

**THREE SCOFFLAWS ARE ON THE LOOSE,
BUT THERE IS A NEW SHERIFF IN TOWN**

(The Good, the Bad and the Ugly of CGL Endorsements – and the Solution)

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A. What You Did Not Know, and Could Have Known, Can Hurt You!

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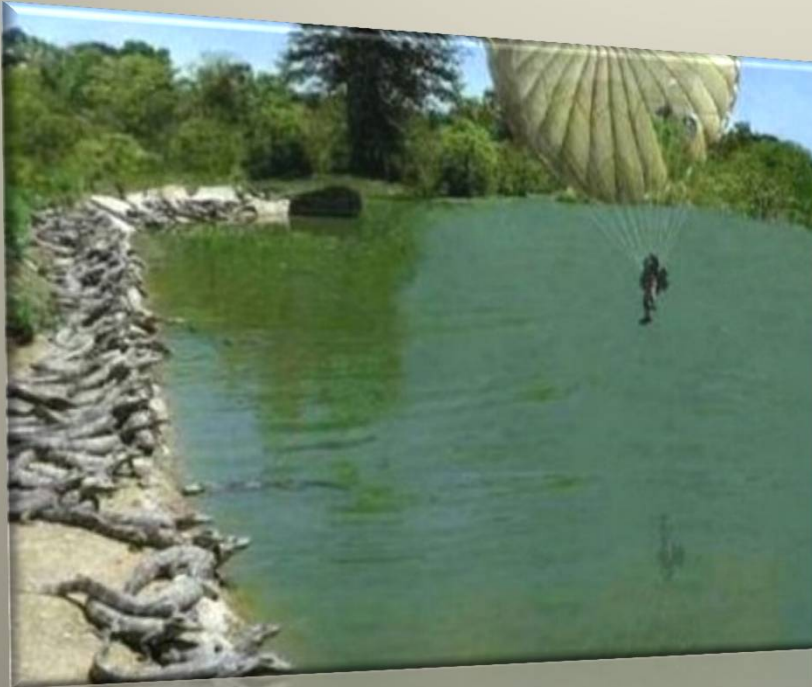
- **Resistant to understand provision they draft.**
- **Confessions.**
- **Rises to heated rhetoric “I only draft the provisions....”**
- **Forms promote non-involvement.**
- **Concern over having professed some knowledge.**

A. What You Did Not Know, and Could Have Known, Can Hurt You!

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**Where “things go wrong,”
Is it better to have been
silent?**

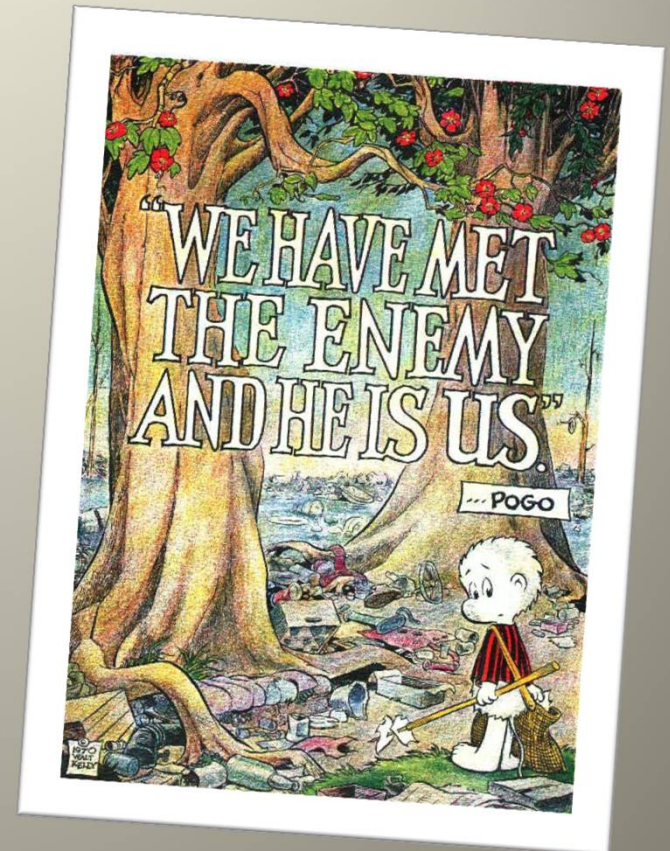
A. What You Did Not Know, and Could Have Known, Can Hurt You!

