



Commercial General Liability Insurance and Coverage:

A Theoretical Review

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Abstract

In this article, the author presents the basis upon which the legal liability of commercial entities arises. The commercial entities may incur huge amounts of losses once found guilty of the offenses against them depending upon their area of operations and the legal interpretations of the offenses committed. The wrongful acts that cause legal claims may arise from one or more of the following legal bases, viz; the law of torts; statutory laws or the contractual agreements. Thus the liability loss will be the amount that a business entity may be required to pay as a result of legal claims against it for the wrong-doing that cause injury or damage to others.

Keywords: Commercial Liability; Coverage; Insurer; Insured; Injury; Damage; Legal Liability Exposure; Law of torts; Statutory laws; Contract law; Negligence; Nuisance.

An Overview

Although all natural persons and institutional entities both commercial and non-commercial face liability exposure in their area of operations, business entities are more exposed to liability losses. The liability loss being the amount that a business entity / person is required to pay as a result of legal claims against it / the person for the wrong-doing that cause injury or damage to others. The wrongful acts that cause legal liability or claims may arise from one or more of the following legal bases, viz; the law of torts i.e common law; statutes or contractual agreements.

Legal Liability Exposure Based on Torts

A tort is considered a wrongful act or omission that causes harm to others negligently or intruding into other people's deserved rights. For instance, if somebody's act of negligence or nuisance cause harm to others, the law provides for a remedy to the victim through an action for damages or compensation. This may be referred to as the legal liability exposure. Each and every person in society does have such legal liability exposure and the degree of such exposure differs with the nature and complexity of the social or economic activity undertaken. An individual or entity can transfer such liability exposure to an insurance company through an appropriate legal liability policy. Thus, the legal liability exposure may be classified into the following categories, viz;

- Commercial general Liability
- Motor or Automobile Liability
- Professional Liability
- Directors' and Officers' Liability
- Clinical / Medical Liability, etc.
- Public Liability or Premises & Operation Liability

- Products liability or products & Completed Operations Liability
- Workmen Compensation i.e Employers' Liability, etc.

In all these liability exposure, the laws of torts i.e common law are the most basic source of legal liability. The law of torts or the common laws are many, but the most commonly known ones may be classified into three major groups i.e negligence; intentional, and strict Liabilities.

Unintentional Torts i.e Negligence: This is a tort or a civil wrong-doing determinable under the common laws. It is an unintentional tort involving the failure of a person to exercise the degree of care that a reasonable person would have exercised under similar circumstances in order to avoid causing harm to others. If a person does something that a reasonably prudent person would not have done or if a person fails to do something that a reasonably prudent person would have done such act of commission or omission is considered negligence under common law. In the Blyth Vs Birmingham Waterworks case, it was observed that “negligence is an omission to do something, which a reasonable person, guided by those considerations, which ordinarily regulate the conduct of human affairs, would do, or do something, which a prudent and reasonable person would not have done.” Thus, every person has a duty to his fellow colleagues so as to ensure that their actions, their property or their operations do not cause injury or damage to others.

Hence, in a court of law in order to succeed in a petition against negligence, the plaintiff i.e the affected victim must raise and prove at least one or more of the following three issues, viz; that

- the defendant owed a duty of care to the victim (the plaintiff);
- there has been a breach of duty; and,
- the plaintiff has sustained an injury or damage as a result of the breach

Thus, negligence is considered one of the most common bases for legal liability insurable under the liability policy. Generally, the onus of proof for negligence rests upon the plaintiff. Moreover, as it has been reflected above, the existence of the legal duty to care arises from common laws, statutes or contract. However, the author's focus is only confined to negligence under the common laws. The final aspect of negligence i.e damages or compensation is subdivided into two types, viz; compensatory damages and punitive damages. Furthermore, compensatory damages are divided into two categories i.e special damages and general damages.

Defense against Negligence Actions: In a negligence petition for compensation, the plaintiff is expected to raise and prove the three basic aspects or elements of Negligence. On the other side, the defendant may raise the following issues in defense to try and avoid the legal liability for the negligence accusations leveled against the defendant:

- Inevitable Accident (as hidden defects in machinery)
- Act of nature (floods, storms, earthquakes, lightening, etc.)
- Emergency (out of eminent danger but not negligence)
- Contributory negligence / Comparative negligence (blame for each other)
- Assumption of Risk (other than PLI Act Policy which provides no fault liability)
- Limitations (Barred by the law of limitation)
- Contracting-out (Disclaimer notices)

Intentional Torts: In contrast to negligence, there could be many torts which may be intentional. Some of the intentional torts may be exemplified as given below:

