



# ***Understanding Your Design One Coverage:***

## **Commercial General Liability Insurance**

**CGL insurance is an important coverage for any business.**

**Understanding this coverage is an important first step in managing CGL risks.**

## Introduction

Commercial general liability (CGL) insurance is intended to provide coverage primarily for liability arising out of non-professional acts (violations of the personal, business, or property interests of private citizens) that result in bodily injury, property damage, or personal and advertising injury. CGL insurance is designed to cover an insured's liability arising out of incidents on the insured's premises or from the non-professional aspects of the insured's practice.

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CGL insurance is designed to cover an insured's liability arising out of incidents on the insured's **premises** or from the non-professional aspects of the insured's practice.

Since CGL coverage covers non-professional negligent acts, it is important to remember the definition of negligence. "Negligence" is a civil wrong that is not based on a contract and may be defined as the failure to exercise the proper degree of care required by a prudent or ordinary person under similar circumstances. There are four basic requirements that must exist for negligence to be established:

- (1) there must be a legal duty of the insured to act or not act;
- (2) breach of this duty must be committed;
- (3) the act (breach) must be the proximate cause of the injury; and
- (4) there must be actual damages.

## What's Covered?

There are three basic coverage areas that comprise a CGL policy: (1) bodily injury and property damage (BI/PD); (2) personal and advertising injury; and (3) medical payments coverage.

### Property Damage

Bodily injury/property damage provides coverage for the legal liability of insureds for bodily injury or property damage to others arising out of non-professional negligent acts or for liability arising out of their premises or business operations. The CGL policy defines property damage as “physical injury to tangible property, including all resulting loss of use of that property.”

### Bodily Injury

Bodily injury is defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” Death that results after a period of time from an earlier injury will be covered by the policy in effect at the time the injury was sustained.

The meaning of “bodily injury” is open to judicial interpretation. Some courts have held that mental injuries and emotional distress can be considered bodily injuries, even in the absence of physical bodily harm.

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The CGL policy defines property **damage** as “physical injury to tangible property, including all resulting loss of use of that property.”

## What is an example of a BI/PD claim?

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**Procedures** should be established and followed whenever staff are engaged in employment activities, professional or otherwise.

An example of a BI/PD incident involved a surveyor working on an airport runway. The surveyor left his tripod and prism standing upright on the side of the runway when he left for lunch. A small Falcon 900 airplane came in for landing and the leading edge of the right wing, which was extended over the edge of the runway, clipped the equipment. The surveying equipment created a dent in the leading edge, but there were no injuries. However, the repairs to the plane and other expenses, such as down time, parts, and labor, totaled more than \$114,000.

This claim illustrates the importance of having an established risk management program. Much like procedures that should be followed when design professionals visit a construction site, procedures should be established and followed whenever staff are engaged in employment activities, professional or otherwise.

This claim possibly could have been avoided if the surveyor had not left the tripod unattended on a job sight. Any equipment used on a job site should be secured before leaving the site to avoid causing possible bodily injury or property damage.

## Could this have been covered by a professional liability policy?

The claim example on the previous page also illustrates another interesting point. A design firm's professional liability (PL) policy provides coverage for that firm's *professional negligence*. As previously noted, a design firm's CGL policy provides coverage for the firm's *non-professional negligence*. In the surveyor's claim example, a compelling argument could have been made that the damage arose out of the surveyor's professional services and, therefore, should have been covered by the PL policy.

It is unfortunate, but occasionally, insurance carriers will challenge whether a particular claim is covered by their policy or by a policy from another carrier. The surveyor's claim example illustrates a situation where the CGL insurance carrier could argue that the claim should have been covered by the surveyor's PL policy. The PL carrier could have made the same argument against the CGL carrier.

In these situations, it is the insured that is caught in the middle while the insurance carriers debate over which policy should respond to the claim. A way to minimize the risk of this situation is to have both the CGL and PL policies with the same insurance carrier. The focus would then shift to resolving the claim instead of debating which policy should respond to the claim. As a risk management practice, design professionals, and their insurance brokers, should consider the advantages and disadvantages of having their CGL and PL policies with the same carrier.

