Commercial General Liability Insurance

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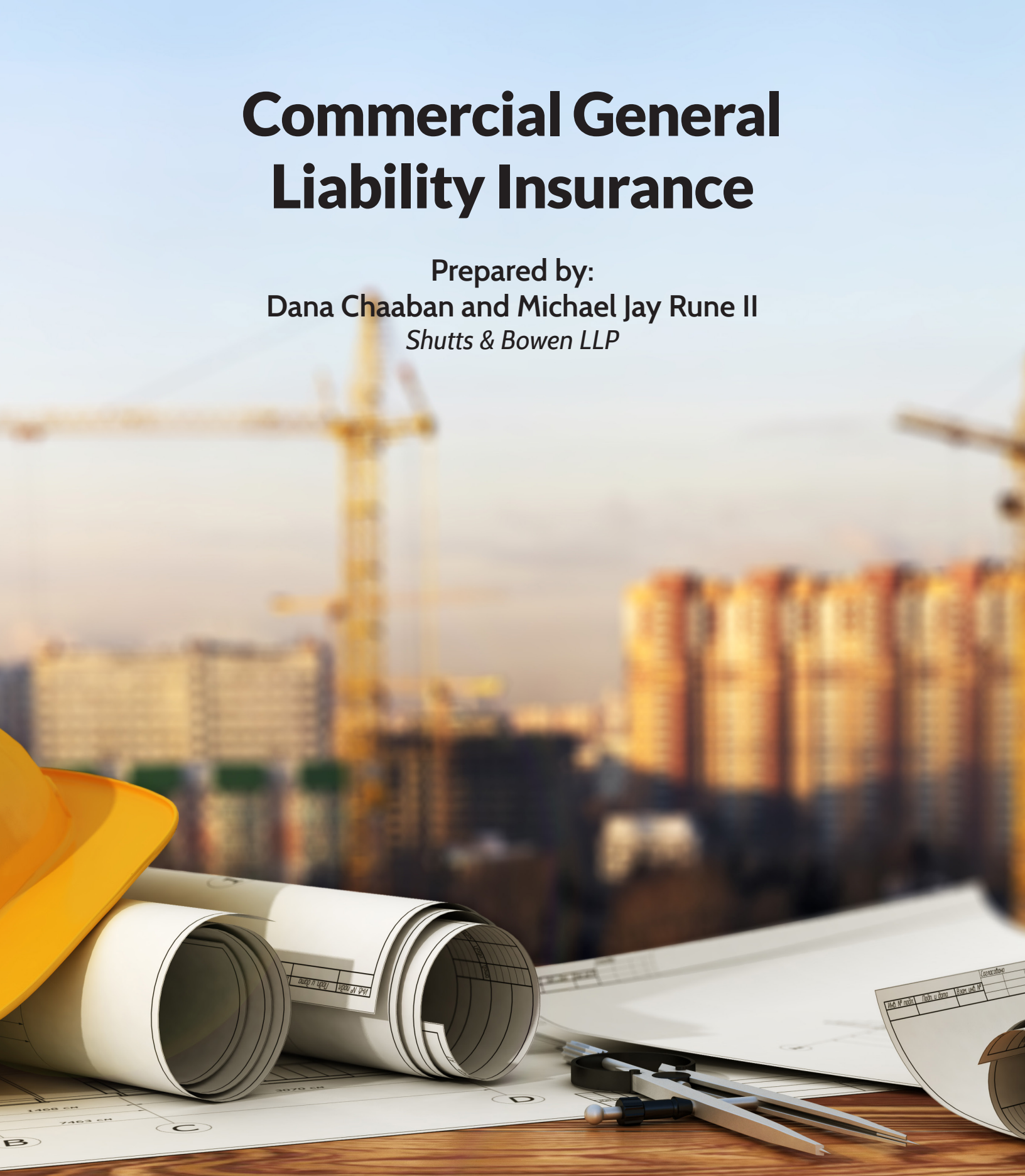

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BASICS PRINCIPLES OF CONSTRUCTION INSURANCE

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I. COMMERCIAL GENERAL LIABILITY INSURANCE:

On almost every construction project the contractor and subcontractors are required to provide some form of liability insurance coverage. In most construction contracts the general contractor and the subcontractors are to maintain liability insurance to protect against unforeseen events. A Commercial General Liability Insurance or a Comprehensive General Liability policy, both commonly referred to as a "CGL" Policy, are the most common in the market.

