuinely hope that it is useful to practitioners.

I. The CGL Policy

Commercial general liability (CGL) policies are the most common form of liability insurance purchased by public and private businesses throughout the United States and, as a result, are arguably the most litigated insurance product in the marketplace. CGL policies are purchased to obtain broad protection and to transfer to the insurer the risk of liabilities for fortuitous injury or damage arising out of the conduct of the insured’s business.

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II. A Brief History of the CGL Policy

The rise of the CGL policy in the landscape of the American insurance industry is rather remarkable given its relatively short history, which began in the 1940s. Generally, contractual liability insurance began early in the 1800s, taking root in the risk-transfer practices of the maritime industry. The early ancestors to general liability policies—public liability policies—were first written in the United States in the late 1800s and continued to be written until the first quarter of the 20th century. They provided coverage to a wide range of commercial insureds, including manufacturers, contractors, landlords, and other businesses.

Until 1940, liability policies were written for a specific hazard. The first CGL policy was created in 1940 jointly by the National Bureau of Casualty and Surety Underwriters and the Mutual Casualty Insurance Rating Bureau, mainly to address the inconsistency of coverages provided by manuscript forms. It was replaced by a second version in 1943, which in turn was replaced in 1955. With additional revisions made in 1966, 1973, 1986, 1988, 1993, 1996, 1997, 1999, and 2001, the CGL policy (known as a comprehensive general liability policy before 1986) slowly took shape into the standard CGL policy that is known and recognizable today. From time to time, the coverages in standard CGL policies are modified, added, and revised.

III. Overview of CGL Policies

CGL policy forms can be custom-written manuscript forms or standardized forms, but the most widely used forms are the ones created and maintained by the Insurance Services Office (ISO). Four components typically comprise the ISO CGL policy: a declarations page, insuring agreements, the policy’s terms and conditions, and, finally, endorsements.


7. Id. at 450 n.3.

The declarations page is usually the first page of the policy and provides a summary of the policy. Generally, the declarations page will state the policy number, the name of the insurance company writing the policy, and contact information for the insurer, including a phone number and address. It also will be countersigned by and include the name and address of the agent, broker, or other authorized representative through whom the policy was purchased. The declarations page also will state the name and address of the insured, the effective dates of the policy, a summary of the risks insured, and the limits of liability. There may be additional information and schedules accompanying the declarations, such as the policy rate and basis for rating, and perhaps any risks or property specially covered.

The declarations page also will typically specify whether the CGL policy is an “occurrence-based” policy or “claims-made” policy. CGL policies can be written on an “occurrence” or “claims-made” basis, as a single line policy, or combined with one or more other lines of insurance (such as an auto or workers compensation policy) to form a commercial package policy. A claims-made liability policy covers losses for which claims are made during the policy period. An occurrence-based liability policy covers losses that occurred during the policy period, no matter when the claim is made.

From there, the insuring agreement of the CGL policy lists the coverages afforded by the policy. Distinct coverages are provided, and each coverage contains its own insuring agreement and exclusions.

- **Coverage A—Bodily Injury and Property Damage Liability.** Bodily injury and property damage coverage is the core coverage provided in a CGL policy. Coverage A responds to claims involving accidental bodily injury or property damage for which the insured is legally responsible. It includes the coverage grant, which is the promise that the insurer will pay on behalf of the insured sums that the insured is legally obligated to pay to the party asserting bodily injury or property damage, and that it will defend the insured against claims seeking such sums. There are also exclusions to Coverage A that are listed in that section. Typically, the exclusions address loss or damages intentionally caused by the insured; liquor liability; pollution liability; liability arising out of automobiles, aircraft, and watercraft; property damage to the insured’s own products or its own work; and claims that may be covered under workers compensation policies.

