Comprehensive General Liability: Policy Period and Triggers

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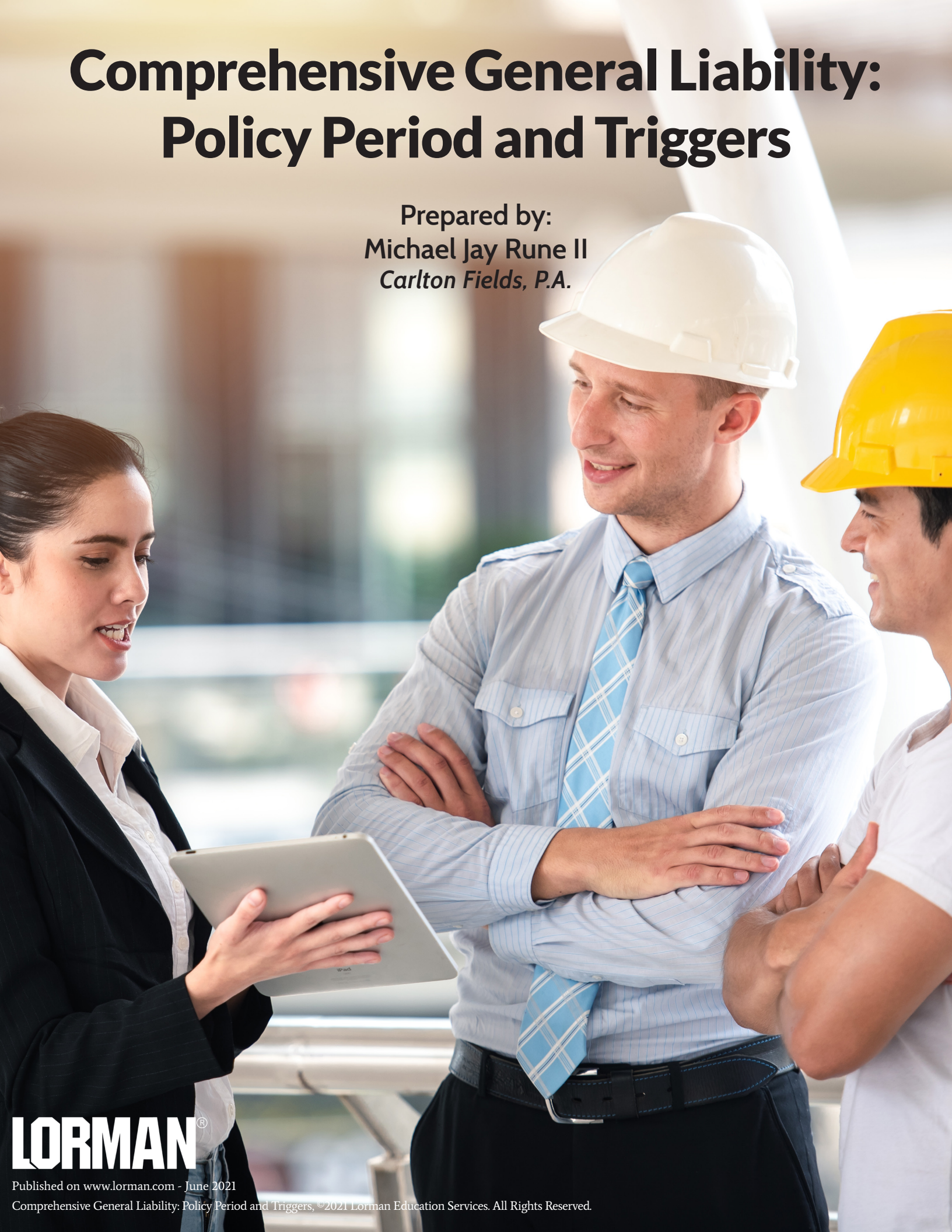

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A. Property Damage or Bodily Injury:

A CGL Policy covers the risk of damage to the property or persons of third parties. What is "property damage" or "bodily injury"? In the realm of insurance law there is seldom a simple and straight-forward answer. Property damage is typically defined in an insurance policy as:

> (1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom or, (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an incurrence during the policy period.[1]

In the construction context an important consideration with regard to property damage is that the property damage must be **physical damage**. The courts have drawn a distinction between "physical" loss/damage to property and other purely economic losses.[2] The inclusion of the term "physical injury" is a significant aspect of the definition of property damage which was designed specifically to preclude coverage of consequential or intangible damages.[3]

B. Occurrence

Most CGL policies define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[4] In Florida, faulty

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[1] *Appleman,* Insurance Law and Practice §4508.02 n.1.