In general, the risk insured against by such policies is the risk of damage to the property or persons of third parties. Throughout the United States, an insurance policy is considered a contract and one must always examine closely the language of the specific policy in order to determine the matters covered.[1] Many states have adopted some form of an insurance code governing insurance policies, including CGL policies.[2]

By statute, insurance policies typically must define the names of the parties to the agreement, the subject matter of the insurance, the risk insured against, the time when the insurance will take effect in the effective period of the policy, as well as the premium, the conditions pertaining to insurance, and the form numbers and rendition dates of all endorsements to the insurance policy.[3]

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[1] *See Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *See also Prudential Property & Caus. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993); *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 150, 663 N.W.2d 131, 132 (2003); *S. Healthcare Servs., Inc. v. Lloyd's of London*, 110 So. 3d 735, 744 (Miss. 2013); *One Beacon Am. Ins. Co. v. Huntsman Polymers Corp.*, 2012 UT App 100, ¶ 11, 276 P.3d 1156, 1160; *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015), reh'g denied (Sept. 11, 2015).

[2] *See* Fla. Stat. Ch. 624 – 651; Tex. Ins. Code tit. 2, Ch. 30 – 7002; Ala. Code tit. 27, Ch. 1 – 61.

[3] *See e.g.*, Fla. Stat. § 627.413.

A potential claimant is entitled to require an insurer to disclose significant information regarding the coverages maintained by their insured. For instance, the Florida Insurance Code requires disclosure within thirty (30) days of a written request from a claimant of a statement under oath of a corporate officer or the insurer's claims manager setting forth the name of the insurer, the name of each insured, the limits of liability, a statement of any policy coverage defense which such insured reasonably believes is available to said insured at the time, the filing of such a statement, and a copy of the policy.[4] Whether you are the owner, general contractor or the subcontractor, or their representative or counsel you should always get a copy of the policy and request disclosures required by the Insurance Code whenever there is a potential claim.

A. <u>Property Damage or Bodily Injury:</u>

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 anytime 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.[5]

In the construction context an important consideration with regard to property damage is that the property damage must be **<u>physical damage</u>**. The courts have drawn a distinction between "physical" loss/damage to property and other purely economic losses.[6] The inclusion of

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[4] Fla. Stat. §627.4137. *Auto Ins. Co. v. Rouseau,* 682 So. 2d 1229 (Fla. 4th DCA 1996); *Allstate Ins. Co. v. Singletory*, 540 So. 2d 938 (Fla. 2nd DCA 1989); *Schlosser v. Perez,* 832 So. 2d 179 (Fla. 2nd DCA 2002); *see also* Maryland Courts and Judicial Proceedings Article, §§10-1101 through 10-1105 (requiring insurers to disclose policy limits information to claimants involved in motor vehicle accidents under certain circumstances prior to litigation being initiated.)

[5] *Appleman,* <u>Insurance Law and Practice</u> §4508.02 n.1.

[6] *Lassiter Constr. Co., Inc. v. American State Ins. Co.*, 699 So.2d 768 (Fla. 4th DCA 1997); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 40, 268 Wis. 2d 16, 40, 673 N.W.2d 65, 76; *Old Republic Ins.*

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.[7]

B. Occurrence

Most CGL policies define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[8] Faulty workmanship that is neither intended nor expected from the standpoint of the contractor constitutes an occurrence under a post-1986 CGL policy.[9] 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.[10]

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); *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 312, 757 N.E.2d 481, 502 (2001).

[7] *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).

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); *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 2012-Ohio-4712, ¶ 9, 133 Ohio St. 3d 476, 480, 979 N.E.2d 269, 272; *Am. Modern Home Ins. Co. v. Corra*, 222 W. Va. 797, 798, 671 S.E.2d 802, 803 (2008).

