



BIG 'I' VIRTUAL UNIVERSITY

Risk & Reality Report

CONTRACTORS PROTECTIVE
PROFESSIONAL INDEMNITY:
Filling Gaps You Didn't
Even Know You Had



Independent Insurance Agents
& Brokers of America, Inc.

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INTRODUCTION

Thanks for taking time to read about "Contractor's Protective Professional Indemnity." It has several different names, and we'll talk about that as well as we go through the topic today.

Some of the things we'll be reviewing include a discussion on contractor's coverage, the limitations and the gaps in the Commercial General Liability Policy. We'll next look at the "traditional" contractor professional exposures as well as the reality of the modern job site and how things have changed in that area. With that base of information, we'll turn our attention to the CPPI coverage themselves, the coverage possibilities. Once we understand the coverage possibilities, we've got to take a look at some of the general coverages and conditions of several CPPI policies.

One of the things that I will mention several times here is that there is no standard CPPI policy. You have to read the form, and you have to see what the individual carrier is providing. I'm just talking about possibilities that are pretty much common to most CPPI policies.

We'll end by looking at a list of construction operations who need CPPI coverage. What you're going to find is, the list is pretty long. So let's begin.

CONTRACTOR COVERAGE, LIMITATIONS & GAPS

Let's open up with a look at common contractor coverages, limitations, exclusions, and gaps specifically in the Commercial General Liability (CGL) policy. Now remember, the CGL coverage for contractors is limited, extending coverage to contractors for only certain types of injuries or damages.

The insurance agreement in Coverage Part A of the CGL states that, "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." It only pays for two types of claims, those arising out of bodily injury and those arising out of property damage.

We're in Coverage Part A; we'll come back to Coverage Part B in just a second.

Bodily injury, as you know, means bodily injury is sickness or disease sustained by a person including death, resulting from any of these.

Property damage claim means a physical injury to tangible property including all resulting loss of use of that property, or loss of use of tangible property that is not physically injured.

Under Coverage Part A, those are the only types of claims, only types of losses, the CGL covers – bodily injury and property damage. That's it. That's all that it gives. Coverage Part B provides coverage for personal and advertising injury.

Personal and advertising injury is essentially a list of seven specific acts. I'm using the term improperly, but it's a named peril type liability coverage. It tells you specifically what qualifies as a personal and advertising injury. If it's not one of those seven listed acts or incidences, it's not covered in Coverage Part B.

Things like false arrest, false detention or imprisonment, malicious prosecution, wrongful eviction from, wrongful entry to or invasion, or the right to private occupancy of a room or dwelling premises that a person occupies, committed by or on behalf of, its owner, landlord, or lessor.

Also, things like a written publication in any manner of material that slanders or libels a person or organization, or disparages a person's or organization's goods, products, or services, or a written publication that violates a person's right of privacy and the use of another's advertising idea in your advertisement.

Last thing, infringing on another's copyright trade dress slogan in your advertisement.

Those are the only things that are covered under coverage part B. It's named perils, if you will, again improperly using the term, that's the only thing that coverage part B covers. Coverage part A provides bodily injury and property damage. That's it. If it's not excluded otherwise.

If it's not bodily injury or property damage, you don't have to go any further, because you have no coverage in the Coverage Part A. If it's not one of the seven things listed or incidences under Coverage Part B, you don't have to go any further.

However, if it is bodily injury and property damage, obviously we start looking then at the exclusions.

If the injury or loss is not a result from any of these things that we just talked about, there is no coverage from the CGL. Now the problem is – please, I don't mean this in an offensive way – agents often stop with the CGL when they are writing coverage for contractors. Historically, that's what we did, but it's not proper.

There are exclusions and gaps in coverage that we are going to talk about over the next few minutes that require us to take one step further in looking at the CPPI coverage. There are financial losses that are suffered by third parties that can be caused by the action or inaction of "a nonprofessional" contractor that does not arise from either bodily injury or property damage. We'll look at an example of this at the end of this section.

Now note, one of the things I want to point out very quickly in the following section, we are pretty much going to ignore Coverage Part B, personal advertising injury. We're going to focus all of our conversation in the CGL side on Coverage Part A, bodily injury and property damage.

Let's jump into some of the issues that we're dealing with. Beyond the coverage limitations that are found in Coverage Part A, bodily injury and property damage, there is one key contractor-specific exclusion, the CGL exclusion, that we have to discuss as part of this CPPI gap discussion. That's the "absolute" pollution exclusion which we'll see in more detail in just a few minutes.

