



# **JAMES K. RUBLE SEMINAR**

## **Ruble Graduate Seminar**

IA&B PA MD DE Webinar  
July 6-7, 2021



# James K. Ruble Seminars

## Ruble Graduate Seminar

July 06-07, 2021 • IA&B PA MD DE Webinar

### Tuesday, July 6, 2021

7:45 AM - 8:00 AM

**Join Webinar**

8:00 AM - 12:00 PM

**Section 1**

**The Invasion of the Drones!**

Richard S. Pitts

12:00 PM - 1:15 PM

**Lunch**

1:15 PM - 5:15 PM

**Section 2**

**Anatomy of a Construction Injury Claim**

Richard S. Pitts

### Wednesday, July 7, 2021

7:45 AM - 8:00 AM

**Join Webinar**

8:00 AM - 12:00 PM

**Section 3**

**Diagnosing Issues in the CGL Policy**

Steven Lyon

12:00 PM - 1:15 PM

**Lunch**

1:15 PM - 5:15 PM

**Section 4**

**Personal Lines Troubles and Solutions**

Steven Lyon

### Faculty

Richard S. Pitts J.D.

Arlington/Roe & Co., Inc.

Steven Lyon CIC, CRM, CPCU, ARM, AAI, CRIS

Lyon Consulting Services, LLC

### Educational Consultant

Terry Tadlock, CIC, CPCU, CRIS

Correll Insurance Group of Hilton Head



**JAMES K. RUBLE SEMINAR**  
**Ruble Graduate Seminar**  
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**1 — THE INVASION OF THE DRONES!**

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**2 — ANATOMY OF A CONSTRUCTION INJURY CLAIM**

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**3 — DIAGNOSING ISSUES IN THE CGL POLICY**

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**4 — PERSONAL LINES TROUBLES AND SOLUTIONS**

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## **A Letter from William J. Hold, President/CEO**

We know that choosing the right professional development programs to strengthen your career can be challenging. There are many options for you to choose from; so how can you be sure that your time, efforts, and money are being invested and not wasted?

By becoming a committed participant of The National Alliance, you can rest assured that you are also making the best educational choice for your career—no matter what step of your learning path you are on.

For the last 50 years, our designations have been regarded throughout the industry as symbols of quality and trust. Our practical insurance and risk management courses are taught by active insurance practitioners, include polices and forms currently used in the field, and guide you through real-world scenarios to give you a deeper understanding of what your clients are facing today. The knowledge and skills you develop in any one of our courses (or designation programs) can be put to use immediately.

You will build long-lasting relationships with your clients, stay ahead of industry trends, emerging risks, and products that are constantly evolving in our dynamic market. You will have access to the industry's latest learning materials and will be the first to hear about new courses. With a learning path customized to fit your needs, you will be better equipped to protect your clients.

Have no doubt that your success is our priority. Whether you are new to your career, or a seasoned professional, you are about to embark on a wonderful professional development journey. Thank you for choosing The National Alliance for Insurance Education & Research as your guide toward a thriving career.

Let's take the first step.

William J. Hold, M.B.A., CRM, CISR  
President/CEO







# James K. Ruble Seminar

*a proud member of The National Alliance for Insurance Education & Research*

Section 1

## **The Invasion of the Drones!**



# Invasion of the Drones!

A Continuing Education Class

Richard S. Pitts

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## Richard S. Pitts

General Counsel,

**INDEPENDENT INSURANCE AGENTS OF INDIANA, INC.**

VP and Gen. Counsel,

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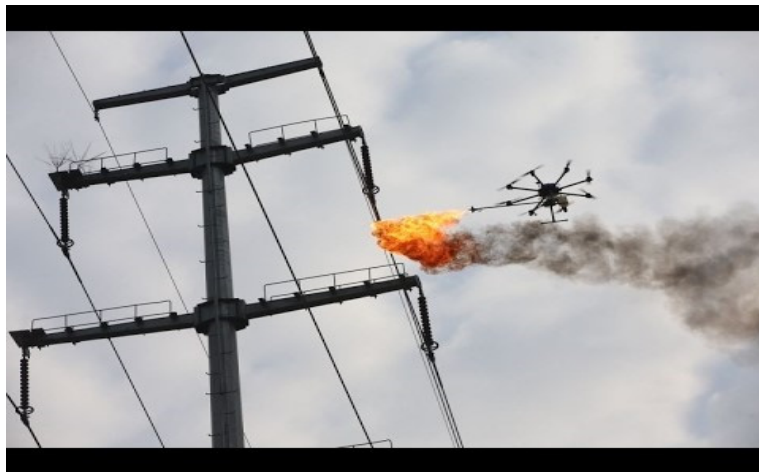
2

## Reuters, 3/21/17 reports:

- The FAA said it estimates the fleet of:
  - [S]mall hobbyist drones will more than triple from an estimated **1.1 million vehicles in 2016 to more than 3.5 million by 2021.**
  - [Commercial drones] will grow from **42,000 at the end of 2016 to about 442,000 aircraft by 2021.**
- The aviation safety agency said there could be as many as 1.6 million commercial drones in use by 2021.

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What...what...what...could POSSIBLY go wrong?



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## Our Itinerary – Leg One

- Introduction to Aviation
- Aviation Underwriting Basics
  - Types of Aircraft
  - Pilot Information
- The Aviation Policy Form
  - Insuring Clauses
  - Hull and Liability
  - Limits

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## Our Itinerary – Leg Two

- What is a Drone?
- Drones, their "Pilots," and Some of the Legal Issues
  - Federal Aviation Administration Rules
  - Common Law Stuff
- Insuring Drones

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## Our Itinerary – Leg Two Continued

- A Bit of Background: What are the underwriting problems here?
- The Existing Policy Forms
  - What is an aircraft?
  - How do the forms treat it?
- What the Future Holds
  - What's the Pricing?
  - What will the forms say?

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## Why Do This?

"We contrive to make the invisible air support us, we relinquish the security of feet on the ground because **flying is demanding, delightful, beautiful: because we love it.** Very few of us are actually crazy, and nearly all of us manage the risks as well as we can, **but we all willingly trade some of our security for the immeasurable beauty of the sky.**"

— Paul J. Sampson

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## Why Do This?

"Aviation in itself is not inherently dangerous. But to an even greater degree than the sea, it is terribly unforgiving of any carelessness, incapacity or neglect."

— Captain A. G. Lamplugh, British Aviation Insurance Group,  
London. c. early 1930's.

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## So What's the Big Deal? It's the Close Calls

"Between February and September 2016, the FAA said reports of unmanned aerial system (UAS) sightings from pilots, citizens and law enforcement near airports reached 1,274. That compares to 874 such sightings during the same period in 2015."



*ABC News 7, Los Angeles*

"Close Calls with unmanned aircraft increase,"  
FCW ([fcw.com](http://fcw.com) 02/24/17)

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## An Introduction to Aviation Underwriting

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### So, what are they worth?

[www.aerotrader.com](http://www.aerotrader.com)



- 1982 Piper Dakota
- \$129,000



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## So, what are they worth?

[www.aerotrader.com](http://www.aerotrader.com)



- 2008 Cessna
- Corvallis 350
- \$419,000

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## So, what are they worth?

[www.aerotrader.com](http://www.aerotrader.com)



- 1983 Bell  
Helicopter
- Textron
- New Turbine
- \$825,000

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## So, what are they worth?

[www.aerotrader.com](http://www.aerotrader.com)



- 1980 Learjet Corp.
- 35A
- \$1,300,000



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## So, what are they worth?

[www.aerotrader.com](http://www.aerotrader.com)



- 2002 Beechcraft C90B
- 1530 total time engines and airframe.
- Fresh props, phase, and gear inspections
- \$2,295,000

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## So, what are they worth?

[www.aerotrader.com](http://www.aerotrader.com)

- Gulfstream IV-SP
- 1999
- One Owner



\$11,495,000

[www.avpro.com](http://www.avpro.com)

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## And They're Expensive to Repair...

*AIG Aviation and Willis, "Flight Fright"*



ICE DAMAGE TO FAN BLADE. REPAIR COST: **\$70,000**

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## And They're Expensive to Repair...

*AIG Aviation and Willis, "Flight Fright"*



**PROP STRIKE. COST TO REPAIR: \$23,500**

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## And They're Expensive to Repair...

*AIG Aviation and Willis, "Flight Fright"*

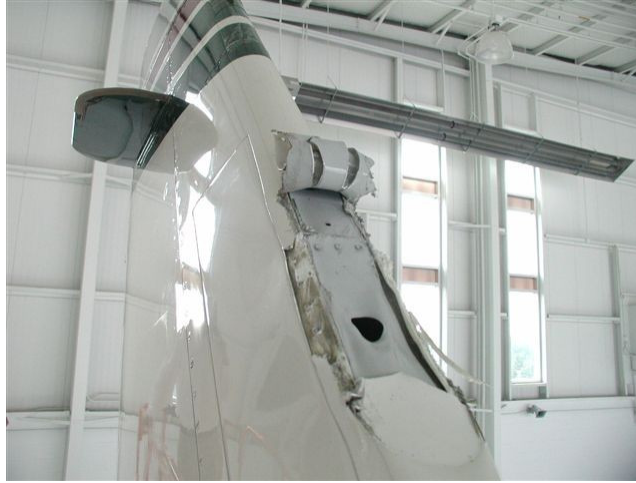


**SLAT DAMAGE – UNREPAIRABLE. REPLACEMENT COST: \$112,000**

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## And They're Expensive to Repair...

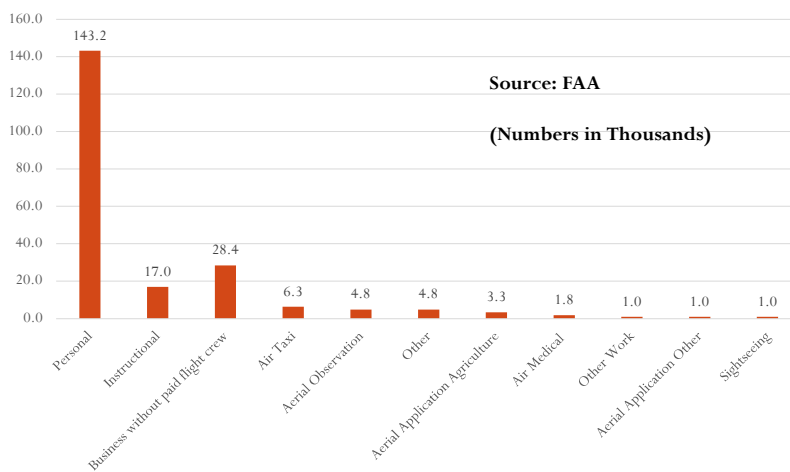
AIG Aviation and Willis, "Flight Fright"



**VERTICAL STABILIZER DAMAGE. COST TO REPAIR: \$48,000**

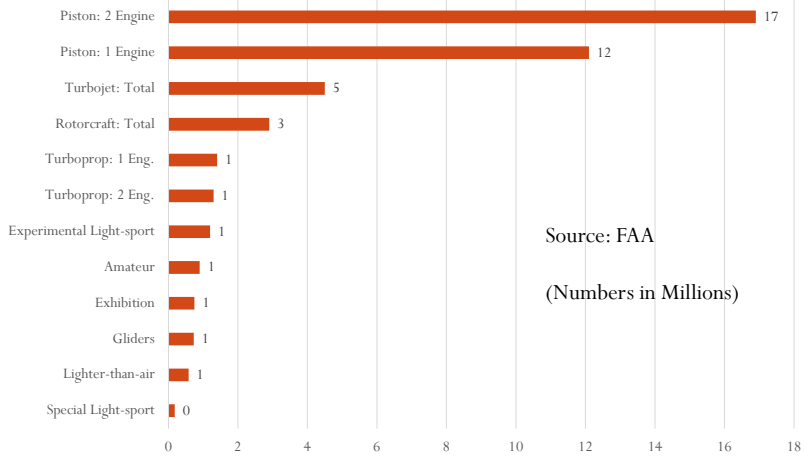
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## Active Use of Aircraft – 2018



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## Total Hours Flown - 2018



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## The Basic Aviation Policy: Important Terms and Conditions

Some history and background – the first policy was a Lloyd's contract in 1912.

So, "Happy 108<sup>th</sup> birthday,  
aviation insurance!"



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## Some Terminology

- Rotary wing aircraft:
  - Helicopters,
  - Gyrocopters, autogiros
  - V-STOL (vertical or short takeoff and landing)
- Fixed wing aircraft:
  - Airplanes (jets and props)
- Turbos and Pistons:
  - (Not the Detroit pro basketball team)
  - The type of engine powering the aircraft

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## Some Terminology

### "Ultralight" aircraft (according to FAA regulations):

1. Has only one seat
2. Is used only for recreational or sport flying
3. Does not have a U.S. or foreign airworthiness certificate
4. Weighs less than 155 pounds (if unpowered; 254 lbs. if powered)
5. Does not carry more than 5 gal. of fuel
6. Has a top speed of 55 knots (63 mph)

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## Some Terminology

"Experimental Aircraft" are certificated by the FAA for:

- Research and Development
- Regulatory compliance
- Crew Training
- Exhibition
- Air Racing
- Market Surveys
- Certain "amateur-built," and "kit-built" craft, or certain "light-sport" aircraft.

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## Some Terminology

Private versus "Commercial Operator"

"Commercial operator means a person who, **for compensation or hire**, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375 of this title. Where it is doubtful that an operation is for "compensation or hire", the test applied is **whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit.**"

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## Some Terminology

- The "Commercial Operator" is important not only from a **regulatory** standpoint.
- It is exceptionally important from an **underwriting** standpoint as well.
- Unfortunately, the "Commercial Operator" regulations generate more questions than they do answers.

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## Some Terminology

According to Phillip Kolczynski, these rules create traps regarding things such as

- What is incidental and what is primary to the business operation?
  - Does it involve flying?
  - Does the pilot know?
- What expenses can be "covered" for the pilot or owner without running afoul of the rules?

**MANY INSURERS HAVE EXCLUSIONARY CLAUSES FOR VIOLATING FAA RULES.**

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## Now, Some Underwriting

- "The premiums charged depend largely upon the experience and ability of the pilot. Insureds may improve their rates based on experience by **verifying the total hours** flown as a pilot-in-command and **time in make and model...**"

*Wells and Chadbourne, Aviation and Risk Management (2<sup>nd</sup> Ed.)*

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## Now, Some Underwriting

"Some aircraft requiring a copilot will also include an open pilot warranty setting forth the minimum certificate and flying hours required for this individual."

*Wells and Chadbourne, Aviation and Risk Management (2<sup>nd</sup> Ed.)*

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## More Underwriting

According to Blais Aviation:

- "[R]ates are higher for pilots with fewer than 1000 total logged hours or those with fewer than 50 hours logged in the model of aircraft they will be insuring.
- "An IFR rating is highly recommended and often required for aircraft that have a 'glass cockpit' avionics, retractable landing gear or more than four seats."
- "[A]n aggressive training and time-building program" can drop renewal rates "substantially."

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## An Example:

Company	Private Pilot, IFR-rated, 26 to 150 FH/yr., > 150 solo hours	Private Pilot, No IFR, > 150 solo hours
AXA	Preferred Elite	Standard
ING	\$0.48 per 1K	Ind. Consideration
John Hancock	Preferred	Standard
West Coast Life	If age < or = 26, usually \$1.50 per 1k x 5 years	If age < or = 26, usually \$2.50 per 1k x 5 years

Source: CPS Insurance Services

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## Other Major Underwriting Considerations

1. At what airport is the craft hangared?  
Where does it "hangar" out? (Sorry...)  
*Runway length; visibility; severity of weather all count...*
2. FAA Registration Number
3. Retractable landing gear?
4. Number of Passengers (capacity)
5. Purchase Price; lienholder(s)

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## Still More Underwriting...

6. How old is the plane?
7. When was the aircraft purchased?
8. When is its next servicing due?
9. Will there be any flights outside the continental United States?
10. What is the expected use?

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## Underwriting Considerations: Use

- Business and Pleasure: private ownership; no charge; no profit.
- Industrial Aid: company-owned craft, usually with professional pilots
- Limited Commercial: possible instruction or rental use, but otherwise not for hire
- Commercial: all profit-making activities
- Special use: crop dusting, spraying hunting, fire fighting, etc.

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## Aviation Policies

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## The Basic Aviation Policy

### FOR THE MOST PART:

- Aviation insurance is written on an "admitted" basis, not on a surplus lines basis.
- There is no "standard" industry form. (ISO and AAIS don't play in this field...)
- There are some standardized terms
- There are some familiar concepts, but...

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## The Basic Aviation Policy

"[Aviation insurance] has become a blend of fire, auto, personal-accident, and marine insurance, having characteristics very different from its antecedents. Reliance on other types of insurance can easily lead to false assumptions..."

-- Wells and Chadbourne, Introduction to  
Aviation Insurance and Risk Management (2d Ed.)

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## The Basic Aviation Policy

"...the least penalty of which is paying for unnecessary coverages but by far the **worst** is being without protection when it is needed."

-- Wells and Chadbourne, Introduction to  
Aviation Insurance and Risk Management (2d Ed.)

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## The Basic Aviation Policy

AT THE SAME TIME,

- If a producer can write a private passenger automobile policy, a general aviation aircraft policy can be written, too.
- Similarly, a garage keeper's policy does not conceptually differ from a hangar keeper's.

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## The Basic Aviation Policy

With all of the emphasis on the pilot in underwriting, it's not surprising that the aviation policy has some specific rules about who can be in command of the ship:

- These are covered by either a "Named Pilot Warranty" or an "Open Pilot Warranty."
- The "Named Pilot Warranty" is, as its name suggests, a listing or schedule of permitted pilots.
- "The Open Pilot Warranty" describes, but does not name, who can captain the plane, such as...

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## The Basic Aviation Policy – the OPW

**"[There is no insurance unless] the pilot in command has:**

1. A valid and current...transport certificate
2. With appropriate ratings for the flight involved
3. A valid medical certificate
4. At least 500 hours as pilot-in-command
5. Of which 50 were in an aircraft with retractable landing gear and
6. 10 hours in the model aircraft being flown."

*Wells and Chadbourne, Aviation and Risk Management (2<sup>nd</sup> Ed.)*

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## The Basic Aviation Policy

- The world divides into two parts
  - Liability and
  - "Hull" Coverage
- "Hull" is a marine term and means "physical damage to the aircraft itself."

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## The Basic Aviation Policy – Hull Coverage

- Originally, hull coverage was written on a named perils basis, such as fire, explosion, lightning, etc.
- Now, hull coverage is written on an all-risks basis, but with important limitations or conditions.
- *Is it moving? Is it flying?*

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## So, what's the difference?

IRMI.com

- **All risks, not in motion**, "provides all risk hull coverage for the described aircraft while not in motion, i.e., on the ground and not in motion under its own power. Coverage applies for a loss occurring while the aircraft is being pushed or towed. A taxiing aircraft is considered to be in motion."
- **All risks, ground and flight**, "provides all risk hull coverage for the described aircraft **whether or not** the aircraft is in flight at the time of loss."

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## So, what's the difference?

- There's even "all risks, not in flight..." which does cover taxiing, but not flight....
- And some carriers will consider losses resulting from a covered cause of loss, i.e., some form of accident, as not being covered.
- It pays to shop well.

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## Basic Aviation Policy – Hull Coverage

- Insured Value:
  - Usually stated as a form of "actual cash value,"
  - ACV as "replacement cost less depreciation"
  - And typically without a coinsurance clause,
  - But with a deductible, and occasionally a deductible based on type of loss (ingestion deductible in jets; moored deductible for seaplanes).
- Salvage and Appraisal:
  - There can be significant salvage values; most policies call for an appraisal process in the event of disagreement

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## Basic Aviation Policy – Hull Coverage

### Familiar Concepts and Clauses:

- Loss Payee / Lienholder clause
- Insured's duties in event of loss
- Assistance of Insured
- Automatic hull coverage for newly acquired aircraft (usually 30 days)
- Automatic value increases

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## Basic Aviation Policy – Liability Cover

### Four Types or Options:

1. Bodily Injury **Excluding** Passengers
  2. Passenger Bodily Injury
  3. Property Damage Liability
  4. Single Limit Bodily Injury and Property Damage (the "smooth" limit)
- ...plus a med pay coverage

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## Basic Aviation Policy – Liability Cover

### A word about limits: Alimonte writes:

"Aviation policies often contain limits per occurrence with a separate '**sublimit**' **per passenger or per seat** in an aircraft. The clear intention of these sublimits is to limit the liability for all damages attributable and related to a single passenger's death or injury to a sum certain regardless of how many individuals may have a right of recovery at law for this death or injury."

***Does your client need excess coverage?***

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## Basic Aviation Policy – Liability Cover

Some aviation-specific exclusions to watch out for:

1. Flights needing a waiver from the FAA
2. Flights when the "Certificate of Airworthiness" is not in effect
3. Flights for an unlawful purpose
4. Passenger overload

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## Basic Aviation Policy – Liability Cover

And some of the "usual suspects" for exclusions (but with an air twist):

1. Liability assumed under contract (except maybe incidental airport use agreements...)
2. Property damage while in the care, custody or control of the insured (except maybe damage to hangars or luggage loss)
3. Intentional acts (except maybe to prevent acts of terrorism or hijacking)

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## Other Aviation Related Matters

The Standard CGL Exclusion: (g. Aircraft, Auto or Watercraft)

"Bodily injury" or "property damage" arising out of the *ownership, maintenance, use or entrustment* to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

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## Other Aviation Related Matters

The Standard CGL Exclusion: (g. Aircraft, Auto or Watercraft)

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured...

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## Other Aviation Related Matters

Who needs to be concerned about the CGL exclusion?

- Aviation maintenance facilities
- Aviation service providers
- Aviation parts manufacturers
- Aviation risk owners (airport owners, etc.)

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## Other Aviation Related Matters

### Underground Storage Tanks

- Historically, USTs have been regulated on both a federal and a state level. Most insurance funds and rules have been implemented at the state level.
- In 2005, Congress passed the Underground Storage Tank Compliance Act of 2005.

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## Other Aviation Related Matters

### Underground Storage Tanks:

The USTCA is aimed at:

- reducing underground storage tank releases.
- expanding the Leaking Underground Storage Tank (LUST) Trust Fund, and
- enhancing inspections, operator training, delivery prohibition, secondary containment and financial responsibility, and cleanup of releases

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## Other Aviation Related Matters

### Underground Storage Tanks

- Most states (and the feds) have regulations on:
  - release detection
  - spill and overflow prevention
  - corrosion protection
  - proper closure or upgrade of tanks

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## Other Aviation Related Matters

- Hot Topics:
  - Disclosure of ownership
  - Broken Windshields as "wear and tear"
  - "Hot Starts"
  - Worker's Compensation – who needs coverage? *Pilots, maintenance technicians, flight attendants, flight department managers and aircraft operators...*

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## What are We Talking About Here and What is a Drone?

---

*Slides courtesy of Prof. Michael Leasure of Purdue  
University*

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## Toys.....



**Under a pound**  
**Under \$100**  
**< 300 foot range**  
**Fly about 10 minutes**  
**Lithium Polymer Battery**  
**Basic flight training**



Toys with cameras



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## Larger Recreational, or Commercial



**Heavier, faster**  
**~2-15 pounds**  
**Fully Autonomous**  
**Video transmits to ground**  
**First Person View (FPV)**



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# Largest Commercial or Recreational (What were you thinking? size)

15–55 pounds  
Under 100 MPH



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No difference in perspective from sim generated screen or  
view from UAV camera



Xplane sim screen



Predator drone operator station



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## Common Technology

Fully Autonomous – no pilot skill required, limited by battery capacity or fuel tank

RTL – return to launch

STL – stability

Geo-fencing

Etc.



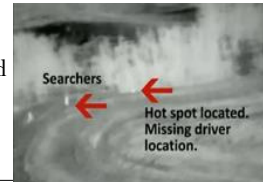
Ground Stations – Video feed, telemetry link, heads up display (HUD)

Gimbal Cameras – Self leveling, tracking, zoom, etc.



Hyperspectral Imaging – captures many bands of light, agricultural research

Thermal – heat sensitive including decomposing bodies underground



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## And the Technology Matters to Us...

According to FC&S (7/18/16):

- “Munich Re used drones in the aftermath of the earthquake in Ecuador in April. The ability to use drones sped up the ability to survey and adjust losses. IAG used drones to inspect brushfires in Australia in order to fast-track assessments for **claims**.”
- “**Loss control** can also make use of drones to **inspect** properties with several locations or outside operations. They can quickly survey multiple sites where digging, trenching, construction, or other operations are being conducted. Safety measures can be verified as well as condition, type, and quantity of equipment or stock for sale.”

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But Remember Some Really, Really Good Things...



TU Delft - Ambulance Drone

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How Many of these Things Are Out There?

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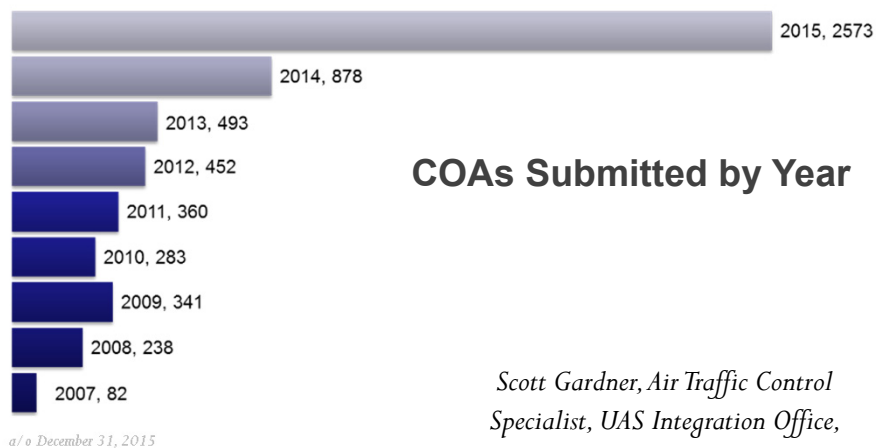
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## More Without than With...

- "More than **325,000** people registered their drones as of Friday, FAA Administrator Michael Huerta said. That surpasses the **320,000** piloted aircraft registered with the agency." USA Today (2/8/16)
- "U.S. hobbyists are projected to buy about **700,000** drones this year, a 63 percent increase from 2014." Washington Post (10/19/15)

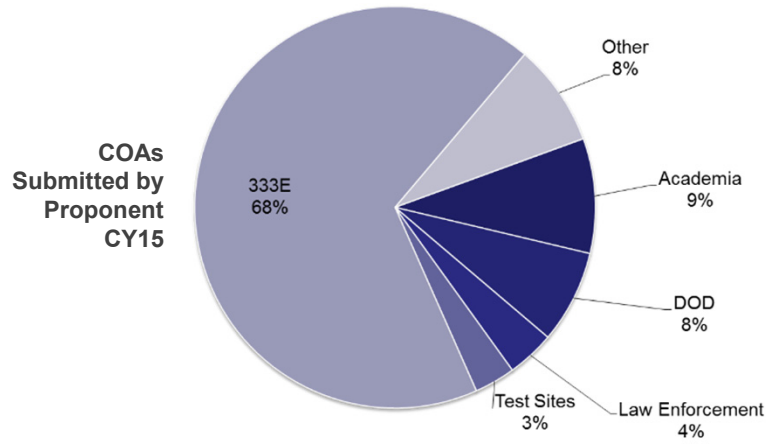
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## COA Applications Submitted



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## COA Application Submission Breakdown

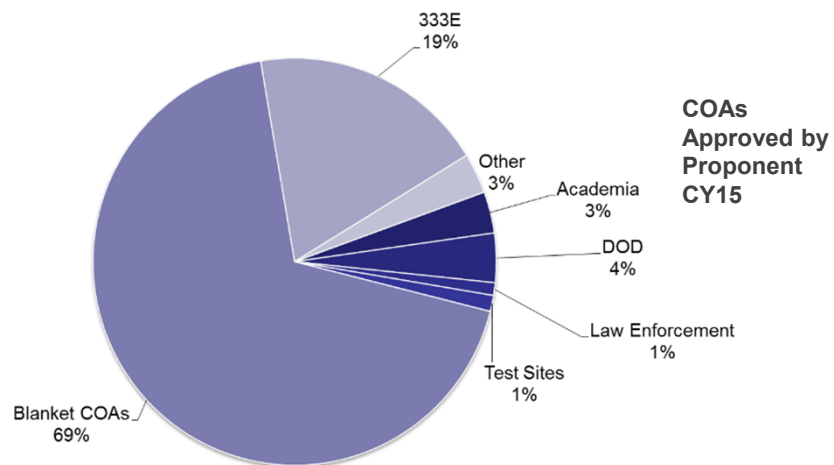


a/o December 31, 2015

Scott Gardner, Air Traffic Control Specialist, UAS  
Integration Office, FAA (2/9/16)

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## COA Application Approval Breakdown



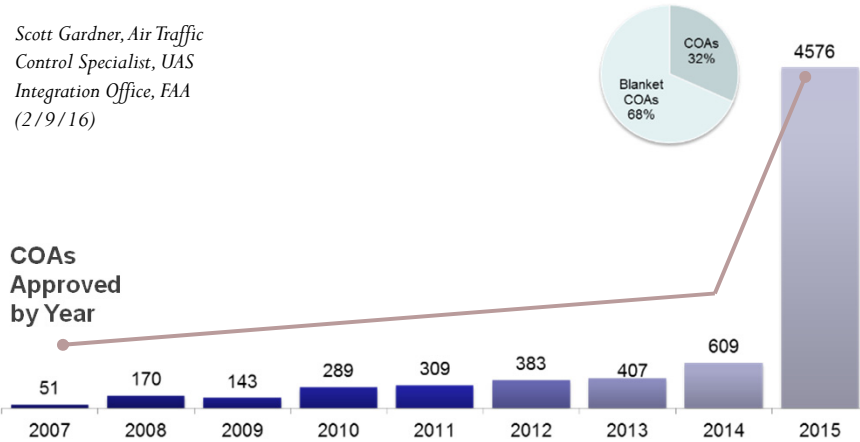
a/o December 31, 2015

Gardner, FAA

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## COA Applications Approved

Scott Gardner, Air Traffic  
Control Specialist, UAS  
Integration Office, FAA  
(2/9/16)



a/o December 31, 2015

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## And What the Future Holds?

- 2019 Model Units: 1.32 million
- 2019 Commercial Units: 385,000
- 2020 Model Units: 1.38 million
- 2020 Commercial Units: 507,000
- 2021 Model Units: 1.42 million
- 2021 Commercial Units: 633,000
- 2022 Model Units: 1.45 million
- 2022 Commercial Units: 731,000
- 2023 Model Units: 1.47 million
- 2023 Commercial Units: 786,000
- 2024 Model Units: 1.48 million
- 2024 Commercial Units: 828,000

FAA Aerospace Forecast Fiscal Years 2020-2040

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## Drones, their "Pilots," and Some of the Regulatory Issues

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What law applies? What is the status of it?

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## Overview of Administrative Legal Issues

- FAA Field Checks
- Law Enforcement Intervention
- Avoiding Unauthorized Operations
- FAA Enforcement Actions
- Pilot's Bill of Rights
- Reporting Motor Vehicle Actions
- NASA ASRS (Safety) Report
- Accident Reporting
- Should I Risk Flying a UAS?

*Dennis Schell*  
Aerospace Industry Practice Group  
SmithAmundsen LLC

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## Regulation

"Federal regulators said Monday that they will require **recreational drone** users **to register** their aircraft with the government for the first time in an attempt to track rogue flying robots that are increasingly posing a threat..."

*Washington Post 10/19/15*

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## Regulation

"The decision to compel drone owners to register their aircraft represents a policy shift by the Obama administration and a tacit admission by the Federal Aviation Administration that it has been unable to safely integrate the popular remote-controlled planes into the national airspace."

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## Regulation

"U.S. officials said they still need to sort out the basic details of the registration system — **which they hope to set up within two months** — but concluded that they had to take swift action to cope with a surge in sales of inexpensive, simple-to-fly drones that are interfering with regular air traffic."

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## The UAS Rule: Major Provisions

- Must see and avoid manned aircraft
  - UAS must be first to maneuver away if collision risk arises
- Must discontinue flight in event of presenting a hazard to other aircraft, people or property
- Must assess risks presented by:
  - Weather conditions
  - Airspace restrictions
  - Location of people

Scott Gardner, Air Traffic Control Specialist,  
UAS Integration Office, FAA (2/9/16)

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## The UAS Rule: Major Provisions

- May not fly over people, except those directly involved with the operation
- Flights limited to:
  - 500 feet altitude
  - 100 mph
- Must avoid airport flight paths and restricted airspace areas
- Must obey any FAA Temporary Flight Restrictions (TFRs)

Scott Gardner, Air Traffic Control Specialist,  
UAS Integration Office, FAA (2/9/16)

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## Net...net

The UAS / UAV / Drone world breaks down  
in to three types:

1. Model or Hobby
2. Non-model or Commercial
3. Public or Governmental

*That's what FAA is telling LEOs*

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## Type 1 – Model or Hobby

- Definition: An unmanned aircraft that is capable of sustained flight in the atmosphere, flown within visual line of sight of the person operating the aircraft, and flown for hobby or recreational purposes.
- Requirements: Operation must:
  - Be strictly for hobby or recreational use
  - Give way to manned aircraft
  - Be in accordance with community safety guidelines
  - Include tower notification if within 5 miles of airport

85

## Type 2 - Commercial

- Definition: Any activity conducted for commercial purpose not meeting model qualifications
- Requirements: Operator must possess ALL of the following documents:
  1. Section 333 Exemption or Aircraft Certification
  2. Certificate of Authorization (COA)
  3. Aircraft Registration and Markings
  4. Pilot certificate

86

## Type 3 – Public or Government

- Definition: Public agencies or organizations that conduct UAS operations for a government function.
- Requirements: Operator must possess ALL of the following documents:
  1. Certificate of Authorization (COA)
  2. Aircraft Registration and Markings

87

## The FAA's LEO Guidance for Unmanned Aircraft Systems (UAS)

### **If you suspect a UAS operation is unsafe or unauthorized:**

1. Locate the operator
2. Ask for registration and verify markings on the UAS - Required for all UAS greater than 0.55 lbs
3. Ask operator for the type of operation and to present appropriate documentation

88

## The FAA's LEO Guidance for Unmanned Aircraft Systems (UAS)

### **If you suspect a UAS operation is unsafe or unauthorized:**

4. Interview operator and collect the following information:
  - Name, address, and positive ID of operator
  - Record Registration Number and the FAA Docket Number from Exemption or COA
  - Document time, place, and details of flight (take pictures and interview witnesses, etc.)

89

## The FAA's LEO Guidance for Unmanned Aircraft Systems (UAS)

### **If you suspect a UAS operation is unsafe or unauthorized:**

5. Take action based on local Laws, Ordinances, Directives
6. Contact the FAA:
  - Safety concern or serious UAS incident – contact the Regional Operations Center
  - Investigation support – contact an FAA Law Enforcement Assistance Program (LEAP) Special Agent

90

## But Wait a Minute...

- “An appeals court on Friday struck down a Federal Aviation Administration rule that required owners of drones used for recreation to register their craft.”
- “The ruling was a victory for hobbyists and a setback for the FAA, which cited safety concerns as it tried to tighten regulation of the fast-growing army of drone operators.”

*Appeals court strikes down FAA  
drone registration rule, ABC News, May 19, 2017*

91

## Taylor v. Huerta, Admin. FAA

- Section 336 of the FAA Modernization and Reform Act of 2012 said:
  - The FAA “may **not** promulgate any rule or regulation regarding a model aircraft” AND
  - A “model aircraft” is “an unmanned aircraft that is capable of sustained flight...and flown for hobby or recreational purposes”

92



## Taylor v. Huerta, Admin. FAA

“In short, the [statute] provides that the FAA ‘may not promulgate any rule or regulation regarding a model aircraft,’ yet the FAA’s 2015 Registration Rule is a ‘rule or regulation regarding a model aircraft.’ **Statutory interpretation does not get much simpler.** The Registration Rule is unlawful as applied to model aircraft.”

93

## In December, 2017

“Section 1092 of the [National Defense Authorization Act] **restores** the FAA registration requirement for all drones in the United States. This reverses the decision in Taylor v. Huerta (856 F.3d 1089 (D.C. Cir. 2017)) in which the D.C. Circuit found that requiring hobbyists to register their drones was prohibited under Section 336 of the FAA Modernization and Reform Act of 2012.”