[9] *See U.S. Fire Ins. Co. v. J.S.U.B.*, 979 So. 2d 871 (Fla. 2007).; *Sheehan Const. Co., Inc. v. Cont'l Cas. Co.*, 935 N.E.2d 160, 173 (Ind. 2010), *opinion adhered to as modified on reh'g*, 938 N.E.2d 685 (Ind. 2010); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 4 (Tex. 2007).

[10] *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).

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 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."[11] 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."[12] 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."[13]

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.

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

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

[13] *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).

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.[14] 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 "trigger of coverage" denotes the facts and/or circumstances which would give rise to a potential for coverage under an insurance policy. There are four basic triggers theories, which have been discussed in the case law of various jurisdictions and debated over the years: (1) exposure (2) manifestation (3) continuous trigger and (4) injury in fact. Under the exposure theory damage may be deemed to occur upon the "installation" of the defective product which caused the loss. Under the "manifestation" theory is a discovery theory, the occurrence is when the damage "manifest" or is discovered. The "continuous" trigger theory basically holds the occurrence is spread over the period of time the damage exist, in other words from the time the defective product is installed until the injury is "manifest". Lastly the "injury in fact" trigger is generally tied to the concept of the resulting damage (or "damage in fact") as the date of the occurrence.

As it relates to coverage under a CGL policy, can there be more than one "occurrence"? Stated simply, yes. Many states including, Florida generally follows an injury in fact theory which holds that multiple occurrences may arise under certain circumstances.[15] In asbestos and environmental contamination-related cases, many jurisdictions have applied the continuous

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

[15] *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).

trigger theory, which holds that "all policies in effect during the aggregate trigger period, for example, during the period of exposure or injury in fact, are activated and may be called on to respond to a loss."[16]

The insurer's duty to defend is broader than its duty to indemnify.[17] Generally, the duty to defend arises solely from the allegation in the complaint made against the insured.[18] In the CGL context the allegations must allege damage to covered property not otherwise excluded, such as damages to the insured's work.[19] An insurer may waive "coverage defenses" by failing to comply with a state statute. For instance, in Florida, an insurer may waive a coverage defense 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.[20] However, coverage cannot be created by §627.426(2) and the existence of a valid exclusion is not a coverage defense.[21]

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[16] *Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr,* 172 N.J. 409, 417, 799 A.2d 499, 503 (2002); *see also Zurich Ins. Co. v. Raymark,* 118 Ill.2d 23, 112 Ill.Dec. 684, 514 N.E.2d 150 (Ill.1987) (applying continuous trigger theory to personal injury asbestos claims); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F.Supp. 71, 76 (E.D.Mich.1987).

[17] *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); *Archon Investments, Inc. v. Great Am. Lloyds Ins. Co.*, 174 S.W.3d 334, 339 (Tex. App. 2005); *United Services Auto. Ass'n v. Speed,* 317 P.3d 532, 538 (Wash. Ct. App. 2014), *review denied,* 180 Wash. 2d 1015, 327 P.3d 55 (2014).

[18] *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. 3d DCA 1998); *Illinois Ins. Exchange v. Scottsdale Ins. Co.,* 679 So. 2d 355, 357 (Fla. 3d DCA 1996)*; Pekin Ins. Co. v. Pulte Home Corp.*, 935 N.E.2d 1058, 1061 (Ill. App. Ct. 2010); *Woo v. Fireman's Fund Ins. Co.*, 161 Wash. 2d 43, 52, 164 P.3d 454, 459 (2007).

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

[20] *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).

[21] *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).

D. Exclusions Typically Involved in Construction Claims:

In the construction context, there are numerous exclusions that have a significant impact on the coverage available under a CGL policy. Generally, CGL policies exclude from coverage: property damage to the insured's product and/or property damage to work performed by or on behalf of the insured; damage to property in the care, custody, and control of the insured; damage after completion of the building; and design defect.

