

Construction Defect Underwriting Guidelines

Quick Links

[Underwriting Guidelines](#)
[State Tiering Chart](#)
[CD Tier Matrix](#)
[Subcontractor Underwriting Controls](#)
[Forms Listing and Guidelines](#)
[State Legal Summary and Description](#)



Key Underwriting Considerations

- **State Tier:** Refer to the State Tier listing to determine Tier (i.e. 1, 2 or 3).
- **Evaluate the contractors' operations:**
 - **Types of projects:** Is majority of work commercial or residential? What types of projects are involved — motel/hotel, office, multi-family, tract housing or custom residential?
 - **Type of contractor:** Is the risk a general contractor or an artisan contractor? What percentage of work is subcontracted to others?
 - **Type of work:** Are they conducting new construction or service/repair type work? Is the specific type of work prone to construction defect claims?
 - **Endorsements:** Review endorsements for legal ramifications and possible increase in exposure to loss from construction defect claims (e.g. additional insured requests).
- **Reference Construction Defect Tier Matrix Index:** Does the matrix indicate "No" = Unacceptable or "Yes" = Acceptable for the type of risk?

Generally Unacceptable Exposures

- Residential general contractors and home builders
- Residential contractors building high valued custom homes
- Contractors involved in new multi-family construction including apartments, town homes, condominiums and tract housing.
- Subcontractors involved in residential structural work such as foundations, framing or roofing
- Commercial general contractors whose annual subcontracting cost is greater than 50% of the contractor's annual receipts.

Underwriting Guidelines

After a review of construction defect losses, consultations with our claims and legal staffs, trade journal research, discussions with reinsurers, and a review of various court decisions, it is clear specific states, types of projects, types of contractors and types of work being performed all impact the exposure to construction defect losses.

A thorough understanding of the insured's operations, procedures and controls are crucial to evaluating a risk's acceptability. The classification alone will not provide the answer due to the diverse type of work that can be conducted under each classification. In judging a risk's loss potential from construction defect claims, in conjunction with the guidance provided by the Construction Defect Tier



Matrix and referencing the state tier chart, the underwriter's analysis should take into account the types of projects, contractors, and the work performed.

Examples

Acceptable	Unacceptable
Artisan contractor doing minor renovations dealing in interior molding and cabinet upgrades to single-family dwellings.	General contractor, performing major repair or remodeling involving changes to the structural integrity of single-family dwellings. <i>(Unacceptable due to type of contractor – general contractor and type of work – structural).</i>
Artisan contractor installing sod and shrubs at single-family dwellings.	Artisan contractor performing pre-construction site prep and foundation work for new single-family dwellings. <i>(Unacceptable due to type of work-ground/foundation work).</i>

Types of Projects

Residential

Residential construction work is the target of construction defect litigation. Projects dealing in residential work involving multi-family construction such as town homes, condominiums and apartments, or residential work involving tract housing projects are the most prone to construction defect losses. The work performed on these projects is replicated in each unit resulting in increased loss potential. Plaintiff attorneys' target groups of townhome owners, condominium owners and tract home owners. These groups have greater potential for larger awards, which translate into larger legal fees for the plaintiff's attorneys.



Commercial

Generally, commercial construction on properties used as offices, retail stores, wholesale storage and distribution centers have not had significant construction defect activity. Specific types of commercial construction such as schools, motels and hospitals are more prone to construction defect litigation than other types of commercial construction.

Type of Contractor

A general contractor means a contractor that secures, coordinates and directs subcontractors to perform work. General contractors, and frequently the developer, are usually included in a construction defect suit.

Artisan and subcontractors typically have specialized skills and expertise, while the general contractor retains an administrative roll over the subcontractors. Subcontractors are responsible for performing a specific part of the overall project that the general contractor has agreed to complete. Any contractor whose annual subcontracting cost is greater than 50% of the contractor's annual receipts shall be deemed a general contractor.

It is common for construction defect suits to name all subcontractors in addition to the general contractor. Because of the prevalence of additional insured and indemnification agreements, even subcontractors performing the most innocuous types of work, such as installing mailboxes, have been forced to defend construction defect damages.



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Type of Work

Contractors performing only service or repair work on an individual unit in a multi-family complex or a single family dwelling, presents less of a loss potential than contractors working on multi-family construction projects as noted under Type of Projects. In general, service or repair work presents less exposure to loss from construction defect claims than new construction.



Contractors engaged in *ground* and *structural* work, such as those working on land grading/site preparation, foundations, framing, roofing, siding, windows, are the most exposed to construction defect losses.

State Tiering

States are classified into three tiers:

Tier 1: States where profitability is questionable due to the legal climate, adverse case law and statutes, proliferation of CD litigation, Loss Adjustment Expenses and settlement values.

Tier 2: States that are exhibiting emerging trends similar to Tier one.

Tier 3: States where no significant litigation has developed, or where case law is favorable to contractors.