Joel Roberson of Holland & Knight

94

Bryan Cave Leighton Paisner LLP,  
January, 2019:

"The Act requires the FAA update many of its existing programs and establish new ones, including (1) a process for accepting risk-based, consensus **safety standards** related to design, production, and modification of small drones; (2) authorizations for government agencies seeking to operate drones for **police and firefighting** purposes; (3) special permits for drones to operate beyond the **visual line of sight**; and (4) parameters for allowing **commercial drone delivery packages**."

95

Reuters, 2/12/19:

- "The FAA said in a notice published on Tuesday in the Federal Register it is requiring the 'registration number to be marked on the exterior of the aircraft.'
- "The agency said the move is at the request of law enforcement and the FAA's interagency security partners 'regarding the risk a concealed explosive device poses to first responders who must open a compartment to find the small unmanned aircraft's registration number.'
- "The new rules take effect on Feb. 23."

96

## The Regulatory Environment Now:

- In 2018, Congress also passed an FAA Reauthorization Act.
- It continues, "the FAA's mission to comprehensively integrate drones into the national airspace..."
- Also, "the FAA initiated a prototype Low Altitude Authorization and Notification Capability program ("LAANC") that provides real-time airspace authorizations for drones near airports
- "and the FAA launched the UAS Integration Pilot Program to allow states to test drone flights in various ways otherwise prohibited by the FAA's Part 107 rules—or the rules governing the operation of drones weighing less than 55 pounds."

*Bryan Cave Leighton Paisner LLP, January, 2019*

97

## The Regulatory Environment Now:

*Uniform Law Commission, TORT LAW RELATING TO DRONES ACT  
Discussion Draft October, 2018, SECTION 301. PER SE AERIAL  
TRESPASS.*

*A person operating an unmanned aircraft is liable to a land owner or lessee for per se aerial trespass, when the person, without consent, intentionally causes the unmanned aircraft to enter into the airspace **below [200] feet** above the surface of land or **below [200] feet above improvements** built upon the surface of land.*

98

## The Regulatory Environment Now:

*Uniform Law Commission, TORT LAW RELATING TO DRONES ACT  
Discussion Draft October, 2018, SECTION 301. PER SE AERIAL  
TRESPASS.*

*Except where conduct interferes or is likely to interfere with emergency, rescue or public safety operations, this section shall not apply to the extent that the conduct:*

- (1) is protected by the First Amendment;*
- (2) pursuant to the requirements of the Fourth Amendment, or is undertaken pursuant to a warrant or other order issued by a judge;*

99

## The Regulatory Environment Now:

*Uniform Law Commission, TORT LAW RELATING TO DRONES ACT  
Discussion Draft October, 2018, SECTION 301. PER SE AERIAL  
TRESPASS.*

*Except where conduct interferes or is likely to interfere with emergency, rescue or public safety operations, this section shall not apply to the extent that the conduct:*

- (3) is undertaken by public employees engaged in the performance of their duties, including firefighters, emergency medical personnel, or public utility employees while engaged in addressing an emergency that presents an imminent danger to health, safety, or the environment...*

100

## The Regulatory Environment Now:

*Uniform Law Commission, TORT LAW RELATING TO DRONES ACT  
Discussion Draft October, 2018, SECTION 301. PER SE AERIAL  
TRESPASS.*

*Except where conduct interferes or is likely to interfere with emergency, rescue or public safety operations, this section shall not apply to the extent that the conduct:*

- (4) is undertaken by persons acting as part of government organized recovery efforts following an accident or natural disaster; [OR]*
- (6) occurred only because the person operating or responsible for the operation of the unmanned aircraft took or was in the process of taking immediate action caused by an inflight emergency...*

101

## State Law / Common Law

Most states recognize at least some variation of the tort of invasion of privacy:

- Public disclosure of private facts,
- Intrusion,
- Appropriation of name or likeness, and
- False light in the public eye.

1  
0  
2

102

## Invasion by Intrusion...

Christopher Stevenson of Wilson Kehoe & Winningham writes:

To establish a claim for invasion of privacy by intrusion, the plaintiff must demonstrate that there was an intrusion upon his or her physical **solitude or seclusion**, such as by invading his home or other quarters or by conducting an illegal search.

103

## Invasion by Intrusion...

Christopher Stevenson of Wilson Kehoe & Winningham writes:

To rise to the level of tortious conduct, establishing a claim for invasion of privacy by intrusion, the intrusion must be something which would be **offensive or objectionable to a reasonable person.**

104

## Invasion by Intrusion...

Stevenson concludes:

- The extent to which videotaping activities occur within public view is relevant to claims of invasion of privacy by intrusion.
- In determining the actionability of an intrusion into another's private activities or information, the trier of fact will consider whether the **means** used were abnormal, as well as the defendant's **purpose** in acting as he or she did.

105

## A Bit of Insurance Background

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What are the Existing Underwriting Concerns?

106

## Aviation Insurance Generally

- Again...there is no "standard" industry form for aviation policies. (ISO and AAIS don't play in this field...)
- Aviation insurance is written on an "admitted" basis, not on a surplus lines basis.
- However, unmanned aircraft insurance may be mostly handled by surplus lines.

107

## Swiss Re: Insurance and the rise of the drones (2014)

### Underwriting: How to write it and how to price it are problems

- What laws apply? Federal? State?
- What liability theories do you want to insure? (examples: never an invasion of privacy? Never criminal activity?)
- What types of claims will you cover? (Liability lawsuits, yes; fines from a regulator, no?)

108



## Swiss Re: Insurance and the rise of the drones (2014)

### Underwriting: How to write it and how to price it are problems

- How will you treat operation without a certificate of authority?
- What "vehicle" will you use to insure it? (Endorsement or stand-alone policy?)
- What about leased drones? Worker's comp exposures?

109

## Swiss Re: Insurance and the rise of the drones (2014)

"Given that the use of drones is completely new ground for the insurance industry, it will be incumbent to partner with agents and brokers to **ensure that all the right questions are asked**. There needs to be a meeting of the minds with the insurance buyers/insureds, taking a deep dive and looking at all aspects of this emerging technology."

110

## The Numbers Are Hard to Come By...

- "[W]hat are the potential risks and liabilities of operating an unmanned aircraft and how will they affect insurance underwriting trends?"
- "This question is difficult to answer because unmanned aircraft are not flying at the rate that they will be in the near future in the national airspace."

111

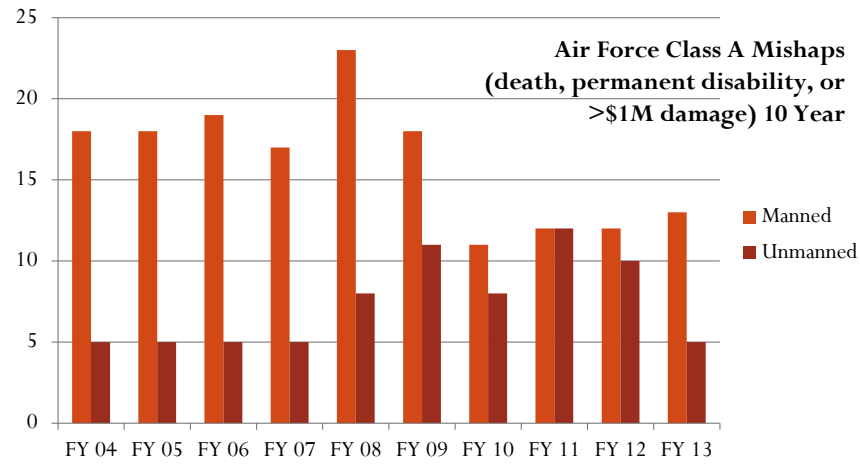
## The Numbers Are Hard to Come By...

"[I]t may take a decade or more to establish accurate liability trends to be able to effectively gauge the true risks and liabilities of unmanned aircraft in the national airspace."

Beyer, Dulo, Townsley and Wu,  
*Risk, Product Liability Trends, Triggers, and Insurance in  
Commercial Aerial Robots*,  
U. Miami School of Law, 2014,  
WE ROBOT Conference on Legal & Policy Issues  
Relating to Robotics

112

## ...But What They Did Find is Startling



113

## ...but remember the good things

<http://adventureblog.nationalgeographic.com/>



114

# The Existing Forms

Commercial and Personal Lines and The Treatment of Drones

115

## The ISO CGL's Structure

The Basic **Commercial General Liability** Policy (CG 00 01 04 13):

- Section 1 – Coverages
  - Coverage A – bodily injury and property damage
  - Coverage B – personal and advertising injury
- Section 2 – Who is an insured?
- Section 3 – Limits of Insurance
- Section 4 – Conditions (reporting, etc.)
- Section 5 – Definitions

116

## Structure of the CGL

Section 1, Coverage A says:

“We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury or property damage** to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages....”

117

## Structure of the CGL:

Section 1, Coverage B provides insurance for:

"Advertising injury,' meaning, injury arising out of one or more of the following offenses....:

Oral or written publication of material that slanders or libels...

***Invasion of privacy...***

Infringement of copyright, title or slogan..."

118

## Structure of the CGL

The Basic Commercial General Liability Policy (CG 00 01 04 13) **EXCLUDES** from coverage:

**"'Bodily injury' or 'property damage'** arising out of the ownership, maintenance, use or entrustment to others of any **aircraft**, 'auto' or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading'..."

119

## Swiss Re: Insurance and the rise of the drones (2014)

**"There's no definition of aircraft in ISO's CG 00 01 04 13.** It would be up to a judicial interpretation to determine if, for insurance purposes, a drone qualifies as an aircraft under ISO CG 00 01 04 13. We think most courts would rule that they do in fact qualify."

120

## Swiss Re: Insurance and the rise of the drones (2014)

*"We'd assume that there's no coverage* under ISO CG 00 01 04 13 for bodily injury liability or property damage liability claims that arise out of a drone accident unless such liability is assumed under a contract."

121

## CGL / Commercial Policies

- This language is common in other commercial policies as well.
- Assume (but verify) similar language – or at least a similar concept – in the following forms:
  - Businessowner's
  - Commercial umbrella
  - Commercial excess
  - Farmowner's

122

## And a Quick Note on the Auto Side

ISO's Commercial Auto Endorsement CA 27 05 11 20

*Section II – General Liability Coverages is changed as follows:*

“This insurance does not apply to any of the following:

“g. Aircraft, Auto Or Watercraft

“(1) Unmanned Aircraft

**“ ‘Bodily injury’ or ‘property damage’ arising out of the ownership, maintenance, use or entrustment to others of any aircraft that is an ‘unmanned aircraft’.** Use includes operation and ‘loading or unloading’.”

123

## Personal Lines / Homeowner's

- The main form here is ISO's HO 00 03 05 11.
- It says: "This policy doesn't cover '**aircraft liability**'..."
- "Aircraft liability" includes ownership, maintenance, use, entrustment, or supervision of anyone with an "aircraft."
- "Aircraft" means "any contrivance used or designed for flight except model or hobby aircraft not used or designed to carry people or cargo..."

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## Personal Lines / Homeowner's

### Swiss Re:

- Model or hobby aircraft not used for commercial purposes probably will be covered.
- Surprisingly, "There are no size restrictions on model aircraft (but there are weight restrictions), so "Big Bird" (80+ inch wingspan) model aircraft liability exposures would be covered."

125

## Insurance Industry Response

- Drone exposure was not contemplated in the HO program
- Two new endorsements
  - Aircraft Liability Definition Revised To Remove Exception For Model Or Hobby Aircraft (HO 34 02 02 17)
  - Personal Injury For Aircraft Liability Excluded (HO 34 03 02 17)

**OPTIONAL**

126

## ISO's HO 34 02 02 17

Endorsement with Definitional Change:

**Aircraft means any contrivance used or designed for flight including but not limited to unmanned aircraft, whether or not model or hobby**

Now bringing back the "aircraft liability" exclusion as applicable to homeowner's policies.

127

## ISO's HO 34 03 02 17

"This insurance does not apply to ["Aircraft liability"].

For the purposes of this exclusion, "aircraft liability" means:

a. Liability for "personal injury" arising out of the:

- (1) **Ownership** of such aircraft by an "insured"
- (2) **Maintenance**, occupancy, operation, use, loading or unloading of such aircraft by any person;
- (3) **Entrustment** of such aircraft by an "insured" to any person;
- (4) **Failure to supervise** or negligent supervision of any person involving such aircraft by an "insured" or
- (5) **Vicarious liability, whether or not imposed by law, for the actions of a child or minor involving such aircraft.**

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## ISO's HO 34 03 02 17

“This insurance does not apply to ["Aircraft liability“].

b. For the purpose of this definition, **aircraft means any contrivance used or designed for flight including but not limited to unmanned aircraft, whether or not model or hobby.**

129

## Coverage Availability

Drone Liability Insurance Apps

Membership Academy of Model Aeronautics

Specific Drone Policies Through Aviation  
Specialty Markets

130

# What Does the Future Hold?

---

And Is The Future Now?

131

## A Brave New World?

"[F]rom a loss history perspective, the industry is very green. Everybody's shooting from the hip right now. Once loss data starts flowing in and the FAA tightens regulations, that will help drive underwriting parameters."

Chad Trainor, Arlington/Roe & Co., Inc., March, 2015

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## A Brave New World?

- "As far as insuring these aircraft, carriers will want to know such things as its function or intent, its takeoff and landing location, whether it will be operating over a populated area, and its flying altitude."
- "As carriers become increasingly more comfortable with this unfamiliar territory...the capacity to underwrite such policies will also increase."

133

## A Brave New World?

- "[However] Given the inherently conservative nature of the insurance industry, carriers might require even stricter guidelines than what the FAA may mandate."
- "[I]f carriers get one or two deaths or serious injury claims, they will inevitably start to pull back, which results in less available coverage and higher prices."

Vikki Stone, Poms & Associates, March, 2014

134

## A Brave New World?

- The marketplace started with premiums around approximately 10% of the vehicle's value for physical damage...
- But the marketplace's competition has driven that down to around 7 to 8%...
- If the drone has a value between \$2,500 and \$10,000.

135

## ISO's "New" Endorsements

- In December 2014, ISO came out with a new set of endorsements.
- They are designed to "*...help insurers limit or add limited liability coverage with respect to drones.*"
- Mainly, the endorsements modify the CGL (discussed earlier).
- The endorsements are effective in June, meaning it will likely be 2016 or 2017 before adoption and use become widespread.

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## ISO's "New" Endorsements

- **This isn't just a "carve out" from coverage.**
- Ron Beiderman, ISO Vice President, said, "Because this is a newly emerging exposure, we introduced various exclusion and coverage options to give insurers maximum flexibility when writing risks that use drones in their operations."
- **Some risks may need an endorsement to a CGL; some may need a stand-alone aviation policy.**

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## ISO's "New" Endorsements

- While ISO believes drones are "aircraft" for purposes of existing forms, no changes are being taken. All the new filings add the following definition:

**"Unmanned aircraft" means an aircraft that is not:  
1. Designed; 2. Manufactured; or 3. Modified after  
manufacture; to be controlled directly by a person  
from within or on the aircraft.**

138

## ISO's "New" Endorsements - Part 1

Endorsement	What it <u>Excludes</u>
CG 21 09	Unmanned aircraft coverage for Bodily Injury, Property Damage, and Privacy Invasions <b>(Coverages A and B)</b>
CG 21 10	Unmanned aircraft coverage for Bodily Injury and Property Damage <b>(Coverage A)</b>
CG 21 11	Unmanned aircraft coverage for Privacy Invasions <b>(Coverage B)</b>

139

## CG 21 09 06 15

Exclusion 2.g. ...is replaced by the following:

### 2. Exclusions

This insurance does not apply to:

#### (1) Unmanned Aircraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft that is an "unmanned aircraft". Use includes operation and "loading or unloading".

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## CG 21 09 06 15

Exclusion 2.g. ....is replaced by the following:

### 2. Exclusions

This insurance does not apply to:

#### (2) Aircraft (Other Than Unmanned Aircraft), Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft (other than "unmanned aircraft"), "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

141

## CG 21 09 06 15

Both the Unmanned Aircraft and "regular" Aircraft language are subject to the following:

This Paragraph...applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft (other than "unmanned aircraft"), "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

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## ISO's "New" Endorsements - Part 2

Endorsement	What it <u>Adds</u>
CG 24 50	Unmanned aircraft coverage for Bodily Injury, Property Damage, and Privacy Invasions <b>(Coverages A and B) by designated aircraft</b>
CG 24 51	Unmanned aircraft coverage for Bodily Injury and Property Damage <b>(Coverage A) by designated aircraft</b>
CG 24 52	Unmanned aircraft coverage for Privacy Invasions <b>(Coverage B) by designated aircraft</b>

143

## CG 24 50 06 15

If an Unmanned Aircraft Liability Aggregate Limit is shown in the Schedule...:

1. ...the Unmanned Aircraft Liability Aggregate Limit shown in the Schedule is the most we will pay for the sum of:
  - a. Damages under Coverage A;
  - b. Damages under Coverage B; and
  - c. Medical expenses under Coverage C;

because of all "bodily injury", "property damage" and "personal and advertising injury" arising out of the ownership, maintenance, use or entrustment to others of any aircraft that is an "unmanned aircraft".

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# James K. Ruble Seminar

*a proud member of The National Alliance for Insurance Education & Research*

Section 2

# **Anatomy of a Construction Injury Claim**



# Anatomy of a Construction Injury Claim



A Continuing Education  
Program

1

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2

## Anatomy of a Construction Injury Claim

- Introduction
- Project Delivery Systems (and OCIPs, CCIPs)
- Major Contract Families (AIA)
- Defective Workmanship
- Indemnification Agreements, A/Is and Certs
- Design Professionals
- Material Suppliers

3

## Introduction

4

## Introduction

### According to OSHA:

Out of 4,693 worker fatalities in private industry in calendar year 2016, 991 or **21.1% were in construction** — that is, **one in five worker deaths last year were in construction**. The leading causes of private sector worker deaths (excluding highway collisions) in the construction industry were falls, followed by struck by object, electrocution, and caught-in/between.

5

## Introduction

### According to OSHA: Top Ten OSHA Standard Violations

1. Fall protection – construction
3. Scaffolding
6. Ladders
9. Fall protection – training
10. Electrical wiring and components

6

## Introduction

According to the BLS:

- 2,900,000 nonfatal workplace injuries and illnesses in 2016, or about 2.9 per 100 FTEs
- The construction industry had about 204,000, or about 3.2 per 100 FTEs, which is a marked decline.

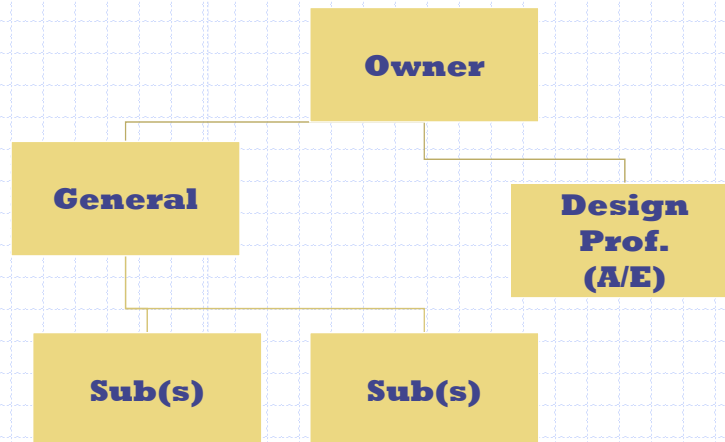
7

## Project Delivery Systems

8

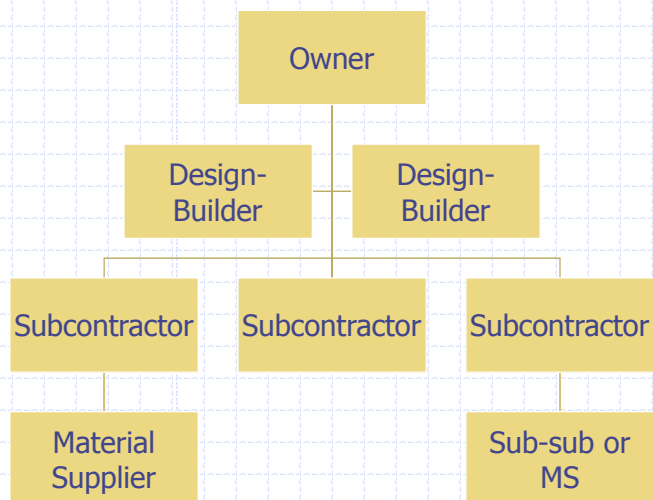


## Project Delivery Systems



9

## Project Delivery Systems



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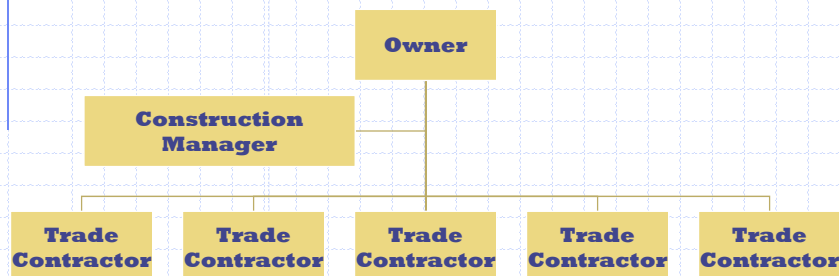
# Project Delivery Systems

## The Typical Trades Are

- Sitework
- Concrete
- Structural and Miscellaneous Steel
- Masonry
- Drywall and Plaster
- Roofing
- Mechanical
- Electrical
- Fire protection
- Flooring
- Wallcovering
- Elevators
- Carpentry
- General Construction
- Doors, Windows and Hardware

11

# Project Delivery Systems: Construction Management



12

## Project Delivery Systems: Other New Forms

- Building Information Modeling ("BIM")
- LEED/Green Building
- Integrated Project Delivery

13

## But what About OCIPs and CCIPs?

According to USDOT: The basic operational features of an OCIP are:

- (1) The owner purchases insurance coverage (all or some specific elements) to cover all contractors and subcontractors on a project;
- (2) There is an integrated owner-contractor managed safety program on the project; and
- (3) Claims are processed centrally.

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## OCIPs and CCIPs

According to Wrap-Up Resources, LLC, OCIPs generally include:

- Necessary "general liability coverage for insureds' activities at the project site, including both bodily injury and property damage protection to non-project property.
- Typically, "provid[ing] completed operations protection against construction defect lawsuits matching in length the longest applicable statute of limitations..."

15

## OCIPs and CCIPs – What Are They?

According to The Contractors Group:

- The premise is that the insurance will cost less to purchase it in "bulk" (covering all contractors under the same policy) than it costs when each contractor purchases insurance on his own.

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## OCIPs and CCIPs – What Are They?

- The Owner then looks to each contractor to credit back to him the cost of the insurance that the contractor would normally include in the bid as overhead costs. The Owner requires the contractor(s) to break his bid down and show how much of the bid is insurance costs.

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## The Drawbacks:

- **MORE PAPERWORK.** The, uncompensated for, additional administration costs involved with dealing with the paperwork generated by the OCIP.
- **INADEQUATE LIMITS.** The possibility that the insurance coverage provided through the OCIP will not be enough coverage for the contractor.

18

## More Drawbacks:

- VARIATIONS IN COVERAGE. Contract deductions that exceed the contractor's actual insurance costs.
- HIGH DEDUCTIBLES. \$50,000 or more.
- PROFESSIONAL COVERAGE. Are professionals (engineers, etc.) covered?

19

## More Drawbacks:

- SHIFTS Insurance; DOES NOT ELIMINATE it.
- Subcontractors still need to carry and provide the owner/builder with Certificates of Insurance for auto liability and workers' compensation.
- Subcontractors still need to carry and provide proof of Commercial General Liability insurance for their own construction activities away from the project site.

20

## When Are Wrap-Ups Used?

- Commercial Wrap-ups –for over 50 years
  - Predominantly for large (\$100M) public works or private, single purpose projects
  - General Liability, Workers Compensation and Builders Risk
- Residential Wrap-ups – for 5-10 years
  - Condominium / Townhouse Projects
  - Large Tract Residential Developments
  - General Liability and occasionally some form of limited (B.I. & P.D.) professional Liability.

Source: Houck, Yaron, Wrap-Up Policies, Current Policy Concerns, and Insurance Trends (Assoc. of Defense Counsel, Northern Ca. and Nev. 2008)

21

## Wrap-up Problems and Pitfalls

- Proper Policy Construction
  - Remove Exclusion "L" (damage to "your work")
  - Confirm completed operations coverage extension for full statute period
  - Warranty / Repair Extension
- Environmental / Mold Coverage
- Enrollment & Administration Procedures

22

# Major Contract Families

23

## Major Contract Families

- AIA (American Institute of Architects)
- AGC (Associated General Contractors of America)
- CONSENSUS Docs
- EJCDC (Engineers Joint Contract Document Committee)(formerly NSPE)
- DBIA (Design Build Institute of America)

24



## Major Contract Families

AIA forms are standard, and have the following benefits

- Common industry knowledge of AIA terms.
- Tendency to be more balanced and neutral than manuscripted forms.
- Less ambiguity due to wide and prolonged use.
- A great deal of case law interpretation exists.
- The AIA forms constitute an integrated set of documents.

25

## The American Institute of Architects' A-201

26

## Article 11 of the AIA A201-2007

- The basic commandment of the AIA's A-201 as regards insurance is that the contractor obtain the insurance.
- As for the typical subcontract, the A-401, Article 13 calls for insurance to be maintained by the Subcontractor on a project, but the types and extent of coverage are to be manuscripted.

27

## Article 11 of the AIA A201-2007

### Contractor's Basic Insurance Requirements (¶ 11.1.1)

- The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below...

28

## Article 11 of the AIA A201-2007

### Scope of Coverage Requirements (§ 11.1.1):

- ...which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable...

29

## Article 11 of the AIA A201-2007

- Worker's Comp and Employer's Liability
- Bodily injury for other than employees
- "Usual" personal injury coverage
- Damage to tangible property
- Motor vehicle liability
- "Claims for bodily injury or property damage arising out of completed operations"
- Claims for indemnity under §3.18

30

## Article 11 of the AIA A201-2007

### Continuity of Coverage (¶11.1.2):

- Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment...

31

## Article 11 of the AIA A201-2007

### Continuity of Coverage (¶11.1.2):

- ...and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of the work or for such other period...specified...

32

## Article 11 of the AIA A201-2007

### A Mixed Bag for this Change...

- The good: a recognition that policies do expire, and an understanding that the continuity of coverage is a matter of contract, not certificate
- The bad: failing to meet the insurance requirements of a long-finished project can trigger a contract breach

33

## Article 11 of the AIA A201-2007

### Certificates of Insurance (¶ 11.1.3):

- Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work...

34

## Article 11 of the AIA A201-2007

### Certificates of Insurance (§ 11.1.3):

- ...and thereafter upon renewal or replacement of each required policy of insurance...

35

## Article 11 of the AIA A201-2007

### Certificates of Insurance (§ 11.1.3):

- Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness

*[DELETE: in accordance with the Contractor's information and belief].*

36

## Article 11 of the AIA A201-2007

### Additional Insured Status (§ 11.1.4):

- The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations...

37

## Article 11 of the AIA A201-2007

### Additional Insured Status (§ 11.1.4):

- ...and the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

38

## Article 11 of the AIA A201-2007

### A Mixed Bag?

- Until now, AIA did not require additional insured status for Owner, but it did require the contractor to insure, "Claims of contractual liability insurance arising under ¶ 3.18 (indemnification)."
- This was usually accomplished via an additional insured endorsement...

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## Article 11 of the AIA A201-2007

### A Mixed Bag?

- ...But the new clause is a radical expansion of the additional insured status...
- ...that surely changes the underwriting...
- And one can sincerely question whether the ISO form 20 37 07 04 meets the contract requirements...

40



## Article 11 of the AIA A201-2007

### A Mixed Bag?

- The AIA's comment about the expanded additional insured status is:
  - "It has become common industry practice..." and "This practice saves legal expenses...by consolidating defense costs under one insurance policy."
- AIA omits "and we're glad it's not ours!"

41

## The AIA Forms Changes in 2017 Impacting Insurance

42

## Exhibit A (Insurance and Bonds)

- Used with the A101, A102 and A103 Owner/Contractor Agreements
- Outlines the required insurance and bonds for the Project
- Includes some terms that were formerly in A201-2007 Article 11
- ***But why do an "Exhibit"?***

43

## The AIA 2007 Conflict

A201-2007, Section 11.1.3:

- *Certificates of insurance: These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner...*

44

## The AIA 2007 Conflict

### A201-2007, Section 9.10.2:

- *Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect ... (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner...*

45

## The AIA 2007 Conflict

### ACORD 25 Certificate of Liability Insurance (as of 2007):

- *SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL \_\_\_\_\_ DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.*

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## The AIA 2017 Conflict

ACORD 25 (2010/05) Certificate of Liability Insurance:

- *SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.*

47

## The AIA 2017 "Fix"

A201-2017, Section 11.1.4:

- Within 3 business days of date Contractor becomes aware of impending or actual cancellation of any required insurance, **the Contractor shall provide notice** to Owner of such impending or actual cancellation or expiration.

48

## The 2017 Exhibit A – Insurance and Bonds

### Builder's Risk

- A2.3.1. Still "all risk" coverage. Owner adjusts loss as fiduciary.11.5.1.
- A2.3.1. No more "as their interests may appear". Other project participants are listed as insureds which is probably a smart way to address the debate whether participants should listed as named insureds. Gives project participants de facto waiver of subrogation protection.

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## Exhibit A – Insurance and Bonds

- A2.3.1.1. Provides for specific coverage for ensuing loss caused by negligence.
- A2.3.1.2. Provides a laundry list of required coverages. This is useful to review what type of coverages you want but just because it is in the contract does not mean the specimen policy will provide coverage.

50

## Exhibit A – Insurance and Bonds

A2.3.3 Requires the Owner to have property insurance in place for an existing structure when the "Work" is remodeling or constructing an existing structure. The waiver of subrogation extends to this new requirement.

51

## Exhibit A – Insurance and Bonds

### Subrogation Issues

- Purpose of waiver
- 11.3.1. Addresses split of authority as to whether waiver extends beyond "work" and makes it clearer that it does.
- Also clears up whether waiver applies to post completion property insurance
- Welcome changes, but true effect won't be felt for some time.

52

## Exhibit A – Insurance and Bonds

### Other Subrogation Issues

- The relationship between subrogation and indemnity. Insurers try to use anti-indemnity statutes to avoid the waiver of subrogation.
- Does the waiver of subrogation apply to a CGL policy? *Tellspen Builder, L.P. v. Kendall Heaton Insurance*, 325 S.W.2d 692 (Tex. App. 2010)

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## §A.2.4 - New, Optional Coverages for Owners:

- Loss of Use, Business Interruption, and Delay in Completion Insurance
- Ordinance or Law Insurance
- Expediting Cost Insurance
- Extra Expense Insurance
- Ingress/Egress Insurance
- Soft Costs Insurance

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## §A.2.4 - New, Optional Coverages

- Most all of these enhanced builder's risk coverages have to be amended **IN**.
- For instance, a standard builder's risk policy **EXCLUDES**: "The enforcement of any ordinance or law (1) regulating the construction, use or repair of any property; or (2) requiring the tearing down of any property, including the cost of removing its debris."

55

## §A.2.4 - New, Optional Coverages

The standard amendatory endorsement adds back **IN**:

- "loss to the undamaged portion of the building caused by enforcement of any ordinance or law
  - Requiring demolition or
  - Regulating construction or repair

56



## OK...what's the skinny...really...?

- The builder's risk market is strong – there are many carriers in it.
- From an underwriting perspective, the real challenge in the market is the partially occupied structure.
- On a related note, ingress/egress insurance is problematic in the renovation context

57

## OK...what's the skinny...really...?

- Law and ordinance coverage is typically added in, but also normally capped at 10% of cost.
- Specifying to add "Civil Authority" insurance is more difficult in the marketplace.
- Soft Costs coverage (for delay in completion, etc.) is not a marketplace challenge and often is included automatically

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## §A.2.5 - New, Optional Owner Coverage

Cyber Security Insurance for loss to the Owner due to data security and privacy breach, including costs of investigating a potential, or actual breach of confidential or private information (*Indicate applicable limits of coverage or other conditions in the fill point below.*)

59

## Section A.3.1.3 – Additional Insureds

"To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04."

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## For the Contractor: §A.3.2.2.2.7

### Specification:

The Contractor's CGL shall not exclude...claims related to residential, multi-family or other habitational projects, if the Work is to be performed on such a project

### Insurance Industry:

The availability of habitational coverage can be quite jurisdiction specific.

Many carriers will have searching underwriting.

This coverage is tough to write on a "standard" commercial general liability form.

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## Contractor: §A.3.2.2.2.9

### Specification:

The Contractor's CGL shall not exclude...claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces...

### Insurance Industry:

A/R represents over 150 insurance companies and has around 2 to 4 companies that will consider this risk.

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## Contractor: §A.3.2.2.2.5 and .6

### Specification:

The Contractor's CGL shall not exclude...claims or loss excluded under a **prior work** endorsement or other similar exclusionary language [OR] under a prior injury endorsement or other exclusionary language...

### Insurance Industry:

These are routine exclusions in the excess and surplus lines segment of the insurance industry.

Be wary of the "troubled" contractor's ability to meet these.

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## Contractor: §A.3.2.8

### Specification:

The Contractor shall purchase and maintain...Professional Liability Insurance covering performance of the professional services...

### Insurance Industry:

*Be cautious of this specification* – common usage for "Contractor's E&O" is actually for a policy provision to buy back the "your work" exclusion, not to provide true "professional liability" coverage.

64

# Insurance and Defective Workmanship Claims

65

## Defective Workmanship Claims

Why Won't a CGL Work? The answer begins in the definitions and the exclusions:

- The three main triggers are "bodily injury" and "property damage" and "occurrence"
- "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

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## Defective Workmanship Claims

### "Occurrence" means:

- "... an accident, including continuous or repeated exposure to substantially the same general harmful conditions."
- ...something other than faulty workmanship. *State Farm v. Tillerson* (Ill.App. 2002); *R.N. Thompson v. Monroe Guaranty* (Ind.App. 1997).

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## Defective Workmanship Claims

### "Property damage" means:

- a. Physical injury to **tangible** property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

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## Defective Workmanship Claims

Why Won't a CGL Work? The answer concludes in the exclusions:

- **j. Damage To Property**

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

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## Defective Workmanship Claims

Why Won't a CGL Work? The answer concludes in the exclusions:

- **k. Damage To Your Product**

- "Property damage" to "your product" arising out of it or any part of it.

- **l. Damage To Your Work**

- "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard"...This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

70

## Defective Workmanship Claims

Why Won't a CGL Work? The answer concludes in the exclusions:

- **m. Damage To Impaired Property Or Property Not Physically Injured**
  - "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
    - (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"...

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## Defective Workmanship Claims

The bottom line:

"...The coverage is for tort liability for physical damages to others, and not for contractual liability of the insured for economic loss suffered because the completed work is not what the damaged person bargained for."

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## Defective Workmanship Claims

- "[T]he policy in question does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident."
- Damage arising from inadequate materials and substandard construction work is generally NOT covered by a CGL insurance policy because they are not
  - "Property damage" or
  - An "occurrence."

Indiana Ins. Co. v. DeZutti (Ind. 1980)

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## Defective Workmanship Claims

- September 30, 2010
- Indiana Supreme Court
- *Sheehan Construction v. Continental Casualty*
- *Sheehan* changes the approach to insurance coverage for claims of faulty workmanship.
- Broadens prospects for coverage.

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## Defective Workmanship Claims

### The Damage:

- Leaking windows
- Fungus growth on the siding
- Decayed OSB [oriented strand board] sheathing
- Deteriorating and decaying floor joists
- Water damage to the interior of the home including water stained carpeting

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## Defective Workmanship Claims

### The Causes:

- Lack of adequate flashing and quality caulking around the windows
- Lack of a weather resistant barrier behind the brick veneer to protect the wood components of the wall
- Bad shingles; bad flashing
- Poor ventilation in the crawl space

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## Defective Workmanship Claims

- Continental was Sheehan's insurer with a standard CGL
- Sheehan was the general contractor
- Continental said:
  - faulty workmanship is not an "occurrence" because it is not an "accident;" and
  - even if there is an "accident" or "occurrence," there is no coverage because of the "your work" exclusion.

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## Defective Workmanship Claims

"We align ourselves with those jurisdictions adopting the view that improper or faulty workmanship **does** constitute an accident so long as the resulting damage is an event that occurs without expectation or foresight."

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## Defective Workmanship Claims

- Contractor insureds will still have to fight through the various business pursuits exclusions.
- The "your work" exclusion will continue to figure prominently in coverage decisions.