1. Insured's Work Exclusion

In the construction context, the courts have held that replacement or repair of defective work is not covered under a commercial liability policy.[22] "A contrary holding would have the effect of converting the policy into a performance bond rather than liability insurance."[23] For example, if a contractor inadequately shores a wall which collapses damaging another portion of the building and workers, typically a CGL policy would allow recovery for the costs of repairing the work that was damaged and any injuries resulting from the collapse; however, the CGL Policy would not cover the cost of replacing the wall which collapsed.[24] This exclusion has been held to exclude claims for damages to subcontractors work even when there is an exception for subcontractor work in the exclusion.[25]

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[22] *Amerisure Mut. Ins. Co. v. Aucter,* 673 F. 3d 1294 (11th Cir. 2012); *LaMarche v. Shelby Mutual Ins. Co.,* 390 So. 2d 325 (Fla. 1980); *American States Ins. Co. v. Villegas,* 394 So. 2d 222 (Fla. 5th DCA 1981); *Tucker Constr. Co. v. Michigan Mut. Ins. Co.,* 423 So. 2d 525 (Fla. 5th DCA 1982); *Lassiter Constr. Co., Inc. v. American State Ins. Co.,* 699 So. 2d 768 (Fla. 4th DCA 1997); *Home Owners Warranty Corp. v. Hanover Ins. Co.,* 683 So. 2d 527 (Fla. 1996); *USF&G v. Meridian of Palm Beach Condo Assoc., Inc.,* 700 So. 2d (Fla. 4th DCA 1997); *ACUITY v. Burd & Smith Const., Inc.,* 2006 ND 187, ¶ 23, 721 N.W.2d 33, 40–41; *Supreme Services & Specialty Co., Inc. v. Sonny Greer, Inc.,* 2006-1827 (La. 5/22/07), 958 So. 2d 634, 643.

[23] *C.A. Fielland, Inc. v. Fidelity & Cas. Co. of New York,* 297 So. 2d 122, 125 (Fla. 2nd DCA 1974).

[24] *American Equity Ins. Co. v. Van Ginhoven,* 788 So. 2d 388 (Fla. 5th DCA 2001) (pool repair).

[25] *Tucker Const. Co. v. Michigan Mutual Ins.,* 423 So. 2d 525 (Fla. 5th DCA 1985); *Home Owners Warranty Corp. v. Hanover Ins. Co.,* 683 So. 2d 527 (Fla. 3rd DCA 1996); *Lassiter Constr. Co., Inc. v. American State Ins. Co.,* 699 So. 2d 768 (Fla. 4th DCA 1997).

In *J.S.U.B., Inc. v. US Fire Ins. Co.,*[26] the Florida Second District Court of Appeal radically departed from the long standing Florida precedent and held that the subcontractor exception to the insured's work exclusion means that claims for the defective work of subcontractors **and** any resulting damage are covered under a CGL policy. The Court receded from its own opinion which gave rise to the Supreme Court holding in *La Marche* and recognized the changes to the policy forms were intended to broaden coverage and that defective construction is an occurrence in light of *CTC Development*'s broad definition of accident.[27] Factually, the case involved a claim that exterior wall movement (sinking) was caused by a subcontractor who improperly compacted, tested, and/or filled the soil for the site. The damages claimed involved structural damages to the walls and as well as interior fixtures and finishes. The insurer agreed to cover fixtures and finishes applied by the owner but denied coverage for the insured's own work. The lower court found the damage arose from the improper work of the subcontractor and ruled in favor of the insurer.

In reversing, the Second Circuit held that a subsequent failure of the work of the insured was an "occurrence" and that the subcontractor exception to the exclusion applied providing coverage for the damage (the exception to the exclusion only applicable to complete operations).[28] As to the first part of the analysis the Court concluded in reading the policy as a whole:

> The Insurer argues that workmanship deficiencies that result in later damage to homes should not be considered to be the result of an accident. However, the Insurer's broad policy language that defines an "occurrence" but does not define an "accident", and the broad definition of "accident" adopted in *CTC Development,* lead

[26] 906 So. 2d 303 (Fla. 2d DCA 2005) affirmed by Florida Supreme Court, 972 So. 2d 871 (Fla. 2007).