Tier 1	Tier 2	Tier 3
Arizona	Alaska	All Other States
California	Hawaii	
Colorado	Illinois	
Florida	Kentucky	
Nevada	Minnesota	
Oregon	New Jersey	
Texas	New Mexico	
Washington	North Carolina	
	South Carolina	
	Wisconsin	

Construction Defect Tier Matrix

The Construction Defect Tier Matrix is an additional tool to assist the underwriter in reviewing the relative hazard of a risk and identify the most severe CD exposures to determine acceptability of a risk.

- "No" = Unacceptable
- "Yes" = Acceptable

Construction Defect Severity Index (CD Index). It will vary depending on State tier.

- Unacceptable CD exposure (CD Index 8 – 10)
- Severe CD exposure (CD Index 5 – 7)
- Moderate CD exposure (CD Index 3 – 4)
- Minimal CD exposure (CD Index 1 – 2)



Classification residential vs. commercial - If a risk is involved in both commercial and residential construction, classify as commercial only if the residential work is less than 10% of the total sales.

Classification single vs. multi family - If a risk is involved in both single family and multi family residential construction, classify as single family only if the multi-family residential work is less than 10% of the total sales.

General Contractor - For the purpose of this document, any contractor whose annual subcontracting cost is greater than 50% of the contractor's annual receipts shall be deemed a general contractor.

Subcontractor--Subcontractors are responsible for performing a specific part of the overall project that the general contractor has agreed to complete. The subcontractors typically have specialized skills and expertise.

Construction Defect Tier Matrix				
Type of Risk	* CD Index	Tier 1 States	Tier 2 States	Tier 3 States
Commercial general contractor subbing out > 50% of total sales.	8	No	No	No
Commercial contractor or commercial artisan subbing out > 25% and < 50% of total sales with no work on hospitals, hotel/motel or schools.	5	No	Yes	Yes
Commercial contractor or commercial artisan subbing out > 25% and < 50% of total sales including work on hospitals, hotel/motel or schools.	7	No	No	Yes
Commercial contractor or commercial artisan subbing out < 25% of total sales with no work on hospitals, hotel/motel or schools.	1	Yes	Yes	Yes
Commercial contractor or commercial artisan subbing out < 25% of total sales and doing work on hospitals, hotel/motel or schools	3	No	No	Yes



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Construction Defect Tier Matrix				
Type of Risk	* CD Index	Tier 1 States	Tier 2 States	Tier 3 States
Single family home builders subbing out > 50% of total sales, or working on more than 6 homes in a development, or building more than 12 homes a year.	10	No	No	No
Single family home builders subbing out < 50% of total sales, working on 6 homes or fewer in a development and building 12 or fewer homes a year and < \$3M sales.	8	No	No	Yes
Residential artisan contractor, working on single family (no condos, town homes, apartments or tract housing) new construction and subbing out < 25% of total sales.	5	No	No	Yes
Residential artisan contractor, working on single family (no condos, town homes, apartments or tract housing) new construction and subbing out > 25% of total sales.	6	No	No	No
Residential artisan contractor, working on single family (no condos, town homes, apartments or tract housing) performing service, repair or remodeling (no new construction) subbing out < 25% of total sales.	4	Yes	Yes	Yes
Residential artisan contractor, working on single family (no condos, town homes, apartments or tract housing) performing service, repair or remodeling (no new construction) subbing out > 25% of total sales.	5	No	Yes	Yes



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Construction Defect Tier Matrix				
Type of Risk	* CD Index	Tier 1 States	Tier 2 States	Tier 3 States
New Multi-family building (condos, town homes, apartments or tract housing) contractor subbing out > 10 % of total sales.	10	No	No	No
New Multi-family building (condos, town homes, apartments or tract housing) contractor subbing out < 10 % of total sales and < \$3M sales.	9	No	No	Yes
Residential artisan contractor, Multi-family (condos, town homes, apartments or tract housing) performing service or repair . (no new construction) subbing out < 25% of total sales.	4	Yes	Yes	Yes
Residential artisan contractor, Multi-family (condos, town homes, apartments or tract housing) performing service or repair . (no new construction) subbing out > 25% of total sales.	5	No	No	Yes
Residential artisan contractor working on Multi-family home (condos, town homes, apartments or tract housing) new construction subbing out < 25% of total sales.	6	No	No	Yes
Residential artisan contractor working on Multi-family home (condos, town homes, apartments or tract housing) new construction subbing out > 25% of total sales.	7	No	No	No



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Endorsements

CG 2294 - Exclusion - Damage To Work Performed By Subcontractors On Your Behalf; and,

CG 2295 - Exclusion - Damage To Work Performed By Subcontractors On Your Behalf Designated Sites Or Operations

Both forms remove the subcontractor exception from the CGL "damage to your work" exclusion. When the endorsement is in place, a general contractor has no coverage for damage to its work if the work was performed by a subcontractor or if a subcontractor's work causes damage to other elements of the work.

An important component of completed operations coverage is removed when this endorsement is attached to a contractor's policy. Agents and insureds have resisted insurance company attempts to attach the exclusion.

If an underwriter feels there is a need to attach this endorsement, in all likelihood we should not be writing the account.