In the unendorsed commercial general liability policy, there are three contractor-specific exclusions found in exclusion f., the absolute pollution exclusion.

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. **However**, this subparagraph does not apply to: (1 contractor-specific exception)

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor.

However, this subparagraph does not apply to: (3 contractor-specific exceptions)

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

f.(1), bodily injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants. (1)(a), at or from any premises, site, or location which is or was at any time owned or occupied by or rented to or loaned to any...there's the key term right there that we're going to see the exception for, in just a couple of minutes, loaned to any insured. However, this paragraph has one exception. That's a contractor specific exception that applies to this building, owner, or occupier exclusion, which is what I refer to as the f.(1)(a) exclusion in the pollution exclusion.

It relates to building owners and occupiers, not to contractors. There's an exception, because of that term that says rented or loaned to any insured. It has to do with additional insured status. We'll review that exception next.

f.(1)(d), under pollution exclusion, excludes at or from any premises, sight, or location on which any insured or any contractors or subcontractors working directly, or indirectly on any insured's behalf, are performing operations. There's a big term here that you can circle.

If the pollutants are brought on or to the premises, sight, or location in connection with such operations by such insured contractor or subcontractor. However...which means forget everything you just read...that's one of the most dangerous terms in an insurance policy. Any time you get to “however”, it means forget what you just read.

It has nothing to do with what we're getting ready to talk about. However, this subparagraph does not apply to...we have three exceptions we're going to look at next. Our last contractor-specific pollution exclusion is f.(1)(e).

At or from any premises, sight, or location on which any insured, or any contractor or subcontractors working directly or indirectly on the insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to or assess the effects of pollutants.

This one has no exceptions. It truly is absolute. Basically, there's no pollution exception, there's no pollution coverage for contractors involved in pollution activities. That makes sense. That is outside of what the CGL's designed to do. If you have a pollution contractor, you definitely need pollution coverage.

Now that we know these contractor-specific pollution exclusions, there are six exceptions that give back limited, key term “limited”, pollution coverage to the contractor, six exceptions that give back limited coverage to a contractor. As we said, there are six contractor-specific exceptions to the absolute pollution exclusion. Not so absolute, is it? Exceptions, as we know, give back some level of coverage.

Now, before I go any further, I do want to point out one thing. Don't get too excited, or too dependent upon the exceptions in the CGL for pollution coverage. The CGL's not intended to provide coverage for somebody who has a traditional pollution exposure, if you will. That's the reason why there's no exception to the pollution contractor exclusion. This is to give essentially incidental pollution coverage back to the insured. Let's look at the first exception that relates to the building, owner, occupier exclusion that we talked about.

f.(1)(a)(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured;

Exclusion f.(1)(d) requires the pollutants be brought to the site by the insured.

f.(1)(d)(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

Implied Exception: Products/Completed Operations NOT Excluded in the wording.

The exception found in f.(1)(a), sub paragraph (ii) which reads bodily injury or property damage for which you, the name insured, the contractor, may be held liable if you are a contractor..." It specifically puts that in there which I find fascinating, because they don't go on to define what they mean by contractor. It just says, "If you are a contractor, and the owner or lessee of such premises, site, or location has been added to your policy as an additional insured, with respect to your ongoing operations, performed for that additional insured at that premises, site or location such premises, site or location is not and never was owned or occupied by, or rent or loaned to any insured other than that additional insured."

Essentially, this exclusion's exception exists to eliminate the carrier's ability to apply the building owner or occupier specific exclusion found, as we just mentioned in f.(1)(a), simply because the building owner or the building occupier is an additional insured on the contractor's policy. Remember, the exclusion said, "Any insured." An additional insured is an any insured. If this exception was not put in there, it is possible that the carrier...and I know carriers will never go overboard and try to exclude something that should probably be covered. If this exception was not put in there, the carrier might try to exclude a loss because of an additional insured being attached to the policies.

This exclusion exists simply to remove the ability to exclude an otherwise covered loss. That should be covered other than the fact that is an any insured's premises. That's the only reason why this exception exists.

The first exception in f.(1)(d) requires that the pollutant be brought to the site by the insured. Now, remember the wording. It says, "If the pollutants are brought on or to the premises, site, or location." If the pollutants are already on the site, the exclusion does not apply. Let me give you a quick example of how this looks.