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## Defective Workmanship Claims

- How will the marketplace respond?
  - CGL carriers?
  - Bonding companies?
- How will the general versus subcontractor issue play out?

80

## Defective Workmanship Claims

"[W]e join the majority of other courts by holding that *a claim for faulty workmanship, in and of itself, is not an 'occurrence'* under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident."

Cincinnati Ins. v. Motorists Mutual (Ky. 2010)

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## Indemnity, additional insureds, and certificates

82

## Indemnification Agreements:

- The indemnification agreement does not relieve the indemnitee of liability to an injured third party. Indemnitee is still liable and must pay damages, whether or not the indemnitor responds. However, the indemnitee has right to sue the indemnitor to force it to honor the obligations of the contract.

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## Types of Indemnity Agreements:

- Each Indemnity Agreement is unique, however, there are three general types:
  - Broad Form
  - Intermediate Form
  - Narrow or Limited Form

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## Types of Indemnity Agreements:

- Courts look at intent of the parties, as expressed in the indemnity provision, when determining the rights and obligations of the parties under an indemnity provision.

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## Narrow or Limited Form:

- Obligates the indemnitor to indemnify the indemnitee **only** to the extent of the indemnitor's own negligence.
- Does little or nothing to increase the indemnitor's liability under common law principles.

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## Narrow or Limited Form:

- Agreement is useful in proving to the other party's insurer that the agreement qualifies as an insured contract.
- Example: Adams Corp agrees to indemnify Smith Corp for "any liability arising from the negligence of Adams Corp." (only covers liability arising out of Adams acts.)

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## Intermediate Form:

- Indemnitee is usually indemnified only for acts of **passive** rather than **active** negligence, which cause or contribute to a loss.
- Does not specifically address the issue of the indemnitee's own negligence.

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## Intermediate Form:

- If language does not clearly state an intent to indemnify the indemnitee from the consequence of its own active negligence, then the agreement will probably be considered "intermediate" by the courts.

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## Intermediate Form:

- Example: Adams Corp and Smith Corp enter into an agreement where Adams agrees to defend and indemnify Smith against "any and all liability or damages, of any sort, whatsoever." (specifically covers negligent acts of Smith)

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## Broad Form:

- Indemnitor assumes an ***unqualified*** obligation to hold the indemnitee harmless for all liability associated with the subject of the agreement, regardless of which party was at fault.
- Indemnitor is obligated to respond.

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## Broad Form:

- Indemnity provision is most favorable to the indemnitee.
- Example: Adams Corp. agrees to indemnify Smith Corp for "all liabilities **arising out of** the Adams work, whether caused in whole or in part by any act or omission of Smith."

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## So, Which Kind Is It?

- Netflix Lease in Los Gatos, CA:
- "Except to the extent due to the negligence or willful misconduct of Landlord..."
- **Not broadest form – perhaps intermediate?**

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## Indemnity, A/Is, and Certs

Indemnification clauses have existed in the AIA documents since 1911, with the advent of the very first A-201. The tensions between the various contracting organizations and the scope of indemnification language led to anti-indemnification statutes in multiple states, including Florida, New York and California.

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## Indemnity, A/Is, and Certs

### The "Core" of the Clause (¶ 3.18.1):

- the Contractor shall indemnify and hold harmless...against claims, damages, losses and expenses, including but not limited to attorneys' fees....

### Who receives indemnity:

- the Owner, Architect, Architect's consultants, and agents and employees of any of them....

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## Indemnity, A/Is, and Certs

### What indemnity relates to:

- ...arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself...

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## Indemnity, A/Is, and Certs

### Limitations on the scope of indemnity:

- ...but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

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## Indemnity, A/Is, and Certs

### More Limitations on Scope of Indemnity (¶ 3.18.2):

- In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 **shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.**

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## Why "unlimit" the indemnity?

- That language is in response to cases such as *Kotecki v. Cyclops Welding*, *Hankins v. Pekin Insurance*, and *Briseno v. Chicago Union Station* in Illinois.

99

## The Employer / Sub says...

- "It's MY employee that got hurt."
- "His sole remedy is a Worker's Compensation action."
- "He can't go to court."
- "I don't have a general liability exposure..."
- "To the employee or anybody else..."

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## The Owner and GC say...

- "But WE'RE not the employer. You are."
- "WE'RE being sued in court, you're not."
- "We've asked you to indemnify us for losses that we suffer."
- "Your employee's claim is a 'loss' to us, so you need to indemnify us."
- "If we get hit for big, big damages, YOU need to pay it."

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## The *Kotecki v. Cyclops* Protection

Valentino, "Let the Broker Be(a)ware."

- "In *Kotecki* the court held that an employer's maximum liability in a third-party suit for contribution is limited to an amount no greater than its liability to its employee (the plaintiff) under the Workers' Compensation Act."

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## The *Kotecki v. Cyclops* Protection

Valentino, "Let the Broker Be(a)ware."

- "This balance allowed non-employer defendants, such as manufacturers or general contractors, to recover limited contribution from the employer, but still gave the employer benefit of the limited liability protection of the Workers' Compensation Act."

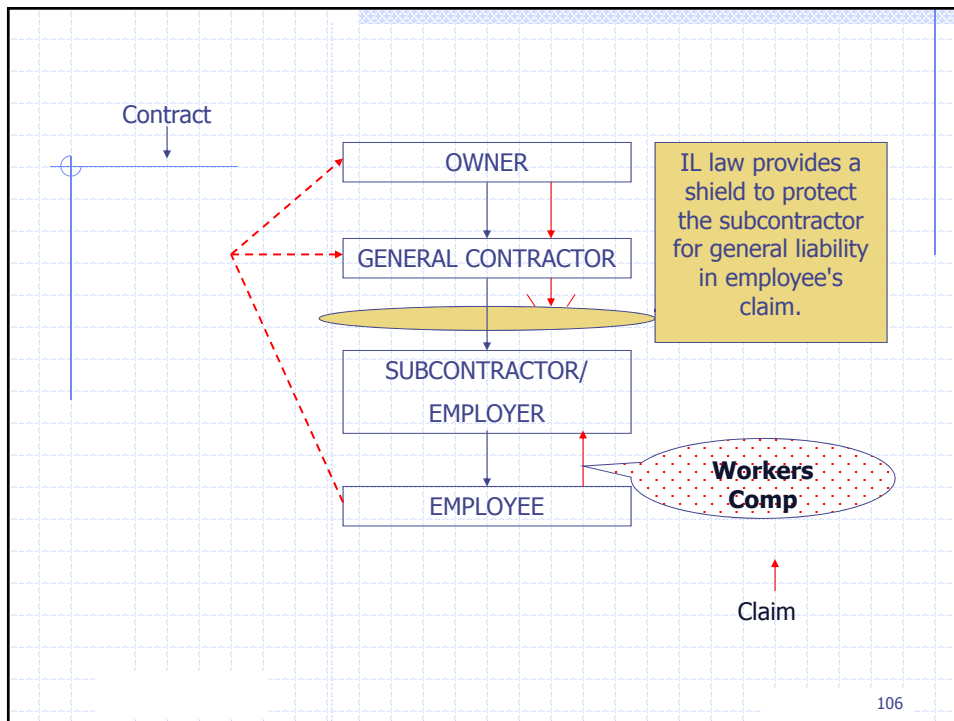
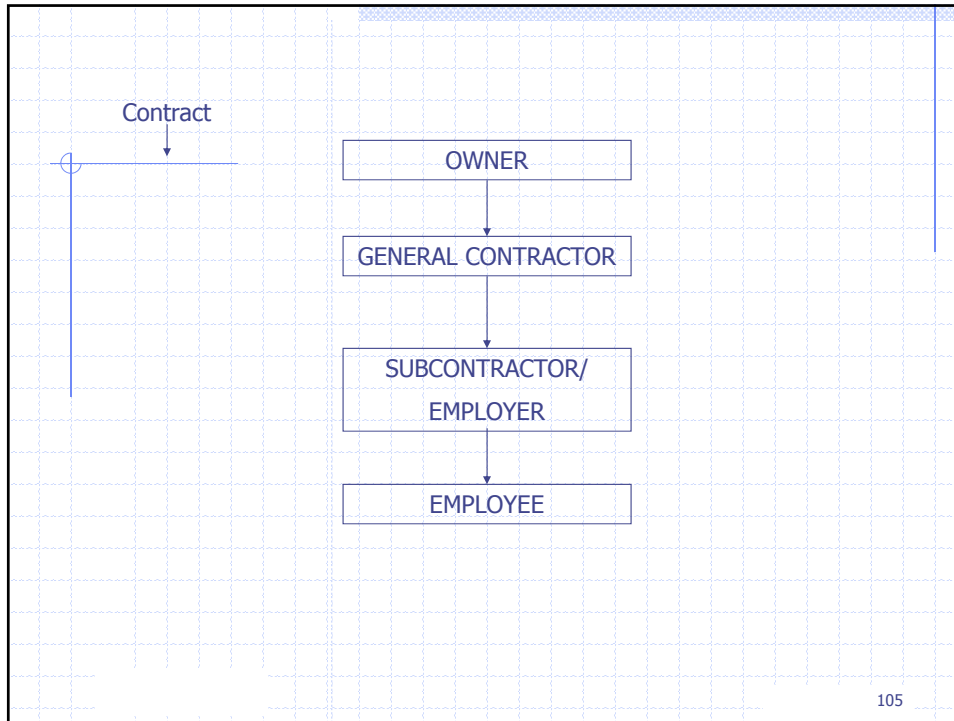
103

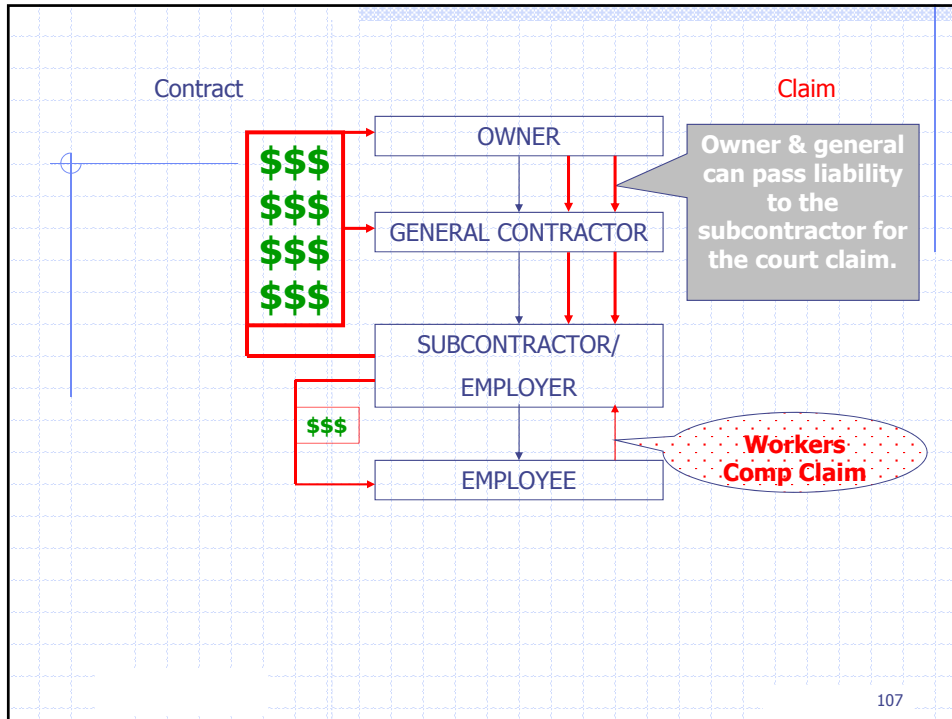
## The *Kotecki* Waiver

- The clauses of
  - "Thou shalt indemnify me" and
  - "Thou shalt fully insure the project"
- Are construed as being waivers of the protections afforded by the *Kotecki* decision.
- Waivers have been tacitly validated as recently as January of 2007.

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## What to Do...

- The key issue from a risk management standpoint is to
  - Review agreements to see if they contain a waiver of the protection afforded by the *Kotecki* decision, AND
  - Seek clauses which make the insurance the sole and exclusive remedy as between the contracting parties, AND
  - Check to see if the agreement having the waiver is otherwise an "insured contract" for purposes of CGL coverage.

108

## Again, remember...

- The AIA 2007 changes have made "additional insured" status EXPLICIT for Owners, Architects and consultants.
- The AIA's comment about the expanded additional insured status is:
  - "It has become common industry practice..."
  - "This practice saves legal expenses...by consolidating defense costs under one insurance policy."

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## Indemnity, A/Is, and Certs

### Additional Insured with P/COH: Additional Insured – Owners, Lessees or Contractors – Completed Operations

- ISO Form 20 37 07 04
- Modified in July, 2004
- "'Who Is An Insured' is amended to include... as an additional insured the person(s) or organization(s) shown in the Schedule...."

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## Indemnity, A/Is, and Certs

### Additional Insured with P/COH:

- "...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'.*"

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## Indemnity, A/Is, and Certs

### Additional Insured without P/COH:

- Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization
- Also modified July, 2004
- ISO Form 20 10 07 04

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## Indemnity, A/Is, and Certs

### Additional Insured Without P/COH:

- Additional Insured status, but
- Only for injuries "...caused, in whole or in part, by..."
  - Your acts or omissions; or
  - The acts or omissions of those acting on your behalf;
  - in the performance of your ongoing operations for the additional insured(s)..."

113

## Indemnity, A/Is, and Certs

### The ACORD Certificate family:

- 23 Leased Autos
- 24 Certificate of Property Insurance
- 25 Certificate of Liability Insurance
- 27 Evidence of Property Insurance

114

## Indemnity, A/Is, and Certs

### OLD Form 25

- Should any of the above described policies be cancelled, [the issuing insurer] **will endeavor to mail** \_\_\_ days written **notice**...But failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.

### NEW Form 25

- Should any of the above described policies be cancelled...**notice will be delivered in accordance with the policy provisions.**

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## Indemnity, A/Is, and Certs

### The ACORD Certificates are:

- Limited by their terms
- Designed to be a "snapshot"
- Speaking as of the day they were issued
- NOT supposed to create a "motion picture" of ongoing obligations

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## Indemnity, A/Is, and Certs

### ACORD 25 – limitations:

- "This certificate is issued as a matter of information only..."
- "It confers no rights upon the certificate holder..."
- "This certificate does not amend, extend, or alter the coverage afforded by the policy..."

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## Indemnity, A/Is, and Certs

### ACORD 25 – limitations:

- "The insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies."
- "Aggregate limits shown may have been reduced by paid claims."

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## Indemnity, A/Is, and Certs

### ACORD 25 – additional insureds:

- "If the certificate holder is an additional insured, the policy(ies) must be endorsed."
- "A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)."

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## Indemnity, A/Is, and Certs

### Do ACORD disclaimers work?

- Yes.
- *Pekin v. American Country* (1991)
- Policy language (manuscripted exclusion) trumps certificate

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## Indemnity, A/Is, and Certs

### Do ACORD disclaimers work?

- Loss payee clause of policy trumps erroneous certificate
- *Lu-An-Do, Inc. v. Kloots* (1999)
- On personal property claim by mortgagee

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## Indemnity, A/Is, and Certs

### Do ACORD disclaimers work?

- Yes
- *U.S. Pipe and Foundry v. U.S. Fidelity and Guaranty* (1974)
- Failure to notify of cancellation
- No liability for carrier
- For 1100 lawsuits from an explosion

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## Indemnity, A/Is, and Certs

### Do ACORD disclaimers work?

- Yes
- But only if YOU don't modify them.
- What happens if "endeavor" to notify is stricken from the form in the *Pipe* case?

123

## Indemnity, A/Is, and Certs

- Do ACORD disclaimers work? Agents have the authority to bind the company.
- *Dumenric v. Union Oil Co.* (1992)
- Including binding them through issuance of certificates.
- So...would the 1100 explosion suits be covered?

124

## Indemnity, A/Is, and Certs

### Do ACORD disclaimers work?

- Possibly... Part 1. The carrier is left without the ability to deny coverage.
- Part 2. The carrier unable to deny coverage may look to the agent who issued the certificate that stopped the coverage denial.
- Part 3. The result is an errors and omissions loss.

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## Indemnity, A/Is, and Certs

### Do ACORD disclaimers work?

- Bill Wilson, Ret. Director of the Virtual University for IIABA writes, "NEVER, EVER modify an ACORD certificate or policy form."
- "The odds are real, REAL good that you have no authority to do so in your agency/company agreement ...
- "[A]nd/or doing so is illegal in your state."

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## Indemnity, A/Is, and Certs

### Do ACORD disclaimers work?

- ACORD says:
- "Agents or brokers should not change any provisions on this form without prior consent of the issuing company."
- The certificate is not designed to
  - Waive rights
  - Amend a policy
  - Attach an endorsement.

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## Design Professionals

128

## First, a little law:

- Defective Specifications
  - Prepare plans and specs
  - Workable and not defective
  - Claims by Owner for defective specifications
    - Breach of Contract
    - Negligence
  - What if you are not the owner?

129

## First, a little law

- The Spearin Doctrine: the Implied Warranty of the Adequacy of the Specifications [US v. Spearin, 248 U.S. 132 (1918)]
- The Spearin Doctrine is used as both sword and shield

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## First a little law:

"[T]he insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate."

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## First, a little law:

### The Spearin doctrine

1. Needs only inaccuracy – not negligence or fraud
2. Cannot be evaded with disclaimers
3. Cannot be rendered inapplicable based on knowledge or expertise
4. Can be limited if there is a breach of the duty to make pre-award inquiries

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## First, a little law:

The Spearin doctrine may depend on whether it is a design or a performance specification:

- **Design** Specifications are exact dimensions, materials, specific services, and designs; no substitution
- **Performance** Specifications are more discretionary and focus on end result

133

## Law and Insurance:

- Is a construction manager's risk primarily a design exposure (a professional malpractice policy) or is it primarily a general business exposure (a CGL exposure)?
- Are there other policies that are "in play"?
- Is there "additional insured" status?

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## Law and Insurance:

- 2009 decision – Regal Construction v. Nat'l Union (New York courts)
- Construction manager was an additional insured under the GC's policy...
- ***"...only with respect to liability arising out of the [GC's] operations performed for the [CM]."***

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## Law and Insurance:

- Employee slips and falls on a painted joist
- CM seeks coverage under GC's policy; insurer refuses
- Court reads the "arising out of" language broadly
- The work was within GC's scope of work, so it was sufficiently connected to trigger AI status.

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## Design Professional Insurance Issues

- Definition of "Covered Services" or "Covered Acts"
- Declarations? Insuring Agreement? Definitions? Endorsement?
- How broad is it? What if engineering work is subcontracted?

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## Design Professional Insurance Issues

IRMI Online (1998) suggests:

- Understand the insured's daily activities
- Review the form and the endorsements
- Negotiate the policy – request removal of exclusions as needed
- Look to the specialty market

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## Design Professional Insurance Issues

- Past Personnel: does the policy cover past owners, partner, officer, director or employee while acting within the scope of their duties?
- Future Personnel: does the policy cover individuals who join the insured organization? Does it require notice?
- Will the policy respond for acts committed by either outside the policy period?

139

## Design Professional Insurance Issues

### Two major options:

- Defense Cost Coverage **within** Policy Limits
- Defense Cost Coverage **in Addition to** Policy Limits

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## Design Professional Insurance Issues

### Pros and Cons of Defense Coverage in Addition to Policy Limits:

- Pros: Defense in addition to limits gives a longer leash to defend against questionable claims
- Cons: Unlimited defense costs do not impose discipline on all parties involved

141

## Design Professional Insurance Issues

### A third option? "First-Dollar" Defense Costs Coverage:

- Policy language states that deductible or SIR is payable only on indemnity, not defense.
- Insurer has marketing advantage
- Example: "If the block in the Declarations labeled 'Deductible Applies To: Loss Only' is checked, the insured shall pay the deductible amount set forth in the Declarations for each loss. The deductible does not include claims expenses."

142

## Design Professional Insurance Issues

### Retroactive Dates:

- A retroactive date is an "occurrence" limitation residing inside a claims-made policy
- The general theory is that the event – the act, error or omission – has to occur after the retroactive date (without regard to when the claim is made) for coverage to apply.

143

## Design Professional Insurance Issues

### Retroactive Dates:

- The opposite of a retroactive date is a professional liability policy providing "full prior acts" coverage
- Retroactive dates are being used more and more aggressively, particularly in the arena of lawyers professional liability insurance.
- The rationale is to prevent coverage for known losses, to prevent stale claims, or long lag time claims.

144

# Subs and Suppliers and Risk Management

145

## Risk Management for the Subcontractor or Mat. Supplier

According to AGC, subcontractors and others downstream resist A/I endorsements because:

- Defects occur from multiple causes
- Multiple defects can occur simultaneously
- Each party should bear its own consequences (as a matter of liability AND insurance).

146

## Risk Management for the Subcontractor or Mat. Supplier

### How do subcontractors resist the exposure?

- Use standard contract modifications or addenda.
- Refuse to execute contracts, but perform the work.
- Modify the contract form.
- Legislative solutions.

147

## Risk Management for the Subcontractor or Mat. Supplier

### How do subcontractors resist the exposure?

- Not very well. None of those are perfect solutions.
- Encourage subcontractors and material suppliers to use their own forms whenever possible.

148



# James K. Ruble Seminar

*a proud member of The National Alliance for Insurance Education & Research*

Section 3

## **Diagnosing Issues in the CGL Policy**





# DIAGNOSING ISSUES IN THE CGL POLICY



Steven D. Lyon  
Lyon Consulting Services, LLC

1

## DISCLAIMER

**PLEASE BE ADVISED THAT THE CONTRACT LANGUAGE PROVIDED AND ANY DISCUSSION THEREOF, IS FOR INFORMATION PURPOSES ONLY.**

**I AM NOT AN ATTORNEY AND CANNOT OFFER LEGAL ADVICE, OR ADVICE ON THE POSSIBLE SUCCESS OR FAILURE OF THE LANGUAGE OR DISCUSSIONS PROVIDED.**

**MOREOVER, THIS LANGUAGE AND DISCUSSION MAY NOT WORK IN ALL SITUATIONS OR ALL JURISDICTIONS. SOME JURISDICTIONS INTERPRET CONTRACTS DIFFERENTLY, AND SOME STATES RESTRICT INDEMNITY AGREEMENTS. YOU SHOULD ALWAYS CONSULT AN ATTORNEY BEFORE DECIDING WHETHER TO MAKE USE OF ANY LANGUAGE PROVIDED OR DISCUSSED**

2

# ISSUE #1

## **UNDERSTANDING OCCURRENCE and CLAIMS MADE TRIGGERS**

3

### Definitions

- What is an “Occurrence” ?
- What is “Bodily Injury” ?
- What is “Property Damage” ?

4

## Insuring Agreement

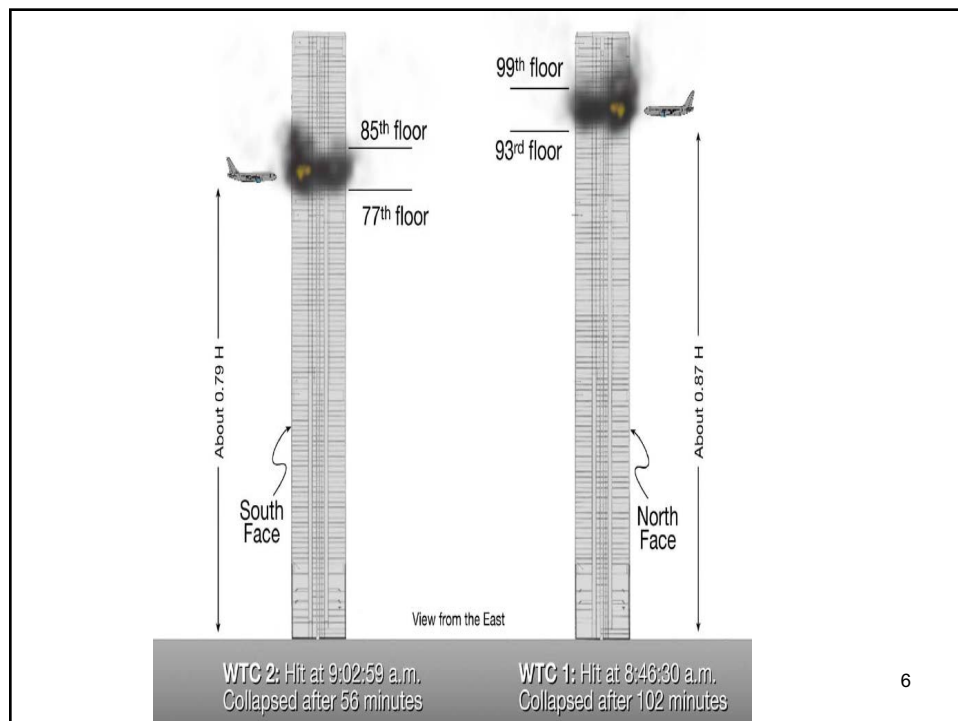
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

Occurrence: means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. (Not expected or intended from the point of the insured.)

5



6

## Wil-Prop Form

- *"'Occurrence' shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur."*

7

## Question

- While in your store, a large display collapses causing serious injuries to a young child. Is that Bodily Injury?
- The child's mother was standing right next to the child, but escaped any injury. However the mother has filed a lawsuit for shock, emotional distress, mental anguish and trauma. Is that Bodily Injury ?

8

## Bodily Injury

- Massachusetts Appeals Court in Richardson v. Liberty Mutual, Feb. 1999: "Bodily injury" as used in an insurance policy is a narrow and unambiguous term. It includes only actual physical injuries to the human body and the consequences thereof; it "does not include humiliation and mental anguish and suffering." Allstate Ins. Co. v. Diamant, 401 Mass. 654, 656, 658 (1988).
- Connecticut – Taylor v Mucci, 2008 Conn. Lexis 302. Ct. Supreme court held that emotional distress was not "bodily Injury"
- New Jersey – must have physical manifestation
- New York - In some jurisdiction such as New York bodily injury includes emotional distress even without physical manifestation. [U. S. Second Circuit, New York, Dec. 1999.](#)

9

## Property Damage Claims

- While working on a jobsite, Bob the Builder drops materials off the side of a building which cause \$3700 damage to an auto parked nearby. Is this PD?
- The damaged auto will be in the shop for 5 days to repair, and the owner is looking to be reimbursed the \$175 for a rental. Is this PD?
- While working on the jobsite, Bob causes the electric power to be knocked out for the retail stores across the street. There is no damage to the stores themselves, but each store is looking for \$1500 lost sales, for the time they were shut down due to loss of power. Is this PD ?
- While Bob is repairing the roof on your building, he stacks too much material in one place, and the roof collapses into your Data Center, damaging the computer, operating systems, software, hard drive and data. Is this PD ?
- While digging with his backhoe, Bob damages an underground fiber optic cable, which causes damage to the data on your hard drive. Is this PD ?

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# Loss of Use is “Property Damage” under CGL Policy

Hunton Andrews Kurth  
Michael S. Levine  
November 2, 2018

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## California Appeals Court Says Loss of Use Is “Property Damage” Under Liability Policy, and Damages Can be Measured by Diminished Value

[Blog](#) Hunton Insurance Recovery Blog

USA | November 2 2018

In a win for policyholders, a California appellate court has held that the loss of use of property resulting from alleged negligence constitutes property damage under a liability insurance policy.

In *Thee Sombrero, Inc. v. Scottsdale Insurance Company*, the property owner, Thee Sombrero, operated a venue as a nightclub. After a shooting inside the nightclub caused a patron’s death, the local government revoked Sombrero’s right to use the property as a nightclub and, instead, limited permissible use of the property to a banquet hall. Sombrero sued the security company it had hired to keep guns out of the club, alleging that it was the security company’s negligence that caused the city to revoke Sombrero’s nightclub use permit and that the loss of use of the facility as a nightclub resulted in damages of almost a million dollars based on an assessment of the property’s diminished market value. The security company did not contest the claim, and Sombrero obtained a default judgment.

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Armed with a default, Sombbrero next sought to hold the security company's liability insurer, Scottsdale Insurance Company, accountable for the judgment. Sombbrero asserted that the loss of its ability to use the venue as a nightclub constituted loss of use of tangible property under the security company's liability policy with Scottsdale. The insurer responded with a summary judgment motion, arguing that Sombbrero suffered only uncovered economic losses, not tangible property damage. Relying on Scottsdale's economic losses argument, the trial court granted the motion.

On appeal, a unanimous appellate court reversed in favor of Sombbrero. In doing so, the court held that Sombbrero's inability to use the property as a nightclub constituted property damage based on the policy's definition of "Property Damage," which included "[l]oss of use of tangible property that is not physically injured." The court also held that a proper measure of damages for a loss of use of undamaged property might be the property's diminution in market value. Indeed, as the court explained, "[i]n the liability policy context, diminution in market value is accepted as a *proper method of measurement* of any property damages which may have been sustained." Thus, the property's diminution in value properly served as a measure of Sombbrero's property damages.

The *Thee Sombbrero* decision has significant implications in California and other jurisdictions, given the use of similar if not identical language in liability insurance policies nationwide, and has already garnered national press attention. Walter Andrews, head of Hunton Andrews Kurth LLP's insurance coverage practice, explained in a recent interview by Law360, [available here](#), that the appellate panel properly treated Sombbrero's financial losses as a measure of its damages from its partial loss of use of the venue as a nightclub. As Andrews further explained, "[o]f course, the damages to be calculated from the loss of use of tangible property will result in a numerical calculation," "That does not make them 'economic loss and does not take them outside the insurance coverage."

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# Loss of Use as Property Damage Master Key Coverage

FC&S Bulletins  
October 2013

14

## Loss of Use as Property Damage

Q

We insure an electrical company that was hired to do work in a vacant apartment of a large apartment building. The insured's employee used a master key to enter the apartment and left the key in the door while he worked inside. Someone took the key, necessitating that locks on all the apartments in the building be changed. Our insured was charged for the replacement of all the locks.

The insurer has denied the claim, stating that it does not meet the policy's definition of property damage.

A

The claim should be properly paid under paragraph b. of the definition of property damage, "loss of use of tangible property that is not physically injured." The locks are tangible property and the theft of the master key rendered them useless for their intended purpose. The inability of the undamaged locks to provide security because of the loss of the master key is a perfect example of a loss of use claim covered under property damage liability insurance.

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## COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

### Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

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<b>INSURABILITY OF PUNITIVE DAMAGES BY STATE</b>		
<b>State</b>	<b>Direct Damages</b>	<b>Vicarious Damages</b>
Many States	Yes	Yes
California	No	Yes
Colorado	No	Undecided
Connecticut	No	Yes
Dist. of Col.	Undecided	Undecided
Florida	No	Yes
Illinois	No	Yes
Indiana	No	Yes
Kansas	No	Yes
Maine	No	Undecided
Massachusetts	No	Undecided
Minnesota	No	Yes
Nebraska	N/A	N/A
New Jersey	No	Yes
New York	No	No
Oklahoma	No	Yes
Pennsylvania	No	Yes
Rhode Island	No	Undecided
Utah	No	No
Virginia	Yes	N/A
Texas	Undecided	Yes

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## Punitive Damage Exclusions

**AAIS**  
**GL-894 Ed 2.4**  
 Page 1 of 1

This endorsement changes the Commercial  
 Liability Coverages provided by this policy

**PLEASE READ THIS CAREFULLY**

**PUNITIVE DAMAGES EXCLUSION**

The Commercial Liability Coverage is amended as follows:

**DEFINITIONS**

The following definition is added:

"Punitive damages" means "damages" that may be imposed to punish a wrongdoer and to deter others from similar conduct.

**EXCLUSIONS**

The following exclusion is added:

"We" do not pay for "punitive damages" and exemplary or vindictive "damages".

**GL-894 Ed 2.4**

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## 1992 McDonald Coffee Case UPDATE



**Stella Liebeck**

[Her name is now used for the Stella Award's]

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### **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

#### **Insuring Agreement- DEFENSE**

We will have the right and duty to defend the insured against any "suit" seeking those damages.

*However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.*

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## Four/Eight Corner Test vs. Extrinsic Evidence

- The Supreme Court of Tennessee held that the determination of the duty to defend **is** limited to the allegations in the complaint. *Travelers Indemnity Co. of Am. V. Moore & Assoc. Inc* 216 S.W. 3d 302,305 Tenn 2007.
- An insurers obligation to defend is determined solely by the allegation in the claimant's complaint, if suit has been filed.

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## Four/Eight Corner Test vs. Extrinsic Evidence

- The Supreme Court of California held that the determination of the duty to defend **is not** limited to the allegations in the complaint. *Scottsdale Ins. Co. v MV Tranp.*, 115P.3d460,466 (Cal.2005)
- Determination of the duty to defend depends on a comparison between the allegation of the complaint and the terms of the policy. *But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be covered.* Moreover, that the precise causes of action pled by the third party complaint, may fall outside policy coverage does not excuse the duty to defend, where other facts alleged, reasonably inferable, or otherwise known, the complaint could be fairly amended to state a covered liability.

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## Pre-Tender Defense Costs

- Question: What happens if your insured fails to tender a claim to the carrier because it does not believe there is any coverage under the policy, retains its own legal counsel at its own cost, and months later realizes after talking with a colleague there may be coverage under the policy and submits the claim for reimbursement?
- Answer: While the duty of an insurance company to defend an insured is very broad, most all states do not obligate the carrier to reimburse the insured any defense costs incurred prior to the tendering of the claim. Unlike late reporting of a claim, there usually is no need to show of prejudice by the carrier.
- State Summary: 16 States - carrier can disclaim, 4 States – carrier must show prejudice, 7 States- mixed, 24 States - no decision

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## Pre-Tender Defense Costs

- The Court of Appeals of Texas held, “ based upon the voluntary payments provision, insured’s cannot recover the costs of defending the underlying lawsuits, since they failed to notify the insurers of the suits pursuant to the policy provisions, and since they voluntarily undertook such costs and payments.
- The Court declined to accept the insured’s argument that the insurer was required to prove that it was prejudiced. “Because an insurer’s duty to defend is triggered by notice, the insurer has no duty to reimburse the insured for defense costs incurred before the insured gave the insurer notice of the lawsuit.”

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## SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

### 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim.
- d. **No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.**

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## Pre-Tender Defense Costs

- Tennessee
  - A District Court of Tennessee held that an insured was entitled to recover pre-tender fees and expenses because the insurer did not experience any prejudice as a result of the insured's late notice. (*Smith & Nephew, Inc v. Fed. Ins. Co. No 02-2455, 2005 WL 3434819 – 2005*).
  - The court concluded that a prejudice analysis should apply to both the existence of a duty to defend and late notice as well as to whether duty includes pre-notice costs, because a state like TN concludes that "notice is not a condition precedent to coverage". While it is logically consistent to find that a duty to defend does not arise until notice is provided in a state that holds notice to be a condition precedent to the duty to defend, the same is not true for a state like TN, which holds the duty exists independent of notice".

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K2 Investment Group, LLC, et al.,  
Respondents-Appellants,  
v.  
American Guarantee & Liability  
Insurance Company,  
Appellant-Respondent.

New York Court of Appeals  
June 11, 2013

27

- We hold that, when a liability insurer has breached its duty to defend its insured, the insurer may not later rely on policy exclusions to escape its duty to indemnify the insured for a judgment against him.

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- We affirm the summary judgment in plaintiffs' favor on the breach of contract claims without reaching the question that - 4 - - 5 - No. 106 divided the Appellate Division: the applicability of the insured's status exclusion and the business enterprise exclusion to American Guarantee's duty to indemnify Daniels for a judgment based on legal malpractice. We hold that, by breaching its duty to defend Daniels, American Guarantee lost its right to rely on these exclusions in litigation over its indemnity obligation.
- It is quite clear that American Guarantee breached its duty to defend -- indeed, it does not seem to contend otherwise now. We summarized the law applicable to this issue in *Automobile Ins. Co. of Hartford v Cook* (7 NY3d 131, 137 [2006]):
- "It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage.
- If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be.

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- "The duty remains even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered . . . . Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course."
- Here, the complaint in the underlying lawsuit against Daniels unmistakably pleads a claim for legal malpractice. American Guarantee no doubt had reason to be skeptical of the - 5 - - 6 - No. 106 claim; it is unusual, in a loan transaction, for lenders to retain a principal of the borrower to act as their lawyer, as plaintiffs here claimed they did. But that means only that the claim against Daniels may have been "groundless, false or baseless . . . meritless or not covered" -- it does not allow American Guarantee to escape its duty to defend. It would be different if the claim were collusive, but American Guarantee has neither claimed that plaintiffs and Daniels were colluding against it nor alleged any facts to support such a claim.