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❖ “He is us.”



B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

a. The Good ISO Endorsements

(1) CG 20 10 Additional Insured – Owners, Lessees or Contractors – Schedule Person or Organization

- **Who?** “person ... shown in Schedule.”
- **What?** “caused, in whole or in part, by your acts or omissions”
- **When?** “in the performance of your ongoing operations”
- **Where?** “at the locations designated above”
- **Exclusions?** “occurring after work completed” or “put to intended use”
- **Limitations?** 2013 Added Limitations “However....”

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

a. The Good ISO Endorsements

(2) CG 20 38 Additional Insured – Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement

- **Who?** “Any other person ... you are required to add ... under the contract (between “you” and the person “you are performing operations).”
- **What?** “caused, in whole or in part, by your acts or omissions”
- **When?** “in the performance of your ongoing operations”
- **Where?** “(the project)”
- **Exclusions?** “occurring after work completed” or “put to intended use”
- **Limitations?** 2013 Added Limitations “However....”

NO PRIVACY REQUIRED!

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

a. The Good ISO Endorsements

(3) CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to **liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard"**.

Completed operations coverage is important!

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

a. The Good ISO Endorsements

(4) CG 20 11 Additional Insured – Managers or Lessors of Premises

- Who? “**person ... shown in the Schedule**”
- What? “liability”
- When? “**arising out of**” the “**ownership, maintenance or use**”
- Where? “*of that part of*” of the **premises leased** to you and **shown in the schedule**”
- Exclusions? “occurrence **after cease to lease**” and “**alterations, new construction or demolition....**”
- Limitations? 2013 Added Limitations “**However....**”

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

a. The Good ISO Endorsements

(5) CG 20 01 Primary and Noncontributory – Other Insurance Condition

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

- (1) The additional insured is a Named Insured under such other insurance; and
- (2) You have agreed in writing in a contract or agreement that this insurance would be **primary** and would **not seek contribution** from any other insurance available to the additional insured.

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

a. The Good ISO Endorsements

(6) CG 24 04 Waiver of Transfer of Rights of Recovery Against Others to Us

Schedule – Name: _____. We waive any right of recovery ... against ... **shown in the Schedule** ... arising out of your ongoing operations or “your work” done under a **contract with that person** ... included in “products-completed operations” hazard”....

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

a. The Good ISO Endorsements

(7) CG 04 37 Electronic Data Liability

See Endorsement in Appendix of Forms

- \$ Limits
- Added coverage
- Exclusions

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

b. The First Scofflaw: 2013 Amendments to the ISO Additional Insured Endorsements – a Friend or a Foe?

(1) To the Extent Permitted by Law



B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

b. The First Scofflaw: 2013 Amendments to the ISO Additional Insured Endorsements – a Friend or a Foe?

(2) Coverage Not Broader Than Required by Contract

B. The Good, The Bad and the Ugly of CGL Endorsements

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1. The Good.

b. The First Scofflaw: 2013 Amendments to the ISO Additional Insured Endorsements – a Friend or a Foe?

(3) Dollar Limit Required by Contract or Policy, *Whichever is Less*

B. The Good, The Bad and the Ugly of CGL Endorsements

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2. The Bad – The Second Scofflaw – Excess & Surplus Lines Insurance.

a. The Difference Between the Admitted Market and the Excess & Surplus Lines Market

(1) The Admitted Market

- Forms and rates
- Binding & certificates

B. The Good, The Bad and the Ugly of CGL Endorsements

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2. The Bad – The Second Scofflaw – Excess & Surplus Lines Insurance.

a. The Difference Between the Admitted Market and the Excess & Surplus Lines Market

(2) The E & S Market (a/k/a non-admitted)

- Unregulated forms and rates
- Operate through intermediaries
- No binding authority with retail agent
- Certificate of insurance?