CG 7155 - Total Exclusion Of Residential Construction; and,

CG 7197 - Exclusion Of Residential Construction



Form CG 7155 excludes operations involving any construction operations on single family, multi-family, residential apartments or residential condos. The exclusion does not apply to repair or service work, thereby, providing coverage for this type of work.

CG 7197 has been filed in most of our operating states and is similar to CG 7155 with one difference. In addition to not applying the exclusion to repair or service work, the exclusion is not

applicable to renovation or remodeling work. (Note: There are no equivalent ISO forms for these endorsements)

In theory, attaching one of these endorsements to a CGL policy will greatly reduce our exposure to construction defect claims. However, if the underwriter determines there are known exposures that could lead to construction defect claims, we should decline writing the account rather than attaching one of these exclusionary endorsements.

Examples: When it may be appropriate to attach one of these exclusions

- The named insured is a commercial contractor. The agent indicates that the insured does no residential construction. The account is acceptable as presented. Due to construction defect concerns, if the insured did perform residential construction we would decline to write the account. It would be acceptable to write the account and attach the exclusion since there is no known exposure. (CG 7155 may be the appropriate endorsement for this situation)
- The named insured is a kitchen/bath remodeling contractor. There is a concern that the insured could branch into doing new construction residential framing work. Because this is an exposure we generally wish to avoid, attaching the endorsement would exclude coverage for the exposure if the insured started this type of operation. We would have the opportunity to review the risk and determine acceptability once notified that the insured was doing this type of work. (CG 7197 may be the appropriate endorsement for this situation)

UMB 0062 - Residential Construction Exclusion – Coverage B – is umbrella's comparable endorsement.

Forms Listing with Guidelines

Form Number	Form Name	Description	Usage
CG 7156	Additional Insured - Primary and Non-Contributory	Use in conjunction with existing AI endorsements. Includes primary and non-contributory language	Optional-see underwriting guidelines.
CG 7157	Additional Insured - Automatic Status, Primary and Non-Contributory	Same as CG 7156 but, includes automatic status when required by contract	Optional-see underwriting guidelines
CG 7155	Exclusion - Total Exclusion of Residential Construction	Excludes all exposures with residential construction work	Optional-see underwriting guidelines
UMB 0062	Residential Construction Exclusion	Same	Attach if CG 7155 is on CGL
CG 7140	Exclusion - EIFS and DEFS	Excludes coverage for damage connected with EIFS and DEFS	Attach to all contractors-see guidelines
UMB 0055	Exclusion-EIFS and DEFS	Same	Same
CG 7158	Waiver of Subrogation as Required by Written Contract	Waives subrogation if required by written contract prior to loss	Optional
GL 2199	Exclusion - Subsidence of Land	Excludes loss from earth movement, landslide, mudflow, etc.	Varies by state if optional or mandatory
UMB 0039	Subsidence Of Land Exclusion - Coverage B	Same	Attach if GL 2199 is on CGL
CG 7007	Amendment of "Your Product" Definition	Amends definition of "Your Product" to include real property constructed by others working on insured's behalf. Basically, removes P/CO coverage for contractors.	Rarely used. If consideration given to attaching this form, account probably should not be written.
CG 7035	Expanded Property Damage Coverage	Provides \$5,000 /occurrence Property Damage coverage	Optional. Premium charge.
CG 7056	Changes-Insuring Agreement	Amends insuring agreement to "manifests" in lieu of "occurs".	Primarily used in CA and NV. Add to all contractors
CG 2426	Amendment of Insured Contract Definition	Amends the definition of an insured contract in the CGL removing contractual liability coverage for an addl insured's sole negligence	Optional – see underwriting guidelines
UMB 0016	Contractors Limitation-Coverage A and B	Excludes wrap-ups and professional services	Mandatory
CG 2294	Exclusion - Damage to Work Performed by Subcontractors on Your Behalf	Removes exception to CGL exclusion. Work performed by subcontractors is excluded.	Optional-see underwriting guidelines

CG 2295	Exclusion - Damage Performed by Subcontractors on Your Behalf-Designated Sites or Operations	Same as CG 2294 except on a designated site or operation	Optional-see underwriting guidelines
CG 2037	Additional Insured – Owners, Lessees or Contractors – Completed Operations	Additional Insured endorsement providing completed operations coverage. See CG 7160	Optional-see underwriting guidelines
CG 7246	Blanket Additional Insured Endorsement Commercial Contractors Coverage	Additional Insured endorsement providing premises and completed operations coverage when required by written contract or written agreement. See CG 7160	Optional, premium charge Recommend using CG 7246 over CG 7160 when blanket coverage requested.
CG 7160	Additional Insured - Owners, Lessees or Contractors-Completed Operations	Additional endorsement providing completed ops. Further clarifies that coverage is not provided for sole negligence of AI. Also, we have no duty to defend AI for their sole negligence.	Optional-see underwriting guidelines Recommend using CG 7160 over CG 2037.
CG 7057	Additional Insured - Owners, Lessees, Contractors-Scheduled Person or Organization	Similar to CG 2010, but this form includes an exclusion for employees of the named insured. Makes a project owner and insured under a general contractors CGL policy.	Only used in CA.