[2] *Lassiter Constr. Co., Inc. v. American State Ins. Co.,* 699 So.2d 768 (Fla. 4th DCA 1997); *Old Republic Ins. Co. v. West Flagler Assoc., Ltd.,* 419 So.2d 1174 (Fla. 3rd DCA 1982); *Peoples Tele. Co., Inc. v. Hartford Fire Ins. Co.,* 36 F.Supp.2d 1335 (S.D. Fla. 1997).

[3] *New Hampshire Ins. Co. v. Vieira,* 930 F. 2d 696 (9th Cir. 1990); *Federated Ins. Co. v. Concrete Units,* 363 N.W.2d 751 (Minn.1985); *Aetna Cas. & Sur. Co. of America v. Deluxe Systems, Inc.,* 711 So. 2d 1293, 1297 (Fla. 4th DCA 1998); *Commercial Union Ins. Co. v. R.H., Barto Co.,* 440 So. 2d 383 (Fla. 4th DCA 1983).

[4] *Koikos v. Travelers Ins. Co.,* 849 So. 2d 263, 266 (Fla. 2003); *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072 (Fla. 1998).

workmanship that is neither intended nor expected from the standpoint of the contractor constitutes an occurrence under a post-1986 CGL policy.[5] This policy definition arose from a change in policy forms. Judge Van Nortwick in a specially concurring opinion explained the historical development of the CGL policies:

> Historically, over the last 20 years insurance carriers have revised the language in general liability policies by substituting the word "occurrence" for "accident" and then generally by defining "occurrence" to mean "an accident including continuous or repeated exposure or conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured..." According to Appleman, used in this manner, the meaning of accident provides coverage not only for an accidental event, but also for unexpected injury or damage resulting from an intentional act. As a result, under this policy language, if the resulting can be viewed as unintended by a fact- finder, the event constitutes an "accident" for purposes of liability insurance policy.[6]

The effect of this change is illustrated by two Supreme Court cases with substantially similar facts that reached the opposite conclusion, *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072 (Fla. 1998) and *Hardware Mutual Cas. Co. v. Gerrits,* 65 So. 2d 69 (Fla. 1953). In *Gerrits,* the Court held that the construction by an insured of a building on his own land encroaching on an enjoining lot was not an "accident" covered

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[5] *See U.S. Fire Ins. Co. v. J.S.U.B.*, 979 So. 2d 871 (Fla. 2007).

[6] *CTC Dev. Corp., Inc. v. State Farm,* 704 So. 2d 579, 581 (Fla. 1st DCA 1997), aff'd, *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072, 1076 (Fla. 1998).

by a liability policy. The Court reasoned that "an effect which is the natural and probable consequence of an act or course of action is not an "accident."[7] In *CTC Dev. Corp.,* the Court held that a general contractor and architect were entitled to recover for the same improper construction of the house, as the damage constituted an "occurrence." In this case, the Court receded from its earlier opinion, as coverage as defined in the policy would be provided for "not only for an accidental event, but also for the unexpected injury or damage resulting from the insured's intentional acts."[8] The Court held the where the term "accident" is not defined in a liability policy, the term "encompasses not only 'accidental events,' but also injuries or damages neither expected nor intended from the standpoint of the insured."[9]

In effect, the ordinary definition of an "occurrence" would only exclude from coverage an event where the resulting bodily injury or property damage was expected or intended by the insured. The overall effect is that the more modern definition of "occurrence" as opposed to "accident," provides broader coverage for the insured, which was apparently the intent of the change in the policy language.