[27] *American Family Mut. Ins. Co. v. American Girl, Inc.,* 673 N.W.2d 65 (Wis. 2004) contains a detailed analysis of the CGL policy changes and reaches the same conclusion that coverage is provided by the exception.

[28] *Ryan Inc. Eastern v. Continental Cas. Co.,* 910 So. 2d 298, 300 (Fla. 2nd DCA 2005).

> to the conclusion that the occurrence here falls within the coverage provisions of the policy.

The Court then found that, unlike the Court in *Lassiter,* the "exclusion does not create coverage" but rather "is consistent with and provides support for the analysis that the insuring provisions" provided coverage.

In addition to the foregoing, the 11th Circuit, in *Carithers v. Mid-Continent Cas., Co.*, 782 F. 3d 1240 (11th Cir. 2015), has recently held that damages for an insured's defective work *are* covered *if* the defective work must be replaced in order to repair covered property damage. In *Carithers,* a balcony was improperly constructed which thereby caused water to seep into the ceilings and walls of the garage and led to wood rot. While the Court recognized that the policy did not cover the defectively constructed balcony, the Court found that to effectuate the repairs to the garage, the balcony would have to be rebuilt. As such, the Court agreed with the lower court's award of damages to the insured for the cost of repairing the balcony, noting "[u]nder Florida law, the [insured] had a right to 'the costs of repairing damage caused by the defective work.. . .' " Because the cost of repairing the balcony was necessarily a part of the cost of repairing the garage, the Court held the policy at issue covered the cost of repairing the balcony.

Finally, the Southern District of Florida in *Pavarini Constr. Co. (Se) Inc. v. Ace American Ins. Co.*, 161 F. Supp. 3d 1227 (S.D. Fla. 2015), recently held that damages for an insured's defective work *are* covered *if* the defective work must be replaced in order to adequately repair the non-defective project components and put an end to ongoing damage to otherwise non-defective property. In *Pavarini,* plaintiff hired a subcontractor to install concrete masonry unit walls and certain reinforcing steel on a project. The subcontractor then hired a sub-subcontractor for the supply and installation of reinforcing steel within the cast-in-place concrete columns, beams and shear walls. Both parties were covered by various CGL policies. It was

determined that the work performed by both subcontractors was seriously deficient as significant amounts of reinforcing steel was either omitted entirely or improperly installed throughout the building, including placement within its critical concrete structural elements, causing destabilization. Despite the fact that the destabilization was caused by defective work of the subcontractors, otherwise not covered by the subject policies, the Court ruled that in order to adequately repair the non-defective project components, the building had to be stabilized. The Court went on to state that "[e]ven if the instability [was] caused by the defective subcontractor work, it is undisputed that the same effort was required to put an end to ongoing damage to otherwise non-defective property, e.g. damage to stucco, penthouse enclosure, and critical concrete structural elements."

Even with the *J.S.U.B.*, *Carithers* and *Pavarini* opinions, it is an uphill battle to recover for damages to an insured's own work. It is important to keep in mind that the insurer bears the burden of demonstrating that an exclusion applies with respect to a claim that would otherwise be covered under a liability policy.[29] Second, as a general rule of contract construction in Florida, insurance policies are to be construed liberally in favor of the insured and strictly against the insurer, and whenever the language is susceptible to two or more constructions, the court must adopt that which is most favorable to the insured.[30] However, exclusions, no matter how poorly drafted, cannot create coverage where coverage does not otherwise exist by the terms of the insurance policy.[31] Of particular concern to those involved in the construction industry in recent

[29] *U.S. Concrete Pipe Co. v. Bould,* 437 So. 2d 1061, 1065 (Fla. 1983); *Herrera v. C.A. Seguros Catatumbo,* 844 So. 2d 664, 668 (Fla. 3d DCA 2003).

[30] *Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla. 2000); *Abreu v. Lloyd's London,* 877 So. 2d 834, 835 (Fla. 3d DCA 2004).

[31] *Seigle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 740 (Fla. 2002); *USF&G v. Meridian of Palm Beach Condo. Assoc., Inc.,* 700 So. 2d 161 (Fla. 4th DCA 1957).

years a number of carriers have omitted this exception for work provided by a subcontractor from their policy language.