Construction Defect Defined

There is no uniform definition for “construction defect”. It is viewed by some as any defect in design or workmanship, or defect related to landslide settlement conditions that reduce the value of residential building property.

Trial courts have recognized that construction defects can be grouped into the following four categories:

- design deficiencies
- material deficiencies
- construction deficiencies (poor quality or substandard workmanship)
- sub-surface problems

What are the problems? Subsidence; collapse; sagging; cracks in walls, foundations, walks and driveways; water intrusion through roofs, windows, doors and foundations; dry rot/water rot in roofs, framing, decks and landscaping; HVAC, plumbing leaks and noise; code violations including nail patterns, nail size, anchoring of roofs and foundations, fire proofing and electrical, mold, stucco, plaster, dry wall and paint.

Construction defect lawsuits are usually filed against as many defendants as possible without regard to insurance coverage or specific construction dates. Litigation is complex, multi-party and expert laden. Developers, graders, architects, engineers, general contractors and all types of sub-contractors are being sued. Factors contributing to the increase in construction defects include:

*For purposes of this discussion, **tract housing** is defined as a development where houses are similar in price, physical characteristics, lot size, and square footage. Tract housing also includes numerous houses of similar or complementary design constructed on a given expanse of land.*



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- an increase in residential building
- shortage of skilled construction labor
- cost-cutting measures by contractors
- inadequate state and local building inspection
- liberal court interpretation of the insurance contract

Mistakes are multiplied in larger developments where defects can be replicated in hundreds of homes. Defects are also magnified in multi-million dollar custom homes.

Homeowners Associations have brought litigation against the developer, general contractor, all subcontractors on the job and design professionals. The next round of litigation is then between the developer/general contractor and the various insurers that issued additional insured endorsements/certificates to subcontractors.

The majority of construction defect activity is focused on residential construction. Generally, commercial construction on properties used as offices, retail stores, wholesale storage and distribution centers have not had significant construction defect activity. Specific types of commercial construction such as schools, motels and hospitals are more prone to construction defect litigation than other types of commercial construction. Contractors performing work on residential projects such as detached homes, town homes, condominiums, apartments and motels incur the vast majority of construction defect losses.

Claims Experience

Claim experience has shown that construction defect claims are occurring in every state. The adjusting expense almost equates to the indemnity costs, and when a loss occurs, the total incurred construction defect loss is significant. Defense costs may have little relationship to the insured's share of potential liability or the amount of its contribution to an overall group settlement. Loss Adjustment Expense (LAE) on CD claims can be as high as 50% - 60% of the indemnity loss, maybe as high as 100% if there was a signed indemnification agreement in place prior to the loss. Some of the hardest hit areas of construction are large housing developments, tract housing projects, town home developments, large condominium developments and high valued custom homes.



Coverage Triggers

In order for the CGL policy to respond to a construction defect claim, the claim must:

- Involve "Property Damage" as defined by the policy;
- Resulting "Property Damage" must occur during the policy period; and
- The "Accident" resulting in property damage must be "neither expected nor intended" by the insured.



There is no coverage under the CGL policy unless the property damage results "during the policy period". Courts have had a difficult time agreeing when "property damage" occurs for purpose of triggering coverage. There is often a question of whether the property damage occurred when the building was originally constructed, when the property damage manifested, or sometime in between.

As an example - an improperly constructed roof results in a hidden water leak. The unknown water leakage continues for an extended period before manifestation. The full extent of damage and or cause may remain hidden even after manifestation. When did the property damage occur?



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Four General “Trigger” Theories

Four general “trigger” theories have been established by the courts:

Manifestation

Only the policy on the risk at the time when property damage is first discovered is obligated to respond. In the above example, coverage would be triggered under the policy that was in force when the water damage was first discovered.

Injury-In-Fact

Injury-In-Fact coverage is triggered when actual property damage first occurs, regardless of whether the damage is known at the time. This is sometimes called the “actual” injury theory. In the roof example, coverage would be triggered when the damage first occurred, which in this case would also be prior to “manifestation”.

Continuous Coverage

Continuous-coverage is triggered under all of the policies on the risk from the beginning of construction, continuing until the manifestation of the problems. Essentially, this boils down to a period of potential coverage and duty to defend from when the insured first set foot on the job site to when the lawsuit was filed. All carriers must defend within this very broad period of time. This can be difficult to determine and costly, since the date of manifestation or discovery of a defect is nearly impossible to identify in large multi-phase housing projects. Historically, this was limited to asbestos and pollution claims. All policies in force, from the time construction began until the damage was discovered, would be triggered in the roof example.

Exposure

Exposure-loss covered by policies in force at time of exposure or introduction of harm. The policy that was in force when the roof was constructed would be triggered.

