

The CGL & Pollution Losses

Every year I get many calls from agents asking about the Commercial General Liability form (ISO) and whether or not pollution losses of various kinds are covered or not. This is mainly from a client who is hoping that his/her CGL (and Umbrella) will cover some happening resulting in pollution costs being incurred.

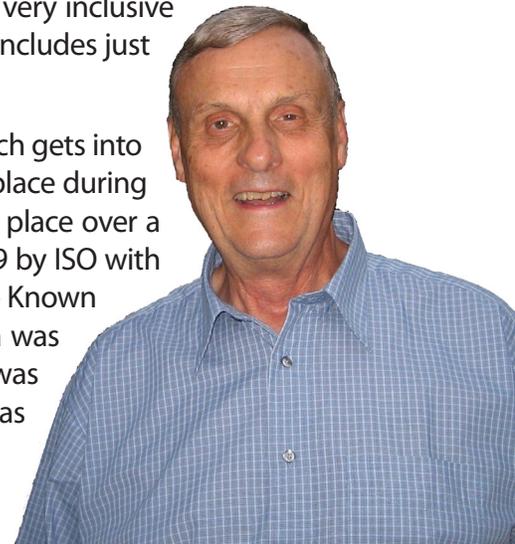
When I started in this business back in 1969, we used the ISO 1966 CGL policy. It did not even use the word pollution – it wasn't an issue back then. In the early 1970's, a revised form came out that made an early attempt to define pollution, and then it sort of excluded it, *"unless the pollution was sudden and accidental"*. This allowed more and more coverage as the courts tried to decide what was "sudden". One claim I remember took place over 7 years, and the court said that was "sudden". As a result, when the very extensive revision of the CGL took place in 1985, the form excluded **all pollution** at first. Then came claims where a hostile fire injured/killed people, and the carriers were able to deny claims based on this exclusion. Remember, that smoke and poisonous gasses are the major killers here, not the fire itself. And smoke and poison gasses fit very comfortably within the definition of what a "pollutant" is. Very quickly came endorsements to change this (such as one old endorsement entitled: *"Pollutants from a Hostile Fire"*). ISO has changed the Pollution Exclusion in the CGL almost every time it has revised the form. They have also changed many of the pollution endorsements as well, such as coverage for storage tanks, remediation of lead, etc. Here is the latest CGL version, based on the 04/2013 edition.

Prepare for a long journey.

Before we get into the insuring agreement and the pollution exclusion, let's consider one important point – there are three exposures from pollution. They are 1) **Bodily Injury**, 2) **Property Damage** and 3) **Cleanup or Remediation Costs**. While the form does give back some coverage relative to the Bodily Injury and Property Damage coverages, it gives very little back for cleanup costs. The reason is simple – some of our clients have used their properties for many years, and who knows what was dumped where back in the early 1900's? As the Superfund sites are testimony to – some properties cost many millions to remediate.

First of all, in the back of the policy, the word "Pollutants" is defined: *"mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed"*. This very inclusive definition has not been revised for several editions. If you read it carefully, it includes just about any type of pollution possible – which is their intent.

Next to consider is the Insuring Agreement language, particularly part b., which gets into the ideas of the policy territory and the fact that the occurrence has to take place during the policy period. Thanks to problems with pollution issues, which can take place over a long period of time, this part of the insuring agreement was changed in 1999 by ISO with a mandatory endorsement (CG 00 57 – Amendment of Insuring Agreement – Known Injury or Damage), commonly called the "Montrose Endorsement". The idea was to exclude all injury or damage that occurred **before** the policy period but was still going on if the insured or any "authorized employee" was aware that it was



taking place. ISO has always contended that insurance should never cover an occurrence that the insurance carrier knew was going on (occurring) **before** the policy period. Then in the 2001 edition revisions, ISO built the Montrose Endorsement language into the CGL and it remains there since. The endorsement itself was then discontinued.

On to the Pollution Exclusion in Section I, Coverages for Bodily Injury and Property Damage. It is Exclusion f, and it is divided into two parts. Part (1) deals with excluding pollution coverage for occurrences that causes Bodily Injury and/or Property Damage. It does not affect anything to do with cleanup. The language from the exclusion: **f. (1)“Bodily Injury or Property Damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutant”**. Again, note the attempt at all-inclusive language to make the exclusion as tight as possible.

f.(1)(a) This language is applied to any premises, site or location ever owned or occupied by, rented to or loaned to any insured. There follows three “exclusions” (or exceptions) from this exclusion, thereby **providing coverage** for:

(i) Bodily Injury from the smoke, fumes, vapor or soot produced by the equipment used to heat, cool or dehumidify the building.

