

THE SHORT, HAPPY LIFE OF THE 1973 CGL FORM

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Amid the tumult of the past few months, one major anniversary has been all but forgotten: the 50th anniversary of the 1973 CGL form. In this brief article, I'd like to make the case that the 1973 form deserves greater recognition in light of its revolutionary impact on the regularization of insurance coverage and claims resolution.

These many years later, it is hard to remember the primordial swamp that was liability insurance in the late 1960s and early 1970s. Although comprehensive general liability insurance had been introduced in 1941, many insurers continued to underwrite different types of liability risk under other GL forms, notably Manufacturers and Contractors (products claims) and Owners, Landlord and Tenants (premises liability) insurance. Also, insurers subscribed to dozens of disparate and regional rating bureaus than is currently the case with the result that different M&C and OL&T forms and other standard bureau forms were used that diverged in minor but consequential ways.

Even though it only remained in place for thirteen years (ISO made major revisions in 1986 followed by minor tweaks in 1990, 1993, 1996, 1998, 2001, 2004, 2007 and most recently in 2013), the 1973 CG 00 01 form revolutionized the insurance playing field in three significant ways. First, it established the primacy of the Insurance Services Office (ISO) as the principal source of standardized policy forms and endorsements for the domestic P&C industry. Second, it cemented the CGL form itself as the dominant means of underwriting general liability insurance. Finally, it effected significant changes to the standard CGL form that proved to have long-lasting consequences for coverage litigation in the years to come.

--The Role of ISO

Although it plays a ubiquitous role today, it is worth remembering that ISO only came into being in 1971 as the result of a merger of 30 individual state rating bureaus. Prior to the consolidation of these entities into ISO, there had been dozens of different bureaus around the country including the National Bureau of Casualty Underwriters, the Multi-Line Insurance Rating Bureau, the Crop-Hail Insurance Actuary Association, the Transportation Insurance Rating Bureau, the Southeastern Underwriter's Association, the New England Insurance Rating Bureau, the Aviation Insurance Rating Bureau, the Nuclear Insurance Rating Bureau, Factory Mutual Rating Bureau, Mutual Insurance Rating Bureau, Middle Department Association of Fire Underwriters, National Automobile Underwriter's Association, Pacific Fire Rating Bureau, the Survey Association of America and the Western Actuarial Bureau. As late as 1965, the Insurance Almanac listed over 200 organizations in the field of property and liability insurance rating insurance on a national or regional level.

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--The Evolution of the CGL Form

The first comprehensive general liability form was developed in 1939 by E.W. Sawyer, the chief underwriter of the National Bureau of Casualty Underwriters and was rolled out on a national basis by the NBCU in 1941. Prior to that date, such limited public liability insurance as was available was specific to individual industries including theater liability, automobile liability, physician's liability, team's liability, and elevator liability.

In 1966, the NBCU and the American Mutual Insurance Alliance jointly produced the first "occurrence"-based CGL form. Prior to that date, general liability insurance coverage was for losses "caused by accident," which many courts interpreted as limiting insurance to "big bang" events rather than gradually-occurring losses. Instead, the 1966 form made clear that coverage was intended to include "injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured.."

This concept of "occurrence"-based coverage remained the keystone of the CGL form that ISO promulgated in 1973. For whatever reason, however, the 1973 CG 00 01 form deleted the 1966 form's "during the policy period" language from the insuring agreement, an omission that fed the flames of extensive controversy during the ensuing battles over trigger of coverage and allocation issues for long-tail losses in the 1980s and 1990s. As amended, the 1973 form defined "occurrence" as:

accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

--1973 Changes in CGL Coverage

While cementing the key role of "occurrence" in CGL coverage, the 1973 CG 00 01 form made several changes to the 1966 form that clarified and in some cases limited the scope of that coverage.

Importantly, the 1973 form added a new exclusion for pollution losses that did not result from "sudden and accidental" causes. Similar wordings had recently appeared in the London Market, as well as New York, where Governor Nelson Rockefeller decided that businesses would be less likely to cause pollution if they could not count on their liability insurance to cover resulting claims. Prior to 1973, however, such exclusions had only been available in the U.S. as endorsements.

The new form also changed the definition of "property damage" to clarify the policy's coverage for the "loss of use" of tangible property. Whereas the 1966 form had included coverage for "loss of use of property resulting from property damage," the new form expanded the definition of "property damage" to include "loss of use" as well as the earlier form's coverage for "injury to or destruction of tangible property." As amended, the policy insured

(1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use at any time resulting therefrom, or (2) loss of use of tangible property that has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

This “loss of use” coverage was subject to a new Exclusion M that eliminated coverage for loss of use due to a failure to perform by the insured or a failure of the insured’s products to perform as promised.

The 1973 form also deleted the policy’s definition of “damages,” a decision that would prove to have fateful consequences for the issue of whether waste site clean up expenses were covered by CGL insurers that dominated environmental coverage litigation in the late 1980s.

Finally, the 1973 form helpfully amended the policy’s definition of “bodily injury” to include “death at any time resulting therefrom.” Sadly, in 42 years of coverage research and litigation, the author has never identified a pre-1973 case in which there was an issue as to whether death was a form of bodily injury.

Conclusion

The 1973 form was hardly the last word in CGL underwriting. Significant changes lay ahead, particularly with respect to policy exclusions that have evolved from edition to edition to cope with emerging tort liabilities, notably for diverse long-tail liabilities (asbestos, pollution, silica, lead) and statutory consumer protection litigation (junk faxes, etc.). However, other than the abortive effort in 1986 to abandon “occurrence”-based coverage altogether in favor of “claims made” coverage that resulted in nineteen states suing the insurance industry and ISO for anti-trust violations and culminated in *Hartford Fire Ins. Co. v. State of California*, 509 U.S. 764 (1993), no serious effort has since been made by the insurance industry to alter the basic structure of CGL coverage that was initially laid down in 1966 and achieved its modern form in 1973.