Date of Loss Determination

In traditional types of claims, the date of loss is easy to determine. However, in construction defect cases there can be continuous property damage over time making the date of loss hard to determine. Generally, the injured party names all potentially responsible parties in the suit. Each of these parties then puts their insurance company on notice of a claim. In a construction situation, this could involve all of the contractors from a job, regardless of liability. This claim situation then triggers the insurers “duty to defend.” The duty to defend is based on the potential for a covered claim, not the actual establishment of a covered claim. A prolonged, messy and expensive claims process often results.

Statute of Limitations

A statute of limitations is the time within which an action must be brought to retain a right of recovery. The period of limitation does not typically begin to run until the defects are discovered, or reasonably should have been discovered. In some states, the statute of limitations is suspended during the time in which the contractor or developer attempts to make repairs. For example, in a manifestation state with a two-year statute of limitation, if a case is not settled within two years, a suit must be filed to maintain a right of recovery.

Statute of Repose

A statute of repose on the other hand, is the maximum time period or "ceiling" in which the lawsuit must be filed or otherwise the claim is barred by law. The statute of repose runs continuously after completion of the construction regardless of when the defect was discovered. A statute of repose is basically an expiration date for actions to be brought arising out of construction of real property. Not all states have statutes of repose that apply to contractors. As an example, a state may have a five-year statute of limitations and a ten-year statute of repose. If a defect is first discovered twelve years after construction was completed, the claim would be barred due to the statute of repose.

The following chart outlines by state, the coverage trigger, the statute of limitations (SOL), the statute of repose (SOR,) and applicable case law for tier 1 and tier 2 states.

State Summary of Occurrence Trigger, Statute of Limitation, Statutes of Repose, and Applicable Case Law

State	Occurrence "Trigger"	Statute of Limitations	Statutes of Repose	Miscellaneous
Tier One States				
AZ	Continuous trigger, beginning when damage is sustained.	2 years for personal injury, Property damage, and products liability	Products 12 years; Construction 8 years following substantial completion, 9 years for latent defects	Construction boom in recent years contributing to suspect quality of construction, with claim trends increasing. Arizona is evidence that climate is not the controlling factor in the development of mold claims. The driving factor is usually shoddy construction allowing water intrusion through windows, roofs and foundations. Additionally, AZ's case law evolves in relationship to CA law, and has seen its own growth in population and construction. Agreements indemnifying a party for its own negligence are enforceable if the contractual language is clear and unequivocal.
CA	Continuous trigger	2 years BI, 3 Years PD, 10 years latent defect.	10 years CD	California is a very troublesome state due to the especially litigious nature of the state, along with high property values and the large volume of claims filed. The concept of continuous trigger, as supported by the Montrose Decision, creates potential occurrences even in policies wherein the loss was known prior to the inception date. There does not appear to be any strong Right of Repair statutes on the books, which thus promotes litigation. In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, California was ranked 46th of 50. Agreements indemnifying a party for its own negligence are enforceable if the contractual language is clear and unequivocal. However, Cal Civ. Code § 2782. prohibits allowing an indemnitor to hold harmless an indemnitee for the indemnitee's sole negligence in construction contracts.



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State	Occurrence "Trigger"	Statute of Limitations	Statutes of Repose	Miscellaneous
Tier One States				
CO	Colorado follows the majority rule that coverage is triggered when the claimant sustains actual damage and not when the act or omission that caused such damage was committed.	2 years generally - - tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract.	Six years after the substantial completion, plus two years from discovery if discovered in fifth or sixth year	Colorado - a troublesome state due mostly to the pace of growth and construction. Colorado, on a percentage basis, has some of the fastest growing populations with corresponding housing and development growth in the nation. The problems with population and constructions booms is combination of the large number of homes built and the lack of experienced and qualified builders and trades people. This results in poor workmanship. It also must be noted that Colorado also has its own share of building in unstable geological areas. Agreements indemnifying a party for its own negligence are enforceable if the contractual language is clear and unequivocal.
FL	Injury-in-fact	4 years -- An action founded on negligence. Construction, latent defect, runs from discovery: two years wrongful death	15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional	In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, Florida was ranked 42nd of 50. Auto Owners Ins. Co. v. Travelers Cas & Sur. Co., 227 F Supp 2d 1248, specifically held a construction defect is an occurrence under the CGL policy. Recent trend of weather related losses questioning the quality of the construction of the building pre-weather loss. The primary forces in FL include construction and population growth and the environment, which is very conducive to moisture and/or water intrusion losses. If the language in an indemnity agreement is clear and unequivocal, a party can be indemnified for it's own negligence.
NV	Injury In Fact with indications of movement towards a Continuous Trigger	3 years personal property and fraud, 2 years slander, 2 years personal injury or wrongful death; 6 years CD patent defect; 8 years latent defect	8 years patent defect; 10 years latent defect after substantial completion	Nevada has seen quite a construction boom. Conducted in a fairly quick, and perhaps haphazard manner. It is also important to emphasize that NV generally follows the evolution of CA law and has done so to a great degree in this area such as continuous trigger, which means an occurrence can implicate multiple policies. Recent Right of Repair statute reform has potentially worsened the problem rather than relieving litigation. If the language in an indemnity agreement is clear and unequivocal, a party can be indemnified for its own negligence.