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## Late Reporting of Claims

- Are Pre-Tender and Late Reporting the same? No.
- Late Reporting under Occurrence vs. Claims Made policies
  - Condition precedent to coverage
  - Notice should be given: immediately, as soon as possible, promptly, as soon as practicable, or within a time frame.
- Most states have ruled that a late report, in and of itself, is not fatal to the claim; without a showing of material prejudice by the carrier (not just inconvenience or additional effort).
- However, this is usually not true with regards Claims Made policies.

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## Reimbursement of Defense Costs for Uncovered Claims

- The Duty to Defend is broader than the Duty to Indemnify [Greer-Robbins Co. v. Pac. Sur. Co. 174P.110,111 (Cal Ct. App. 1918)]
- If after spending \$40,000 to defend an insured, can the carrier get its money back when it successfully denies the claim because coverage does not apply.

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- **Fact: The duty to defend is broader than the duty to Indemnify**
- Question: Your client tenders a lawsuit to its CGL carrier. Since there is the potential / possibility that one of the allegations in the lawsuit might trigger coverage, the carrier opens up a claim, and begins defending under a reservation or rights letter. During the next 4 months, the carrier spends \$40,000 in defense costs.
- After seeking a declaratory judgement, the court ruled that the insurance company was not obligated to defend the insured, as none of the allegations in the lawsuit fell within the scope of coverage.

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## CGL Insuring Agreement- CG 00 01

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

34

## ANSWER

- It depends on how your state's courts have ruled on this issue.
- Several states have yet to rule on this interesting scenario.
- The following summary of outcomes, illustrates one of three ways which the courts have ruled.

35

## Different Schools of Thought

- No – violates the broad duty to defend clause of the policy, can't let insurance company come back at the end and ask for its money back, when it had a duty to defend. Can't do at the end of the case, what it is not permitted to do at the beginning.
- Yes – The insured did not pay for defense of uncovered claims, this was not bargained for in the contract
- Depends – Depending on the outcome of the case, and whether or not the insurer has timely and expressly reserved those rights in a properly executed a Reservation of Rights Letter. Recovery may also depend on any expressly stated policy language.

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## Jurisdictional

- Buss v. Superior Court of LA County
  - 27 count complaint was filed against insured
  - Only one count was potentially covered
  - Carrier defends under ROR, including the right to deny all coverage, and be reimbursed for defense costs for non-covered causes of action
  - Suit settles for \$8.5 mil and carrier incurs \$1.0 mil in defense costs. The Carrier retains an expert who apportions defense costs to be about \$55,000 for the one covered count

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## Buss v. Superior Court of LA County

- The Court held that the carrier did not have a duty to defend for claims that were not potentially covered, since it was not paid a premium to defend non-covered claims.
- Relying on the law of restitution, the court held that the carrier had a right to reimbursement because the insured would have been unjustly enriched if the carrier incurred the expense of defending against non-covered claims.

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### **Terra Nova Ins Co v. 900 Bar, Inc - PA**

- Opposite outcome of Buss
- Third Circuit court held that permitting such recovery would be inconsistent with the carriers offer to defend under a ROR letter.
- When an insurer offers to defend under a ROR it is uncertain whether it will have a duty to indemnify.
- By defending the insured, the carrier avoids the risk that the insured's defense will be lackadaisical. If it is, the carrier's exposure could be greater if it is determined that coverage is owed. Thus a defense under a ROR benefits both the insured and the insurer, and the carrier cannot recoup defense costs.

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### **American Foreign Ins Co v. Jerry's Sport Center, Inc 2008- PA**

- Court reviews Buss and Terra Nova and sides with Terra Nova, forbidding an insurer to reimbursement of defense costs absent policy language that explicitly permitted such right. (Arkansas thinks like that)

40

## Jurisdictional

- Florida – yes, relied on “Buss” decision
- Illinois – no
- Texas – only with unequivocal insured consent
- New Jersey - yes
- New York - yes
- Pennsylvania –no Jerry’s Sport
- Connecticut – no ruling to date, but likes the “Buss” decision in California
- Minnesota – no, Westchester Fire Ins Co. v. Wallerich (8<sup>th</sup> Circuit 2009)- company cannot amend the policy by a ROR letter

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## Jurisdictional

- Arkansas – no
- Arizona – no decisions
- Iowa – no decisions, but predicted would follow Minnesota
- Kansas – no decisions
- Montana – yes
- South Dakota – no decisions
- Wisconsin – unresolved, but insurers claim for reimbursement of defense costs was not frivolous

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## COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

### Insuring Agreement

We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

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But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) **Our right and duty to defend ends** when we have used up the applicable limit of insurance in the **payment of judgments or settlements** under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

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b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

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## g. Coverage Territory

All other parts of the world *if* the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph a. above;

(2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

**.....provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.**

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## g. Coverage Territory

"Coverage territory" means: **a.** The United States of America (including its territories and possessions), Puerto Rico and Canada; **b.** International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or **c.**

### U.S. Territories

- |                  |                             |
|------------------|-----------------------------|
| • Guam           | • Navassa Island            |
| • Virgin Islands | • Palmyra Atoll             |
| • American Samoa | • Wake Island               |
| • Baker Island   |                             |
| • Howland Island | <b><u>Commonwealths</u></b> |
| • Jarvis Island  | • Northern Mariana Islands  |
| • Johnston Atoll | • Puerto Rico               |
| • Kingman Reef   |                             |
| • Midway Islands |                             |

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## Examples

- Steve Lyon is a self employed insurance lecturer and consultant who has an unendorsed CGL policy through your agency.
  - While conducting a seminar in London, England Steve accidentally bumps into one of the participants and knocks her to the floor, resulting in a broken hip. The participant files a lawsuit against Steve in New York Federal court. Will Steve's CGL respond ?
  - Would your answer change if the suit was filed in the London courts ?

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## Examples

- Steve's Products, Inc has an unendorsed CGL policy through your office.
  - Steve manufactures CD players at his plant in Saratoga Springs, NY. John purchases a CD player from Steve to use while on vacation in Mexico. While in Mexico the CD player malfunctions and injures John. John hires a Mexican lawyer and files suit in the Mexican court system.
  - Steve Products, Inc has several sales reps. Philippe', is the European sales rep. who lives in Paris, France. Philippe' injures a potential customer. The potential customer files a lawsuit in the New York courts.

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## Coverage Territory Endorsements

- 1)CG 24 22 Amendment of Coverage Territory –  
Worldwide Coverage
- 2)CG 24 23 Amendment of Coverage Territory –  
Additional Scheduled Countries
- 3)CG 24 24 Amendment of Coverage Territory –  
Worldwide Coverage with specified Exceptions

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## Worldwide ?



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### GAP IN COVERAGE TERRITORY – International and CGL

- Luggage made in France
- Client bought luggage in France and brought it on vacation to USA
- Luggage defect injures client in USA (occurrence)
- Suit is brought back in France – no coverage under either policy a occurrence was in the US and suit was brought in France
- Occurrence would have to happen in France for international policy to respond and suit would have to be in the USA for CGL to respond.

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## Coverage Triggers

- Refers to the event that must occur before a liability policy applies to a loss
- Determines which liability policy among a series of liability policies covers a loss
- Two types
  - Occurrence
  - Claims-made

53

## OCCURRENCE FORM ISSUES

b. This insurance applies to "bodily injury" and "property damage" only if:

(2) The "bodily injury" or "property damage" occurs during the policy period; and;

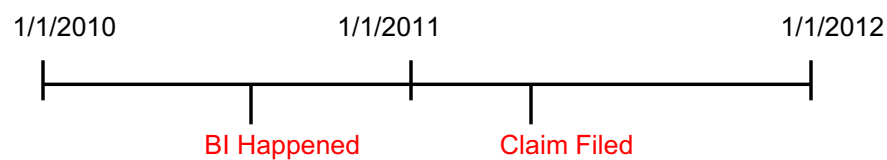
54

## Coverage Triggers

- Occurrence
  - The policy in effect when an accident or wrongful act causes injury or damage
- Claims-Made
  - The policy in effect when a claim is made against an insured

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## Occurrence Form



- Our focus is on “When did the BI or PD occur?”
- In this case, the 2010-2011 policy would respond to the claim
- The date the claim was made has no bearing on the trigger
- The claim could have been made during the 2010 policy period or anytime after

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## Claims Reporting Occurrence

Bob Smith, a long time client is very cost conscious. You have moved his account from company to company over the past 22 years. On January 2, 2014 Bob came into your office with a lawsuit alleging negligence on a project he completed in 2011 caused an injury to the claimant in 2013. Which Insurance Company should you report the claim to?

- 88-98 Podunck Mutual \$300,000
- 99-11 Lloyds of Lubbock \$500,000
- 12-13 Browntree Ins Co \$500,000
- 13 -14 Everly Ins Group \$1,000,000

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## Occurrence

It is possible for the

- Occurrence –exposure to asbestos 3/3/90
- Bodily Injury – diagnosed with asbestosis 3/3/05
- Claim – File Suit 3/3/06

To happen in three different policy periods

Under Occurrence Forms: We only care that the Bodily Injury occurred during the policy period; we don't care when the occurrence took place or when the claim was made.

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## Claims Reporting Occurrence

Bob Smith, a long time client has decided to retire after 25 years in the Construction business. During the past 18 years, Bob has had coverage with the following carriers, shown below. On January 10, 2013 there is a fire in a home which was built by Bob in 2009, where a young girl is badly injured. On June 1, 2013 A lawsuit is filed against Bob for negligence and faulty construction. Which carrier will respond to this claim ?

- 94-01 Podunck Mutual \$300,000
- 01-07 Lloyds of Lubbock \$500,000
- 07-10 Browntree Ins Co \$500,000
- 10-12 Everly Ins Group \$1,000,000

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## Occurrence Policies.....

- **DO NOT HAVE "TAILS"**
- **DO NOT HAVE "EXTENDED REPORTING PERIODS"**
- THESE ARE "CLAIMS MADE" TERMS

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## Discontinued Products and Completed Operations Coverage

- Continue CGL policy in force if possible
  - Must justify there is a need
- Buy a separate policy for this coverage
  - Standard vs. Excess Market
- Not just for Occurrence Policies- Claims Made too !
- How long does this exposure last ?
  - Statute of Repose

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## Statute of Repose

- MA = 6 years
- NH = 8 years
- ME = 10 years
- CT = 7 years
- NJ = 10 years
- PA = 12 years
- RI = 10 years
- VT = ?
- NY = ?
- What state has the longest ?

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## Misunderstanding...

- **Every person is personally liable for their own torts**, even if the torts are business torts committed while acting solely on behalf of a corporation, this protection is extraordinarily important to owners of small corporations. An all too common misunderstanding of business owners is that the “corporate veil” shields the owner from all tort liability.

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## Coverage A Insuring Agreement

- Known Loss Restriction
  - Denies coverage for injury or damage of which the insured is already aware prior to the policy inception
  - Eliminates multiple policies being called upon to pay for injury or damage **if known by an insured** that occurs over multiple policy periods
  - Standard CGL does not prohibit the triggering of PRIOR policies—just future ones.

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b. This insurance applies to "bodily injury" and "property damage" **only if:**

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

***Montrose Decision Wording – Pollution claim, put on notice as a PRP, got worse each successive policy period—separate occurrences all policies respond.***

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***Montrose Chemical Corp. vs. Admiral Insurance Co., 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d. 878 (1995)***

- Admiral Insurance Co. began insuring Montrose Chemical Corp. of California on a commercial general liability policy effective Oct. 13, 1982.
- Each of the four successive policies Admiral issued to Montrose contained the 1973 "occurrence" and "property damage" definitions.
- No later than two months **before** the first Admiral policy became effective, a Montrose Northern California (Levin Metals) site was discovered by the insured to be contaminated.
- In addition, **six weeks before inception of the first Admiral policy,** Montrose was notified by the Environmental Protection Agency that it was a potentially responsible party for response costs at a Southern California (Stringfellow) site.
- Montrose sought protection under Admiral's policies, obviously, to gain access to more limits because it was already being defended by six other CGL insurers.
- Admiral moved for summary judgment that it had no duty to defend or indemnify. The trial court decided in favor of Montrose, but the Court of Appeals reversed. Ultimately, the California Supreme Court granted review to consider the issue of whether defense (not indemnification) coverage was triggered by the pollution events

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- Admiral moved for summary judgment that it had no duty to defend or indemnify. The trial court ruled in favor of Montrose.
- The California Court of Appeals overturned the summary judgment of the trial court. The appeals court based its ruling upon the fact that the property damage was a continuous, progressive deterioration that was still in progress throughout the period covered by Admiral's policies, thus triggering coverage. It further decided that the wording in the CGL policy was not strong enough to preclude such losses. It also decided that the loss-in-progress rule did not preclude coverage in this case. Finally, it ruled that the expected or intended exclusion did not bar coverage in a progressive damage situation.
- The case went to the California Supreme Court where in July of 1995, the decision of the appeals court was affirmed.

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## “Who has to have Knowledge” Endorsement

### **"NOTICE OF OCCURRENCE"**

Add the following to Paragraph 2 of COMMERCIAL GENERAL LIABILITY CONDITIONS (Section IV):

e. Knowledge of an "occurrence," claim, or "suit" by the agent, servant or employee of any insured shall not in itself constitute knowledge of the insured unless individuals in the following positions shall have received such notice from the agent, servant or employee:

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## Known Loss Claim

- 1/1/10-11 CGL renewal
- 10/15/10 insured receives notice of claim
- Claim settled 7/1/11
- While 2011 policy will not respond at all;
- The known loss provision of the 2010 policy will not apply, since the insured was not aware of the claim at the beginning of the 2010 policy period
- Watch “first known” wording – limits coverage to one policy (non-standard forms)

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## Introduction to Claims Made

- Until the 1970’s all liability policies, including professional malpractice policies, were written on an Occurrence basis.
- Occurrence policies covered BI/PD/WA that occurred during their policy period, but imposed no time limit for reporting them. (pollution, asbestos, malpractice, etc)
- **Once the Occurrence happened, the carrier became perpetually obligated to indemnify the insured.**

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## Why Change?

- Inability to accurately set rates
- Predict carrier liabilities/ profit better
- Determines which insurer is on the claim

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## Setting Occurrence Rates

- Carrier's book has 100 Occurrence policies
- All have a 1/1/08 – 1/1/09 policy period
- All Policies set to renew 1/1/09
- Underwriter/Actuary attempting to set rates based upon loss history
- Facts:
  - 15 claims reported
  - Time Lag: The 15 claims made only represent about 25-30% of actual claims for the 1/1/08-09 policy period
  - Over time, this policy period will actually yield about 50-60 claims
- Carriers have a hard time determining the number and value of future claims (IBNR)
- **Carrier accepts a fixed price for an open ended promise to indemnify**
- Carriers have a hard time determining what their actual profit was for any given year

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## 1. Differences in Claims Made vs. Occurrence Form Triggers

### **c. Claims-Made Form Trigger (CG 00 02)**

*\*\*\*\*(pure claims made vs. claims made & reported\*)*

This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;"
- (2) The "bodily injury" or "property damage" did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and
- (3) A claim for damages because of the "bodily injury" or "property damage" is first made [and reported] against any insured, in accordance with paragraph c. below, during the policy period or any Extended Reporting Period we provide under EXTENDED REPORTING PERIODS. [example: CM&R End of year served with lawsuit]

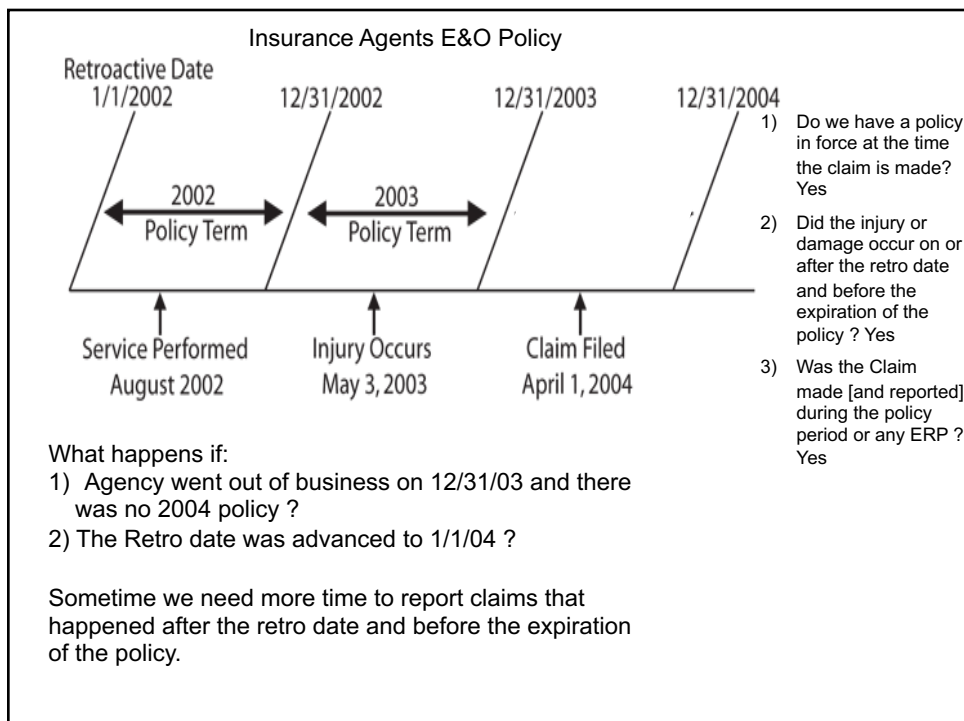
73

## Retro Date

### 2. Claims Made Retroactive date:

- a. All injury or damage that occurs prior to the retroactive date is excluded.
- b. May be the inception date of the first policy issued
- c. May be an earlier date than policy inception or None
- d. Limitations on changing the retroactive date

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### 3. Extended *Reporting* Periods-Tails

[need more time to report injury or damage that happened on/after retro date but before expiration]

#### a. Guaranteed by Coverage Form – BERPS and SERPS

As specified in section V of CG 00 02 an insured is entitled to an extended reporting period in any of the following situations:

- The policy is canceled or not renewed by the *insurer*.  
[one or two way tails]
- The policy is canceled or not renewed by the *insured*.
- The insurer renews or replaces the policy with one specifying a later retroactive date
- The insurer renews or replaces the policy with another policy that has an occurrence or other non-claims made coverage trigger.

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## b. Basic Extended Reporting Period (BERP)

2) Provides coverage for claims:

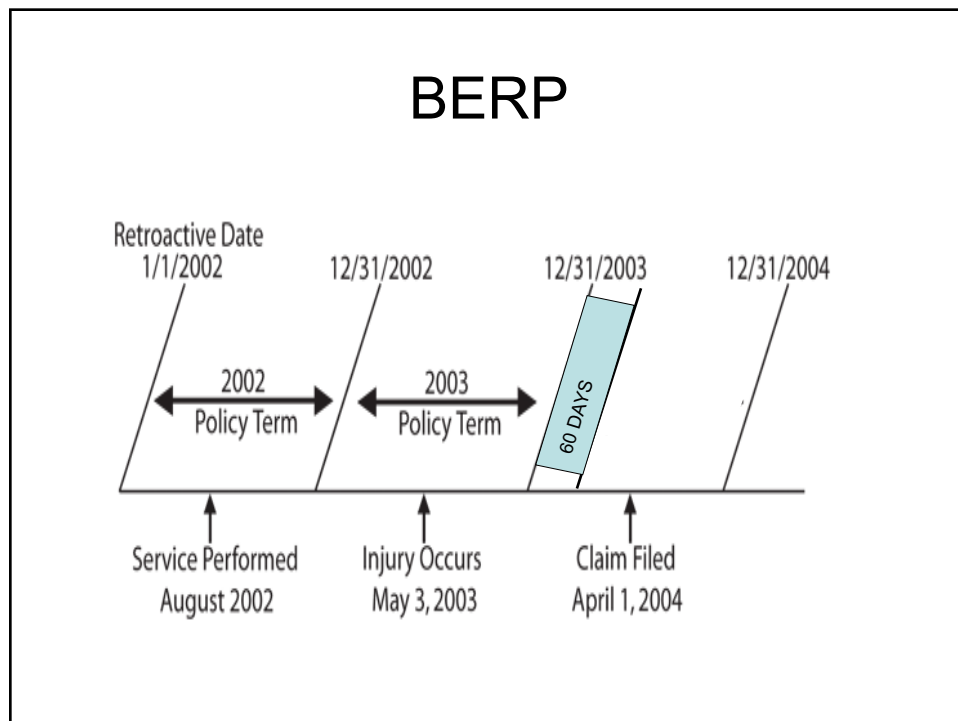
a) Known and reported no later than 60 days after policy term and claim made within five years

b) 60 Days for incurred but not reported

c) Shares aggregate limits of policy period

3) **Only extends time for reporting claims**

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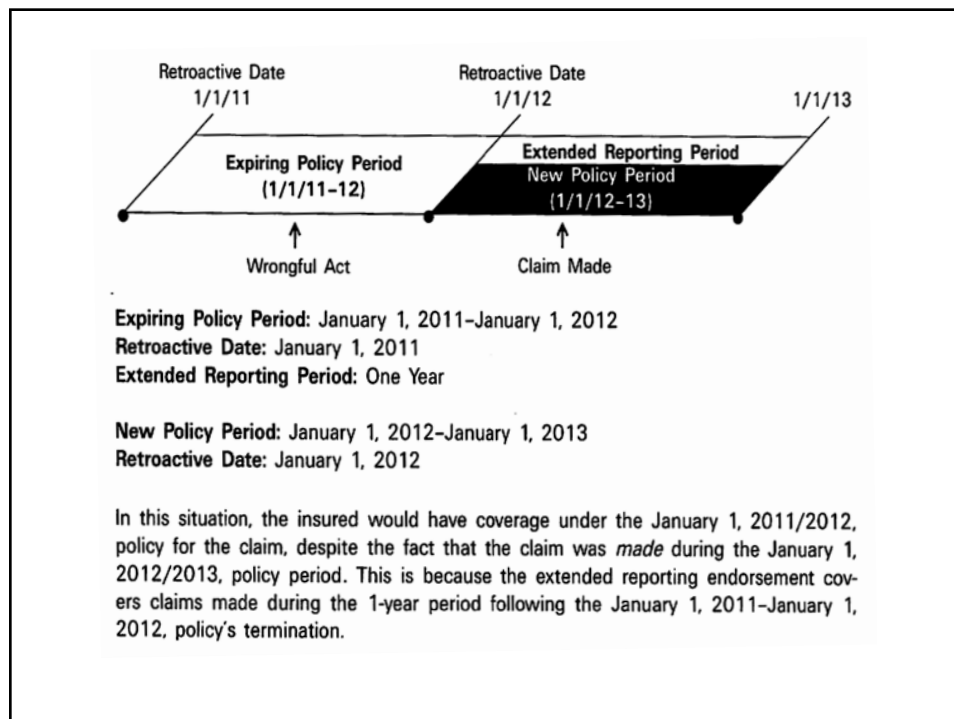
78

## c. Supplemental Extended Reporting Period (SERP)

1

- 1) Very specific requirements levied on the named insured [only offered for 30-60 days]
- 2) Additional premium / Who can buy it ?
- 3) Insured should request coverage and quotation to determine if coverage should be purchased.
- 4) Reinstates Limits under SERP ?
- 5) When should this coverage be negotiated ?

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## Manifestation Occurrence \*

- We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies **IF**:
- The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”,
- The “bodily injury” or “property damage” *first manifests and appears* during the policy period; and
- Prior to the policy period, no insured knew that the “bodily injury” or “property damage” had occurred in whole or in part.
- \*Some proprietary policies are not labeled as “Manifestation Occurrence” forms, but the definitions, conditions or endorsements added, in effect make them act as such. Claims can only “manifest” once.

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## Claims Made and Reported

- We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies **IF**:
- The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”,
- **A claim for damages because of the “bodily injury” or “property damage” is first made against any insured during the policy period** or any Extended Reporting Periods; and
- The “bodily injury” or “property damage” did not occur before the Retroactive Date or after the end of the policy period.

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Coverage Form Comparison		
Occurrence Form	Manifestation Occurrence Form	Claims Made Form
We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies IF:		
1	The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";	
2	The "bodily injury" or "property damage" occurs during the policy period; and	The "bodily injury" or "property damage" first manifests and appears during the policy period; and  A claim for damages because of the "bodily injury" or "property damage" is first made against any insured during the policy period or any Extended Reporting Periods; and
3	Prior to the policy period, no insured knew that the "bodily injury" or property damage" had occurred, in whole or in part.	The "bodily injury" or "property damage" did not occur before the Retroactive Date or after the end of the policy period.
(Adapted from CG 00 01 04 13 and CG 00 02 04 13, ISO Properties, Inc.)		

Dwight Kealey, Esq.

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**ISSUE #2**

**WHO IS AN "INSURED" ?**  
**and**  
**WHERE IN THE WORLD IS MY COVERAGE?**

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## Types of Insureds

### A. Three Types of Insureds under the Commercial General Liability Coverage Form

1. Named Insureds [What is an Named AI or an Additional NI ?]
2. Automatic Insureds
3. Non-Automatic - Additional Insureds added by endorsements.

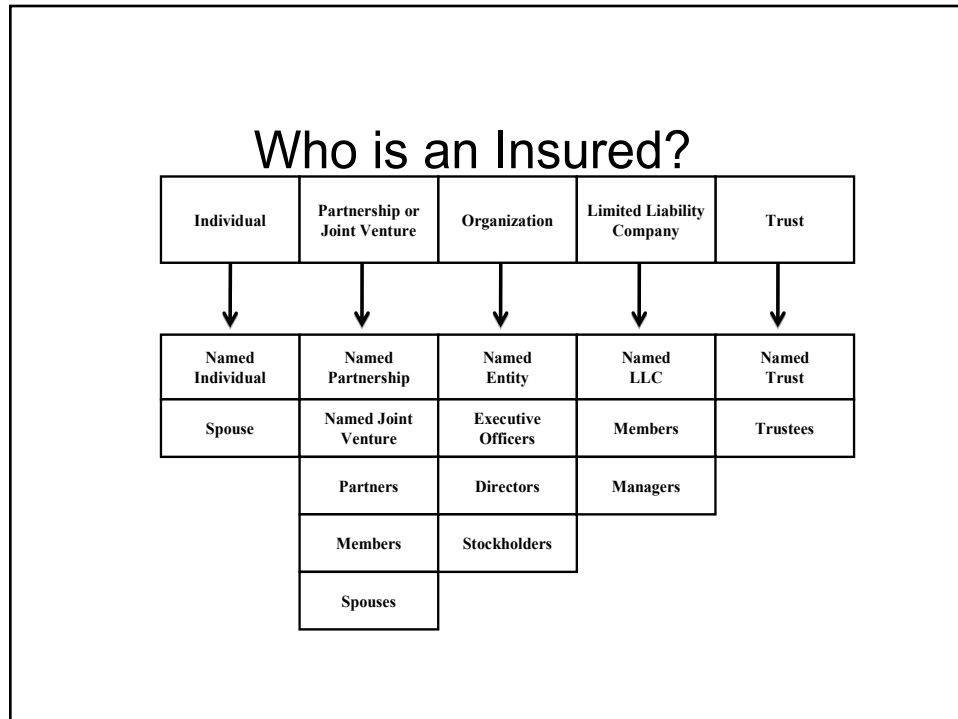
85

## Named Insured

### B. Named Insured – What does the term “You” and “Your” mean?

1. If named insured is an individual, includes spouse
2. If named insured is a partnership or joint venture, includes members, partners, and spouse(s)
3. If named insured is a limited liability company (LLC), includes:
  - a. Members
  - b. Managers
4. If name insured is a corporation, includes:
  - a. “Executive Officers,” Directors, with respect to their duties
  - b. Stockholders, with respect to their liability
5. If named insured is a Trust, includes the trustees within the scope of their duties

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## Example

- ABC Corporation is the named insured under an unendorsed CGL policy.
- Who is entitled to defense and indemnity coverage under this CGL policy?
  - ABC Corporation?
  - Mr. Johnson President of ABC, Inc. ?

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## A Closer Look...

### Example:

- CGL Named Insured is Steven Lyon t/a Lyon Consulting, a sole proprietorship.
- Is my wife an Insured when she injures a customer while assisting him ?
- Does she have coverage for her separate Crafts business ?
- Do I have coverage for a new business I formed, Steve Lyon t/a Lyon Landscaping, even though I forgot to tell my agent and carrier?

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## A Closer Look...

### SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
  - a. An **individual**, you and your spouse are insureds, but only with respect to the conduct of a business of which “you” are the sole owner.

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**SECTION II – WHO IS AN INSURED****1. If you are designated in the Declarations as:**

**a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.**

**b. A partnership or joint venture, you are an insured.**  
Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

**c. A limited liability company, you are an insured.**  
Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

**d. An organization other than a partnership, joint venture or limited liability company, you are an insured.** Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

**e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees**

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## Example

- ABC Corporation is the named insured under an unendorsed CGL policy. Who is entitled to defense and indemnity coverage under this CGL policy?
  - ABC Corporation?
  - Mr. Johnson President of ABC, Inc. ?
  - Mr. Johnson when he calls the superintendent a “moron” at his sons PTA school meeting ?

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## Automatic Insureds

### C. Automatic Insureds - Includes Others:

1. **"Employees"** – while acting within the scope of their employment. [why? Coop]
  - a. Employee Definition
 

*"Employee" includes a "leased worker". "Employee" **does not** include a "temporary worker".*
  - b. Leased Employee Definition
 

*"Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".*
  - c. Temporary Workers Definition
 

*"Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.*
  - d. Limitations or Exceptions to Coverage- except for BI/PI/AI to the Named insured, partners or members or other employees and for prof health care services

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## Temp. vs. Leased Employee

- When is a temp no longer a temp ?
  - *"Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.*
- When the Temporary Worker no longer fits the definition of such !
  - When the Temp. Worker is not being used for a short-term workload condition or as a substitute for a permanent employee on leave

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## Claim Example

- Due to high processing volume for 1/1 renewals, Lyon Insurance Agency (LIA) hires a "Temporary Worker" from a local Temp Agency (TA)
- The TA supplies WC/EL for the Temp. Worker, while LIA supplies WC/EL for all its other employees.
- After three months of using the Temp Worker things are going very well at LIA, and the Temp Worker continues working at LIA.
- Steve Lyon principal of LIA trips with a hot cup of coffee and spills it on the Temp Worker, severely injuring him. Temp Worker collects statutory WC benefits from its employer TA.
- Because of the severity of his injury Temp. Worker (a single dad) brings a tort action against LIA for \$500,000 for his pain and suffering and separately for \$500,000 on behalf of his daughter for loss of consortium
- The suit is permitted to proceed by the courts, as the state's exclusive remedy doctrine is ruled not to apply to LIA and the Temp. Worker.  
(In NJ, LIA and TA are deemed Co-employers and exclusive remedy would apply to both)
- LIA's CGL carrier denies the claim citing Exclusion E: Employers Liability

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## Claim Example

- Steve is very annoyed and counters with the facts that the Temp Worker is NOT an employee and the exclusions cited applies only to employees.
- The CGL carrier continues to deny based upon the facts of the claim. Despite the fact that Temp Worker was furnished to LIA he no longer fits the definition of such, as he is not there short term, nor is he a replacement for a permanent employee.
- The CGL carrier's position is that Temp Worker has turned into at least a "Leased Worker" if not an "employee"; and therefore the EL exclusion does indeed apply.

*"Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".*

*Employee" includes a "leased worker".*

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## Claim Example

- What could LIA have done to protect itself from this situation ?
  - Alternate Employer Endorsement should have been added to TA's WC policy naming LIA as the alternate employer [think AI endt; watch EL limits adequacy]
  - Add CG 0424 Coverage for Injury to Leased Workers to LIA's CGL policy [Redefines CGL definition of "employee" to NOT include Leased Worker, so EL exclusion does not apply]

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**However, none of these "employees" or "volunteer workers" are insureds for:**

**(1) "Bodily injury" or "personal and advertising injury":**

**(a) To you**, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), **to a co-"employee"** while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

**(b) To the spouse, child, parent, brother or sister** of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a) above**;

**(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or**

**(d) Arising out of his or her providing or failing to provide professional health care services.**

**(2) "Property damage" to property:**

**(a) Owned, occupied or used by,**

**(b) Rented to, in the care, custody or control**

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## Fellow Employee Exclusion

- Contained in both CGL and BAP
- CGL has a give back for “executive officers”
- BAP does not
- At very least, we should equate the two policies to have coverage for “executive officers” by adding CA 20 56 for designated positions/persons or CA 20 55 to delete the exclusion in its entirety.

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## Automatic Insureds

C. Automatic Insureds - Includes Others:

2. **Volunteer Workers** – while performing duties related to the conduct of named insured’s business  
*“Volunteer worker” means a person who is not your “employee”, and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.*
3. **Real Estate Managers** – other than “employees”  
*Any person (other than your “employee” or “volunteer worker”), or any organization while acting as **your** real estate manager.*
4. Persons with temporary custody or property if named insured dies
5. **Legal representative** if the named insured dies

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## Automatic Insureds

C. Automatic Insureds - Includes Others:

6. **Newly Acquired or newly Formed organizations:**
  - a. If no other similar insurance
  - b. Until the end of the policy period or 90th day
  - c. Excludes prior injury or damage
7. **No person or organization is an insured with respect to the conduct of any *current or past* partnership, joint venture, or limited liability company that is not SHOWN as a Named Insured in the Declarations**

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COMMERCIAL GENERAL LIABILITY  
CG 24 54 12 19

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

### **AUTOMATIC INSURED STATUS FOR NEWLY ACQUIRED OR FORMED LIMITED LIABILITY COMPANIES**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A.** Paragraph 3. under **Section II – Who Is An Insured** is replaced by the following:
- 3.** Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization.  
However:
    - a.** Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
    - b.** Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
    - c.** Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.
- B.** The last paragraph of **Section II – Who Is An Insured** is replaced by the following:  
No person or organization is an insured with respect to the conduct of any current or past:
1. Partnership or joint venture; or
  2. Limited liability company, unless Paragraph **A.** above applies;
- that is not shown as a Named Insured in the Declarations.

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**ABC Corporation is the named insured under an unendorsed CGL policy.**

**Who is entitled to defense and indemnity policy?**

- ABC Corporation?
- Mr. Johnson President of ABC, Inc. ?
- Mr. Johnson when he calls the superintendent a pedophile at his sons PTA school meeting ?
- Bob Jones, an employee of ABC, Inc. ?
- ABC Corp for injuries to an employee ?
- ABC, LLC which was formed last week to buy a piece of of real estate property ?
- ABC-XYZ a joint venture formed between ABC, Inc and XYZ, Inc to develop a residential housing project ?
- Nurse Nancy an employee of ABC, Inc, injects an injured employee with the wrong medicine causing an allergic reaction ?
- Bob Jones an employee, is sued by Nurse Nancy for injuries he caused to her.

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## Who's an Insured ?

- ABC, Inc. is the named insured on a CGL policy
- Jennifer owns 100% of ABC, Inc.
- Jennifer forms and owns 100% of XYZ, Inc.
- Is XYZ, Inc. an insured ?
  
- NO !
- Why not ?
- New Entity not formed by "YOU"
- Employees are not "you's"
- Common Interest, but not formed by ABC, Inc
- ABC, Inc. would have had to form XYZ in order to trigger coverage [Watch carrier broadening endorsements]

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## ISO CG 00 01 (0413)

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
  - b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
  - c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

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## WHO IS AN INSURED ?

- Changing Named Insured's
  - Sole Prop to LLC
  - Don't delete NI's
- Contractors / Business Retire / Cancel Policy
- Mergers / Acquisitions – Where is Coverage?
  - Successor Liability Coverage
- Joint Ventures
- CEO Retirement / "Of Counsel"

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## Changing Named Insured

- CGL: Steve Lyon T/A Lyon Contracting
- January 1, 2007 to January 1, 2016
  
- CGL: Lyon Contracting, LLC
- Effective April 12, 2016
  
- Claim is filed against Steve Lyon in 2017 for injuries resulting from improper work performed in 2015

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## Situation #2

- ABC Manufacturing, Inc. sold their assets (Asset Only Sale) to XYZ, Inc. effective 1/1/07. A claim was filed against ABC 6/1/07 for injuries arising out of a product they manufactured in 2004. Where's the coverage?
  
- Asset Only Sale- The Seller retains liability, needs Discontinued products /completed operations coverage.

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### Situation #3

- ABC Manufacturing, Inc sold their business to XYZ, Inc. (Asset & Liabilities). A claim was filed against ABC on 6/1/07 for injuries arising out of a product they manufactured in 2004. Where's the coverage?
- Previous entity should be named on current CGL policy "forever".