C. **Policy Period and Triggers:**

The policy period of a CGL Policy is determined by the express terms of the insurance contract. Typically, a CGL Policy provides coverage for any claims arising during the policy period, whether or not the claim was made during the policy period.[10] The term "trigger of coverage" is a term of art in the insurance industry which is used to describe the occurrences which must take place during a policy period in order to "activate" the insurance carriers' duty to defend and/or indemnify a claim made under the policy. Stated somewhat differently, the term

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[7] *Hardware Mutual Cas. Co. v. Gerrits,* 65 So. 2d 69 (Fla. 1953), *citing, Appleman,* Insurance Law and Practice, §4492.

[8] *CTC Dev. Corp.,* 720 So. 2d at 1075.

[9] *CTC Dev. Corp.,* 720 So. 2d at 1076. *See also, Grissom v. Commercial Union Ins. Co.,* 610 So. 2d 1299 (Fla. 1st DCA 1992), *rev. denied,* 621 So. 2d 1065 (Fla. 1993).

[10] *Gulf Ins. Co. v. Dolan, Fertig and Curtis,* 433 So. 2d 512, 514 (Fla. 1983); See n. 70, *infra,* discussing claims made policies.

"trigger of coverage" denotes the facts and/or circumstances which would give rise to a potential for coverage under an insurance policy. As it relates to coverage under a CGL policy, can there be more than one "occurrence"? Stated simply, yes. Florida follows the causation theory which holds that multiple occurrences may arise under certain circumstances.[11]

The insurer's duty to defend is broader than its duty to indemnify.[12] Generally, the duty to defend arises solely from the allegation in the complaint made against the insured.[13] In the CGL context the allegations must allege damage to covered property not otherwise excluded, such as damages to the insured's work.[14] An insurer may waive "coverage defenses" by failing to comply with Florida Statute §627.426(2), which requires an insurer to advise an insured of its coverage defenses in denying coverage. Violating §627.426(2) potentially waives the insurers right to deny coverage.[15] However, coverage cannot be created by §627.426(2) and the existence of a valid exclusion is not a coverage defense.[16]

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[11] *See Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003) (holding that, in the construction context, multiple occurrences can exist for different types of work).

[12] *See, e.g., Wendy's of N.E. Florida, Inc. v. Vandorgriff,* 865 So. 2d 520, 522 (Fla. 1st DCA 2003); *Jones v. Fla. Ins. Guar. Ass'n Inc.*, 908 So. 2d 435, 443 (Fla. 2005).

[13] *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 10 (Fla. 2004) (emphasis supplied); *Nationwide Mut. Fire Ins. Co. v. Advanced Cooling & Heating, Inc.,* 126 So. 3d 385, 388 (Fla. 4th DCA 2013); reh'g denied (Dec. 5, 2013), *review denied*, SC14-135, 2014 WL 4826790 (Fla. 2014); *Castro v. Allstate Ins. Co.,* 724 So. 2d 133, 135 (Fla. 3rd DCA 1998); *Illinois Ins. Exchange v. Scottsdale Ins. Co.,* 679 So. 2d 355, 357 (Fla. 3rd DCA 1996) *Fun Spree Vacations, Inc. v. Orion Ins. Co.,* 659 So. 2d 419, 421 (Fla. 3rd DCA 1995).

[14] *Auto Owners Ins. Co. v. Tripp Constr. Co., Inc.,* 737 So. 2d 600 (Fla. 3rd DCA 1999); *Barry University, Inc. v. Fireman's Fund Ins. Co. of Wisconsin,* 845 So. 2d 276 (Fla. 3rd DCA 2003); *Biltmore Const. Co., Inc. v. Owners Ins. Co.,* 842 So. 2d 947 (Fla. 2d DCA 2003).

[15] *Nationwide Mut. Fire Ins. Co. v. Beville,* 825 So. 2d 999 (Fla. 4th DCA 2002); *American Empire v. Gold Coast Elevator,* 701 So. 2d 904 (Fla. 4th DCA 1997); *Auto Owners Ins. Co. v. Salvia,* 472 So. 2d 486 (Fla. 5th DCA 1985).

[16] *AIU Ins. Co. v. Block Marina Invest., Inc.,* 544 So. 2d 998 (Fla. 1989); *Hartford Ins. Co. of the Midwest v. Bellsouth,* 824 So. 2d 234 (Fla. 4th DCA 2002) (anti-stacking clause held effective).