	Occurrence "Trigger"	Statute of Limitations	Statutes of Repose	Miscellaneous
Tier One States				
OR	Normally, injury-in-fact, but Pollution -- continuous,	Personal injury 2 years;	Negligent injury 10 years	Oregon generally follows the evolution of CA law and has done so to a great degree. The environment is very conducive to moisture and/or water intrusion with corresponding damage. Indemnification for a party's own negligence is not permitted in construction contracts.
TX	Split, either continuous or manifestation.	1 year libel slander; 2 years personal injury, property damage, wrongful death; 4 years fraud;	Professional liability for A&E 10 years; construction defect 10 years after the substantial completion of the improvement	Richland Homes Inc. v. Great American Lloyds Insurance Co., 2004, Texas Dist. Ct. In addition to finding that the carrier must provide a defense to the policy holder in a construction defect claim, the court assessed 18% penalty in addition to the costs of the attorney's fees. There is a trend toward alleging bad faith against the carrier in construction defect claims. TX. is the home of the Ballard decision, which certainly has influenced future filing and handling of CD/mold claims, including settlement values. Case law is not very clear on trigger and other issues, though the claims handling consensus leans towards continuous. There does not appear to be any strong Right of Repair statutes. In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, Texas was ranked 36th of 50. If the language in an indemnity agreement is clear and unequivocal, a party can be indemnified for its own negligence.
WA	Continuous back to the date of the negligent act; "known losses" -- CERCLA	Personal property 3 years; defamation, battery 2 years; 2 year catchall.	Construction defect -- accrued within six years after such substantial completion of construction	Burro v. Douglas, 125 Wn App.684, 2005 Court of App of Washington, expands exposure by expanding potential claims under an allegation that the warrant habitability was breached and that such a breach does rise from contract, so that it is covered under the policy. An indemnification agreement is valid and enforceable to the extent of the indemnitor's negligence case of concurrent negligence by the indemnitor indemnitee. Right of Repair statutes have been ineffective. Damp climate. Case law is unclear on many issues.



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State	Occurrence "Trigger"	Statute of Limitations	Statutes of Repose	Miscellaneous
Tier Two States				
AK	"Exposure" theory	Generally, actions for torts, for injury to personal property, for certain statutory liabilities, and against peace officers and coroners to be brought in two years.	Statute of repose of 10 years except "from an intentional or reckless disregard of specific project design plans and specifications or building codes."	Alaska is a "no play" state, with no planned expansion.
HI	Injury-in-fact	BI & PD 2 year; CD 2 years	Ten years after the date of completion of the improvement	Hawaii is a "no play" state, with no planned expansion.
IL	Injury-in-fact for property damage	4 years commencing when the claimant knew or should reasonably have known of such act or omission. § 735 ILCS 5/13-214 holds that actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, ... or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission.	10 years after the act or omission, except that any person who discovers an act or omission prior to the expiration of 10 years for such act or omission shall have 4 years to bring an action. Not applicable to fraud or concealment.	In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, Illinois was ranked 45th of 50. Survey respondents rated Cook County as the second worst legal environment in the country, trailing only Los Angeles. Cook County accounts for nearly two-thirds of all of Illinois' civil litigation. In Viking Const. Mgmt. v. Liberty Mutual, 831 N.E.2d 1 (2005), the Court found no occurrence for property damage arising within the contract for any damages that were the natural and ordinary consequences of defective workmanship by a party to the contract that results in damages to the work or product of another party to the contract.

State	Occurrence "Trigger"	Statute of Limitations	Statutes of Repose	Miscellaneous
Tier Two States				
KY	Injury-in-fact"	<p>1 year personal injury; personal property; construction defect, personal injury,</p> <p>five years from original occupancy;</p> <p>contract or tort 7 years.</p> <p>Written contract 15 years; oral, implied 5 years.</p>	<p>No action to recover damages based upon contract or ... tort, resulting from or arising out of any deficiency in the construction ... of any improvement to real property, or for any injury to property, either real or personal, ... or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person after the expiration of seven (7) years following the substantial completion of such improvement.</p>	<p>In <i>James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance</i>, 814 S.W.2d 273 (1991), the KY Supreme Court held: An event that qualifies as an occurrence must either cause property damage or bodily injury during the period of time the policy is in effect.</p> <p>In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, Kentucky was ranked 40th of 50. Federal court predicted that the Kentucky Supreme Court would hold that negligent construction that causes damage to work performed by a contractor or performed on a contractor's behalf qualifies as an "occurrence" that causes "property damage" under a commercial general liability policy.</p>
MN	The trigger of occurrence for construction defects is "actual injury" and the actual injury can continue into contiguous policy periods (similar to continuous trigger).	<p>2 years for injury after discovery of the injury.</p> <p>6 years for breach of contract and</p> <p>4 years for breach of contract for sale of goods.</p>	<p>10 years after construction except where cause of action accrues in 9th or 10th year/the injuries suffered must also arise out of "the defective and unsafe condition of an improvement to real property."</p>	<p>Minnesota held firm at 11th (no change) in the the 2010, Chamber of Commerce, State Liability Systems Ranking Study. In <i>Wanzek Constr., Inc. v. Empls. Ins.</i>, 667 N.W.2d 473 (Minn. Ct. App. 2003), the Court held that there is coverage under a CGL insurance policy when there is damage to insured's work that has been caused by work performed on insured's behalf by subcontractor. This represents the basic application of the subcontractor exception to the your work exclusion.</p>