2. Care, Custody, and Control Exclusion

The care, custody, and control exclusion typically comes into play in the construction context when one contractor is directing the operations of another or has possessory control of its property. The courts have drawn a distinction between ownership and control with regard to this exclusion.[32] For example, there would still be potentially coverage for a property owned by the insured which was damaged as a result of an occurrence which was not in the possessory control of the insured at the time of the loss.[33]

3. Completed Operations Exclusion

Completed operations exclusions in a CGL Policy exclude from loss any occurrence or accident which arises after the construction is completed. In an early Florida Supreme Court case, *Nixon v. United States Fidelity and Guarantee Company*[34], a child was killed when a wall in a building collapsed. The Florida Supreme Court held that despite the completed operation exclusion, there was coverage. The rationale of the Florida Supreme Court in *Nixon* was that the completed operations exclusion in essence applied to products and that since the contractor did not make, sell, or deal in products, the exclusion was inapplicable.[35] The apparent pitfall for the insurer was that in the coverage section of the policy one of the hazards covered against was "all operations of the contractor." It is readily apparent from the substantive case law that *Nixon* stands primarily on the specific language of the policy, once again illustrating the importance of reviewing the policy language before making a determination as to potential coverage.

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[32] *Phoenix of Hartford v. Halloway Corp.*, 298 So. 2d 195 (Fla. 4th DCA 1981).

[33] *Michigan Mutual Liability Co. v. Mattox*, 173 So. 2d 754 (Fla. 1st DCA 1965).

[34] 290 So. 2d 26 (Fla. 1973).

[35] *Id.* at 28.

In numerous other cases where the exclusion operation was more carefully or broadly worded, and the coverage portion of the policy did not create an ambiguity, the completed operations exclusion applied to bar the claim.[36] For example, in *Sandpiper Construction Co. v. USF&G Co.,*[37] the roof of a newly constructed building collapsed six months after the building was completed by the general contractor. Despite the holding in the *Nixon* case, the District Court found that the policy exclusion for completed operations applied.[38]

E. Insureds and Additional Insureds:

An insured is the named beneficiary under an insurance policy. However, other parties may be added to the policy as an additional insured. Whether an additional insured has coverage in a policy is controlled by the policy language.[39]

There are no hard and fast rules to determine whether an additional insured has coverage pursuant to an endorsement because of the variations in policy language and the individual facts of the case. Typically, the coverage provided by an additional insured coverage is limited to the time frame of the ongoing operations.[40]

A frequent problem in the construction context is the furnishing of proof of insurance. Often, the subcontractor or contractor will have an obligation to name a general contractor or the owner as an additional insured. However, what typically happens is that the Certificate of Insurance is often issued naming a general contractor and/or owner as a certificate holder as

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[36] *Auto-Owners Ins. Co. v. Marvin Corp.*, 805 So. 2d 888, 891 (Fla. 2d DCA 2001); *Lassiter Constr. Co., Inc. v. American States Ins. Co.*, 699 So. 2d 768, 769 (Fla. 4th DCA 1957); *Tucker Constr. Co. v. Michigan Mutual Ins. Co.*, 1123 So. 2d 525, 527 (Fla. 5th DCA 1982).

[37] 348 So. 2d 379 (Fla. 2d DCA 1977).

[38] *Id.* at 380.

[39] *Tidewater Equipment, Inc. v. Reliance Ins. Co.*, 650 F. 2d 503 (4th Cir. 1981); *In re Deepwater Horizon*, 470 S.W.3d 452, 459 (Tex. 2015), *reh'g withdrawn* (May 29, 2015).

[40] *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F. 2d 882, 887 (10th Cir. 1991); *Pennsylvania DOT v. American State Ins. Co.*, 588 A.2d 1320 (Pa. Commw. Ct. 1990).

opposed to an additional insured. Being a certificate holder does not reasonably render one an additional insured, as most certificates are furnished for the purposes of information only and refer one to the policy for coverage.[41]

A common legal issue arising out of the additional insured language is that often the additional insured under a policy is only entitled to coverage "arising out of" the named insured's work.[42] The majority of jurisdictions construe this limitation to mean only there must be some causal connection between the occurrence and the work.[43] In addition, an additional insured endorsement may often contain some of the same exclusions contained in the CGL policy itself.

