

New Policy, Same Premium, Less Coverage: The 2005 CGL Policy Form

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OVERVIEW

Responsible Canadian businesses are insured under a Commercial General Liability policy. Most policyholders do not know that a number of Canadian insurers have adopted a new CGL policy which attempts to impose significant restrictions on coverage. This article explains the most significant changes to the CGL form, and discusses what can be done to avoid the changes.²

THE “OLD” CGL

The Insurance Bureau of Canada issued a revised wording in 2005 for the CGL policy. While there were numerous changes to the policy, the most controversial involve the “trigger” of coverage.

Prior to 2005, the older CGL stated that coverage only applies to bodily injury or property damage that occurs “during the policy period”. This caused no problems where the injury or damage occurred suddenly (such as a slip and fall, or an explosion). However, it was problematic when injury or damage occurred over a long period of time (such as premature deterioration of concrete foundations over ten years).

Courts in the United States and Canada developed a number of “trigger theories” to determine when injury or damage occurred, for the purposes of determining which CGL policy years applied. Courts have held that where progressive injury or damage spans a number of insurance policy years, then all of those policies apply: *Alie v. Bertrand & Frère Construction Co.* (2002), 62 O.R. (3d) 345 (C.A.).

This older wording helps the policyholder in large claims. Assume that the policyholder had primary and excess limits of \$20 million per year, and that five policy years were triggered. Under the old wording, the policyholder would have \$100 million (\$20 million times five years).

¹ This article was published in the March 2010 edition of *The Pulse*, a publication of the Ontario Risk and Insurance Management Society.

² This article focuses on the “known loss” revisions in the 2005 CGL, but does not review less controversial changes which were made to the policy at the same time.

THE “NEW” 2005 CGL WORDING

The IBC revised its CGL wording in 2005 in an attempt to circumvent cases like *Alie v. Bertrand*. The goal was to try to limit coverage to one policy year. A number of Canadian insurers, but not all, have now adopted the 2005 wording for their standard CGLs.

The 2005 policy uses “deemed knowledge” clauses in an attempt to limit coverage. The two main clauses are:

“b. This insurance applies to “bodily injury” and “property damage” only if:

...

(3) Prior to the policy period, no insured ... knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such ... insured ... knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury or “property damage” will be deemed to have been known prior to the policy period.

...

d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured ...:

(1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;

(2) Receives a written or verbal demand or claim for “compensatory damages” because of the “bodily injury” or “property damage”; or

(3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

The goal of this new wording is to limit coverage to the first policy period in which the loss became known. Instead of having \$100 million (representing five policy years) in coverage as per the example above, the policyholder would only have \$20 million (representing one policy year). The insurers would argue that that was always the intent of the policy, and that there is no change in coverage. In reality, however, the wording attempts to change about 30 years of American and Canadian case law holding that multiple policy years can apply to long-term injury or damage.

It is also possible that the new wording may create gaps in coverage. Consider this scenario:

- Assume that a plumber installs piping throughout a building in 2003.
- In 2004, the property manager advises the plumber that there has been a small leak resulting in \$100.00 worth of damage to carpeting. The plumber fixes the leak and there is no claim or lawsuit.
- In 2007, there is a major leak which causes \$500,000 in damage. It is ultimately determined that both leaks resulted from the same faulty installation.
- The plumber reports the \$500,000 claim to the insurer under the 2007 policy, because that is when the main damage took place.

Both the 2007 and 2004 insurers could deny coverage for this claim, resulting in a gap in coverage. The 2007 insurer's analysis might be as follows:

- While there has been "property damage" (consequential damage resulting from the leaky pipes) caused by an "occurrence" (the leak), which took place in the 2007 policy period, there is no coverage due to the new "known loss" provisions.
- In particular, the CGL in force in 2007 precludes coverage because the loss is deemed to have been known in 2004 (when the \$100 damage took place). The relevant policy provisions are as follows:
 - Clause 1.b.(3): The policy only applies if "*prior to the policy period, no insured ... knew that the ... 'property damage' had occurred, in whole or in part*". (In this case, the insurer would argue that the plumber knew that the damage had occurred, in part, in 2004 when the \$100 damage took place.)
 - Clause 1.d.: Property damage is deemed to have taken place when the insured "*becomes aware by any other means that . . . 'property damage' has occurred or has begun to occur.*"
- Therefore, the 2007 insurer denies coverage for the \$500,000 liability claim against the plumber, because the loss is deemed to have been known in 2004.

The plumber then turns to his 2004 CGL insurer, which had the old CGL wording. The 2004 insurer denies coverage for the \$500,000 liability claim resulting from the 2007 leak as well. The 2004 insurer argues:

- The 2004 CGL only applies to damage that took place during the policy period.
- The 2007 leak, which resulted in \$500,000 worth of damage, did not take place during the 2004 policy period, so there is no coverage.

It is therefore conceivable that the plumber will be left without coverage for a significant claim. If the court upholds the denial by both insurers, then the plumber has no coverage. If the plumber sues and successfully challenges the denial, he will still have to pay for the defence in the interim, and he will have to pay for the cost of the coverage

proceedings as well. All of this may occur even though the plumber was continuously insured and reasonably expected that he would be covered under one or more policies.

LESSONS FOR THE POLICYHOLDER

Big claims do not always happen to big companies. Many smaller companies get caught up in large product liability claims too.

Policyholders must learn that not all CGL policies are created equal. There is more to CGL coverage than choosing the lowest premium. Policyholders should review their coverages with an experienced independent insurance broker, to ensure that they are adequately protected.

No one knows how the courts will interpret the new wording, and whether the attempt to restrict coverage will be upheld. Many policyholders and brokers are insisting on the pre-2005 wording, and are actively seeking insurers who still write on the old policy form.

Read your policy and speak to your broker. Why accept a new policy, for the same premium, which provides less coverage?

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Thomas Gold Pettingill LLP is a litigation law firm which helps corporate policyholders obtain insurance coverage for a wide variety of claims. The firm also represents insurance companies in the defence of significant property and liability claims as well as corporations in complex commercial disputes. Situated in Toronto, the lawyers at Thomas Gold Pettingill LLP have developed a Canada-wide reputation in insurance law.