How to Get the Insurance Coverage You Bought, Contracted for and/or Deserve
Insurance Generally

Insurance contracts are to be “construed in accordance with the plain language as bargained for by the parties.” Westmoreland v. Lumbermens Mutual Casualty Co., 704 So.2d 176, 179 (Fla. 4th DCA 1997). Insuring clauses in policies “are construed in the broadest possible manner to affect the greatest extent of coverage.” Id. Any “ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy.” Id.

The scope and extent of insurance coverage is defined by the language and terms of the policy. See, e.g., Union Am. Ins. Co. v. Maynard, 752 So.2d 1266, 1268 (Fla. 4th DCA 2000); United States Fire Ins. Co. v. Morejon, 338 So.2d 223, 225 (Fla. 3d DCA 1976). Where the language of the policy is plain and unambiguous, “there is no need for judicial construction and the contract must be enforced as written.”

However, any ambiguities in insurance policy contracts are interpreted liberally in favor of the insured and strictly against the insurer. See Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So.2d 467 (Fla.1993). The central concern in interpreting insurance contracts is the intent of the parties. Excelsior Insurance Co. v. Pomona Park Bar & Package Store, 369 So.2d 938, 942 (Fla.1979).

A. Trigger Theories

An "occurrence' is an event in which negligence manifests itself in "property damage" or "bodily injury." Prieto v. Reserve Ins. Co., 340 So. 2d 1282 (Fla. 3d DCA 1977); Commercial Union Ins. Co. v. R.H. Barto Co., a Div. of Atlas Air Conditioning Corp.,
440 So. 2d 383 (Fla. 4th DCA 1983); see Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), cert. denied, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed. 2d 650 (1981). The trigger of coverage is "property damage" caused by an "occurrence," and not the "occurrence" itself. At its core, the issue of triggers is an issue of inexact policy language in occurrence-based CGL policies.


Under the exposure theory, property damage occurs upon installation of the defective product. Under the manifestation theory, property damage occurs at the time the damage manifests itself or is discovered. The continuous trigger, defines property damage as occurring continuously from the time of installation until the time of discovery. Finally, under the injury in fact trigger, sometimes referred to as damage-in-fact in the context of property damage, coverage is triggered when the property damage underlying the claim actually occurs. Usually, discussions of exposure and continuous trigger theories are confined to asbestos and toxic-tort cases, respectively.
B. Property Damage

At the outset, in order to trigger coverage, the complaint must allege property damage or bodily injury. Standard CGL policies define “property damage” as “physical injury to tangible property, including all resulting use of that property.” Florida courts recognize “that there is a difference between a claim for the costs of repairing and removing defective work, which is not a claim for “property damage,” and a claim for the costs of repairing damage caused by the defective work, which is a claim for “property damage.” U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871 (Fla. 2007); see also Miller v. Triad Adoption & Counseling Servs., Inc., 65 P.3d 1099 (N.M. App. 2003); Whitman Corp. v. Commercial Union Ins. Co., 782 N.E. 2d 297 (Ill. App. 2002).

C. Duty to Defend & Indemnify

Under Florida law, an insurer’s duty to defend is more expansive than and separate from the insurer's duty to indemnify. Pennsylvania Lumbermens Mut. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co., 43 So. 3d 182, 186 (Fla. 4th DCA 2010), citing Keen v. Fla. Sheriff’s Self Insurance, 962 So. 2d 1021, 1024 (Fla. 4th DCA 2007). The duty to defend arises when the complaint alleges facts that, if true, fairly and potentially bring the suit within coverage. State Farm v. Higgins, 788 So. 2d 992, 995 (Fla. 4th DCA 2001). As determined in Greystone Construction, Inc. v. National Fire & Marine Insurance, Co., 661 F.3d 1272, 1284 (10th Cir. 2011), any claim that “is potentially or arguably within the policy coverage,” must be defended by the insurer.