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## Premises and Operations Liability

There are several coverages included under BI/PD that provide protection for an insured against loss from legal liability arising out of the (1) operation, maintenance, or use of the premises and (2) liability arising out of business operations. This liability involves the insured's (1) legal responsibility for bodily injury or property damage to others on the insured's premises, or (2) liability arising out of the insured's business operations or work performed by independent contractors on the named insured's behalf.

### **What is an example of a claim that would arise out of premises or business operations?**

An example of a liability claim would be if a visitor walks into an insured design professional's office lobby and slips on the marble flooring after a rain storm and breaks her ankle. The injury occurred on the named insured's premises and the injured woman would make a claim against the insured for her medical expenses resulting from her broken ankle.

This example illustrates the importance of maintaining safe building premises, proper warning signs for hazards, and prompt attention to hazardous situations that may increase the likelihood of an accident.

It is also important to note that this coverage does not provide BI/PD coverage for the insured or the insured's employees. Such claims will likely be covered by workers' compensation insurance.

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An example of a business operations claim would be if a manufacturer accidentally flushes flammable liquids into a city's sewer system. An explosion in the sewer results and city streets are torn up, utility services are suspended, and dozens of businesses in the vicinity of the explosion must close because access to the neighborhood has been cut off. The businesses have sustained a loss of use of that property, even though the explosion did not damage the property of these businesses. The manufacturer's CGL coverage will respond to loss of use claims of this kind, just as it will to claims of direct physical injury.

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The CGL policy provides a **broader** contractual liability coverage than professional liability.

### **Is there coverage for contractual liability under the CGL policy?**

Yes, the CGL policy provides broader contractual liability coverage than professional liability. This coverage is for specific contractual agreements. (Under the CNA/Schinnerer PL policy, as well as most PL policies, obligations under a contract are excluded from coverage unless such obligations would have existed in the absence of the contract. This is commonly referred to as *limited form* contractual liability coverage.)

The following contractual agreements are covered under the CGL policy:

- contract for a lease of premises;
- sidetrack agreement (related to railroad deliveries);
- easement or license agreement;
- an agreement, as required by ordinance, to indemnify a municipality; and
- elevator maintenance agreement.

## What does personal and advertising injury cover?

Personal and advertising injury liability protects an insured against liability arising out of certain offenses, such as:

- libel;
- slander;
- false arrest;
- infringing on another's copyright;
- malicious prosecution;
- use of another's advertising idea; or
- wrongful eviction, entry, or invasion of privacy, which is committed during the policy period and within the coverage territory.

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**“Libel”** is a written statement about someone that is personally injurious to that individual.

**“Slander”** is similar to libel in that it is a spoken statement that is injurious to an individual.

### What is libel and slander?

“Libel” is a written statement about someone that is personally injurious to that individual. An example of a libelous situation would be if uncomplimentary comments are made by an architect in a letter to a newspaper about a construction contractor's performance or quality of work on a project in general.

“Slander” is similar to libel in that it is a spoken statement that is injurious to an individual. An example of slander would be if an architect verbally degrades the reputation or past work of another architect to a client in order to secure a project from that client. The act of speaking defamatory words by one architect to sway the client, whether justified or not, affects the other architect's means of livelihood, business, and reputation, which is a personal and advertising injury offense.

Design professionals need to be cautious about making comments, either written or verbal, about another professional or member of the project team. Truth is always a defense to libel and slander so statements should be based on facts or couched as a professional opinion based on the facts presented.

This is another area where there is potential conflict between CGL and PL coverage, as discussed on page 4. This often arises in the context of a design professional commenting to the client about the qualifications of a contractor. When the alleged defaming statements are made, the claim may be excluded under the CGL policy. Having CGL and PL coverage with the same insurance carrier should minimize the risk of a claim being caught between two carriers as they debate which policy should respond.

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Statements should be based on **facts** or couched as a professional opinion based on the facts presented.