- Tort against Property - nuisance, trespass,
- Tort against persons - defamation, assault, false arrest, etc.
- Invasion of right of privacy
- Misuse of Legal Process

Nuisance: This is also a tort implying a wrong-doing done by one person to another by unlawfully disturbing the other person in the enjoyment of his/her property or in some cases in the exercise of the common right. It is one area of law where the liability can arise even though one has taken all reasonable care. For instance, in the Greenwood Vs Port wood case, it was observed that encroachment i.e enlargement of tree roots in two adjacent house-properties would cause liability of nuisance and once damage is proved by the plaintiff, the defendant would automatically incur liability. Similarly the flow of dust, fumes, and smells may bring legal liability based on nuisance for the offender. Thus, it is

important to note that, if the flow does not give rise to physical harm to the plaintiff or the property, there will be no indemnity under the policy though the defendant may suffer financial loss by complying with court injunctions.

Commercial General Liability: The CGL policy covers a wide range of liability loss exposure for commercial entities or business organizations. The loss exposure may come under one or more of the following broad categories of risk exposure, viz;

- Productions and completed operations Liability Risks
- Premises and operation liability Risks
- Personal and advertising injury liability
- Limited contractual liability
- Medical expenses
- Supplementary / additional expenses, etc

The bases for liability under the CGL Policy are the Common Laws, Contractual laws and the statutory laws. The common forms of torts that are covered in the CGL Policy include negligence, nuisance, trespasses, strict liability, etc.

The CGL policy has become the most popular form of liability policy all over the world. The first CGL policy introduced by the casualty insurers was comprehensive in nature and known as comprehensive general liability policy. In subsequent periods the comprehensive general liability policy was replaced by the simplified CGL policy. In 1996 the American Association of Insurance filed revised versions of CGL policy on behalf of its member insurers with two distinctive versions of the CGL formats, viz; 'Occurrence Version' and 'Claim-made Version'. They have differences from each other with respect to the coverage of claims. The occurrence version covers all bodily injuries or property damages that occur during the policy period; while the claim-made version covers all bodily injuries or property damages that occur during the policy period provided claims are made against the insured during the policy period. Except for the above mentioned differences in respect of coverage and claims, the two versions of CGL policy are similar with the following six common parts in the policy.

Part- I: Coverage

- A- Bodily Injury and Property Damage Liability
- B- Personal and Advertising Injury Liability
- C- Medical payments
- D- Supplementary Payments

Part-II: The insured

- Individual — Named Insured and his spouse
- Partnership — Partners and their spouses
- Limited Liability Co. — Members of the company

Part-III: Limits

Part-IV: Conditions

Part-V: Extensions

The coverage

Insuring Agreement for Coverage-A for Bodily Injury and Property Damage: The provisions for coverage-A consist of an insuring agreement and several exclusions. If a claim made against the insured meets the entire criterion in the said insuring agreement and does not come within the purview of the specified exclusions, it is admissible subject to policy terms and conditions. Moreover, the insuring agreement has certain distinctive subdivisions:

- i) An agreement to pay damages on behalf of the insured; and,
- ii) An agreement to defend the insured against claims for damages under the policy

Duty to Pay Damages: The insurer's duty to pay damages for the liability claims made against the insured depends upon the extent to which the following conditions are satisfied, viz;

- Insured must be legally liable to pay for the damages

- The damages must result from bodily injury or property damage
- The bodily injury or damages must result from an occurrence of accident
- The accident must occur during policy period and within the coverage territory
- The claim must be made against the insured during policy period (Claim-made version)
- Damages must be within the terms and conditions of service
- Liability as per the limits of the insurance cover

The CGL policy contains an exclusion of bodily injury or Property damages intended by the insured. For instance, if a building is set on fire purposefully by the insured, the CGL policy will not cover any claim against the insurer. Thus, it's important to note in this context the difference between intentional acts and intentional torts.

Duty to Defend: Coverage-A Involving the insuring Agreement also expresses the insurer's right and duty to defend the insured against any suit seeking damages for bodily injury or property damage. In determining whether the insurer has a duty to defend, consideration would be based upon the findings from the allegations expressed in the complaint or petition by the plaintiff.

The insurer shall not have any duty to defend if the allegations against the insured are not covered by the policy. The revised CGL format contains the amended insuring agreement stating that the insurer has no duty to defend the insured against any suit seeking compensation for injury or damage to which the insurance does not apply.

Premises and Operations Liability — Coverage-A

This is the most basic and common component of general liability. Before the introduction of the CGL cover, the Public liability policy had been popular covering premises and operation liabilities. The CGL cover is divided into two broad considerations for risk analysis and rating purposes i.e Premises and Operation Liability and Products and Completed Operation Liability. Generally a separate rate is considered for each category.

