Commercial General Liability Insurance ("CGL insurance")

- **Purpose of CGL Insurance**
  - CGL insurance is intended to protect a purchaser of an insurance policy from the risks of liabilities imposed by lawsuits and similar claims. See, e.g., *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 620 (Nev. 2011) ("An insurance policy is a contract between a policyholder and an insurer in which the policyholder agrees to pay premiums in exchange for financial protection from foreseeable, yet unpreventable, events.")
  - CGL insurance often protects companies from third-party claims by paying the reasonable costs of defense and by paying judgments or settlements.
  - CGL insurance is critical to risk management of a business.
CGL Insurance Basics

- Types of CGL Coverage Provided Are Specific To Each Policy
  - The type of commercial general liability insurance varies from policy to policy. The duties undertaken by the insured and the insurer are defined by the terms of the policy itself.
  - CGL insurance often protects against bodily injury or property damage that occurs on your premises or as a result of your business operations.
  - CGL insurance also often protects against bodily injury or property damage that occurs away from your premises but that is caused by your products or completed work.
The Duty to Defend


- "The insurer must defend any lawsuit brought against its insured which *potentially* seeks damages within the coverage of the policy." *Id.* (citation omitted) (emphasis added).

- “[T]he duty to defend is broader than the duty to indemnify.” *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 620-21 (Nev. 2011). “[A]s a general rule, an insurer’s duty to defend is triggered whenever the potential for indemnification arises, and it continues until this potential for indemnification ceases.” *Id.*

- “Because the duties undertaken by an insurer are dictated by the terms of its contract with the policyholder . . . an insurer is free to contractually limit these duties—that is, to contract its way around this general rule.” *Id.*
The Duty to Defend (Cont.)

- "An insurance policy is to be judged from the perspective of one not trained in the law or insurance, with the terms of the contract viewed in their plain, ordinary and popular sense." *Allstate Ins. Co.*, 495 F.Supp.2d at 1106 (citations omitted).

- "Any attempt to restrict insurance coverage must be done explicitly." *Id.* (citation omitted).

- "In particular, an insurer wishing to restrict the coverage of a policy should employ language which clearly and distinctly communicates to the insured the nature of the limitation." *Id.* (citation omitted); *see also Powell v. Liberty Mutual Fire Ins. Co.*, 127 Nev. 14, 252 P.3d 668, 672 (2011) (noting that "[b]ecause the insurer is the one to draft the policy, an ambiguity in that policy will be interpreted against the insurer.")
The Duty to Indemnify

- An insured purchases an insurance policy often in the hopes of being “indemnified” by an insurance carrier for claims the insured is deemed liable.

- Courts have noted that the duty to indemnify is separate and distinct from the duty to defend. See, e.g., *Allstate Ins. Co.*, 495 F.Supp.2d at 1106; *Utica Nat’l Ins. Co. of Texas v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004).

- The duty to indemnify is not as broadly construed as the duty to defend.

- The duty to indemnify only arises if it is established that the insured’s damages are actually covered by the terms of the policy.

- In other words, an insurer must indemnify its insured only if liability is found for conduct that actually falls within the scope of the policy.
Occurrence vs. Claims-Made Policy


- “Under an occurrence policy, ‘it is irrelevant whether the resulting claim is brought against the insured during or after the policy period as long as the injury-causing event happens during the policy period.’” *Id.*

- Thus, as an example, if an injury causing event happens in 2003, but the claim (often a lawsuit) is not made until 2014, the CGL Policy in effect during 2003 will often be implicated. This is true even if the 2003 policy has not been renewed and/or the business has not purchased insurance after 2003.
“By contrast, the event that invokes coverage under a ‘claims made’ policy is transmittal of notice of the claim during the policy period to the insurance carrier.” Id. (alterations omitted).

However, there are several different types of claims-made policies, many of which (such as “claims made and reported policies” which require the claim to be both made and reported to the insurer during the policy period, but also that the claims arose out of wrongful acts that take place during the policy period.