B. The Good, The Bad and the Ugly of CGL Endorsements

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2. The Bad – The Second Scofflaw – Excess & Surplus Lines Insurance.

b. The Problem Giving Rise to the E & S Market

- Admitted Market
 - Desires most desirable risks
 - Not those with
 - Adverse loss experience
 - Higher risk than the premium warrants
 - Limited experience in field of operation
 - Small premium size
- Where do these accounts get written?
 - E & S carriers
 - Admitted carriers that utilize proprietary policy and endorsement forms

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2. The Bad – The Second Scofflaw – Excess & Surplus Lines Insurance.

c. The Resulting Concern

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3. The Ugly – Invisible Limitations and Exclusions



**You have to look
below the surface!**

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

a. ISO Limitations and Endorsements to an ISO CGL Policy

(1) ISO Exclusion 2.p - Electronic Data Liability Exclusion

2. Exclusions. This insurance does not apply to:

p. Electronic Data. Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data....

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

a. ISO Limitations and Endorsements to an ISO CGL Policy

- (2) CG 20 38 Additional Insured – Owners, Lessees Or Contractors – Automatic Status When Required in Construction Contract With You

PRIVITY REQUIRED!

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

a. ISO Limitations and Endorsements to an ISO CGL Policy

(3) CG 20 39 Contractual Liability Limitation

The definition of “insured contract” ... is replaced by the following:

“Insured contract” means:

- a. ...
- b. ...
- c. ...
- d. ...
- e. ...

(Note f. is omitted.)

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

a. ISO Limitations and Endorsements to an ISO CGL Policy

(4) CG 24 26 Amendment of Insured Contract Definition

The definition of “insured contract” in the **Definitions** ... is replaced ...

“**Insured contract**” means: **a. b. c. d. e.** and

- f.** That part of any other contract ... under which you assume the tort liability of another ... **caused, in whole or in part, by you** ... However, such part of a contract ... shall only be considered an “insured contract” to the extent your assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract ...

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

a. ISO Limitations and Endorsements to an ISO CGL Policy

(5) CG 22 94 and CG 22 95 Exclusions – Damages to Work Performed by Subcontractors

Exclusion I. ... is replaced by the following:

2. Exclusions. This insurance does not apply to:

I. Damage to Your Work

“Property damage” to “your work” arising out of it and included in the “products-completed operations hazard”.

- **Exclusion I** to CGL Coverage and the “**subcontractor exception**”.
- CG 22 94 and CG 22 95 eliminate the exception, thereby eliminating the single most important coverage under which many construction defects claims have historically been paid.

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

a. ISO Limitations and Endorsements to an ISO CGL Policy

- (6) CG 21 42 and CG 21 43 Exclusions – Explosion, Collapse and Underground Property Damage Hazard

3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations

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ISO CG 21 42 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations)

Schedule - Excluded Hazard: _____.

The following exclusion is added to **2. Exclusions:** Insurance does not apply to property damage included within the explosion hazard, the collapse hazard or the underground property damage hazard if the hazard is entered as an excluded hazard on the Schedule

This exclusion does not apply to:

- a. Operations performed for you by others; or
- b. Property damage within “products completed operations hazard”.

Definitions added to **Definitions:** 1. “Collapse hazard.” 2. “Explosion hazard.” 3. “Structural property damage.” 4. “Underground property damage hazard.” 5. “Underground property damage.”

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ISO CG 21 43 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted)

Schedule - Covered Hazard: _____

The following exclusion is added to **2. Exclusions:** This **Insurance does not apply to** “property damage” arising out of the “explosion hazard”, the “collapse hazard” or the “underground property damage hazard”.

This exclusion **does not apply to:**

- a. Operations performed for you by others;
- b. “Property damage” included within “products-completed operations hazard: or
- c. Any operation described in the Schedule above, if any of these hazards is entered as a covered hazard.

Following definitions are added to the **Definitions:** **1. 2. 3. 4. 5.**

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

b. Manuscript Endorsements to CGL Policies

(1) Exclusions and Limitations on Negligence Coverage

Manuscript Endorsement # 1:

This insurance applies **only with respect to negligent act or omission of the Named Insured.**

Manuscript Endorsement # 2:

We have no duty to indemnify the additional insured for damages, claims or any other **liabilities arising from actions, inactions, errors or omissions of the additional insured.** This endorsement does not create a duty on our part to defend the additional insured or to participate in, contribute to, or reimburse any person, organization or entity for any fees or expenses incurred in the defense of the additional insured.

