THINK YOU’RE COVERED?
UNDERSTANDING THE DIFFERING COVERAGE AND EXCLUSIONS OF YOUR GCL POLICY, EXCESS POLICY AND UMBRELLA POLICY
A PRIMER

After almost two decades in the construction industry I have found that most of my contractor and subcontractor clients do not understand the coverage provided by their Commercial General Liability Policies, Excess Policies and/or Umbrella Policies.

In most instances, it is more important to understand what types of claims are excluded from coverage under these insurance products to better understand the limited coverage that is provided by each.

In evaluating policies and coverage, the starting point is your Commercial General Liability Policy.

I. COMMERCIAL GENERAL LIABILITY POLICY [CGL]

The typical post-1986 CGL policy is comprised of standardized forms and thus is primarily uniform from policy to policy. These polices have identical
built-in exclusions to coverage. However, the policies can and do differ with respect to exclusions added to the policies via endorsements. These endorsements should be reviewed carefully.

Under the CGL policy you [the insured] are entitled to:

1. Coverage [payment] for covered claims up to the coverage amount provided by the policy; and
2. A defense of lawsuits filed against your company [provided the lawsuit alleges damages for items that are or may be covered under the policy].

I could write 20 pages on the subject of “covered claims and the insurer’s duty to defend its insured and the difference between a claims made policy vs an occurrence policy.” For brevity purposes [and keeping the reader awake], this article is focused on the coverages and primary exclusions provided within CGL and the purposes and coverages of Excess and Umbrella policies.

A. COVERED AND EXCLUDED CLAIMS

Covered Claims

The CGL policy provides coverage for damage to “other property”. “Other property” as defined under the policy does not include the specific part of the construction project that the insured is performing its work.

Thus, coverage will be provided if your work damages “other property”, such as a building across the street from the construction project you are working on.

For example, one of your forklift operators strikes the building across the street with its load damaging the building. The damage to that building [other property] would be covered under your CGL policy up to the limits of insurance [barring any exclusions to the contrary].

Example 2, your sheet pile installation at the construction project causes vibrations and the vibrations damage the foundation of a property adjacent to the construction project. The damage to the foundation of the adjacent property is covered under the policy, as it is damage to “other property”.

Excluded Claims

One of the most important exclusions under the CGL policy that all contractors/subcontractors should understand is the “your work” exclusion.

The CGL policy does not provide coverage for a contractor or a subcontractor’s defect work. The policies contain a “your work” exclusion.
For example, you install a roof with defects [i.e.-leaks or improper construction] and the roof was must be replaced due to the defects. There is no coverage for the cost to replace the roof. This is considered “your work” and the exclusion applies to bar coverage.

Limited exceptions to this exclusion exist so long as the policy contains “completed operations coverage”.

The exception to the exclusion for “your work” in CGL policy with “completed operations coverage”: in Florida

In Florida, coverage under the post-1986 CGL policy for defective work exists in limited circumstances. Most contractors [and some subcontractors] do not self-perform their work, they hire subcontractors to perform the work. The limited exception for coverage of construction defects favors the non-performing contractor or subcontractor in some instances.

The exclusion for “your work” contains an exception if a subcontractor performed “your work” and that subcontractor’s work caused damage to other property.

For example, the contractor hires subcontractor, ABC Roofing to perform the roof work at the project and hires subcontractor, XYZ Drywall to perform the drywall work at the project. ABC Roofing’s work is defective and the roof leaks and the leaks cause damage to the drywall installed by XYZ Drywall. Coverage will be provided for the damage to the drywall under the policy, as the damaged drywall is “other property” under the exception to the exclusion for “your work”.

However, there will be no coverage if ABC Roofing performed both the roof work and the drywall work. Damage to “other work” under this exception must be damage to work performed by a different subcontractor than the subcontractor that performed the defective work causing damage.

Additionally, there is still no coverage for the defective work itself—the defective roof. Thus, coverage exists for the damage to the drywall [other work] but not the roof itself [the defective work].

The “your work” exclusion and the exception to the exclusion has caused much confusion and litigation in the construction industry. In most instances, the confusion can by crystalized by remembering that in almost all\(^1\) circumstances your CGL policy does not provide coverage for the cost to correct your defective work or your subcontractors defect work. Coverage is provided to a contractor for the cost to correct damage to “other work” caused by a subcontractor’s defective work.

\(^1\) In Florida, at least one court has ruled that coverage does exist for defective work in the rare instances where the defective work must be corrected to prevent ongoing damage to other work.
There are many more exclusions under the CGL policies that are not covered in this article.

**B. THE DUTY TO DEFEND UNDER THE CGL POLICY**

The duty of the insurer to defend you against a lawsuit under these policies is very broad. The insurer must provide you a “defense” [pay for a lawyer to represent you] if the claims in the lawsuit are covered claims under the policy or may potentially be covered under the policy. Any indication that the claims in the lawsuit may be covered requires the insurer to provide you a defense.

The duty to defend is very broad and often times the insurer will provide a defense to a lawsuit even though the insurer denies coverage for the claims.

Plaintiffs in construction litigation have become sophisticated and often plead their claims [within the lawsuit] to trigger coverage under the policy. Insurers often complain that plaintiffs “write their way into coverage.” Writing into coverage in this sense is often done by claiming damage to ‘other work’ caused by defective work performed.

**II. EXCESS AND UMBRELLA POLICIES ARE NOT EQUAL**

Excess and Umbrella polices are often mentioned interchangeably by most laymen, even though there is a difference between the policy forms.

Both are designed to provide coverage above the underlying insurance. The underlying insurance is the CGL policy.

The *Excess policies* provide coverage beyond the limits of the underlying coverage. For example, if your CGL policy provides $1 million in coverage and you are found liable for $1.5 million, you can make a claim on your excess policy for the remaining $500,000. However, excess policies are often more restrictive than the underlying policy. In other words, your CGL policy may provide coverage for a specific claim while your excess policy may not provide coverage for the same claim.

In addition, the excess policy does not provide coverage that is unavailable in the underlying policy. Thus, if the claim is not covered under the CGL policy it is not covered under the excess policy.

Further, an excess policy can only be applied to one underlying policy.

The *Umbrella policies* are a type of excess insurance that not only provides additional limits [as does the excess policy] but also provides broader coverage not available in the underlying policy.
For instance, if there is a coverage denial in the underlying policy, Umbrella policy can "drop down" and provide defense and indemnity.

Another distinction between excess and umbrella is that the umbrella policy can be applied to multiple underlying policies.

Most Excess and Umbrella policies are not written on standardized forms. Thus, coverage and exclusions vary from policy to policy. It is very important to read your policies to see what each cover and consult with an attorney versed in insurance policies and coverage matters.

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