State	Occurrence "Trigger"	Statute of Limitations	Statutes of Repose	Miscellaneous
Tier Two States				
NJ	Injury-in-fact, then continuous trigger. Coverage is not triggered by damage that first occurs after the expiration of the policy even where the negligent act occurred during the policy period. Pollution-- uses a continuous trigger.	1 year libel/slander; 6 years PD; 2 years personal injury	Construction defect 10 years	New Jersey is a "no play" state. No expansion into state is planned.
NM	No case law.	6 years written; 4 years unwritten; 4 years injury to property; 2 years injury to person. (Actions against sureties on fiduciary bonds; injuries to person or reputation).	CD 10 years after substantial completion.	In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, New Mexico was ranked 41st of 50. New Mexico consistently follows California and Arizona case law and is very liberal.
NC	Injury-in-fact for construction-defect property damage claims, but defined as the date on which the defective construction was performed. Exposure theory for latent bodily injury claims including mold BI claims.	3 years bodily injury or property damage; 3 years fire policy (theory of breach of contract).	Construction defect/improvement to real property PD claims - 6 years (from date of substantial completion); Products liability - 6 years (from date of sale); Latent BI or PD - 10 years (from last act or omission).	Factors that adversely affect the profitability of insuring contractors include construction and population growth, and the coastal environment which is very conducive to moisture and water intrusion and the damage they create. There is a trend towards claims made by homeowner's associations and claims based on defective exterior siding. A recent change - any agreement in a construction contract, to indemnify or hold harmless the promisee for damages arising from bodily injury or property damage resulting from the negligence of the promisee, in whole or in part, is against public policy and is void and unenforceable.

State	Occurrence "Trigger"	Statute of Limitations	Statutes of Repose	Miscellaneous
Tier Two States				
SC	Injury-in-fact where coverage is triggered at the time of an injury-in-fact and continuously thereafter under all policies in effect from the time of the injury-in-fact.	3 years for breach of contract; 3 years pd; 3 years injury to person.	8 years after substantial completion of improvement, unless longer term provided by contract.	In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, South Carolina was ranked 39th of 50. The Supreme Court of South Carolina has adopted an "injury in fact" approach to latent property damage claims arising out of construction defects. In <i>Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.</i> , 486 S.E.2d 89 (S.C. 1997), the court declared that the coverage would arise under all policies from the date that property damage first commenced and forward.
WI	Continuous trigger for construction defect property damage.	6 years for breach of contract; 6 years for action for damages for injury to property; 3 years for injury to the person.	10 years after substantial completion of improvement to real property, except if the damage is sustained during year 8, 9, or 10. Claimant may bring suit not later than 3 years after date on which damages occurred. Not applicable where fraud, concealment or misrepresentation are at issue.	In the 2010, Chamber of Commerce, State Liability Systems Ranking Study, Wisconsin was ranked 22nd of 50. In <i>Am. Family Mut. Ins. Co. v. Am. Girl, Inc.</i> , 2004 WI 2 (2002), the Supreme Court held that there is coverage under the CGL when there is damage to the insured's work that has been caused by a subcontractor's work, however, that defective work that produced the resulting damage is not covered. In the case, the entire building was covered but the site preparation excavator's work (subcontractor who caused all of the resulting damage) was not covered. This differs from the basic application because it only covers resulting damage but not the subcontractor's faulty work.

Additional Insureds

Additional insureds add complexity to construction defect claims especially with respect to completed operations. For information and guidelines regarding attaching additional insured endorsements, refer to the [Additional Insured](#) article.

Subcontractor Underwriting Controls

Refer to the [Subcontractor Underwriting Controls](#) BPUG article for guidelines.

Exterior Insulation and Finish Systems (EIFS)

EIFS was originally designed in Europe as a quick and easy product to be installed over stone. It was brought to the United States as a replacement for stucco. It is basically, insulation for the outside of the building.

EIFS comes in virtually any color, a wide variety of textures, and can be fashioned into almost any shape or design. With EIFS, contractors can create all sorts of exterior architectural detailing that



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would often be cost-prohibitive using conventional construction — cornices, arches, columns, keystones, cornerstones, special moldings and decorative accents are but a few examples.



Some of the additional benefits of EIFS are its lighter weight, lower cost and its relatively waterproof nature. The last feature makes the product less susceptible to exterior water damage than traditional stucco. As a by-product, it acts as a moisture barrier. The result is a product, when used over frame construction, that often traps moisture in the exterior walls of a building resulting in rotting and mold damage.