The underwriting of premises liability insurance is much more critical than property insurance. For underwriting this liability insurance, an exhaustive CASE (Circumstances, Activity, Security and Events) study is required to be undertaken in order to assess the liability exposure. The critical aspect of the premises liability can be observed from the following comparative analysis between property insurance and premises liability insurance:

In the property insurance liability, the insurer is determined by the terms and conditions of the policy; while in liability insurance the amount payable by the insurer is determined primarily by the liability of the policy-holder to compensate the third party suffering loss, injury, or damages due to the wrongful act and then by the terms and conditions of the policy covering the legal liability of the insured.

In the property insurance, the maximum liability of the insurer is determined on the basis of sum insured along with the operation of the principle of contribution and subrogation while a liability policy provides an indemnity in respect of the insured's legal liability to the third party.

The legal liability may arise from the three principal causes, viz; the common law as decided by the courts over many years in view of the socio-economic culture, conditions, and development; Statutory liability as laid down by the Acts of Parliament; and the contractual obligation between the parties involved (the insured and third party). However, the contractual liabilities as indicated are specifically excluded from the coverage as supported by most of the liability policies. The public liability policy covers the only civil wrong-doing either under common law (law of torts) or under statutes due to breach of duty by the policy-holders, which may arise in the form of negligence, nuisance, trespass, or strict liability, causing bodily injury or damage to the property of third party, etc. These basic elements of the liability policy are analyzed below. In addition, the CGL covers libel, slander or false imprisonment besides the above mentioned forms of liabilities.

Pollution Exclusions in Premises / Public Liability

The CGL policy provides for certain absolute pollution exclusions. For instance, bodily injuries or property damages resulting from the release of pollutants are not admissible. However, it's very difficult to exclude all the pollution incidents from the CGL cover under this clause. The exclusion contains some explicit exceptions, viz;

- Bodily injury or property damage by heat, smoke fumes emanating from a fire at the premises where the insured is residing. Thus, if smoke and fumes from a hostile fire from the neighborhood infiltrates the insured's premises or warehouse and cause damage to the items in the warehouse, the insured's CGL policy would cover claim for such damages.

- Another express exception to pollution exclusions is coverage for bodily injury or property damage resulting from the escape of lubricants e.g fuel, paraffin/kerosene required for normal functioning of mobile equipments.
- The other express exception to such exclusions may be bodily injury caused by smoke, fumes, vapor, or soot from equipment used to heat a building provided such bodily injury must be sustained within building.
- Yet another exception to such exclusions may relate to the bodily injury or property damage resulting from the release of pollutants at any place / distance away from the named insured's premises, where the named insured is working or his employer's workplace.

Products and Completed Operations Coverage

This is yet another component of Coverage-A which can be purchased as a stand-alone coverage. The coverage responds to claims for bodily injury or property damage arising out of the named insured's products or completed operations. Product liability and completed operations liability are so similar that they are treated as components of one exposure. It is the legal responsibility of the manufacturers, distributors, and/or retailers to ensure that the use of their product does not harm customers or users of the products. Product liability lawsuits are based on negligence or strict liability in tort or both. Under strict liability in tort, the conduct of the manufacturer, distributor or retailer is irrelevant and the focus is on the product itself and whether it was unsafe. They could have used utmost care in making, designing and distributing the product. However, the plaintiff must raise and prove the following issues to succeed against the defendants in relation with the product i.e whether,

- the product was defective when it left the manufacturer's or supplier's place
- the defective condition made the product dangerous
- the defective product caused the plaintiff's injury.

Moreover, in regard to the completed operations, whether,

- injury or damage from work
- injury or damage occurred away from premises
- work causing injury completed or abandoned

Exclusions

- Work not yet completed or abandoned
- Products still in possession of the insured

Coverage Territory: The coverage territory depends upon the policy definitions. If it's worldwide the international waterways and air space are also included in the coverage territory. In this regard the following aspects deserve a special mention in respect of products and completed operations:

- Products made and sold by the insured in the specified coverage territory
- Activities of a person having home in the specified coverage territory being away from that on his named business
- Extensions of the coverage territory for the goods or products sometimes referred to as worldwide product coverage

Building / Premises Liability or Product Liability

Sometimes, confusions arise as to the scope of liability in some cases and application of insurance. To deal with the case, the underwriter needs to analyze situation very carefully.