Just for the sake of this example, this is something that occurred and I got involved with in the past. An HVAC contractor was replacing an oil furnace with a new HVAC system. It was a residential situation, and in this house, they had the old oil tank for the heating oil. The HVAC contractor crimped the pipe and welded the pipe of the oil tank.

Several weeks after that, the weld failed and the oil leaked out and flooded the basement. The carrier, as you might imagine, denied the claim because there was a pollutant involved. That's not proper, because this exception says, or the exclusion says, that it has to be brought to the site by the insured. The oil was already there. The exclusion did not apply.

There's also a second exception that we'll talk about in just a few minutes, that applies to this particular claim. The oil was already there. The pollutant was already there. That's the requirement of the exclusion, that the insured brings it to the site.

If it's already there, why should the contractor be punished for something that was already on the site? Again, like I said, there's a second exception that I'll also apply to this loss.

There are three remaining exceptions to the f.(1)(d) exclusion, and those are, bodily injury or property damage arising out of the escape of fuels, lubricants, or other operating fluids which are needed to perform in normal electrical, hydraulic, or mechanical functions, necessary for the operation of mobile equipment or its parts.

If a piece of mobile equipment...If gas leaks out of it, or oil leaks out of it, during normal operation, that's not excluded, provided that the discharge was not intentional.

If, for some reason, they open it up, or that was part of the operations, and they were discharging oil, then discharging gas on purpose, it was intentional, that's still excluded. The unintentional, the gas line ruptures and releases diesel fuel or whatever on the ground, that's not excluded. That's given back coverage by exception. That's one of the first exceptions or the first exception to the f.(1)(d) exclusion.

A second exception to the exclusion is, bodily injury or property damage sustained within a building, and caused by the release of gases, fumes, or vapors from material brought into that building in connection with operations being performed by you, or on your behalf, by a contractor or subcontractor. Except it gives coverage back for bodily injury or property damaged sustained within a building caused by the release of gas fumes, so on and so forth. An example that often gets used in classes is, if you have a flooring contractor, a carpeting contractor – and this was a real claim – who is putting down a carpet and all these fumes are being released. This contractor's putting down carpet in a chicken processing plant. The fumes infect, if you will, the chickens that are being

processed, and the smell gets in the chickens. The chickens had to be thrown away. That's what this exception would cover, bodily injury or property damage sustained within a building, and caused by the release of gases, fumes, or vapors from materials brought into that building in connection with operations being performed by you, or on your behalf, by a contractor or subcontractor.

The carpeting flooring contractor brought it with them as part of the operations. That is an exception that gives back coverage for the release of those fumes. You also have situations where people get sick because of the release of fumes or whatever, bodily injury or property damage.

Our third exception to the f.(1)(d) exclusion is bodily injury or property damage arising out of heat, smoke, or fumes from a hostile fire, hostile fire being one that escapes its intended confines. Finally, there is an implied exception in the pollution exclusion.

There's no exclusion for products-completed operations. Products and completed operations are not excluded in the pollution exclusion. Remember our example earlier of the HVAC contractor who welded the pipe. When did the loss occur? It was weeks after the contractor left the job site. The weld failed...That's hard to say, by the way. The weld failed and released oil into the basement. That was a completed operations claim. Not only is the exception for the fact they didn't bring the oil to the site, but there's also the exception because it was a completed operations loss, which is not excluded in the absolute pollution exclusion.

It's still covered, because it occurred after it was put to its intended use. It's only an ongoing operations exclusion, not a completed operations exclusion. Before we leave the pollution exclusion and its contractor's exceptions, let's do a quick recap on the limited pollution protection offered to contractors in the CGL.

Essentially, we have off premises pollution coverage granted if the insured did not bring the pollutant to the site. The pollutant escaped from mobile equipment, provided it was an unintentional escape. The injury sustained within a building from a specific material that was brought as part of the operation. Within a building, not outside the building. Note the difference. Within the building, not outside the building. If those fumes get outside the building, or the pollution escapes the building, then we got a problem, because it's within a building. Not only is coverage granted to the building owner as an additional insured if he's held vicariously liable for the actions of the insured contractor, additionally, whatever limited pollution coverage is available to the contractor in the CGL is not deleted simply because the building owner is an additional insured.

Again, removing the ability of the insurance carrier to use the owner/occupier exclusion to a pollution event just because that building owner or occupier is an additional insured.



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