



COMMERCIAL GENERAL LIABILITY POLICIES (CGL)

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As a new member of CSI, I am quite excited to revive Loy Waldrop's "CSI and The Law" articles. This month, I will discuss a very recent Tennessee Supreme Court decision affecting Commercial General Liability policies (CGL) and what you should do if you receive a reservation of rights letter or a Complaint for Declaratory Judgment from your insurer. CGL insurers have become increasingly aggressive about denying coverage. As an insured, you must know what your rights and duties are if you are faced with a claim.

1. Factual History

On March 7, 2007, the Tennessee Supreme Court filed its decision in The Travelers Indemnity Company of America v. Moore & Associates, Inc., 2007 Tenn. LEXIS 234. Travelers issued a CGL policy to Moore. Moore contracted to be the design and building contractor for the construction of a hotel. As part of the construction project, Moore hired a subcontractor to provide and install the hotel windows. Moore completed construction in 2002. In 2003, the hotel owner filed a demand for arbitration alleging: "Poor and negligent design, supervision, and implementation of the window installation, resulting in water and moisture penetration, which in turn has caused pervasive premature deterioration of and damage to other components of the interior and exterior wall structure, and some room finishes and fixtures. Mold has been found in some locations. Rooms have had to be taken out of service for mold remediation and for water damage repair." After receiving notice of the claim, Travelers filed suit against Moore seeking a declaratory judgment that Travelers had no duty to defend or indemnify Moore in the arbitration proceeding.

2. Duty to Defend versus Duty to Indemnify

After Travelers filed its declaratory judgment action, Moore had to retain its own attorney to fight against this lawsuit. However, often an insurer will not file a declaratory judgment action, but will simply issue a "Reservation of Rights Letter" to the insured. This type of letter states that the insurer will provide a defense against the claim; however, the insurer reserves its right to deny indemnification to the insured. There have been many Tennessee cases in this area of the law. The law says that an insurer has a duty to defend when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for which there is a potential basis for recovery. The duty to defend arises if even one of the allegations in the Complaint is covered by the policy. The duty to defend is broader than the duty to indemnify. The duty to defend is based on the facts alleged, while the duty to indemnify is based upon the facts found by the judge or jury.

3. The CGL Policy

Most CGLs are written on standardized forms developed by an association of domestic property and casualty insurers known as the Insurance Services Offices. CGLs are divided into several components, including the "insuring agreement," which sets the outer limits of an insurer's contractual liability, and the "exclusions," which help define the shape and scope of coverage by excluding certain forms of coverage. The policy terms of CGLs have been and continue to be frequently litigated. The terms of the CGL in Travelers v. Moore were those of the standard CGL. The insuring agreement of the policy in this case provided in pertinent part: "We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. ... This insurance applies to "bodily injury" and "property damage" only if: The "bodily injury" or "property damage" is caused by an "occurrence." An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The CGL also provided that certain damages are excluded from coverage. The most relevant "exclusion" to this case was the "your work" exclusion, which provided that there is no coverage for "property damage to your work arising out of it or any part of it." "Your work" was defined as "work or operations performed by you or on your behalf." The "your work" exclusion, however, included an exception for situations where "the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

4. The Court's Interpretation of the CGL "Insuring Agreement" Language

An "accident" had previously been held to refer to "an event not reasonably foreseen." Therefore, Travelers argued that the claims in this case could not constitute an accident because it is foreseeable that leaks and water damage will occur if a contractor improperly installs windows. However, in this case, the Tennessee Supreme Court stated that in the determination of whether or not an accident has occurred, the Court must determine whether the damages would have been foreseeable if the insured had completed the work properly. The Court found that Moore obviously assumed that the windows would be installed properly; therefore, Moore could not have foreseen the water penetration. Because the Court concluded that the water penetration was unforeseeable to Moore, the Court found that the water penetration was both an "accident" and an "occurrence" for which there was coverage under the "insuring agreement."