Personal and Advertising Damages Coverage-B

This is considered to be a basic coverage under CGL wherein those who do not need it may get it excluded by endorsement. Under the cover the insurer agrees to pay the sums that the insured becomes legally liable to pay for the damages. The insurer also agrees to defend the insured against any court suits. However the cover may not respond to any claim for bodily injury or property damage. It applies to personal injury if the injury is caused by an offense arising out of the named insured's business excluding advertising, publishing, broadcasting or telecasting done by the named insured. The coverage-B applies to advertising damages only if the damage is caused by an offense committed in the course of advertising the named insured's goods, products and services. The cover is not appropriate for insuring the advertising damage liability exposures of an advertising agency or other firm involved in providing advertising services.

Examples of Personal Injury:

- False arrest, detention or imprisonment;
- Malicious prosecution;
- The wrongful eviction or wrongful entry
- Defamation, libel or Slander/ Product Disparagement
- Oral / written publication damaging person's privacy

Examples of Advertising Injury:

- Use of another's advertising idea in advertisement
- Infringing on other's copyright, trade mark or slogan
- Oral/written publication of material that violates a person's right of privacy

Medical Expenses coverage-C

This coverage is not liability insurance in true sense of the term because the insurer pays regardless of whether the insured is legally liable. The coverage is included in CGL Policy to give relief to the insured by providing a small amount of compensation for settling minor injury cases without having regard to his actual liability of the insured. This is viewed as a means of making prompt settlement to the potential liability claimant in order to avoid possibly larger liability in the near future. It is an in-built cover and can be deleted by endorsement. The insurer agrees to pay medical expenses for bodily injury caused by an accident occurring in or on the way to premises that the insured owns or rents. The accident must take place in the CGL coverage territory and during policy period and medical expenses must be incurred and reported to the insurer within one year into the date of accident. Bodily injury caused by an accident that occurs away from the insured's premises (example job site, where insured's employer is based) is covered if the accident results from the named insured's operations.

- Payments made regardless of fault
- Payments within applicable limit of insurance
- Reasonable expenses paid for;
- ✓ First aid administered during accident.
- ✓ Necessary medical, surgical, x-ray, dental services etc
- ✓ Necessary ambulance, hospital, nursing professional and funeral services

Medical expenses payable for bodily injury caused by an accident:

- ✓ On premises owned or rented;
- ✓ On ways next to premises owned or rented;
- ✓ Because of operations;

Provided that –

- a) The accident in the coverage territory and during the policy period
- b) The expenses incurred and reported within 30days of the date of accident
- c) Submission for examination by physician as often as reasonably required

Supplementary Payments

The supplementary Payment provides for the details of the cost that insurer will pay with respect to any claim to be investigated or settled by the insurer or any suit the insurer defends the insured under either coverage 'A' or Coverage 'B'. The supplementary payments may consist of the following:

- a) All legal expenses such as defense cancel fees
- b) Cost of bail bond related with bodily injury liability coverage
- c) All reasonable expenses incurred by the insured at the request of insurer for investigation or defense
- d) Prejudgment interest awarded against the insured relating to the judgment the insurer satisfies

- e) All court expenses, imposed against the insured

Common Exclusions to CGL Cover

The following Exclusions define the scope of CGL Policy for bodily injury or property damages. Moreover, there are lots of express exceptions to such common exclusions:

- Expected or Intended Injury
- Contractual Liability
- Workmen Compensation and similar legal liabilities
- Employers' Liability
- Pollution Liability
- Aircraft, Auto or Watercraft
- War Warlike action or Insurrection, Rebellion
- Damage to owned / rented / occupied property
- Damaged own product
- Damage to Impaired Property or Property not physically injured
- Recall of Products, Work or Impaired Property, etc.

Claims Made Versus Occurrence Based Policy

The most commonly accepted form of CGL policy is based on "Claim-Made Basis" as opposed to being based on an "Occurrence Basis". With a claim-made policy, a claim is covered under the policy in effect at the time the claim is made provided the injury has occurred during the period of insurance and after retroactive date. In the Claims-made coverage form, Coverage-A and Coverage-B are both subject a claims-made coverage trigger. The basic requirement of the claim made trigger is that the claim for bodily injury or property damage (or personal injury or advertising injury) must be first made against any insured during either the policy period or an extended reporting period provided that the injury or damage must have occurred before the end of the policy period and after the retroactive date provided in the policy.