Whether an insurer has a duty to defend “is determined solely by the allegations
of the complaint against the insured, not by the actual facts, nor the insured’s version of
the facts or the insured’s defenses.” *Reliance Ins. Co. v. Royal Motorcar Corp.*, 534 So.
2d 922, 923 (Fla. 4th DCA 1988) (internal citations omitted); see also *City of Sharonville
duty to defend arises under Ohio law); see also *Cincinnati Ins. Cos. v. Motorists Mut. Ins.
Co.*, No. 13CV0016-M, 2014 Ohio 3864, ¶ 10 (9th Dist. Sept. 8, 2014). Thus, a defense
is excused only when “the third party complaint can by no conceivable theory raise a
single issue which could bring it within the policy coverage.” *Montrose Chemical Corp. v.
Superior Court* (1993) 6 Cal.4th 287, 289, 24 Cal.Rptr.2d 467, 861 P.2d 1153. It is settled
that “the insured need only show that the underlying claim may fall within policy coverage;
the insurer must prove it cannot.” id. at 300. Thus, an insurer may have a duty to defend
even when it ultimately has no obligation to indemnify, either because no damages are
awarded in the underlying action or because the actual judgment is for damages not
Cal.Rptr.2d 811.

**Multiple Policy Limits – Other Insurance**

“The reconciliation of ‘other insurance’ and ‘multiple insurance’ issues is often
irrelevant to insureds.” Douglas R. Richmond, Issues and Problems in "Other
“If a single policy will cover a claimed loss, or if a single insurer will defend without
reserving its rights, the potential involvement of two or more insurers matters little to the
insured.” *Id.* “However, the presence of another insurer on a particular risk is of appreciable economic concern to all carriers.” *Id.* “Courts recognize that when two or more insurance companies insure the same interest and the same risk, and one carrier is compelled to pay the entire loss, the insurer that pays may be entitled to recover some portion of its expenditure from its co-insurers.” *Id.* (external citations omitted). “An insurer’s right to recover from another carrier on the same risk does not sound in contract because there is no contractual relationship between the carriers.” *Id.* (external citations omitted). “Courts thus look to the basic equitable principle that one who pays money for the benefit of another is entitled to be reimbursed.” *Id.* “Some courts allow insurers to recover from one another under a contribution theory, while others follow equitable subrogation doctrine.” *Id.* (external citations omitted). “Still other courts apparently mix contribution and subrogation, or allow recovery on either approach.” *Id.* at 1378-79 (external citations omitted).

“While insurers’ rights to contribution may be essentially equitable, they are not purely so.” *Id.* at 1379. “The specific means by which co-insurers’ risk is allocated must be determined not by an adjustment of equities, but by the provisions of the contracts which they made.” *Id.* (internal quotations and external citations omitted). “Hence the significance of ‘other insurance’ clauses in concurrent policies.” *Id.*

Insurance policies typically contain any of four "other insurance" clauses:

1. the “pro rata” clause, which provides that the insurer will pay its share of the loss in the proportion its policy limits relates to the aggregate liability coverage available;
2. an "excess" clause, which provides that an insurer will pay a loss only after other available primary insurance is exhausted;
3. an "escape" clause, which provides that an insurer is absolved of all
liability if other coverage is available; and
(4) an "excess escape" clause, which provides that the insurer is liable for
that amount of a loss exceeding other available coverage and that the
insurer is not liable when other available insurance has limits equal to or
greater than its own.


“Some ‘other insurance’ clauses specially crafted by individual insurers defy easy
classification.” Id. at 1381-82. “Commentators and scholars sometimes term such ‘other
insurance’ clauses ‘tailor-made’” and these clauses require detailed interpretation and
typically do not have prior decisions to rely upon. Id. at 1382.

Additional Insured Endorsements

One of the most hotly contested areas of coverage continues to include the
concept of the inclusion of an additional insured under the insured’s policy. This
phenomenon is particularly prevalent in the construction industry. Construction
contracts almost invariably require subcontractors to indemnify upstream parties (e.g.,
developers, owners, construction managers and general contractors) for bodily injury,
property damage and other claims or losses that arise out of the downstream party’s
work. The breadth of indemnification provisions vary. While some provisions state that
the downstream indemnitee is liable for its own negligence only, others are far broader,
sometimes requiring indemnification for the upstream indemnitee’s own or even sole
negligence.
Common indemnity clauses are often classified as broad, intermediate, and limited. Broad indemnity clauses provide that an indemnitee is protected by an indemnitor for losses “whether caused by the acts or omissions including the sole negligence of the indemnitee.” These clauses are often voided by state jurisprudence or statutes. Intermediate indemnity clauses are triggered where the loss is “caused by, in whole or in part...” or “except for loss caused by the sole negligence of” the indemnitee. These clauses are seldom disturbed by the courts. Limited indemnity clauses apply to any loss resulting from an indemnitor’s acts or omissions, but only to the proportional extent of that negligence or causative fault. Limited indemnity clauses contain phrases such as “to the extent” or “indemnify each other.” These clauses are desirable from the perspective of carriers for indemnitors, but they often create finger pointing and discord among the contracting parties when losses occur.