The problem does not stop there. EIFS has very tight tolerances for application. There are only a few unique products that can be used when installing EIFS. Special caulk, paints, wallboard, screws, etc., are required. Any attempt at using an incompatible product with EIFS usually results in product failure.

EIFS is a known problem in the construction industry involving accounts that are currently installing, have installed in the past, or are planning to install an EIFS product. The primary exposure generally rests with the actual installer of EIFS; however, it is also common for EIFS litigation to include window installers, roofers, painters, and others who are involved in projects where EIFS is the exterior finish on the building.

CG 7140 - Exclusion - Exterior Insulation and Finish Systems ("EIFS") and Direct – Applied Exterior Finish Systems ("DEFS"); and,

CG 2186 – Exclusion - Exterior Insulation and Finish Systems

Attach one of above EIFS exclusions to all GL and Umbrella policies for contractors regardless of whether there is an EIFS exposure. In addition, attach the exclusion to other risks with potential installation exposures, such as manufacturers or building material dealers. Subject to Underwriting Director approval, the underwriter will have the option of removing the exclusion on selected accounts.

CG 7140 is approved for use in all states on the PCIO system. It is recommended that form CG 7140 be used where filed and approved.

UMB 0055 - Exterior Insulation and Finish Systems and Direct Applied Exterior Finish Systems Exclusion – Coverage B. - When the above forms are included in the underlying GL coverage the Umbrella policy should include UMB 0055.

Unacceptable Operations with EIFS Exposures

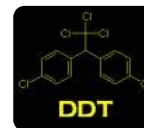
Do not write (even with exclusions) contractors who have a known significant or ancillary exposure to EIFS. Ancillary means a general contractor who subbed out the exposure or was involved with a project involving the application of EIFS. Do not write contractors or risks such as manufacturers or building material dealers that have a known exposure to EIFS. This includes the design, manufacture, distribution, sale, construction, fabrication, preparation, installation, application, maintenance or repair, remodeling, service, correction or replacement of any EIFS, other than incidental sales. We can consider retailers who sell small quantities of EIFS material, and sales are incidental to the insured's overall sales. We must verify the insured is not repackaging EIFS material, thus resulting in a manufacturer exposure, or offering instructions on application. EIFS exclusion endorsement, CG 7140 excludes coverage for "sales", along with other activities. Form CG 7140 should not be attached to risks with incidental EIFS sales. *Refer to **BPUG EIFS** article for Property Guidelines on construction.*

Best Practice Underwriting Guidelines Manual
General Liability –Construction Defect



Montrose

Montrose Chemical Corp. v Admiral Insurance Co., 913 P2d 878 (1995). This case involved claims brought against a manufacturer of the pesticide DDT who had disposed of waste by-products from its operations at a disposal site for a period of several years before the site was found to be leaking toxic chemicals.



The manufacturer sought defense for pollution damage under four successive CGL policies, the first one of which took effect several months after the escape of the chemicals had been discovered and the manufacturer had been named as a party in a Superfund action. The CGL insurer argued that they did not have a duty to defend the manufacturer since the escape of pollutants had occurred well before the inception of the first policy and since the alleged property damage had manifested itself several months before policy inception.

The court disagreed and applied a continuous injury trigger to claims stemming from releases of toxic waste over a period of several years, including the triggering of policies purchased after the release had been discovered and the insured had been named as a potentially responsible party for cleanup obligations. The court declined to apply the so-called “known loss” rule, under which insurance coverage may not be obtained for a loss that already has occurred and of which the insured already has knowledge (you can’t buy insurance on a burning building).

This case has had a significant effect on construction defect claims. Prior to this case the only carrier to have exposure was the carrier who was providing coverage when the damage became manifest. Subsequently, damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods. Also, as noted above, the insured’s knowledge of damage that occurs before the policy period will not prevent coverage as long as the insured’s actual liability for the damage has not been established when the policy goes into effect.

In response, ISO developed CG 0057 - Amendment of Insuring Agreement - Known Injury or Damage. This endorsement replaces the entire insuring agreement of the CGL form and eliminates coverage for known losses and that any continuation of covered injury after the end of the policy period will be considered part of the covered injury or damage and not a separate occurrence triggering a subsequent policy.

As of the (10/01) version of CG 0001-CGL Coverage Form, the Montrose “known loss” wording has been incorporated into the insuring agreement and a separate exclusion endorsement is not needed.

Detailed Forms Write Ups

[Exclusion-Damage to Work by Subs CG 2294/2295](#)

[Exclusion-Residential Construction CG 7155](#)

[Primary and Non Contributory CG 7156/7157](#)

[Exclusion-EIFS CG 7140](#)

Additional Resources

[Construction Defect \(CD\) Loss Control Powerpoint](#)

Region Exceptions

[Mid-West Region](#)

[Rocky Mountain Region](#)

[Pacific Coast Region](#)

[South Eastern Region](#)