- **Coverage B—Personal and Advertising Injury Liability.** In addition to bodily injury and property damage, CGL policies also provide coverage for personal and advertising injuries. Coverage B contains its own insuring agreement and responds to liability claims alleging personal injury and advertising injury. These terms have been combined into a single definition in recent forms. The Coverage B insuring agreement stands alone, separate and distinct.
from Coverage A. Personal and advertising injury often includes false arrest; slander/libel; malicious prosecution; wrongful eviction; violation of rights of privacy; misappropriation of advertising ideas; and infringement on trade slogans, trade dress, copyright, and the like. Coverage B differs from Coverage A in several respects. For example, Coverage B claims nearly always involve intentional acts. Further, while Coverage A is typically occurrence-based, Coverage B is offense-based. This means that whether the claim is considered an occurrence or accident is irrelevant when determining whether an offense falls within the personal and advertising injury liability insuring agreement.

- **Coverage C—Medical Payments.** In addition to the above, the typical CGL policy also provides for the payment of emergency medical expenses to individuals injured on the premises or work site of the insured whether or not the insured is found to be legally liable. Medical payments generally do not cover the insured or its employees, athletic participants, or individuals that may be covered under workers compensation policies or Coverage A.

- **Supplementary Payments.** In addition to the above coverages, CGL policies may provide for supplementary payments in addition to the limits of liability shown on the declarations page. These include payments for items such as bail bonds, expenses incurred by the insured at the insurer’s request when assisting in the defense of a claim, and the insurer’s expenses in responding to the claim.

With the insurance agreements set forth in Section I, Section II of the CGL policy identifies “Who Is an Insured” and provides detail as to the individuals and entities entitled to coverage as named and additional insureds.

Section III, “Limits of Insurance,” typically explains how the limits of insurance are calculated and their relation to one another. The per occurrence or claim limit is the amount that the insurance company is liable to pay for each particular occurrence or claim. The general aggregate limit is the maximum amount that the insurance company is obligated to pay for all damage and injury during the policy period, regardless of the number of occurrences or claims. When the total claims exceed the aggregate policy limits, there is no more coverage available to pay any additional claims. This limit includes injury or damage covered under Coverages A, B, and C, but typically excludes damages or injury related to the products-completed operations coverage; a separate aggregate limit often applies to this coverage. Other sub-limits may also apply to specific coverages, such as medical payments or fire damage.

Section IV, “Commercial General Liability Conditions,” generally provides an outline of the conditions that must be met for coverage to be provided. A number of these conditions are considered “conditions precedent” to coverage and require performance or obligations by the named insured, such as “timely notice” or “cooperation” with the insurer. Failure to uphold these conditions can either prevent the trigger of coverage or extinguish coverage, depending on various circumstances.
Section V, “Definitions,” provides definitions for terms, words, and phrases used in the CGL policy. The terms set forth in CGL policies are not standard dictionary terms—they are unique to the particular policy at issue and are important for determining whether coverage exists.

Finally, the typical CGL policy contains a series of endorsements. Endorsements can add to or subtract from coverage provided by the insuring agreements. Endorsements that broaden coverage include supplemental, extended, or additional coverages, often available to the insured at a discount. These endorsements can affirmatively expand beyond the coverage in Section I of the insuring agreement or can broaden coverage by eliminating exclusions. On the other hand, endorsements added to the policy can also reduce coverage. Some examples of endorsements that detract from coverage are exclusions for damages or injury resulting from pollution, bacteria/fungi, employment-related practices, assault and battery, aircraft/auto/watercraft operation, war, and terrorism. Typically, some of these exclusionary endorsements can be removed from the policy for extra cost if the insured so desires.

IV. Recent Changes to CGL Policies

In recent years, the changes to the standard form CGL policy have resulted in an expansion of coverage in some areas, while decreasing coverage in others.

Some of the more notable recently added exclusions include the addition of tremors and aftershocks to earthquake/earth movement exclusions; debris removal as an exclusion to covered losses to property; exclusions for liquor liability for “BYO” establishments; changes to endorsements reflecting anti-indemnity laws among states that prohibit construction contracts from obligating a contractor to indemnify another contractor or subcontractor for liability resulting from the contractor’s own fault; the addition of negligent hiring, training, or supervision in professional services exclusions; and the exclusion from advertising injury coverage of oral/written publication of material that violates privacy violations.