Therefore, utilizing the hypothetical from the prior slide, if an injury causing event happens in 2003, but the claim is not made until 2014, the claims made policy for 2014 may not be triggered because the wrongful act took place in 2003, which was prior to the 2014 policy period.
What is an Occurrence?

Occurrence Definitions


- “Under the cause test, the number of occurrences is determined by referring to the cause or the causes of the damage, rather than to the number of individual injuries or claims.” Id.

- “Thus, ‘as long as the injuries stem from one proximate cause there is a single occurrence.’” Id. (alterations omitted).

- “Conversely, ‘where each injury results from an independent cause, there are a series of occurrences.’” Id.

However, “an unexpected happening caused by faulty workmanship could be an occurrence.” *Id.*

“Costs incurred to prevent future occurrences that may cause damage to property or life may be considered property damage as well.” *Id.* at 1109.
Common Exclusions/Limits of Liability in CGL Policies

- Worker’s Compensation
- Contractual Liability
- Professional Liability
- Directors’ and Officers’ Liability
- Pollution Liability
- “Other Insurance”
- Damage to “Your Work”
- Damage to “Your Product”
- Prior Loss
- Additional Insured
Deductibles, SIR’s, Retained Limits

- Deductibles, Self-Insured Retentions (SIR’s), and Retained Limits’ provisions are all mechanisms by which the insured is required to bear responsibility for a loss.

- **Deductible**
  - The amount the insured is required to pay as part of a covered loss. A deductible is typically paid by the insured once the claim is actually paid.
  - The Insured is typically not responsible for up front payment of attorneys’ fees and costs.

- **SIR**
  - The amount of the SIR in a policy typically refers to the portion of loss that is not covered by the policy.
  - The insured is typically responsible for defending against claims brought within the SIR. Therefore, the insured is often responsible for payment of attorneys’ fees and costs until the SIR has been satisfied.

- **Retained Limits**
  - A Retained Limits provision is often interchangeably used with an SIR provision.
Deductibles, SIR’s, Retained Limits (Cont.)

  - This case is famous for permitting proceeds paid by a third-party, including a co-insurer, to satisfy a deductible or SIR under a policy.
Importance of Timely Reporting Claims

- All claims, including potential claims, should be timely reported in order to reduce the risk of an insurance carrier rejecting defense and/or coverage.

- Policies will often have a provision indicating the manner in which notice of a claim must be provided. It is highly recommended that a policy be reviewed for notice requirements.
Importance of Timely Reporting Claims

- **Notice Under Occurrence Policies**
  - Claims under an occurrence policy are usually required to be provided as soon “as practicable” or as soon as “reasonably possible.”
  - **Notice-Prejudice Rule**
    - The Nevada Supreme Court has adopted the “notice-prejudice” rule, which provides as follows: “In order for an insurer to deny coverage of a claim based on the insured party’s late notice of that claim, the insurer must show (1) that the notice was late and (2) that it has been prejudiced by the late notice.” *LVMPD v. Coregis Insurance Company*, 256 P.3d 958, 965 (Nev. 2011). “Prejudice exists ‘where the delay materially impairs an insurer’s ability to contest its liability to an insured or the liability of the insured to a third party.’” *Id.*

- **Notice Under Claims-Made Policies**
  - The Nevada Supreme Court has indicated that “[b]ecause the reporting of a claim to the insurer during the policy period is one of the essential terms of a claims-made policy, a failure to give timely notice should be less excusable under a claims-made policy that it would be under an occurrence policy.” *Physicians Ins. Co. of Wisconsin, Inc.*, 279 P.3d at 178 n. 4.
  - **Notice of Circumstances/Awareness Provision**
    - Claims-made policies will often provide coverage for claims made after the policy period if notice of a potential claim is provided during the policy period.
Conflict-Free Defense

- Nevada Follows Majority Rule For Joint Representation of Insured and Insurer
  - “With respect to the relationship between an insurer and counsel the insurer retains to defend its insured, the majority rule is that counsel represents both the insurer and the insured in the absence of a conflict.” *Nevada Yellow Cab Corp v. Eighth Judicial District Court*, 123 Nev. 44, 50, 152 P.3d 737, 741 (2007).