### **What medical payments are covered by a CGL policy?**

Coverage for medical payments includes payments for injuries sustained by members of the general public caused by an accident that takes place on the insured's premises or when exposed to the insured's business operations. Injuries must be reported within one year of the accident. Medical payments coverage can be triggered without legal action from a third party. This provides for prompt settlement of smaller medical claims without litigation. It is included in the CGL policy and pays for all necessary and reasonable medical, surgical, ambulance, hospital, professional nursing, and funeral expenses for a person injured or killed in an accident arising out of the premises or business

operations of the insured, regardless of negligence or liability. There is no defense or legal liability coverage as there is with BI/PD liability and personal and advertising liability since coverage is provided on a no-fault basis.

### What are other key differences between CGL and PL policies?

There are some other differences between the CGL and PL policies in terms of what is and is not covered. The following are some key differences between the two.

### Claims-Made vs. Occurrence Claims Triggers

Commercial general liability coverage is written

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Commercial general liability coverage is written on an **“occurrence”** basis. The PL policy is written on a **“claims-made”** basis.

#### Claims-Made vs. Occurrence Trigger

ABC Engineering has had claims-made policies for the last three years. Nation's Insurance Co. provided coverage during 2001, XYZ Insurer provided coverage in 2002, and Main St. Insurance provided coverage in 2003. In 2003, ABC received notice of a claim from a client, even though the event leading to the claim occurred in 2002 (see the timeline below).



Question: Assuming that the allegations are within the CGL policy's coverage, which carrier—Nation's, XYZ, or Main St.—would be obligated to provide defense for ABC and possibly pay the client's damages?

Answer: *Claims-Made*—The claim occurred in 2003, while Main St. Insurance's policy was in effect. Thus, Main St. would respond to the claim.

Answer: *Occurrence*—The event leading to the claim occurred in 2002, while XYZ Insurer's policy was in effect. Thus, XYZ would respond to the claim.

on an “occurrence” basis. The PL policy is written on a “claims-made” basis. The basic difference between the claims-made and occurrence forms of coverage is when the coverage is actually “triggered” or activated. Occurrence coverage is triggered when the event giving rise to the claim actually happened. The policy in effect at the time the event or occurrence happened is responsible for the claim even if the claim is not made until years after the policy expires. Claims-made coverage is based on when a claim is actually filed, and the insurance carrier providing coverage on the filing date is responsible for the claim.

Claims-made policies include a retroactive date, which is usually the effective date of the first policy the insurance carrier writes for an insured. Generally, the claims-made form will not provide any coverage for claims arising out of events that take place prior to the retroactive date, but usually there is a prior-acts endorsement available on the policy that will cover such events.

### **Additional Insureds**

An additional named insured is a party that is added to the coverage of an insurance policy with the right of recovery, but without the obligation to pay the premium or meet certain other terms of the policy. Additional insureds cannot be added to a PL policy since the design firm’s client usually does not perform professional services and, therefore, does not have the risk that the policy is designed to cover. On the CGL policy, however, additional insureds can be added through an endorsement.

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An **additional** named insured is a party that is added to the coverage of an insurance policy with the right of recovery, but without the obligation to pay the premium or meet certain other terms of the policy.

It is important to note that the additional insured endorsement does not add an individual, corporation, or government entity to the list of named insureds. It does, however, afford the named additional insured the same coverage available for the named insured.

## **Contractual Liability Coverage**

As previously noted, the PL policy provides a *limited form* contractual liability coverage only for those contractual obligations that would have existed in the absence of a contract.

The CGL policy provides broader contractual liability coverage for those contract types listed on page 6.

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It does, however, afford the named **additional** insured the same coverage available for the named insured.

## How do I manage my risks?

Operating a business is inherently risky and the management of the accompanying risks is an essential value-added activity. Design professionals need to become aware of the risks that they face.

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### Premises: Business Operations

As the example on page 3 illustrates, it is important that design professionals keep common areas such as lobbies, hallways, sidewalks, and others clean and safe and avoid disrepair. Unsafe conditions and areas in need of repair may lead to slips and falls or other accidents.

Likewise, care should be given to the daily operations of a business. For example, a design firm that recklessly sets up a model of a project in the client's office may cause damage to the client's office, leading to a claim. Procedures should be established and followed for all business activities.