Some of the more notable areas on which coverage has been broadened include the length of time business income is to be restored to the policyholder; coverage for property loss extended to property in storage units and entrusted property; new coverage for vegetated roofs; removals of sublimits for electronic data loss; additional coverages for property away from the premises, such as laptops or electronic equipment; and clarification that coverage is not excluded for bodily injuries resulting from electronic data liability.9

There are also new coverage options. Businesses can now obtain additional coverage for equipment breakdowns; increases in rebuilding expenses after a disaster; losses of business income arising from physical loss at dependent properties; discharges

9. ISO Form CG 00 01 0413.
of water from sewers, pumps, and drains; theft of building materials and supplies; wastewater removal property; and food contamination, among other coverages.

These changes reflect the shifting trends of allocating risk, liability, and coverage between insurer and policyholder that have occurred in recent years.

V. Overview of Book

This book is not intended to be an exhaustive treatise on CGL policies nor an academic catalog of judicial authority interpreting insurance policy provisions. Rather, it is intended to provide a concise overview of the salient points of CGL policies from a practitioner’s viewpoint.

Chapter 2, “Who Is the Insured?,” addresses issues concerning the individuals and entities that qualify for coverage under the policy’s definition of an “insured” and “additional insured.”

Chapter 3’s two parts discuss the types of injuries and losses generally covered by CGL policies. Chapter 3-A, “Insured Injuries under Coverage A,” focuses on “bodily injury” and “property damage,” and Chapter 3-B, “Insured Injuries under Coverage B,” discusses “personal and advertising injury.”

Chapter 4, “Occurrences,” provides an analysis of the event (“occurrence”) that typically triggers coverage.

Chapter 5, “Number of Occurrences,” addresses important issues about the number of occurrences and the effects this determination may have on the erosion of policy limits, payment of deductibles, self-insured retentions, and other issues.

Chapter 6, “As Damages,” provides a discussion of the loss or damage covered by CGL policies.

Chapter 7, “Trigger,” addresses the trigger of coverage and, in particular, which policies on the risk must respond to continuous-injury or “long-tail” claims that span multiple policy periods. The various theories on trigger issues—namely the exposure theory, manifestation theory, injury-in-fact/actual injury theory, and continuous or triple trigger theory—are all discussed.

Chapter 8, “Key Conditions,” provides an outline of the conditions precedent and other policy conditions that must be met before the insurance policy is triggered.

Chapters 9 and 10 address principal exclusions for Coverage A (“bodily injury” and “property damage”) and Coverage B (“personal and advertising injury”).

Chapter 11, “Business Risk Exclusions,” provides a more detailed discussion about the typical exclusion for products that do not meet the level of performance, quality, fitness, or durability warranted or represented by the insured.

Chapter 12, “Duty to Defend,” discusses the insurer’s duty to defend the insured from liability claims made against the insured asserting loss or damage that may be potentially covered under the CGL policy.
Chapter 13, “Allocation,” analyzes the complex issues of allocating damage or loss among multiple policies and/or multiple policy years.

Chapter 14, “Deductibles and Self-Insured Retentions,” addresses the amount of risk that is to be retained by the insured by way of a deductible or a self-insured retention before the primary insurer’s coverage obligations attach.

Chapter 15, “Bad Faith under a Commercial General Liability Policy,” summarizes an insurer’s extracontractual duties to its insured, such as the duty of good faith and fair dealing.

Chapter 16, “Provisions Concerning Coverage Disputes,” provides a general overview of policy provisions generally covering insurance coverage litigation, namely, service of process, jurisdiction, choice of law, forum selection issues, and alternative dispute resolution provisions.

Chapters 17 and 18 discuss the Bermuda and London policy forms and compare the provisions of those liability forms to the CGL policy. Most American corporations have historically purchased excess insurance from the London market, and more recently, many have incorporated the Bermuda form into their insurance programs.

It is the authors’ collective hope that this book is as useful and concise a summary for the seasoned insurance coverage litigator as it is the foundational groundwork for a lifelong practice in the industry for the beginner.