  - “This rule requires that the primary client remains the insured, but counsel in this situation has duties to the insurer as well.” *Id.*

  - Joint representation is permissible as long as any conflict remains speculative.
Conflict-Free Defense (Cont.)

- What is the obligation of an Insurer to an Insured When A Conflict Arises?
  - An example of a potential conflict would be an attorney who previously retained by the insurer to defend a policyholder who then subsequently sues the insurer for bad faith.

- Should the Insurer Be Required to Appoint (and pay for) Independent Counsel (often referred to as Cumis counsel following the decision in San Diego Navy Fed. Credit Union v. Cumis Ins. Soc., Inc. 162 Cal.App.3d 358, 364 (1984))?  

- These Are Currently Open Questions Under Nevada Law
In *Hansen v. State Farm Mutual Automobile Insurance Company*, Case No. 2:10-cv-01434-MMD-NJK (D. Nev. Nov. 19, 2013), Judge Du certified the following question to the Nevada Supreme Court: “Does Nevada law require an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured?”
Bad-Faith Issues (Unfair Claims Practices Act)

- NRS 686A.310  Unfair practices in settling claims; liability of insurer for damages.
- 1. Engaging in any of the following activities is considered to be an unfair practice:
  - (a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue.
  - (b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
  - (c) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
  - (d) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.
  - (e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.
  - (f) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.
  - (g) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.
  - (h) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, or the representative, agent or broker of the insured.
  - (i) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made.
  - (j) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
  - (k) Delaying the investigation or payment of claims by requiring an insured or a claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
  - (l) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
  - (m) Failing to comply with the provisions of NRS 687B.310 to 687B.390, inclusive, or 687B.410.
  - (n) Failing to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insured’s claim and the applicable law, for the denial of the claim or for an offer to settle or compromise the claim.
  - (o) Advising an insured or claimant not to seek legal counsel.
  - (p) Misleading an insured or claimant concerning any applicable statute of limitations.
Many jurisdictions recognize that insurers have a duty to settle and negotiate claims in good faith pursuant to the implied covenant of good faith and fair dealing.

A reasonable policy limits demand can unlock the policy limits.

Carriers can often be liable for bad-faith for failing to provide a defense.
Directors & Officers Liability Insurance ("D&O Insurance")

- **Side A Coverage**
  - Provides insurance to the corporation’s directors and officers when the company cannot indemnify the individuals.

- **Side B Coverage**
  - Provides insurance to the company when it is required by law or legally permitted to indemnify the insured individuals.

- **Side C Coverage**
  - Provides broad form entity coverage in circumstances where a claim is made against the company and the individuals.
D&O Insurance (Cont.)

- Typically claims-made policies

- Policies can vary significantly

- Duty to Advance Defense Costs and Right to Select Counsel of The Insured’s Choosing
  - D&O Policies often contain a “Duty to Advance Defense Costs” provision as opposed to a “Duty to Defend” provision.
  - Under a Duty to Advance Defense Costs provision, an Insured often has the right to select its own counsel, subject to the approval of the insurance carrier. The insurance carrier is responsible for payment of Defense Costs.
D&O Insurance (Insured Capacity)

- D&O insurance typically does not protect against actions that are not undertaken by a director or officer in an “insured capacity”.

- For example, work performed by a director or officer in a personal capacity, such as acting as a shareholder, investor, or serving as an officer or director of another company is typically not covered.

- Claims arising out of work performed by an In-House attorney may not be covered if the work does not pertain to the attorney’s role as an officer or director of a company.
Thank you for attending.
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