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### Situation #4

- Steve's Construction Inc. and Liz's Construction Inc. for a joint venture to build a Condominium complex in 2015.
- Steve & Liz's Excellent Joint venture is the named insured under a CGL policy.
- The project was completed in 2016, and the CGL policy canceled.
- Two years later a claim is filed for injuries or damages resulting from their work

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## Situation #5

### “Of Counsel” Attorneys ?

- Any problems meeting the definition of “insured” under the CGL policy ?
    - Are they the entity?
    - Are they a partner ?
    - Are they a manager and/or member ?
    - Are they a director of officer ?
- "Of counsel" originally described a semi-retired or retired partner who still kept a hand in the firm. Today, the designation "of counsel" is used to describe everything from a full-time outside lawyer providing expertise in a particular specialty, to a firm of the guy down the hall who is available to discuss cases over coffee. -- Nancy Kaufman October 2000
- Are they an Employee?

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## Situation #6

- ABC Corporation, Inc. manufactures products (machines) and is managed by their chief executive officer, Ed Norton. ABC’s CGL policy, a standard unendorsed ISO CGL occurrence policy, has a calendar year effective date. Ed decides to completely retire from ABC Corporation, Inc., in 2014.
- A product made by ABC on February 2, 2015, malfunctions on June 15, 2015, and causes fatal injuries to a consumer. The consumer’s estate sues ABC Corporation, Inc. and Ed Norton personally. Does Ed still have coverage even though he is retired and is no longer a director, officer or employee of ABC ?
- The insurer answers the complaint and agrees to defend the named insured, ABC Corporation, Inc., but denies that any coverage could possibly apply to Ed Norton and refuses to defend or consider paying on his behalf. Their reasoning—Ed Norton is not an executive officer at the time of the bodily injury and therefore has no insured status under the CGL on June 15, 2015.

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## Successor Liability Coverage

[Insurance Risk Management Institute-IRMI]

- **Types of Corporate Acquisitions**

- Generally, a company can acquire another in one of three ways.

- Statutory mergers
- Stock purchases
- Asset purchases

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## Successor Liability Coverage - IRMI

- One of the risks associated with corporate acquisitions is that the acquiring company may be statutorily or contractually liable for the long-tail claims arising out of the target company's preacquisition operations that have been "incurred but not reported" (IBNR).
- Suppose, for example, that the target of a corporate acquisition operated a manufacturing plant at a particular location for many years and that, unbeknownst to the parties, pollution has been occurring in the soil and groundwater. After a corporate takeover, an acquiring company would succeed to ownership of the plant. If the pollution is discovered later, the acquiring company may be held liable for the cleanup costs.
- Whether the acquiring company has coverage for the target company's long-tail IBNR liabilities under the target company's preacquisition insurance policies depends in part on how the corporate transaction is structured.

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## Successor Liability Coverage

[Insurance Risk Management Institute-IRMI]

- In a **statutory merger**, the acquiring company subsumes the target company. The target company ceases to exist as a separate entity, and only the acquiring company survives the corporate transaction. In that kind of situation, state statutes specify that all of the long-tail liabilities for IBNR claims and contractual rights of the target company—including its rights under occurrence-based insurance policies—are automatically transferred to the acquiring company by operation of law.

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## Successor Liability Coverage

[Insurance Risk Management Institute- IRMI]

- In a **stock purchase**, the acquiring company purchases all of the stock of the target company so that the acquiring company becomes its new owner. The target company continues to exist as a separate entity. Its long-tail liabilities and insurance coverage remain in place, and the target company can still demand coverage for IBNR claims under its preacquisition insurance policies the same as before the corporate transaction.

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## Successor Liability Coverage

[Insurance Risk Management Institute- IRMI]

- In an **asset purchase**, the acquiring company buys all of the physical and intangible assets that the target company uses to carry on its business. The target company continues to exist as an empty shell. Generally, neither the long-tail liabilities for IBNR claims nor the insurance policies of the target company are transferred by operation of law to the acquiring company.
- (There are a few exceptions to this. Normally, they will be transferred only if the acquiring company agrees to contractually assume the long-tail liabilities for IBNR claims, and the target company agrees to assign\* [usually not permitted by policy] the insurance policies, under the terms of the purchase agreement.)

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## Successor Liability Coverage

[Insurance Risk Management Institute- IRMI]

- Attempting to transfer insurance policies under an asset purchase agreement poses a coverage problem. Standard CGL policies contain a "no assignment" clause that prohibits the transfer of the policyholder's interest under the policy to another party without the insurance company's consent. For example, the Common Policy Conditions coverage form attached to standard CGL policies states as follows.

### F. Transfer Of Your Rights And Duties Under This Policy

- Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

- Form number [L 00 17 11 98](#), © Insurance Services Office, Inc., 1998.

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## Successor Liability Coverage

- But in fast-moving corporate deals, the parties usually do not seek the consent of the target company's CGL insurer before finalizing an asset purchase. Does that mean that unapproved assignments of insurance policies in asset purchase agreements are invalid?
- Courts answer that question in one of two ways, depending on when they think the target company's right of coverage under an occurrence-based, third-party liability policy arises.
  - Courts favoring the policyholder hold that the target company's right to coverage under an occurrence-based, third-party liability policy arises immediately when an IBNR claim occurs. Under this view, the target company may assign that right to the acquiring company in an asset purchase agreement.
  - Courts favoring the insurer hold that the target company's right to coverage under an occurrence-based, third-party liability policy does not arise until the actual claim is presented or the actual lawsuit is filed. Under that view, before a claim is presented or a lawsuit is filed, the target company does not have any right yet to coverage for an IBNR claim that can be transferred to the acquiring company in an asset purchase agreement.

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### Gopher Oil Co. v. American Hardware Mut. Ins. Co.

588 N.W.2d 756 (Minn. Ct. App. 1999),

- This case exemplifies the thought process of pro-policyholder courts. In that case, the policyholder deposited oil sludge at four disposal sites, and environmental contamination took place from 1954 to 1966. In 1973, the policyholder sold its assets to an acquiring company, which took the policyholder's corporate name. The CGL insurer that issued preacquisition policies was not advised of the transaction, and so it did not give its consent. In 1991, environmental claims were made, and the acquiring company was held liable for cleanup costs.
- The acquiring company sought coverage under the preacquisition insurance policies issued to the policyholder. The court held that the "no assignment" clause did not bar coverage here.
- The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure. But when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity.

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# ISSUE #3

## HORIZONTAL vs. VERTICAL EXHAUSTION

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## CGL Policy Conditions

# FIRST NAMED INSURED



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## First Named Insured

Who has all the rights under the policy?

- Right to Cancel
- Cancellation Notices
- Authorized to make changes
- Premiums: pay and return
- Non-Renewal notice
- Audit Responsibility and premiums
- Claims History

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## What is the Purpose of the “Other Insurance” Clause

### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

#### a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.**....

#### b. Excess Insurance

(1) This insurance is excess over:....

#### c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

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## Other Insurance Clause

- Pre 1998 CGL Form
  - 1 out of 4 chance in getting it right
    - Excess / Primary = wrong !
    - Primary / Primary = wrong !
    - Excess / Excess = wrong !
    - Primary / Excess = right !
  - Primary and Non-Contributory requirement

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## 1998 Revision of Other Insurance Clause

### 4. OTHER INSURANCE

#### b. Excess Insurance:

This insurance is excess over:

(2) Any other **primary** insurance available to you covering liability for damages arising out of the **premises or operations; or products and completed operations** for which you have been added as an additional insured.

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## W9/PHC Real Estate LP v. Farm Family

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### W9/PHC Real Estate LP v. Farm Family

- Due to a recent NJ Superior Court decision the effect of AI status is unclear
- Superior Court of NJ completely ignored the intentions and expectations of both parties
- While the courts purely legal decision is technically correct, the holding upsets practical reasons for obtaining AI status and creates uncertainty for the party receiving that status.

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## Case Facts

- Property Owner and Property Manager (“Owner”) sought to be added and were named as additional insured under CGL policy of snow removal contractor.
- Snow Removal contractors placed CGL policy with Farm Family
- Owner had a CGL policy through Zurich
- A slip and fall claim arose out of contractors negligent snow removal on the Owner’s property

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## Case Facts

- Owner sought defense and indemnification as AI under contractors Farm Family policy
- Farm Family denied coverage and the court upheld based upon an analysis of the “Other Insurance” clause contained in both policies
- While there are various types of “Other Insurance” clauses, they basically fall into two categories:
  - One category provides if two primary insurance policies apply to the same loss, the two insurers must allocate the loss between them
  - The other type of “Other Insurance” clause, is known as an excess coverage clause. This clause provides that, if other primary insurance covers the same loss, it must be exhausted before the other policy kicks in.<sup>130</sup>

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## Conclusion

- In the Farm Family case, its policy procured by the snow removal contractor was an excess coverage policy
- The Zurich policy was an allocation type policy
- As a result the Court held that Zurich provided primary coverage and Farm Family provided excess coverage.
- Since the limits of the Zurich policy covered the personal injury loss, the Farm Family policy was never reached...DESPITE the intent of the parties to shift the insurance risk to the snow removal contractor who agreed to name the Owner as an additional Insured.

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## Horizontal vs. Vertical Exhaustion of Limits

- Other Insurance Clause / Primary Non-Contributory
- Who goes first, Who goes second, etc..
- Primary means- CGL,CUMB or both or none
- Kajima Construction Services, et al. v. St Paul Fire and Marine Ins Co. (ILL-targeted tender rule.)
- Pacific Coast Building Products v AIU Ins Co

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## Horizontal vs. Vertical Exhaustion of Limits

Saxe Doernberger & Vita  
Willis

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In those states that have litigated this issue, the following theories have been adopted:

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## Horizontal Exhaustion

- California
- Illinois
- New York
- Illinois
- Pennsylvania
- Maryland
- Kansas
- Louisiana (?)
- New Jersey (AI)

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Most jurisdictions where this issue has been decided embrace horizontal exhaustion of limits versus vertical exhaustion. In horizontal exhaustion jurisdictions (IL, PA, MD, NY, CA, KS and sometimes LA - please check with your attorney) all primary insurance available to an insured (including their own primary insurance) must be exhausted before invoking any excess insurance. Assuming both parties have other insurance wording equivalent to that found in ISO's Commercial General Liability form CG 0001®, our hypothetical \$10 million claim in a horizontal allocation state would likely be settled as follows:

<b>LOSS LAYER</b>	<b>HORIZONTAL EXHAUSTION WHO PAYS?</b>	<b>HOW MUCH?</b>
First \$1M	Tenant's primary	\$1M
Second \$1M	Landlord's primary	\$1M
Next \$8M	Tenant & Landlord	\$4M ea
	<b>Total paid by Tenant</b>	<b>\$5M</b>
	<b>Total paid by Landlord</b>	<b>\$5M</b>

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## Vertical Exhaustion

- New Jersey (environmental)
- Minnesota
- Arkansas
- Washington
- Kentucky
- Colorado
- Missouri
- Texas
- Virginia

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The outcome could be significantly different in vertical exhaustion jurisdictions (TX, NJ, MN, WA, CO – please check with your attorney). Under vertical exhaustion rules, all insurance from the first party must be exhausted before invoking any insurance from the second party.

<b>LOSS LAYER</b>	<b>VERTICAL EXHAUSTION WHO PAYS?</b>	<b>HOW MUCH?</b>
First \$1M	Tenant	\$1M
Second \$1M	Tenant	\$1M
Next \$8M	Tenant	\$8M
<b>Total paid by Tenant</b>		<b>\$10M</b>
<b>Total paid by Landlord</b>		<b>\$0</b>

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## Lamb- Weston Rule

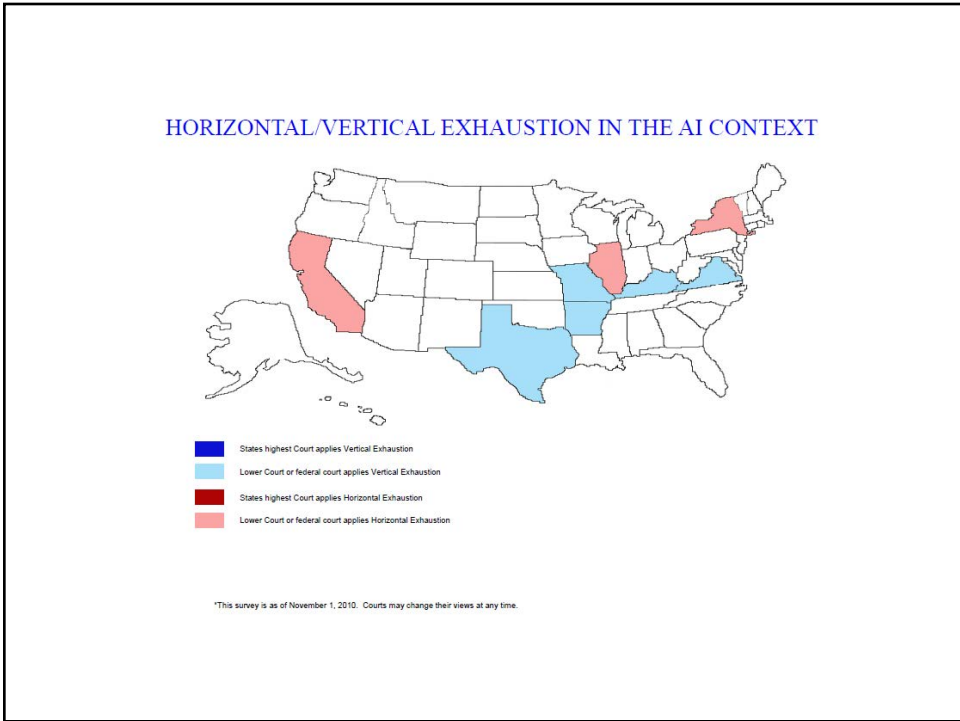
- Alabama
- Arizona
- Delaware
- Idaho
- Indiana
- Nevada
- Oregon
- Rhode Island
- Maine ?
- Michigan ?

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In jurisdictions applying the Lamb-Weston rule (AL, AZ, DE, ID, IN, NV, OR, RI, and sometimes ME, MI, LA and TN – please check with your attorney), all other insurance clauses may be ignored and claims would likely be pro-rated.

LOSS LAYER	LAMB-WESTON RULE WHO PAYS?	HOW MUCH?
First \$1M	Tenant's primary	\$500,000 ea
Second \$1M	Landlord's primary	\$500,000 ea
Next \$8M	Tenant & Landlord	\$4M ea
	<b>Total paid by Tenant</b>	<b>\$5M</b>
	<b>Total paid by Landlord</b>	<b>\$5M</b>

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**Major Construction Company  
New Revised Insurance  
Requirements**

May 9, 2013

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## NEW INSURANCE REQUIREMENTS

- Please be advised that effective immediately, XXXXXXXXXXXX Construction Corporation has revised their standard insurance requirements for General Liability and all contractors, regardless of your trade, are required to comply with the same at your next insurance renewal.

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- Going forward you will be required to provide General Liability limits of \$2 million per occurrence and \$4 million general aggregate. To be clear, these limits CAN NOT be accomplished through a combination of General and Excess Liability. This means, if you have General Liability limits of \$1 million per occurrence and \$2 million general aggregate but you have \$25 million in Excess Liability, you are still not in compliance. Please read and understand that part thoroughly.

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- Please also be advised that this is not specific to any one project or any one contract, it is a global change in the minimum requirements needed to work for XXXXXXXXXX. Failure to comply with these requirements on existing projects will result in progress payments being suspended. Failure to comply with these requirements going forward will affect your ability to secure the work on future projects. Understand that this is an industry wide change and the majority of comparable construction managers and even several owners / developers either have or will be implementing a similar process.

It is important that you speak to your broker immediately and take steps to make these changes to your policy upon renewal. If your broker is unable to help or if you just have questions or concerns, please do not hesitate to contact us for guidance. tischman

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## Primary and Noncontributory

- If you haven't been asked to indicate on a certificate of insurance that coverage for the additional insured is "primary and noncontributory," then you don't insure contractors.
- We know what general contractors want; they want the additional insured coverage provided by a subcontractor's policy to respond as primary and their own policy to respond as excess, with no loss sharing on these separate tiers.
- In fact, the general contractor's coverage as an additional insured will be primary and noncontributory, provided that the Other Insurance provisions of both policies are consistent with that intent. However, if the general contractor's own policy does not specify its coverage as excess, there will be contribution from both policies because both policies will then be primary. 146

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## NEW CG 20 01

- Because general contractors don't seem to understand ISO's original solution to this problem, or they don't trust it and insist on seeing the words "primary and noncontributory" on the certificate (something that should not be stated because such result is conditioned upon the general contractor's policy language, not the coverage evidenced on the certificate), the ISO had to produce a new solution.
- That solution is the newly introduced *optional* Primary and Noncontributory—Other Insurance Condition endorsement (CG 20 01). This endorsement requires that there be an underlying written contract or agreement stating that the policyholder's coverage for the additional insured must be primary and noncontributory.
- **When the endorsement is added to the policy, the certificate legitimately can state that coverage is primary and noncontributory.**

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### XIII. Introduction Of Primary And Noncontributory – Other Insurance Condition and NEW CG 20 01 Endorsement

We are introducing an optional endorsement applicable to the CGL coverage forms, which will generally reflect that coverage made available to an additional insured is provided on a "primary and noncontributory" basis.

#### Background

As described in Section I - Coverage Forms Changes, Paragraph b.(1)(b) of the Other Insurance Condition of the CGL provides that the insurance provided under the CGL is excess over:

Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured. Notwithstanding this provision, we have received several requests from agents and insurers to introduce an endorsement that revises the Other Insurance Condition to expressly state that coverage provided to an additional insured is provided on a "primary and noncontributory basis" since it appears that many construction agreements require that such an endorsement be included in an insurance policy when additional insured status is provided.

#### Explanation of Changes

We are introducing optional Primary and Noncontributory – Other Insurance Condition Endorsement CG 20 01 which revises the Other Insurance Condition to indicate that coverage is provided to an additional insured on a primary and noncontributory basis, provided that:

◆ the additional insured is a named insured on other insurance available to them;

**AND**

◆ a written contract or agreement has been entered into by the insured stating that the insured's policy will be primary and would not seek contribution from any other insurance available to the additional insured.

#### Impact

There is no impact on coverage.

#### New Forms

- ◆ CG 20 01 - Primary And Noncontributory – Other Insurance Condition

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## Issues

- Only works with ISO CGL policies, or policies that have similar Other Insurance Agreements
- Applies to NI.....not AI
- How do you know what the other parties policy says ?
- This only works with NI vs. AI, not AI vs. AI
  - GC requests sub name him as AI = no problem
  - GC does this for all 20 subs on jobsite = ? Which subs policy goes first ?
  - This does not make any one subs policy primary to another subs policy

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## ISSUE #4

WHAT IS AN OCCURRENCE  
AND HOW MANY ARE  
THERE?

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## DEFINITION OF OCCURRENCE

- An accident, including continuous or repeated exposures to substantially the same general harmful conditions – ISO
- A Marshmallow, in that anyone can squeeze it and get the results the wanted – Eugene Anderson, attorney

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## Multiple Occurrences— One Loss or Two?

- Florida Hurricanes
- WTC 9/11/01
- Food Poisoning
  - John Mason
  - Taco Bell
- Failure to prevent Sexual Molestation against Arch Diocese
- Dow Corning- Silicone Breast Implants

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## Claim Example

- The local filling station has a problem—it has inadvertently deposited the diesel fuel in the underground gasoline storage tank and the gasoline in the underground diesel fuel tank. Several motorists purchase motor fuel and direct the attendant to pump (unknown to both the attendant and motorist) the wrong motor fuel into their vehicles and attempt to drive away, only to find out that the motor fuel has damaged their engines, requiring, on the average, about \$800 in repair work.
- Before the problem is discovered and corrected, two dozen motorists have damaged their engines because of the mistake by the filling station. Each motorist makes a claim against the filling station for property damage (\$800 per motorist or \$19,600 in total damages) to their respective vehicles.
- The filling station is subject to a \$1,000 per occurrence property damage deductible on its CGL policy. The insurer, consistent with the notion that an incidence of property damage is the occurrence, deems each motorist's property damage to be a separate occurrence, leaving the filling station to pay more than \$19,000 for the damages instead of the filling station paying one \$1,000 deductible, with the balance of the damages (more than \$18,000) paid by the insurer. Is the insurer correct?

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## Effect or Cause Approach ?

- In most (but by no means all) instances, the insurer would not be correct. The property damage to the motorists' vehicles would be considered one occurrence, despite the fact that, in this example, there were two dozen separate incidents of property damage.
- In general, courts nationally have adopted two approaches for determining number of occurrences.
  - **Under the "effect" test, number of occurrences is determined by examining the effect that an event had, i.e., how many individual claims or injuries resulted from it.**
  - **Conversely, under the "cause" test, number of occurrences is determined by examining the cause or causes of the damage.**
- The "cause" test is the majority rule nationwide.<sup>1</sup> In the above "Bad Gas" example, the "cause" test would likely focus on the underlying cause—the motor fuels being placed into the wrong underground storage tanks. That cause is the "occurrence"; the resulting property damage to each motorist's vehicle is not the "occurrence."

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## Cause or Effect Approach

- The majority of courts, however, appear to answer this question based on the "underlying cause" of the property damage alleged. Under this majority approach, the calculation of the number of occurrences must focus on the underlying circumstances which resulted in the personal injury and claims for damage rather than each individual claimant's injury. *Addison Ins. Co. v. Fay*, 905 N.E.2d 747 (Ill. 2009)

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## New York "Unfortunate Event" Test

- The NY courts resolve this question by determining whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same continuum, without intervening agents or factors.
  - *National Liab. v. Itzkowitz* auto accident (1 or 3?)
  - Two dogs bite sisters – *Verius v. Liberty Mutual* (1 or 3 ?)

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## Republic Underwriters: What Does "Occurrence" Mean?

--By Robert Chesler, Lowenstein  
Sandler PC

*Bob Chesler is a member of the firm in  
Lowenstein's Roseland, N.J., office.*

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- "Occurrence" is a much-used insurance term, and no one is quite sure what it means. One famous policyholder attorney, Eugene Anderson, described the word as a marshmallow, in that anyone can squeeze it and get the result that she wanted.
- Republic Underwriters Insurance Co. v. Moore, No. 11-5075 (10th Cir. July 20, 2012), confirms that Anderson was right. Country Cottage Restaurant prepared food both for itself and at a catered church event. The food infected hundreds of people with E. coli, one of whom died. This bodily injury was clearly covered under Country Cottage's general liability policy. The issue was: How many occurrences took place?
- Did the preparation of the food at one place mean there was one occurrence? Since two locations were involved, were there two occurrences? Or was each infected person a separate occurrence? Why did this matter? If only one occurrence had taken place, the insurer asserted that its exposure was limited to \$2,000,000. If there were two occurrences, the insurer argued that its exposure was \$4,000,000, while the claimants asserted that it was \$6,000,000.

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- **The court found that the processing and preparation of the food was the cause of the injuries, and that one occurrence had taken place, minimizing Country Cottage's coverage.**
- This is ironic, because it is usually the insured that is arguing for a single occurrence. This issue usually arises in the context of mass torts such as asbestos. An insured may receive 1,000 asbestos claims, and settle each for \$1,000. That same insured may have a deductible of \$5,000 per occurrence. Thus, if each asbestos claim constitutes a separate occurrence, the insured does not have any coverage.
- Each policyholder must review its insurance profile, determine which occurrence argument best suits its purposes and draft the insurance policy so that it maximizes the potential for coverage.

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**Using 'Cause Test,' Circuit  
Finds One Occurrence Where  
Hundreds of Surgical  
Instruments Were Washed with  
Hydraulic Fluid**

FC&S Insurance Coverage Law  
Report

April 2013

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## Mitsui Sumitomo Ins Co v. Duke University Health System, Inc

- The U.S. Court of Appeals for the Fourth Circuit has decided that there was one occurrence where hydraulic fluid was used to wash hundreds of surgical instruments.
- *The Case*
- In 2004, Duke University Health System, Inc., hired Automatic Elevator Company to renovate two elevators in a hospital's parking deck. After Automatic Elevator completed its work, it placed barrels full of used hydraulic fluid in its designated storage area at the hospital. Duke employees saw the barrels, mistakenly thought they contained surgical detergents and lubricants, and ultimately used the hydraulic fluid to wash hundreds of surgical instruments. Approximately 127 patients who may have come into contact with the tainted instruments sued Duke, which settled the claims for over \$6 million. Duke then sued Automatic Elevator.
- Mitsui Sumitomo Insurance Company of America, which had issued two policies to Automatic Elevator, argued that the hydraulic fluid mistake constituted one "occurrence," obligating it to pay \$1 million under the policies, which it had already paid to settle the surgical patients' claims against Automatic Elevator. Duke countered that each instance of a waste-laden medical instrument being used to operate on an unsuspecting patient gave rise to a separate "occurrence." A federal district court agreed with the insurer, and the coverage dispute reached the Fourth Circuit.

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- *The Policy*
- The insurance policies included a \$1 million limit for "any one occurrence." The policies defined "occurrence" as:
  - an accident, including the continuous repeated exposure to substantially the same harmful condition
  - Neither policy defined "accident."
  - The policies included a \$3 million aggregate limit, and both policies contain a "per elevator" endorsement that applied the aggregate limit to each and every elevator ... that is either serviced, repaired, installed, renovated, refurbished or worked upon by [Automatic Elevator] during the policy period.
- *The Circuit Court's Decision*
- In its decision, the circuit court explained that, under applicable North Carolina law, it had to apply a "cause test" to determine how many occurrences an event encompassed. Under this type of test, the number of occurrences was determined by the cause or causes of the resulting injury, the circuit court continued. It noted that the cause test stood in opposition to the effect test, which treated each injury as a separate occurrence. Therefore, to determine how many occurrences stemmed from the hydraulic fluid mistake, the circuit court said that it had to evaluate the cause or causes of the incident rather than its effects.
- It then explained that the only action that Automatic Elevator – the insured – took in this case was placing the barrels of hydraulic fluid in its designated storage area at the hospital's parking deck. The circuit court then held that Automatic Elevator's alleged negligence in leaving the barrels in its storage area constituted a single occurrence.

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## What is an “Occurrence” ?

- International Flavors vs. Royal Insurance – Popcorn Workers Lung Disease
- New York Supreme Court Appellate Div
- 30 employees of MLC (a microwave popcorn packaging plant) file suit against IF alleging butter flavoring contained VOC’s causing respiratory injuries [diacetyl]
- 18 shipments of butter from 1992 to 1996
- AIG insures IF with \$100,000 SIR per any one Occurrence regardless of the number of persons injured
- Definition of Occurrence- accident or cont. or repeated harmful exposure
- **Court says while policy is clear that SIR is to be applied without regard to the number of persons injured, the definition of occurrence does not require the conclusion that the exposure of multiple individuals to the same harmful conditions constitutes a single event, for the purposes of applying the SIR**
- There was no one single incident that could be identified as the event that resulted in injuries to multiple employees. SIR applies to each claim.
- Both parties were sophisticated buyers. If they wanted to combine all claims resulting from exposure they could have changed the definition of occurrence or inserted a specific aggregate.

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## The Batch Clause

Willis – Life Sciences  
September 2009

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## Occurrence or Occurrences

- What is an Occurrence ?
  - One injured party is exposed to multiple exposures over time
  - Multiple injured parties are exposed to the same condition
  - Multiple claims arise out of a similar course of conduct

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## Pharmaceutical Claim

- A drug company manufactures three drugs that have a common action, but are prescribed for three different diseases.
- Users of all three experience a similar adverse reaction and sue.
- Does this constitute one occurrence for all claimants?
- Does this constitute three occurrences (one for each disease group) ?
- Does this constitute an individual occurrence for each claimant ?

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## Batch and Non-Cumulative Clauses

- Batch Clause
  - Aggregates the losses that arise from a “related incident” into a single claim covered by one policy period and one policy limit.
  - The insured pays one deductible for all claims arising from the “batch”, and all claims fall into one policy year –usually the year of the earliest known claim.

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## Batch and Non-Cumulative Clauses

- Non-Cumulative Clause
  - Typically states that regardless of the number of insured persons, injured persons, claims, or claimants or policies involved, our total liability for damages covering one loss will not exceed the limit of liability shown on the Declarations Page of this policy.
  - The intent is to prevent stacking of policy limits when claims are caused by a single negligent act are made in different policy years.

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## Claim Example

- You are a small Life Science Company with one product on the market
- You buy a \$5mil products liability policy with a \$10,000 deductible
- Over a period of time, you receive notice that individuals using your product are experiencing an unexpected adverse reaction.
- Letters from attorneys begin arriving on your desk
- You notify your insurer
- The injuries are not serious and it looks like you could settle each loss for \$5000
- You receive 30 claims before you pull the product from the market

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## Individual Claims

- If these losses are determined to be individual claims you company would be responsible to pay each loss under your per-claim deductible.
- Your company pays  $30 \times \$5,000 = \$150,000$  and your insurer pays nothing

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## Batch Claims

- If these claims are batched and treated as one loss, your firm pays one deductible (\$10,000) and your insurer pays the balance of the claims (\$140,000).
- In this example batching the claims looks like a good deal for your company.

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## New Claim Circumstances

- Your company buys a \$10mil policy, with a \$1mil self insured retention (SIR)
- The claims look like they are going to average \$500,000 to settle
- Again, 30 claims are presented (30 X\$500,000 = \$15mil)
- The losses straddled two policy periods.

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## Individual Claims

- If the claims are considered individual losses, your firm is going to pay your SIR for each of two policy periods (\$2mil) and your insurer has two policy limits exposed; resulting in payments of \$13mil.

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## Batch Claims

- If the claims are batched, you pay one SIR (\$1mil) and your insurer pays one policy limit (\$10mil).
- However the claims equal a total to \$15mil and the payment of your SIR and the insurer's policy limit equals \$11mil.
- You are short \$4mil, which you must pay out of pocket

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## Definition of “Batch”

To add to the confusion around the batch issue, actual policy language varies dramatically from one policy to the next. For example, some policies limit a batch to products that “can be distinguished by the specific date of production or by a batch number, lot number or control number.”

Another policy may more broadly define a batch (or related occurrence) as claims arising from “two or more persons...that are attributable directly, indirectly or allegedly to the same event, defect, hazard, condition, cause, decision or advice in the design, formulation, manufacturing, distribution, sale, use, testing, handling, repair, replacement, maintenance or disposal of your product...”

Even without a batch clause, most Product Liability policies will use the definition of occurrence and the non-cumulative policy language to corral multiple losses from a single cause into one policy period and one policy limit.

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## ISSUE #5

### Theories of Allocation of Losses

by

Craig Stanovich

Used with permission

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## CGL Trigger

- Does an “occurrence” trigger an occurrence based CGL policy?
- “Occurrence” means an ACCIDENT, including continuous or repeated exposure to substantially the same general harmful conditions.
- This insurance applies to BI or PD only if:
  - The BI or PD is caused by an occurrence that takes place in the “coverage territory”
  - The BI or PD occurs during the policy period

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## CGL Trigger

- Is the CGL in effect when the work is negligently performed, the policy that is triggered ?
- ABC Construction installs a deck on Bob’s house today. The installation is done in a negligent manner – the deck was not fastened to the house. Two years later the deck collapses injuring Bob. He sues ABC for BI.
- This insurance applies to BI and PD only if:
  - The BI or PD is caused by an occurrence that takes place in the coverage territory;
  - The BI or PD occurs during the policy period

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## Coverage Trigger

- CGL in effect for ABC Construction
  - Today (Time deck is built) is Travelers
    - \$1,000,000 each Occurrence Limit
    - January 1 to January 1 effective dates
  - Two years later (When deck collapses) is Hartford
    - \$1,000,000 each Occurrence Limit
    - January 1 to January 1 effective dates
- This insurance applies to BI and PD only if:
  - The BI or PD is caused by an occurrence that takes place in the coverage territory;
  - The BI or PD occurs during the policy period

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## Coverage Trigger

- Hartford must respond – BI “occurred” during the Hartford CGL policy period
- When the “occurrence” takes place is not the trigger of the CGL and therefore not relevant
- When the BI or PD OCCURS is relevant and the Trigger of an Occurrence CGL Policy

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## Travelers Ins Co v Eljer Mfg. Inc 757 N.E. 2d 481(Ill. 2001)

- ...under CL policies covering “physical injury to tangible property” that claims against insured that it manufactured defective plumbing system were covered if the buildings, in issue suffered water damage due to leaks during the policy period, regardless of when the plumbing systems were installed, because the plain language of the policies state “that the insurable event which gives rise to the insurers obligation to provide coverage is the physical damage to tangible property.

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## Millers Mut. Fire Ins Co. of Texas v. Ed Bailey Inc 647 p.2d 1249, 1250 (Idaho 1982)

- ...that where the insured installed foam in a building during the term of a CGL policy, and a fire allegedly caused by the foam occurred after the policy expired, the property damage claim was not covered because the policy defined property damage as “physical injury to or destruction of tangible property which occurs during the policy period”, and no actual physical damage to the structure in this case occurred within the policy period.

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## CGL Trigger

- What if it is difficult to determine exactly when the BI or PD took place ?
  - BI or PD may happen over time (progressive, cumulative or continuous injury or damage)
  - Does this change the CGL policy trigger ?
- Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

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## CGL Trigger Theories

- The courts will determine when the BI or PD took place, by using one of four “Trigger Theories”:
  - Exposure
  - Manifestation
  - Injury in Fact
  - Continuous Trigger

184

## Exposure Theory

- Asbestos Theory
- ALL CGL policies are triggered if they are in effect during the exposure to injurious or harmful conditions. Primarily used in asbestos cases, this theory consider BI to begin when a person was first exposed to asbestos, usually at the first inhalation of asbestos fibers [even if they don't have the disease, they are considered to have the disease].

185

## Manifestation Theory

- The CGL policy is triggered when the injury or damage is discovered or manifests itself (or in some cases is capable of being discovered) during the policy period.
- That injury or damage may have been occurring prior to the discovery may not be taken into account in this theory.

186

## Injury-in-Fact Theory

- ALL CGL policies are triggered if they are in effect during the time the injury or damage is shown to have actually taken place, even if the injury or damage continues over time.
- Most commonly used Trigger Theory
- Fits the policy wording that the BI or PD has to occur during the policy period

187

## Continuous Trigger Theory

- a/k/a Triple Trigger Theory
- NJ often uses for pollution claims
- ALL CGL policies are triggered if they are in effect during any of the following times:
  - Exposure to harmful conditions
  - Actual injury or damage, and
  - Upon manifestation of the injury or damage

188

## Trigger Theories

- States follow different theories, which may even differ within the state depending on the type of claim:
  - Asbestos (Exposure)
  - Pollution (Continuous)
  - Construction Defect (Injury in Fact)

189

## Examples of Theories by State

- Exposure – AL, AK, FL, LA\*, MA, MD\*, MN\*, NC, TX, WI\*
- Manifestation – LA, ME, MA, OH, NC, PA, RI \*, TX
- Injury In Fact – CA, CO\*, CT, FL, HI\*, IL\*, IN, KS, MD\*, MI\*, MN\*, MO, NJ, NY, NC\*, ND\*, OR\*, PA, SC\*, TX\*, UT, VT
- Continuous – CA\*, DE, IL, IN\*, KS\*, MA, MN\*, MS, NJ\*, NY, OH, PA\*, TX, WA, WV, WI
- State's highest court adopted this theory for certain claims

190

## One Beacon Ins Co v. Don's Bldg Supply 496 F.3d 361 (5<sup>th</sup> Circuit 2007)

- Texas Supreme Court
  - QUESTION: What is the proper rule under Texas law for determining the time at which property damage occurs for the purposes of an occurrence based CGL policy?

191

## Texas Supreme Court

- ANSWER: We hold that property damage under this policy occurred when actual physical damage to the property occurred. The policy says as much, defining PD as “physical injury to tangible property” and explicitly stating that coverage is available if and only if “PD occurs during the policy period.”

192



## Texas Supreme Court

So in this case, PD occurred when a home that is the subject of an underlying suit suffered wood rot or other physical damage. The date the physical damage is or could have been discovered is irrelevant under the policy [manifestation]. Many courts agree with the analysis we adopted today, sometimes called the “actual injury” or “injury-in-fact” approach.

193

## CGL Trigger

- Does cumulative, progressive or continuous BI or PD change the CGL trigger? NO !!
- Note in *One Beacon v. Don's Bldg Supply*, the 5<sup>th</sup> Circuit asked WHEN the PD took place, not if the CGL is TRIGGERED when the PD took place.