A. Additional Insured Coverage in Policies

The evolution of ISO Additional Insured coverage began in 1985 with Form CG 20 10 (11 85), where additional insured coverage for the person or organization shown in the Schedule of a Named Insured’s policy was triggered only “to liability arising out of ‘your work’ for that insured by or for you.” The 1993 editions of Form CG 20 10 (10 93) added the concept of ongoing operations to the additional insured coverage limitation. Then, in 2001, there were two significant changes to additional insured coverage; namely, Form CG 20 10 (10 01) amended the definition of insured to limit additional insured coverage for “liability arising out of your ongoing operations performed for that insured.” Form CG 20 37 (10 01) reinstated completed operations coverage for “liability
arising out of ‘your work’ at the location designated and described in the Schedule of this endorsement performed for that insured and included in the products-completed operations hazard.”

In 2004, Form CG 20 10 (07 04) introduced a causal connection between the named insured’s conduct and the additional insured’s liability, limiting additional insured coverage to injuries “caused in whole or in part” by the named insured’s acts or omissions or the acts or omissions of those acting on behalf of the named insured in the performance of ongoing operations for the additional insured. Form CG 37 (07 04) similarly addressed completed operations coverage.

B. Most Recent Changes in the Additional Insured Coverage Forms

The ISO 2013 AIE modifies its application in three new ways that have changed the way contracting parties can rely on them as solving risk allocation. Specifically, this AIE specifies that: (1) it affords protection only “to the extent permitted by law”; (2) coverage thereunder “will not be broader” than the contract requires; and (3) the limits available to the additional insured are “the lesser of the contract requirement or the policy declaration.”

Many AIEs available in the market provide that the person or organization for whom the named insured is performing operations will qualify as an additional insured “when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.” The “such person” reference may create uninsured exposures where a
downstream party agrees to name an upstream party as additional insured when there is no executed contract between them. In many cases, for example the subcontractor has privity with the general contractor, but it has no direct contract obligation to the owner or developer. When an additional insured endorsement contains a “such person” clause, the lack of a direct contract between the named insured and the purported additional insured has often been construed to mean that the party not in privity of contract is left unprotected.

One of the 2013 amendments that intends to honor the parties’ expectation in a more expansive and protective manner is found in the new ISO blanket endorsement styled Additional Insured-Owners, Lessees or Contractors-Automatic Status For Other Parties When Required In Written Construction Agreement (CG 20 38 04 13). This form provides blanket additional insured status to all parties whom the named insured is required to add as an additional insured under a contract.

As part of the 2013 revisions, ISO also introduced an endorsement that enables brokers and their clients to ensure the intended order of coverage primacy is recognized. The form entitled Primary and Noncontributory -- Other Insurance Condition (CG 20 01 04 13) revises the “Other Insured Condition” to state that coverage made available to an additional insured is provided on a primary and noncontributory basis where the named insured has agreed to do so in writing.
Primary and Excess Insurance

Primary insurance is the first level of insurance that responds to a claim. It is a policy written to insure against specific risks, such as property damage, premises liability, or motor vehicle liability. The policy is specifically tailored and premiums priced to cover explicit risks. Generally, in the construction industry we consider Commercial General Liability, Professional Liability or Errors and Omissions policies of insurance to address the risks associated with construction projects.

A true excess policy is one that is confined to covering only the risks that the primary policy covers. In other words, excess insurance does not expand the scope of the primary policy’s coverage; it instead raises the policy limits.

The relationship between primary and excess policies is generally cooperative. However, that relationship can be challenged upon the claim reaching the primary policy limits, as each policy has an interest in pushing the claim into the other's coverage. If the claim warrants, the primary generally wants to pay its limits (or exhaust) and end its obligation to pay defense costs. The excess policy, however, has an interest in keeping the claim within the primary policy's limits to avoid payment from its limit.