### Personal and Advertising Injury

*Defamation*—It was noted earlier that the risks of a defamation claim can be managed by careful consideration of comments regarding the professional services or performance of others. Statements regarding these matters should be limited to facts or statements of personal opinions based on known facts.

*Copyright Infringement*—The risks of copyright infringement can be managed by awareness of

federal copyright law, protecting your own copyrights, and obtaining proper licenses or permission when using the copyrighted materials of others. For a more detailed discussion on intellectual property risks, please see Schinnerer's *Get Smart About Intellectual Property* at [www.PlanetRiskManagement.com/getsmart.html](http://www.PlanetRiskManagement.com/getsmart.html).

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Special attention should be given to any risk **transfer** or limit of liability provision, such as an indemnification provision.

## Contractual Liability

As previously noted, the CGL policy provides broad coverage for the following types of contractual obligations:

- contract for a lease of premises;
- sidetrack agreement (related to railroad deliveries);
- easement or license agreement;
- an agreement, as required by ordinance, to indemnify a municipality; and
- elevator maintenance agreement.

As with all contracts, review by your legal advisor is strongly recommended. Special attention should be given to any risk transfer or limit of liability provision, such as an indemnification provision.

It is also important that applicable firm staff are aware of the requirements of the contract. For example, firm staff should be aware of the terms of the lease agreement to help minimize the chance of a claim arising out of a breach of a lease of the premises.

Also, as stated above, there is contractual coverage for agreements to indemnify a

municipality when such indemnification is required by ordinance. Regardless of whether the indemnification is required by ordinance or in another agreement, it is important that the indemnification be limited to claims that would be covered by the CGL policy.

### **What is an example of CGL indemnification?**

Unfortunately, because CGL coverage is broader and more complex than PL coverage, it is difficult to draft a sample indemnification clause (as has been done with the PL policy) that would be insurable under the CGL policy. Also, state courts vary in how they interpret and enforce indemnification clauses. Your legal advisor is in the best position to advise you as to an appropriate CGL indemnification clause.

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State courts vary in how they interpret and enforce **indemnification** clauses.

At a minimum, design professionals should insist that the indemnification clause for professional services is separate from any indemnification clause for non-professional services. Also, the CNA/Schinnerer professional liability program will honor a defense obligation as long as it is tied to an indemnification obligation to the extent that the claim arose out of the professional negligent act, error, or omission.

Under the CGL policy, however, a contractual obligation to defend the client may not be honored by the policy. Therefore, design professionals should insist that such contractual obligations are removed. The circumstances of the claim will be a major consideration.

## Additional Insureds

Including additional insureds under the CGL policy is permissible under certain circumstances, such as lease agreements, and customer or vendor relationships. Additional insureds are added to the policy by endorsement when the named insured wishes to provide such status or when it is required of the named insured as part of a business contract. Careful consideration should be given before granting any additional insured request. Ask yourself, “Why is this party asking to be listed as an additional insured?”

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Additional insureds are **added** to the policy by endorsement when the named insured wishes to provide such status or when it is required of the named insured as part of a business contract.

Similarly, there are times when a design professional will want to be listed as an additional insured on another policy. For example, since design professionals often visit the construction site, it is logical for the design professional to be listed as an additional insured on the contractor’s CGL policy. However, because the contractor is rarely, if ever, involved in the design professional’s business activities, it is not as logical to list the contractor as an additional insured on the design professional’s CGL policy.

This is the type of evaluation that should occur when a design professional receives a request for the client or contractor to be listed as an additional insured on the design professional’s CGL policy.

## Conclusion

Although typically broader and more complex than PL coverage, the need to manage the risks of CGL coverage is just as important. The first step in managing CGL risks is to understand the coverage.

This publication has attempted to explain the basic concepts of the various coverage aspects of the CNA/Schinnerer CGL policy and, where appropriate, has given examples. It is important to note that some of the examples illustrate claim scenarios that could be covered by either the CGL or PL policy. As a risk management tool, insureds and their advisors should consider having their CGL and PL coverage with the same insurance carrier to avoid conflict between multiple carriers as to which policy should respond to a claim.

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The first step in managing CGL risks is to **understand** the coverage.