194

## Allocation of Loss Theories

- If more than one policy period is triggered due to “injury-in-fact” or “continuous trigger” type losses, how is the loss allocated among the insurers?

195

## Allocation of Loss Theories

- Illustration: ABC Construction improperly installs a roof on a new high school. After the work is completed, water intrusion begins to damage interior portions of the school over a period of three years before the PD is found and the roof fixed.
- ABC installed only the roof. Coverage is being sought for damage to property other than ABC work (the roof) – the water damage to other portions of the school.

196

## Allocation of Loss Theories

- ABC Construction carried the following policies during the 3 years of property damage:
  - Year One: \$1mil CGL and \$4 mil XS with AIG
  - Year Two: \$1mil CGL and No XS with Zurich
  - Year Three: \$1mil CGL and No XS with ACE
- Property Damage is determined to be \$5mil that took place over the three years
- Is ABC fully covered ?
- Depends on allocation theory

197

## ALL SUMS THEORY

- When multiple policies are triggered, insured may chose which triggered policies on which it will make its claim.
- Also known as the “joint and several” theory.
- Allows insured to go vertical at the insured’s choice

198

## ALL SUMS APPROACH

- Under this approach ABC is allowed to chose Year One- AIG and go vertical, and thus would be covered for the entire \$5mil judgment.
- Most favorable theory for insured
  - Year One: \$5mil paid by AIG – Limit is \$5 mil
  - Year Two: No claim against Zurich
  - Year Three: No claim against ACE
- AIG may have right of equitable contribution against Zurich and ACE for their proportionate share—but this does not affect the insured.

199

## PRO RATA APPROACH

- Insurers with policies that have been triggered respond in proportion to the loss –usually based on the “TIME ON RISK” – the amount of time each insurer provided coverage to the insured during the BI or PD.

200

## PRO RATA APPROACH

- Courts may allocate ABC loss by “Time on Risk”.
- Each insurer had one year out of three on the risk, each insurer is liable for 1/3 of \$5mil or \$1,666,666 each.
- Insurers pay: \$3,666,666
- ABC is NOT fully covered, and will be uninsured for \$1,333,332
- (ABC uninsured for \$666,666 for year three)

201

## Theories of Allocation by State

- ALL SUMS – AR, CA\*, DE\*, DC, IL\*, IN\*, MA, NY, OH\*, OR, PA\*, TX, WA\*, WV
- PRO RATE – AL, CA, CO\*, CT\*, GA\*, HI\*, IL, KS\*, KY\*, IN\*, MD, MI, MN\*, MO, NH\*, NJ\*, NY\*, OH, OR, SC, TX
- Thirty Three states remain uncertain and do not have a definitive ruling.

202

## WATCH OUT !!

- Insurers may use Non-ISO limitation or exclusionary endorsements such as:
  - Prior Work
  - Exclusion for progressive injury or damage
  - First manifestation endorsement
- This insurance does not apply to: any BI or PD that commenced in whole or in part prior to this policy period.

203

## WATCH OUT !!

- Effects of endorsements on ABC when Pro Rata allocation is used:
  - What if ACE and Zurich had exclusions for any injury or damage commencing prior to its policy period?
  - ABC is insured for only \$1,666,666 and uninsured for \$3,333,334
- Year One - \$1,666,666 paid by AIG- Limit is \$1mil
- Year Two - \$0 paid by Zurich – Limit is \$1mil  
(ABC uninsured for \$1,666,666 –excluded as prior PD)
- Year Three- \$0 paid by ACE – Limit si \$1mil  
(ABC insured for \$1,666,666 – excluded as prior PD)
- ALL SUMS WOULD STILL PROVIDE COMPLETE COVERAGE FOR ABC as they can go Vertical!

204

## Known Injury or Damage Wording - Montrose

- No coverage provided if the BI or PD was KNOWN to certain insured's prior to the policy period
- Meant to exclude "known loss" or "loss in progress" but ISO wording is known injury or damage, not known loss.
  - This insurance applies to BI and PD only if: Prior to the policy period, no insured listed under Paragraph 1 of Section II- Who is an Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the BI or PD had occurred in whole or in part.
  - If such listed insured or authorized "employee" knew, prior to the policy period, that the BI or PD occurred, then any continuation, change or resumption of such BI or PD during or after the policy period will be deemed to have been known prior to the policy period.

205

## Known Injury or Damage Wording – Montrose Background

- "Specifically, the court held that, given the wording of the CGL policies involved in litigation, the known loss rule does not bar liability coverage for claims alleging continuous or progressive injury or damage as long as there remains uncertainty about damage or injury that may occur during the policy period and the imposition of liability upon the insured.
- Montrose stated that, until an insured's legal obligation to pay third party claims has been established, there remains a potentially insurable risk for which coverage can be sought under a CGL policy is currently worded."

206

## Known Loss or Damage Illustration

- ABC Construction improperly installed a roof on a new high school. After the work is completed, water intrusion begins to damage interior portions of the school over a period of three years. PD is known to ABC in the second year (Year Two) but the roof is not fixed until year three.

207

## Known Loss or Damage Illustration

- ABC Construction's insurance is as follows:
  - Year One: \$1mil CGL / No XS – AIG
  - Year Two: \$1mil CGL / No XS – Zurich
  - Year Three: \$1mil CGL / No XS – ACE
- Assume all policies have known injury or damage wording (Montrose Wording)

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## Known Loss or Damage Illustration

- ABC Construction's president found out of the PD in Year Two (Zurich year). Same scenario of claim - \$5mil of PD takes place over three years.
- Who will pay ?

209

## Known Loss or Damage Illustration

- \$1mil paid by AIG (policy limit)
- \$1mil paid by Zurich (policy limit)
- NO Payment by ACE
  - The ACE CGL policy is NOT triggered as PD was known by president PRIOR to the ACE policy period
- ABC must pay the remaining \$3mil regardless of trigger theory

210

## Who has to Know?

- Corporation
  - Executive Officers
  - Directors
  - Risk Manager
  
- LLC
  - Manager
  - Member
  
- Not any employee

211

## “Who has to have Knowledge” Endorsement

### **"NOTICE OF OCCURRENCE"**

Add the following to Paragraph 2 of COMMERCIAL  
GENERAL LIABILITY CONDITIONS (Section IV):

e. Knowledge of an "occurrence," claim, or "suit" by the agent, servant or employee of any insured shall not in itself constitute knowledge of the insured unless individuals in the following positions shall have received such notice from the agent, servant or employee:

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# Prior Work Exclusion and The Sunset Clause

213

# ISSUE #6

## LIQUOR LIABILITY



214

## CGL- Liquor Exclusion

### c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

***This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.***

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### ***Laconia Rod and Gun Club v. Hartford Accident and Indemnity Company, 459A 2nd 249 (N.H. 1983)***

- Court determined that the phrase "*in the business of*" was ambiguous
- Determined the word "business" to have a dual sense of usage
- A broad sense to mean any regular activity that occupies one's time and attention with or without a direct profit objective, OR can be used more narrowly to mean a direct profit objective.
- The fact that the club did not make a profit on the beverages it served – as would a tavern – was sufficient to create ambiguity.
- Result: The Court concluded that because the phrase "*in the business of*" was ambiguous, the exclusion would not apply.

216

***American Legion Post #49 v. Jefferson  
Insurance Co. of N.Y., 485A 2nd 293 (N.H. 1984)***

- **Not-for-profit veterans association derived substantial profit revenues from sales of alcohol.**
- **Court concluded the insured was not “*in the business of*” because they used the proceeds to meet operating expenses to provide benefits to its members as well as community activities.**
- **Court reasoned the insured did not have same profit motive as an inn or tavern would have.**
- **Result: Exclusion does not apply in that insured was not “*in the business of*”.**

217

**CG 2150 – Amendment of Liquor  
CG 2151 [exceptions] Liability Exclusion**

- c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
- (1) Causing or contributing to the intoxication of any person;
  - (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
  - (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

***This exclusion applies only if you:***

- (1) Manufacture, sell or distribute alcoholic beverages;
- (2) **Serve or furnish alcoholic beverages for a charge** whether or not such activity:
  - (a) Requires a license;
  - (b) Is for the purpose of financial gain or livelihood; or
- (3) **Serve or furnish alcoholic beverages without a charge, if a license is required for such activity.**

218

## Not for Profits

- Boys & Girls Club
- Volunteer Fire Departments
  - Wetdown
- Local Library Wine & Cheese Art Auction
- Others

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## B.Y.O.B.-Restaurants

- ABC Regulations
- Liquor Liability Exposure ?
- Catch-22 !

220

## BYO Alcohol

- The ISO now is facilitating the expansion of BYOB restaurants by adding an exception to the liquor liability exclusion for patrons who bring their own alcoholic beverages for consumption on the insured's premises, whether or not a fee is charged or a license is required.
- The ISO is also putting further restrictions on coverage regarding the failure to provide transportation or negligent hiring or supervision

221

### **Penn-America Insurance Company v. Peccadillos, 27 A.3d 259 (Pa. Super.Ct. 2011)**

- In Penn-America Insurance Company, the court ruled that a duty to defend was triggered under the CGL policy at issue when an insured was alleged to have continued to serve alcohol to visibly intoxicated patrons and then ejected them from the premises in a dangerously inebriated condition.
- The complaint in the case alleged, in part, that two friends visited several bars where both drank excessive amounts of alcohol, causing them to be significantly and visibly intoxicated. While in the insured's establishment they purchased and consumed additional alcohol, and after a physical altercation with another patron, they were required to leave the premises and it was apparent that neither of them were in a safe condition to drive.

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Upon leaving the bar, the two entered their vehicle, drove away from the establishment and subsequently caused an accident by colliding with another vehicle while attempting to pass it. As a result of the collision, the driver of the other vehicle and a passenger were killed and two minor children of the driver of the other vehicle were seriously injured. The CGL insured argued that the allegations in the underlying action against them fell outside the related CGL policy's liquor liability exclusion.

The insured emphasized the allegation that the injuries and damages were caused by reckless and/or negligent, grossly negligent, willful and/or wanton actions and/or inactions of continuing to serve alcoholic beverages to visibly intoxicated patrons and thereby rendering the driver incapable of safely operating his vehicle and by ejecting the patron from the premises after an altercation, rather than summoning the police when the insured knew or should have known that the patron would attempt to drive his car in his unsafe and extremely intoxicated condition.

223

## **McGuire v. Curry, 766 N.W.2d 501 (S.D. 2009)**

In McGuire, the court generally ruled that the employer could be held liable for the actions of its underage employee when the employer allowed its underage employee unsupervised and unrestricted access to alcoholic beverages.

In McGuire, the court generally ruled that the employer could be held liable for the actions of its underage employee when the employer allowed its underage employee unsupervised and unrestricted access to alcoholic beverages. In this case, the underage employee of a racetrack was hired as a runner to deliver alcohol and other supplies to the racetrack's concession stands and bars.

The racetrack gave the underage employee a key to its alcohol storage facility. No one monitored the employee's access to the alcohol or checked the amount of alcohol sold or used on any given night. One day, after the underage employee's shift ended, he drove his vehicle off the racetrack's premises while intoxicated and struck the plaintiff, who was a passenger on a motorcycle. The underage employee subsequently admitted drinking while on the job.

The plaintiff brought a suit against the racetrack alleging negligent hiring, retention and supervision of the underage employee. The Court concluded that the racetrack had a duty to supervise the underage employee, and it was foreseeable that with no supervision an underage employee with free access to consume alcohol while at work could abuse the alcohol and leave the premises after work unfit to drive and cause an accident.

224



### **Essex Insurance Company v. Café Dupont, LLC, 674 F.Supp.2d 166 (D.D.C. 2009)**

In Essex Insurance Company, an insurer sued an insured, a nightclub operator, seeking a declaration that it had no duty under the CGL policy at issue to defend or indemnify the insured in a suit alleging, in part, that the insured generally failed to prevent a patron from becoming intoxicated and allowed the intoxicated patron to leave and not detaining him or arranging alternative transportation.

The nightclub operator's separate liquor liability policy had lapsed before the accident and coverage was sought under the insured's CGL policy. The related CGL policy contained a provision in the liquor liability exclusion that excluded damages or injuries that arose out of any act or omission by the insured or any employee of the insured regarding "*providing or failing to provide transportation, detaining or failing to detain any person, or any act assuming or not assuming responsibility for the well being, supervision or care of any person allegedly under the influence of alcohol.*"

The court stated that the quoted provision clearly applied to injuries arising out of failure to detain anyone or the failure to provide transportation for any intoxicated person and not merely those who become intoxicated at the nightclub.

225

### **Simmons v. Homatas, 925 N.E.2d 1089 (Ill. 2010)**

In Simmons, the court generally considered issues related to whether a business that allows its patrons to bring their own alcoholic beverages into an establishment, a BYO, is considered to be "in the business of selling alcoholic beverages", and whether it can be liable for injuries that arise, not as a result of serving alcohol, but as a result of actions in connection with allowing patrons to consume alcohol, brought onto its premises.

In the suit against the operator (defendant) of a BYO, the Court concluded that the plaintiff's common law negligence claim(s) were not preempted by the specific Dram Shop laws of the state. The court also stated that the operator is not in the business of selling liquor in the state as the club did not provide alcohol, even though it provided glasses and ice to its patrons.

226

**c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

***This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:***

- (a) The supervision, hiring, employment, training or monitoring of others by that insured; or***
- (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;***

***if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph (1), (2) or (3) above.***

***However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling.***

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## CG 2150 – Amendment of Liquor CG 2151 Liability Exclusion

c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

***This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:***

- (a) The supervision, hiring, employment, training or monitoring of others by that insured; or***
- (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol; if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph (1), (2) or (3) above.***

***This exclusion applies only if you:***

- (1) Manufacture, sell or distribute alcoholic beverages;
- (2) Serve or furnish alcoholic beverages for a charge whether or not such activity:
  - (a) Requires a license;
  - (b) Is for the purpose of financial gain or livelihood; or
- (3) Serve or furnish alcoholic beverages without a charge, if a license is required for such activity.
- (4) Permit any person to bring any alcoholic beverages on your premises, for consumption on your premises***

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COMMERCIAL GENERAL LIABILITY  
CG 40 09 12 19

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**AMENDMENT OF LIQUOR LIABILITY EXCLUSION – LIMITED EXCEPTION FOR BRING YOUR OWN ALCOHOL**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following replaces Exclusion c. under Paragraph 2. Exclusions of Section 1 – Coverage A – Bodily Injury And Property Damage Liability:

This insurance does not apply to:

**c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

- (a) The supervision, hiring, employment, training or monitoring of others by that insured; or
- (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph (1), (2) or (3) above.

This exclusion applies only if you:

- (1) Manufacture, sell or distribute alcoholic beverages;
- (2) Serve or furnish alcoholic beverages for a charge whether or not such activity:
  - (a) Requires a license;
  - (b) Is for the purpose of financial gain or livelihood; or
- (3) Serve or furnish alcoholic beverages without a charge, if a license is required for such activity.

For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered selling, serving or furnishing alcoholic beverages.

229

## “FURNISHING”

In *Harleysville Preferred Ins. Co. v. Exec. Banquet & Conf. Ctr.*, No. N15C-07-068 FWW (Del. Super. Nov. 21, 2016) the court held that a Liquor Liability exclusion, contained in a commercial general liability policy, precluded coverage to a conference center – even though it was hands-off in many ways when it came to serving liquor – after a patron was served alcohol, left and was struck and killed by a motor vehicle when attempting to cross a street.

The court explained that the conference center, despite another entity having everything to do with pouring the drinks, still furnished alcohol within the terms of the Liquor Liability exclusion. The opinion is brief. The heart of it is this:

“[T]he Exclusion shall be construed according to its ordinary and usual meaning because the word ‘furnish’ is unambiguous in this context.

**According to Webster’s Concise Dictionary, the word ‘furnish’ means ‘to supply; provide,’ and ‘to supply’ something means ‘to make it available.’**

Despite Defendants’ arguments to the contrary, an ordinary reading of these definitions makes clear that furnishing something is not limited to one physically handing something to another. Instead, one can furnish something to another by providing the means for that person to obtain it.

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## “FURNISHING”

**While it is true that Defendants neither physically pour the alcoholic beverages nor hold the liquor license, Defendants are directly responsible for making alcohol available at events.** Defendants are in the business of catering social events at the Center, and they advertise their business online. Interested customers, who see the advertisements, contact Defendants to book an event. While booking an event, customers tell Defendants which bar service, if any, that they want, and Defendants provide that service accordingly. Customers do not discuss anything about bar services with Local No. 74, which provides the bartenders. As these facts illustrate, an important part of Defendants’ business is contracting with interested customers about which bar services will be offered at events. Therefore, the Court finds that Defendants are in the business of furnishing alcohol because a part of their business is to arrange for alcohol to be served at events.”

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## ISSUE #7

### **THE CGL AUTO, AIRCRAFT and WATERCRAFT EXCLUSION**

232

## Is there any Auto coverage in the CGL Policy?

233

## Exclusions

### Aircraft, **Auto** Or Watercraft

- **"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".**
- This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.
- What's left ?
- *Coverage for Independent Contractors use of an auto--- since we do not own, operate, rent, or loan it.*

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- A case in point is *Nick's Brick Oven Pizza, Inc. v. Excelsior Insurance Company, et al., No. 2008-03856 (Sup. Ct. N.Y. App. Div. 2009)*. Both the pizza business and the person delivering pizzas were sued following an accident that injured another motorist. Claim was denied by the CGL carrier because of (1) the auto exclusion in the CGL policy and (2) the driver, as an employee, was an insured.
- The pizza company, however, maintained that the delivery person was a temporary employee because he was hired to meet seasonal or short-term workload conditions during the busy summer months prior to his return to college. Since the delivery person was not an insured, coverage applied.

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## Automatic Insureds

### C. Automatic Insureds - Includes Others:

1. **"Employees"** – while acting within the scope of their employment. [why? Coop]
  - a. Employee Definition  
*"Employee" includes a "leased worker". "Employee" **does not** include a "temporary worker".*
  - b. Leased Employee Definition  
*"Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".*
  - c. Temporary Workers Definition  
*"Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.*
  - d. Limitations or Exceptions to Coverage- except for BI/PI/AI to the Named insured, partners or members or other employees and for prof health care services

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**TECHNOLOGY**

# McDonald's expanding UberEats delivery sites

THE ASSOCIATED PRESS

**WASHINGTON** - Forget the drive-thru, McDonald's could be coming to your driveway.

The company announced last week that the number of McDonald's restaurants available to deliver Big Macs, Chicken McNuggets and fries is expanding by another 1,000 this week, bringing the total to more than 2,000.

New delivery locations include the New York metro area, Seattle, Denver and more.

CEO Steve Easterbrook says McDonald's will have 3,500 restaurants on the UberEats app by the end of June.

The world's largest fast-food chain had announced two weeks ago that "McDelivery" through the UberEats app was available in 1,000 U.S. locations. Uber says its delivery fee varies depending on the city, but that it is generally a flat \$4.99.

Easterbrook says McDonald's was encouraged by early delivery results, particularly with younger customers with late-night appetites.

McDonald's CEO Steve Easterbrook says McDonald's will have 3,500 restaurants on the UberEats app by the end of June. AP

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## ABSOLUTE AUTO, AIRCRAFT AND WATERCRAFT EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, paragraph g. is deleted and replaced with the following:

**g. Aircraft, Auto Or Watercraft**

"Bodily injury" or "property damage" arising directly or indirectly out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft.

B. The following is deleted under SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. Other Insurance, paragraph b. Excess Insurance:

If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I - Coverage A - Bodily Injury and Property Damage Liability.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

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## Snowplowing- Completed Operations

- Where is coverage afforded ?
  - CGL
  - Business Auto
- Business Auto Exclusion  
 (10) BI or PD arising out of your work after that work has been completed or abandoned.
- CGL Exclusion  
 (g) "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".  
 (excludes operation and loading/unloading-- coops?)

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## Introducing CG 2292

- For use with 2007 CGL forms
- Adds completed operations for Snowplowing to CGL policy
- Why have an endorsement if it is included?
- Need for an endorsement if not excluded ?
- Assures client of coverage for Completed Operations

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COMMERCIAL GENERAL LIABILITY  
CG 22 92 12 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## SNOW PLOW OPERATIONS COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Within the "products-completed operations hazard",  
Exclusion g. under Section I – Coverage A – Bodily  
Injury And Property Damage Liability does not  
apply to any "auto" used for snow plow operations.

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## The Key to Contractual Liability is Understanding an "Insured Contract"

- 9) The contractual liability exclusion precludes coverage for contractually assumed liability except for liability assumed in a contract or agreement that is an "insured contract" and only then with respect to injury or damage that occurs after the contract is executed."

### Exclusions

This insurance does not apply to:

#### b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. **This exclusion does not apply to liability for damages:**

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an **"insured contract"**, provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.."

242

## “Insured Contract”

- EXCLUDED
  - Exceptions to exclusions – “insured contracts”
    - a) **L**ease of Premises [not fire for which you are solely contractually liable for]
    - b) **E**asements – except operations w/i 50 ft of a RR
    - c) **A**greement with Municipality – [Ordinances / not work]
    - d) **S**idetrack Agreements
    - e) **E**levator Maintenance Agreements
    - f) **+ Tort Liability assumed in a contract (BI and PD only)**

243

## “Insured Contract” Means:

- a. A contract for a **lease** of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b. A **sidetrack** agreement;
- c. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to **indemnify a municipality**, except in connection with work for a municipality;
- e. An **elevator maintenance** agreement;
- f. That part of **any other contract** or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under **which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a *third person* or organization**. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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## “Insured Contract” Means:

**Paragraph f. does not include** that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing; [CG2417] + [CA 2070]
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
  - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
  - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

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## b) Endorsements that impact “Insured Contract” Coverages

- i) CG 21 39 - Contractual Liability Limitation
- ii) CG 24 26 – Amendment of Insured Contract Definition
- iii) CG 24 17 - Contractual Liability - Railroads
- iv) CG 00 09 - Owners and Contractors Protective Liability Form (OCP)

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## CG 2426 Amendment of Insured Contract Definition

9. "Insured contract" means:

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, **provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf.** Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Burden of Proof on Policyholder, Insured, Agent)

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## CG 2139 Contractual Limitation

### CONTRACTUAL LIABILITY LIMITATION

This endorsement modifies insurance provided under the following:  
COMMERCIAL GENERAL LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The definition of "insured contract" in the DEFINITIONS Section is replaced by the following:

"Insured contract" means:

- a. A contract for a **lease** of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A **sidetrack** agreement;
- c. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An **agreement** [obligation], as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An **elevator** maintenance agreement.
- f. **?????**

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## Defense of Indemnitee (GC)

- 10) Contractual liability defense expense
  - a) The Supplementary Payments section further discusses "damages" to include Attorney's Fees and clarifies if within or outside the limits of the policy.
  - b) Those defense expenses meeting all policy requirements – paid as supplemental expense [joke !]
  - c) Those defense expenses not meeting all policy requirements – paid within limits
  - d) Limits – Errors and Omission (E&O)

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### b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. **This exclusion does not apply to** liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. **Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:**
  - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

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## Supplementary Payments

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
- a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
  - b. This insurance applies to such liability assumed by the insured;
  - c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
  - d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
  - e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
  - f. The indemnitee:
    - 1) Agrees in writing to:
      - (a) Cooperate with us in the investigation, settlement or defense of the "suit";
      - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
      - (c) Notify any other insurer whose coverage is available to the indemnitee; and
      - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
    - (2) Provides us with written authorization to:
      - (a) Obtain records and other information related to the "suit"; and
      - (b) Conduct and control the defense of the indemnitee in such "suit".

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## Other Requirements for Direct Defense under Supplemental Payments

- Both Named in Lawsuit
  - Problem with Third Party Over– Insured (employer) is not named - exclusive remedy doctrine
- No Conflict
  - No dispute of fact as to who did what to whom
- Request to Defend
  - Indemnitor and Indemnitee must both request indemnitors insurance carrier to conduct and control the defense, and both parties agree to the same legal counsel. [not right to chose your own counsel]
- Duty to Cooperate
  - Similar to those imposed on insured
  - **\*\* Must notify insurer if any other coverage is available to indemnitee, and cooperate in coordinating the other insurance (trouble)**
- Continuing Duty
  - These are ongoing continuous obligations
  - If they stop, so does the defense
  - Duty to defend ends when limits have been exhausted by payment

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## Responsibility to Indemnify

- Please understand that just because Insurance does not respond for whatever reason; the Indemnitor is still responsible and obligated to defend and indemnify the Indemnitee.

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## Drones



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## What is a “Drone”

- A/K/A
  - UAV’s [unmanned aerial vehicles]
  - UAS’s [unmanned aerial systems]
  - RPV’s [remotely piloted vehicles]
  - RPS’s [remotely piloted systems]

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## Homeowner Policy Exclusions


- **Aircraft Definition**: “any contrivance used or designed for flight,
- except model or hobby aircraft not used or designed to carry people or cargo.
  - A contrivance does not need a motor to be an aircraft; therefore hang gliders, parasail, or parachutes are aircraft.
  - No size restriction on model or hobby aircraft

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## Definition of “Hobby”

hob·by<sup>1</sup>

/ˈhɒbi/ 

*noun*

1. an activity done regularly in one's leisure time for pleasure.  
"her hobbies are reading and gardening"  
*synonyms:* [pastime](#), leisure activity, leisure pursuit; [More](#)
2. *archaic*  
a small horse or pony.

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## Homeowner Policy Exclusions

- Aircraft Definition: “any contrivance used or designed for flight, **except model or hobby aircraft not used or designed to carry people or cargo.**
  - A contrivance does not need a motor to be an aircraft; therefore hang gliders, parasail, or parachutes are aircraft.
  - No size restriction on model or hobby aircraft- Big Bird model aircraft ¼ scale.

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## Aircraft - Homeowners

### 4. Property Not Covered

We **do not** cover:

**d.** Aircraft meaning any contrivance used or designed for flight including any parts whether or not attached to the aircraft.

We **do** cover model or hobby aircraft not used or designed to carry people or cargo;

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## CGL POLICY DEFINITIONS

- What is the definition of aircraft in the CGL policy ?
- THERE IS NONE !
- Merriam Webster.com:  
“A machine that flies through the air.”

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## Commercial Uses

- Farmers / Agri-business – crop spraying, etc.
- Real Estate
- Insurance adjusters / inspectors / underwriters
- Film / TV Industry \*
- Search & Rescue Operations
- Fire / EMS / Police departments
- Weather / Storm Tracking
- Private Investigators
- Energy Companies \*
- Delivery – Amazon, UPS, Dominos (DomiCopter), etc.
- Australian company delivers text books to students
- United Arab Emirates delivers government documents
- Lakemaid Beer tried delivering six-packs to ice fishers \*
- Other uses ??

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## Claims Journal

Denise Johnson 3/3/2014

- “I envision a time when, after a catastrophe, an adjuster pulls up to a neighborhood and opens the trunk of his car and presses a few buttons on his tablet device and the drone does an immediate survey of everything and streams it all right to his tablet device, and he knows exactly where to go first and what’s most significant...within minutes. Costing very little money, the insurance company has a sense of everything that needs to be done in a very short amount of time,” Wolf said.
- As far as who will operate the drones, Wolf said adjusters will likely see their skills expanded again.

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## CGL Exclusions

### AIRCRAFT, Auto Or Watercraft

- **"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".**
- This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.
- What's left ?
- *Coverage for Non-Owned aircraft--- since we do not own, operate, rent, or loan it.*

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## Exceptions to Exclusion

*This exclusion does not apply to:*

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
  - (a) Less than 26 feet long; and
  - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) *Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft;*

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## ABSOLUTE AUTO, AIRCRAFT AND WATERCRAFT EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**A. SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions**, paragraph **g.** is deleted and replaced with the following:

**g. Aircraft, Auto Or Watercraft**

"Bodily injury" or "property damage" arising directly or indirectly out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft.

**B.** The following is deleted under **SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. Other Insurance**, paragraph **b. Excess Insurance**:

If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section I – Coverage A – Bodily Injury and Property Damage Liability.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

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## IRMI – CGL Contractual Liability

- An important area of contractual coverage provided in the standard CGL coverage with respect to aircraft, [autos, and watercraft] comes by way of an exception to exclusion g.
- The exclusion does not apply to any assumption of liability in connection with the ownership, maintenance, or use of aircraft or watercraft, as long as the liability is assumed in an "insured contract."
- This exception provides aircraft and watercraft owners with contractual liability coverage in connection with the business use of their property.
- **For example, a HVAC contractor agrees to indemnify a project owner for liability arising out of the contractor's use of its own aircraft in connection with the contracted work.** (Watch CG 2426 or CG 2139)
- The contractor has no coverage for its own direct liability in connection with the use of its owned aircraft (because of the aircraft exclusion).

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## Property Exclusions

CP 00 10 (1012)

**p.** Vehicles or self-propelled machines (including aircraft or watercraft) that:

- (1)** Are licensed for use on public roads; or
- (2)** Are operated principally away from the described premises.

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## CYBER COVERAGE ?

- Cyber policy may be needed if data is destroyed or damaged that causes the drone to malfunction an injure or damage property
- Cyber hacking drone's computer systems , causing loss of control or re-programming of aircraft
- Interference with airspace and other aircraft
- Invasion of privacy
- Breach of private data being collected

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## Privacy

- “We hang this whole thing on privacy, but to me, I think the privacy issues have long been decided with commercial aircraft. Small private aircraft or helicopters, it’s pretty well documented that if you’re doing something in your backyard that is still within public view of a passing-by aircraft, you don’t have a reasonable expectation of privacy, and that’s been upheld through Supreme Court rulings for a number of years,” Goldsmith said.
- An invasion of privacy could just as easily occur with an onsite visit by a field adjuster.
- “If they’re looking at the exterior and they happen to peer in the window and see some sort of activity that could be construed as a privacy intrusion, I don’t know how different that is than the adjuster being there when the homeowner or the property owner is at work and whoever’s home is not answering the door,” Wolf said. “I think a lot of that is really just overblown, as long as there’s notice given and the insured knows what is going on.”

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### ISO CGL (0413) Edition

- 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:**
- a.** False arrest, detention or imprisonment;
  - b.** Malicious prosecution;
  - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;**
  - d.** Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
  - e.** Oral or written publication, in any manner, of material that violates a person's right of privacy;
  - f.** The use of another's advertising idea in your "advertisement"; or
  - g.** Infringing upon another's copyright, trade dress or slogan in your "advertisement".

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## Claims / Potential Problems

- Drone being used to film a marathon, failed and hit a runner
- A man operating a drone around a vehicle crash site interfered with a medical helicopters landing
- NY arrested for flying his drone too close to police helicopters
- Drone operator crashed his UAV into a hot spring at Yellowstone National Park, potentially damaging the spring.
- Man fined \$10,000 for using a drone to create a video for University of Virginia.

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## ISO Endorsements

### **Commercial General Liability Coverage Part:**

- CG 21 09 06 15 – Exclusion – Unmanned Aircraft
- CG 21 10 06 15 – Exclusion – Unmanned Aircraft (Coverage A Only)
- CG 21 11 06 15 – Exclusion – Unmanned Aircraft (Coverage B Only)
- CG 24 50 06 15 – Limited Coverage For Designated Unmanned Aircraft
- CG 24 51 06 15 – Limited Coverage For Designated Unmanned Aircraft (Coverage A Only)
- CG 24 52 06 15 – Limited Coverage For Designated Unmanned Aircraft (Coverage B Only)

### **Commercial Liability Umbrella Coverage Part:**

- CU 21 71 06 15 – Exclusion – Unmanned Aircraft
- CU 21 72 06 15 – Exclusion – Unmanned Aircraft (Coverage A Only)
- CU 21 73 06 15 – Exclusion – Unmanned Aircraft (Coverage B Only)
- CU 24 50 06 15 – Limited Coverage For Designated Unmanned Aircraft
- CU 24 51 06 15 – Limited Coverage For Designated Unmanned Aircraft (Coverage A Only)
- CU 24 52 06 15 – Limited Coverage For Designated Unmanned Aircraft (Coverage B Only)

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## FAA Regulations – Commercial Drones

- Operator Certification
  - Pass written exam at FAA approved testing center to obtain operator's certificate
  - TSA will screen applicants and operator's will have to pass a recurrent knowledge test every 24 months
  - No requirements to date for training, operating hours or liability insurance

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## FAA Regulations – Commercial Drones

- Implications
  - Total cost to take FAA exam and apply for operators certificate is estimated at \$150 No definitive resources are listed for knowledge or skills training. Companies will have to develop their own internal standards
- Hardware Requirements
  - Drones must weigh less than 55 lbs. and have a maximum speed of 100 mph
  - Aircraft must be registered with FAA and have visible registration number on craft (\$50 renewable every 3 years)
  - Inspection and Maintenance records must be kept

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## FAA Regulations – Commercial Drones

- Operational Limitations
  - Operator must maintain visual line-of-sight and may not operate over persons not directly involved in the operation.
  - Only daylight operations are permitted
  - Minimum visibility of 3 miles
  - Not closer than 500 feet below and 2000 feet horizontal from clouds, with a maximum altitude of 500 feet
  - Operation in B,C, D, and E airspace requires Air Traffic Control (ATC) permission
  - Operation is not permitted in areas where FAA restrictions are in place (problem Tri-State area)
  - Less stringent restriction for “Micro-Drones” <4.4lbs, <34.5mph
  - March 24, 2015 the FAA announced it would award “blanket” certification allowing companies to be exempt from a U.S. ban on commercial drones, to begin using the aircraft at altitudes of up to 200 feet during daylight hours and within the operator’s visual line of sight.
  - 333 exemption for commercial use / 127 exemption S.U.A.S. - \$150

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## FAA Regulations- Hobby/Model Drones

The screenshot shows the FAA website's 'Model Aircraft Operations' page. At the top, there is a navigation bar with the FAA logo and links for 'Home', 'Jobs', 'News', 'About FAA', 'A-Z Index', and 'FAA for You...'. Below this is a search bar. The main navigation menu includes 'Aircraft', 'Airports', 'Air Traffic', 'Data & Research', 'Licenses & Certificates', 'Regulations & Policies', and 'Training & Testing'. The page title is 'Model Aircraft Operations' and the breadcrumb trail is 'FAA Home > Unmanned Aircraft Systems > Model Aircraft Operations'. The main content area is titled 'Model Aircraft Operations' and contains the following text: 'Model aircraft operations are for hobby or recreational purposes only. The FAA has partnered with several industry associations to promote Know Before You Fly®, a campaign to educate the public about using unmanned aircraft safely and responsibly. Individuals flying for hobby or recreation are strongly encouraged to follow safety guidelines, which include:'. A list of guidelines follows: 'Fly below 400 feet and remain clear of surrounding obstacles', 'Keep the aircraft within visual line of sight at all times', 'Remain well clear of and do not interfere with manned aircraft operations', 'Don't fly within 5 miles of an airport unless you contact the airport and control tower before flying', 'Don't fly near people or stadiums', 'Don't fly an aircraft that weighs more than 55 lbs', and 'Don't be careless or reckless with your unmanned aircraft – you could be fined for endangering people or other aircraft'. Below the list, there is a paragraph: 'The statutory parameters of a model aircraft operation are outlined in Section 336 of Public Law 112-95 (the FAA Modernization and Reform Act of 2012) (PDF). Individuals who fly within the scope of these parameters do not require permission to operate their UAS; any flight outside these parameters (including any non-hobby, non-recreational operation) requires FAA authorization. For example, using a UAS to take photos for your personal use is recreational; using the same device to take photographs or videos for compensation or sale to another individual would be considered a non-recreational operation.' On the right side, there are sections for 'Top Tasks' (Read about the draft rule for small UAS, Review FOIA Responses, Apply for a Section 333 exemption, Connect with a UAS Test Site, Contact the UAS Integration Office) and 'What can you do with your unmanned aircraft?' (with a B4UFLY Smartphone App icon).