As noted above, insurers have two general duties regardless of whether they are an excess carrier or primary: the duty to indemnify and the duty to defend. The duty to indemnify arises in those situations where the insurers must pay damages as a result of a claim. The duty to defend arises as soon as a complaint is filed in which a claim may be payable if the facts alleged are true. The duty to defend is much broader than the
duty to indemnify as the duty to defend deals with possible claims, while the duty to indemnify deals with the application of the policy after damages are assessed.

A. The Duty to Defend

Whether a duty to defend is triggered is governed by the comparison of the Complaint to the insurance policy. “The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint.” Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc., 606 Pa. 584, 609, 2 A.3d 526, 541 (2010). So, even if there is a slight possibility that a claim could trigger coverage, the insurer has a duty to provide a defense to its insured, regardless of the likelihoods of the defense. New Jersey noted that “whether the claim is groundless, false, or fraudulent is irrelevant to the duty to defend.” Gen. Acc. Ins. Co. v. N.Y. Marine & Gen. Ins. Co., 320 N.J. Super. 546, 554 (App. Div. 1999).

However, in some jurisdictions, the duty to defend can be limited by the insurance policy. “The duty to defend is not a product of statute or of common law. It is solely a contractual undertaking of the insurer and it can be as limited or as broad as the insurer sees fit to provide through its policy.” Hartford Acci. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984).

B. Additional Duties in a Primary/Excess Relationship

The primary and excess insurer both want the same thing: to fairly address, litigate and settle a claim while minimizing exposure. However, in practice the primary carrier
and excess carrier may be at odds. The excess carrier oftentimes pushes the primary carrier to settle within the primary limits. The primary carrier oftentimes picks up the tab for the defense of the claim in addition to the damages. So, while settling a claim within the primary limits may be possible later on down the line, the primary carrier may have expended considerable amounts in defense costs by that time.

In a situation where excess coverage may be triggered, the primary carrier must adopt a duty of care to the excess carrier. “Fairness and policy require the imposition of a duty of good faith on the primary carrier.” United States Fire Ins. Co. v. Am. Nat'l Fire Ins. Co., 53 Pa. D. & C.4th 474, 486 (C.P. 2001). This is because the primary carrier is:

1. In a position of knowledge about the claim;
2. The excess carrier’s premiums are dependent on the primary carrier acting in good faith to settle claims within the primary policy limits;
3. When the primary acts in good faith, it keeps premiums lower as excess will not be triggered as often.

If a primary fails to act in good faith to settle a claim within the primary policy limits, the excess carrier can bring an action against them for the breach of that duty. However, “under the direct duty theory, any duty owed by … [the] primary insurer to … an excess insurer cannot exceed the duty owed by [the primary insurer] to its own insured.” Forest Ins. v. Am. Motorists Ins. Co., 89 Civ. 4326 (BN) (S.D.N.Y. Mar. 21, 1994).

When it comes to an alleged breach of the duty to settle a claim, an insurer has a duty to settle a claim within the policy limits when the damages are clearly outside the policy limits. For example, in McNally v. Nationwide Ins. Co., 815 F.2d 254, 259 (3d Cir.
an insurance company failed to settle for its policy limits of $100,000 and led to a $3.15 million judgment against their clients. The Court found that the insurer acted in bad faith in not settling the claim for the policy limits and upheld a judgment against the insurer in excess of $3 million. Note, that this judgment had to be paid by the insurance company directly.

Similarly, in some jurisdictions, "[t]he ability of an excess carrier to recover damages when the primary carrier unreasonably fails to settle a claim is well established." Cont'l Cas. Co. v. Royal Ins. Co., 268 Cal. Rptr. 193, 195 (Ct. App. 1990). The theory is based in equitable subrogation – the idea that the excess insurer stands in the shoes of the insured. So, when a primary has an opportunity to settle a claim within its policy limits and unreasonably fails to do so, the excess carrier may be able to sue for damages.

C. Who Pays for Defense Costs?

As with most other parts of the primary-excess relationship, this is governed by the policy language. However, absent the excess policy’s explicit denial of a duty to provide defense costs, many courts will not read a provision into the policy. Generally, this is governed by the excess policy itself. Some policies place the entire burden of defending an action on the primary insurer while others will pay for some share of defense costs. This is another often contested area of coverage litigation, as the primary will want to end its defense obligation upon the payment of its limits (whether in indemnity or through defense in a wasting or eroding policy), while the excess policy has great interest in ensuring the primary limits are not volunteered or otherwise wasted improperly in an
effort to rush to exhaustion.