

Covenants to Insure in Commercial Agreements

A Review of the CGL Policy

In House Training Seminar
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Introduction & Overview

- Examples of Covenants to Insure in Commercial Agreements
 - Distribution and Supply Agreement
 - Standard Mortgage Terms & Standard Mortgage Clause
 - Lease Agreement
 - CCDC2 Stipulated Price Contract 2008

Introduction & Overview (cont'd)

- Anatomy of a CGL Policy
 - Who is Insured?
 - What is Insured?
 - Insured's Obligations When Claim Arises
 - The Insurers Duty to Defend Lawsuits
- Multiple Policies and Overlapping Coverage

Covenants to Insure: Standard Mortgage Terms

The Mortgagor will insure and keep insured the buildings and improvements on the Land . . . for at least their full insurable value on a replacement cost basis against loss or damage by fire and will insure against such other risks and losses as the Lender requires, all with loss payable to the Lender as the Lender's interest may appear and bearing such mortgage clause as the Lender may require.

Standard Mortgage Terms (cont'd)

6.1 General

The Mortgagor will forthwith insure (or will cause to keep insured) and during the continuance of this Mortgage will keep insured (or will cause to be kept insured) the Improvements against loss or damage by fire and such other perils and in such amount(s) as the Mortgagee may reasonably require (including but not limited to boiler insurance, loss of rental income and business interruption insurance).

6.2 Liability Insurance

The Mortgagor will keep and maintain third party liability insurance in an amount satisfactory to the Mortgagee.

Covenants to Insure: Standard Mortgage Clause

This insurance . . . AS TO THE INTEREST OF THE MORTGAGEE . . . is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured . . .

Covenants to Insure: Distribution and Supply Agreements

6.4 . . . Supplier will . . . take out and maintain insurance with such coverage limits and deductibles as are reasonably required by Distributor from time to time, against fire, theft and all other insurance perils inclusive of business interruption and in respect of product liability claims, . . . Distributor will be a named insured under all such policies of insurance . . .

Covenants to Insure: Lease Agreement

The Tenant's insurance shall contain the following:

a) *Property Insurance:*

- i. broad form contents coverage . . .*
- ii. comprehensive boiler and machinery insurance . . .*

Lease Agreement (cont'd)

b) Liability Insurance:

- i. Five Million Dollars . . . commercial general liability (CGL) insurance. This insurance will include coverage for bodily injury or property damage, owners' products and completed operations, intentional acts to protect persons or property, personal injury, advertising liability, employers' liability, blanket contractual liability coverage, provision of cross liability, severability of interests and non-owned automobile liability form; and*
- ii. One Million Dollars . . . Tenant's legal liability broad form (TLL) insurance.*

Lease Agreement (cont'd)

- a) Landlord shall, at all times throughout the Term, carry:**
- i. broad form property of every description (POED) insurance on the Building and Comprehensive Boiler and Machinery insurance on the equipment contained therein and owned by the Landlord . . .*
 - ii. commercial general liability (CGL) insurance with respect to the Landlord's operations in the Building . . .*

Lease Agreement (cont'd)

Waiver of Subrogation

The Landlord and the Tenant agree that the policies of insurance to be placed and maintained by them respectively under Sections 11.1(a) and 11.4(a) shall provide for the waiver and release of any and all subrogated claims, under the policies, against the other.

Covenants to Insure: Construction Contracts / CCDC 2

GC 11.1 INSURANCE

. . . Contractor shall provide, maintain and pay for the following insurance coverages . . .

.1 General liability insurance in the name of the Contractor and include . . . the Owner and the Consultant as insureds but only with respect to liability, other than legal liability arising out of their sole negligence, arising out of the operations of the Contractor with regard to the Work. . . .

Construction Contracts / CCDC 2 (cont'd)

.4 "Broad form" property insurance in the joint names of the Contractor, the Owner and the Consultant. The policy shall include as insureds all Subcontractors. . . .

.5 Boiler and machinery insurance in the joint names of the Contractor, the Owner and the Consultant. The policy shall include as insureds all Subcontractors. . . .

Anatomy of a CGL Policy

- The CGL policy comprises three discrete forms:
 - The declarations pages
 - The policy wording
 - The endorsements, if any

The Declarations

- Identify the named insured
- Describe the business organization
- The policy period
- Which coverages have been selected
- The limits of liability for each type of coverage
- The endorsements attached to the policy form
- The premium paid

The Policy Wordings

- Coverages/insuring agreement, including:
 - Bodily injury liability
 - Property damage liability
 - Personal and advertising injury liability
 - Medical payments
 - Tenants' legal liability

The Policy Wordings (cont'd)

- Exclusions (both general and specific to separate coverages)
- General conditions
- Definitions

The Endorsements

- Amend or supplement the coverages afforded by the standard policy wording e.g. adding insureds, enlarging or restricting certain coverages, etc.

Who is Insured?

- The “Named Insured” (in the Declarations), his spouse and partners.
- The corporation’s officers and directors (but only with respect to their duties as such) and its shareholders (but only with respect to their liability as shareholders).
- The Named Insured’s real estate manager (while acting as such).
- Any newly-acquired organization (automatic coverage for 90 days or expiration of the new policy, whichever is earlier).
- (Some policies) Any person for whom the Named Insured has agreed to obtain liability insurance.