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## Mandatory FAA Registration

- It's here! The Federal Aviation Administration's (FAA) Small Unmanned Aircraft System (UAS) registry is now live and ready for UAS owners to use at [www.faa.gov/uas/registration](http://www.faa.gov/uas/registration). Registration is free for the first 30 days with a rebate, then \$5 after that.
- During the registration process, each owner must provide his or her name, home address and e-mail address. When registration is complete, the web application will generate a Certificate of Aircraft Registration/Proof of Ownership including a unique identification number for the UAS owner, which must be marked on the aircraft.
- Owners using the model aircraft for hobby or recreation will only have to register once and may use the same identification number for all of their model UAS. The registration is valid for three years.
- **All aircraft weighing more than 0.55 pounds (250 grams) and less than 55 pounds (approx. 25 kilograms), including payloads such as on-board cameras, must be registered.**
- Under this rule, owners who previously operated an unmanned aircraft exclusively as a model aircraft prior to December 21, 2015, must register no later than February 19, 2016. Owners of any other UAS purchased for use as a model aircraft after December 21, 2015 must register before the first flight outdoors. Owners may use either the paper-based process or the new streamlined, web-based system. Owners using the new streamlined web-based system must be at least 13 years old to register.
- About 185,000 drones have been registered as of 1/7/16

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Chicago Drone Operator Proposed FAA Fine \$1.9 Million

<<http://www.chicagotribune.com/business/cl-drone-proposed-fine-20151006-story.html>>

A Chicago aerial photography firm was hit Tuesday by the Federal Aviation Administration with a record proposed fine of \$1.9 million for flying drones in busy downtown Chicago and New York without permission.

SkyPan International — which provides dramatic aerial photography to dozens of high-end property developers and architects, including the Trump Organization — endangered life and property when it flew 64 unauthorized flights in New York and one just north of Chicago's Loop between March 2012 and December 2014, the FAA alleges.

Its drone was not registered with the FAA, did not have a certificate of airworthiness, and lacked the two-way radio, transponder and altitude-reporting equipment required by the law for commercial use of drones, the FAA said.

A spokesman for SkyPan, which on its website says it's "flight approved" by the FAA, declined to comment on the allegations Tuesday.

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## Drones are Aircraft

- A drone is an “aircraft” under the Federal Aviation Regulations.
- Shooting down an aircraft is a federal crime. The penalties include 20 years in prison, and a *threat* to shoot down an aircraft can get you five years in prison (18 U.S.C. §32). The government also can impose fines of up to \$250,000.

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## Self Piloting Drones

Time Magazine

January 2016

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**SNAPSHOT****The self-piloting helicopter**

We have drones that record videos, fight fires and even deliver packages. EHang's 184 aims to one-up them all—by transporting a human. The all-electric creation, unveiled Jan. 6 at the CES tech show in Las Vegas, works much like a self-driving car: after specifying a destination, users hop in, sit back and enjoy the ride. Although EHang, based in Guangzhou, China, has successfully flown manned tests in its home country, safety remains a headwind; should the technology malfunction, there is no pilot to step in. Nonetheless, EHang plans to start selling the 184s this year in China, where drone regulations are less strict than they are in the U.S. CEO Huazhi Hu says they will cost \$200,000 to \$300,000. —Alex Fitzpatrick



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## The Lowest Bidder

It is unwise to pay too much, but it is worse to pay too little. When you pay too much, you lose a little money—that is all. When you pay too little, you sometimes lose everything, because the thing you bought is incapable of doing what it was bought to do. The common law of business balance prohibits paying a little and getting a lot—it can't be done. If you deal with the lowest bidder, it is well to add something extra for the risk you run. And if you do that, you will have enough to pay for something better”

John Ruskin (1819-1900)

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# James K. Ruble Seminar

*a proud member of The National Alliance for Insurance Education & Research*

Section 4

# Personal Lines Troubles and Solutions





# RUBLE GRADUATE SEMINAR



## PERSONAL LINES TROUBLES and SOLUTIONS

April 2019

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# Introduction

- ISO Policy Forms
  - Nationally Written
  - State Approved
    - Your State's Amendatory Endorsements
  - Company Adopted
- Non-ISO Policy Forms
  - "Contains ISO Copyrighted Material"
  - Proprietary
- Policy Form Edition Dates
  - Why Change?
  - Duty to advise Client



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## ISSUE # 1

# ISO Homeowner and Host Liquor Liability



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ISO HO 00 03 (0511) wording.....

1. "Aircraft Liability", "Hovercraft Liability", "Motor Vehicle Liability" and "Watercraft Liability", subject to the provisions in b. below, mean the following:

a. **Liability for "bodily injury" or "property damage" arising out of the:**

(1) Ownership of such vehicle or craft by an "insured";

(2) Maintenance, occupancy, operation, use, loading or unloading of such vehicle or craft by **any person**;

(3) Entrustment of such vehicle or craft by an "insured" to any person;

(4) Failure to supervise or negligent supervision of any person involving such vehicle or craft by an "insured"; or

(5) Vicarious liability, whether or not imposed by law, for the actions of a child or minor involving such vehicle or craft.

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- **SECTION II – EXCLUSIONS**

- **"Motor Vehicle Liability"**

- Coverages **E** and **F** do not apply to any "motor vehicle liability" if, at the time and place of an "occurrence", the involved "motor vehicle":

- Is registered for use on public roads or property;
    - Is not registered for use on public roads or property, but such registration is required by a law, or regulation issued by a government agency, for it to be used at the place of the "occurrence"; or

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## Social Hosts Liability and Homeowners Motor Vehicle Exclusion

### FC&S Bulletins

*Massachusetts Property Insurance  
Underwriting Association v. Berry, 954  
N.E.2d 584 (2011).*

- The insurer brought an action seeking a declaration regarding its obligations to indemnify the insureds under a homeowners policy for their liability to a third party for injuries arising out of a motor vehicle accident occasioned by the negligent operation of an underage minor under the influence of alcohol. The minor was served alcohol while a guest at the insureds' home. This case is *Massachusetts Property Insurance Underwriting Association v. Berry*, 954 N.E.2d 584 (2011).
- Bernier and Caron own a home and are insureds under a homeowners policy issued by Massachusetts Property Insurance Underwriting Association. The two insureds negligently served, supplied, or permitted DiFrancesco, a nonresident minor, to consume alcohol and become intoxicated at the insured premises. While under the influence, DiFrancesco negligently operated a motor vehicle that struck another vehicle operated by Berry. Berry sustained serious personal injuries.

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- Berry sued Bernier and Caron. The insurer offered a defense under a reservation of rights. The insurer then instituted this action seeking a declaration that it had no duty to indemnify under the terms of the homeowners policy. The trial court ruled in favor of the insurer and this appeal followed.
- The appeals court noted that liability on the part of the insureds was conceded. The question before the court was whether the homeowners policy requires the insurer to indemnify them from liability to Berry as social hosts. The issue of coverage centered around the motor vehicle exclusion in the policy. The insurer contended that Berry's injuries arose out of the use of a motor vehicle and the motor vehicle exclusion relieves it from its indemnity requirements. The insurer pointed out that the exclusion referred to "any person" who operates or uses a motor vehicle. And, if injury arises out of the use of a motor vehicle, the exclusion relieves the insurer of indemnity liability regardless of whether other covered causes may have contributed to the injury.

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- The appeals court agreed with the insurer. The court said that under the plain, broad, and unambiguous terms of the motor vehicle exclusion, there is no bodily injury coverage because Berry's injuries arose out of the use of a motor vehicle.
- The court also addressed the chain of causation and whether the injuries were caused by the service of alcohol, by the negligent operation of the auto, or by a combination of both. The court said this was irrelevant. Under the terms of the exclusion, the operative question was whether Berry's injuries arose out of the use of a motor vehicle, and since the phrase "arising out of" must be read expansively, incorporating a greater range of causation that that encompassed by proximate cause under tort law, the court found that the exclusion eliminates the significance of other causal elements and renders irrelevant the chain of causation analysis.
- The judgment of the trial court was affirmed.

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- Editor's Note: The appeals court in Massachusetts weighed the liability of a social host for serving alcohol to a minor against the motor vehicle exclusion in a homeowners policy, and decided that the exclusion prevailed. Even though the social hosts in this case were liable for serving alcohol to a minor, their liability was not covered by their homeowners policy because that minor injured someone through the use of an auto.
- This case is also noted due to the discussion of the chain of causation by the court. The chain of causation analysis is usually confined to first-party insurance cases where causation is at issue. This was a third-party insurance dispute and the court noted that even though the insureds did serve alcohol to a minor, the motor vehicle exclusion with its "arising out of" language operated to eliminate coverage. The injured party could claim that the serving of alcohol to a minor caused his injuries, but the court ruled that, no, the injuries were actually caused by the negligent use of an auto and this was clearly excluded under the homeowners policy.

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# Is There PAP Coverage?

B. "Insured" as used in this Part means: ISO PP 00 01 (0918)

1. **You or any "family member" for the ownership, maintenance or use of any auto or "trailer".**
2. Any person using "your covered auto".
3. For "your covered auto", any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.
4. For any auto or "trailer", other than "your covered auto", any other person or organization but only with respect to legal responsibility for acts or omissions of you or any "family member" for whom coverage is afforded under this Part. *This Provision (B.4.) applies only if the person or organization does not own or hire the auto or "trailer".*

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## ISSUE # 2

## THE ISO HOMEOWNER POLICY and MOTOR VEHICLES

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## Definition

### 7. "Motor vehicle" means:

- a. A self-propelled land or amphibious vehicle;

ISO HO 00 03 (0511)

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## What is a "Motor Vehicle" ?

- Car
- Truck
- Motorcycle –street or dirt bike
- Segway / Motorized Scooters / Hoverboard
- ATV / UTV / RTV
- Snowmobile
- Go-Kart
- Golf Cart
- Grandma's Jazzy Wheelchair
- John Deere Riding Lawnmower
- Barbie or Jeep Motorized Child's Toy
- Velkie – An Attachment to Self-Propelled Lawnmowers for a Rider

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## • **SECTION II – EXCLUSIONS** ISO HO 00 03 (0511)

### • **"Motor Vehicle Liability"**

– Coverages **E** and **F** do not apply to any "motor vehicle liability" if, at the time and place of an "occurrence", the involved "motor vehicle":

- Is registered for use on public roads or property;
- Is not registered for use on public roads or property, but such registration is required by a law, or regulation issued by a government agency, for it to be used at the place of the "occurrence"; or

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## Your State's Motor Vehicle Statute

- Many states consider a “motor vehicle” on a public road, to be an auto.
- Those autos are subject to the State's Registration / Financial Responsibility / Compulsory Liability Insurance laws.
- Check your State's Motor Vehicle Statute to see what motor vehicles need to be registered and/or insured on a public road.

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## Sample Motor Vehicle Law

- NEW YORK—MOTOR VEHICLE STATUTES
- Registration Statute: New York State Consolidated Laws, Vehicle & Traffic, Title 4, Registration of Vehicles; and Title 11, Registration of Snowmobiles, Motorboats, and Limited Use Vehicles
- Applies to:
- No **motor vehicle** shall be operated or driven upon the public highways of this state without first being registered in accordance with the provisions of this article, except as otherwise expressly provided in this chapter. Every owner of a trailer shall also make application for the registration thereof in the manner herein provided. [401, subdivision 1]
- No **motorcycles** shall be operated or driven upon the public highways of this state without first being registered in accordance with the provisions of this article, except as otherwise expressly provided in this chapter. [410, subdivision 1]

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# Sample Motor Vehicle Law

- Except as hereinafter provided, no person shall operate any snowmobile within the state unless such **snowmobile** has been registered in accordance with the provisions of this article. [2222]
- Except as hereinafter provided, no person shall operate any limited use vehicle on a public highway or street within this state unless such limited use vehicle has been registered in accordance with the provisions of this article. [2261, subdivision 1]
- Except as hereinafter provided, no person shall operate any **ATV** within the state unless such ATV has been registered in accordance with the provisions of this article. [2282, subdivision 1]

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## SECTION II – EXCLUSIONS

ISO HO 00 03 (1000)

### A. "Motor Vehicle Liability"

2.If Exclusion A.1. does not apply, there is still no coverage for "motor vehicle liability" unless the "motor vehicle" is:

- a. In dead storage on an "insured location";
- b. Used **solely** to service an "insured's" residence;
- c. Designed to **assist the handicapped** and, at the time of an "occurrence", it is:
  - (1) Being used to assist a handicapped person; or
  - (2) Parked on an "insured location";
- d. Designed for recreational use off public roads and:
  - (1) **Not owned by an "insured"**; or
  - (2) Owned by an "insured" provided the "occurrence" takes place **on an "insured location"** as defined

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## ISO 2011 CHANGES HO 00 03 (0511)

Liability coverage for motor vehicles used to service a residence is expanded so that a loss arising from a motor vehicle that is occasionally used to service any residence (e.g., a neighbor's yard) is covered.

To address these concerns we are revising Paragraph **A.2. b. of the Section II** Motor Vehicle Liability Exclusion to delete reference to "an insured's". The new provision will read as follows:

2. If Exclusion A.1. does not apply, there is still no coverage for "motor vehicle liability", unless the "motor vehicle" is:

- a. In dead storage on an "insured location";
- b. Used solely to service a residence;**

**Still no coverage if you use your riding lawn mower at the church or day care center, or any place other than a residence.**

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## ISO 2011 CHANGES

- Coverage for certain electric toy vehicles is added via an exception to the motor vehicle liability exclusion.
- Thus, an off-premises loss arising from a low-power electric toy vehicle (including those designed for small children to sit in and "drive") is now covered.

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## ISO HO 00 03 (0511)

- (2) Owned by an "insured" provided the "occurrence" takes place:
  - (a) On an "insured location" as defined in Definition **B.6.a., b., d., e. or h.**; or
  - (b) Off an "insured location" and the "motor vehicle" is:
    - (i) Designed as a toy vehicle for use by children under seven years of age;
    - (ii) Powered by one or more batteries; and
    - (iii) Not built or modified after manufacture to exceed a speed of five miles per hour on level ground;

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## ISSUE # 3

## STUDENTS AWAY AT SCHOOL



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## To be Safe....

If you are spending \$20k, \$30k, \$40k per year, to send your child to college; please spend a few more dollars and buy them a:

- 1). Tenant Policy
- 2). Named Non-Ownership Auto Policy
- 3). Personal Umbrella

Be careful relying on Mom and Dad's HO, PAP, and UMB Policy

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## Definition of an “Insured”

HO 00 03 (0511)

“Insured” means:

- a. You and **residents** of your **household** who are:
  - (1) Your relatives; or
  - (2) Other persons under the age of 21 and in the care of any person named above;
- b. A student enrolled in school full time, as defined by the school, who was a resident of your household before moving out to attend school, provided the student is under the age of:
  - (1) 24 and your relative; or
  - (2) 21 and in your care or the care of a person described in a.(1) above; or

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## Homeowner Issues

- Personal Property owned or ***used*** by you while it is anywhere in the world !
  - **Damage to Property of Others**
- 10% Limitation for Contents usually situate at a “insured’s” Residence other than the “Residence Premises”
  - Contents in Storage ?
  - College Student ?
    - Theft ?
  - Tenant Policy !

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## ISO 2011 CHANGES

- Theft coverage is broadened for an insured who is a student living away from home.
- Personal property coverage for the student while at the residence he or she occupies to attend school is expanded to apply as long as the student has been at the residence at any time during the 90 days (up from 60 days) immediately before the loss.

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## ISO 2011 CHANGES

### **Personal Property Located In Self-Storage Facilities**

The current homeowners program provides worldwide coverage for personal property. There is a 10% limit of liability for Coverage C personal property (or \$1,000 whichever is higher) for personal property “usually located” at an insured’s residence other than the “residence premises”. The policy does not address personal property in a self-storage facility.

**Section I is being revised to limit personal property located in self-storage facilities to 10% of the Coverage C limit (or \$1,000 whichever is higher).**

An optional buy-back endorsement, HO 06 14 Increased Amount of Insurance For Personal Property Located at Self-Storage Facilities, is being introduced to provide for an increase in coverage.

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## PAP- Who is an Insured?

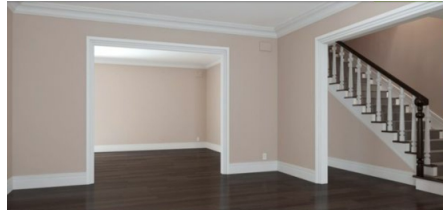
B. "Insured" as used in this Part means: PP 00 01 (0918)

1. **You or any "family member" for the ownership, maintenance or use of any auto or "trailer".** (no business use of a truck / in policy territory)
2. **Any person using "your covered auto".**
3. For "your covered auto", any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.
4. For any auto or "trailer", other than "your covered auto", any other person or organization but only with respect to legal responsibility for acts or omissions of you or any "family member" for whom coverage is afforded under this Part. ***This Provision (B.4.) applies only if the person or organization does not own or hire the auto or "trailer".***

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## ISSUE # 4



**“WHERE YOU RESIDE” - CAN BE  
FATAL TO YOUR HOMEOWNER CLAIM**



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## Zises v. NY Central Mutual

2012 NY Slip Op 50020(U)

January 10, 2012

Supreme Court Dutchess County, NY

- This action arises out of a property loss incurred by the insured as a result of a fire that occurred on 4/10/10.
- This above home was owned by the insured, but was rented to a tenant. Tenant had occupied the rented dwelling for the past eight years.
- The Insured filed a claim under his homeowner policy for the fire damage with Central Mutual.
- Central Mutual denies coverage based upon the fact that the policy of insurance specifically defines the covered dwelling as “the dwelling on the residence premises” shown in the declarations, including structures attached to the dwelling.....
- **The policy further defines the term “residence premises” to mean “the one family dwelling where the insured resides”**

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- Notwithstanding the insured assertion, the policy’s reference to the phrase “reside” is not ambiguous and must be accorded its plain and ordinary meaning.
- It is significant that all of the definitions of “insured premises” have a common element requiring that it must be the residence of the insured.
- This fact emphasizes that the policy is only intended to afford coverage for places where the insured lives.
- Accordingly because the insured did not reside at the subject property, the policy of insurance did not apply.

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## Homeowners Policy

- Homeowners policies are intended to provide coverage for premises occupied by the homeowner:
- Coverage A- Dwelling  
We cover: a). The dwelling on the “residence premises” shown in the declarations...
- Residence Premises is defined as:
  - a). The one family dwelling where you **reside**;
  - b). The two, three or four family dwelling where you **reside** in at least one of the family units; or
  - c). That part of any other building where you **reside**, and which is shown in the Declarations page

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## Two More Claims

- Tower Ins Co v. Khan 2011- NY
  - Ms. Khan bought a two family home in Queens and purchased a Homeowners policy
  - Before moving in she hired a contractor to do work, who was injured and sued
  - Tower argued that Khan never resided at the covered premises and denied coverage.
  - The NY Supreme Court agreed with Tower.

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## Two More Claims

- Patricia Dolan asked her friend Susan Raner to help her do the end of summer clean-out of a beach cabana in Atlantic Beach
- Dolan had rented the cabana every year for 20 years
- Raner tripped over an umbrella which had been placed in the ground outside the cabana and fractured her hip, suing Dolan
- Security Mutual denied coverage because the cabana was not an "insured premises":
  - Insured premises means.... "that part of a premises occasionally rented to an insured for other than business purposes
- The court agreed.
- When does a rental become not occasional ?

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6. "Insured location" means:
- a. The "residence premises";
  - b. The part of other premises, other structures and grounds used by you as a residence; and
    - (1) Which is shown in the Declarations; or
    - (2) Which is acquired by you during the

h. Any part of a premises occasionally rented to an "insured" for other than "business" use.

- d. Any part of a premises:
  - (1) Not owned by an "insured"; and
  - (2) Where an "insured" is temporarily residing;
- e. Vacant land, other than farm land, owned by or rented to an "insured";
- f. Land owned by or rented to an "insured" on which a one-, two-, three- or four-family dwelling is being built as a residence for an "insured";

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# October 2015 ISO Homeowner Changes

Homeowner Multi State Endorsements  
ISO Forms Filing- Homeowner LI-HO-2015-051

**\*\*May not be approved in your State\*\***

## MANDATORY ISO ENDORSEMENTS

- 1). HO 06 48 (1015) Residence Premises Definition Endorsement.
- 2). HO 17 48 (1015) Residence Premises Definition Endorsement – Unit Owners.
- 3). HO 04 26 (1015) Resident Premises Definition Endorsement- Mobilehome.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## RESIDENCE PREMISES DEFINITION ENDORSEMENT

### DEFINITIONS

Definition B.11. is replaced by the following:

11. "Residence premises" means:

- a. The one-family dwelling where you reside;
- b. The two-, three- or four-family dwelling where you reside in at least one of the family units; or
- c. That part of any other building where you reside;

on the inception date of the policy period shown in the Declarations and which is shown as the "residence premises" in the Declarations.

"Residence premises" also includes other structures and grounds at that location.

All other provisions of this Policy apply.

## OPTIONAL ENDORSEMENTS

- 1). HO 06 49 (1015) Broadened Residence Premises Definition Endorsement.
- 2). HO 17 47 (1015) Broadened Residence Premises Definition Endorsement – Unit Owners.
- 3). HO 04 27 (1015) Broadened Resident Premises Definition Endorsement-Mobilehome.

POLICY NUMBER:

HOMEOWNERS  
HO 06 49 10 15

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## BROADENED RESIDENCE PREMISES DEFINITION ENDORSEMENT

### SCHEDULE

Inception Date	Termination Date
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

### DEFINITIONS

Definition B.11. is replaced by the following:

11. "Residence premises" means:

a. With respect to the period shown in the above Schedule:

- (1) The one-family dwelling;
- (2) The two-, three- or four-family dwelling; or
- (3) That part of any other building; which is shown as the "residence premises" in the Declarations; and

b. With respect to any portion of the policy period not shown in the above Schedule:

- (1) The one-family dwelling;
- (2) The two-, three- or four-family dwelling; or
- (3) That part of any other building; where you reside and which is shown as the "residence premises" in the Declarations.

"Residence premises" also includes other structures and grounds at that location.

All other provisions of this Policy apply.

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# MSO vs ISO Where you Reside Wording



**MSO**

**In MPL 01:**

**Residence Premises**

Means that applicable *insured premises* described in Part A of the definition of *insured premises*, and shown as the *residence premises* in the Declarations.

**Insured Premises**

**Part A**

Means one of the following, at the described location, as shown in the Declarations.

1. The 1 to 4 family house *you own* or the 1/2 of a 2 family house *you own* and any related structures and grounds exclusively used by *your* household.
2. That part of a row house or townhouse *you own* and any related structures and grounds exclusively used by *your* household.
3. The 1 or 2 family mobilehome *you own* or the 1/2 of a 2 family mobilehome *you own* and any related structures and grounds exclusively used by *your* household.
4. Those parts of the building exclusively used by *your* household, when *you* reside in an apartment or similar rented premises, condominium or cooperative unit, or a family unit in a multi-family unit owned by *you* and *you* are covered by form MHO 4.

All of the preceding Items 1 through 4 are covered **when used solely as a private residence or as otherwise permitted by this policy.** "Exclusive use" includes use by others of those portions of such premises otherwise normally occupied by *you* or *your* household, while rented by *you* to others **and** such rental is permitted by this policy.

**In MHO 2, 3, 5**

**A. Owner Occupancy**

Unless otherwise agreed to in this policy by *us* it is understood that the covered dwelling is owned and customarily occupied by *you* and this is the condition of hazard and use that *we* undertake to insure under this policy.

**C. Section I D — Losses Not Insured**

**2. The following exclusion is added:**

**Other Than Owner Occupancy Exclusion**

*We* do not provide insurance for a covered dwelling that is not owned and customarily occupied by *you*.

If MPL 150 is listed in the Declarations, this exclusion does not apply.

**D. Section II D — Liability Not Insured**

The following exclusion is added:

**Other Than Owner Occupancy Exclusion**

*We* do not cover *bodily injury* or *property damage* arising out of a covered dwelling that is not owned and customarily occupied by *you*.

If MPL 150 is listed in the Declarations, this exclusion does not apply.

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**ISSUE # 5**

# EARTHQUAKE



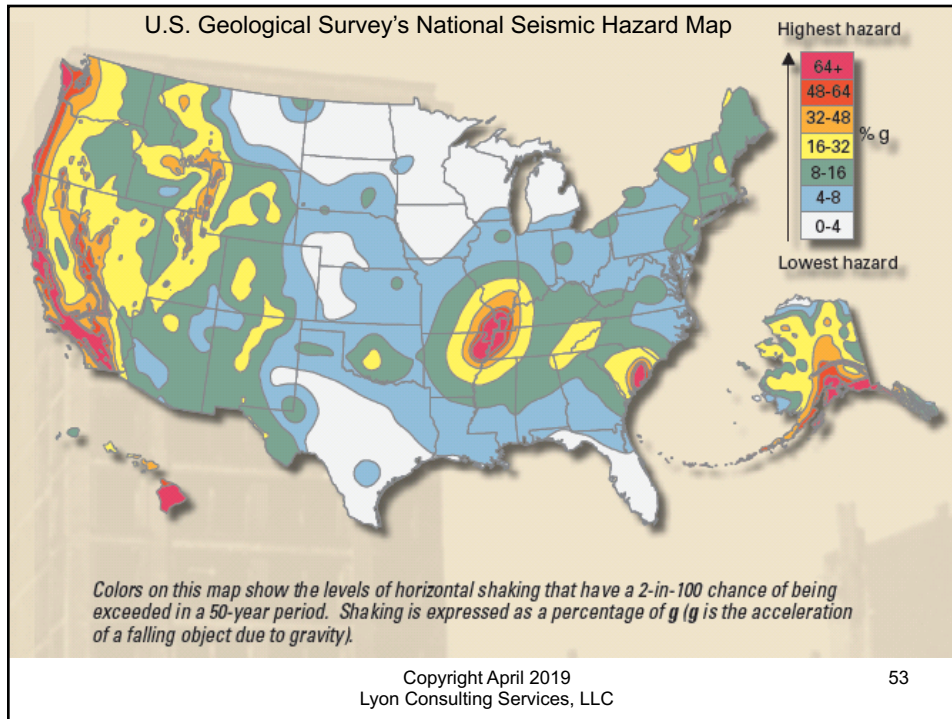
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- **Earthquakes have occurred in 39 states since 1900, and about 90% of Americans live in areas considered seismically active. Yet only a small percentage of people purchase earthquake insurance.**

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- The New Madrid Fault, which runs through Arkansas, Kentucky, Missouri and Tennessee, also has insurers worried. According to the [Insurance Information Institute](#), there's a 40 to 63 percent chance the region will suffer an earthquake with a 6.0 magnitude in the next 15 years.
- For those who don't remember, which would include anyone not alive in 1811, an earthquake struck the New Madrid area with enough force to change the course of the Mississippi river and ring church bells on the east coast.

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MODERATE RISK	HIGH RISK	VERY HIGH RISK
<ul style="list-style-type: none"> <li>• Alabama</li> <li>• Colorado</li> <li>• Connecticut</li> <li>• Delaware</li> <li>• Georgia</li> <li>• Maine</li> <li>• Maryland</li> <li>• Massachusetts</li> <li>• Mississippi</li> <li>• New Hampshire</li> <li>• New Jersey</li> <li>• New York</li> <li>• North Carolina</li> <li>• Ohio</li> <li>• Oklahoma</li> <li>• Pennsylvania</li> <li>• Rhode Island</li> <li>• Texas</li> <li>• Vermont</li> <li>• Virginia</li> <li>• West Virginia</li> </ul>	<ul style="list-style-type: none"> <li>• American Samoa</li> <li>• Arizona</li> <li>• Arkansas</li> <li>• Illinois</li> <li>• Indiana</li> <li>• Kentucky</li> <li>• Missouri</li> <li>• New Mexico</li> <li>• Puerto Rico</li> <li>• South Carolina</li> <li>• Tennessee</li> <li>• Utah</li> </ul>	<ul style="list-style-type: none"> <li>• Alaska</li> <li>• California</li> <li>• Commonwealth of Northern Mariana Islands</li> <li>• Guam</li> <li>• Hawaii</li> <li>• Idaho</li> <li>• Montana</li> <li>• Nevada</li> <li>• Oregon</li> <li>• Virgin Islands</li> <li>• Washington</li> <li>• Wyoming</li> </ul>
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### Estimated Insured Losses For The Top Ten Historical Earthquakes Based On Current Exposures (1) (\$ Bill)

Rank	Date	Location	Magnitude	Insured loss (current exposures)
1	Feb. 7, 1812	New Madrid, MO	7.7	\$100
2	Apr. 18, 1906	San Francisco, CA	7.8	96
3	Aug. 31, 1886	Charleston, SC	7.3	37
4	Jun. 1, 1838	San Francisco, CA	7.4	27
5	Jan. 17, 1994	Northridge, CA	6.7	21
6	Oct. 21, 1868	Hayward, CA	7.0	21
7	Jan. 9, 1857	Fort Tejon, CA	7.9	8
8	Oct. 17, 1989	Loma Prieta, CA	6.3	6
9	Mar. 10, 1933	Long Beach, CA	6.4	5
10	Jul. 1, 1911	Calaveras, CA	6.4	4

(1) Modeled loss to property, contents, and business interruption and additional living expenses for residential, mobile home, commercial and auto exposures as of December 31, 2008. Losses include demand surge and fire following earthquake. Policy conditions and earthquake insurance take up rates are based on estimates by state insurance departments and client claims data.

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POLICY NUMBER:

HOMEOWNERS  
HO 04 54 05 11

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

### EARTHQUAKE

#### SCHEDULE

<p>Earthquake Deductible Percentage Amount:  <b>Exterior Masonry Veneer Exclusion 1.</b>  <input type="checkbox"/> Check here only if this exclusion does not apply.</p>
<p>Information required to complete this Schedule, if not shown above, will be shown in the Declarations.</p>

#### A. Section I – Property Coverages

The following is added:

- We insure for direct physical loss to property covered under Section I caused by earthquake, including land shock waves or tremors before, during or after a volcanic eruption.  
One or more earthquake shocks that occur within a 72-hour period constitute a single earthquake.
- This coverage does not increase the limits of liability stated in this policy.

#### B. Section I – Exclusions

1. The following exclusions are added:

##### a. Exterior Masonry Veneer

We do not cover loss to exterior masonry veneer caused by earthquake. The value of exterior masonry veneer will be deducted before applying the earthquake deductible described above. For the purpose of this exclusion, stucco is not considered masonry veneer.

##### b. Flood

We do not cover loss resulting directly or indirectly from flood of any nature or waves, including tidal wave and tsunami, whether:

- Caused by;
- Resulting from;
- Contributed to by; or

#### c. Filling Land

This coverage does not include the cost of filling land.

#### 2. Exception To The Earth Movement Exclusion

The Section I – Earth Movement Exclusion does not apply to loss caused by earthquake, including land shock waves or tremors before, during or after a volcanic eruption.

#### C. Section I – Conditions

##### B. Deductible

The following replaces any other deductible provision in this policy with respect to any one loss covered under this endorsement:

- We will pay only that part of the total of all loss payable under all Section I – Property Coverages, except:
  - Coverage D; and
  - The Additional Coverages; that exceeds the earthquake deductible described in Paragraph B.2.
- The dollar amount of the earthquake deductible is determined by multiplying either the:
  - Coverage A; or
  - Coverage C;
 Limit Of Liability shown in the Declarations, whichever is greater, by the deductible percentage amount shown in the Schedule

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HO 04 36 05 11

#### LOSS ASSESSMENT COVERAGE FOR EARTHQUAKE

#### SCHEDULE

A.	Location Of The Unit	Limit Of Liability
		\$
B.	Earthquake Loss Assessment Deductible Percentage Amount:	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

#### A. Section I – Property Coverages

The following coverage is added:

##### Loss Assessment Coverage

We will pay your share of any loss assessment charged during the policy period against you by a corporation or association of property owners, up to the Limit Of Liability shown in A. in the Schedule above for each unit. The assessment must be made as a result of direct loss to property, owned by all members collectively, of the type that would be covered by this policy if owned by you, caused by:

- Earthquake; or
- Land shock waves or tremors before, during or after a volcanic eruption.

One or more earthquake shocks that occur within a 72-hour period constitute a single earthquake.

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# ISSUE # 6

## DON'T GET CAUGHT UNDERWATER

### NFIP POTENTIAL PROBLEM AREAS



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# Definitions

- Flood
  - “A general and temporary condition of partial or complete inundation of **two or more acres** of normally dry land areas or of **two or more properties** from:
    - (1) overflow of inland or tidal waters;
    - (2) unusual and rapid accumulation or runoff of surface waters from any source;
    - (3) mudflows caused by flooding.
    - (4) Collapse or subsidence of land along the shore or lake as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood”

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# Water Damage

- Homeowners Policy
- Water Back-up Endorsements
- On Premises / Off Premises
- NFIP
- Potential GAPS



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**EXCLUSIONS -- HO 00 03 (0511)**

**3. Water**

This means:

- a.** Flood, surface water, waves, including tidal wave and tsunami, tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind, including storm surge;
- b.** Water which:
  - (1)** Backs up through sewers or drains; or
  - (2)** Overflows or is otherwise discharged from a sump, sump pump or related equipment;
- c.** Water below the surface of the ground, including water which exerts pressure on, or seeps, leaks or flows through a building, sidewalk, driveway, patio, foundation, swimming pool or other structure; or
- d.** Waterborne material carried or otherwise moved by any of the water referred to in **A.3.a.** through **A.3.c.** of this exclusion.

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**EXCLUSIONS - HO 00 03 (0511)**

This Exclusion **A.3.** applies regardless of whether any of the above, in **A.3.a.** through **A.3.d.**, is caused by an act of nature or is otherwise caused.

This Exclusion **A.3.** applies to, but is not limited to, escape, overflow or discharge, for any reason, of water or waterborne material from a dam, levee, seawall or any other boundary or containment system.

However, direct loss by fire, explosion or theft resulting from any of the above, in **A.3.a.** through **A.3.d.**, is covered.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

### WATER BACK UP AND SUMP DISCHARGE OR OVERFLOW

#### A. Coverage

We insure, up to \$5,000, for direct physical loss, not caused by the negligence of an "insured", to property covered under Section I caused by water, or water-borne material, which:

1. Backs up through sewers or drains; or
2. Overflows or is discharged from a:

- a. Sump, sump pump; or
- b. Related equipment;

even if such overflow or discharge results from mechanical breakdown. This coverage does not apply to direct physical loss of the sump pump, or related equipment, which is caused by mechanical breakdown.

This coverage does not increase the limits of liability for Coverages A, B, C or D stated in the Declarations.

#### B. Section I – Perils Insured Against

With respect to the coverage described in A. above, Paragraph:

A.2.c.(6)(b) in Form HO 00 03;

A.2.e.(2) in Form HO 00 05;

2.j.(2) in Endorsement HO 05 24;

#### D. Exclusion

The Water Damage exclusion is deleted and replaced by the following:

Water Damage, meaning:

- a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

- b. Water, or water-borne material, which:

(1) Backs up through sewers or drains; or

(2) Overflows or is discharged from a sump, sump pump or related equipment;

as a direct or indirect result of flood; or

- c. Water, or water-borne material, below the surface of the ground, including water which:

(1) Exerts pressure on; or

(2) Seeps or leaks through;

a building, sidewalk, driveway, foundation, swimming pool or other structure;

caused by or resulting from human or animal forces or any act of nature.

Direct loss by fire or explosion resulting from water damage is covered.

All other provisions of this policy apply.

## NFIP Exclusion

- D. We do not insure for direct physical loss caused directly or indirectly by any of the following:

7. water or waterborne material that:

- a. backs up through sewers or drains;
- b. discharges or overflows from a sump, sump pump, or related equipment; or
- c. seeps or leaks on or through the covered property;

UNLESS... there is a flood and the flood is the proximate cause.