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

b. Manuscript Endorsements to CGL Policies

(1) Exclusions and Limitations on Negligence Coverage

Manuscript Endorsement # 3:

A person or organization's status as an insured under **Additional Insured-Completed Operations** continues only until the earlier of the end of the policy period; or the period of time required by the **written contract or agreement**. If no time period is required by the written contract or agreement, a person or organization's status as an additional insured under this endorsement will not apply beyond the lesser of the end of the policy period; or **five years from the completion of "your work"** on the project which is the subject of the written contract or agreement.

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

b. Manuscript Endorsements to CGL Policies

(2) Additional Insured Coverage to Be Primary – But Contributory!

Manuscript Endorsement # 1:

Primary & Noncontributory Additional Insured Endorsement

Who Is An Insured is amended to include as an insured the person or organization shown in the schedule of this endorsement, but only with respect to liability arising out of "your work" for that insured by or for you.

As respects additional insured as defined above, this insurance also applies to "bodily injury" or "property damage" arising out of your negligence when the following written requirements are applicable: Coverage available under this coverage part shall apply as primary insurance.

Manuscript Endorsement #2:

This insurance shall be primary and non-contributory but only in the event of a named insured's sole negligence.

B. The Good, The Bad and the Ugly of CGL Endorsements

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3. The Ugly – The Third Scofflaw – Invisible Exclusions and Limitations.

b. Manuscript Endorsements to CGL Policies

(3) Waiver of Subrogation – But Conflicting With Indemnity

Manuscript Endorsement # 1:

This waiver shall not apply to "damages" resulting from the sole negligence of the person(s) or organization(s) indicated in the Schedule shown above.

Manuscript Endorsement # 2:

This waiver shall only apply to "damages" resulting from the sole negligence of the Named Insured.

Manuscript Endorsement #3:

This waiver applies only if the designated construction project shown in the Schedule above is completed.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(4) Employer's Liability Manuscript Exclusion

Exclusion 2.e(1) to the standard CGL policy:

2. Exclusions. This insurance does not apply to: ...

e. Employer's Liability. "Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or (b) Performing duties related to the conduct of the insured's business....

This exclusion does not apply to liability assumed by the insured under an "insured contract".

Manuscript Endorsement # 1:

Change "the" to "an".

B. The Good, The Bad and the Ugly of CGL Endorsements

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(4) Employer's Liability Manuscript Exclusion

Manuscript Endorsement # 2:

Throughout this policy, with the exception of Section II – Who Is An Insured, when the word "insured(s)" is used it shall mean "any insured".

Manuscript Endorsement # 3:

This insurance does not apply to any liability arising out of "Action Over" or Indemnity Over" suits involving United States Longshoremen and Harbor Workers' Act, Jones Act, Outer Continental Shelf Extension Act, Workers' Compensation law or acts of any of the various states, or any other similar Workers' Compensation or Employers Liability Laws or act or Employers Liability Maritime Laws or Acts.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(4) Employer's Liability Manuscript Exclusion

Manuscript Endorsement # 4:

~~This exclusion does not apply to liability assume by the insured under an "insured contract".~~

Manuscript Endorsement # 5:

This insurance does not apply to "Bodily Injury" to any employee of the Insured arising out of any Occupational Disease.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(5) Construction Defect – Completed Operations - Manuscript Exclusions

Manuscript Endorsement:

This insurance **excludes** coverage for actual or alleged deficiency in new construction, conversion, reconstruction, rehabilitation, renovation, remodeling, repair, maintenance or demolition.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(6) Punitive Damages Exclusions

Manuscript Endorsement:

This insurance does not apply to fines, penalties, punitive, exemplary, vindictive or other non-compensatory damages imposed upon the insured, or any multiplied portion of compensatory damages.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(7) “Residential” or “Habitational” Exclusions

Manuscript Endorsement # 1:

It is agreed this insurance does not apply to liability arising in whole or in part, either directly or indirectly, out of any past, present, or future "residential construction activities" performed by or on behalf of any insured or others.