If the Complaint had only alleged the faulty installation of the windows, coverage could have been denied because there would have been no "property damage." However, because the Complaint alleged that the defective window installation resulted in water penetration causing further damage, the Court concluded that the owner had alleged damages constituting "property damage" for purposes of the CGL.

HINDSIGHT

MINUTES FROM APRIL BOARD MEETING

Written by Serita Lewis, CSI Secretary, CDT

CSI Meeting Minutes

Tuesday, April 3, 2007 – 5:39 p.m.

These minutes were recorded and are presented as understood by the Secretary, Serita Lewis. Following is a brief summary of the official minutes for the April Board meeting.

Meeting called to order by Nancy Roberts at 5:39 p.m. at the Knoxville Builder's Exchange.

Committee Reports

- Academic Affairs
 - Voting for student officers in May; working on a student chapter guide
- Bylaws
 - Response received from Institute on submitted Chapter Bylaws; requested revisions will be discussed with the Institute Secretary to continue with the approval process.
- Golf Tournament / UT Scholarship
 - Motion passed for CSI to pay \$5000 towards the UT Scholarship Endowment
- Product Show
 - The Product Show goal of \$28k goal was exceeded, coming in at approximately \$30k. Agreement made to sign contract for next year's Product Show at the Crown Plaza.

Old / New Business

Nominating Committee – 2007-2008 slate submitted. [Looking for Programs Committee Chair and Product Show Committee Co-chair volunteers.](#) Contact Nancy Roberts for more information.
Don't forget to sign up for the National Convention in Baltimore!

Meeting adjourned around 6:54pm.



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5. The Court's Interpretation of the CGL "Exclusion" and "Exception" Language

The CGL in this case contained a common "your work" exclusion excluding from coverage "property damage" to "your work" arising out of it or any part of it. The Court found that the entire hotel met the definition of "your work" because the entire construction project was performed by Moore or by subcontractors on Moore's behalf. This CGL, however, also contained a subcontractor exception to the "your work" exclusion. The subcontractor exception provided that any damages arising out of the work performed by a subcontractor fell outside the "exclusion" and were covered under the CGL.

6. Summary of the Court's Ruling

The Court held that an "occurrence" is defined as an "accident" which is an event that is unforeseen by the insured. Moore could not have foreseen the water penetration had the work been completed properly; therefore, the water damages were the result of an "occurrence." Claims alleging only damages for replacement of a defective component or correction of faulty installation do not allege "property damage." Because the damages alleged by the owner were not limited to faulty workmanship, the owner had alleged "property damages." Given the exception to the exclusions, damages to the insured contractor's work were not excluded from coverage because those damages resulted from the faulty workmanship of a subcontractor.

7. Practical Effects/Conclusion

The immediate result of this case may be that the insurer will be more willing to provide coverage to the insured where coverage might have been denied in the past. However, there most likely will be revisions to CGL policies by some or all CGL insurers to avoid the results of [Travelers v. Moore](#). When obtaining an insurance policy, first, read the "insuring agreement." Next, read the "exclusions." Finally, read the "exceptions" to the "exclusions." If you have questions concerning the policy, ask your insurance agent or your personal counsel. If you are served with a Complaint, contact your insurance agent immediately. If you are later served with a Declaratory Judgment action, contact your personal counsel immediately. If you receive a reservation of rights letter from your insurer, contact your insurance agent and your personal counsel immediately. A call to your insurance agent may get him or her working on your behalf to try and persuade the insurer to provide indemnification as well as the defense. All too frequently the insured will do nothing upon receiving a reservation of rights letter until after a trial. The insurer will have provided a defense, but will refuse to indemnify the insured for any judgment rendered. This scenario exposes the insured to further actions by the Plaintiff to execute on any judgment. An insured should have all rights under the CGL settled before trial so that the insured knows what he or she is facing in the dispute.

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