In occurrence based policy event giving rise to the claim must occur during policy period and the insurer would react whenever the claim is thereafter made on the insured. The occurrence-based policy covers injury that occurs during policy period regardless of when claims are made. A claim made today for injury that occurred 10-years ago could be covered under occurrence-based policy that was in effect in 10yrs before. As this occurrence version of CGL policy is long-tail claims oriented, determination of cost and management of claims are the major problems for the insurers. The insurers cannot predict the cost for pricing risks for such liability exposures. Occurrence trigger cover has become very costly and difficult for the underwriters for their liability cover for the asbestos industry and other harmful substances. To address such problems insurers developed Claim-made policy. Many underwriters believe that the occurrence form of CGL policy is not suitable for certain type of risks. In many countries both the versions of CGL (Claim-made and Occurrence-based) are in use.

Occurrence Based / occurrence Trigger

- Injury or property damage must occur during policy period
- Policy responds to a legal liability of the insured for a particular claim even if made many years after the policy ends if injury or damage occurs during policy period.

Limits

The limits of insurance in CGL Policy require discussions on the following limits and aspects:

- i) General Aggregate Limit for damages payable
 - For bodily injury or property damage in premises and operation liability, but not damages for 'Products and Completed Operations' under Coverage-A
 - For personal and advertising injury liability under Coverage-B; and,
 - Medical expenses under Coverage-C
- ii) Product and Completed Operation Aggregate Limit for damages payable for 'Products and Completed Operations' under Coverage-A

- iii) Each Occurrence Limit specifies the maximum amount of damages payable under Coverage-A and Coverage-C for any one occurrence.
- iv) Personal and advertising injury Limit specifies the maximum amount of damages payable for personal and advertising injury sustained by any one person or organization under Coverage-B for any one occurrence.
- v) Fire Damage Limit specifies the maximum amount payable by the insurer for damages resulting from any one fire covered by Fire Legal Liability Coverage.
- vi) Medical Expenses Limit specifies the maximum amount payable by the insurer under Coverage to any one person.

Fire Legal Liability Coverage

The fire legal liability coverage is highlighted at the end of exclusions for damage to property under coverage-A, which states that. "...Paragraphs of this exclusion do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner..." It is subject to separate limit of insurance as specified in limits of insurance. This limit is generally lower than per occurrence limit. Thus salient aspects of this cover are:

- Part of premises and operation coverage, but a distinct coverage
- Rented to or temporarily occupied by the named insured with the owner's permission
- Subject to separate limits to be specified in limits of insurance
- Subject to exclusions for expected or intended injury or contractual agreement

CGL Policy Conditions

This part addresses various matters, such as the insured's duties in the event of occurrence, claim, or suit, the insured's right to sue the insurer, principle of contribution, subrogation, etc.

- a) Duties of the Insured after occurrence, Offense, Claim or Suit —
 - Immediate notice,
 - Contents in notice—time, place and cause of occurrence, names and address of insured persons and witnesses, nature and location of injury or damage etc.
 - Others
- b) Legal Actions against the insurers providing for procedure and on agreed settlement
- c) Other Insurance mentioning Primary Insurance, Excess Insurance and method of sharing
- d) Premium Audit: Provision for computation of final premium after audit for adjustment against advance premium and for due return of excess premium if paid in advance and for recovery of the shortage, if any.
- e) Representations: Statements in the policy issued are based on the insured's representations
- f) Separation of Insured: Application of insurance to each insured separately against who claim is made
- g) Renewal of Policy: Providing rule and procedure for non-renewal of policy (by notice before 30days)
- h) Transfer of Recovery Rights: The insured will bring suit or transfer those rights to insurer
- i) Bankruptcy: Insolvency of insured will relieve insurer of their obligation under coverage part.

Extensions

A claim-made CGL policy provides for two extended reporting period:

i) Basic Extended Reporting Period and ii) Supplemental Reporting Period

The basic extended period is provided automatically without any additional premium if the policy is cancelled or not renewed or the insurer renews the policy with later retrospective date or with occurrence base. With such extension policy will cover claims made against the insured within 5 years for the occurrence within policy period and reported within 60 days from expiry. It does not increase limits of insurance or apply to claims to be covered by subsequent policy.

The supplemental extended reporting is granted under the same circumstances as above provided the named insured requests in writing within 60 days from the expiry of policy and pays an additional premium specified by the insurer. The

supplemental tails begins when basic tails ends and it continues indefinitely for the occurrence reported to the insured within 60 days, but did not result into claims even after 5 years.

Conclusion

This paper has tried to highlight only a few fundamental aspects of commercial general liability policy, which is always in great demand for medium and large MNCs. In view of new dimensions of legal liability exposures arising from diversification, technology development, sweeping changes in market conditions and human risk exposures, business organizations prefer CGL policy to public liability policy and product liability policy separately. This paper may be of great help to commercial property insurers or underwriters as well as aspiring business houses for effective transfer of their liability risk exposures.

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