(ii) Bodily Injury or Property Damage for which You may be held liable if you are a contractor and the owner/lessee has been added to Your policy as an additional insured.

(iii) Bodily Injury or Property Damage caused by heat, smoke or fumes from a hostile fire.

f.(1)(b) Then comes this exclusion which says no coverage for any premises site or location ever used to handle, treat, etc. waste materials. The policy is not interested in covering dumps.

f.(1)(c) Next is the exclusion which takes away coverage for any pollutants ever transported, handled, stored, disposed of, or processed as waste by the insured or any person or organization for whom You may be held responsible. For example, I might be sued because the waste disposal service illegally disposed of my waste products.

f.(1)(d) This part of the exclusion takes away coverage at any premises, site or location on which any insured (or a contractor or subcontractor for which the insured may be held responsible) is performing operations, if the pollutants are brought onto those premises in connection with those operations. There are three exceptions to this exclusion (coverage again):

(i) Bodily Injury or Property Damage arising out of the escape of various fluids that are needed for mobile equipment to function. Examples of these fluids would be diesel fuel, oil, brake fluid, etc. An example of a loss is the case where antifreeze leaked out of a machine’s radiator, flowed into a nearby creek and killed several thousand dollars worth of prize catfish. This Property Damage loss was covered.

(ii) Bodily Injury or Property Damage caused by the release of gases, fumes or vapors from materials that You (or a contractor or subcontractor for which You may be liable) brought into the building in connection with operations that You are performing. An example is the claim where customers were made ill from vapors caused by floor stripping materials that the Named Insured (You) had used in the basement. Their Bodily Injury claims for ambulance, hospital costs, etc. were covered.

(iii) Bodily Injury or Property Damage caused by heat, smoke or fumes from a hostile fire. Note that this covers a location other than the insured’s.

f.(1)(e) At or from any other premises, site or location that any insured (or anyone they may be responsible for) are performing operations to test for, monitor, clean up, remove, contain, treat, detoxify, neutralize, or in any other way to respond to or assess the effects of pollutants. The policy is not interested in covering Superfund or any other type of pollution remedial contractors.

f.(2) The second part of the pollution exclusion deals with the **cleanup** exposure, not Bodily Injury or Property Damage. It begins with the words that there is no coverage for **“any loss, cost or expense arising out of any”**:

f.(2)(a) Request, demand, order or statutory or regulatory requirement that any insured test for, monitor, clean up, remove, detoxify, etc. any pollutants;

or

f.(2)(b) Claim or suit by any governmental authority (federal, state, county, city, etc.) for the same problems as (a) above.

Then comes the last paragraph that provides some coverage, and the only coverage for cleanup losses. It says that this exclusion does not apply to any damages that the insured might be held liable for Property Damage losses if there is no demand or order from the above governmental authorities. This means that if the federal, state and other authorities make no demands, there is coverage for cleanup losses. In this author’s opinion, that means the loss is not large enough to get their attention, and they are willing to allow the insured to handle the cleanup.

One last detail about this exclusion – it only applies to **Premises and Operations**. Note that it does not apply to the **Products Liability** exposure. For example, if I manufacture a storage tank (guaranteed for 10 years) and it leaks a year later, and the chemicals cause a Bodily Injury claim, it would not be excluded under this form.

In Coverage B – Personal & Advertising Injury Liability coverage, there is one exclusion that references pollution. It is exclusion m. Pollution. It says no coverage for **“Personal and Advertising Injury arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time”**. This became necessary many years ago because of the definition of Personal & Advertising Injury which includes wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises. One of the claims that caused this exclusion, for example, was waste products that escaped out of the insured’s operation at his own premises that then seeped into the premises of his neighbor. The neighbor sued under the claim that the waste products were a “wrongful entry onto his premises”, and was therefore covered under Personal and Advertising Injury. The claim was paid, and the exclusion was created and put into Coverage B.

Finally, there are numerous endorsements that can affect the pollution exposure under the CGL policy. Some provide coverage, some take coverage away. One example is the **Total Pollution Exclusion** that takes away **ALL** pollution coverage. This endorsement is often added to commercial Umbrella policies, but also can be added to the CGL.

As you can see from the ideas above, there is some coverage for pollution issues, but not what is needed by some clients who have significant exposures. When you spot those clients, be sure to recommend an appropriate pollution coverage. While they can be expensive, they are necessary. If your client does not purchase the coverage, at least you have made them aware of their exposure and give them the choice to buy or not. This is the professional way.