What is Insured:

Bodily Injury and Property Damage Liability

- This coverage extends to the insured's
 - liability imposed by law
 - to pay compensatory damages
 - because of body injury or,
 - “property damage” (“physical injury to tangible property” or “loss of use of tangible property”) occasioned by an “occurrence” (“accident, including continuous exposure to harmful conditions”),
 - in the policy territory (usually Canada and USA)
 - during the policy period

Bodily Injury and Property Damage Liability (cont'd)

- Implications arising from above policy language:
 - “legal liability” is not necessarily restricted to negligence or even tort liability (though see exclusions relating to contractual liability)
 - “compensatory damages” does not include injunctive relief, rescission
 - “physical injury” generally requires actual physical damage . . . does not generally include mere risk of future injury

Bodily Injury and Property Damage Liability (cont'd)

- “tangible property” does not include mere economic or other intangible interests (e.g. pure economic loss)
- “accident” does not include intentional consequences, egregious courting of the risk or certain “business risks” (e.g. repairing poor workmanship)
- “policy period” - this is “occurrence” not “claims made” coverage and gradual damage over several years may “trigger” previous coverages in place during the relevant times

What is Excluded:

Bodily Injury/Property Damage Coverage

- Each exclusion must be read carefully as many contain exceptions. The primary exclusions include:
 - Injury or damage expected or intended from the standpoint of the insured (except from use of reasonable force to protect persons or property)
 - Obligation to pay compensatory damages by reason of the assumption of liability in a contract (except a certain group of contracts that are carved out and except for liability that the insured would have in the absence of a contract)

Bodily Injury/Property Damage Coverage (cont'd)

- Obligation arising out of workers compensation, disability benefits or employment compensation law or any similar law
- Injury to an employee of the insured acting in the scope of his employment (except if denied workers compensation coverage)
- Liability arising out of the ownership or use of an automobile, watercraft or aircraft

Bodily Injury/Property Damage Coverage (cont'd)

- Damage to property owned/occupied/rented to, used by or in the care, custody or control of the insured
- Damage to that particular part of real property on which the insured or any contractors or subcontractors are working
- That particular part of any property that must be repaired because the insured's work as incorrectly performed on it (except for property damage included in the "products-completed operations hazard")
- Damage to the insured's own product or work/operations arising out thereof

Bodily Injury/Property Damage Coverage (cont'd)

- Loss of use of undamaged “tangible property” arising out of the insured’s breaches of quality/workmanship warranties or the insured’s failure to perform a contract
- Expenses arising from the withdrawal of the insured’s products from the market due to suspected defects
- Liability arising out of the rendering or failure to render “professional services”

What is Insured:

Personal and Advertising Injury Liability

- This insurance applies to “personal and advertising injury” arising out of one or more of the following offences arising out of the insured’s business:
 - False arrest, detention or imprisonment
 - Malicious prosecution
 - Wrongful eviction or entry

Personal and Advertising Injury Liability (cont'd)

- Slander or libel
- Oral or written publication that violates a person's right of privacy
- Use of another's advertising idea in your "advertisement"
- Infringing upon another's copyright, trade dress or slogan in your "advertisement"

Personal and Advertising Injury Liability (cont'd)

- Exclusions
 - Knowing infliction of injury
 - Publication of known false material
 - Wrong description of price in advertisements

Personal and Advertising Injury Liability (cont'd)

- Infringement of copyright, patent, trademark, trade secret or other intellectual property rights (except copyright, trade dress or slogan in an advertisement)
- Media/internet-type businesses, electronic chat rooms and bulletin boards

Insured's Obligations When Claim Arises

- Duties in event of occurrence, offence, claim or action including:
 - Notice to insurer as soon as practicable of an occurrence or an offence which may result in a claim
 - Notice to insurer as soon as practicable of any claim that is made or litigation commenced

Insured's Obligations When Claim Arises (cont'd)

- Immediate remittance of legal papers received
- No voluntary payment or assumption of obligation/liability without insurer's express consent

The Insurers Duty to Defend Lawsuits

- The insurer has the “right and duty” to defend any legal proceedings commenced against the insured claiming damages to which the insurance applies.
- The insurer’s duty to defend is broader than its duty to indemnify (pay damages) because:

The Insurers Duty to Defend Lawsuits (cont'd)

- The duty to defend arises regardless of the merit of the claim against the insured (i.e. the insurer must defend frivolous as well as valid claims)
- The insurer must defend the litigation even if the matters alleged in the Notice of Civil Claim only *possibly* fall within coverage (i.e. the insured need not prove at the outset that the claims are actually covered . . . the mere possibility of coverage triggers the insurer's duty to defend)

The Insurers Duty to Defend Lawsuits (cont'd)

- The insurer controls the defence of the lawsuit including the appointment and instruction of counsel, the investigation and settlement of the claim
- The insured must cooperate in the defence of the litigation

The Insurers Duty to Defend Lawsuits (cont'd)

- In cases of partial or questionable coverage for the claims presented, the insurer may defend the matter on a “reservation of rights basis” and in these circumstances the insured may be in a position to appoint and instruct counsel to look after the matter at the insurer’s expense

Multiple Policies and Overlapping Coverage

- Which insurer responds first?
- Whether an insurer is primary, contributory or straight excess depends on the wording of the “other insurance” clauses in the policies
- If the “other insurance” clauses can be reconciled and enforced in a commercially sensible fashion, then priority is governed by those clauses
- If the clauses are irreconcilable, then all policies at risk contribute equally up to exhaustion of policy limits

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THANK YOU