



Project-Specific Policies and Products-Completed Operations Hazard Extensions

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1. Understanding the “Products-Completed Operations Hazard”

ISO commercial general liability (“CGL”) policies use the term “products-completed operations hazard” (“PCOH”) to define a category of risk which is treated specially by certain exclusions within the policy and often subject to separate limits of insurance. In construction, we think about PCOH as being about coverage for completed work.

Bodily injury and property damage arising out of completed work is a significant construction risk. Most construction contracts include warranty and indemnity obligations for completed work. All states allow lawsuits to be brought alleging bodily injury or property damage because of completed work based on common law. Contract and common law claims are subject to statutes of limitation – laws which define the time in which suits must be brought. Most states provide exceptions to their statutes of limitation for common law claims – the most common example is an extension to file a lawsuit based on a latent defect until the defect is discovered. Most states also have “statutes of repose” – laws that set a date after which suit may no longer be brought, no matter what the circumstances are. A construction contractor, therefore, has potential liability until the statute of repose period has expired. Thus, a contractor looks to ensure that it has coverage for the PCOH for its full statute of repose liability period.

With an annually renewing CGL policy (a.k.a. “practice policy”), coverage for ongoing and completed work is provided under each annual policy period. Where a contractor insures construction risk through an annually renewing practice program, it should continue to purchase annual policies until all of its exposure under the statutes of repose has ended.

2. PCOH in Project-Specific Policies

Project-specific CGL policies do not rely on annual renewals. Instead, they include a policy period which is typically several years designed to encompass the period of construction, followed by an extension of coverage for completed work. During the policy period, the insured's have coverage for both ongoing and completed operations. The extension then provides certain coverage for a period of time after the policy period. These extensions are our focus. Extensions are manuscripts – they vary significantly from insurer to insurer. The overriding goal of the insured should be to ensure that the extension covers their full CGL exposure for the full statute of repose period.

3. What is Included in the Extension?

The broadest of extensions simply extend all coverage under the policy for a period of time. A policy might include a simple statement such as “coverage under this policy is extended for the period of time stated in the schedule”. In that case, the insured would have an extension for both ongoing and completed operations. Most policies, however, confine the extension to PCOH. This is significant because the PCOH only includes specifically defined completed work. In most cases, work will only qualify as “completed” for purposes of PCOH extensions if all the work called for under the contract has been completed or the work has been put to its intended use. Many policies use the ISO standard PCOH definition, but some instead use their own modified/manuscript definitions. One of the first steps in evaluating a proposed extension is determining what the scope of coverage extended is.

It is important to remember that an extension which limits coverage to the PCOH will usually not cover punch list work. The term “punch list” is usually intended to mean completion of miscellaneous items necessary to complete the scope detailed in the construction agreement. Unless the work subject to punch list has been put to its intended use, most extensions will not cover it. Herein lies an important lesson – an insured on a project-specific policy must be sure that the project/work meets the definition of the extension before allowing the policy period to lapse. In general, unless all the work on a project is either complete or put to its intended use, the policy period will need to be extended.¹

Just as punch list work is usually not covered, repair work *usually* is covered. This is because the ISO PCOH deems work that needs “service, maintenance, correction repair or replacement, but which is otherwise complete, “as completed” for purposes of the PCOH. By granting an extension of coverage for the PCOH, a policy grants coverage for bodily injury and property damage arising out of completed work including repair work.² Many policies also include “repair work” endorsements which provide an extension of coverage for specifically defined repair work. These endorsements typically do not extend coverage for punch list work either.

The point to remember is that these extensions define the work they cover, and that definition could be as broad as the expiring policy period, confined to the ISO PCOH hazard, or dictated by a manuscript definition. Thus, when the policy period ends, all of the exposure must fit into the scope of the extension. If not, then the policy period needs to be renewed.

¹Failing to do so will likely result in a gap in coverage and may also violate contract insurance requirements.

²This is in fact necessary because most practice policies exclude liability for bodily injury and property damage arising out of projects insured by wrap-ups or other forms of project-specific insurance, and these exclusions apply regardless of whether or not the project-specific policy remains in effect. There would be no practice policy coverage for repair work performed on a project covered by a project-specific policy so it has to be provided by the project-specific policy.

4. PCOH Extension Triggers

Next, the insured needs to understand how the PCOH extension “triggers.” Most extensions commence at certain defined times/events. These can include a single event such as the end of the policy period or substantial completion, but many include a list of potential events and specify triggering on either the earliest or latest of the listed items. Or, the extension may simply apply to work that meets the PCOH definition.

The length of the extension period is also important as it relates to the trigger - if the extension runs for a period of time (e.g., 10 years), when does it begin? And, if the PCOH extension is intended to cover the exposure period determined by the applicable state statute of repose, does the policy's PCOH extension “trigger” match the “trigger” in the statute? If the PCOH extension starts running before the statutory exposure period begins, it will end before the contractor's period of potential liability ends. For example, where Florida's statute of repose commences at the later of: (1) the owner's actual possession; (2) the issuance of a certificate of occupancy; (3) the abandonment of the construction, if not completed; or (4) final contract payment, a 10-year PCOH extension that commences on substantial completion would be starting too early. Under this scenario, if final payment was issued a year after substantial completion, there would be a year of additional liability after the 10-year PCOH extension ended. Ideally, the policy period should be extended until the project meets the statutory trigger for the statute of repose, and the PCOH extension's trigger and duration should match the statute's.

5. The Impact of the Inability to Extend the Policy Period

The hard insurance market (especially in excess markets) has resulted in many instances of one or more layers in a project-specific insurance tower being unwilling to issue extensions. As discussed, a PCOH extension is typically not an answer for covering an uncompleted project – replacement of the coverage is usually necessary. Replacement of coverage inevitably leads to challenges over how coverage is divided between the old and new towers. Incoming insurers typically want to exclude risk on prior work. It may not be necessary, however, to replace the PCOH extension. Most PCOH extensions do not require that all work be completed during the policy period. Simply put, there is typically nothing in the policy that would make the non-renewal, and therefore the gap between the end of the policy period and the commencement of the PCOH extension, relevant. The PCOH extension attaches per its terms at its described trigger. This includes PCOH extension coverage for work completed after the policy period and during the replacement tower's policy term. This assertion always troubles underwriters, but there is no requirement in most policies that the PCOH extension coverage only applies to work performed during the policy period. While insurers may bridle at the notion that they cover such risk, their policies may obligate them to do just so.³ This should be considered carefully in deciding how you buy replacement coverage.

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³Conversely, since the original project insurance tower insurers charged premium on the full PCOH extension risk associated with the project, it would certainly not be fair to allow them to keep that premium but avoid the PCOH extension risk because the project ran over its anticipated time period.