## “Flood” ?

- Sewer / Drain Back Up ?
- Discharge or Overflow of Sump Pump
- Seepage or Leakage
- Neighbors above ground pool collapses
- Water Tank rupture
- Broken Water Main
- Hydrostatic Pressure

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## Definitions

- **Flood**  
**“A general and temporary condition of partial or complete inundation of *two or more acres* of normally dry land areas or of *two or more properties* from:**
  - (1) overflow of inland or tidal waters;
  - (2) unusual and rapid accumulation or runoff of surface waters ***from any source***;
  - (3) mudflows caused by flooding.
  - (4) Collapse or subsidence of land along the shore or lake as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood”

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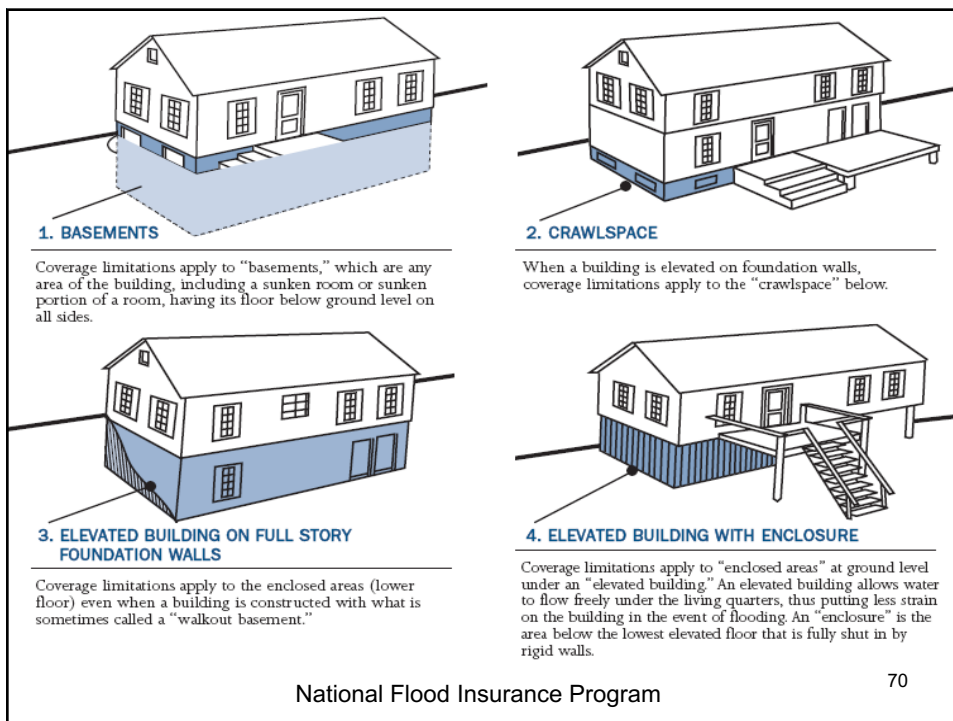
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# Three Types of Buildings

- Slab on Grade
- **Basement** — Any area of the building having its floor below ground level (subgrade) on all sides.
- **Elevated** — A building that has no basement and that has its lowest elevated floor raised above ground level by foundation walls, shear walls, posts, pilings, or columns.

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**1. BASEMENTS**  
Coverage limitations apply to “basements,” which are any area of the building, including a sunken room or sunken portion of a room, having its floor below ground level on all sides.

**2. CRAWLSPACE**  
When a building is elevated on foundation walls, coverage limitations apply to the “crawlspace” below.

**3. ELEVATED BUILDING ON FULL STORY FOUNDATION WALLS**  
Coverage limitations apply to the enclosed areas (lower floor) even when a building is constructed with what is sometimes called a “walkout basement.”

**4. ELEVATED BUILDING WITH ENCLOSURE**  
Coverage limitations apply to “enclosed areas” at ground level under an “elevated building.” An elevated building allows water to flow freely under the living quarters, thus putting less strain on the building in the event of flooding. An “enclosure” is the area below the lowest elevated floor that is fully shut in by rigid walls.

National Flood Insurance Program

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## Purpose of ICC Coverage

**ICC provides for the payment of a claim to pay for additional cost of compliance with State or local floodplain management laws or ordinances when a building has been declared substantially or repetitively damaged by flooding.**

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## Maximum ICC Coverage

- \$30,000
- No separate deductible
- **Maximum amount that can be paid for both flood loss and ICC claim cannot exceed :**
  - \$250,000 - single family
  - \$500,000 - non-residential
  - \$250,000 - residential condo x number of units

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# Debris Removal

## Coverage C- Other Coverages

- 1- Debris Removal
  - We will pay the expense to remove non-owned debris on or in insured property and owned debris anywhere [must be insured property]
  - If you or a member of your household perform the removal work, the value of your work will be based on the Federal Minimum Wage
  - The coverage does not increase Coverage A or Coverage B limit of liability

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# Loss Avoidance - NFIP

- A flood insurance policy also reimburses you for actions you take to prevent flood damage. For example, costs for moving insured contents, in imminent danger of flooding, to a safe location are reimbursed up to \$1,000 with no deductible. [reduces limits – 45 days]
- Other costs, such as for sandbags, plastic sheeting and lumber, pumps, fill for temporary levees, and wood to save the building can be reimbursed up to a limit of \$1,000 with no deductible. [reduces limits]

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## NFIP and Pollutants

- Under The General Property Form damage by pollutant's is limited to \$10,000.
- In the Dwelling Form and RCBAP form damage by pollutants to the building or contents is covered up to policy limits.
- Damage to ground, soil, or land caused by flood, oil, or flood water mixed with oil is NOT covered
- The cost of complying with any local or state ordinance including one that requires special removal methods for oil is specifically excluded
- All three forms exclude coverage for testing or for monitoring of pollutants unless there is a law or ordinance requiring such.

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## ISSUE # 7



## INSURANCE TO VALUE



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## What's the REAL Replacement Cost of a 3500 Sq Ft Structure ?

100% Structure.....	\$ 420,000 (\$120/sf)
Demolition.....	\$ 10,500 (2.5%)
Debris Removal.....	\$ 31,500 (7.5%)
Architects/Engineer.	\$ 42,000 (10%)
ICC.....	\$ 63,000 (15%)
Market Conditions..	\$ 84,000 (20%)
Other * .....	\$ 84,000 (20%)



**REAL R.C. \$735,000 (\$210/sf)**

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## BUILDING ORDINANCE and LAW COVERAGE

- When more than 50% of a building is damaged, it is deemed structurally unsafe to rebuild and must be torn down.  
(Uniform Construction Code-most every town adopts)

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## BUILDING ORDINANCE and LAW COVERAGE

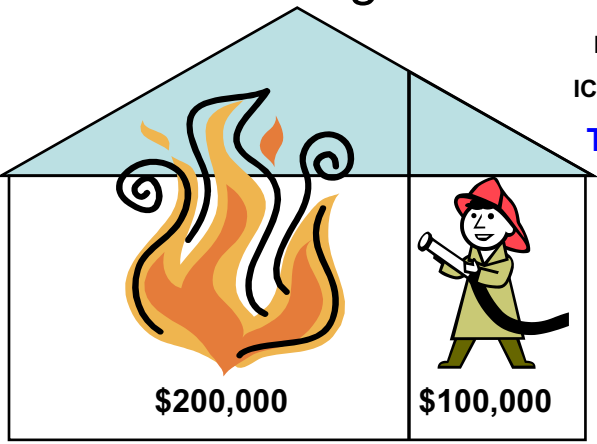
### 100% Building Replacement Cost

- Coverage for Loss to the Undamaged Portion of the Building (A)
- Demolition Costs Coverage (B)
- Increased Cost of Construction Coverage (C)
  - Current Building Code
  - Americans with Disabilities Act
  - National Flood Insurance Program
  - Undersized Lot
  - Grandfathered Occupancy / Zoning


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**\$300,000 Building Coverage**



**\$200,000**



**\$100,000**

**Damaged Part Paid**

- Structure-\$200,000
- Demolition-\$5000\*
- Debris Removal-\$10,000\*
- ICC-\$30,000\* (\*up to policy limit)

**Total Paid \$245,000**

**Undamaged Part-NOT Paid**

- Structure- \$100,000
- Demolition-\$2500
- Debris Removal-\$5000
- ICC-\$10,000

**Out of Pocket- \$117,500**

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POLICY NUMBER: HOMEOWNERS  
HO 04 77 10 00

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ORDINANCE OR LAW  
INCREASED AMOUNT OF COVERAGE**

SCHEDULE\*

New Total Percentage Amount:

\*Entry may be left blank if shown elsewhere in this policy for this coverage.

**SECTION I – PROPERTY COVERAGES**

**ADDITIONAL COVERAGES**

**11. Ordinance Or Law**

The total limit of liability that applies:

a. To Coverage A, or

b. For Form HO 00 04, to Building Additions And Alterations;

is increased from 10% to the percentage amount shown in the Schedule above.

This is Additional Coverage 10, in Form HO 00 06.

All other provisions of this policy apply.

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## ISSUE # 8

WHY PERSONAL LINES AND  
COMMERCIAL LINES HAVE TO TALK TO  
EACH OTHER !



Personal Auto and Business Auto  
Exposures Intersect

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# ISO PAP 00 01 (0918)

## EXCUSIONS

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

Any vehicle, other than "your covered auto",  
which is:

- a. Owned by you; or
- b. **Furnished or available for your regular use.**

Any vehicle, other than "your covered auto", which is:

Owned by any "family member"; or

**Furnished or available for the regular use of any "family member".**

However, this exclusion (B.3.) does not apply to you while you are maintaining or "occupying" any vehicle which is:

- (1) Owned by a "family member"; or
- (2) Furnished or available for the regular use of a "family member".

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## Furnished or Available....

- 1) The words "furnished" or "available" are often litigated
- 2) Company Car furnished/available from your employer
- 3) Long Term Rental while in Florida for the winter
- 4) Co-Habitants, each with their own auto policy
- 5) Four College roommates in an off campus apartment

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	POLICY NUMBER: PERSONAL AUTO PP 03 06 09 18										
<p><b>THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.</b></p> <p><b>EXTENDED NON-OWNED COVERAGE – VEHICLES FURNISHED OR AVAILABLE FOR REGULAR USE</b></p> <p><b>SCHEDULE</b></p>											
<p>Unless otherwise indicated below or in the Declarations, Extended Non-owned Coverage is applicable only to the individual named in the Schedule or in the Declarations.</p>											
<p>Name Of Individual:</p>											
<p>If indicated below or in the Declarations, Extended Non-owned Coverage applies to:</p>											
<p><input type="checkbox"/> Named Individual and "Family Members" (including Named Individual's Spouse)</p>											
<p>Coverage is provided where a premium is shown for the coverage.</p>											
<table border="0"> <tr> <td style="text-align: left;"><b>Extended Non-owned Coverage</b></td> <td style="text-align: center;"><b>Premium</b></td> </tr> </table>			<b>Extended Non-owned Coverage</b>	<b>Premium</b>							
<b>Extended Non-owned Coverage</b>	<b>Premium</b>										
<table border="0" style="width: 100%;"> <tr> <td style="width: 80%;"><b>Liability</b></td> <td style="width: 10%; text-align: center;">\$</td> <td style="width: 10%;"></td> </tr> <tr> <td><b>Medical Payments</b></td> <td style="text-align: center;">\$</td> <td></td> </tr> <tr> <td><b>Total Premium</b></td> <td style="text-align: center;">\$</td> <td></td> </tr> </table>			<b>Liability</b>	\$		<b>Medical Payments</b>	\$		<b>Total Premium</b>	\$	
<b>Liability</b>	\$										
<b>Medical Payments</b>	\$										
<b>Total Premium</b>	\$										
<p>Information required to complete this Schedule, if not shown above, will be shown in the Declarations.</p>											
<p>With respect to the individual(s) and coverages indicated in the Schedule or in the Declarations, the provisions of the Policy apply unless modified by this endorsement.</p>											
<p><b>I. Extended Non-owned Coverage</b></p> <p>The Extended Non-owned Coverage provided by this endorsement does not afford coverage under Part A and Part B of the Policy for any accident involving:</p> <p>A. A vehicle owned by an individual named in the Schedule or in the Declarations;</p> <p>B. A vehicle owned by a "family member"; or</p> <p>C. A temporary substitute vehicle for such owned vehicle described in A. or B. above.</p> <p><b>II. Part A – Liability Coverage</b></p> <p>Part A is amended as follows with respect to the individual(s) shown as applicable in the Schedule or in the Declarations:</p> <p>A. Exclusion B.2.b. does not apply to the coverages provided by this endorsement.</p>	<p><b>III. Part B – Medical Payments Coverage</b></p> <p>Part B is amended as follows, if a premium is shown in the Schedule or in the Declarations for Medical Payments Coverage, with respect to the individual(s) shown as applicable in the Schedule or in the Declarations:</p> <p>A. Exclusion 5.b. does not apply to the coverages provided by this endorsement.</p> <p>B. We will provide Medical Payments Coverage for "bodily injury" sustained while "occupying", or when struck by, any vehicle (other than "your covered auto") which is furnished or available for the regular use of the named individual.</p>										
PP 03 06 09 18	© Insurance Services Office, Inc., 2017	Page 1 of 1									

## Recap- Auto

- Mom and Dad are named insureds = You
- Son is resident + relative = Family member
- All insured under the same PAP
  
- Mom is furnished a company car
  - No coverage under mom + dad's PAP- furnished to a you
- Son is furnished a company car
  - No coverage under mom + dad's PAP- furnished to a family member
- Dad is driving son's company car
  - Coverage under mom + dad's- as dad is a YOU

## Recap- Auto

- Mom and Dad are named insureds under PAP = You
- Son has his own PAP = you
- All reside in the same household
  
- Mom is furnished a company car
  - No coverage under mom + dad's PAP- furnished to a you
  - No coverage under son's policy – furnished to a family member
- Son is furnished a company car
  - No coverage under son's policy – furnished to a you
  - No coverage under mom + dad's PAP- furnished to a family member
- Dad is driving son's company car
  - No coverage under son's policy- furnished to a family member
  - Coverage under mom + dad's- as dad is a YOU

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## Fellow-employee suits

- Another important consideration in the application of this endorsement is the protection against fellow employee suits.
  
- Business auto policies and commercial general liability policies exclude liability for suits of employees against fellow employees.
  
- The personal auto policy does not have such an exclusion.

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- Liz is a good producer, but not such a good driver. She decides to take her assistant, Steve, to visit a client one day in her company car. On the way, Liz is texting, and gets into an accident. Steve is injured and taken to the hospital for treatment.
- Workers' compensation will provide Steve with benefits for Medical, Wage, Rehabilitation and Death. Steve is not satisfied with Work Comp benefits, and decides to sue Liz for pain, suffering and loss of consortium.
- **When Liz tenders the claim to her employers Business Auto Policy, the adjuster cites the "Fellow Employee" exclusion and declines to provide coverage.**
- **Although Liz's personal auto policy does not exclude fellow-employee suits, that carrier also declines coverage. The adjusters denial under Liz's Personal Auto is because of the "furnished or available for your regular use" exclusion.**
- Without the Extended Non-owned Coverage For Named Individual endorsement, Liz would have no coverage.
- If Liz has a personal umbrella policy, additional limits likely will be available, since the umbrella often follows form with the underlying policy or can be endorsed.

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## Fellow Employee Exclusion

- Contained in both CGL and BAP
- CGL has a give back for "executive officers"
- BAP does not
- At very least, we should equate the two policies to have coverage for "executive officers" by adding CA 20 56 for designated positions/persons or CA 20 55 to delete the exclusion in its entirety.

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## ISSUE # 9

WHAT TYPE OF EXCESS LIABILITY  
POLICY ARE YOU SELLING ?



UMBRELLA ?  
HYBRID / BI-FURCATED ?  
STAND ALONE ?  
DOES IT FOLLOW FORM ?

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## Important Basic Policy Definitions:

- **Excess Policy** – A catastrophe policy that provides additional limits of liability
- **Umbrella** - A catastrophe policy that provides additional limits of liability and broader coverage than the underlying policies.
- **Hybrid policies** – A policy that provides some of the features of an umbrella and some of an Excess policy.
- **Following Form** –An Umbrella / Excess policy which incorporates the policy terms, conditions and exclusions of the underlying policies.
- **Stand Alone Form** – An Umbrella / Excess policy which has its own insuring agreement, policy terms, conditions, and exclusions.

## Important Basic Policy Definitions:

- **Underlying Insurance** – The designated policies for which the Umbrella / Excess policy provides additional limits of liability.  
(spin kids off- get separate policy. Covered?)
- **Underlying Limits** – The minimum required limits of liability for all Underlying Insurance.
- **Self Insured Retention** – A deductible like payment, the insured must make when an Umbrella policy affords broader coverage than the underlying policies.
- **Concurrency** – All underlying policies have the same effective dates and coverages.
- **Buffer Layer** – An additional policy or limit of insurance, necessary to meet the minimum underlying requirement by the umbrella/excess carrier.



## Excess Follow Form

- Excess Following Form Personal Liability Policy
  - Provides additional liability limits only over areas covered by the underlying policies
  - Generally has the same insuring agreement, definitions, terms conditions and exclusions as underlying policies
  - May / May not provide additional defense protection

## Excess Policy- Following Form



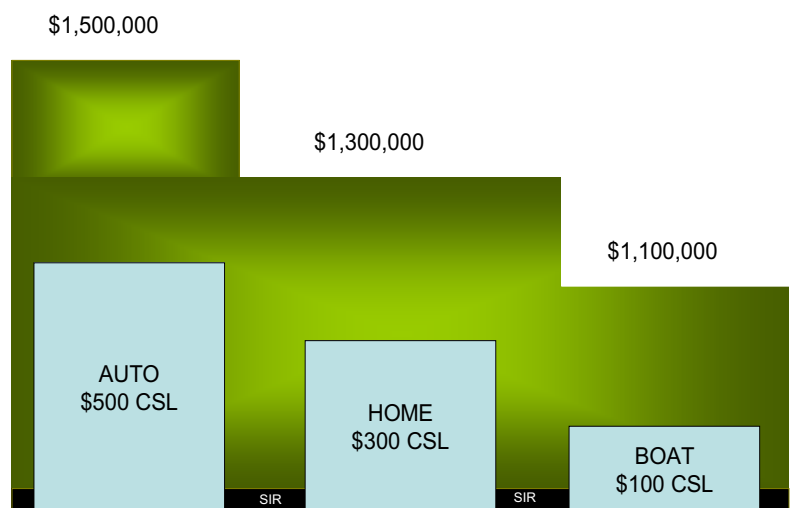
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## True Personal Umbrella Policy

- Provides additional liability limits over underlying primary policies, AND
- Can provide primary coverage in areas not covered by the underlying policies, subject to a Self- Insured Retention.
- It is a stand alone policy with its own insuring agreement, definitions, terms, conditions and exclusions.
- Will provide defense coverage if covered by Umbrella, but not by the underlying.

## True Umbrella



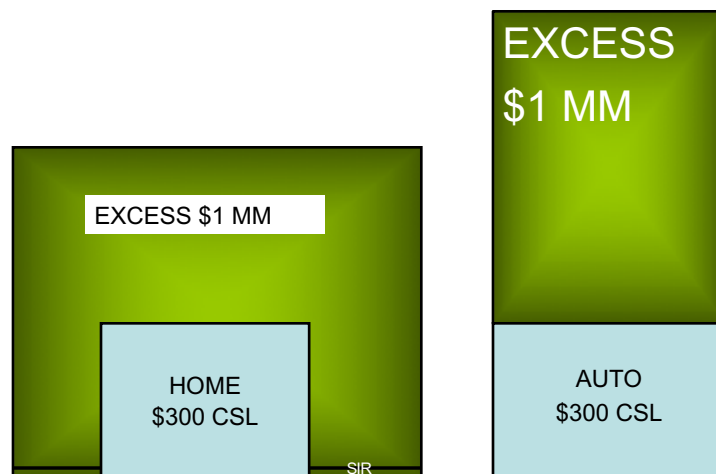
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## “Hybrid” Personal Liability Policy

- Contains “True” Umbrella coverage for certain exposures, AND
- Provides Excess Following Form Personal Liability for certain exposures
- Typical Following Form exposures
  - Autos
  - Watercraft
  - Recreational Vehicles
  - Excludes all Auto liability but gives back coverage if it is covered by underlying auto policy
  - Provides Following Form coverage for specific recreational vehicles over underlying, but True Umbrella coverage over Personal Auto, Home and Watercraft liability policies

## Hybrid Policy



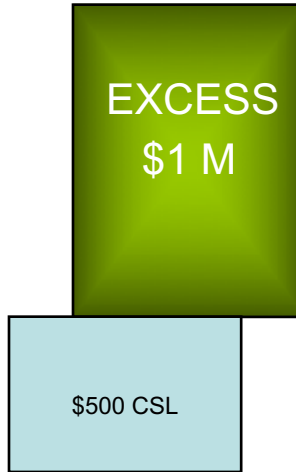
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# Umbrella Form – Excess Form - Following Form - Stand Alone Form

## STAND ALONE FORM

(sometimes equal,  
sometimes broader,  
sometimes more restrictive)



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Required Underlying Insurance		Minimum Required Underlying Limits
1. Personal Liability, Homeowners or Comprehensive Personal Liability	Bodily Injury/Property Damage Combined Single Limit	\$300,000 each occurrence
2. Private Passenger Auto and Licensed Recreational Vehicles	Bodily Injury and Property Damage or Combined Single Limit:	\$250,000 Bodily injury each person \$500,000 Bodily injury each accident \$ 25,000 Property damage each accident \$300,000 each accident
	Uninsured/Underinsured Motorist Protection	Bodily Injury and Property Damage or Combined Single Limit:
3. Watercraft	Less than 26 feet and less than 50 hp Combined Single Limit:	\$300,000 each occurrence
	26 feet or more or more than 50 hp Combined Single Limit:	\$500,000 each occurrence
4. Unlicensed Recreational Vehicles	Bodily Injury and Property Damage or Combined Single Limit:	\$300,000 each occurrence
5. Employers Liability	Combined Single Limit	\$300,000 each occurrence

### XIII. Maintenance of Underlying Limits

- A. Review the Personal Umbrella/Excess policy to determine the minimum underlying insurance requirements for each underlying policy.
  - B. **Some carriers require that no restrictive changes to policy conditions be made during the policy period**
  - C. Some Umbrella/Excess carriers require that the carrier be notified if the underlying limits are not maintained, changed or replaced.
  - D. **Failure to maintain the required underlying limits will obligate the insured to pay the difference between the actual limit in force and the required limit; before the Umbrella/Excess policy will pay.**
  - E. Most Umbrella/Excess policies require coverage to be in place when the occurrence took place and when the Umbrella/Excess policy was written or renewed.
  - F. Concurrency of the underlying policies and the Umbrella/Excess policy is a major concern.
- **Risk Management Tip:** Adopt a system to identify any changes or cancellation of a required underlying policy which will affect the Umbrella/Excess coverage.

### REVISED ENDORSEMENT

- HO 24 82 Personal Injury Coverage
- The definition of PI has been expanded to include an oral or written publication in any manner.
- This change is intended to address Internet exposures
- Also introduced is HO 24 10 Personal Injury AGGREGATE LIMIT, which will reduce coverage substantially if included.

## Possible Gaps and Solutions

- Client rents a 45' houseboat for a two week vacation
- Client charters a 30' sailboat on Lake George
- Client rents a jet-ski on vacation in Bermuda
  - BI and PD to Others ?
  - Legal and Contractual Liability for damage to the watercraft

## Possible Gaps and Solutions

- Your client uses his John Deere tractor to plow the neighbors driveway after a winter storm
- Your client uses his John Deere tractor to mow the church lawn
  - BI and PD to Others ?

## Possible Gaps and Solutions

- Your client –"Grandma", is driven by her neighbor to the supermarket on Tuesdays and to the doctor on Thursdays. On the way to the doctor, neighbor is distracted by Grandma and is involved in an accident. Neighbor and "Grandma" are named in the lawsuit.
  - Where does Grandma have defense or indemnity for the lawsuit since she gave up her auto policy 2 years ago ?
  - BI and PD to Others ?

## Possible Gaps and Solutions

- Your affluent client lives in a upscale condo in the City. They do not own a car. When taking a taxi to an upscale restaurant, your client opens the taxi door into an oncoming bicyclist, severely injuring the cyclist. A lawsuit results.
  - Where does your client have defense or indemnity for the lawsuit since they do not have an auto policy ?

## Possible Gaps and Solutions

- Your client is driving his only car-- a company car-- and negligently injures a co-worker. After collecting Work Comp, the co-worker files a lawsuit against your client for pain and suffering and loss of consortium.
  - Where does your client have coverage for defense or indemnity for the lawsuit since he does not own any personal autos ?

## Possible Gaps and Solutions

- Your client works from home. The UPS delivery person falls on your front porch due to a loose brick. After collecting WC, the delivery person sues your client.
  - Where does your client have defense or indemnity for the lawsuit since the Homeowner policy excludes injuries arising out of a business ?



## Possible Gaps and Solutions

- Your client is seriously injured by a negligent third party, who turns out to be Under- insured.
- Your client can usually only use his/her UIM coverage to the extent it exceeds the recovery from negligent third party's liability limits.
- Your client has already recovered \$300,000 from the negligent third party, but is now precluded from filing a UIM claims since his UIM limits are \$300,000 also.
  - Where does your client obtain excess UM/UIM coverage?

## Possible Gaps and Solutions

- Your client's 23 year old son is well known for his ability to modify and/or repairs skateboard's. He operates from the garage of the home, and earns approximately \$5-\$6000 per year. After an extensive repair, the owner of the skateboard is injured when a wheel falls off.
  - Where does your client have defense or indemnity for the lawsuit since the Homeowner policy excludes injuries arising out of a business and the son is over 21 years old ?

## Possible Gaps and Solutions

- While vacationing in Aruba, your client rents a car and is involved in an accident. Your client is sued for injuries to third parties and is contractually responsible for \$7500 damage to the rental car itself.
  - Where does your client have defense or indemnity for the lawsuits and damage to the rental car, since all of his cars are under the Corporate policy and he does not have a PAP ?

### **XXI. Broad Coverage Found in some Personal Umbrella Policies, if not Excluded**

- A. Drive Other Car Coverage
- B. Vicarious Auto Liability
- C. Fellow Employee Liability Coverage
- D. Broadened Territory- Auto
- E. Collision Damage Liability
- F. Auto Contractual Liability
- G. Auto Contractual Damage
- H. Non-Owned Watercraft
- I. Non-Owned Watercraft Legal Liability
- J. Watercraft Loss of Use Liability

## **Broad Coverage Found in some Personal Umbrella Policies, if not Excluded**

- K. Non-Owned Aircraft Liability
- L. Non-Owned Recreational Vehicle Liability
- M. Non-Owned Recreational Legal Liability
- N. Heating Oil Tank Pollution Liability
- O. Work Related Home Premises Liability \*
- P. Employers Liability
- Q. Non-Profit D&O Liability
- R. Assumed Contractual Liability

**WATCH FOR FOLLOW FORM or EXCLUSIONARY ENDORSEMENTS !!**

## **ISO Personal Umbrella Policy Changes- Edition 0215**

- Public or Livery Conveyance Related Excl.
  - Does not apply to share the expense car pool
  - Does not apply when insured transports individuals as a volunteer or for charitable purposes
- Car Sharing Exclusion
- Racing Exclusion
  - Applies to autos, rec. vehicles, and watercraft (except predicted log cruises) for any pre-arranged race, contest or similar competition, inside a racing facility, including driver skill development
  - Motorcycle Safety courses are covered
- Canine Liability Exclusion

## ISO Personal Umbrella Policy Changes- Edition 0215

- Trust Endorsement
- Personal Injury Aggregate Limit
- Motor Vehicle Exclusion
  - “a residence” vs. “insureds residence”
  - Host Liquor liability involving a motor vehicle
- Flying Car Exclusion (2018)

**ISSUE # 10**

# LOSS ASSESSMENT COVERAGE

IT'S NOT JUST FOR CONDOS !



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## Loss Assessment

- Condos
- Coops
- Homeowner Associations
- Lake Associations
- Property Associations
- TRIGGER is the assessment..... NOT the date of loss

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## Statistics

- 1:6 people live in some type of Homeowner Association
- Approximately 80% of all new Housing is some form of Community Association

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## Welcome to our Lake Association....



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# Loss Assessment

- **Coverage E – Personal Liability**

Coverage E does not apply to:

1. Liability:

a. For any loss assessment charged against you as a member of an association, corporation or community of property owners, except as provided in D. Loss Assessment under Section II – Additional Coverages;

- **Personal Umbrella / Excess Policy**

– Probably Excluded

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.  
**LOSS ASSESSMENT COVERAGE** [HO 04 35 10 00](#)  
SCHEDULE\*

"Residence Premises" – Additional Amount Of Insurance:	
A	.
B Additional Locations	
	.
Location Of Unit And Limit Of Liability	
*Entries may be left blank if shown elsewhere in this policy for this coverage.	

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### Loss Assessment

a. We will pay up to \$1,000 for your share of loss assessment charged during the policy period against you, as owner or tenant of the "residence premises", by a corporation or association of property owners. **The assessment must be made as a result of direct loss to property, owned by all members collectively,** of the type that would be covered by this policy if owned by you, *caused by a Peril Insured Against under Coverage A*, other than:

- (1) Earthquake; or
- (2) Land shock waves or tremors before, during or after a volcanic eruption.

The limit of \$1,000 is the most we will pay with respect to any one loss, regardless of the number of assessments. We will only apply one deductible, per unit, to the total amount of any one loss to the property described above, regardless of the number of assessments.

b. We do not cover assessments charged against you or a corporation or association of property owners by any governmental body.

c. **Special Limit -- We will not pay more than \$1,000 of your assessment per unit that results from a deductible in the policy of insurance purchased by a corporation or association of property owners.** **\*\*Deleted in 2011 Form\*\***

## 2011 REVISED ENDORSEMENT

- The **loss assessment coverage (HO 04 35)** endorsement is broadened by the deletion of the special limit for assessments resulting from a deductible in the policy procured by the corporation/association of property owners.
- The endorsement's title is amended to **supplemental loss assessment coverage (HO 04 35)**.
- Section "B" Additional Locations is being revised to include a "unit" or "premises" listed in the schedule.



## 2011 REVISED ENDORSEMENT

- The unit-owners modified other insurance and service agreement condition (HO 17 34) endorsement is withdrawn, and the "other insurance and service agreement" provision of the unit-owners form (HO 6) is broadened to address the deductible of any other insurance or service agreement in the name of a corporation or association (e.g., association master policy) covering the same property the HO 6 covers.
- It stipulates that the HO 6 is primary with respect to any amount of the loss covered by this policy and not covered under the association master policy because of its deductible.

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## Endorsements

- **HO 04 35 Loss Assessment Coverage**
  - Increases the basic \$1,000 loss assessment limit for damage to the residence premises up to \$50,000
- **HO 04 90 Personal Property Replacement Cost**
  - Changes loss settlement for Personal Property to Replacement Cost
- **HO 04 36 Loss Assessment Coverage For Earthquake**
  - Provides loss assessment coverage for an earthquake loss
- **HO 04 77 Ordinance Or Law Increased Amount**
  - Increases the 10% coverage limitation of the homeowners policy
- **HO 04 54 Earthquake**
  - Adds the peril of earthquake for the dwelling, other structures, and personal property coverage
- **HO 17 31 Unit-Owners Coverage C Special Coverage**
  - Changes Coverage C – Personal Property to open perils
- **HO 17 32 Unit-Owners Coverage A Special Coverage**
  - Changes Coverage A – Dwelling to open perils
- **HO 17 33 Unit Owners Rented to Others**
  - Permits Rental of Unit ? / Dwelling Fire Policy – Watch endorsements !
- **HO 24 82 Personal Injury**
- **HO 1734 Other Insurance Revision**
  - Permits Unit owner to recover regardless of whether Assoc. can or not (large deductible)

# ISSUE # 11

## Miscellaneous Personal Lines

- Nannies
- Low Speed Vehicles
- Debris Removal- Trees
- Valet Parking a Rental Car
- Loaner Cars
- Who can drive a deceased persons auto ?



# NANNIES / AU PAIR's / GOVERNESS

Formal Employment Contract-live in/out vs. Live In child car and cultural exchange vs. Educate and Train the children

## • Homeowners Policy

- Contents:
  - Insured: Furnished Room = OK (not rented)
  - Nanny: = OK "residence employee" while in residence occupied by insured
  - Needs HO-4 policy
- Liability:
  - Insured: OK for BI/PD add PI and UMB (invasion of privacy- nanny-cam / intentional act)
  - Nanny: No Coverage, not an insured (maybe watercraft, motor vehicles, animals- business exclusion)
  - Needs own CGL policy (hire from agency or directly / independent contractor vs. employee)
- Medical Payments = OK (arise out of work on /off premises) (small limits)
- Work Comp:
  - Check your States Domestic Laws



## • Automobile Policy

- Liability:
  - Nanny driving Insured's Vehicle with Permission = OK permissive user
  - Nanny driving rental car or borrowed car = No Coverage (Named Non-Ownership Policy)
  - Nanny sues insured for injuries as a result of insured's poor driving = OK insured protected
  - Add Nanny as a driver = recommended
  - OPERATOR DOES NOT EQUAL INSURED !!
- Med Pay / PIP / UM-UIM:
  - OK= Only in Insured's Vehicle (any person while occupying your vehicle)
  - Work Comp Exclusion (if required or available)

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## Definition of LSV



- 4 wheeled vehicle
- Speed more than 20 MPH but less than 25 mph.
- Powered solely by electricity
- Must be permitted on public roads or Highways

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## Debris Removal for Trees



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**b.** We will also pay your reasonable expense, up to \$1,000, for the removal from the "residence premises" of:

**(1)** *Your tree(s)* felled by the peril of Windstorm or Hail or Weight of Ice, Snow or Sleet; or

**(2)** *A neighbor's tree(s)* felled by a Peril Insured Against under Coverage C; provided the tree(s):

**(3)** Damage(s) a covered structure; or

**(4)** Does not damage a covered structure, but:

**(a)** Block(s) a driveway on the "residence premises" which prevent(s) a "motor vehicle", that is registered for use on public roads or property, from entering or leaving the "residence premises"; or

**(b)** Block(s) a ramp or other fixture designed to assist a handicapped person to enter or leave the dwelling building.

The \$1,000 limit is the most we will pay in any one loss regardless of the number of fallen trees. No more than \$500 of this limit will be paid for the removal of any one tree. This coverage is additional insurance.

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## Bill for Tree Removal – HO-3, Wind, \$250 Ded.

Crane to Remove Tree From House.... \$1700

Cost to Cut up and Remove Tree..... \$ 850

=====

TOTAL BILL ..... \$2550

**PAY \$2200**

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## Coverage for the Tree Itself ?

### 3. Trees, Shrubs And Other Plants

We cover trees, shrubs, plants or lawns, on the "residence premises", for loss caused by the following Perils Insured Against:

- a. Fire or Lightning; (NO WIND !)
- b. Explosion;
- c. Riot or Civil Commotion;
- d. Aircraft;
- e. Vehicles not owned or operated by a resident of the "residence premises";
- f. Vandalism or Malicious Mischief; or
- g. Theft.

We will pay up to 5% of the limit of liability that applies to the dwelling for all trees, shrubs, plants or lawns. **No more than \$500 of this limit will be paid for any one tree, shrub or plant.** We do not cover property grown for "business" purposes. This coverage is additional insurance.

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## Valet Parking of a Rental Car

- Your insured is on vacation and rents a car
- While at the hotel, the valet parking attendant crashes your insured's rented car
- Your insured's PAP will extend the broadest coverage of any "your covered auto" to a "non-owned auto" within the coverage territory
- The PAP policy denies coverage for Collision to the rented auto
- Why?

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## C. "Non-owned auto" means:

- 1. Any **private passenger auto, pickup, van** or "trailer" not owned by or furnished or available for the regular use of you or any "family member" while in the custody of or being operated by you or any "family member"; or

In order to have coverage for a "non-owned auto" the vehicle must be in your/family members Care, Custody or Control; or be operated by same.

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## Loaner Cars

- Your insured's car is at the dealers shop for servicing and he is given a loaner car
- Insured totals loaner car worth \$37,000
- Does his Personal Auto Policy pay ?
  - Insured has one car listed full coverage
  - Temporary Substitute = yes
  - Non-Owned auto = yes
- Physical Damage is excess on Non-Owned autos
- Insured's PAP carrier declines to initially pay, stating their PAP is excess to any non-owned auto
  - PAP offers to settle on a pro-rata basis- dealer refuses
- Dealer uses their own Collision coverage, and its carrier files a suit against your insured for Property Damage liability (subro)
- Your Insured's carrier issues a ROR /denial based upon the exclusion for damage to property in your Care, Custody or Control
- Insured has to pay dealership for damage out of pocket ?
- Waive subro in advance ? (Only a few states have amendatory endorsement to resolve this)
- Rent from company that has no Phys Dam = OK

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## TRANSFER OF YOUR INTEREST IN THIS POLICY

### ISO PERSONAL AUTO

A. Your rights and duties under this policy may not be assigned without our written consent. However, if a named insured shown in the Declarations dies, coverage will be provided for:

1. The surviving spouse if resident in the same household at the time of death. Coverage applies to the spouse as if a named insured shown in the Declarations; and

2. The legal representative of the deceased person as if a named insured shown in the Declarations. This applies only with respect to the representative's legal responsibility to maintain or use "your covered auto".

B. Coverage will only be provided until the end of the policy period.

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## The Lowest Bidder

It is unwise to pay too much, but it is worse to pay too little. When you pay too much, you lose a little money—that is all. When you pay too little, you sometimes lose everything, because the thing you bought is incapable of doing what it was bought to do. The common law of business balance prohibits paying a little and getting a lot—it can't be done. If you deal with the lowest bidder, it is well to add something extra for the risk you run. And if you do that, you will have enough to pay for something better”

John Ruskin (1819-1900)