Only an insured or an additional insured is entitled to a direct action against an insurer.[44] What this means is that if one is not named as an additional insured under the policy, there is no right to sue the insured directly until there is a settlement with or a verdict against the insured. AI issues have become a focus in many recent construction defect litigations as carriers try to shift or spread the costs of defense and potentially liability to other carriers.

F. <u>Subrogation:</u>

An insurer which pays a claim for its insured is surrogate to an insured's rights against a person or persons who may also be responsible for causing a claim which was satisfied.[45] Subrogation may arise through contract, statute or at common law.[46]

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[41] *TIC Ins. Co. v. Sedgwick James of Washington,* 276 F. 3d 754, 758 (5th Cir. 2002); *Sumitours Marine & Fire Ins. Co. v. Southern Guar. Ins. Co.,* 337 F. Supp. 2d 1339 (N.D. Ga. 2004); *Mid-Am Builders, Inc. v. Federated Mut. Ins. Co.,* 194 F. Supp. 2d 822 (C.D. Ill. 2002).

[42] *Container Corp. of America v. Maryland Cas. Co.,* 707 So. 2d 733, 736 (Fla. 1998); *FP&L v. Penn America Ins. Co.,* 654 So. 2d 276, 278 (Fla. 4th DCA 1995) *citing, Cas. Ins. Co. v. Northbrook Property & Cas. Ins. Co.,* 501 N.E.2d 812 (Ill. App. 1986); *McIntosh v. Scottsdale Ins. Co.,* 992 F. 2d 251 (10th Cir. 1993); *Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co.,* 721 F. Supp 740 (E.D.Pa. 1989).

[43] *FP & L,* at 279.

[44] Fla. Stat. §627.413; *see also Structural Group, Inc. v. FCCI Commercial Ins. Co.,* 11-CV-81339 (S.D. Fla. 2012).

[45] *Underwriters of Lloyd v. City of Lauderdale Lakes,* 382 So. 2d 702, 704 (Fla. 1980).

In the construction context; however, due to common requirements that one of the contracting parties maintain the other parties as additional insurers has ramifications for an insurer's subrogation claim. In addition, most standard form agreements concerning construction contain waivers of subrogation clauses.

The law is well established that a subrogation insurer stands in the shoes of its insured and has no greater rights than the insured had.[47] The law is equally well established i that an insurance company typically cannot maintain a subrogation action against its own insured.[48] In the context of construction contract, the courts have consistently held that subrogated insurers are not entitled to recover against parties to a construction contract where one party is obligated to obtain insurance covering the risk or requires to name the other parties and the named insured under the policies.[49]

The prohibition against subrogated insurers applies even if the contracting party did not carry out its contractual duty to name other parties as an additional insured under the insurance contract. As the court in *Norland Industries*[50] summarizing the holding in *Smith v. Ryan* explained:

> In Smith an owner and contractor entered into a contract which provided the owner would carry fire insurance on the premises and that the contract or would be a named insured in all policies. The owner did obtain fire insurance but failed to have the contractor

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[46] *Dade Co. School Bd. v. Radio Station WQBA,* 731 So. 2d 638, 646 (Fla. 1999); *Wolters v. Am. Republic Ins. Co.,* 149 N.H. 599, 601, 827 A.2d 197, 199 (2003).

[47] See, *e.g., Cas. Index., Exchange v. Penrod Brothers, Inc.,* 632 So. 2d 1046, 1047 (Fla. 3d DCA 1994); *Great Am. Ins. Companies v. Gordon Trucking, Inc.,* 81 Cal. Rptr. 3d 65, 70 (Ct. App. 2008).