Manuscript Endorsement # 2:

For the purposes of this endorsement, "residential construction activities" means any work or operations related to any job or project involving the construction, repair, remodeling, renovation, maintenance, change or modification of single-family dwellings, multi-family dwellings, condominiums, townhomes, townhouses, time-share units, fractional-ownership units, cooperatives and/or any other structure or **space used or intended to be used as a residence**, whether full-time, part-time, live-work combination, vacation or temporary residence, and **regardless of the actual use** or occupancy of any such structure or space.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(8) Classification Limitation Manuscript Exclusions

Manuscript Endorsement # 1:

Coverage under this contract is strictly **limited to the classification(s) and code(s) listed** on the policy Declarations page. No coverage is provided for any classification(s) and codes(s) not specifically listed on the Declaration page of this policy.

Manuscript Endorsement # 2:

This insurance does not apply to any "bodily injury", "property damage", "personal and advertising injury", medical expenses or other injury or damage that **does not arise out of your operation described** in the above Schedule and performed by you or on your behalf.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(9) Height Exclusion

Manuscript Endorsement:

This policy does not insure against loss or expense, including but not limited to the cost of defense, arising from or resulting, directly or indirectly, from:

1. "Your work" on the exterior of any building or structure in excess of fifty feet in height; or
2. "Your work" on the exterior of any building or structure that is proposed to be over fifty feet in height

B. The Good, The Bad and the Ugly of CGL Endorsements

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(10) Underground Utility Location Warranty

Manuscript Endorsement:

It is a condition of coverage that before the Named Insured commences any digging, excavation, boring or similar underground work, a local locator service must come to the job site and mark all underground lines, pipes, cables, and underground utilities. The **Named Insured must obtain proof in writing from the locator service.** If the above procedure is not completed, coverage under this policy is voided for any claim, loss, costs or expenses arising out of such digging operations. Where there is no coverage, there is no duty to defend.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(11) Escape Clauses and Manuscript Negligence Exclusions

- Particularly egregious manuscripted exclusions.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(12) Subsidence Manuscript Exclusion

B. The Good, The Bad and the Ugly of CGL Endorsements

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(13) “Prior Work” or “Continuous and Progressive Injury And Damage” Exclusions

Manuscript Endorsement # 1:

This insurance does not apply to "bodily injury" or "property damage" within the "products-completed operations hazard" if the injury or damage first occurred prior to the effective date of this policy.

Manuscript Endorsement # 2:

This insurance does not apply to "Bodily injury" or "property damage":

- (1) which first existed, or is alleged to have first existed, prior to the inception date of this Policy, or
- (2) which are, or are alleged to be, in the process of taking place prior to the inception date of this Policy, even if the actual or alleged "bodily injury" or "property damage" continues during this policy period; or
- (3) which were caused, or are alleged to have been caused, by a condition that first existed prior to the inception date of this Policy.

B. The Good, The Bad and the Ugly of CGL Endorsements

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(14) Insured vs. Insured Manuscript Exclusion

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(15) Controlled Insurance Program (“CIP”) or “Wrap” Manuscript Exclusion

3. The Ugly – Third Scofflaw – Invisible Exclusions and Limitations

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And: Many, many more!

Problem: How would you know?

Recommended: See Insurance Specifications

C. THE SHERIFF: SPECIFIC SPECIFICATIONS ARE BETTER THAN GENERAL

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1. Two Approaches

C. THE SHERIFF: SPECIFIC SPECIFICATIONS ARE BETTER THAN GENERAL

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2. A Contractual Specification for “Additional Insured Status” is Meaningless

Most Common Drafting Error

Problematic Spec.

The Named Insured will cause its CGL insurer to list _____ as an additional insured on its CGL Policy.

- Meaningless
- Shell game
- Illusory

C. THE SHERIFF: SPECIFIC SPECIFICATIONS ARE BETTER THAN GENERAL

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In re Deepwater Horizon (Tex. 2015)



C. THE SHERIFF: SPECIFIC SPECIFICATIONS ARE BETTER THAN GENERAL

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- **Inform of severity**
- **Inform that review is essential**
- **Insert prohibition of exclusions and limitations reasonably unacceptable to your client**
- **Describe precisely what is expected**
- **Remember your audience.**

C. THE SHERIFF: SPECIFIC SPECIFICATIONS ARE BETTER THAN GENERAL

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- Don't invite litigation by failing to handle these issue proactively.
Who wins?
- Insurance trigger is subject to a lot of “whether” conditions
- Demand copy of the Additional Insured endorsements
- Demand copy of **Schedule of Forms and Endorsements** page, listing of all exclusions and limitations added by endorsement



or