[48] See, *Travelers Ins. Co. v. Warner,* 679 So. 2d 324, 330 (Fla. 1996) ("The fundamental principal of insurance law"); *Continental Ins. Co. v. Kennerson,* 661 So. 2d 325, 327 (Fla. 1st DCA 1995); *Ray v. Earl,* 277 So. 2d 73, 76 (Fla. 2d DCA 1973) ("Basic rule of law"); *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.,* 49 Cal. Rptr. 3d 785, 790 (Ct. App. 2006).

[49] *Dyson and Co. v. Flood Engineering,* 523 So. 2d 756, 758 (Fla. 1st DCA 1988); *IN v. EL Nezlek, Inc.,* 480 So. 2d 1333, 1335 (Fla. 4th DCA 1986); *Housing I and V, Corp. v. Carris,* 389 So. 2d 689,690 (Fla. 5th DCA 1980); *Smith v. Ryan,* 142 So. 2d 139, 141 (Fla. 2d DCA 1962).

[50] *U.S. Fire Ins. Co. v. Norland Industries, Inc.,* 428 So. 2d 325, 326 (Fla. 1st DCA 1983).

> named as an insured on the policy. The contract further provided that if either party should suffer damage in any manner because of the wrongful act or negligence of the other party, the damaged party would be reimbursed by the other party. After a fire damaged the property, the insurance company paid the owner for losses and then brought suit against the contractor alleging negligence. The court affirmed the trial court's summary judgment in favor of the contractor, declaring that the contract clearly required the owner to name the contractor's insured in the fire insurance policy and the insurer could not maintain a subrogation suit against its own insured.[51]

G. Notice and Other Requirements:

An insured is responsible for complying with the notice requirements in the insuring agreement. The failure of the insured to timely give notice to the insurer raises the presumption of prejudice and may discharge the insurer from liability.[52] Courts have typically treated notice provisions in insurance contracts as conditions precedent to recovery under insurance policies held to be an important part of the bargain for a contract.[53]

Florida, unlike the majority of jurisdictions, has refused to shift the burden to the insured to show substantial prejudice resulting from a lack of notice in order to avoid coverage. The Supreme Court explained in *Bankers Insurance:*

> Mafias urges us to abandon the *Tiedtke* presumption of prejudice rule as out-of-step with the modern trend requiring the insured to show substantial prejudice resulting from the lack of notice. *See* 32 A.L.R. 4th 141 (1984). We declined to do so, a notice of an accident in most insurance policies is a condition precedent to a claim and it was so designated in the policy in this case. Such a condition can be avoided by a party alleging and showing that the insurance carrier was not prejudiced by the non-compliance with

[51] *Id.*

[52] *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985); *National Gypsum Co. v. Travelers Indemnity Co.*, 417 So. 2d 254 (Fla. 1982); *Tiedtke v. Fidelity & Cas. Co.*, 222 So. 2d 206 (Fla. 1969); *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 641 (Colo. 2005).

[53] *Id.*

> the condition. The burden should be on the parties seeking an avoidance of a condition precedent.[54]

However, the courts have construed notice to be a coverage defense.[55] Under the Florida Insurance Code, an insurer must comply with the provisions of Florida Statute §627.426(2). Failure of the insured to timely comply with the statute may result in a waiver of that defense.[56] In addition, the courts have generally construed that issues of notice and prejudice are factual and should be resolved by a jury[57].

There is an important distinction in Florida law between policies which require the cooperation of the insured and policies which merely require notice.[58] Where a policy requires the cooperation of the insured, the burden is shifted to the insurer to demonstrate that the insured's failure to cooperate prejudiced the insurer.[59]

Generally, CGL policies contain a timely notice provision but not a cooperation provision.

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[54] 475 So. 2d at 1218.

[55] *Nationwide Mut. Fire Ins. Co. v. Beville*, 825 So. 2d 999 (Fla. 4th DCA 2002).

[56] *Nationwide Mut. Fire Ins. Co. v. Beville, supra; 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).

[57] *Perez v. Public Service Mutual Ins. Co.*, 755 So. 2d 168 (Fla. 3d DCA 2000).

[58] *Allocation of Losses in Complex Ins. Coverage Claims § 16:3,* Seaman, Scott J.; and Schulze, Jason R. (Westlaw 2015); *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985).

[59] *Id.*